

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN B. LONG)
)
 and)
)
 DAVID BURNHAM)
)
 Plaintiffs,) Civil Action No. 1:02CV02467 PLF
)
 v.)
)
 DEPARTMENT OF JUSTICE)
)
 Defendant.)
 _____)

MOTION TO CONSOLIDATE WITH CIVIL ACTION NO. 00-211

Plaintiffs hereby move to consolidate this action with Civil Action No. 00-211, a related case that is currently pending before this Court on cross-motions for summary judgment. As explained in the accompanying Brief In Support of Plaintiffs’ Motions to Consolidate with Civil Action No. 00-211 and for Summary Judgment, both cases involve suits under the Freedom of Information Act between identical parties, the co-Directors of the Transactional Records Access Clearinghouse (“TRAC”) and the Executive Office of the United States Attorneys (“EOUSA”) within the Department of Justice. Both cases involve requests for case management data maintained by the EOUSA. The earlier suit concerns data compiled through March 2000, and this suit concerns data that the EOUSA compiled from May 2002 through August 2002.

In this suit, Plaintiff’s challenge the EOUSA’s claim that five categories of information within the EOUSA data are exempt from public disclosure under the FOIA. Four of these categories are identical to the categories at issue in the summary judgment motions in Civil

Action No. 00-211. The fifth category is not addressed in the Civil Action No. 00-211 motions because it concerns an exemption claim that the EOUSA first asserted in October 2002. However, this fifth category presents issues similar to those already before the Court in Civil Action No. 00-211. Because the factual record already before this Court in Civil Action No. 00-211 is directly relevant to the issues presented in this case, and because the legal issues are identical or overlap, Plaintiffs' request that the Court consolidate the two suits under Federal Rule of Civil Procedure 42(a).

Plaintiffs' counsel has consulted with counsel for Defendant concerning this motion and has been informed that the Department of Justice opposes consolidation of these actions.

Respectfully submitted,

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Counsel for Plaintiffs

March 19, 2003

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ORDER

Upon consideration of Plaintiffs’ Motion to Consolidate This Action with Civil Action No. 00-211, and the record herein, it is hereby

ORDERED that Plaintiffs’ Motion is granted and Civil Action Nos. 00-211 and 02-2467 are hereby consolidated pursuant to Federal Rule of Civil Procedure 42(a). The parties may rely on the record in Civil Action No. 00-211 in the course of the proceedings in this action.

Dated:

PAUL L. FRIEDMAN
U.S. DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
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PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby move for summary judgment in this action, in which Plaintiffs challenge exemption claims asserted by the EOUSA to withhold electronic database records under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As described in Plaintiffs’ Brief in Support of Plaintiffs’ Motions to Consolidate with Civil Action No. 00-211 and for Summary Judgment, the EOUSA has continued to withhold information based on exemption claims challenged in Long v. Department of Justice, C.A. 00-211. The EOUSA has also begun withholding an additional category of information, known as the “program category” field.

Summary judgment is appropriate with respect to these FOIA exemption claims. The material facts are not in dispute, and requesters are entitled to judgment under the FOIA when the agency withholding records is unable to prove its claims. The Department of Justice’s claim that “lead charge” and “program category” information in the EOUSA data are exempt from disclosure is unfounded, and the Department’s remaining exemption claims rest on erroneous interpretations of FOIA’s exemptions for personal privacy, and personnel rules and practices.

The basis for this Motion is set forth in the accompanying Brief in Support of Plaintiffs' Motions to Consolidate with Civil Action No. 00-211 and for Summary Judgment, the Declaration of Susan Long and accompanying exhibits. This Motion is also accompanied by a Statement of Material Facts as to Which There Is No Genuine Dispute (pursuant to LCvR 7.1(h)).

Respectfully submitted,

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ORDER

Upon consideration of Plaintiffs’ Motion for Summary Judgment, Defendant’s Opposition, and the record herein, it is hereby

ORDERED that Plaintiffs’ Motion is GRANTED; and it is further

ORDERED that the Court declares that the Department of Justice has improperly withheld information from the EOUSA case management database records that is responsive to Plaintiffs’ requests for files compiled from data collected through the end of May, June, July and August 2002; and it is further

ORDERED that, within thirty days of this order, the Department shall release to Plaintiffs copies of the EOUSA case management database records that include the information that it has improperly withheld: (i) the "lead charge" entries in the database files concerning criminal matters; (ii) the “program category” entries in the database files concerning criminal matters; (iii) court docket numbers, case captions and names of litigants that appear in the civil and criminal master files in records associated with a federal civil or criminal case; (iv) the names of

properties, businesses, and other non-individual entities that appear in the civil and criminal database files; and (v) entries in the fields for the tracking numbers used by other agencies.

PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: _____

CERTIFICATE OF SERVICE

I, Michael E. Tankersley, hereby certify that on March 19, 2003, I caused copies of Plaintiffs' Motion to Consolidate with Civil Action No. 00-211, and Motion for Summary Judgment, Plaintiff's Brief in support of these motions, Plaintiffs' Statement of Material Facts, the Declaration of Susan Long and accompanying Exhibits to be served by delivering an electronic copy to the CM/ECF system for the District Court for the District of Columbia.

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**BRIEF IN SUPPORT OF PLAINTIFFS' MOTIONS TO CONSOLIDATE WITH CIVIL
ACTION 00-211 AND FOR SUMMARY JUDGMENT**

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March 19, 2003

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INTRODUCTION

This case concerns the efforts of the Transactional Records Access Clearinghouse (“TRAC”) to obtain data that is compiled each month by the Executive Office for the United States Attorneys (“EOUSA”) to track the work of the United States Attorneys’ Offices. The parties’ dispute over the government’s July 2002 position on the application of the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to this data is before this Court in a suit brought in February 2000, Long v. Department of Justice, C.A. 00-211. However, in late 2002, the EOUSA announced that it considered the final list of exemptions at issue in Civil Action 00-211 incomplete, and that it would begin withholding certain “program category” information from all data compiled in May 2002 and later months. Plaintiffs filed this action to challenge the Department’s new restriction on access to the program category information. Because the EOUSA has also applied the four disputed exemption claims that are at issue in Civil Action 00-211 to the files from May 2002 and later months, those four claims are also at issue in this action.

Because most of the disputed exemption claims in this action are identical to those already before this Court in Civil Action 00-211, Plaintiffs move for consolidation of the two cases. Plaintiffs also move for summary judgment in this action. The summary judgment record already presented in Civil Action 00-211 shows that the Department has erred in withholding the four categories of data challenged in that suit, and the Department should be directed to release this data from the May 2002 and later files as well. The Department also lacks a basis for its new claim that program category information may be withheld under the FOIA. Indeed, the Department has already released the vast majority of the program category information that it has redacted.

BACKGROUND

The EOUSA (“EOUSA”) maintains databases that track the work of each of the 94 United States Attorneys’ Offices (USAOs). The databases are updated monthly with new information from each of the 94 Offices. Answer ¶ 7. The Department of Justice uses the data to make management and policy decisions, justify budget requests, and demonstrate the success of law enforcement initiatives. Answer ¶ 8.

The Plaintiffs are co-directors of TRAC, a nonprofit organization affiliated with Syracuse University. TRAC compiles information about the functioning of federal law enforcement and regulatory agencies, analyzes the data, and publishes reports. See TRAC website, *available at* <http://trac.syr.edu/>. TRAC also makes data compilations and tools for analyzing data available to others -- including Congress, journalists, scholars, public interest organizations and members of the public. Id.; Declaration of Susan Long ¶ 4. The data is used to study the priorities of federal prosecutors in civil or criminal litigation, to monitor trends in the criminal justice system, and to test the validity of claims made by Department of Justice officials. TRAC data and studies have been cited by congressional leaders and news organizations in debates over gun control, tax policy, immigration, terrorism, and similar law enforcement issues.¹

TRAC began requesting data from the EOUSA on the activities of federal prosecutors in 1989. In responding to these requests, the EOUSA withheld substantial portions of its databases.

