UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN B. LONG	)	
	)	
and	)	
	)	
DAVID BURNHAM	)	
	)	
Plaintiffs,	)	Civil Action No. 1:00CV00211 PLF
	)	
v.	)	
	)	
DEPARTMENT OF JUSTICE	)	
	)	
Defendant.	)	
_____	)	

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE DEPARTMENT'S REVISED EXEMPTION CLAIMS, AND ITS CLAIMS CONCERNING NOTICE OF DELAY AND FEE WAIVER

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Introduction

The Department's Combined Opposition and Reply Memorandum ("2d Combined Mem.") underscores that its exemption claims arise from irrational assumptions and bizarre interpretations that are worthy of Lewis Carroll's Alice in Wonderland. In the world portrayed in the Department's brief, criminals defer taking steps to avoid detection until they examine a government database to see if federal agencies have gathered enough evidence to ask prosecutors to obtain an indictment. The judicial branch disseminates the names of litigants on the Internet while simultaneously declaring the disclosure of such names to be an "unwarranted invasion of personal privacy." The words that appear in the Freedom of Information Act ("FOIA") are also drained of meaning. FOIA's exemptions for disclosures that invade "personal privacy" apply to public information about corporations, and the exemption for "internal personnel rules and practices" applies to information that bears no relationship to either. Although FOIA states that the burden is on the agency to show that the information that it has withheld falls within the statute's exemptions, 5 U.S.C. § 552(a)(4)(B), the Department repeatedly argues that the burden is on the requester to disprove speculation that exempt information might be present.

FOIA does not allow the Department to deny access to records based on speculation and interpretations of the statutory text that make sense "[o]nly in the world of Alice in Wonderland, in which up is down and down is up, and words lose their real meaning." United States v. Galloway, 976 F.2d 414, 438 (8th Cir. 1992). As we show below, the Plaintiffs are entitled to release of the database fields identified in Plaintiffs' motion for partial summary judgment, and are also entitled to judgment on their claims concerning the Department's handling of notice and fees.

I. THE DEPARTMENT'S CLAIM THAT LEAD CHARGE INFORMATION IS EXEMPT IS WITHOUT MERIT.

A. The Department's Claim That Suspects Reasonably Could Use the Combination of Lead Charge and the Office Handling the Matter to Interfere With Law Enforcement Investigations Is Not Supported by Reason or Evidence.

The Department does not dispute that its theory that disclosure of lead charge information in pending investigations could interfere with those investigations is speculative. Instead, it simply asserts that the speculation that it has presented is sufficient unless the Plaintiffs disprove the agency's imaginary scenarios by showing that there is no combination of circumstances in which disclosure of this data could "ever" alert a suspect "as to the increased possibility of an investigation." 2d Combined Mem. at 15, 17. FOIA, however, places the burden of proof on the Department and it has failed to show: (1) that lead charge information enables suspects to interfere with investigations in a particular way; (2) that records being withheld have the characteristics that the Department has assumed in making this claim; or (3) that the Department's claim is reasonable even though the data does not contain geographic, demographic, or other identifying information.

1. Disclosure Does Not Add to a Suspect's Ability to Interfere With a Law Enforcement Investigation. To sustain an Exemption 7(A) claim the agency must show that disclosure can reasonably be expected to interfere in an ongoing law enforcement proceeding "in a palpable, particular way." North v. Walsh, 881 F.2d 1088, 1100 (D.C. Cir. 1989). The fact that the records give a suspect information about an investigation he or she did not have before is not sufficient; the government must show that the records disclose information (e.g., the names of witnesses, the location of evidence) that would allow the suspect to harm the enforcement proceeding in "some particular, discernable way." Id. at 1097; accord Church of Scientology v. IRS, 816 F. Supp. 1138, 1156 -1157 (W.D.Tex. 1993).

The Department has failed to do so here because it makes no claim that the lead charge information enhances a suspect's ability to disrupt an investigation. Instead, it relies entirely on the general proposition that criminals seek to avoid detection, and on steps that a criminal may take

regardless of whether lead charge information is disclosed. See Wainstein Decl. ¶¶ 3, 6. As a result, the Department's claim not only lacks any particularized proof, it rests on the improbable assumption that the EOUSA data would have substantial value to suspects even though the only thing that the data could reveal to the suspect is that an investigation is well underway or has been completed. An entry in the EOUSA database is not an early warning that an investigation should be anticipated. Rather, it indicates that a federal agency such as the FBI, IRS, or the DEA has conducted an investigation and has referred the matter to the United States Attorney for prosecution. Eighth Long Decl. ¶¶ 13, 14. Consequently, it would be irrational for criminals who suspect that they are under investigation to postpone taking some or all of the steps that they could take to avoid detection until after they have checked the EOUSA databases for an indication that investigators have referred the matter to prosecutors.

Even the Department's own description of its "proof" on this issue is circular. In response to the challenge to identify a palpable way in which a suspect could use the lead charge information, the Department asserts: "[i]t is self-evident that a suspect who is monitoring EOUSA's database is doing so because the information he finds might be of assistance" because "otherwise, the suspect would not be monitoring the database in the first place." 2d Combined Mem. at 20. Thus, the Department's "evidence" that suspects could use this information is its speculation that there are suspects who use this information.

2. The Withheld Records Do Not Have The Characteristics That The Department Hypothesizes. To sustain a claim that a category of information is protected by Exemption 7(A), the agency must not only define functional categories of records that qualify, it must also explain how the release of each category of records would interfere with law enforcement proceedings, and demonstrate that it the information withheld actually falls within the exempt categories. Voinche v. Federal Bureau of Investigation, 46 F. Supp. 2d 26, 31 (D.D.C. 1999). The Department has not done so. Instead, the

Wainstein Declarations assert that, hypothetically, the database could contain entries with certain characteristics. See Wainstein Decl. ¶¶ 5, 7 (identifying infrequent offenses and "size of the location" as relevant characteristics). The Department offers no evidence that any of the records that it is withholding actually have such characteristics. Moreover, it concedes that many do not.

The Department attacks a straw man when it asserts that Plaintiffs and City of Chicago v. United States Dep't of the Treasury, 287 F.3d 628 (7th Cir. 2002), maintain that the government must "cite actual instances of interference with law enforcement proceedings when asserting a claim under" Exemption 7(A). 2d Combined Mem. at 3-4, 5, 7. The Seventh Circuit found, and Plaintiffs argue here, that the Department's claim is without merit because it has neither evidence that the disclosure has permitted interference in the past nor evidence that it is reasonable to conclude that disclosure could permit such interference. Indeed, the Seventh Circuit underscored this point when it denied the Department's request for rehearing in City of Chicago, with an amendment to the opinion that states that "a showing of specific instances of interference is not required," but "this does not end our inquiry." City of Chicago v. United States Dept. of Treasury, 297 F.3d 672, 673 (7th Cir. 2002):

> ATF's evidence might predict a *possible* risk of interference with enforcement proceedings, but these predictions are not *reasonable.* Instead, ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records.

297 F.3d at 673 (emphasis in original); see also 287 F.3d at 634 (Exemption 7(A) claim rejected because agency has "not affirmatively established any potential interference" of the type recognized under the statute, and the agency's "hypothetical scenarios" are unconvincing). The Seventh Circuit's observations apply with equal force to the EOUSA's hypothetical scenarios here.

