

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NORTHWEST PORTLAND AREA INDIAN )  
HEALTH BOARD, INC. )  
2121 Southwest Broadway #300 )  
Portland, Oregon 97201 )

Plaintiff, )

v. )

Civil Action No. \_\_\_\_\_

YVETTE ROUBIDEAUX, )  
*in her official capacity as* )  
Director of the U.S. Indian Health Service; )  
801 Thompson Avenue, TMP 450 )  
Rockville, MD 20852 )

KATHLEEN SEBELIUS, )  
*in her official capacity as* )  
Secretary of the U.S. Dep't of Health )  
and Human Services, )  
200 Independence Avenue, S.W. )  
Washington, D.C. 20201 )

WILLIAM TIBBITTS )  
*in his official capacity as* )  
Acting Director, Division of Regulatory Affairs )  
Department of Health and Human Services )  
Indian Health Service )  
801 Thompson Avenue, TMP 450 )  
Rockville, MD 20852 )

DEPARTMENT OF HEALTH )  
AND HUMAN SERVICES )  
200 Independence Avenue, S.W. )  
Washington, D.C. 20201 )

INDIAN HEALTH SERVICE )  
801 Thompson Avenue, Ste. 400 )  
Rockville, MD 20852 )

Defendants. )

\_\_\_\_\_ )

**COMPLAINT  
FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. In this action, the Northwest Portland Area Indian Health Board (NPAIHB) seeks declaratory and injunctive relief under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to remedy the refusal of the U.S. Indian Health Service (IHS) to produce certain agency records that are subject to disclosure under the FOIA. Plaintiff seeks documents depicting agency contract support cost (CSC) data compiled by the agency for Fiscal Year (FY) 2010, FY 2011 and FY 2012.

2. Each year Congress appropriates CSC funds to IHS so that IHS can make contract payments due to Indian tribes and tribal organizations that are operating federal hospitals, clinics and other federal health care programs under contracts awarded pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq* (ISDA). Upon receipt of the appropriated funds, IHS makes various calculations and then pays the appropriated funds to the contracting tribes and tribal organizations. Prior to 2011 and going as far back as the early 1990s, the agency regularly shared such data with Indian tribes and tribal organizations shortly after the data on contract payments was compiled, and generally no later than May of each contract year. Indeed, the agency's Manual requires the disclosure of such data after February 1 of each year, upon its approval by the IHS Director. IHS Manual pt. 6, ch. 3.5, ¶¶ B.3, B.4 However, in 2011 the agency adopted an unwritten policy that it would no longer disclose such data until an annual report prepared for Congress which incorporates such data has been first approved by the Secretary (a process which, with rare exception, has taken years and has often never occurred). Pursuant to this new policy, IHS has refused to disclose this data for FY 2010, 2011 and 2012 in response to a FOIA request filed by Plaintiff. This action is brought to compel

the agency to disclose the requested data pursuant to the FOIA so that the Plaintiff, affected ISDA contractors and the public have timely access to data showing how and on what basis IHS spent appropriated contract support cost funds, and in order to assure accountability in the management and expenditure of appropriated public funds.

### **JURISDICTION AND VENUE**

3. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) (jurisdiction under FOIA “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant”) and 28 U.S.C. § 1331 (federal question).

4. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

### **PARTIES**

5. Plaintiff Northwest Portland Area Indian Health Board (NPAIHB) is a non-profit corporation organized under the laws of the State of Oregon, and is also a “tribal organization” as defined in the ISDA, 25 U.S.C. § 450(b)(1). The NPAIHB operates as an inter-tribal organization on behalf of forty-three federally-recognized Indian Tribes situated in Oregon, Washington and Idaho, and is controlled by a Board of Directors whose members are appointed by each of the governing bodies of its member Tribes. The NPAIHB was established to serve its member Tribes in the areas of health promotion and disease prevention, legislative and policy analysis, training and technical assistance, and health surveillance and research. The NPAIHB annually contracts directly with IHS under the ISDA to carry out certain federal functions, and annually it receives CSC funding from IHS to carry out that contract.

