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. 21-10761-AK

DEFENDANT'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

American Civil Liberties Union of Massachusetts, Inc., and American Oversight ("Plaintiffs") brought this action against the United States Immigration and Customs Enforcement agency ("ICE") under the Freedom of Information Act, 5 U.S.C. § 522 ("FOIA") seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA. ICE has produced the relevant and responsive document at issue with minimal redactions based on Exemption 7(A) of FOIA. For the reasons set forth herein, ICE is entitled to judgment as a matter of law.

LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS

Defendant has filed simultaneously herewith, a separate Local Rule 56.1 Statement of Material Facts and incorporates it herein.

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ARGUMENT

A. Summary Judgment Standard

Where no genuine dispute exists as to any material fact, summary judgment is required. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Borges v. Serrano-Isern*, 605 F.3d 1, 4 (1st Cir. 2010) (citing Fed. R. Civ. P. 56(c)(2)). A genuine issue of material fact is one that would change the outcome of the litigation. *Anderson*, 477 U.S. at 247. "The burden on the moving party may be discharged by 'showing' -- that is, pointing out to the [Court] -- that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

B. FOIA Cases are Most Appropriately Decided on Summary Judgment

FOIA actions are "generally and most appropriately" adjudicated through summary judgment. *Wightman v. ATF,* 755 F.2d 979, 983 (1st Cir. 1985) ("Virtually all FOIA cases are adjudicated by summary judgment…."). *See also National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement*, 811 F. Supp. 2d 713, 732-33 (S.D.N.Y. 2011), *citing Bloomberg L.P. v. Board of Governors of the Fed. Reserve Sys.,* 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009); *Miscavige v. IRS,* 2 F.3d 366, 369 (11th Cir. 1993).

"In a FOIA case, summary judgment may be granted to the government if 'the agency proves that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.'" *ACLU Foundation of Massachusetts v. FBI*, No. 14-cv-11759, 2016 WL 4411492, at *3 (D. Mass. Aug. 17, 2016) (*quoting Fischer v. U.S. Dep't of Justice*, 596 F. Supp. 2d 34, 42

(D.D.C. 2009)). An agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and, if applicable, that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. U.S. Dept. of State*, 257 F.3d 828, 833 (D.C. Cir. 2001); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980) ("The defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.").

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and plaintiff with affidavits or declarations and other evidence which show that the documents in question were produced or are exempt from disclosure. *Hayden v. NSA*, 608 F.2d 1381, 1384, 1386 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 742 (9th Cir. 1980); *Trans Union LLC v. FTC*, 141 F. Supp. 2d 62, 67 (D.D.C. 2001) (summary judgment in FOIA cases may be awarded solely on the basis of agency affidavits "when the affidavits describe 'the documents and the justifications for non-disclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'") (*quoting Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)); *see also Public Citizen Inc. v. U.S. Dept. of State*, 100 F. Supp. 2d 10, 16 (D.D.C. 2000), *aff'd in part, rev'd in part*, 276 F.3d 634 (D.C. Cir. 2002).

Generally, a court should accord "substantial weight" to agency affidavits in these matters. *See Bell v. United States*, 563 F.2d 484, 487 (1st Cir. 1977). Further, the test of sufficiency of the submitted affidavits should be whether the affidavit demonstrates by "sufficient description (that) the contested document logically falls into the category of the

exemption indicated," and the court "need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." *Id.* at 487. *See also Hrones v. CIA*, 685 F.2d 13, 18 (1st Cir. 1982) (rejecting allegations of bad faith against federal government in withholding documents under FOIA exemption).

The requester may challenge such a showing by "set[ting] forth specific facts showing that there is a genuine issue for trial," *Matsushita,* 475 U.S. at 586 n.11, that would permit a reasonable jury to find in his favor. *Laningham v. U.S. Dep't of Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987). 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.'" *Defenders of Wildlife v. U.S. Dep't. of Interior*, 314 F. Supp. 2d 1, 8 (D.D.C. 2004).

C. Defendant Has Conducted an Adequate Search

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). To show that an adequate search was conducted, an agency "may rely upon affidavits provided they are relatively detailed and non-conclusory and are submitted by responsible agency officials in good faith." *Maynard v. C.I.A.,* 986 F.2d 547, 559 (1st Cir.

1993). The agency's affidavit receives a "presumption of good faith" that cannot be rebutted by "purely speculative claims about the existence and discoverability of other documents." *Id.* at 550 (*citing SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). The burden then shifts to the requester to provide evidence that the agency's search was inadequate. *Olesky*, 658 F. Supp. 2d at 294. Accordingly, the sufficiency of a FOIA search is determined by the "appropriateness of the methods" used to carry it out, "not by the fruits of the search." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