The Department also misses the mark when it asserts that this case is distinguishable from City of Chicago because it has identified "several thousand actual pending investigations" that support its claim here. 2d Combined Mem. at 6. The Department has withheld lead charge entries in records

concerning tens of thousands of matters, but it has not produced any evidence that it has actually examined the data and determined that most, many or even one of the redacted entries has a combination of statutory citation and location information that would allow a suspect to impair an undisclosed investigation. The Department's second round of declarations highlights the deficiency in its evidence on this point. The Declarations state that the EOUSA generated a report that identified ten statutes that "appeared ten times or fewer in the entire" database for a given fiscal year. Second Hamilton Decl. ¶ 2; Second Wainstein Decl. ¶ 5. However, the infrequent appearance of a statute is only one of several characteristics that must be present for the Department's theory to even apply. See Maltz Decl. ¶ 23. For example, records that contain an obscure lead charge do not fall within the Department's theory if (i) the suspect has already been arrested, publicly charged by indictment or information, or the matter was closed; (ii) the agency that investigated the matter has already alerted the suspect to the investigation; (iii) the size of the jurisdiction to which the matter has been makes indirect identification impractical; or (iv) the offense is committed frequently, but rarely prosecuted by the United States Attorneys. The Department ignores these considerations and examination of the EOUSA data shows that most, if not all, of the records that list the statutes identified in the Department's latest declarations do not have the characteristics needed to support the Department's speculation. See Eighth Long Decl. ¶¶ 11-17.

Moreover, the Department's position is even more untenable here than in was in City of Chicago because the Department has disclosed the lead charge information at issue here for decades without incident. As discussed in Plaintiffs' opening Brief, the Department has, and continues to, disclose lead charge information for matters opened before FY99. Seventh Long Decl. ¶¶ 10-13. These disclosures (i) waive the Department's claim for just under half of the lead charge redactions at issue here; and (ii) require that it provide a rational basis for distinguishing the remainder.

First, with respect to approximately 49% of the lead charge redactions, the Department's current claim is foreclosed because it has released the lead charges for these matters, most recently in the FY98 files released in 1999 and 2000. Eighth Long Decl. ¶¶ 2-6. In redacting the lead charge matters in the FY99 and mid-year FY00 files, the Department has redacted the lead charge for matters that also appear in the FY98 files, even though the Department has disclosed, and is currently disseminating, records that identify the lead charge for matters opened before the end of FY98. Id. For the remaining 51% (i.e., matters that were not opened until after the end of FY98), the disclosure of the lead charge in similar records does not "waive" the exemption claim, but it does require that the agency provide a persuasive rationale for concluding that the information that it is withholding would impair investigations even though the prior disclosures have not done so. Cf. Army Times Pub. Co. v. Department of Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (agency must reconcile disclosures of some deliberative materials with its claim that similar materials must be withheld). The Department has not done so and, instead, has ignored the significance of regular practice of disclosing lead charge information.[1]

3. The Department's Speculation Is Not Reasonable. Under Exemption 7(A), the Department must provide non-conclusory proof that disclosure of the lead charge entries being withheld "reasonably could" interfere with a law enforcement proceeding. 5 U.S.C. § 552(b)(7)(A). The Court of Appeals has emphasized that when Congress amended the statute in 1974 to substitute "could" for "would," this amendment relieved the agency of the burden of proving "'to a certainty'" that disclosure would interfere with law enforcement proceedings, but the amended language "does not otherwise alter the test.'" North v. Walsh, 881 F.2d at 1098 n.14 (quoting Reporters Comm. for

[1] The Department asserts that it has not released the lead charge information "from the records at issue here" and then claims that it is possible that its prior disclosures of the "lead charge"did not include "records of investigations that were pending at the time the Department released the information." 2d Combined Mem. at 7-9 (italics omitted).

Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 738 (D.C. Cir.), modified on reh'g, 831 F.2d 1124 (1987), rev'd on other grounds, 489 U.S. 749 (1989)). Contrary to the Department's argument, the statutory language does not allow an agency to withhold information based solely on what the agency considers to be "possible." As City of Chicago correctly held, the agency's claim must be reasonable and supported by evidence. See also Miller v. Unites States Dep't of Agriculture, 13 F.3d 260, 263 (8th Cir. 1993); Campbell v. Dep't of Health and Human Services, 682 F.2d 256, 259 (D.C. Cir. 1982).

In addition to the irrational assumptions identified above, Plaintiffs' Motion identified several respects in which the Department had failed to show that its theory of indirect identification from the combination of the lead charge and location of the office handling the matter is reasonable. The only additional evidence on this point that the Department has tendered is the testimony of statistical expert Bernard Siskin. However, Dr. Siskin's declaration is limited to criticizing the opinion of Michael Maltz. He ventures no opinion of his own that would fulfill the Department's burden of proving that its theory is reasonable. The gaps that Plaintiffs' previously identified show that its theory is not.[2]

a. The Department's theory falters on the very first consideration identified in Plaintiffs' Motion: The number of individuals who may be identified in any given record is virtually unlimited because the records at issue here do not include any codes with information on the location of the suspect. Plaintiffs' Opening Memorandum at 22 ("Plfs' Mem.") The Department does not address this flaw in it its theory; it simply assumes — without supporting evidence or reasonable explanation — that the location of the United States Attorneys Office handling the matter is the same as the location of the suspect. 2d Combined Mem. at 10 n.4. This assumption is irrational. There is no rule that

[2] The closest that the Siskin Declaration comes to an affirmative opinion is the statement that "there is no way to remove all disclosure risk from a microdata file other than not releasing the file at all." Siskin Decl. ¶ 10. There is a wide gulf, however, between Dr. Siskin's statement that the risk is not zero, and proof that disclosure of the information reasonably could interfere with law enforcement investigations.

suspects live near or even return to the scene of the crime, or that they take of residence near the offices of the United States Attorney who has been chosen to investigate them. The location of the prosecutors office does not narrow the number of individuals who may be associated with any given record in the EOUSA data.

The Department also asserts that the relevant population for assessing its theory is "the population of people who have committed crimes that could potentially be under investigation." 2d Combined Mem. at 11. Even this potential population is enormous and unknown. However, the Department's unsupported assertion is obviously wrong and it is not endorsed by Mr. Siskin. The United States Attorneys receive requests to prosecute (and sometimes even indict) persons who have not committed any crime. From the perspective of an individual who does not have access to the names in the database, the individuals who might be the subject of a record in the EOUSA data include anyone who might, rightly or wrongly, be suspected of crime a that could potentially be under investigation.[3]

b. Even if the absence of information on the location of the suspect is overlooked, the Department's theory is unreasonable because it assumes that the target of an investigation can be determined from just two items of information: the location of the United States Attorneys Office and the lead charge entry. The Declaration of Michael Maltz explains why this is implausible. Maltz Dec. ¶ 16-23. The Department devotes much of its response to attacking the 100,000-person benchmark