6. The NPAIHB is a member of the National Tribal Contract Support Cost Coalition (NTCSCC), an unincorporated voluntary association comprised of 20 federally recognized Tribes and inter-tribal organizations situated in 11 States and collectively operating contracts to administer in excess of \$400 million in Indian Health Service and Bureau of Indian Affairs facilities and services on behalf of over 250 Native American Tribes. The NTCSCC was established to advocate for full funding of contract support costs due Tribes and tribal organizations under the ISDA, as confirmed in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) and *Ramah Navajo Chapter v. Salazar*, 567 U.S. \_\_\_, 132 S. Ct. 2181 (2012), and to advocate for greater transparency and accountability within the U.S. Indian Health Service and the U.S. Bureau of Indian Affairs in matters pertaining to contract support costs. The NTCSCC regularly testifies in Congress and advocates to IHS and the BIA on issues related to contract support costs.

7. Defendant Yvette Roubideaux is the Director of the U.S. Indian Health Service. Director Roubideaux exercises authority delegated to her by the Secretary of Health and Human Services to carry out portions of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* This includes the duty to contract with Tribes and tribal organizations under that Act, the duty to pay tribes and tribal organizations CSC amounts due under contracts awarded under that Act, and the duty to manage and account for appropriated funds used to make such payments. On information and belief, in late 2010 or early 2011 Director Roubideaux made the decision to cease sharing CSC data with tribal contractors except to the extent contained in published reports to Congress that are approved in advance by the Secretary.

8. Defendant Kathleen Sebelius is the Secretary of the U.S. Department of Health and Human Services. Secretary Sebelius exercises authority delegated to her by Congress to carry out the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* This includes the duty to contract with Tribes and tribal organizations under that Act, the duty to pay tribes and tribal organizations CSC amounts due under contracts awarded under that Act, and the duty to manage and account for appropriated funds used to make such payments. (Unless otherwise stated or commanded by context, the term “Secretary” as used herein includes the Director of the Indian Health Service.)

9. Defendant William Tibbitts is the Acting Director of the Division of Regulatory Affairs for the Indian Health Service (IHS), and an Acting IHS FOIA Officer. Mr. Tibbitts signed the IHS March 13, 2012 letter denying the FOIA request at issue in this action.

10. Defendant United States Department of Health and Human Services (“DHHS”) is a cabinet agency of the United States and is the Department principally charged with protecting the health of Americans, including American Indians and Alaska Natives. *See* Indian Health Care Improvement Act, 25 U.S.C. 1601 *et seq.* DHHS is an agency within the meaning of 5 U.S.C. § 552(f)(1).

11. Defendant Indian Health Service is the principal agency within DHHS charged with providing federal health services to American Indians and Alaska Natives. IHS is an agency within the meaning of 5 U.S.C. § 552(f)(1). IHS exercises delegated authority from the Secretary to carry out the ISDA, including delegated authority to manage and pay to Tribes and tribal organizations the funds which Congress appropriates for contract support cost payments.

## I. BACKGROUND

### A. The Freedom of Information Act

12. “FOIA was enacted in 1966 to implement a „general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” *A.C.L.U. v. F.B.I.*, 429 F. Supp. 2d 179, 186 (D.D.C. 2006) (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360-361 (1976)). FOIA embodies a policy that “„the public is entitled to know what its government is doing and why.” *Ferranti v. Bureau of Alcohol, Tobacco and Firearms*, 177 F. Supp.2d 41, 44 (D.D.C. 2001) (citing *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980)). Thus, an agency must “promptly make available any records requested by members of the public, unless the agency can establish that the information is properly withheld under one or more of the nine exemptions set forth in the statute.” *A.C.L.U.*, 429 F.Supp.2d at 188.

13. FOIA represents a congressional commitment to transparency in government. To carry out that purpose, FOIA imposes on agencies that receive FOIA requests an obligation to undertake a search that is “reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999). It also confines an agency’s discretion to refuse to release requested documents to nine exemptions. 5 U.S.C. § 552(b). Exemption 5 allows an agency to refuse to disclose “inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency.” 5 U.S.C. §552(b)(5). However, as the United States Supreme Court noted in *E.P.A. v. Mink*, 410 U.S. 73 (1973), Congress “expressly intended „to delimit the exception [5] as narrowly as consistent with efficient Government operation.”” 410 U.S. at 89 (quoting S. Rep. No. 813, p.