¹ See, e.g., Letter of Hon. Charles E. Grassley and Hon. Patrick Leahy to John Ashcroft and Robert Mueller, June 14, 2002, *available at* <http://trac.syr.edu/tracatwork/articles/congress/senatejudcom020614.pdf> (citing TRAC data as basis for inquiring into FBI’s enforcement activities with respect to counter-terrorism and other matters); *Send Them To Jail*, Fortune Magazine, 145:6, March 18, 2002 (citing TRAC data on infrequency of prison terms for white-collar crimes).

The EOUSA has repeatedly changed its position on the application of the FOIA to this data, and its inconsistent exemption claims have now given rise to three suits.

In 1998, Plaintiffs sued the Department for the release of data from two of the USAOs that provide data to the central EOUSA databases. Long v. Department of Justice, N.D.N.Y. C.A. No. 98-CV-370. The court ordered the Department to produce a Vaughn index justifying its exemption claims. Long v. United States Department of Justice, 10 F. Supp. 2d 205, 208-09 (N.D.N.Y. 1998). In June 1999, the Department formally acknowledged that many of the fields that it had previously withheld were not exempt under the FOIA. See Plaintiffs' Exhibits and Declarations in C.A. 00-211, First Long Decl. ¶¶ 7, 8. Moreover, on June 18, 1999, the EOUSA assured Plaintiffs that it would not be necessary to re-litigate the exemptions the EOUSA had conceded in the New York suit when the Director of the EOUSA signed a letter stating that the agency's new position would be applied to Plaintiffs' future requests for case management data of the EOUSA. Id. ¶ 8. The parties dismissed the case by entering a stipulation setting a schedule for release of the data in accordance with the EOUSA's concessions. Id. By the end of October 1999, the EOUSA released the data at issue in the New York litigation and copies of the EOUSA's central database files for FY98 in accordance with the June 18, 1999 letter and the list of exempt fields that the EOUSA adopted in June 1999. Id. ¶ 11.

The second litigation was brought in this Court when the EOUSA retreated from its June 1999 commitment to release this data. In October 1999, the EOUSA declared that it would only release the data files compiled at the end of the fiscal year on the theory that, until the year-end verification of the data was complete, the data was protected by the deliberative process privilege. Id. ¶¶ 15, 16. Plaintiffs challenged this claim by filing an administrative appeal, and then filed a request for judicial review in February 2000. Long v. Department of Justice, D.D.C.

C.A. No. 00-211 PLF. Six weeks after plaintiffs filed that suit, the EOUSA announced that it would not release the fiscal year-end data for FY74-97 to plaintiffs as it had promised. See Plaintiffs' Exhibits and Declarations in C.A. 00-211, First Long Decl. ¶¶ 21, 22 and Exhibit 11. Instead, the Department announced that it was developing new guidelines for redaction of the records and, as a result, the agency would delay release of the FY1974-97 data indefinitely. Id. Although the EOUSA had never questioned Plaintiffs' entitlement to a fee waiver in the past, after Plaintiffs brought suit in February 2000, the agency demanded that Plaintiffs provide the Department with all records concerning fees and funding for the last five years as a precondition to a determination on the Plaintiffs' request for a waiver. Id. ¶ 22.²

The Department then proceeded to withhold individual fields and entire records from Plaintiffs based on claims that it was unable to defend. When the Department was directed to file a summary judgment motion to justify its withholdings, it responded by filing declarations and briefs that contained inaccurate statements. Between February 2001 and April 2002, the Department filed three motions for summary judgment, each of which was withdrawn or stricken due to errors. See Docket in Civil Action 00-211, Doc. No. 112, Memorandum Opinion and Order of April 30, 2001. The Department voluntarily withdrew the first version of its summary judgment motion after admitting that it contained errors. It withdrew the second version after Plaintiffs filed a motion to strike the papers for failure to comply with Federal Rule of Civil Procedure 11. This Court struck the third version of the motion after the Department acknowledged that the declarations and brief in this version also contained errors. Answer ¶ 18.

² The propriety of this demand is at issue before this Court in Civil Action 00-211. See Plaintiff's Memorandum In Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Partial Summary Judgment at 13-14, 61-64 (filed Aug. 5, 2002).

In June and July 2002, the Department filed its fourth, revised account of its exemption claims. Plaintiffs have challenged the Department's July 2002 exemption claims with respect to four categories of information:

- (1) the "lead charges" in ongoing criminal investigations, which the Department has withheld on the theory that disclosure could reasonably be expected to alert suspects that they are under investigation, 5 U.S.C. § 552(b)(7)(A);
- (2) court docket numbers, case captions and names of litigants that the Department has withheld on the theory that disclosure would constitute an "invasion of personal privacy" under 5 U.S.C. § 552(b)(6), (7)(C), even though this information is disseminated by the government through PACER and other public databases;
- (3) the names of properties, businesses and other institutions, which the Department has withheld under the FOIA's exemptions for protecting personal privacy; and
- (4) entries in the fields for the tracking numbers used by other agencies, which the Department has withheld under the FOIA's exemption that protects "internal personnel rules and practices."

The validity of these exemption claims is currently before the Court on motions for summary judgment in Civil Action 00-211.

While the Department was repeatedly withdrawing and revising its summary judgment papers during 2001 and 2002, TRAC's analysis and distribution of data that the EOUSA had released to TRAC prompted inquiries concerning the Department of Justice's activities and statistics. Much of the analysis of the EOUSA data focused on entries in the "program category" field, a field that contains a code for one of 90 categories that the Department uses to describe matters. For example, code "033" identifies matters in the tax fraud category, "055" identifies

violations of the immigration and nationality act, and “040” is used for matters in the drug trafficking category. See Long Decl., Exhibit E, Appendix A- LIONS Codes, A-43-52 (Updated September 2002).

In December 2001, TRAC issued a report on the Department of Justice’s terrorism activities, and the *Philadelphia Inquirer*, using TRAC data, published an analysis that found that the Department’s reports to Congress inflated the number of terrorism cases by classifying “erratic behavior by people with mental illnesses, passengers getting drunk on airplanes, and convicts rioting to get better prison food” as terrorism cases.³ Shortly after these reports were released, a House Committee requested a General Accounting Office audit of the Department’s practices for categorizing and reporting this data.⁴ In June 2002, TRAC released an analysis of work of the FBI and another analysis of the EOUSA’s data on terrorism, and that same month members of the Senate Judiciary Committee wrote a letter to the Attorney General and the Director of the FBI stating that data made available by TRAC “raises troubling questions about whether the FBI and Department of Justice are devoting sufficient resources to counter-terrorism efforts.”⁵ In September 2002, the GAO briefed the House Committee chairman on the results of its audit. The GAO found that the number of convictions reported by the Department in the “International Terrorism” program category overstated the actual number of convictions by 75%.⁶

³ *U.S. Overstates Arrests in Terrorism*, The Philadelphia Inquirer, Dec. 16, 2001; A Special TRAC Report: Criminal Enforcement Against Terrorists, December 3, 2001, *available at* <http://trac.syr.edu/tracreports/terrorism/report011203.html>.

⁴ *Audit of Justice Terror Reports Sought*, The Philadelphia Inquirer, Dec. 20, 2001.

⁵ Letter of Hon. Charles E. Grassley and Hon. Patrick Leahy, June 14, 2002, *available at* <http://trac.syr.edu/tracatwork/articles/congress/senatejudcom020614.pdf>.

⁶ Justice Department: Better Management Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics, GAO-03-266,

The statistics in other terrorism-related categories were also inflated, so that nearly half of all of the fiscal year 2002 convictions that the Department classified as terrorism-related were reclassified into other categories as a result of the GAO audit. Id. at 13.⁷

As Plaintiffs, Congress and the researchers carefully examined the Department's program category data, the EOUSA announced that it would begin withholding program category entries from Plaintiffs. This new exemption claim has given rise to this third litigation between TRAC and the Department. In Department's fourth summary judgment motion in Civil Action 00-211, filed at the end of July 2002, the Department identified the program category as a field that is not subject to any FOIA exemption. See Answer ¶ 29. However, less than two months later, the EOUSA announced that it would delay its response to Plaintiffs' pending FOIA requests in order to consider revising its position. Id., ¶ 31; Long Decl., Exhibit H. On October 29, 2002, EOUSA announced that it had decided to make an additional claim and would "redact information from the 'program category' field from the records of ongoing investigations in the Criminal Flagged Master, Criminal Immediate Declination, and Criminal Delete History file." Answer ¶ 35; Long Decl., Exhibit K.