[3] Mr. Siskin suggests that the relevant "sampling frame" for evaluating geographic identifiers in the EOUSA data is "persons (or other entities) engaged in or suspected of criminal activity." Siskin Decl. ¶ 4. This criterion would also cover a population that is large enough to demonstrate that indirect identification is not reasonable, particularly where there is nothing in the database that limits the suspects could be identified by a record to residents of a particular region. But Mr. Siskin's statement reflects an incorrect usage of the term "sampling frame." See Eighth Long Decl. ¶¶ 18, 19; Second Maltz Decl. ¶ 3-6. His statement also it understates how many individuals must be considered by a suspect seeking to use the EOUSA data for indirect identification. In Department's hypothetical scenario, the suspect does not know who is "engaged in or suspected of criminal activity," so the anyone who might be suspected of criminal activity is within the "sampling frame" from which the individuals who actually appear in the EOUSA database is drawn.

referenced in the Maltz Declaration. In doing so, the Department quibbles over details while ignoring the central issue. The Maltz Declaration is not based on the 100,000 number, but points to the Census and National Center for Health Statistics ("NCHS") standards as proof that statisticians have concluded indirect identification should not be a concern if the number of individuals who could potentially be represented by a record in their databases is above a certain number. Id. ¶¶ 17-18; see also Second Maltz Decl. ¶¶ 1, 2. The Department does not this dispute the general principle, see Wainstein Decl. ¶ 7 ("size of the location" must be weighed in considering whether lead charge information needs to be redacted), and neither Plaintiffs nor Mr. Maltz claim that 100,000 is a magic number that applies to all data. The central issue is not whether the EOUSA should employ the 100,000 standard for its data, but whether the Department's claim is reasonable where it offers no evidence that lead charge and location information are sufficient for indirect identification when the potential number of individuals who may be identified by a record is many times greater than this standard.

Moreover, the Department offers no proof that the appropriate number for evaluating the feasibility of indirect identification in the EOUSA data is greater than 100,000, and the evidence that is available points to the opposite conclusion. Both common sense and the empirical studies show that if the number of potentially identifying details in a database is smaller, the size of the population that renders indirect identification unrealistic is lower.[4] For this reason, the Department's arguments that EOUSA data is different from Census and medical data are misplaced because the considerations that the Department identifies indicate the risk of indirect identification from the EOUSA data is lower than for the Census and medical data that contain more identifying details. For example, the Department

[4] Greenberg and Voshell, Bureau of the Census Statistical Research Division Report, *The Geographic Component of Disclosure Risk for Microdata* at 4 (Oct. 1990). As noted in Plaintiffs' motion, the Department of Health and Human Services has concluded that a benchmark of 20,000 is appropriate for some medical data, and the Census Bureau's standard increases from 100,000 to 250,000 where the number of potentially identifying variables is large. See Plfs' Mem. at 21 n.9 (citing studies and regulations).

notes that Census and NCHS decrease the risk of identification by masking demographic and other information that may facilitate indirect identification. 2d Combined Mem. at 11. This is true, but it does not help the Department's cause here because the EOUSA data at issue are equivalent to a Census or medical data file in which all demographic information has been completely removed because the EOUSA data contains no information on age, sex, ethnicity, or other identifying characteristics. Similarly, the Department argues that self-identification "is generally easier than identification of others" because "people generally have better information about their own characteristics." Id. at 12. This is also true, but it would only be relevant if the EOUSA data contained information about personal characteristics that would allow someone to identify himself or herself. It does not. The fact the EOUSA data contain less information that could be used for indirect identification than the Census or medical databases only reinforces Plaintiffs' argument that the Department's hypothesis is unreasonable in light of the standards used in these contexts. See Second Maltz Decl. ¶ 7, 8.

Moreover, the Department has withheld lead charge for all judicial districts, including those with populations up to 16 million. To sustain these withholdings it is incumbent on the Department to show that its theory is reasonable for districts of every size. However, the agency has not offered proof that it is reasonable for even the smallest districts.[5]

c. Finally, Plaintiffs also noted that the Department's speculative theory of indirect identification is implausible because the lead charge entries, which consist solely of citations to criminal statutes, lack the specificity necessary for indirect identification. In reply, the Department concedes that some statutes lack such specificity, and then erroneously asserts that this admission is

[5] The Second Declaration of Siobohan E. Sperin, which accompanies the Second Combined Memorandum, only confirms that there is no uniform policy concerning assignment of cases to branches, and the policies that do exist are subject to exceptions. Consequently, the branch information does not facilitate the indirect identification imagined by the Department. The branch code does not designate the location of the suspect and the code cannot even be used to infer the location of the suspected crime within the district without knowing the details of the varied assignment policies in the United States Attorneys offices.

irrelevant because all lead charges are exempt unless Plaintiffs bear the burden of proving that there is no statute in the criminal code that could permit indirect identification. 2d Combined Mem. at 14-15. This claim is obviously inconsistent with the applicable burden of proof and the agency's obligation to segregate and release information that does not jeopardize ongoing law enforcement proceedings. See Vionche, 46 F. Supp. 2d at 31.

The Department also asserts that the statutes cited as hypothetical examples in its prior papers and new examples listed in its reply are "highly specific" and disclosing these lead charge entries would inform a suspect that the government "might well" be investigating his or her activities. 2d Combined Mem. at 15-17. The Department's assertion that the statutes that it has identified are highly specific is not persuasive, and it is belied by the fact that the mail fraud and drug statutes it has identified frequently appear as lead charges in the EOUSA data. See Eighth Long Decl. ¶¶ 9, 10. Moreover, the disclosure that the Office of the United States Attorney is considering bringing charges under a mail fraud or drug statute does not disclose anything that would impair an investigation because suspects must already know that federal or local officials "might well" be conducting an investigation that would lead to charges under these statutes.

In short, the Department has withheld the lead charge information for all records in the files for FY99 and later periods that are at the "investigative stage" based solely on the premise that, hypothetically, there may be circumstances where prosecutors in a small jurisdiction are secretly investigating a crime that is so idiosyncratic that the only charge likely to be identified as a lead charge for this crime is an obscure statute. This speculation does not reasonably support an Exemption 7(A) claim because only a senseless suspect would wait until after an entry in the EOUSA data appeared before taking steps to conceal the crime, and the Department has not shown that any, much less all, of the records that it has redacted have the anomalous characteristics assumed by its theory.

B. The Department May Not Withhold Lead Charge Information Based On Speculation About What Might Appear In Other Fields.

The Department has also claimed that its redaction of the lead charge information is justified by information that might conceivably appear in other fields (e.g., the specific amount of funds embezzled) that would permit indirect identification. The arguments described above also show that this claim is untenable, i.e., there is no reason that a suspect cautious enough to monitor government data would wait until a database indicates that investigation is well underway before concealing a crime, and there is no evidence that the data contain records like those described in the Department's hypothetical examples. Plaintiffs' Opening Memorandum also showed that this claim suffered from two additional flaws: (1) the "other fields" identified in the Department's hypothetical examples are empty in more than 97% of the records; and (2) the examples assume situations in which the suspect is already aware of the investigation, or the "other information," not the lead charge, must be removed to prevent a suspect from recognizing his or her handiwork in the record. Plfs' Mem. at 25-26

The Department first inaccurately asserts that Plaintiffs ignored their claim concerning information in other fields. 2d Combined Mem. at 18. Then it asserts that, because it has made a conclusory assertion that the threat from disclosure arises from a "combination" of information, FOIA is indifferent to whether the agency elects to withhold all lead charge data in every pending investigation or withholds the "other information" in the few records in which this information supports its Exemption 7(A) theory. Id. at 19 & n.9. For the reasons discussed in our prior Memorandum, the Department's assertion that its concern is justified by a "combination" lead charge and other information is simply false. See Plfs' Mem. at 25-26. Its assertion that "FOIA expresses no preference for which item is to be redacted," 2d Comb. Mem. at 19, is flatly contrary to law as FOIA imposes an affirmative obligation on the agency to maximize disclosure and prove that it has released all segregable information, even if this requires proving that individual characters in a multi-character code cannot be released without triggering an exemption. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022, 1026-27 (D.C. Cir. 1999).

