UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION, OF MASSACHUSETTS; and AMERICAN OVERSIGHT, Plaintiffs, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendant.	)	C.A. No. 1:21-cv-10761-AK

DEFENDANT'S REPLY AND OPPOSITION
TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On December 14, 2021, Defendant U.S. Immigration and Customs Enforcement agency ("ICE") filed its Motion for Summary Judgment ("MSJ"). *See* Defendant's MSJ, Dkt. Nos. 25, 26. On January 11, 2022, Plaintiffs filed their Opposition and Cross-Motion for Summary Judgment ("Opposition"). *See* Dkt. No. 31. In their Opposition, Plaintiffs spend a considerable amount of time painting a picture that the indictment of Massachusetts State Court Judge Shelley Joseph, and her court officer, Wesley MacGregor, was the by-product of an internal ICE scheme to use the threat of punishment to pressure judges to exercise their powers in favor of ICE's law enforcement efforts in the immigration context; otherwise, they may be faced with a similar fate as Judge Joseph. *See* Opposition, Dkt. No. 31, pp. 6, 8.[1]

[1] When citing to page numbers, Defendant will use the docket's corresponding page numbers not those contained in the respective papers cited herein.

Defendants will not grace this unfounded theory with a response except to state that this is a Freedom of Information Act ("FOIA") matter and the Court's only focus has been succinctly noted by this Court (Saylor, J.) when confronted at the outset with such theories:

> This is not a case in which this Court must determine whether plaintiff is correct in his belief that a pervasive and protracted government conspiracy resulted in the public being provided with a false explanation of the crash. Rather, it is simply a dispute arising from plaintiff's request for information under FOIA, and defendant's determination that certain information was exempt from the disclosure requirements of FOIA, and thus may be properly withheld under the statute.

See Stalcup v. C.I.A., No. CIV. 11-11250-FDS, 2013 WL 4784249, at *3 (D. Mass. Sept. 5, 2013), *aff'd*, 768 F.3d 65 (1st Cir. 2014). Needless to say, Judge Saylor's comments equally apply to this case. That being said, Defendant will address the FOIA issues raised in Plaintiffs' Opposition, namely, whether: (i) Defendant's search for records was more than adequate; (ii) Defendant's use of Exemption 7(A) was proper; and (iii) Defendant's redaction of personal identifying information was proper under Exemption 6 and 7(C). As stated below, Plaintiffs' speculation that additional documents must exist is insufficient, as a matter of law, to establish a search was unreasonable. Accordingly, Defendants request that the Court deny Plaintiffs' cross motion for summary judgment and grant its MSJ.

ARGUMENT

(i) Defendant's Search was Adequate Under FOIA

In their Opposition, Plaintiffs hypothesize that Defendant's search must be inadequate because it did not render any documentation emanating from an apparent discussion former DHS Director Thomas Homans had with the *New York Times* ("*NYT*") wherein he purportedly stated that he was made aware of the Judge Joseph incident when it happened and discussed ICE's response thereto with others at the agency. *See* Dkt. No. 31, p. 8. Thus, since no records were recovered from former DHS Director Homans' files or any other of the named DHS superiors in the FOIA request addressing the Judge Joseph matter *at or near the time of the incident,* the

search must be inadequate. *See* Opposition, Dkt. No. 31, p. 9. This speculation has been a common theme in each interaction with Plaintiffs when discussing the adequacy of the search conducted by ICE and Plaintiffs' belief that the search was inadequate. *See* Opposition, *Exhibit L,* Dkt. No. 33-12, p. 2 (public reporting about Homans reaction to the events that occurred at the Newton District Court on April 2, 2018, gives us strong reason to believe responsive records exist from throughout the full search range) and *Exhibit O*, Dkt. No. 33-15, p. 2 (referencing *NYT* article and lack of responsive records at time of incident).