When the EOUSA announced its decision to withhold program category information, Plaintiffs had pending requests for the monthly updates of the EOUSA data going back to May 2002. Although Plaintiffs' requests were submitted at a time when the Department had formally declared that the program category field was not exempt from disclosure, the Department had

January 17, 2003, available at <http://www.gao.gov/cgi-bin/getrpt?GAO-03-266>.

⁷ See also *GAO: U.S. Inflated Terror Successes*, CBS News, Feb. 21, 2003, available at <http://www.cbsnews.com/stories/2003/02/21/attack/main541518.shtml>; *Antiterror Success Found Overstated*, The Philadelphia Inquirer, Feb. 21, 2003, available at <http://www.philly.com/mld/philly/news/5227640.htm>.

postponed release of the data until October and then announced that it would withhold program category entries in these files. Plaintiffs exhausted their administrative remedies for challenging the EOUSA's response to their requests for the May, June, July, and August 2002 data by filing an administrative appeal on November 1, 2002. Answer ¶¶ 44, 45. The Department never responded to this appeal, but the EOUSA released copies of the data for the months in question in installments during October, November and December. Answer ¶¶ 34, 36-39. The EOUSA withheld from these copies (i) all of the categories of information for which it had asserted exemption claims in Civil Action 00-0211, including the four challenged claims listed above; *and* (ii) program category information in the "criminal flagged master" and "criminal delete history" file for those records that do not contain entries showing that the matters described have been closed or filed in court. See Long Decl. ¶¶ 9, 12, 30-32.

ARGUMENT

I. THIS ACTION SHOULD BE CONSOLIDATED WITH CIVIL ACTION 00-211.

This action should be consolidated with Civil Action 00-211 because it involves overlapping legal and factual issues. As discussed above, Plaintiffs have challenged the Department's exemption claims with respect to four categories of information in Civil Action 00-211, and the EOUSA has withheld those same four categories of information from the May-August 2002 files at issue in this action. This action involves one additional challenge, arising from the EOUSA's redaction of program category information. As discussed below, the legal and factual issues presented by the program category information are similar to the issues presented by the Department's claim in Civil Action 00-211 that lead charge information is exempt from disclosure. See below at pp. 16-17, 20-22.

Because common questions of law and fact are presented, Federal Rule of Civil Procedure 42(a) permits this Court to consolidate the cases, consider the summary judgment record and legal arguments presented in Civil Action 00-211 in this action. Such consolidation is appropriate because it will save time, minimize delay, and reduce the expense of the litigation. See Miller v. U.S. Postal Service, 729 F.2d 1033, 1036 (5th Cir. 1984) (discussing standards for consolidation). A substantial volume of the factual record and legal argument compiled in the summary judgment motions in Civil Action 00-211 is directly relevant to the claims in dispute here, and it would be wasteful to require that those submissions be re-submitted for the record in this action.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT.

Because the merits of the Department's exemption claims have been briefed at length in Civil Action 00-211, Plaintiffs' discussion of the exemptions in this brief summarizes issues discussed in detail in Civil Action 00-211. Plaintiffs address the five categories of information at issue in this litigation two groups: (A) the lead charge and program category information that the Department has only recently begun to withhold;⁸ and (B) the court docket information, names of non-individual entities, and agency tracking numbers that the Department has withheld in the name of personal privacy and FOIA's exemption for internal agency personnel rules and practices.

⁸ The briefs in Civil Action 00-211 address the withholding of "lead charge" information, but not "program category" information because the government did not claim program category was exempt in Civil Action 00-211. Because the government has asserted exemption 7(A) as a basis for redacting both fields, because these fields have been selectively redacted based on similar criteria, and because these fields raise similar issues concerning prior disclosure, Plaintiffs address the Department's exemption claim for these two fields together in this brief.

A. The Department’s Exemption Claims for Lead Charge and Program Category Information Are Unfounded.

Each record in the criminal master files of the EOUSA databases contains a field for the “lead charge,” which identifies the lead charge for an investigation by the title and section number (and sometimes the subsection) of the United States Code (e.g., 18 U.S.C. 1001). As discussed above, the records also contain a “program category” code that associates the record with one of the categories that the Department uses to describe matters, such as the tax fraud or drug trafficking category. See Long Decl., Exhibit E, Appendix A- LIONS Codes, A-43-52 (Updated September 2002). A given case may be associated with multiple program categories, but the EOUSA data only reveals one of the program categories associated with a given case.

In the May-August 2002 files, the EOUSA has withheld the “lead charge” and program category information from each record in the criminal master files in which the database entries in the record being redacted do not contain an entry that shows that the matter described by the record has been closed or filed in court. Long Decl. ¶¶ 9, 12.⁹ In addition, the EOUSA has redacted program category -- but not lead charge -- information from each record in the criminal delete history file if the entries in the file being redacted show that the record relates to a matter that is not closed and has not been filed in court. Id. ¶ 12. With respect to both of these fields, the Department has released this information to researchers for many years, and only recently asserted that the information is exempt from the FOIA. Consequently, lead charge information in

⁹ Because the EOUSA has redacted these files using information in the file that is being redacted – rather than the most current information on the status of the matter – it is erroneously redacting information for all cases that closed or were filed in court between the time that the database file was created and the date that the records are released. See Plaintiffs’ Declarations in C.A. 00-211, Third Long Decl. ¶ 13(B) (describing similar flaw in redactions made by the Department in 2001, but abandoned later in the course of Civil Action 00-211).

cases opened through the end of Fiscal Year 1998 is already available to the public, and program category information in cases opened before May 2002 is available to the public, even if the matters to which the charge and category entries relate have not been closed or filed in court. Long Decl. ¶¶ 19-25.

Plaintiffs are entitled to summary judgment because the Department's claims are based on speculation that is not supported by the facts. "FOIA compels disclosure in every case where the government does not carry its burden of convincing the court that one of the statutory exemptions apply." Goldberg v. United States Department of State, 818 F.2d 71, 76 (D.C. Cir. 1987); accord United States Department of State v. Ray, 502 U.S. 164, 173 (1991) (presumption in favor of disclosure places the burden on the agency). The Department's disclosure of lead charge and program category information for decades belies its claim that disclosure would be harmful, and the Department has neither a factual or legal basis to justify its new position.

Indeed, for many of the records at issue, the Department has not only released the same type of information, but has released the lead charge and program category entries in the *very same matters* for which it is now redacting this information. The only purpose served by the Department's decision to redact these entries from the May-August 2002 files is to complicate Plaintiffs' efforts to analyze the Department's activities -- a purpose that is directly at odds with the FOIA.

1. The Department's Theory That Disclosure of the Lead Charge Field Could Reasonably Be Expected to Impair Law Enforcement Proceedings Is Unfounded and Unreasonable.

The name of the target of the investigation is not identified in the EOUSA data files at issue here. The Department, however, maintains that the disclosure of the lead charge could allow someone to indirectly identify the target of an investigation and, therefore, asserts that the

lead charge entries in matters that have not been closed or filed in court are exempt from disclosure because disclosure of these entries could reasonably be expected to interfere with law enforcement proceedings. 5 U.S.C. § 552(b)(7)(A). The flaws in the Department's claims are described in detail in our papers in Civil Action 00-211 and fall into three categories.

First, to sustain a claim under Exemption 7(A), the government must show that disclosure of the information at issue would 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). Exemption 7(A) typically applies where premature disclosure of law enforcement records would reveal the identity of witnesses who might be intimidated or would reveal secret aspects of the government's investigation. Id. at 1097-98 (discussing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236, (1978) and Alyeska Pipeline Service Co. v. United States EPA, 856 F.2d 309 (D.C. Cir. 1988)). The lead charge entries do not reveal such information, or permit a suspect to obtain such information. See Plaintiffs' Exhibits and Declarations in C.A. 00-211, Ninth Long Decl. ¶¶ 2-4. Moreover, a suspect could never rely on disclosure of the EOUSA data to provide warning that an investigation of his or her crime is underway because entries appear in the EOUSA data only *after* other law enforcement agencies have conducted an investigation and concluded that there is sufficient evidence to refer the matter to the United States Attorneys. Plaintiffs' Exhibits and Declarations in C.A. 00-211, Eighth Long Decl. ¶¶ 12-14.

