

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT ON
THE DEPARTMENT’S REVISED EXEMPTION CLAIMS, AND PLAINTIFFS’
CLAIMS CONCERNING NOTICE OF DELAY AND FEE WAIVER**

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Introduction

This case concerns access to databases that track the caseload of the United States Attorneys' Offices and serve as the government's principal source of information for public reports and statistics on federal law enforcement activities, and on civil actions brought by or against the United States. For the past three years, Plaintiffs' requests for access to this data and the progress of this litigation have been thwarted by the Department of Justice. The Department has continually revised its position on what data it considers exempt under the Freedom of Information Act ("FOIA"), and has repeatedly made material errors in producing the data and in its filings with this Court. In July 2002, the Department finally complied with this Court's orders to correct its errors and complete production of the requested database files and associated documentation. However, it has withheld four categories of information that must be released under the FOIA. Accordingly, Plaintiffs urge the Court to deny the Department's Motion for Summary Judgment, to order the Department to release the data that it has improperly withheld, and to enter judgment for Plaintiffs on their claims concerning notice and waiver of fees.

The issues presented by this case fall into three categories.

1. When this action began in early 2000, it presented two issues: (i) whether the deliberative process privilege allows the Department to withhold all data in the case management databases until the end of the fiscal year; and (ii) whether the Department was improperly delaying release of even the year-end data files and related documentation. On May 16, 2000, Plaintiffs sought partial summary judgment against the deliberative process privilege claim and an order directing the Department to promptly release records for which it had not asserted any FOIA exemption. This Court granted part of this relief in a series of orders directing the Department to turn over all the records that have been erroneously withheld. See,

e.g., Doc. No. 76, Order of September 25, 2001. In July 2002, the Department finally complied with these orders by completing production of the information that the agency concedes is not exempt. However, Plaintiffs' challenge to the Department's claim that it may withhold data prior to year end verification has not been resolved. This claim is not addressed in this memorandum because it has been exhaustively briefed in the memoranda and replies on the May 16, 2000 Motion for Partial Summary Judgment, and is ripe for decision.

2. Apart from the deliberative process exemption claim, the Department asserts that other FOIA exemptions permit it to withhold certain fields in the databases at issue. Although the Department has retreated from most of the claims that it made during the past two years, it is still withholding four categories of information that are not exempt. In Part I of the argument in this memorandum, we show that the Department's claims are unfounded and Plaintiffs are entitled to disclosure of the information as a matter of law.

Specifically, Plaintiffs challenge the Department's assertions that: **(A)** the "lead charges" in ongoing criminal investigations are properly withheld under Exemption 7(A) because disclosure could reasonably be expected to alert suspects that they are under investigation; **(B)** disclosure of court docket numbers, case captions and names of litigants 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; **(C)** the names of properties, businesses and other institutions have been properly withheld under FOIA's exemptions for protecting "personal privacy;" and **(D)** entries in the fields for the tracking numbers used by other agencies are exempt from disclosure under FOIA's exemptions concerning personal privacy and "internal personnel rules and practices."

3. Aside from the contested exemption claims, two other legal issues are in dispute: (i) whether the Department failed to provide Plaintiffs with the notices required by the FOIA and the agency's FOIA regulations, 5 U.S.C. § 552(a)(6) and 28 C.F.R. § 16.5(c); and (ii) whether, because Plaintiffs have requested a determination that they are exempt from fees under the FOIA, the Department is entitled to examine all Plaintiffs' records concerning fees and financial support during the past five years. Parts II and III of the argument in this Memorandum show that the Department's notice was improper, that Plaintiffs qualify for the FOIA's limitation on fees, and that the Department's demand that Plaintiffs turn over records identifying their subscribers and financial supporters as a prerequisite to a fee decision is unlawful. Accordingly, the Court should deny the Department's Motion for Summary Judgment with respect to these issues and enter judgment for Plaintiffs.