Under FOIA, an agency need only show 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." *Olesky v. U.S. Dep't of Defense*, 658 F. Supp. 2d 288, 294 (D. Mass. 2009). If a search by an agency does not uncover responsive documents, it does not mean the search is inadequate. *Id*. at 298. In other words, the adequacy of an agency's search is determined not by whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents. 5 U.S.C.A. § 552; *Moffat v. U.S. Dep't of Justice*, 716 F.3d 244, 254 (1st Cir. 2013) *cert. denied,* 134 S. Ct. 950, 187 L. Ed. 2d 814 (U.S. 2014). Importantly, and *apropos* to this case, the adequacy of a search cannot be adjudged based on a party's speculation that documents must exist. *See Safecard Services, Inc. v. SEC,* 926 F.2d 1197, 1200 (D.C. Cir. 1991) (affidavits are accorded a presumption of good faith that cannot be rebutted by speculative claims that documents must exist).

By way of background, the FOIA request sought all communications concerning Judge Joseph and Wesley MacGregor and/or the events alleged in the indictment of them in the custody of 7 named ICE employees.[2] *See* Opposition, *Exhibit C,* Dkt. No. 33-3, pp. 4-5. Initially,

[2] An agency is not required to look beyond the four corners of the FOIA request for leads to conduct its search. *See Sheridan v. Dep't of the Navy,* 9 Fed. App'x 55, 56 (2d Cir. 2001).

Defendant conducted a responsive search of the files of the 7 named ICE individuals identified in the FOIA request, using the terms "Judge Shelley M. Richmond"; "Judge Joseph"; "Officer Wesley MacGregor"; "Officer MacGregor"; "Andrew Lelling"; "Lelling" and "Case No. 19-10141-LTS". *See* Declaration of Lynnea Schurkamp ("First Schurkamp Decl."), Dkt. No. 27-1; Opposition, Dkt. No. 33-9, *Exhibit I,* p. 2. The search terms were applied to data in different variations[3] likely to produce any potentially responsive records, should they exist.

In an email dated August 23, 2021, Plaintiffs acknowledged ICE's productions of August 9 and 19, 2021 in connection with its initial search and outlined topics of discussion for an upcoming September 9, 2021, telephone conference which included their request that ICE broaden its search to include 10 additional search terms noted in that email, which did not include the Connector Search Terms noted above. *See* Opposition, *Exhibit L,* Dkt. No. 33-12, p. 4. During that conference, ICE agreed to conduct a supplemental search using 5 of the 10 search terms Plaintiffs proposed; namely, "Newton District Court"; "Jose Medina -Perez": "Medina-Perez"; "Shelley Joseph"; and "MacGregor". [4] *See* First Schurkamp Decl., Dkt. No. 27-1, ¶ 32. *See also* Opposition, Dkt. No. 31, p. 12. Many of the other topics raised in that August 23, 2012, email was also resolved in that September 9 conference, excluding Plaintiffs' disagreement with Defendant's use of Exemption 7(A) to withhold in full three pages and two minor redactions.

[3] The search terms were applied as follows in *Relativity*: ""Judge Shelley M. Richmond Joseph" OR "Judge Joseph" OR "Officer Wesley MacGregor" OR "Officer MacGregor" OR "Andrew Lelling" OR "Mr. Lelling" Or "Lelling" OR "Case No. 19-10141-LTS." *See* First Schurkamp Decl., Dkt. No. 27-1, ¶ 29.

[4] The other 5 search terms proposed by Plaintiffs were: "NDC"; "Sanctuary City"; "Sanctuary cities"; "Newton"; and "Boston". *See* Opposition, *Exhibit L,* Dkt. No. 33-12, p. 4. These terms were either wholly unrelated to the FOIA request topic or were so broad that it would have resulted in significant document hits that would not have uncovered responsive records not already retrieved from ICE's prior search and agreed upon supplemental search.