Second, to sustain a claim under Exemption 7(A), the agency must do more than describe a category of information that, if disclosed, could reasonably interfere with law enforcement proceedings; the agency must also demonstrate that the information it is withholding actually falls within the category that it has identified. Voinche v. Federal Bureau of

Investigation, 46 F. Supp. 2d 26, 31 (D.D.C. 1999). The Department has not shown that any of the EOUSA data has the hypothetical characteristics that the Department assumes in making its Exemption 7(A) claim. To the contrary, the Department acknowledges that “in most cases” the removal of “the names and other directly identifying information” from the records is sufficient to prevent a suspect from being alerted to an investigation. Defendant’s Declarations and Exhibits in C.A. 00-211, Exhibit I, Wainstein Declaration ¶¶ 4, 7. It theorizes that the redaction of the names *might* not be sufficient in a subset of cases in which the crime identified by the statute listed as the lead charge is so infrequent that a suspect could determine that he or she is probably the target of the investigation, id. ¶¶ 4, 5, 6, or the record contains “other particularized information” that allows the suspect to indirectly identify the target even though the name of the target has been redacted. Id. ¶ 7. The Department has not presented any evidence from anyone who has actually examined the EOUSA data to determine whether records with entries that would make such indirect identification reasonably possible actually exist.

The Department’s failure to go beyond speculating is fatal to its claim. The case law makes clear that an agency may not, as the Department has here, withhold information under the FOIA on the basis that it theorizes that exempt information *might conceivably* be present in its files, without any evidence that its theory is confirmed by the facts. Under FOIA’s burden of proof, the courts “will not speculate as to whether Exemption 7 might, under some possible congruence of circumstances” apply to records. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 870 (D.C. Cir. 1980). Nor may the agency ask the court to “assume that all the necessary conditions are met merely because the agency invokes an exemption.” Id.

Finally, the statute requires that the agency prove that disclosure “reasonably could” interfere with a law enforcement proceeding. 5 U.S.C. § 552(b)(7)(A); see also Campbell v.

Department of Health and Human Services, 682 F.2d 256, 259 (D.C. Cir. 1982); City of Chicago v. United States Dept. of Treasury, 287 F.3d 628, amended 297 F.3d 672, 673 (7th Cir. 2002), vacated and remanded on other grounds, --- S.Ct. ----, 2003 WL 484146 (U.S. Feb 26, 2003).¹⁰

The Department has presented two speculative theories, neither of which is reasonable or supported by evidence.

(1) The Department theorizes that the combination of the lead charge and fields that identify the location of the investigation could, “on their own,” allow a suspect to indirectly identify himself or herself as the target of an investigation. Defendant’s Declarations and Exhibits in C.A. 00-211, Wainstein Decl. ¶¶ 4-6. As examples, the Department states that records in which the lead charge identifies “certain mail fraud schemes” or the “Continuing Criminal Enterprise” statute, 21 U.S.C. § 848, would satisfy Exemption 7(A) under this theory. Id. ¶ 5.

Plaintiffs have shown that this theory is unreasonable for several reasons. First, lead charges are too general and appear too frequently to provide a basis for indirect identification. Maltz Decl. ¶¶ 19-23. For example, the mail fraud and continuing criminal enterprise statutes

¹⁰ The Supreme Court vacated the Seventh Circuit’s decision in City of Chicago and remanded the case without considering the merits because, shortly before the Supreme Court was scheduled to hear the case, Congress enacted an appropriations statute that the government argues renders the merits of the City of Chicago decision moot because it bars the Department of the Treasury from using any appropriated funds to comply with the Seventh Circuit’s decision. This outcome does not diminish the authority of the Seventh Circuit’s decision as a description of the government’s burden when making claims like those presented here. Indeed, in the course of the Supreme Court proceedings, the Solicitor General stated that the Seventh Circuit’s opinion, as amended, accurately describes the agency’s burden under Exemption 7(A). See Brief for the Petitioner, Bureau of Alcohol Tobacco and Firearms v. City of Chicago, No. 02-322, p. 48, *available at* <http://www.usdoj.gov/osg/briefs/2002/3mer/2mer/2002-0322.mer.aa.pdf> (acknowledging that “an agency’s predictions of harm to law enforcement will support withholding of documents pursuant to Exemption 7(A) only if those predictions are “reasonable.”)

cited by the Department (18 U.S.C. § 1341 and 21 U.S.C. § 828), apply to a wide range of conduct and appear in thousands of the EOUSA records. Plaintiffs' Exhibits and Declarations in C.A. 00-211, Eighth Long Decl. ¶¶ 9, 10. Even if a statute cited as the lead charge appeared rarely and described unusual conduct, the location information does not restrict the individuals who might be the subject matter of the record because nothing in the EOUSA data reveals the address of the suspect or even the location of the offense that is being investigated. Id.⁸ Moreover, disclosure of the lead charge would not allow a suspect to determine that he or she was being investigated because nothing in this field or the other fields released describes the characteristics of the suspect. Long Decl. ¶ 10.

The declaration of statistical expert Michael Maltz further explains why the Department's theory that suspects could identify themselves as the target of an undisclosed investigation from the combination of lead charge and location information is unreasonable. Plaintiffs' Declarations and Exhibits in C.A. 00-211, Maltz Decl. ¶¶ 15-24. In response, the Department has argued Dr. Maltz's conclusions are inaccurate *if* other potentially identifying information is available to assist in identification. See Second Siskin Decl. ¶ 4. This retort is unresponsive, however, because Dr. Maltz's analysis specifically addresses the Department's claim that the lead charge and location information are, *on their own*, sufficient to allow a suspect to identify himself or herself as the target of an investigation. See Maltz Decl. ¶ 15. Remarkably, the Department's only affirmative proof for this claim, on which it bears the burden of proof, is a conclusory assertion these two items of information would allow indirect identification in some unspecified

⁸ The only "location" information provided in the records is the location of the United States Attorneys' Office that is responsible for the investigation. See Defendant's Exhibits and Declarations in C.A. 00-211, Defs' Exhibit O, Field 1 (DIST).

subset of the records at issue. See Defendant's Declarations and Exhibits in C.A. 00-211, Wainstein Decl. ¶ 6.

(2) The Department's second theory of indirect identification is that "the information in other fields," such as the "estimated dollar loss" might make it possible for a suspect to identify himself or herself when combined with lead charge and location information. Wainstein Decl. ¶¶ 4, 5, 7. However, the Department does not support this theory with any evidence from anyone who has actually examined the contents of these fields.⁹ Examination of these "other fields" reveals that they are optional fields and they are usually blank. See Ninth Long Decl. ¶¶ 6, 7 (65-97% of entries are blank). Moreover, in the records that contain any entries in these fields, the information provided is usually incomplete or lacks detail. Id. ¶ 8. Government archivists who reviewed the optional fields for the National Archives observed that "the data in many of these fields is unreliable" because the fields may be blank, may be completed with non-standardized codes, or may be used for information that is totally unrelated to the field label. See Plaintiffs' Response to Defendants' Surreply in C.A. 00-211, Appraisal of Automated case management systems, Executive Office for U.S. Attorneys, at 13. Consequently, even if the Department identified entries in which the information in these fields was so precise that disclosure would threaten an ongoing investigation, the appropriate response would be to mask

⁹ In Civil Action No. 00-211, Plaintiffs have argued that paragraphs 3 and 4 of the Second Declaration of Bernard R. Siskin should not be accepted as evidence because there is no evidence that the declarant has ever examined the database fields referenced in these paragraphs of his testimony. See Civil Action 00-211, Doc. No. 155, Plaintiffs' Response to Defendants' Motion for Leave to File Surreply; Doc. No. 160, Plaintiffs' Response to Surreply Memorandum of October 21, 2002 at 1. This Court has reserved ruling on this issue. See id., Doc. No. 158, Order.

or redact the “other field” entries in the few, if any, records where detailed information appears -- not to redact lead charge information. Id., Maltz Decl. ¶ 26.¹⁰

2. Disclosure of the Program Category Is Not Reasonably Expected To Jeopardize Law Enforcement Proceedings or Risk Physical Harm.