BACKGROUND

I. The EOUSA Databases

The Executive Office for the United States Attorneys ("EOUSA") maintains databases that track the work of each of the 94 United States Attorneys' Offices (USAOs). These centralized databases contain information on matters such as how many and what types of criminal investigations the IRS or the FBI have referred for prosecution; the outcome of criminal prosecutions (including sentences); and the types and results of civil actions brought by or against federal agencies. See, Tab 2, Second Declaration of David Burnham ¶ 3 ("Second Burnham Decl.") These databases are used by the Department of Justice to make management and policy decisions, to justify budget requests, and to demonstrate the success of law enforcement initiatives. Private researchers use this data 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.¹

The EOUSA databases are created by collecting data from systems in which each of the USAOs records information on civil and criminal cases, investigations, and collection matters. Each month the EOUSA receives data extracted from the case management files of the 94 USAOs and uses this data to compile centralized databases. Each record in these databases pertains to a particular matter or investigation, and the records are divided into “fields” that contain specific elements of data, such as the court docket number, the identity of the agency that referred the investigation, or a code indicating how the case was concluded. At the end of each fiscal year, the EOUSA stores information on criminal, civil and collection matters that were active during the prior fiscal year. Seventh Long Decl. ¶¶ 4, 5.

The database files date back to fiscal year 1974. The centralized databases for which there are FOIA exemptions in dispute are divided into databases for criminal matters, civil matters, and collection matters:²

¹ See, e.g., Letter of Hon. Charles E. Grassley and Hon. Patrick Leahy to John Ashcroft and Robert Mueller, June 14, 2002 (citing TRAC data as basis for inquiring into FBI’s enforcement activities with respect to counter-terrorism and other matters); Fortune Magazine, 145:6, March 18, 2002, *Send Them To Jail* (citing TRAC data on infrequency of prison terms for white-collar crimes); The American Lawyer, March 2000, *Prosecutor Report Cards*, 62; *Borderline Crackdown*, 65; *A New Lease on Law*, 67; *Justice Delayed*, 69 (using TRAC data to analyze criminal justice legacy of the Clinton Administration); William Greider, *Mandatory Minimums: National Disgrace*, Rolling Stone 42, 50 (April 16, 1998) (analysis of impact of sentencing guidelines).

² The Department also produced files from a system known as the “EOUSA-5 system” in response to the requests at issue here. However, on June 28, 2002, the Department abandoned its claims that data from this system was exempt from disclosure under the FOIA and re-released the files in their entirety. See Davis Decl. ¶ 71.

The Department acknowledges that it has not produced all of the criminal, civil and collections files covered by Plaintiffs’ FOIA requests because the EOUSA destroyed data files from these systems before and, in some cases, after receiving Plaintiffs’ request. See, e.g., Defs’

Criminal & Civil Files. The EOUSA has compiled records from the USAOs on criminal and civil matters into a centralized database that was originally known as the Docket and Reporting System or DNR, and is now known as the “Central Files.” The files that the Department refers to as the “Criminal Master Files” and “Civil Master Files” contain information on matters to which the USAOs have devoted at least an hour of investigation, civil and criminal actions, and appeals handled by the USAOs.³ Another set of files, the Criminal and Civil “Immediate Declination Files,” identify matters that the USAOs declined to investigate.⁴

Collection Files. In 1980, the EOUSA began to maintain a separate database on collection matters handled by the USAOs. The collection files for years FY80-85 are identified as the DNR Collections System. A slightly revised system, known as “Central Collections,” was used to compile collection records from the 94 USAOs beginning in FY85. Since 1998, the EOUSA’s central database on collection matters has been known as “TIGAS.”

II. EOUSA’s Response To FOIA Requests for EOUSA Case Management Data.

The Plaintiffs are co-directors of the Transactional Records Access Clearinghouse (“TRAC”), a nonprofit organization affiliated with Syracuse University. TRAC compiles and disseminates comprehensive information about the functioning of federal law enforcement and

Declarations, Tab A, Davis Decl. ¶ 76; Tab D, Garvey Decl. ¶¶ 16, 19, 25. Plaintiffs have challenged the destruction of these records and the Department’s compliance with the laws governing preservation of this data in a separate action pending before this Court, *Long v. Aschroft*, C.A. No. 98-1855 PLF.

³ The Criminal and Civil Master Files encompass three separate files, a “flagged” master, an “unflagged” master and a “delete history” file. The distinctions between these files are not relevant to the contested exemption claims.