II. THE DISCLOSURE OF COURT DOCKET INFORMATION DOES NOT INVADE PERSONAL PRIVACY.

The court docket numbers and names of civil and criminal litigants that the Department has withheld are not "private" in any legal or practical sense. In order to defend withholding this information to protect personal privacy, the Department has reduced the Supreme Court's decision in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), to half of a sentence in the opinion — discarding the remainder as surplusage. In doing so, it urges a standard under which not only the PACER system, but every press release by the Attorney General or a United States Attorney that names the defendant or participant in a civil or criminal action constitutes an unwarranted invasion of personal privacy. This position is "as silly as it sounds." Public Citizen v. Steed, 733 F.2d 93, 102 (D.C. Cir. 1984).

A. The Court Docket Information That The Department Is Withholding Is Readily Available To The Public.

The Department's reply asserts that the names of litigants and court docket numbers that it is withholding are not readily available to the public. Its argument is based on a series of disingenuous assertions.

1. The Department argues that the information is not "freely" available to the public through PACER because it "can only be accessed by people with specialized knowledge," and it "takes time and costs money." 2d Combined Mem. at 24. To the contrary, neither specialized knowledge or wealth is required. For less than the price of a telephone call, the PACER U.S. Party Index allows an individual to obtain a list of the captions and docket numbers for federal civil and criminal actions in which his next door neighbor is or has been a party by typing the neighbor's name on the Internet. See U.S. PACER Overview, http://pacer.psc.uscourts.gov/uspci.html#cost (cost is 7¢ per page through Internet). A single search of the U.S. Party Index covers all but a few federal courts that are not integrated into the national index. The handful of courts whose litigation is not listed in the national

index are identified, and information on the litigants and docket numbers for litigation in these courts can be obtained through the PACER services for the individual courts. Id. PACER shows that the Administrative Office and the individual courts do not regard the information as "private" and actively facilitate public access to the very information that the Department is withholding.

2. The Department also argues that the PACER records do not undermine its claim that the names and docket numbers are properly withheld to protect personal privacy because the EOUSA records contain additional information about agency activities, such as the fact that a prosecution was initiated by the Internal Revenue Service. 2d Combined Mem. at 26. However, the information on agencies' activities does not invade personal privacy, as the Department's own example illustrates. The fact that an individual was charged with tax evasion is readily available to the public through court dockets and PACER. The fact that the EOUSA database might reveal that the IRS referred this charge for prosecution does not impair any personal privacy interest.

3. The Department notes that PACER records do not cover cases as far back as the EOUSA databases because the PACER records only go back to 1990 or the late 1980s. Id. at 26. This is true, but irrelevant because the pre-1990 information has been available to the public since the Department deposited the FY1974-1989 EOUSA data at the National Archives with the court docket information intact. See Seventh Long Decl. ¶ 6.a. The Department implies that it made the court docket information public because it deposited the files before the Reporters Committee decision. 2d Combined Mem. at 26. This is not accurate. The FY74-89 files were not deposited until after the end of FY89, and perhaps as late as 1990 -- well after the Supreme Court's March 1989 decision. See Eighth Long Decl. ¶ 21. However, Plaintiffs agree with the Department's statement that, because the

Department has made this information public, Plaintiffs' request for injunctive relief is directed at the files for FY90 and later years. 2d Combined Mem. at 27.[6]

B. The Department Misconstrues Reporters Committee and Safecard

The Department argues that even if the information that it is withholding is available to the public through PACER, disclosure constitutes an unwarranted invasion of personal privacy. It does not, however, argue that logic supports this conclusion. Instead, it claims that this result is dictated by two "categorical" rules stated in prior cases. In both instances, the Department has misread the cases to reach an irrational result.

From Reporters Committee, the Department quotes the statement "we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy." 489 U.S. at 780. It asserts that this sentence forecloses Plaintiffs' claim that disclosure of the names that appear in public docket information should be treated differently. 2d Combined Mem. at 21-22. The Department also maintains, without any support, that this same sweeping rule should apply to the names of litigants in proceedings that do not involve law enforcement. Id. at 29-30. These assertions are wrong because the Department omits the context, including the remainder of the sentence it quotes. The surrounding paragraph makes clear that the Supreme Court was concerned about requests for records that do not contain information on "what the Government is up to," and the balance of the quoted sentence underscores this by stating that the invasion of privacy is "unwarranted" "when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing." 489 U.S. at 780.

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[6] The FY74-89 files that the Department released through NARA and the files that it released in this litigation in June 2002 differ because the Department took inconsistent positions, redacting information from the files at NARA that the Department now concedes must be released, and redacting court docket information that was released in 1990 from the files released in June 2002. Although the Department's position is irrational, an injunction is not required to correct it because the two sets of data may be combined. The only purpose served by the Department's decision to redact the court docket information from the files released to TRAC is to impose additional burden on the requester.

The omitted language shows that Plaintiffs' requests for records here are not part of the category addressed by these statements.

Moreover, as discussed in Plaintiffs' opening Memorandum, Reporters' Committee states that the information at issue in that case was "private" because of statutory, regulatory and other restrictions on the disclosure of "rap" sheets, 498 U.S. at 752-54, 764-65. The Court also considered the information private because it was not available to the public as a practical matter, even if there had been scattered disclosures in dispersed court files, archives, and police stations over a period to time. Id. at 762, 764. The Department dismisses these portions of the opinion entirely by asserting that the Supreme Court's discussion of legal restrictions was surplusage, 2d Combined Mem. at 27-28, and that Reporters Committee holds that "availability does not alter the privacy interest in compiled information." Id. at 23. The Department is too quick to dismiss th reasoning in Reporters' Committee, and that reasoning shows that the records at issue here do not have the characteristics that led the Supreme Court to conclude that disclosure of rap sheets invades personal privacy because court docket information is practically and legally available to the public, and because this information appears in records on agency activities.[7]

The Department also asserts that Plaintiffs' claims here are foreclosed by a sentence in Safecard Services v. Securities and Exchange Comm'n, 926 F.2d 1197 (D.C. Cir. 1991), which states that names and addresses of private individuals are exempt from disclosure under Exemption 7(C) unless access to this information "is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." Id. at 1206; 2d Combined Mem. at 29. The Department's reliance on this sentence is also misplaced because it arose in the context of a request for names that were not already

[7] The Department's assertion that the name and court docket number information at issue here is equivalent to a "rap sheet writ large," 2d Combined Mem. at 22, is also inaccurate. In addition to information on arrests or legal proceedings that may not be available for legal or practical reasons, rap sheets contain personal information, such as the date of birth and physical characteristics. 489 U.S. 751-52.

available to the public, and the Court of Appeals subsequently qualified this statement in Nation Magazine v. United States Customs Service, 71 F.3d 885, 895-96 (D.C. Cir. 1995) Nation Magazine reversed a district court decision that had applied Safecard literally and denied a request for records concerning Ross Perot, even though Mr. Perot had publicly acknowledged activities described in the records. The Court observed that Safecard was concerned with disclosure of the names of subjects, witnesses or informants, id. at 896, and its categorical statement addressed circumstances where the requester sought information about a "private citizen, not agency conduct." Id. at 895. The language that the Department quotes from Safecard is not applicable where information about agency conduct is sought and the identity of the individual identified in the records is already public. Id. at 896. Moreover, the in Nation Magazine the Court of Appeals warned that a blanket rule that names in law enforcement files are always exempt would represent an "impermissible reading of Exemption 7(C)." Id. at 895-96. That flawed reading is precisely what the Department urges here.