The Department asserts that Exemptions 7(A) and 7(F) authorize withholding program category information from (i) records in the criminal flagged master files in which the lead charge has been redacted; and (ii) certain records in the criminal delete history file in which the lead charge is disclosed. See Long Decl. ¶ 12 and Exhibit K. This claim is even more untenable than the exemption claim for lead charge entries already before this Court in Civil Action 00-211.

First, all of the objections to relying on Exemption 7(A) to redact lead charge information also apply to the use of this Exemption for program category information. Like the lead charge information, the program category information does not enhance a suspect’s ability to interfere with an investigation in a “particular, discernible way.” See North v. Walsh, 881 F.2d at 1097-98. The program category information merely reveals that a given United States Attorneys Offices have been asked to consider bringing cases that fall under broad categories such as “Consumer fraud” (03A) or “Civil Rights- Law Enforcement” (05D). See Long Decl. ¶ 14 and Exhibit E.

¹⁰ The Department’s initial papers on this issue also suggested in passing that information in fields reserved for the “arrest date” or “quantity seized” might justify withholding the lead charge under Exemption 7(A). Wainstein Decl. ¶ 7. These fields could not justify the EOUSA’s claim here because (i) these fields contain no information in over 97% of the records in which the EOUSA has withheld the lead charge, see Plaintiffs’ Exhibits and Declarations in C.A. 00-211, Seventh Long Decl. ¶¶ 17, 18; and (b) entries in these fields identify events that will have already alerted the suspect to an investigation. See below, p. 21. The Department’s later declarations do not argue that these fields support its Exemption 7(A) claim.

There is no tenable claim that disclosure of such information prior to the case being closed or filed in court impairs law enforcement proceedings in any palpable way.

Indeed, the Department's indirect identification hypothesis is even more far-fetched when applied to the program category field because the information revealed by the program category is less specific than the lead charge entries. The lead charge entries identify statutory provisions, while the program category codes cover multiple statutory offenses that the Department has decided to group under a single category. Long Decl. ¶ 14. As discussed above and in Plaintiffs' prior papers, the statutory provisions that appear in the lead charge are too imprecise to give rise to a reasonable expectation that a suspect will be able to determine indirectly that prosecutors have been asked to charge him or her with a crime. See Plaintiffs' Exhibits and Declarations in C.A. 00-211, Maltz Decl. ¶¶ 19-22. *A fortiori*, disclosure of a program category code that corresponds to multiple statutes cannot support the Department's speculative hypothesis that suspects will indirectly identify themselves by combining this information with location information.

Second, the Department's reliance on Exemption 7(A) to redact the program category information in the criminal delete history file is untenable because the Department is disclosing the lead charge information in each record from which it has redacted the program category. See Long Decl. ¶¶ 9, 12, 15. Because the Department has disclosed the lead charge for these matters, the Department has already disclosed information about the nature of the offense that is more specific than the category information that it has withheld as exempt.

Third, the Department's reliance on Exemption 7(A) to redact the criminal delete history file cannot be justified because there is no evidence that these "delete history" records relate to ongoing criminal proceedings in which suspects are unaware of the investigations.

Exemption 7(A) is only applicable if the agency shows that a concrete, *prospective* law enforcement proceeding would be harmed by the premature release of evidence or information *not in the possession of known or potential defendants*. North v. Walsh, 881 F.2d at 1098 (quoting 120 Cong. Rec. S17,033 (May 30, 1974)); Coastal States, 617 F.2d at 860. Indeed, this Exemption was specifically amended in 1974 to reject pre-1974 decisions that had applied the Exemption in circumstances where investigations had been terminated or no enforcement action was contemplated. Campbell v. Department of Health and Human Services 682 F.2d 256, 262, (D.C. Cir. 1982); accord NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 227-232, 235 (1978). Consequently, to sustain a claim under Exemption 7(A), the government must prove that an investigation exists, that it has not been closed or abandoned, and that the information at issue has not already been given disclosed to the suspect. See Coastal States Gas Corp., 617 F.2d at 860, 870 (D.C. Cir. 1980) (exemption only applies to concrete prospective or presently active investigations); Pacific Molasses Co. v. NLRB, 577 F.2d 1172, 1184 & n. 9 (5th Cir. 1978) (Exemption 7(A) claim improper where there is no ongoing investigation or enforcement proceeding underway).

Because the criminal delete history file is a collection of outdated records deleted from the list of active cases, it is unlikely that the government can make this showing for many, if any, of the records that it has redacted. By design, this file is a collection of records that are errors or are out of date. It contains records that the EOUSA has deleted from the master database because no new information has been reported about these records for at least seven consecutive months. Long Decl. ¶ 15. In redacting these “deleted” records, the EOUSA has made no effort to determine whether the records (i) reflect erroneous entries for matters that never existed, or (ii)

relate to matters that existed, but were closed or were publicly disclosed in court after the date that the records in the delete history file were updated, which is seven or more months ago.

Finally, the Department's reliance on Exemption 7(F) as an alternative ground for withholding program category information is misplaced. Exemption 7(F) provides that an agency may withhold records compiled for law enforcement purposes to the extent that disclosure "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). This exemption authorizes redacting law enforcement records to conceal the identities of law enforcement personnel and informants when there is reason to believe that the target of an investigation may retaliate violently. Blanton v. United States Department of Justice, 182 F. Supp. 2d 81, 86-87 (D.D.C. 2002); accord Maroscia v. Levi, 569 F.2d 1000, 1002 (7th Cir. 1977); Anderson v. United States Marshals Service, 943 F. Supp. 37, 40 (D.D.C. 1996); Durham v. United States Department of Justice, 829 F. Supp. 428, 433 (D.D.C. 1993). No such information is revealed by the program category codes that have been redacted here.

3. The Department's Exemption Claims for Lead Charge and Program Category Information Are Inconsistent With Its Disclosure of This Information.

An additional flaw in the Department's Exemption 7(A) claim is that the Department has previously disclosed, or is currently disclosing, the charge and category information for the very same matters covered by the records at issue here. These disclosures arise in two ways.

First, some records from which the lead charge and program category information have been redacted show that the suspect is already aware of the USAO's investigation. For example, other fields in the case management records show that the Department is withholding lead charge and program category information in criminal cases in which the defendant has negotiated a pre-

trial diversion agreement to resolve the potential charges. See Long Decl. ¶ 11. The government cannot properly claim that information may be withheld from the public under Exemption 7(A), if the very information that the government seeks to withhold (in this case, the mere existence of an investigation), has already been revealed to the target of the investigation. Scheer v. United States Department of Justice, 35 F. Supp. 2d 9, 13-14 (D.D.C. 1999) (rejecting Exemption 7(A) claim where investigative report had already been disclosed to target); cf. Coastal States, 617 F.2d at 870 (agency unlikely to have valid Exemption 7(A) claim where matters addressed in documents were discussed with targets of law enforcement proceeding).

Second, because the Department's theories for withholding lead charge and program category entries are recent inventions, the charge and category entries for many of the matters in the files at issue here have been released in files created before the Department invented the theories. The May-August 2002 files contain records relating to matters that were opened in the EOUSA database in prior years, but were not closed by the end of the last fiscal year. Long Decl. ¶¶ 26, 27. The Department has disclosed the lead charge and category information for many of these records because it did not make any claim that lead charge information could be withheld until after it had disclosed the lead charges for all cases opened prior to October 1998, and it did not make any claim that program category information could be withheld until after it had disclosed the program category for all matters opened prior to May 2002. Id. ¶ 25.

Consequently, within the May-August 2002 records at issue here, the Department has previously released the lead charge entry for approximately 10% of the redacted records, and it has previously released the program category entry for approximately 77-93% of the redacted records. Id. ¶¶ 28, 29. For all of these records, the only purpose served by the Department's redactions is to make it more difficult for Plaintiffs to utilize the data the Department discloses,

because the lead charge or program category identified by prosecutors can be obtained by matching the May-August 2002 records with the corresponding records in files that the Department sells to the public or has previously released under the FOIA.