⁴ These files include files from FY85-90 that are described as the “civil immediate declination test files.” Davis Decl. ¶ 69.

regulatory agencies. See Declarations and Exhibits Submitted in Support of Plaintiffs' Motion for Partial Summary Judgment, Tab B, Declaration of David Burnham Decl. ¶¶ 2-3 (“Burnham Decl.”). TRAC regularly requests case management data from the EOUSA, analyzes the data, and publishes reports on current federal law enforcement activities. See TRAC website, *available at* <http://trac.syr.edu/>. TRAC also makes data compilations and tools for analyzing data available to journalists, scholars, and members of the public over the Internet, on tape and diskettes. TRAC compiles many data sets on governmental activities, but the data on the activities of federal prosecutors are among the most valuable in TRAC’s reporting and are the most widely used. See Burnham Decl. ¶ 4.

TRAC has requested release of the EOUSA's case management data under the FOIA since 1989. TRAC has also requested data files from the systems used by individual USAOs to create the local data from which the EOUSA’s centralized databases are compiled. See id., Tab A, Declaration of Susan Long Decl.¶¶ 3-10 (“First Long Decl.”).

In responding to these requests, the EOUSA withheld substantial portions of the data, and this gave rise to disputes between TRAC and the EOUSA. These disputes came to a head in 1998, when plaintiffs sued the Department for the release of data from two of the USAOs that provide data to the central EOUSA databases. See Long v. Dep’t of Justice, N.D.N.Y. C.A. No. 98-CV-370. In June 1999, the discussions between Plaintiffs and the Department culminated in the Department acknowledging that many of the fields that it had previously withheld were not exempt under the FOIA. First Long Decl. ¶¶ 7, 8.

By letter dated June 18, 1999, the head of the EOUSA stated that the EOUSA's new position concerning release of the case management data fields would be applied to future requests for data from the EOUSA's central databases. Id. ¶ 8. In October 1999, the EOUSA released a set of centralized database files for FY98 in accordance with the June 18, 1999 letter.

That same month, the EOUSA announced that it also would release to plaintiffs the year-end data for FY74-97 in accordance with the exemption claims articulated in June 1999. Id. ¶ 11.

In October 1999, the Department also qualified its willingness to release EOUSA case management data by formally declaring that the agency 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. In February 2000, Plaintiffs filed the complaint in this action to challenge the Department's claim that only the year-end data is subject to the FOIA.

In March 2000, six weeks after Plaintiffs filed this suit, the EOUSA repudiated the commitments made by the head of the EOUSA in her June 18, 1999 letter and said that it would not release the fiscal year-end data for FY74-97 as it had promised. See First Long Decl. ¶¶ 21, 22 and Exhibit 11. The Department announced that it was developing new guidelines for redaction of the records which would delay release of the data indefinitely. Id. In April 2000, Plaintiffs amended the complaint to challenge the EOUSA's decision to withhold the year-end data, and on May 16, 2000, Plaintiffs moved for an order (i) directing the Department to promptly release records for which no exemption claim had been asserted; and (ii) entering judgment against the Department's claim that exemption 5 of the FOIA allows the agency to withhold database entries in their entirety prior to year-end verification. Plaintiffs subsequently amended the complaint to include requests for more recent EOUSA case management files, so that the database files covered by this action are (i) the year-end files for FY74-FY97 and FY99; and (ii) the data compiled by the EOUSA during the first six months of FY99 and FY00.⁵

⁵ See Davis Decl. ¶¶ 11, 23, 27, 44. The requests at issue in this action also include requests for certain documentation concerning the databases, but Plaintiffs are not challenging the Department's decision to withhold portions of this documentation under 5 U.S.C. § 552(b)(5), and the Department's only other exemption claim with respect to the documentation

The Department implemented its decision to repudiate the June 18, 1999 letter by asserting exemption claims for fields and entire records that the agency had previously acknowledged should be disclosed to Plaintiffs. During the past two years, the Department has retreated from these claims in the course of filing three motions for summary judgment, each of which was withdrawn or stricken because it was riddled with errors. See Doc. No. 112, Memorandum Opinion and Order of April 30, 2001 (denying motion to supplement third motion for summary judgment and directing the Department to file corrected motion). In repudiating the June 18 letter, advancing new exemption claims, and then retreating from those claims, the Department has come almost full circle over the past three years. The Department's current position on the application of FOIA to the FY74-FY97 case management data is identical to the position the head of the EOUSA endorsed in June 1999. See Davis Decl. ¶¶ 8, 9. With respect to the data from FY99 and later periods, the Department's position is identical to its June 1999 position with one exception: it now claims that "lead charge" field in certain records of the criminal master files is exempt from disclosure in these files. Id.