In an email dated September 10, 2021, Plaintiffs asked ICE to also use the following search terms: "court" and "newton" within 5 words of each other, as well as "judge" and "newton" within 5 words of each other (hereinafter, "Connector Search Terms") in its supplemental search. *See* Opposition, *Exhibit M,* Dkt. No. 33-13, p. 2. Nonetheless, Defendant conducted its supplemental search using the 5 terms ICE agreed upon during the September 9, 2021, conference and located 17 additional responsive records which were produced to Plaintiffs in full. *See* Supplemental declaration of Lynnea Schurkamp ("Supp. Schurkamp Decl."), *Exhibit 1,* ¶¶ 9, 10. The locations and file systems searched have been previously discussed in Defendant's MSJ. Briefly, as noted in the First Schurkamp Decl., the offices within ICE that were reasonably likely to contain responsive materials, primarily the Office of the Chief Information Office (OCIO), and then, Enforcement and Removal Operations (ERO), Office of the Executive Secretariat (OES) and the Office of the Chief of Staff, were all searched. *Id.,* ¶¶ 24, 35, 39, 44.

Although Defendant maintains that the First Schurkamp Decl. adequately described the methods and search of the file systems in each of the offices searched in response to Plaintiffs' FOIA request, it has filed the Supp. Schurkamp Decl. further discussing the agency's file system and its role in the search. For example, concerning the OCIO, Schurkamp reiterated that ICE's Enterprise Vault (EV) stores all current and former ICE employee records in electronic format from December 2008 through June 2018, with Microsoft O365 containing records dated thereafter. *See* Supp. Schurkamp Decl., *Exhibit 1,* ¶ 7. Providing more detail, Schurkamp noted that the OCIO retrieved the responsive records in the form of "personal storage tables" or ".pst files". These files contain all email, email attachments, calendar items and contacts for every ICE employee. *Id.,* ¶ 8. The 5 agreed upon supplemental search terms were applied to the

retrieved OCIO data in *Relativity* system where 17 additional responsive records were retrieved and delivered to Plaintiffs on September 30, 2021. *Id.,* ¶ 10. Schurkamp further elaborates on the searches conducted of the Office of Chief Staff and the Office of Executive Secretariate and the reasonable likelihood, based on those offices' role at ICE, that they may contain responsive records to Plaintiffs' FOIA request. *Id,* ¶¶ 11, 12, 13, and 14. In the end, the various office searches coupled with the search terms used by ICE to locate records were reasonably calculated to locate the universe of potentially responsive records to Plaintiffs' request.

Despite Defendant's expansive search, Plaintiffs continue to quarrel with the methods used in conducting that search. First, Plaintiffs maintain that the search terms used by Defendant were too narrow. *See* Opposition, Dkt. No. 31, pp. 11-14. Yet, Plaintiffs fail to demonstrate why using the subjects' actual names to search for records about the very subjects in the FOIA request is "too narrow." Contrary to Plaintiffs' statements, locating individuals by their names is the most logical and reasonable avenue to locate records containing their names. Additionally, the second set of search terms were almost identical to the first search terms applied, including new search terms of "Newton District Court" OR "Jose Medina-Perez" OR "Medina-Perez."

As noted above, Plaintiffs, unsatisfied with the first two ICE searches, believed that Defendant should have used the Connector Search Terms; namely, "court" and "newton" within 5 words of each other, as well as "judge" and "newton" within 5 words of each other.[5] *See*

[5] As a general matter, Plaintiffs cannot dictate the search terms to be used by an agency in a FOIA request. *See Climate Investigations Ctr. V. DOE,* No. 16-cv-124, 2017 WL 4004417, at * 4 (D.D.C. Sept. 11, 2017) (as a general matter, a plaintiff cannot dictate the search terms an agency must use to locate responsive records, and when an agency's search terms are 'reasonably calculated to lead to responsive records, a court should neither micromanage nor second guess the agency's search). Moreover, Plaintiffs' suggestion that these terms may uncover additional records because the terms such as Judge Joseph may not have been around at the time of April 18, 2019 (date of incident) is nothing more than conjecture and defies the significance of the event at issue as painted by Plaintiffs in their Opposition. *See* Opposition, Dkt. No. 31, p. 13.