On this backdrop, summary judgment in FOIA cases is routinely granted solely based on agency affidavits. *Crooker v. Tax Division of U.S Dep't of Justice*, 1995 WL 783236, at *10 (D. Mass. 1995). In this regard, the agency must demonstrate that all relevant documents have been produced, cannot be located, or fall under an exemption to discharge its duty under the FOIA and be granted summary judgment. *Gillen v. IRS*, 980 F.2d 819, 821 (1st Cir. 1992). Summary judgment is only *in*appropriate when a review of the record raises *substantial* doubt of the adequacy of the agency's search. *Maynard*, 986 F.2d at 550 (*citing SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (emphasis added). A court's evaluation of the adequacy component is deferential to the government. There is no requirement that an agency search every record system, but instead the agency need only perform a good faith, reasonable search of record systems likely to possess the requested information. *Stalcup v. C.I.A.,* 768 F.3d 65, 74 (1st Cir. 2014). *See also Brophy v. United States DoD*, 2006 WL 571901, 16 (D.D.C. Mar. 8, 2006) (*citing Blanton v. United States DOJ*, 182 F. Supp. 2d 81, 84 (D.D.C. 2002)). Furthermore, an agency is not required to undertake a search that is so broad as to be unduly burdensome. *Id.* (*citing Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 2003)). Even if an agency claims a FOIA exemption in error, that fact alone does not establish that the government's response lacked good faith, or that the search was inadequate, as the

adequacy of a search focuses on the reasonableness of the agency's response, not whether that response was legally correct in every particular. 5 U.S.C.A. § 552; *Moffat*, 716 F.3d at 255 (1st Cir. 2013).

In its communications with Defendant, Plaintiff has asserted that there must be additional records because a *New York Times* article discussed conversation about the Judge Joseph matter with then DHS Director Thomas Homan, yet no documents memorializing his statements or actions was ever recovered by Defendant. However, 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). Needless to say, Defendant has conducted an exhaustive manual search of all electronic files for each of the individual ICE employees named in the FOIA Request, using terms identified therein; namely, "Judge Shelley M. Richmond Joseph", "Officer Wesley MacGregor", "Andrew Lelling", "Mr. Lelling", and "Case No. 19-10141-LTS". *See* Schurkamp, Decl., ¶¶ 29, 40. Thereafter, Defendant accepted Plaintiff's request for a further search using mutually agreed-upon terms which included "Wesley MacGregor", "Shelley Joseph", "Newton District Court"[1], "Jose Medina-Perez"[2], and "Medina-Perez", and produced all responsive records. *Id.,* ¶ 32. The offices within ICE that were reasonably likely to contain responsive materials, the Office of the Chief Information Office (OCIO), Enforcement and Removal Operations (ERO), Office of the Executive Secretariat (OES) and the Office of the Chief of Staff were all searched. *Id.,* ¶¶ 24,

[1] Judge Joseph was assigned to the Newton District Court at the time of the incident in question.

[2] Medina-Perez was the undocumented individual involved in the incident.

35, 39, 44. In the end, 85 pages of responsive records were reviewed and produced to Plaintiffs. *Id.,* 47. Excluding minor redactions of certain ICE staff names and email addresses under Exemptions 6 and 7(C), all documents, which included emails, memoranda, newspaper articles, etc., were produced in full. *Id.,* ¶ 48. As discussed below, there were approximately 3 pages of documents that were fully redacted under Exemption 7(A).

At bottom, Defendants performed a more than adequate search for responsive records to Plaintiffs' request and summary judgment should not be defeated on the grounds of inadequacy 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).

D. Exemption 7(A) Applies to the Redactions Asserted

a. <u>The Requested Records Satisfy the Threshold of Exemption 7</u>

Exemption 7 protects "records or information compiled for law enforcement purposes" to the extent that disclosure could "reasonably be expected to" cause one of the harms enumerated under the subsection of the exemption. 5 U.S.C. § 552(b)(7). To withhold documents under Exemption 7(A), the agency must, as a preliminary matter, make a threshold demonstration that the records at issue were compiled for a "law enforcement purpose." *See Kay v. FCC,* 976 F. Supp. 23, 37 (D.D.C. 1997). Accordingly, agencies, like ICE, that have a law enforcement function can satisfy the threshold of Exemption 7 by establishing that the records at issue relate to the enforcement of federal laws and that the enforcement activity involves one of the law enforcement duties of that agency. *See Campbell v. DOJ*, 164 F.3d 20, 24 (D.C. Cir. 1998) (affirming that where an agency specializes in law enforcement it "must establish a rational 'nexus between the investigation and one of the agency's law enforcement duties,' and a

connection between an 'individual or incident and possible security risk or violation of federal law'" to meet the Exemption 7 threshold).

It is a well-settled principle that the term "law enforcement" in Exemption 7 refers to the act of enforcing the law—both civil and criminal. *Henderson v. DNI,* 151 F. Supp. 3d 170, 175-76 (D.D.C. 2016) (quotations omitted); *see also Pub. Employees for Environmental Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n,* 740 F.3d 195, 203 (D.D.C. 2014) (*citing Tax Analysts v. IRS,* 294 F.3d 71, 77 (D.C. Cir. 2002)). The term encompasses "internal agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and procedures, even when the materials have not been compiled in the course of a specific investigation." *See Tax Analyst,* 294 F.3d at 77.