A substantial portion of the Department's Combined Memorandum in support of its Motion for Summary Judgment is devoted to rationalizing its shifting positions and error-filled production of records from June 1999 to July 2002. The Department's account includes numerous statements that are inaccurate and mischaracterize events. However, these inaccuracies are not relevant to the issues currently before the Court. Plaintiffs do not challenge the Department's latest search for responsive records and the Department has corrected prior errors by redacting the files roughly in accordance with its exemption claims (although the Department's redactions are still inconsistent with its exemption claims in some respects, see

records is derived from its claim that all names in the databases, including names of corporations and property, are covered by 5 U.S.C. § 552(b)(6) and (7)(C).

notes 7, 12). The principal remaining issues are the validity of the exemption claims that remain now that the Department has abandoned its earlier positions.

Consequently, Plaintiffs will not revisit here details of the errors that led to multiple re-releases of database files and previously undisclosed records, and to the Department submitting three summary judgment motions that erroneously claimed that the agency had completed a thorough search and fulfilled its obligations under the FOIA. At this stage, it is sufficient to observe that the three year delay from the end of the 1998-99 litigation until the Department released copies of the FY74-97 files in accordance with the position that it announced in that litigation illustrate how an agency can thwart access to information that it has conceded is subject to release under the FOIA by recanting its concession and asserting meritless exemption claims.

III. Disputed FOIA Exemption Claims.

Plaintiffs challenge the Department's remaining claims with respect to four categories of information:

A. Exemption 7(A) Claim for Lead Charge Entries from FY99 and Later Years.

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). The Department claims that, for current investigations that have not resulted in a court filing, even though the name of the target of the investigation is not disclosed, the lead charge field is exempt under Exemption 7(A) because its disclosure could reasonably be expected to compromise a current investigation. The Department theorizes that, for some lead charges, it is possible that a suspect who was unaware of any investigation could be tipped-off that the

government was investigating his or her crime by examining the lead charge entries and the fields that identify the location of the United States Attorneys' Office that is responsible for the investigation. Plaintiffs maintain that this claim is premised on unfounded and unrealistic speculation. For reasons set forth in detail in the declaration of statistical expert Michael Maltz, the lead charge and investigating office entries do not give sufficient information to permit a suspect to expose an otherwise secret investigation.

B. Personal Privacy Claim for Court Docket Information.

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. Nonetheless, the Department has redacted this information from the EOUSA case management databases on the grounds that disclosure would result in an “unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6), (7)(C). Plaintiffs maintain that the Department’s claim is untenable because the information is not only in the public record, but is disseminated in databases. This issue affects the Department’s withholding of the following fields:⁶

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

C. Personal Privacy Claim for Entries That Do Not Identify Individuals.

For a substantial number of the case management records, the subject of the record is not an individual, but a business, a governmental unit, an organization, or an item of property

⁶ The file name field does not appear in the earliest criminal and civil master files. See Seventh Long Decl. at 4 n.1.

named in a forfeiture or *in rem* proceeding. In the recent years, the USAOs database systems have included codes that allow the EOUSA to identify records in which the entity that is the subject of the record is not an individual. Nonetheless, the Department is withholding the names of businesses, property, governmental bodies and other entities that are not persons under the FOIA's "personal privacy" exemptions. Plaintiffs maintain that the personal privacy exemptions do not apply to these non-individual entries because they are not persons. This issue affects information in the following fields and data files where the codes that correspond to businesses or property are available:

Criminal Master Records	midyear FY99- midyear FY00	Business or Property Code	defendant name court number (i.e. docket number) file name (i.e. case caption)
Civil Master Records	midyear FY99- midyear FY00	Business or Property Code	litigant name court number (i.e. docket number) file name (i.e. case caption)
Criminal Immediate Declination File	midyear FY99- midyear FY00	Business or Property Code	suspect
Civil Immediate Declination File	FY99		name
Collections - TIGAS	midyear FY99- midyear FY00	Corporation or Property Forfeiture Code	court number (i.e. docket number) name-first, name-last Address_1 (street address)
Collections - Central	FY85-FY97	Property Forfeiture Code	debtor last and first name court docket number street address

D. Agency Numbers Withheld Under Exemption 2 and Personal Privacy Exemptions.

Many of the investigations in the EOUSA databases involve referrals from other agencies, and the case management records contain the numbers used by these referring

agencies to identify the case. The Department has withheld these numbers based on two alternative theories: (1) these agency tracking numbers are "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2); and (2) local offices sometimes use this field to record social security numbers or names and, therefore, all of the entries are properly withheld under the FOIA's privacy exemptions.

Plaintiffs maintain that Exemption 2 is not applicable because the agency numbers are not "internal personnel rules and practices" and, moreover, there is a legitimate public interest in disclosure of these records to reconcile conflicts between data reported by the EOUSA and the referring agencies. FOIA's personal privacy exemptions may warrant removing social security numbers in the rare instances in which they appear, but they do not warrant withholding all entries in the agency numbers fields, which is what the Department has done here. The Department has already placed the agency numbers from the criminal and civil master files for FY74-89 in the public domain (although the Department redacted these fields from the files delivered to TRAC in July 2002). Consequently, this issue affects the following fields and data files:

Criminal Master Records	FY90 and later	investigative agency file number program agency file number
Civil Master Records	FY90 and later	agency file number
Criminal Immediate Declination File	FY86 and later	agency file number
Civil Immediate Declination File	FY85-90, FY94-99	agency file number
Collections - DNR & Central	FY80-FY97	agency number
Collections - TIGAS	midyear FY99 and later.	agency file number

III. Plaintiffs' Requests for Fee Waiver.

The FOIA provides that an agency may only charge fees for duplicating costs “when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media.” 5 U.S.C. § 552(a)(4)(A). Each agency’s procedures for assessing fees must be set forth in published regulations. Id. From 1989 through 1999, the Department never questioned that TRAC is eligible for limitation of fees. First Long Decl. ¶ 22.

However, during the same week that the Department repudiated the EOUSA Director’s June 18, 1999, letter, the EOUSA, for the first time, questioned TRAC’s eligibility for FOIA’s limitation on fees and stated that TRAC must provide the following information within the next 30 days: (i) “any and all records for the previous five years regarding all fee schedules utilized by TRAC,” (ii) “any and all records of any fees proposed, charged and/or received by TRAC in the previous five years,” and (iii) “any and all records regarding the sources of funding for TRAC, including but not limited to any grants, stipends, and private or commercial funding sources.” Plfs’ Exhibit 14.

This request is unprecedented. The Department’s published regulations do not require such documentation, and the EOUSA acknowledges that it has not demanded such documentation from any other fee waiver applicant. Answer to Second Amended Complaint ¶ 34. The timing and sweeping scope of the EOUSA’s request indicate that it is designed to inhibit TRAC’s use of FOIA.

Plaintiffs informed the EOUSA’s that they would not provide all of the records that the agency demanded because they were irrelevant. See Plfs’ Exhibit 15 at 1. However, Plaintiffs submitted an eight-page letter to the agency in April 2000, explaining why TRAC qualifies

under the relevant statutory provisions. Id. In May 2000, Plaintiffs provided additional information on TRAC's past and intended use of the EOUSA case management records, and the fees and foundation grants associated with TRAC projects that use the EOUSA case management records. Plfs' Exhibit 16. Both letters were accompanied by exhibits concerning TRAC's activities and fees.