Opposition, Dkt. No. 33-13, p.2. Nevertheless, Plaintiffs' have not demonstrated why the original and secondary search terms would not have captured all responsive records. Instead, Plaintiffs argue, based on mere speculation, that records *may* exist because of the possibility that Judge Shelly Joseph was not referred by her actual name at the time of the incident, asserting that "… [J]udge Joseph's full name, that may not have been available around the time of the incident in April 2018 or may never have been used colloquially in email." *See* Opposition, Dkt. No. 31, p. 13. This argument clothed in conjecture fails as a matter of law. *Mullane v. United States Department of Justice,* No. 19-cv-12379-DJC, 2021 WL 1080249, at *6 (D. Mass. Mar.19, 2021) (plaintiff's claim that more documents must exist where emails were not produced concerning conversations between U.S. Attorney and federal judge is not the standard for Court's inquiry into whether the search was reasonable). *See also Wilbur v. C.I.A.,* 355 F. 3d 675, 678 (D.C. Cir. 2004) (agencies failure to find document, or mere speculation that other documents might exist, does not undermine a a determination that agency conducted a reasonable search).

Additionally, not only are Plaintiffs claims consistently rooted in speculation, but they are equally inaccurate; thus, they cannot overcome the burden of good faith afforded to the agency's declarations. *See Defenders of Wildlife v. U.S. Dep't. of Interior*, 314 F. Supp. 2d 1, 8 (D.D.C. 2004) (agency declarations "are afforded a presumption of good faith", and an adequate affidavit "can be rebutted only 'with evidence that the agency's search was not made in good faith'"). For example, Plaintiffs assert that "[I]CE's narrower search apparently missed all responsive emails sent or received for nearly a year after the event". *See* Opposition, Dkt. No, 31, p. 14. However, an examination of the records produced by ICE highlight the existence of documents from the date range April 27, 2018, and August 10, 2018. *See* Opposition, Dkt. No. 33-17, *Exhibit Q*, pp. 39-44.

Next, Plaintiffs claim that Defendant has not explained the reason for its failure to search for text messages as sought in their FOIA request. *See* Opposition, Dkt. No. 31, p. 16. More specifically, Plaintiffs assert that Defendant has not linked its failure to search for text messages with DHS Policy Directive 141-03 (Electronic Records Management Update for Chat, Texts, and Instant Messaging) referenced in the First Schurkamp Decl. *Id.,* p. 17. In response, Defendant has filed herewith as *Exhibit 2,* the Declaration of Richard Clark, Chief Information, and Technology Officer at ICE ("Clark Decl."). As noted by Clark, unlike text messages, ICE maintains an archival system to retain emails. *See* Clark Decl., *Exhibit 2,* ¶ 13. Since no such system exits for text messages, ICE has discouraged its employees from conducting business through text messaging. *Id.* In fact, ICE Policy Directive 141-03 encourages its employees to memorialize their telephone and other similar communications in written form on their computers, so they may be retained and retrieved in the future. *Id.,* ¶ 14.

Furthermore, text messages are only retained for a short period of time and employees' phones are eventually wiped clean or deleted for security purposes upon return to ICE. *Id.,* ¶¶ 14, 15. Lastly, on this issue, none of the mobile carriers, including Apple iPhone, retain text messages after they are deleted, or the associated account is deactivated. *Id.,* ¶16. In short, ICE has no means by which to systematically search mobile phones for text messages. *Id.* Accordingly, as mentioned above, ICE expects its employees to document in writing business content sent through text messages. *Id.* At bottom, there are no copies of text messages with ICE, the telephone carries used by ICE or mobile device equipment providers infrastructure. *Id.* Thus, should any record of text messages exist, OCIO email search of the 7 named custodians would have located any potentially responsive records. *Id.,* ¶ 17.[6]