The fact that the Department has released the very entries that it has redacted from the data files delivered to Plaintiffs has two legal consequences. First, with respect to the records for which the lead charge and category entries have *not* been released, the disclosure of the entries in similar records heightens the Department's burden of proof. To sustain its Exemption 7(A), the agency must provide a persuasive rationale for concluding disclosure of the information that it is withholding would impair investigations *even though there is no evidence (nor even an allegation) that prior or current disclosures of the same type of information has jeopardized any investigation*. See Coastal States, 617 F.2d at 870 (unlikely that agency will be able to show that disclosure of records would jeopardize investigation where agency typically disclosed information to target in the course of investigation); 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).

Second, with respect to the records for which the lead charge and category information has been released, these disclosures foreclose any claim that Exemption 7(A) applies. Even where classified information is at issue, the Court of Appeals has indicated that the prior, authorized release of identical information waives any claim that the information may properly be withheld. Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983). *A fortiori*, the Department has no basis for claiming that Exemption 7(A) allows it to withhold information that it has already publicly disclosed and, indeed, is still distributing to the public.

B. The Department Has Improperly Invoked FOIA’s Personal Privacy Exemptions and Personnel Rule Exemption to Withhold Information That Does Not Fall Within These Provisions.

Plaintiffs also challenge the Department’s withholding of three additional categories of information: (1) court docket information (litigant names and court numbers); (2) the identities of businesses, public agencies and property; and (3) tracking numbers assigned to matters by agencies that refer matters to the USAOs. All three of these claims are discussed at length in the summary judgment papers in Civil Action 00-211, and the discussion below merely describes the records at issue and summarizes Plaintiffs’ argument that the Department’s position is inconsistent with the language of the applicable exemptions as a matter of law.

1. The Department Has Improperly Withheld Public Court Docket Information Based on FOIA’s Privacy Exemptions.

The Department has redacted court docket numbers, case captions and names of litigants based Exemptions 6 and 7(C) of the FOIA. These exemptions allow agencies to withhold information where disclosure would result in a “clearly unwarranted” or an “unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6), (7)(C). Plaintiffs challenge the Department’s decision to withhold the following fields in cases that have been filed in court:

Criminal Master Records Criminal Delete History	defendant name court number (i.e. docket number) file name (i.e. case caption)
Civil Master Records Civil Delete History	litigant name court number (i.e. docket number) file name (i.e. case caption)

The Department's privacy claim for this information is untenable because this court docket information is not private. As the Department of Justice itself concedes, "if the information at issue is particularly well known or is widely available within the public domain, there generally is no expectation of privacy." FREEDOM OF INFORMATION ACT GUIDE AND PRIVACY ACT OVERVIEW 333 (May 2002 ed.); accord Avondale Industries, Inc. v. NLRB, 90 F.3d 955, 961 (5th Cir. 1996) (names and addresses on voting lists that are in public record may not be withheld under Exemption 6). The court docket numbers, case captions and the names of litigants are readily available to the public through the PACER database sponsored by the Administrative Office of the United States Courts and other databases. See Plaintiffs' Exhibits and Declarations in C.A. 00-211, Exhibits 10 and 11.

The Department's claim that it is entitled to withhold the court docket information is based on the agency's misapplication of United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), and Safecard Services v. Securities and Exchange Comm'n, 926 F.2d 1197 (D.C. Cir. 1991). As discussed in Plaintiffs' Motion for Summary Judgment in Civil Action 00-211, these cases do not apply where, as here, the information at issue is readily available to the public. See Avondale, 90 F.3d at 961 (distinguishing Reporters' Committee). The identity of litigants in public litigation is public information, and is not subject to any statutory, regulatory and other restrictions that would justify characterizing this information as "private." Compare 498 U.S. at 752-54, 764-65 (legal restrictions on access to rap sheets make them "private"). Moreover, the court docket information is readily available in electronic databases and, therefore, is not private as a practical matter. Compare id. at 762, 764 (difficulty of obtaining rap sheet information gives it "practical obscurity"). Finally, disclosure of this information enhances the ability of researchers to

examine the agency activities reflected in the EOUSA data. See Plaintiffs’ Exhibits and Declarations in C.A. 00-211, Maltz Decl. ¶ 13; Second Burnham Decl. ¶ 6-8; compare Reporters Committee, 492 U.S. at 773 (disclosure of the information at issue would “not shed any light on the conduct of any Government agency or official.”)

2. The Department Has Improperly Withheld Redacted Records Concerning Actions Against Businesses and Property Based on Exemptions That Apply Only to Personal Privacy.

Plaintiffs also challenge the Department’s claim that entries identifying businesses, governmental entities and property may be withheld under Exemption 6 and 7(C). The EOUSA databases identify three types of entities: (i) individuals; (ii) properties (which are listed as the subject of forfeiture actions); and (iii) institutions such as businesses, organizations, and governmental bodies. Long Decl. ¶ 31. The EOUSA can distinguish between the individual and non-individual entries using codes within the government’s databases. Id. However, in redacting the data at issue here, the Department has made no such distinction and is withholding the names of property, governmental bodies (e.g., agencies in civil rights litigation), businesses and other entities that are not natural persons. This issue affects the following files and fields where the EOUSA’s codes identify the subject of the record as a businesses or property:

Criminal Master Records Criminal Delete History	defendant name court number (i.e. docket number) file name (i.e. case caption)
Civil Master Records Civil Delete History	litigant name court number (i.e. docket number) file name (i.e. case caption)
Criminal Immediate Declination File	suspect

The entries that do not identify natural persons do not fall within FOIA's exemptions protecting "personal privacy." Over twenty-five years ago, the Court of Appeals observed that Exemption 6 does not protect the interests "of businesses or corporations." National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 685 n. 44 (D.C. Cir. 1976); accord Sims v. CIA, 642 F.2d 562, 572 n. 47 (D.C. Cir. 1980) (observing that "Exemption 6 is applicable only to individuals."); Washington Post Co. v. United States Dept. of Justice, 863 F.2d 96, 100 (D.C. Cir. 1988) ("Information relating to business judgments and relationships does not qualify for exemption."). Consequently, courts have repeatedly held that when an agency withholds names in reliance on personal privacy, the agency may withhold only the names of individuals. See Ivanhoe Citrus Association v. Handley, 612 F. Supp. 1560 (D.D.C. 1985); Washington Research Project, Inc. v. Department of Health, Education & Welfare, 366 F. Supp. 929, 937-38 (D.D.C. 1973), aff'd in part, rev'd in part on other grounds, 504 F.2d 238 (1974), cert. denied, 421 U.S. 963 (1975).

3. The Agency File Numbers Are Not Exempt Under 5 U.S.C. § 552(b)(2) Because These Numbers Are Not Personnel Rules or Practices.

The EOUSA databases track matters referred by other agencies, and the EOUSA case management records contain the numbers used by these referring agencies to identify the cases. The Department asserts that the agency numbers are covered by the "Low 2" exemption, meaning that the government does not claim that there would be any adverse consequences from disclosure of this information, but claims that it should not be put to the trouble of releasing the

information because it has no value to the public. Department of Air Force v. Rose, 425 U.S. 352, 369-70 (1976).¹¹ This issue affects the following fields and data files:

Criminal Master Records Criminal Delete History File	investigative agency file number program agency file number
Civil Master Records Civil Delete History Files	agency file number
Criminal Immediate Declination File	agency file number

To sustain this claim, the Department must show that (a) the agency file numbers relate predominantly to internal personnel rules and practices of an agency, and (b) there is no legitimate public interest in disclosure of the information. See Schwaner v. Department of Air Force, 898 F. 2d 793, 794 (D.C. Cir. 1990). Neither requirement is satisfied here.

First, the numbers that the agency is withholding do not constitute or reveal an internal personnel rule or practice. In Fitzgibbon v. United States Secret Service, 747 F. Supp. 51 (D.D.C. 1990), Judge Harold Greene concluded that the Court of Appeal’s decision in Schwaner forecloses claims that numbers “used to index, store, locate, retrieve, and identify information” are covered by the “low 2” branch of Exemption 2. Id. at 57; see also Abraham & Rose v. United States, 138 F.3d 1074, 1081 (6th Cir. 1998) (information in IRS database used for tracking liens does not fall within Exemption 2). That conclusion is equally applicable here.¹²

¹¹ “Low two” distinguishes the government’s claim here from a “high two” claim, in which the basis for withholding is that disclosure of the government’s procedures and practices would permit circumvention of agency rules or enforcement efforts. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1073 (D.C. Cir. 1981).