9). See also Attorney General Memorandum on FOIA at 1 (Mar. 19, 2009) (“An agency should not withhold information simply because it can do so legally.”)

14. When a party requests records from an agency, the agency must respond to the request within 20 working days, notifying the party of the agency’s determination whether or not to fulfill the request and of the requester’s right to appeal the agency’s determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i). If a party chooses to appeal an agency decision, the agency must respond to the appeal within 20 working days, notifying the appealing party of the agency’s determination. 5 U.S.C. § 552(a)(6)(A)(ii). In “unusual circumstances,” an agency may delay its response to a FOIA request or appeal, but must provide notice and must also provide “the date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B).

**B. Contract Support Costs**

15. Under the ISDA, Indian Tribes and tribal organizations are authorized to contract with the Secretary to carry out federal health care programs which the Secretary, through IHS, would otherwise carry out for American Indian and Alaska Native communities. 25 U.S.C. § 450f(a)(1). Under the ISDA, the Secretary is required to add to each contract the “full amount of funds to which the contractor is entitled” under the Act, including the full amount of agency funds she would otherwise spend on the contracted program in the absence of a contract (25 U.S.C. §§ 450j-1(a)(1)), plus the full amount of contract support costs specified in the Act and required by the contractor to carry out the contract (25 U.S.C. §§ 450j-1(a)(2)-(5)). See 25 U.S.C. §§ 450j-1(g).

16. The Secretary has issued a Manual which explains how a Tribe or tribal organization's contract support cost requirement is determined. Indian Health Manual, pt. 6, ch. 3, sec. 6-3.2 (available at [http://www.ihs.gov/ihtm/index.cfm?module=dsp\\_ihm\\_pc\\_p6c3](http://www.ihs.gov/ihtm/index.cfm?module=dsp_ihm_pc_p6c3)) (IHM). The Manual also describes how annual appropriations for contract support cost payments are to be allocated among, and paid to, the contracting Tribes and tribal organizations. IHM sec. 6-3.3. Among other things, the Manual specifies that, in general, the agency will place into "Pool 2" an amount equal to the prior year's contract support cost appropriation (assuming the current year's appropriation is at least as large as the prior year's appropriation). *Id.* sec. 6-3.3B. Similarly, the Manual explains that the agency will use Pool 2 to pay to a contracting Tribe or tribal organization the same amount the Tribe or tribal organization was paid in the preceding year (subject to payment limitations in the event such amount exceed the contractor's CSC requirement for that year). *Id.*

17. The Manual also provides that the agency will place into "Pool 3" funds equal to the amount (if any) by which the current year's CSC appropriation exceeds the prior year's CSC appropriation, plus certain other miscellaneous funds. *Id.* sec. 6-3.3C. The Manual explains that Pool 3 Funds are then allocated across all tribal contractors whose Pool 2 payment has left them underpaid relative to their full CSC requirement, employing a formula which allocates one-half ("50 percent") of Pool 3 to the most severely underfunded contractors, and one half ("50 percent") of Pool 3 to all underfunded contractors on a pro rata basis. *Id.* sec. 6-3.3C.2(g).

18. The Secretary, through IHS, has over many years failed to pay hundreds of tribal contractors millions of dollars in contract support cost requirements, leading to considerable litigation. See *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005); *Arctic Slope Native Ass'n v.*



*Sebelius*, 2012 WL 3599217 (Fed. Cir. Aug. 22, 2012) (“The Secretary is obligated to pay all of ASNA’s contract support costs for fiscal years 1999 and 2000”) (on remand from *Arctic Slope Native Ass’n v. Sebelius*, 2012 WL 2368663 (U.S. June 25, 2012) (vacating decision and remanding for further consideration in light of *Salazar v. Ramah Navajo Chapter*, 567 U.S. \_\_\_, 132 S. Ct. 2181 (2012))).