The EOUSA did not respond directly to these letters but announced in the summary judgment papers filed in this action in February 2001, April 2001, and November 2001, that the agency would not render a determination on TRAC's fee status because Plaintiffs had not provided the documentation that the Department needed to make a determination. See, e.g., Declaration of Suzanne Little ¶ 95 (filed Nov. 19, 2001). The Department asserted that the EOUSA had properly "specified the information it needs" to make a decision on TRAC's fee request and, because EOUSA would not make a determination without this information, Plaintiffs' challenge was not "ripe." See, e.g., Combined Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Partial Motion for Summary Judgment at 55, 57-58 (Nov. 19, 2001). The Department's latest summary judgment motion does an about-face; the Department now asserts that the fee issue is "moot," because "[t]o date, EOUSA has not charged Plaintiff [sic] any fees for the records released in response to" FOIA requests that are at issue in this litigation. Davis Decl. ¶ 82.

ARGUMENT

I. THE DEPARTMENT HAS FAILED TO PROVE THAT ITS EXEMPTION CLAIMS ARE VALID.

"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 Dep't of State, 818 F.2d 71, 76 (D.C. Cir. 1987). In evaluating the government's claims that

information is properly withheld, the statutory exemptions “must be narrowly construed” in favor of disclosure. Department of Air Force v. Rose, 425 U.S. 352, 361 (1976). FOIA’s strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents. United States Dep’t of State v. Ray, 502 U.S. 164, 173 (1991).

With respect to the four categories of information discussed below, Plaintiffs are entitled to summary judgment because the Department has not sustained this burden. To the contrary, the Department has misapplied FOIA’s exemptions concerning law enforcement investigations and personal privacy by relying upon them to withhold information that does not fall within these provisions as a matter of law.

For example, the government’s interest in protecting ongoing investigations is adequately protected by redacting the names and other entries that directly identify suspects who are not aware that they are under investigation. The Department has improperly extended this Exemption to the “lead charge” entries based on speculation that indirect identification of the unnamed suspect is possible from these entries. This speculation is unfounded, and the lead charge information and investigating office information is so general that it cannot be used to identify specific individuals.

Similarly, while FOIA’s exemptions concerning personal privacy cover entries that would disclose private information about individuals, the Department has improperly invoked these exemptions to withhold information that is not “private” because it is public and readily available, and information that is not “personal” because it does not identify an individual, but a business, a governmental unit or an item of property. The Department’s claim that agency tracking numbers are exempt fails because Exemption 2 simply does not apply to this database, and the occasional presence of social security number entries cannot justify the Department’s decision to withhold all entries, especially where most entries contain no personal information.

A. Disclosure of The Lead Charge Field Is Not Reasonably Expected To Impair Law Enforcement Investigations.

The lead charge field contains the title and section number of the United States Code (e.g., 18 U.S.C. 1001) that the prosecutor has tentatively identified as the lead charge for the investigation. Consequently, this field provides valuable information for researchers about how the government, including law enforcement agencies such as the FBI, DEA and INS, set priorities, and how these priorities may differ from the criminal prosecution priorities of the USAOs. For example, if a researcher is seeking to examine how the number of drug offense investigations compares to the number of investigations concerning terrorism-related crimes, or the trends in such investigations over time, the lead charge field provides critical information. Seventh Long Decl. ¶ 9.

The Department has actively disseminated databases with the lead charge information for at least 20 years. In this litigation, however, it makes a novel claim that Exemption 7(A) justifies withholding all entries in the lead charge field for ongoing investigations that do not involve charges in court.⁷ 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. Defs’ Declarations and Exhibits, Exhibit I, Wainstein Declaration ¶¶ 4, 7; Combined Memorandum at 57-58. However, the Department hypothesizes that a suspect may be able to indirectly identify a record as pertaining to him or her by examining two items of information: (i) the lead charge entry and (ii) the fields that identify

⁷ The Department has limited the lead charge withholdings to data files from FY99 and FY00. The practical reason for this limitation appears to be that the Department could not devise a means to identify records in the pre-1999 files that correspond to current investigations. Tab A, Davis Decl. ¶ 112. Because of this arbitrary date cut-off, the Department is withholding the lead charge field in the FY99 file for matters in which it has already disclosed the lead charge because records concerning the same investigation appear in the FY98, FY97, or earlier files, and the investigation has not closed or culminated in a court proceeding.

the location of the United States Attorneys' Office that is responsible for the investigation. Combined Memorandum at 47-48. It asserts that this might occur where the lead charge identifies crimes that are "relatively infrequent" or because of "the size of the location." Wainstein Declaration at ¶¶ 4, 5, 7. The Department then states that it has not identified the subset of lead charge entries for which such indirect identification would be possible. Instead, it is withholding all lead charge entries for all cases in the investigative stage -- regardless of how frequently they appear -- on the basis that identifying the entries that fit its hypothesis would involve "some research" and "inherent subjectivity of the assessment." Combined Memorandum at 59.