¹² Schwaner observed that cases in which the agency made a “high two” claim to withhold sensitive codes that could reveal the identity of informants or personnel involved different considerations because such sensitive notations may reveal an agency’s practices concerning internal routing and distribution of information. 898 F.2d at 796. Decisions concerning the “high two” exemption are inapplicable here because the government makes no claim that the notations reveal sensitive internal personnel practices. Id.; accord Abraham &

Second, Exemption 2 is inapplicable here because there is a legitimate public interest in the disclosure of these numbers. The agency file numbers allow researchers to correlate data reported by different agencies and identify the reasons for conflicts in agency data. See Plaintiffs' Exhibits and Declarations in C.A. 00-211, Maltz Decl. ¶¶ 10, 11. Because agency data like that in the EOUSA databases is used for budget and policy decisions, there is a significant public interest in disclosure of the elements of the data that will allow researchers to evaluate its reliability and determine whether it is consistent with information reported in other databases.

CONCLUSION

The Court should consolidate this action with Civil Action 00-211 and grant summary judgment for Plaintiffs.

Respectfully submitted,

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March 19, 2003

Rose, 138 F.3d at 1080-81; Fitzgibbon, 747 F. Supp. at 57.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN B. LONG)
)
and)
)
DAVID BURNHAM)
)
Plaintiffs,) Civil Action No. 1:02CV02467 PLF
)
v.)
)
DEPARTMENT OF JUSTICE)
)
Defendant.)
_____)

**PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Local Rule 7.1(h), Plaintiffs hereby submit this statement of material facts as to which there is no genuine dispute in support of their motion for summary judgment. The record materials cited herein are the Defendant's Answer (admitting statements in numbered paragraphs of the complaint), the Declaration of Susan Long and Exhibits thereto, and Declarations and Exhibits submitted in support of Plaintiffs' motions for summary judgment in Civil Action No. 00-211.

1. Plaintiffs Susan B. Long and David Burnham are co-directors of the Transactional Records Access Clearinghouse ("TRAC") and are the requesters of the withheld records. TRAC is a nonprofit organization affiliated with Syracuse University. Its mission is to compile and disseminate comprehensive information about the functioning of federal law enforcement, staffing and spending. Answer ¶ 4.

2. Defendant Department of Justice is an agency of the United States, and it has possession of and control over the records that Plaintiffs seek. Answer ¶ 5.

EOUSA Case Management Records

3. Each United States Attorneys Office maintains computerized record-keeping systems that track the investigations, civil and criminal cases, and debt collection matters within each office. Answer ¶ 6.

4. Each month the individual United States Attorneys Offices extract information on investigations, and civil and criminal cases from their record-keeping systems and send the information to the EOUSA in Washington, DC. The EOUSA uses this information to compile centrally maintained case management databases known as the “Central System” databases. Answer ¶ 7.

5. The Department of Justice uses the EOUSA’ s Central System databases, among other sources, to respond to requests for statistical information from the Office of Management and Budget, Congress, and the public. The Department also uses the EOUSA’ s Central System databases, among other sources, to compile the Attorney General’s Annual Report, United States Attorneys Annual Statistical Reports, management reports for use within the Department, and other reports, some of which are involved in formulating the Department's law enforcement and other activities. Answer ¶ 8.

Shifting EOUSA Exemption Claims

6. Beginning in 1989, Plaintiffs, on behalf of TRAC, submitted FOIA requests to the EOUSA for electronic copies of EOUSA’ s central case management data from fiscal year 1974 and later years. The EOUSA released some of the data requested, but redacted information pursuant to the FOIA. Answer ¶ 9.

7. In June 1999, in response to a court order in Long v. United States Department of Justice, N.D.N.Y. C.A. No. 98-cv-370, the Department produced a table that listed all of the fields in the case management database files at issue in that action, identified those fields that Department claimed were exempt from disclosure, and specified the exemption under 5 U.S.C. § 552(b) that the Department asserted was applicable. Answer ¶ 11. The Director of the Executive Office for the United States Attorneys, Donna Bucella, signed a letter stating that “[i]n response to future requests for case management system records, we intend to continue to release the fields agreed upon in the subject lawsuit [Long v. Department of Justice, C.A. No. 98-cv-370] as the appropriate ones under FOIA, absent unforeseen complications, errors or changes.” Answer ¶ 12.

8. On October 29, 1999, the EOUSA sent a letter to TRAC in which it announced that the agency would not provide current data from the electronic case management databases until after the end of the fiscal year because EOUSA claimed that such data is “exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5).” This letter stated that EOUSA would produce fiscal year-end data for the years 1974 to the present for all criminal, civil and collections case file systems in accordance with the procedures agreed to in Long v. Department of Justice, C.A. No. 98-cv-370. Answer ¶ 13.

9. On February 7, 2000, Plaintiffs brought suit against the Department under the FOIA to challenge the Department’s claim that 5 U.S.C. § 552(b)(5) allowed EOUSA to withhold case management data until the end of the fiscal year. Long v. Department of Justice, Civil Action No. 1:00CV00211 (PLF). Answer ¶ 14.

10. On March 24, 2000, the Assistant Director of the FOIA/PA Division of the EOUSA sent a letter to TRAC stating that delivery of the year-end fiscal 1974 through 1997 EOUSA case management data and the year-end fiscal year 1999 EOUSA case management data

would be delayed because the EOUSA was revising its position on the application of the FOIA to these records and intended to withhold additional information. Answer ¶ 15.

11. In May 2000, the EOUSA began to release EOUSA case management data from fiscal year 1974 and later years, but withheld data fields and entire records based on exemption claims that it did not assert in June 1999. The EOUSA withheld from the data that it released to Plaintiffs information and records that it subsequently released under the FOIA. Answer ¶ 17.

12. The Department filed in this Court declarations and briefs that contained inaccurate statements concerning the records and information that it was withholding from Plaintiffs. The Department was directed to file a summary judgment motion to justify its response to Plaintiffs' FOIA request, and responded by filing papers that had to be withdrawn or stricken three times because they contained material errors. The Department voluntarily withdrew the first version of its summary judgment motion after admitting that it contained errors. It withdrew the second version after Plaintiffs filed a motion to strike the papers for failure to comply with Federal Rule of Civil Procedure 11. This Court struck the third version of the motion after the Department acknowledged that the declarations and brief in this version also contained errors. Answer ¶ 18.

Requests for May-August 2002 Data

13. On June 4, 2002, pursuant to the FOIA, plaintiff Long sent a written request to the Assistant Director of the FOIA/PA Division of the EOUSA for six files of the EOUSA case management database containing data through May 2002. The FOIA/PA Division of the EOUSA sent a letter acknowledging receipt of this FOIA request and identifying the request as Request Number 02-1986. Answer ¶ 21.

14. On July 12, 2002, pursuant to the FOIA, plaintiff Long sent a written request to the Assistant Director of the FOIA/PA Division of the EOUSA for six files of the EOUSA case management database containing data through June 2002. The FOIA/PA Division of the EOUSA sent a letter acknowledging receipt of this FOIA request and identifying the request as Request Number 02-2065. Answer ¶ 22.

15. On August 6, 2002, pursuant to the FOIA, plaintiff Long sent a written request to the Assistant Director of the FOIA/PA Division of the EOUSA for six files of the EOUSA case management database containing data through July 2002. The FOIA/PA Division of the EOUSA sent a form letter acknowledging receipt of this FOIA request and identifying the request as Request Number 02-2893. Answer ¶ 23.

16. On September 9, 2002, pursuant to the FOIA, plaintiff Long sent a written request to the Assistant Director of the FOIA/PA Division of the EOUSA for six files of the EOUSA case management database containing data through August 2002. The FOIA/PA Division of the EOUSA sent a form letter acknowledging receipt of this FOIA request and identifying the request as Request Number 02-2896. Answer ¶ 24.