[6] Similarly, Plaintiffs do not point to any evidence indicating that text messaging was used for agency business or otherwise show that searching text messages would likely lead to responsive documents;

Assuming, *arguendo*, text messages are "records" for FOIA purposes, where an agency has no technological ability to retrieve text messages (if they ever existed at all), and as importantly, the text messages no longer exist because they were destroyed under ICE policy, ICE's inability to locate these potential records does not render its search inadequate. *See Stevens v. Broad Bd. of Governors,* No. 18-cv-5391, 2021 WL 1192672, at * 2 (N.D. Ill. Mar. 30, 2021) (ICE failure to search for text messages did not deem search inadequate where facts indicated that the agency did not have the technological capability to retrieve such records even if they existed); *Ctr. For Biological Diversity v. U.S. Env't Prot. Agency,* 279 F. Supp. 3d 121, 143 (D.D.C. 2017) (agency should explain inability to produce text messages).

Likewise, Plaintiffs seemingly assert that the Defendant's search was inadequate because it did not search the files of the 7 named ICE employees' administrative staff, such as, secretaries and schedulers. *See* Opposition, Dkt. No. 31, p. 18. An agency is not required to search every file in its system but only those reasonably likely to contain responsive records. *See Am. C.L. Union of Massachusetts, Inc. v. U.S. Immigr. & Customs Enf't,* 448 F. Supp. 3d 27, 42-43 (D. Mass. 2020). Here, the notion that administrative staff would have records separate from those of their superiors regarding the criminal investigation of a sitting state court judge is inconceivable. Moreover, any emails sent by administrative staff would have been captured by the original OCIO email and data retrieval of the 7 identified custodians. *See* Clark Decl., *Exhibit 2,* ¶ 17.

Finally, Plaintiffs now assert for the first time that ICE's entire Homeland Security Investigations ("HSI") office should have been searched. As noted in the First Schurkamp Decl., HSI's primary role is to investigate issues such as immigration crime, human rights violations,

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rather, it is nothing more than speculation resulting from the *NYT* article that cannot render a search inadequate. *See, e.g., Hunton & Williams, LLP. V. EPA,* 248 F. Supp. 3d 220, 238 (D.D.C. 2017).

human smuggling, smuggling of narcotics, weapons, as well as financial crimes, cybercrimes, and export enforcement issues. *See* First Schurkamp Decl., Dkt. No. 27-1, ¶ 56. In any event, any documents HSI potentially produced thereto would have been retrieved in the OCIO email and data files of the 7 named supervisory ICE employees identified in the FOIA request. Not surprisingly, HSI documents were located in the search of the OCIO files and have been withheld in full or redacted in part under Exemption 7(A).

Without undue repetition, Plaintiffs continued speculation that more documents must exist because of a *NYT* article does not equate to any requirement that the agency must unturn every possible stone to locate documents.[7] *See Stalcup v. Naval Special Warfare Command,* Doc. No. 00117115749, at * 2 (1st Cir. Feb. 28, 2017) (fact that AP article referenced existence of certain records, failure to retrieve documents does not render search inadequate as reliance on AP article is speculative). In FOIA, perfection is not the standard to measure reasonableness of search and failure to locate records does not render the search inadequate. *See Olesky,* 658 F. Supp. 2d at 298 (D. Mass. 2009) (perfection is not the standard by which the reasonableness of a FOIA search is measured and an agency's failure to locate additional responsive records does not render the search inadequate). In the end, speculative claims about the existence of other documents are insufficient to raise substantial doubt that the search is inadequate and was not conducted in good faith under FOIA. *See Maynard v. C.I.A.,* 986 F. 2d 547, 560 (1st Cir. 1993) (rebutting presumption of good faith requires more than speculation about existence and discoverability of other documents); *Mullane,* No. 19-cv-12379-DJC, 2021 WL 1080249, at *6 (D. Mass. Mar.19, 2021) (plaintiff's claim that more documents must exist where emails were