In short, law enforcement records need not relate to any particular investigation; rather, "law enforcement manuals and other non-investigatory materials can be properly withheld under Exemption 7 if they were compiled for law enforcement purposes and their disclosure would result in one of the six recognized harms to law enforcement interests set forth in the subparagraphs of the exemption." *Id.* at 79 (citations omitted). A law enforcement agency's decision "to invoke Exemption 7 is entitled to deference." *See Campbell,* 164 F.3d at 34. *See also Parker v. U.S. Immigration and Customs Service,* 238 F. Supp. 3d 89, 98 (D.D.C. 2017) ("A reviewing court should respect the expertise of an agency and not overstep the proper limits of the judicial role in FOIA review.").

On this legal backdrop, "ICE is indisputably a law enforcement agency," and "its determination that the records were compiled for a law enforcement purpose" is therefore "entitled to deference." *Gilman v. DHS*, 32 F. Supp. 3d 1, 19 (D.D.C. 2014); *see also Advancement Project v. U.S. Dep't of Homeland Security,* --- F. Supp. 3d ---, 2021 WL

3036723, at * 8 (D.D.C. July 19, 2021) (ICE's mission is to enforce immigration laws and, thus, its claims about the purpose of withheld records deserves deference); *Roseberry-Andrews v. Dep't of Homeland Security,* 299 F. Supp. 3d 9, 31 (D.D.C. 2018) (ICE is a law enforcement agency for purposes of Exemption 7); *Concepcion v. CBP*, 907 F. Supp. 2d 133, 140-41 (D.D.C. 2012) (ruling that CBP's "Passenger Activity report regarding [the plaintiff] is a law enforcement record within the scope of Exemption 7").

In this case, the Plaintiffs' FOIA request seeks, among other things, records from ICE officials dealing with ICE's investigation of Judge Joseph and a member of her court staff, court Officer Wesley MacGregor, which lead to their federal indictment and current prosecution. *See* Schurkamp Decl., ¶ 5. The records at issue, contain specific names of law enforcement personnel, and/or identifying potential witnesses (including non-ICE personnel) interviewed in the investigation of Judge Joseph and Officer MacGregor, which have not been publicly released, as well as information gathered from these interviews. *Id.,* ¶ 56. In this regard, the records clearly concern law enforcement activities of the agency and fall within the purview of Exemption 7. Moreover, ICE is the principal investigative arm of DHS and the second largest investigative agency in the federal government. *Id.,* ¶ 52. *Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger,* 502 F.2d 370, 373 (D.C. Cir. 1974) (considering the "salient characteristics of 'law enforcement' contemplated by the wording of exemption 7."). Consequently, there is no question that it is a law enforcement agency within the meaning of Exemption 7.

Accordingly, courts are "even more deferential to the agency's claimed purpose for the particular records." *See Tax Analyst,* 294 F.3d at 79 ("Courts apply a more deferential standard to a claim that the information was compiled for law enforcement purposes when the claim is

made by an agency whose primary function involves law enforcement.").[3] In sum, the records at issue concerning ICE's investigation of alleged criminal activities of individuals who were indicted falls within the ambit of Exemption 7.

b. The Redactions Under Exemption 7(A) were Appropriate

As mentioned above, a few of the documents produced by ICE were fully redacted under Exemption 7(A). *See* Schurkamp Decl., ¶ 48. Generally speaking, Exemption 7(A) allows an agency to withhold records "compiled for law enforcement purposes" if the disclosure of that information "could reasonably be expected to interfere with enforcement proceedings." *See* 5 U.S.C. § 552 (b)(7)(A). For Exemption 7(A) to apply, the agency must demonstrate that (1) a law enforcement proceeding is pending or prospective, and (2) release of the information could reasonably be expected to cause harm. *See Manna v. DOJ,* 51 F.3d 1158, 1164 (3d Cir. 1995). 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

[3] Additionally, to the extent the materials are non-investigatory, such a fact is inconsequential to establishing a law enforcement purpose. *Id.* at 79 ("An agency may seek to block the disclosure of internal agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and procedures, even when the materials have not been compiled in the course of a specific investigation.").

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).

Here, on this legal backdrop, the few redactions made by ICE under Exemption 7(A) are proper. There is no dispute that ICE investigated the activities of Judge Shelley Joseph and Court Officer Wesley MacGregor in their dealings with an alien who was able to evade ICE detention after his proceedings before Judge Joseph at the Newton District Court. *See United States of America v. Shelley M. Richmond Joseph and Wesley MacGregor,* 19-cr-10141-LTS, Dkt. No. 1. The records were created in the course of law enforcement investigations of both individuals who were indicted by the United Sates Attorney's Office on various federal criminal

charges of obstruction of justice for these activities. *Id.* As of December 8, 2021, the ICE investigation remains open, and criminal proceedings are currently pending before this Court. *See Vaughn* index, p. 1.

Indeed, the documents sought by Plaintiffs in their FOIA request discuss in detail the investigation at issue, including those individuals and witnesses present on the day of the incident, who provided information concerning the alleged criminal activities at issue therein, which led to Judge Joseph and Officer MacGregor's Indictment. *See* Schurkamp Decl., ¶ 56. 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).

CONCLUSION

For the reasons set forth herein, Defendant is entitled to judgment as a matter of law.

Respectfully submitted,

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