C. Disclosure of the Court Docket Information Serves the Public Interest.

Because the disclosure of the court docket information does not violate a significant privacy interest, "FOIA demands disclosure" of this information, even if there is no countervailing public interest. National Association of Retired Federal Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989). However, the declarations that accompany Plaintiffs' opening Memorandum demonstrate that, although the Department's exemption claim does not advance anyone's personal privacy, it does advance the Department's self-interest in limiting scrutiny of the agency's activities and inhibiting criticism of the statistics that the Department uses to justify budget requests and policy decisions. See Second Burnham Decl. ¶¶ 3, 5-7; Seventh Long Decl. ¶ 40; Maltz Decl. ¶¶ 8, 9, 12, 13-15.

The public interest in examining data that chronicle the Department's activities to determine if the data are reliable, whether conclusions that the Department draws from the data are accurate, and whether the data support policies different from those advocated by the Department, falls squarely

within FOIA's core purpose of requiring the disclosure of "[o]fficial information that sheds light on an agency's performance of its statutory duties." Reporters' Committee, 489 U.S. at 773. The Department's argument that such interests have been dismissed by the courts as irrelevant or negligible, see 2d Combined Mem. at 31-32, is simply inaccurate. Even in cases in which disclosure would invade privacy interests, courts have found that the public interest in evaluating how the government conducts itself in enforcement activities or other agency duties may warrant disclosure of information. See, e.g., Cooper Cameron Corp. v. United States Dept. of Labor, 280 F.3d 539, 548 (5th Cir. 2002); City of Chicago, 287 F.3d at 637; Nation Magazine, 71 F.3d at 895.

The Department also asserts that the public interest in disclosure can only be considered if the public would learn something about the agency's activities "directly" from names that are being withheld without any further analysis. 2d Combined Mem. at 34. This argument is twice flawed. First, the relevant issue is not whether a list of the names being withheld would reveal something about the agency's activities, but whether disclosure of the names in conjunction with the other non-exempt information in these database records serves the public interest. Disclosure of the database records directly provides such information because the names are linked with information about the agency's activities in the litigation. Second, the Department's suggestion that the public interest cannot arise from analysis of records that reveal information on agency activities, id. at 35, is not supported by the case law. The Department's claim is based on a quotation taken out of context from NARFE v. v. Horner, 879 F.2d at 879, in which the records contained only the names and addresses of former federal employees and no information on agency activities. Nothing in the case law suggests that where records reveal information on an agency's action, the public interest served by analyzing such information is irrelevant, and several cases conclude the public interest in analyzing government records justifies disclosure. See, e.g., United States Dep't of State v. Ray, 502 U.S. 164, 178 (1991); City of Chicago, 287 F.3d at 637.

The Department's other efforts to rebut Plaintiffs' evidence on the public interest are really arguments about the weight that the Court should give to the declarations, although the Department offers no counter-declarations on this point. For example, the Department argues that the public interest is too narrow because only certain types of names will provide information about disparities in how the government has handled different types of litigants, that Plaintiffs are on a "fishing expedition," and that issues identified by statistics experts should not necessarily be considered matters of public interest. 2d Combined Mem. at 32-34 & n. 12. However, the evidence presented by Plaintiffs amply demonstrates that Plaintiffs' interests are not parochial or inconsequential. Moreover, the declarations show that analysis of the statistics produced from official databases like those at issue here influence policies debated by Congress and the public at large. See, e.g., Second Burnham Decl. ¶ 5; Maltz Decl. ¶¶ 12, 14. Although it seems inevitable that an agency reluctant to release its records will argue that the public has no need to see any more information than the agency has chosen to reveal, Congress emphatically rejected this view when it enacted FOIA.

III. THE DEPARTMENT'S ARGUMENT THAT THE DISCLOSURE OF THE NAMES OF PROPERTY AND INSTITUTIONS CONSTITUTES AN UNWARRANTED INVASION OF PERSONAL PRIVACY IS WITHOUT MERIT.

As discussed in Plaintiffs' opening Memorandum, the case law reflects two principles that are relevant to the Department's claim that entries that do not name individuals may be withheld under FOIA's personal privacy exemptions. First, the personal privacy exemptions apply only to individuals and do not protect the interests "of businesses or corporations." See Plfs' Mem. at 33-34 (citing cases). Second, the personal privacy exemptions do not apply to the disclosure of individual names in contexts relating to business activities and relationships. Id. at 37 (citing cases).

The Department concedes the first principle, 2d Combined Mem. at 38-39, but it ignores the second. Just as the Department's arguments concerning court docket information would eliminate any requirement that information withheld under FOIA's personal privacy protections is private, its

arguments concerning institutional entries would eliminate the word "personal" from the statute by treating business information as personal.

Much of the Department's argument addresses circumstances that simply are not presented here. The Department observes that, in ruling that the names of businesses and corporations may not be withheld on grounds of personal privacy, the Court of Appeals left open the possibility that the name of a business might be protected if it appeared in conjunction with financial information that was so "personalized" that it could be "attributed divisibly and accurately to individual stockholders or partners." National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 685 n. 44 (D.C. Cir. 1976). It then argues that the cases do not foreclose the possibility that a business name might also be protected if it appeared in conjunction with medical or other "personally sensitive information" that could be attributed to individual stockholders or partners. 2d Combined Mem. at 37-38. The Department's speculation about the application of Exemptions 6 and 7(C) in these circumstances is irrelevant because the EOUSA database records do not contain such financial, medical, or other personalized information.

To justify its exemption claims here, the Department must show that the disclosure that a corporation is involved in civil litigation or the subject of a law enforcement investigation, by itself, constitutes an unwarranted invasion of personal privacy. It cannot do so because even if the identity of an individual associated with the corporation can be ascertained from public records or other sources, disclosure that an individual is associated with a business involved in civil litigation or an enforcement proceedings does not invade any privacy interest. Indeed, the Court of Appeals made this clear in Washington Post Co. v. United States Dept. of Justice, 863 F.2d 96 (D.C. Cir. 1988), when held that, although the name of targets or witnesses in a criminal investigation may be withheld under Exemption 7(C), this Exemption does not allow an agency to withhold the names of corporate employees when the

records simply identify them as employees -- rather than as suspected criminals or witnesses. Id. at 100-01.