**C. NPAIHB’s FOIA Request**

19. On February 14, 2012, NPAIHB submitted a FOIA request to IHS seeking the following:

- (1) Documents showing the final Area Office compilation of CSC data for every Area Tribe and tribal organization for FY 2010, 2011 and 2012;
- (2) Consolidated Area Office reports showing CSC data by Tribe and Tribal Organization for FY 2010, 2011 and 2012;
- (3) The document showing the calculation of the contract support cost allocation of that year’s appropriation by Area and by Tribe and tribal organization for FY 2010, 2011, and 2012;
- (4) The document reflecting the final allocation of the CSC appropriation by Area Office and by Tribe and tribal organization for FY 2010, 2011, and 2012; and
- (5) Copies of all correspondence, including e-mails, letters, memoranda, or other communications made by officers, employees or representatives of Defendant to Members of Congress or their staffs, relating in whole or in part to contract support costs, between the period January 1, 2011 to the present.

*See* letter dated Feb.14, 2012, from Lloyd B. Miller, counsel to NPAIHB, to William Tibbitts, IHS FOIA Officer (Exhibit 1).

**D. IHS's Denial of NPAIHB's Request**

20. On February 23, 2012, IHS acknowledged receiving NPAIHB's FOIA request. *See* letter dated Feb. 23, 2012, from Janet Ingersoll and Nina Argent to Lloyd B. Miller (Exhibit 2).

21. On March 13, 2012, IHS advised NPAIHB that access to all requested information was being denied on the grounds that, with regard to categories 1 through 4 of ¶ 19, *supra*, the information requested was exempt from disclosure under Exemption 5, 5 U.S.C. § 552(b)(5), and, with regard to category 5 of ¶ 19, *supra*, IHS had searched its records and determined that it had no responsive documents. *See* letter from William Tibbitts to Lloyd B. Miller, March 13, 2012 ("Denial Letter") (Exhibit 3 at 13).

**E. NPAIHB's Administrative Appeal with IHS**

22. On April 5, 2012, NPAIHB appealed IHS's failure to release requested documents. *See* letter of Apr. 5, 2012, from Lloyd B. Miller to Dori Salcido (Exhibit 3 at 1). The administrative appeal challenged each of the grounds described in ¶ 21, *supra*.

23. To date, IHS has not responded to NPAIHB's April 5, 2012 appeal.

24. NPAIHB has exhausted the applicable administrative remedies under FOIA. 5 U.S.C. § 552(a)(6)(C)(i) ("Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies to request if the agency fails to comply with the applicable time limit provisions of this paragraph."). To date, NPAIHB has not received the documents from IHS requested in its FOIA request of February 14, 2012.

## II. VIOLATIONS OF LAW

### COUNT 1

#### **THE REQUESTED DATA IS NOT PROTECTED FROM DISCLOSURE UNDER OMB CIR. A-11 AND IS NOT “PREDECISIONAL” OR “DELIBERATIVE”**

25. The preceding paragraphs are incorporated as if fully set forth herein.

26. With regard to requested items in categories 1 through 4, IHS refused to release 44 pages of documents on the grounds that the data requested was “contained within the Secretary’s Contract Support Costs [ ] Annual Shortfall Reports” (“Shortfall Reports”) which had yet to be “sent to Congress.” *See* Denial Letter, Ex. 3 at 14. IHS stated that the Shortfall Reports were “predecisional and deliberative” and based this conclusion on Office of Management and Budget Circular A-11 (“OMB Circular A-11”). *Id.*

27. OMB Circular A-11 section 22.1 is entitled “Confidentiality of Budget Deliberations.” It protects the “nature and amounts of the President’s decisions ... until the Budget is transmitted to the Congress.” OMB Cir. A-11 § 22.1. It further protects “agency justifications” for “[p]residential decisions on current and budget year estimates....” *Id.* As such, OMB Circular A-11 is aimed at protecting the process involved in creating the President’s budget *before* the President transmits his budget to Congress, along with any justifications made regarding current and future year estimates. OMB Cir. A-11 addresses *draft* budget documents; it does not address data regarding actual agency expenditures of appropriated funds.

28. Circular A-11 § 22.5 is entitled “Information available to the Public.” It directs agencies to consider the President’s FOIA Memorandum issued on January 21, 2009 (“President’s FOIA Mem.”), and the Attorney General’s FOIA guidance when deciding whether to withhold budget documents from the public. In the referenced Attorney General guidance,

Attorney General Holder notes that, even as to budget documents: “In the face of doubt, openness prevails.” AG FOIA Mem. at 1.