17. Plaintiff Long's FOIA requests for the May, June, July and August EOUSA case management data requested that the EOUSA make available six specific files known as the civil flagged master, civil delete history file, criminal charge file, criminal flagged master, criminal immediate declination file, and criminal delete history file. Answer ¶ 25.

18. Plaintiff Long's FOIA requests for the May, June, July and August case management files also requested that TRAC be granted a waiver of fees under 5 U.S.C. § 552(a)(4)(A)(iii). All four FOIA requests referenced detailed information concerning TRAC's

qualifications for a fee waiver that TRAC had furnished to the EOUSA FOIA Unit in April and May of 2000. Answer ¶ 26.

19. Plaintiff Long's FOIA requests for the May, June, July and August case management files also requested that the EOUSA provide records concerning any revisions in the central system codes contained in the criminal flagged master, civil flagged master, criminal charge and criminal immediate declination files. Answer ¶ 27.

20. On June 28, 2002, the Department submitted a revised motion for summary judgment. The Department discovered errors in this revised motion. On July 31, 2002, the Department again submitted revised papers in Long v. Department of Justice, 1:00CV00211 (PLF), that included a corrected list of fields in the EOUSA case management data that it claims are exempt from disclosure under the FOIA. Answer ¶ 29.

21. Between October 17, 2002, and December 11, 2002, TRAC received from the EOUSA tapes with copies of data files that the EOUSA produced in response to TRAC's request for the criminal and civil flagged master, criminal and civil delete history file, criminal charge file and criminal immediate declination files for May 2002, June 2002, July 2002 and August 2002. Answer ¶ 34, 36-39.

22. On October 29, 2002, Plaintiffs received a letter from the Assistant Director of the FOIA/PA Division of the EOUSA, stating that the EOUSA had made a "final agency decision" to "redact information from the 'program category' field from the records of ongoing investigations in the Criminal Flagged Master, Criminal Immediate Declination, and Criminal Delete History file." Answer ¶ 35.

23. On November 1, 2002, Plaintiffs submitted an administrative appeal from the October 29, 2002, "final agency decision" in which the EOUSA announced that it would

withhold "program category" information from the May, June, July and August 2002 case management records requested by TRAC. Answer ¶ 44.

24. More than 20 days working days have passed since Plaintiffs submitted their appeal of the EOUSA's "final agency decision" concerning TRAC's request for May, June, July and August 2002 case management records and the Department of Justice has not notified Plaintiffs of a determination in that appeal. Answer ¶ 45.

Challenged Exemption Claims

Lead Charge

25. In the May-August 2002 files delivered to TRAC between October 17 and December 11, the EOUSA has withheld the lead charge field in certain records of the criminal flagged master files. The "lead charge" field in the EOUSA's master files for criminal data describes the principal charge against a suspect or defendant by the title and section number of the criminal statute in the U.S. Code. In some instances, the lead charge entry also includes the subsection of the code. The EOUSA's program for redacting the lead charge entries provides that the lead charge is to be removed if the EOUSA database entries in the file being redacted do not contain an entry that shows that the record relates to a matter that is closed or has been filed in court. Long Decl. ¶ 9.

26. The criminal flagged master files in which the lead charge entries appear do not contain a field for entering information that would identify the location of the suspect or target of the investigation by city, state, district, zip code or any other means. Long Decl. ¶ 10. Nothing in the data that the EOUSA has released from these files, nor in the lead charge and program category information that it has withheld, describe the characteristics of the suspect, such as gender, height, ethnicity, name or even address. Id.

27. It is not reasonable to expect that an individual could identify the target of an investigation from the combination of a lead charge entry and information in the Criminal Master Files identifying the office that is responsible for the investigation. The population of individuals potentially covered by the data in the criminal flagged master files is too large, the information in the lead charge entries is too imprecise and does not give details about the crime being investigated, and the lead charge entries are not mutually exclusive identifiers. *Plaintiffs' Declarations and Exhibits in C.A. 00-0211*, Tab 1, Declaration of Michael D. Maltz ¶¶ 15-24.

Program Category

28. The EOUSA has withheld from the May-August 2002 files delivered to TRAC certain entries in the “program category” field of the criminal flagged master file and the criminal delete history file. Answer ¶ 41.

29. The EOUSA’s program for redacting the program category entries use the same criteria used in redacting lead charge information: the entry in the program category field is removed if the EOUSA database entries in the file being redacted do not contain an entry that indicates that the record relates to a matter that is closed or has been filed in court. Long Decl. ¶ 12.

30. The EOUSA has not redacted lead charge information from the criminal delete history files, but has redacted program category information if the database file being redacted does not contain an entry that shows that the matter described by the record has been closed or has been filed in court. *Id.* ¶¶ 12, 15.

31. The “program category” information in the EOUSA case management database files identifies the program category (for example, domestic terrorism, immigration, civil rights,

organized crime, bank robbery) associated with each record in the database files. Answer ¶ 43; Long Decl. ¶ 13; Exhibit E, Appendix A- LIONS Codes, A-43-52 (Updated September 2002).

32. The EOUSA has disclosed the information in the program category field of EOUSA case management files created from fiscal year 1974 through April 2002. Answer ¶ 42; Long Decl. ¶ 21.

Court Docket Information

33. In the copies of the database records that the EOUSA has released in response to Plaintiffs' FOIA requests, the EOUSA has redacted all entries in the fields for court number, caption of the case, name of the defendant in criminal cases, and name of litigant in civil cases because the Department contends that this information is exempt from disclosure under 5 U.S.C. § 552(b)(6) and (7)(C). Long Decl. ¶ 32.

34. As part of the Public Access to Court Electronic Records (PACER) service, the Administrative Office of the United States Courts makes available a national index of docket information on cases in federal district, appellate and bankruptcy courts. Among other things, the PACER database discloses the court number, the names of the parties, and the caption of the case. See Plaintiffs' Declarations and Exhibits in C.A. 00-0211, Exhibits 10, 11. PACER is available to the public through the Internet or a modem and the database can be searched electronically. Id.

35. There is a public interest in disclosure of the information in the fields for court number, caption of the case, name of the defendant in criminal cases, and name of litigant in civil cases, because this information will assist researchers in evaluating how law enforcement agencies have acted in cases involving different kinds of litigants, and assist researchers in correlating the EOUSA's data with data reported by the courts to obtain a broader and more

accurate view of the government's actions in criminal and civil litigation. *Plaintiffs' Declarations and Exhibits in C.A. 00-0211*, Maltz Declaration ¶¶ 13, 14; Second Burnham Declaration ¶ 6; Seventh Long Decl. ¶ 40.

Names of Institutions and Property

36. In the copies of the database records that the EOUSA has released to Plaintiffs, the EOUSA has redacted the names of property, corporations, businesses, governmental bodies, and other non-individual entities identified in the database fields concerning the name of the defendant or litigant. Long Decl. ¶ 31.

37. There is a public interest in disclosure of the names of businesses and property in the EOUSA case management databases because this information will assist researchers in evaluating how law enforcement agencies have acted in cases involving different kinds of litigants, and facilitate research on the role and effectiveness of property forfeiture actions. *Plaintiffs' Declarations and Exhibits in C.A. 00-0211*, Second Burnham Declaration ¶¶ 7, 8.

Agency File Numbers

38. In the copies of the database records that the EOUSA has released in response to Plaintiffs' FOIA requests, the EOUSA has redacted all entries in the fields for agency file number, investigative agency file number, and program agency file number. Long Decl. ¶ 32.

39. The agency file number, investigative agency file number, and program agency file number fields are designed to store numbers that are used by agencies other than the United States Attorneys Offices to identify the matter addressed by a record. Id.

40. Public disclosure of the agency file number, investigative agency file number and program agency file number would be valuable to the public because it would permit researchers to reconcile data reported by different agencies and identify the reasons for conflicting reports.

See Plaintiffs' Declarations and Exhibits in C.A. 00-0211, Tab 1, Declaration of Michael D. Maltz ¶¶ 7-11; Tab 2, Second Burnham Decl. ¶¶ 3-5; see also Maltz Decl. ¶¶ 8, 9, 12 (examples of correlation of law enforcement data collected by different agencies).

Respectfully submitted,

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