In a circuitous argument, the Department appears to assert that corporate investigations are matters of personal privacy on the theory that any disclosure that might harm an individual constitutes an "unwarranted invasion of personal privacy." See 2d Combined Mem. at 37-39. This court rejected an analogous claim in Washington Post Co. v. United State Dep't of Agriculture, 943 F. Supp. 31 (D.D.C. 1996), when it held that Exemption 6 did not permit an agency to withhold the names and addresses of recipients of government subsidies because disclosure of the names in a context that reflects the "professional relationship of the recipients to the government," and their activities "as business people" did not invade personal privacy. Id. at 35-36. Other cases have similarly held that information disclosing information about "business judgment and relationships" does not invade the personal privacy interests protected by FOIA. See Washington Post v. DOJ, 863 F.2d at 100; Cohen v. EPA, 575 F.Supp. 425, 429-30 (D.D.C. 1993); Board of Trade v. CFTC, 627 F.2d 392, 399-400 (D.C. Cir. 1980). Indeed, the government itself has argued that the disclosure of corporate financial information that may embarrass corporate officers may not be withheld as "personal" information under the FOIA. New York Times Co. v. NASA, 920 F.2d 1002, 1007 (D.C. Cir. 1990) (quoting government Petition).

With respect to the TIGAS collection records and entries that identify property in the civil, criminal and collection files, the Department also asserts that it is entitled to withhold names that do not identify individuals because the names of individuals sometimes appear with these entries, and the names cannot be segregated. Plaintiffs' opening Memorandum showed that the Department has failed to produce facts to support this claim, Plfs' Mem. at 38-40, 42-43, and the agency offers no new evidence to cure this defect. The legal arguments it its Second Combined Memorandum are without merit:

1. The Department does not dispute that the names may be officers of the corporations or owners of the property, but it contends that the disclosure of such names would be an unwarranted invasion of personal property because prior cases concerning law enforcement records make "no exceptions for individuals who happened to be officers of corporations or owners of property." 2d Combined Mem. at 40. However, these cases do not articulate an exception for names that simply identify corporate officers (as opposed to suspects or witnesses) because the issue was not presented. As discussed above, when the issue of whether the names of corporate employees who are not identified as targets of an investigation was squarely presented in Washington Post v. DOJ, the Court of Appeals rejected the Department's position and held that Exemption 7(C) did not apply in this context. Moreover, because the standards under Exemptions 6 and 7(C) differ, and because Exemption 7(C) is concerned with the unique concerns raised by law enforcement records that identify suspects and witnesses, the Exemption 7(C) cases that the Department cites provide no support for its decision to withhold names in the context of civil proceedings that do not involve law enforcement. See Armstrong v. EOP, 97 F.3d 575, 581-82 (D.C. Cir. 1996).

2. The Department asserts that even if personal names are not exempt from disclosure when they appear as part of the name of a business or identify corporate officers, this is irrelevant because "Plaintiffs do not allege that *all* individuals' names appearing in these fields are those of corporate officers or the like." 2d Combined Mem. at 40. The burden of proof, however, rests on the Department and it has not offered any evidence that any of the names appear in a context that discloses information that is both personal and private.

3. Finally, the Department offers a defense of its original estimate of the burden of segregating the individual names from the non-exempt institution and property names. Its defense, however, makes no sense. The records at issue fall into two categories: (a) recent records that contain codes that allow the Department to isolate records that do not involve individuals; and (b) earlier

records that do not have such codes. Plfs' Mem. at 38, 41. Plaintiffs did not challenge the withholding of names in the second category, id. at 11, and argue that it is not burdensome for the Department to review the records in the first category and redact any that contain exempt information in addition to the non-exempt names. Id. at 40 & n.17, 42-43. In response, the Department continues to maintain that it is appropriate to ignore the codes and evaluate the burden of segregating the entries in pre-1998 records (many of which have codes) as "if no codes were available to assist the Department." 2d Combined Mem. at 42. This contention that the difficulty of segregating records must be evaluated without considering the most direct means to segregate them is without merit.

IV. THE DEPARTMENT'S CLAIM THAT FILE NUMBERS ARE EXEMPT BECAUSE THEY RELATE TO "INTERNAL PERSONNEL RULES AND PRACTICES OF AN AGENCY" IS WITHOUT MERIT.

Depending on how one interprets the Department's papers, it has either abandoned its claim that Exemptions 6 and 7(C) justify withholding the agency file numbers, or has clarified that it makes no such claim. 2d Combined Mem. at 47-49. Consequently, its redaction of the agency file numbers must be rejected unless the Department demonstrates that this information passes both prongs of the two-part test that the courts have articulated in interpreting Exemption 2. See Schwaner v. Department of Air Force, 898 F. 2d 793, 794 (D.C. Cir. 1990) . The Department cannot satisfy either test, and its effort to revise the tests should be rejected.

The first test is fixed by the statutory language. Exemption 2 addresses material "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). As discussed in Plaintiffs' opening Memorandum, Schwaner v. Department of the Air Force held that this language imposes an independent requirement that is not satisfied by claiming that the information is trivial or internal. 898 F. 2d at 795-96; accord Abraham & Rose v. United States, 138 F.3d 1074, 1080 (6th Cir. 1998).

The Department now asserts that the file numbers satisfy this test because a file number system "is clearly an agency practice." 2d Combined Mem. at 44. This exemption, however, is limited to personnel rules and practices. The District of Columbia Circuit and every other circuit court that has ruled on the issue has held that "personnel" modifies both rules and practices. Abraham & Rose, 138 F.3d at 1081; Jordan v. United States Dep't of Justice, 591 F.2d 753, 764 (D.C. Cir. 1978).

The Department also asserts that Schwaner does not apply to file numbers and that, because some cases have held that file numbers were properly withheld under Exemption 2, it follows that all file numbers qualify for this exemption. The Department's arguments on this point are disingenuous. First, the Department's states that courts have "routinely" held that file numbers fall within Exemption 2, despite Schwaner. 2d Combined Mem. at 43-44. The Department is wrong. In Fitzgibbon v. United States Secret Service, 747 F. Supp. 51 (D.D.C. 1990), Judge Harold Greene concluded that Schwaner foreclosed the government's claim that administrative numbers "used to index, store, locate, retrieve, and identify information" are covered by Exemption 2. Id. at 57; see also Abraham & Rose, 138 F.3d at 1081 (information in IRS database used for tracking liens does not fall within Exemption 2). Moreover, in Schwaner itself the Court of Appeals observed that prior decisions concerning codes were limited in scope because those cases addressed "sensitive notations on documents where they indicated an agency's practices as to their internal routing and distribution." 898 F.2d at 796. Thus, these decisions are distinguishable from situations like Schwaner and this case, in which the government makes no claim that the notations reveal sensitive internal personnel practices. Id.; accord Abraham & Rose, 138 F.3d at 1080-81; Fitzgibbon, 747 F. Supp. at 57. Thus, the Department's Exemption 2 claim fails because the numbers do not fall within the statutory language.

Even if the first test is satisfied, information may be withheld under Exemption 2 only if the Department shows that there is no legitimate public interest in the information. See Vaughn v. Rosen, 523 F.2d 1136, 1143 (D.C. Cir. 1975). The Department suggests that this test requires a showing that

the public interest is "predominant" in some sense. 2d Combined Mem. at 47 . This argument is without merit because the quotation from Schwaner that is the basis for the Department's claim addresses the issue of whether the information relates "predominately" to internal personnel rules or policies, not the distinct issue of whether there is a legitimate public interest in the information. See 898 F.2d at 795, 798. The declarations submitted with Plaintiffs' prior papers demonstrate that there is a legitimate public interest in disclosure of these numbers because they cast light on the relationship between the data reported by the EOUSA and that maintained by other agencies — matters that are "the focus of legitimate public interest and attention." Vaughn, 523 F.2d at 1143.