29. The IHS Manual requires that the agency maintain certain data relating to appropriated funds spent by the agency to pay contract support costs. IHM 6-3.5A. The required data include:

**Requirements for Reporting and Documenting Amounts of CSC Available, Needed, and requested.** The Area Director or his or her designee shall maintain a historical record of funds negotiated and awarded in each of the categories listed below. Manual Exhibit 6-3-F contains a detailed sample of the database.

1. Direct program funds
2. Startup costs
3. Direct contract support funds
4. Indirect cost funding
5. Indirect-type cost funding
6. Indirect cost rates
7. Types of bases
8. Pass through/exclusions
9. Total IDC base (direct cost base)
10. Direct CSC requirements (including the unduplicated DCSC requirement associated with sub-awards)
11. Indirect CSC requirements (including the unduplicated IDC requirement associated with sub-awards)

30. The data described in ¶ 29 encompasses the data sought in NPAIHB’s FOIA request. This data does not contain or relate to any budgetary decisions, much less budgetary decisions made prior to the President’s budget being transmitted to Congress, within the meaning

of OMB Cir. A-11 § 22.1. The data does not contain any justifications regarding current year or future estimates within the meaning of OMB Cir. A-11 § 22.1. Instead, the requested data is a simple accounting of how IHS spent appropriated public funds. Since the data do not concern budgetary decisions protected by OMB Cir. A-11 § 22.1, and since OMB Cir. A-11 § 22.1 is the only authority IHS invoked for refusing to disclose the requested data, IHS's refusal to disclose the requested data is contrary to law.

31. The fact that IHS intends to include some (but not all) of the requested data in a report to be prepared for Congress does not shield the data from disclosure under FOIA. While some of the requested data will eventually be included in a report to Congress mandated by law, *see* 25 U.S.C. § 450j-1(c), that fact does not mean that data which is otherwise subject to disclosure becomes exempt from disclosure until a formal report is submitted to Congress. Indeed, during the 24 year period from 1988 (when the predecessor to § 450j-1(c) was first enacted) through 2012, and on information and belief, at most only three reports to Congress have ever been cleared through the Department and formally transmitted to Congress, and no report has *ever* been cleared within the mandatory time limitations set forth in 25 U.S.C. § 450j-1(c). One recent report transmitted to Congress concerned FY 2009 data, which Congress mandated be furnished on or before May 15, 2009. *See* 25 U.S.C. § 450j-1(c). However, IHS did not develop that report until FY 2010 (leading IHS to name the report the "Fiscal Year 2010 Report to Congress on Funding Needs for Contract Support Costs of Self-Determination Awards (Based on Fiscal Year 2009 Data)."<sup>3</sup> Exhibit 3 at 35. Even still, that Report was not transmitted to Congress until February 27, 2012, three years late. Exhibit 4. As noted, most other reports have *never* been cleared and transmitted to Congress. Thus, purporting to withhold data from

disclosure until a subsequent report to Congress is submitted will likely mean that data otherwise subject to disclosure will either never be disclosed or will not be disclosed until years after it is compiled.

32. Past practice confirms that the agency has never before considered its CSC data to be exempt from disclosure to the public. From the early 1990s and continuing through 2009, IHS routinely released CSC data of the type set forth in ¶ 19, *supra*. IHS did so at the agency's annual Tribal Self-Governance Conference held each Spring in meetings attended by past IHS Directors, by IHS attorneys and by OMB examiners. Until 2010, identical data was disclosed and discussed at all of the meetings of the agency's joint tribal-federal Contract Support Cost Work Group (CSCWG). *See* IHM 6-3.4.F.8 ("From time to time, the IHS will hold meetings that will be open to the public, in order to provide an opportunity for the free exchange of information related to the CSC and the IHS CSC policy"). Although Defendant Roubideaux in 2012 reappointed and reconvened the CSCWG, she declined demands that she release all of the data that is the subject of this action. As past practice confirms, the subject data described in ¶ 19, *supra*, is neither "predecisional" (because it records only decisions already made) nor "deliberative" (because it documents only the agency's expenditure of funds). IHS's FY 2010, FY 2011 and FY 2012 contract support cost appropriations have all been spent. The data is not exempt from disclosure, and the agency's assertion that the data are "predecisional and deliberative" is contrary to law.