[7] During its discussions, Defendant did make inquiry whether Plaintiffs had any information outside the *NYT* article that other documents existed in connection with their FOIA request. *See* Opposition, *Exhibit P,* Dkt. No. 33-16, p. 3. Their response was in the negative.

not produced concerning conversations between U.S. Attorney and federal judge is not the standard for Court's inquiry whether the search was reasonable). In short, summary judgment should be granted in favor of Defendant on issue of adequacy of search. *See Georgacarakos v. F.B.I.,* 908 F. Supp. 2d 176, 180 (D.D.C. 2012) (FOIA cases rarely present a dispute of material fact, they are "typically and appropriately decided on motions for summary judgment") (citations omitted).

(ii) Defendant's Use of Exemption 7(A) was Proper

As noted in Defendant's MSJ, the Freedom of Information Act of 1986 change to the language of Exemption 7(A) broadened its protection for law enforcement agencies use of the exemption. *Id.,* at 1164, n. 5 (Congress's amendment to FOIA relaxed "significantly the standard for demonstrating interference"); *see also Curran v. Department of Justice,* 813 F.3d 473, 474 n. 1 (1st Cir. 1987) ("The drift of the changes is to ease-rather than to increase-the government's burden in respect to Exemption 7(A)"). Additionally, courts will give deference to the agency decision to exclude information under Exemption 7(A). *See, e.g., Center for National Sec. Studies v. Dep't of Justice,* 331 F.3d 918, 928 (D.C, Cir. 2003); *Judicial Watch, Inc. v. Department of Homeland Security,* 59 F. Supp. 3d 184, 193 (D.D.C. 2014) (same). In the end, the key question is whether revelation of the data will in any way tend to obstruct, impede, or hinder enforcement proceedings. *Curran,* 813 F.3d at 747.

Pending criminal investigations are enforcement proceedings. *See Boyd v. Department of Justice,* 475 F.3d 381, 386 (D.C. Cir. 2007). Where disclosure of information would reveal the scope, direction, nature, or pace of the investigation and could harm the government's prosecution, Exemption 7(A) would apply. *See Adionser v. Dep't of Justice,* 811 F. Supp. 2d 284, 298 (D.D.C. 2011) (where criminal proceeding is not final, disclosure of withheld materials

could reasonably be expected to interfere with ongoing criminal proceedings). In fact, even if the enforcement proceeding is closed, Exemption 7(A) may continue to apply where related proceedings are still pending. *See, e.g., New England Med. Ctr. Hosp. v. NLRB,* 548 F.2d 377, 385-86 (1st Cir. 1976) (finding Exemption 7(A) applicable when "closed file is essentially contemporary with, and closely related to, pending open case against another defendant); *Kuffle v. Bureau of Prisons,* 882 F. Supp. 508, 512 (D.D.C. 1994) (Exemption 7(A) remains applicable when inmate has criminal prosecutions pending in other cases).

Despite the above, Plaintiffs challenge the limited redactions made by ICE under Exemption 7(A) on a couple of bases. First, Plaintiffs assert that because the indictment of Judge Joseph occurred three years ago, the passage of time lessens the protections of Exemption 7(A). *See* Opposition, Dkt. No. 31, p. 23. Although nearly three-years have passed since indictment, the criminal proceedings at issue are on-going.[8] Merely because there has been some passage of time since indictment, Exemption 7(A) does not lose its protections until the matter has reached its conclusion. *See Adionser,* 811 F. Supp. 2d at 298 (D.D.C. 2011) (where criminal proceeding is not final, disclosure of withheld materials could reasonably be expected to interfere with ongoing criminal proceedings).