V. THE DEPARTMENT'S FORM NOTICES DO NOT SATISFY ITS OBLIGATION TO PROVIDE THE REASONS FOR, AND THE EXPECTED DURATION OF, THE AGENCY'S DELAY IN RESPONDING TO THE REQUEST.

Both the Department's regulations concerning notice to requesters and FOIA state that when a component such as the EOUSA becomes aware that its response to a FOIA request will be delayed, the component shall send the requester a notice that identifies both the "unusual circumstances" that cause the delay and the date that the agency expects to complete processing of "the request." 28 C.F.R. § 16.5(c). The Department claims that the form notice that the EOUSA sends to requesters fulfills this requirement because it "unmistakably defines 'Project Request,'" and states that very large requests take nine months to process. 2d Combined Mem. at 50, 51-52. We think that the Department mischaracterizes the notice.[8] But independent of the issue of what constitutes a "Project Request," the

[8] Although the third paragraph of the notice contains a sentence that states "Project Requests" are "[r]equests for 'all information about myself in criminal case files," the Department contends that this is not the definition of a "Project Request." Instead, the Department calls attention to the second paragraph, in which "Project Request" appears in parenthesis after the words "very large requests," and it maintains that this makes clear that Project Requests are not just the requests described in the next paragraph, but all "very large" requests. We submit that this construction of the notice is unpersuasive and only a clairvoyant reader would find the EOUSA's reading "unmistakable." Moreover, the reference to "very large requests" does not made the notice any more effective because the requester has no way of knowing how EOUSA measures a request, or when it considers the request to be not just large, but "very large."

problem with the EOUSA's form notice is that Plaintiffs and all requesters always get the same notice, regardless of what request they submit.

The EOUSA's notice does not give information about "the request" presented, but acts like a broken scale that always gives the same reading. For example, Plaintiffs' complaint challenges the Department's notice in response to two requests that are very different in substance. See Defs' Exhibits 21 (case management data) and 25 (redaction programs). The EOUSA responded to each with an identical notice, and it appears to use the same notice for all FOIA requests. See Exhibits 22, 27 and Exhibits 14, 15, 17. In addition to violating the requirement that the EOUSA notify Plaintiffs of the expected delay for the request presented, the EOUSA's practice thwarts the purpose of the notice, which is to give the requester an opportunity to determine whether it is appropriate to narrow the request to secure a faster response.

The Department argues that the EOUSA's conduct does not violate the law because the law does not define "what constitutes 'meaningful' or 'reasonable' notice." 2d Combined Mem. at 51. However, the law proscribes arbitrary and capricious agency action, 5 U.S.C. § 706(2)(A), and an agency notice that always gives the same expected completion date, regardless of the content of the request, is just as arbitrary and useless as a notice that gives a random date or no date.

The Department's only other argument on this issue is that it is possible that EOUSA would cure the form notice by "providing a different estimate and/or revising its original estimate" with a individualized notice "where the situation warrants." 2d Combined Mem. at 51. The issue is hypothetical because the EOUSA did not cure its notices to Plaintiffs with individualized follow-up notices that belatedly fulfilled the requirements of 28 C.F.R. § 16.5. The first exhibit cited by the Department (Exhibits 20) does not address either of the two FOIA requests that are the basis for Plaintiffs' charge that the EOUSA sent improper notices (Exhibits 21, 25), and the second exhibit (Exhibit 32) was not sent until more than three months after the EOUSA's form notice. More

importantly, for both of the examples that the Department cites, the follow-up communication was not initiated by the EOUSA, but occurred because Plaintiffs contacted the EOUSA and requested an explanation for the agency's failure to respond. Eighth Long Decl. ¶ 22.

VI. PLAINTIFFS' FEE STATUS AND THE LEGALITY OF THE DEPARTMENT'S DEMAND FOR RECORDS ARE JUSTICIABLE.

The Department's argument concerning Plaintiffs' fee waiver request is based on an Orwellian claim that the government can re-write history to suit its purpose. The history of this case shows that, in three separate declarations filed in this action in 2001, EOUSA FOIA officers described how Plaintiffs had refused to produce the records the EOUSA demanded on March 21, 2000, and then stated that the EOUSA had not rendered its determination on fees "because TRAC has not provided the documentation needed to make the determination."[9] Despite this testimony, the Department now asserts that there is "no evidence in the record that would even suggest" that there is a connection between the EOUSA's failure to grant the fee waiver application that has been pending for two and half years, and the EOUSA's demand for any and all records regarding TRAC's fees and funding for the past five years. 2d Combined Mem. at 56, 57, 58. The Department maintains that, because the EOUSA's testimony was filed with three motions it withdrew, the government can pretend that these events never occurred. See Defendants' Response to Plaintiffs' Statement of Material Facts ¶ 33.

The justicability arguments that the Department advances based on its revisionist history are without merit. The Department's withdrawal of its defective motions does not alter history or make the EOUSA's declarations any less admissible against the Department. Moreover, those declarations show that the EOUSA's failure to act on Plaintiffs' request for a fee waiver during over two years of litigation is not due to a bureaucratic oversight. To the contrary, the EOUSA has not granted Plaintiffs' application because it maintains that (A) the materials in the administrative record are not sufficient to

[9] See Declaration of Andrea Hoffmann ¶¶ 71-73 (Feb. 9, 2001); Declaration of Andrea Hoffmann ¶¶ 78-80 (April 27, 2001); Declaration of Suzanne Little ¶¶ 93-96 (November 19, 2001).

support Plaintiffs' request for a fee waiver under National Security Archive v. United States Department of Defense, 880 F.2d 1381 (D.C. Cir. 1989); and (B) the EOUSA may attempt to coerce disclosure all of TRAC's records concerning funding and fees for the past five years by conditioning its fee determination on such disclosure. Courts routinely adjudicate the validity of such claims, and it is particularly important that the court do so here to prevent agencies from circumventing FOIA's fee provisions and abusing their power.

A. The EOUSA's Claim That Plaintiffs Did Not Provide Sufficient Information to Demonstrate Their Eligibility Is Inconsistent with National Security Archive.

In our opening brief, we showed that there is no principled distinction between TRAC's activities and those that the Court of Appeals held qualify for fee limitation in National Security Archive. Plfs' Mem. at 58-61. The Department's Opposition does not respond to these arguments on the merits, or justify the EOUSA's demand for five years of fee and funding records in light of the ruling in National Security Archive that TRAC's use of the records at issue is not a "commercial use" even if fees are charged to make a profit. The Department's arguments that this Court should side-step the merits are untenable.