## COUNT 2

### **EXEMPTION 5 DOES NOT AUTHORIZE WITHHOLDING PURELY FACTUAL MATERIAL OR RAW DATA.**

33. The preceding paragraphs are incorporated as if fully set forth herein.

34. Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party ... in litigation with the agency.” 5 U.S.C. § 552(b)(5). This exemption is read narrowly, *Mink*, 410 U.S. at 89, and it is not a “wooden exemption permitting the withhold[ing] of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy, or opinion.” *Id.* at 92. Instead, “Exemption 5 contemplates that the public access to internal memoranda will be governed by the same flexible, common-sense approach that has long governed private parties” discovery of such documents involved in litigation with Government agencies”—*i.e.*, allowing disclosure of “*purely factual material* appearing in [policy] documents in a form that is severable without compromising the private remainder of the documents.” *Id.* (emphasis added).

35. Since *Mink*, courts have followed the rule-of-thumb that factual data that is severable must be disclosed. *Tarzia v. Clinton*, 2012 WL 335668, at \*13-15 (S.D.N.Y. 2012); *Reilly v. E.P.A.*, 429 F. Supp. 2d 335, 341-53 (D. Mass. 2006). As one district court recently explained:

The raw research data is not a recommendation, is not subject to alteration on further review by others in [the] agency, and is not selective. Whatever [agency employees] might subsequently do with the data, the data itself does not expose the deliberative process.

*Sw. Ctr. for Biological Diversity v. U.S.D.A.*, 170 F.Supp.2d 931, 941 (D. Ariz. 2000). Agency regulations echo the same principle. 45 C.F.R. § 5.66(a) (“We will release purely factual material in a deliberative document unless that material is otherwise exempt.”).

36. Nothing about the CSC data requested in ¶ 19, *supra*, is of a deliberative nature. The data is initially maintained by each of the 12 Area Directors, as required by IHM 6-3.5(A).

It is then collected centrally by the Director pursuant to IHM 6-3.5(B). While it may or may not contain information submitted by tribal contractors, that is immaterial because Exemption 5 does not protect such information from disclosure. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-16 (2001). Nor does OMB Cir. A-11 restrict disclosure of such data, since that Circular does not address completed expenditures of appropriated funds.

37. Even if the narrative portion of the draft of the agency's annual CSC "Shortfall Report," prepared for Congress pursuant to 25 U.S.C. § 450j-1(c), were considered to be exempt from disclosure prior to transmittal to Congress, the CSC data contained within a portion of the Report is severable, is not exempt and must be disclosed. Indeed, the FY 2010 Shortfall Report (containing FY 2009 data) was submitted to Congress in two pieces (two PDF files), separating the agency's CSC data from the agency's narrative. *See* Exhibit 3 at 35, 42. The Defendants' cursory assertion that such data is "inextricably intertwined in the reports' contents" is plainly erroneous. Even when such data is part of one integrated document (not the case here), similar blanket statements have been routinely rejected by the courts as a basis for withholding an entire document. *Tarzia*, 2012 WL 335668, at \*15 ("Department's single, conclusory statement . . . is insufficient to establish that these emails do not contain severable factual information"); *Judicial Watch Inc. v. Dep't of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) ("Conclusory language in agency declarations that does not provide a specific basis for segregability findings by a district court may be found inadequate."); *Wilderness Soc'y v. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) ("[A] blanket declaration that all facts are so intertwined to prevent disclosure under the FOIA does not constitute a sufficient explanation of non-segregability.").



38. The format in which the FY 2010 Shortfall Report (containing FY 2009 data) was released demonstrates that the requested CSC data contained in that Report is easily severable. That CSC data is essentially an attachment—an EXCEL spreadsheet that is saved as a separate PDF file containing the categories of information required by IHS Manual provisions at IHM 6-3.5(A). *See* 2010 Shortfall Report, Exhibit 3 at 42. This table can easily be disclosed by itself, without implicating the narrative portions of the Report, even if such narrative portions were deliberative (although for the reasons stated in Count I, they are not). Reports from previous years have been published in a similar format, with the CSC data tables wholly separate from the narrative portions of the reports. The 2010 Shortfall Report (containing FY 2009 data), submitted to Congress in two parts only 7 months ago, demonstrates how the agency's CSC data can easily be segregated and released.