The withheld material under Exemption 7(A) contains specific names of law enforcement personnel, and/or identifying potential witnesses (including non-ICE personnel) interviewed in

[8] As of December 8, 2021, the ICE investigation remains open, and as noted above, criminal proceedings are currently pending before this Court. *See Vaughn* index, p. 1. *See NLRB v. Robbins Tire & Rubber Co,* 437 U.S. 214, 242-243 (1978) (Exemption 7(A) protects the release of information in investigatory files prior to completion of an actual, contemplated enforcement proceeding). In addition, Plaintiffs' citation to *Lemaine v. I.R.S.,* No. 89-2914-WD, 1991 WL 322616 (D. Mass. Dec. 10, 1991) for support of their argument on Defendant's use Exemption 7(A) is suspect because, as the Court in that case recognized, the declarations submitted contained no allegation that any criminal proceedings were ongoing or contemplated, or even that defendant was investigating plaintiff. *Id.,* at *4.

the investigation of Judge Joseph and Officer MacGregor, which have not been publicly released, as well as information gathered from these interviews. *See* First Schurkamp Decl., Dkt. No. 27-1, ¶ 56. As noted previously by Defendant, release of these records could potentially disclose information that discusses, describes, or analyzes evidence, and would undermine any pending or prospective prosecutions by disclosing confidential information to the public, identifying investigation law enforcement personnel (including non-ICE personnel), and/or identifying potential witnesses, or at a minimum expose them to intimidation or harm. *Id.,* ¶ 57. Additionally, evidence, and information about evidence in documents, is pertinent and integral to potential investigations and any resulting prosecutions, and premature disclosure of such evidence would adversely affect the Government's ability to prepare for trial and prosecute offenders. *Id. See, e.g., Am. Civil Liberties Union of Mich. v. FBI,* 734 F.3d 460, 468 (6th Cir. 2013). At bottom, under established law, their content is protected from disclosure under Exemption 7(A). *See, e.g., Moffatt v. U. S. Dep't of Justice,* 2011 WL 3475440, at * 16 (D. Mass. Aug. 5, 2011) (redactions under Exemption 7(A) of information containing witness interviews that would later be used as part of federal grand jury proceedings or at criminal trial was valid).

(iii) Exemptions 6 and 7(C) Protect the Release of Information Concerning Staff ICE Employees

Although Defendant believed that any issue regarding redactions of personal identifying information ("PII") in emails produced to Plaintiffs was resolved during its September 9, 2021, conference when Defendant agreed to un-redact all PII in connection with top level, public-facing ICE employees, Plaintiffs seemingly are continuing to pursue redactions of PII raised in connection with its lower-level employees in those emails, and any third parties. *See* Opposition, Dkt. No. 31, p. 24.

Exemptions 6, as well as Exemption 7(C), both provide that government documents may be withheld where their disclosure would cause an "unwarranted invasion of personal privacy." *See* 5 U.S.C. § 552(b)(6), (b)(7)(C); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 174-75 (1991). Specifically, Exemption 6 states that FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." § 552(b)(6). Similarly, Exemption 7(C) provides that FOIA does not apply to "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." § 552(b)(7) (C). To determine whether a record has been properly withheld under both Exemptions 6 and 7(C), courts balance the privacy interests versus public interests in the disclosure of the records at issue. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004); *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 762 (1989); *Providence Journal Co. V. U.S. Dep't of Army,* 981 F.2d 552, 568 (1st Cir. 1992). The only cognizable public interest for FOIA purposes in this context is the "citizen's right to be informed about 'what the government is up to.'" *See Maynard v. C.I.A.,* 986 F.2d 547, 566 (1st Cir. 1993).