1. The Department does not dispute that the EOUSA has not granted a fee waiver, and that its declarations are careful to state that EOUSA has not assessed fees "[t]o date." See Davis Decl. ¶ 82. Nonetheless, counsel declares that the Department's failure to give TRAC a bill constitutes a "*de facto* waiver." 2d Combined Mem. at 52-53, 61. However, neither FOIA nor the Department's regulations provide for a *de facto* waiver, and the EOUSA has not done anything that would prevent it from assessing fees for records that have been or will be released to TRAC. To moot plaintiffs' challenge to the EOUSA's conduct, the agency must show that the EOUSA has completely and irrevocably foreclosed repetition of that conduct. See Reeve Aleutian Airways, Inc. v. United States, 889 F.2d 1139, 1142-1143 (D. C. Cir. 1989); see also American Iron and Steel Institute v. EPA, 115 F.3d 979, 1006-07 (D.C. Cir. 1997) (agency disavowal does not render challenge moot). The fact that the

EOUSA has not presented a bill "to date" does not meet this standard. In addition, the Department's assertion that Plaintiffs do not have standing to obtain a declaratory judgment concerning Plaintiffs' liability for fees until the EOUSA presents a bill is directly contradicted by the case law. Courts routinely adjudicate such claims, including adjudicating the agency's ability to assess fees for FOIA requests that are prospective. See Better Government Ass'n v. Dep't of State, 780 F.2d 86, 91 (D.C. Cir. 1986).

2. The Department also argues that the issue is not "ripe" because "there is no administrative record currently before the Court." To the contrary, all of the materials submitted in support of Plaintiffs' fee waiver request are in the record, see Plfs' Exhibits 14-16, and the Department has submitted testimony and correspondence describing the EOUSA's response. See Defs' Exhibit 19; Davis Decl. ¶¶ 77-81, and declarations cited in note 9 .

3. The Department repeats its argument that judicial review is precluded because the EOUSA did not grant or deny the fee waiver outright; rather, it stated that it no determination could be made without the records that the EOUSA demanded. Aside from the fact that the EOUSA's action is "final" insofar as the agency has declared that the material in the record is inadequate to grant Plaintiffs' application, the Department's claim that judicial review is not yet available is foreclosed by the provisions of FOIA that provide that a requester is deemed to have exhausted administrative remedies whenever the agency fails to give its determination within the statutory deadlines. 5 U.S.C. § 552(a)(4)(C). The Department's contention that the statute does not contemplate that the agency's determination on fees will be part of, or subject to, the same time limitations as its determination to release records is disingenuous. The Department's own guidelines provide that the issue of fees is so

inseparable from the request for records that the Department does not consider a FOIA request to be received (or "perfected") until the requester has agreed to pay fees or has received a waiver.[10]

Moreover, where requester seeks release of records without assessment of fees, the agency's position on fees determines whether the requester will obtain the records in accordance with FOIA. The statutory language requires that the agency "determine whether to comply with such request" within the deadlines, 5 U.S.C. § 552(a)(6)(A), and failure to do so constitutes exhaustion of administrative remedies with respect to "such request." Id. § 552(a)(6)(C)(i). If the agency responds on the statutory deadline by stating that it has determined that the requested records are not exempt but that it may still decide to withhold the records unless the requester agrees to pay all expenses, the agency has not provided the determination required by the statute, and the exhaustion provisions of the statute apply.

4. Finally, the Department asserts that Plaintiffs are not entitled to summary judgment because the Department has raised a disputed issue of fact by introducing testimony that in 1999 the EOUSA received a telephone call from an unidentified person who stated that TRAC would charge $10,000 for EOUSA database records. 2d Combined Mem. at 63-64. The Department's proffer is more akin to innuendo than evidence, and it does not preclude summary judgment. Judicial review of fee waiver issues is conducted de novo on the record before the agency. 5 U.S.C. § 552(a)(4)(A)(vii). TRAC showed in its fee waiver application that it has not charged such a sum. Exhibit 16 at 3. Moreover, such charges are irrelevant where, as here, the requesters' primary purpose in requesting the

[10]See Pollack v. U.S. Dept. of Justice, 1993 WL 293692 at 3 (D. Md.,1993); Dep't of Justice, Guidelines for Agency Preparation and Submission of Annual FOIA Reports (1997), available at http://www.usdoj.gov/ oip/foia_updates/Vol_XVIII_3/ page2.htm; 28 C.F.R. § 16.11(e).

records is to analyze the records and disseminate the information that they contain to the public. See Plfs' Mem. at 60-61.[11]

B. The Department's Demand For Fee and Funding Records Was Improper.

The EOUSA's directive that TRAC disclose all its fee and financing records did not serve a legitimate purpose under the National Security Archive decision. However, it did impose on TRAC the dilemma of choosing between jeopardizing its rights of access under FOIA and disclosing sensitive information about its funders and subscribers. The Department's claims that there is no problem with agencies placing FOIA requesters in this predicament are unpersuasive.

1. The Department asserts that Plaintiffs' challenge is not justiciable because the EOUSA's demand is harmless and there is no evidence that it was connected to the EOUSA's failure to grant a waiver. 2d Combined Mem. at 56, 57. However, Plaintiff Long's declaration provides uncontested testimony of the injury imposed by this demand. See Seventh Long Declaration ¶¶ 37, 38. Moreover, the EOUSA had routinely granted TRAC's fee waiver requests in the past. Id. ¶ 37; [First] Long Decl. ¶ 22. The Department's claim that Plaintiffs are in no way harmed by the EOUSA's decision to abruptly change course and demand access to all TRAC's records is frivolous.

The fact that the Department continues to maintain that the EOUSA is entitled to these records refutes any claim that this issue is not justiciable. Where a plaintiff charges that agency's demands for sensitive information is illegal, the plaintiff's claim is not rendered moot by the agency withdrawing the demand for the time being, particularly where the agency maintains that its conduct was authorized. See Doe v. Harris, 696 F.2d 109, 112-13 (D.C. Cir. 1982); accord Better Government, 780 F.2d at 91

[11] Aside from the fact that the issue that the Department identifies is not material, the Department's argument that there is a disputed issue of fact would only indicate that the fee issue must be resolved by trial, not that it is not justiciable. A trial would be a futile, however, because the issue must be decided on the record presented to the agency and because the only evidence that the Department would have to offer on this issue at trial is an inadmissible hearsay statement from an unidentified person.

(D.C. Cir. 1986). Plaintiffs' challenge here is analogous to other situations in which the courts have reviewed claims that an agency has overstepped its authority to demand information or to impose conditions. See Plfs' Mem. at 57-58.

2. On the merits, the Department asserts that the fact that nothing in the agency's regulations authorized the EOUSA's action is irrelevant because such a demand is lawful unless a regulation "expressly withholds or denies such authorization." 2d Combined Mem. at 59-60. But it is well established that an agency is bound by its regulations, and an action that exceeds the authority set forth in those regulations is unlawful. See Service v. Dulles, 354 U.S. 363, 372, 385-88 (1957). Moreover, even when an agency has authority to take action, it may not act arbitrarily or in bad faith. Here, the EOUSA's request far exceeds its authority to give a FOIA requester an opportunity to clarify why it qualifies for a fee waiver.

CONCLUSION

For the reasons stated above and in Plaintiffs' opening Memorandum, the Court should grant Plaintiffs partial summary judgment on their challenges to the Department's exemption claims, and grant Plaintiffs summary judgment on their challenge to the EOUSA's form notice and response to Plaintiffs' request for fee waiver.

Respectfully submitted,

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October 2, 2002

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2002, I caused a copy of Plaintiff's Reply in Support of Plaintiffs' Motion for Partial Summary Judgment on the Department's Revised Exemption Claims, and its Claims Concerning Notice of Delay and Fee Waiver to be served by first class mail, postage prepaid, addressed to:

Elizabeth Goitein
Elizabeth J. Shapiro
United States Department of Justice
Civil Division
Box 883
Washington, DC 20044

_____
Michael Tankersley