39. With regard to the FY 2012 data, by the time Plaintiff appealed IHS's denial of NPAIHB's FOIA request, IHS had compiled its data showing how IHS allocated that portion of its FY 2012 CSC appropriation contained in Pool 2 and Pool 3 (which constitute the overwhelming bulk of the annual CSC appropriation). On information and belief, prior to the close of the fiscal year IHS generated additional data showing its disposition of the small Pool 1 portion of the FY 2012 CSC appropriation. Records that have been prepared showing those payments thus exist, are disclosable under FOIA and must be produced.

### **COUNT 3**

#### **IHS'S SEARCH FOR ITEM 5 WAS INADEQUATE AS A MATTER OF LAW.**

40. The preceding paragraphs are incorporated as if fully set forth herein.

41. The agency states that it has searched its records and determined that it has no documents described in category 5 of the FOIA request—correspondence including e-mails, letters, memoranda, or other communication made by IHS officers, employees or representatives to Members of Congress or their staffs relating to contract support costs between January 1, 2011 to the present.

42. IHS is obligated to undertake a search that is “reasonably calculated to uncover all relevant documents.” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep’t of State*, 897 F.2d 6540, 542 (D.C. Cir. 1983)); *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The burden is on the agency to demonstrate that it has made “a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested....” *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). In litigation, the agency must show that “the search method ... was reasonably calculated to uncover all relevant documents.” *Oglesby*, 920 F.2d at 68. The AG’s FOIA Guide states that agencies in litigation typically submit a declaration “that identifies the types of files that an agency maintains, states the search terms that were employed to search through the files selected for the search, and contains an averment that all files reasonably expected to contain the requested records were, in fact, searched.” Dep’t of Justice, DOJ Guide to the Freedom of Information Act (2009) at 759. *See, e.g., Tarzia*, 2012 WL 335668, at \*9-10 (holding that agency search was inadequate based on agency employee’s detailed declaration); *Wilderness Soc’y*, 344 F. Supp. 2d at 19 (same).

43. The agency failed to document its search in any way. In its denial of the FOIA request, the agency states simply that it “searched its records and determined that [it has] no documents.” Denial Letter, Exhibit 3 at 14. This bare assertion, however, does not provide a basis for NPAIHB or a court to determine the adequacy of the search. As the court in *Nation Magazine* noted, the burden is on IHS to demonstrate that it made “a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” 71 F.3d at 890. IHS has not met that burden.

44. Exhibit 3 at 62 is a copy of a memorandum that IHS sent to Congress containing statements about CSC data and about recent court rulings addressing the Government’s legal obligation to pay the full amount of CSC that it had contractually agreed with Indian Tribes to pay. This memorandum falls within the scope of the category 5 request made by NPAIHB and should have been produced by the agency in response to the request. The fact that the agency contends that it has no responsive documents when at least one such document exists casts serious doubt upon the adequacy of the agency’s search. It is not credible that no further correspondence of any kind exists between the agency and Congress concerning one of the most controversial aspects of IHS’s activities.

45. IHS has failed to meet the statutory requirement to conduct a search reasonably calculated to uncover relevant documents, and its search was inadequate as a matter of law.

#### **PRAYER FOR RELIEF**

WHEREFORE, NPAIHB respectfully requests that the Court enter judgment in its favor and against the Defendants as follows:

- A. Declare Defendants’ decision to withhold the requested documents under Exemption 5 was contrary to law;

- B. Order Defendants to conduct a thorough search for all responsive records;
- C. Order Defendants to disclose the requested records in their entireties and make copies available to Plaintiff;
- D. Provide for expeditious proceedings in this action;
- E. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action, under 5 U.S.C. § 552(a)(4)(E); and
- F. Grant such other relief as the Court may deem just and proper, including an order directing the agency to produce similar records in the future when requested pursuant to the FOIA.

Respectfully submitted this 1st day of October 2012.

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*/s/ Lloyd B. Miller*

By: \_\_\_\_\_

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