The purpose of Exemption 6 is to protect individuals from injury and embarrassment that can result from the unnecessary disclosure of personal information. *See U.S. Dep't of State v. Washington Post Co.,* 456 U.S. 595, 599 (1982). Likewise, the Supreme Court has emphasized that the concept of "personal privacy" under Exemption 7(C) as broadly protecting "an individual's control of information concerning his or her person," and an individual's "interest in keeping personal facts away from the public eye." *Reporters Comm*., 489 U.S. at 763; *see Favish*, 541 U.S. at 165 ("[T]he concept of personal privacy under Exemption 7(C) is

not some limited or cramped notion of that idea."). Stated differently, Exemption 7(C) protects a broad notion of personal privacy and that where the provider of information is a private individual, the "privacy interest . . . is at its apex." *Reporters Comm.,* 489 U.S. at 780. As the Supreme Court noted, "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *Id*. at 765-66.

Conversely, as emphasized above, "the *only* relevant public interest in the FOIA balancing analysis," according to the Supreme Court, "is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties . . .." *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 355-56 (1997) (alteration and internal quotation marks omitted); *see Reporters Comm.*, 489 U.S. at 773. If the government satisfies its burden of proving that Exemption 6 (and 7(C)) is applicable because there is a relevant private interest in the requested materials, the burden then shifts to the individual requesting the information to demonstrate that the public interest served by disclosure "is a significant one," and that disclosure of the documents is likely to advance that interest. *Favish*, 541 U.S. at 172.

Here, the only information redacted by ICE from the documents under Exemption 6 and 7 (C) was the names, email addresses, telephone and cell numbers of several non-supervisory, lower-level ICE employees, and nothing more. Release of such PII could subject them to harassment in their personal and private lives. *Id.,* ¶ 19. *See also Rojas-Vega v. United States Immigration and Customs Enforcement,* 302 F. Supp. 3d 300, 310 (D.D.C. 2018) (Exemptions 6 and 7(C) protects release of personally identifiable information of ICE employees). In fact, acknowledging the sensitivity of release of personal identifying information and likely consequences therefrom, ICE Office of Personnel Management (OPM) designated ICE as a

security/sensitive agency for FOIA purposes, ensuring that OPM would withhold all personal identifying information pertaining to ICE employees. *Id.,* ¶ 19.

Further, the names of third parties were also redacted as an unwarranted invasion of privacy as these unsuspecting individuals could be subject to embarrassment, harassment and undue public attention should this information be disclosed. *Id.,* ¶ 20. Third party individuals have an expectation of privacy in not being associated with law enforcement investigations through release of records compiled for law enforcement purposes and the mere mention could result in stigmatization. *See Maynard,* 986 F.2d at 566 (1st Cir. 1993) (names of FBI agents and third parties who were involved in CIA investigation all had significant privacy interest in not having names released and plaintiff failed to suggest how disclosure would reveal what the government was up to).

Bearing the above in mind, ICE balanced the privacy interests of the individuals described above against the public interest in shedding the light on what ICE is up to and determined that the minimal redactions of ICE staff names, email addresses, cell numbers, and the information pertaining to third parties involved in law enforcement investigations was warranted and protected under Exemptions 6 and 7(C). *Id.,* ¶¶ 19, 20, 21, 23. At bottom, there can be no claim by Plaintiff that the disclosure of this information would provide the public with a greater understanding of "what the government is up to" in order to mount a challenge to such minor withholdings under Exemption 6 and 7(C) and the minor redactions are protected under FOIA. *See Federal Labor Relations authority v. United States Dep't of Navy,* 941 F.2d 49, 57 (1st Cir. 1991) (where the information does not relate to what the government is up to, a non-zero interest in privacy at stake cannot be outweighed by a public interest that falls outside

FOIA's purpose); *Stalcup v. CIA,* 768 F.3d 65, 74 (1st Cir. 2014) (names of third-party witnesses properly withheld under Exemption 7(C)).

CONCLUSION

For the reasons set forth herein and in Defendant's MSJ, this Court should grant Defendant's request for summary judgment and deny Plaintiff's request for summary judgment.

Respectfully submitted,

FOR THE DEFENDANT

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