The Department's claim that this lead charge information is exempt must be rejected because it is based on speculation and contradicts statistical standards for preventing indirect identification. Exemption 7(A) provides for withholding information compiled for law enforcement purposes if the information "could *reasonably be expected* to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (italics added). Thus, to withhold information under this exemption, an agency must not only identify an ongoing law enforcement investigation, but also must show how releasing the information is "reasonably expected" to interfere with the investigation "in a palpable, particular way" with evidence that is not conclusory or speculative. North v. Walsh, 881 F.2d 1088, 1100 (D.C. Cir. 1989); see also City of Chicago v. Dep't of the Treasury, 287 F.3d 628, 635 (7th Cir. 2002) (citing Campbell v. Department of Health and Human Services, 682 F.2d 256, 265-66 (D.C. Cir. 1982)).

The Department's claim does not satisfy this standard. To the contrary, this claim rests on the unreasonable premise that a criminal who is concerned about being caught by federal authorities will not simply try to avoid detection, but will monitor government databases and wait until the data indirectly identifies him or her as the target of the investigation before taking

steps to avoid detection. See Maltz Decl. ¶ 24. Even if one accepts the Department’s far-fetched assumption that such persons exist, the Department’s claim fails because statistical standards and the testimony of statistical expert Michael Maltz show that the lead charge information cannot be used to identify the target of a particular investigation. Independent of this evidence, however, the Department’s own articulation of this claim shows that it does not satisfy the statutory standard because it is based entirely on speculation.

Despite a history of releasing this information that spans over 20 years, the Department does not point to any concrete evidence to support its claim. The Department has released the “lead charge” information to the public since at least 1978. Seventh Long Decl. ¶ 10. Prior to this litigation, EOUSA released copies of case management data from FY74-98 to TRAC under the FOIA without making any claim that the lead charge field should be withheld, and it has made all the lead charge information from FY74-FY89 available for the asking at the National Archives. Id. ¶¶ 11, 12. Under the Federal Justice Statistics Program (run by the Bureau of Justice Statistics), the Department has disseminated data derived from the FY83-98 EOUSA case management data with the lead charge field intact. Id. ¶ 13.

Despite this wealth of experience, the Department does not point to even a single example of a case in which a suspect who was unaware of a pending investigation was tipped-off, or could have been tipped-off, by examining lead charge and location information that actually appeared in the database. Instead, the Department conjures up imaginary combinations. See Combined Memorandum at 48. These imagined combinations miss the mark because they do not reflect the data that is actually in the database. See below at 23. More importantly, unfounded hypotheses about such conjectural examples cannot satisfy the Department’s burden of proving that disclosure of the lead charge information “could reasonably be expected” to interfere with an ongoing law enforcement investigation.

The Seventh Circuit recently rejected a remarkably similar Exemption 7(A) claim in City of Chicago v. Dep't of the Treasury because the government's theory was "based solely on speculation." 287 F.3d at 635. The requester in that case sought disclosure of Bureau of Alcohol Tobacco and Firearms ("ATF") databases that contained information compiled from law enforcement agencies on gun sale transactions. 287 F.3d at 631-32. The ATF claimed that Exemption 7(A) was applicable to certain information because senior ATF officials testified that "if an individual pieced any withheld information together with what has already been disclosed, that individual might deduce that a particular investigation is underway." Id. at 634. The Court of Appeals not only found that these declarations were unpersuasive, but it concluded that the district court properly rejected the ATF's assertions on summary judgment. "ATF's witnesses failed to testify as to any specific instances in which disclosing the type of records requested did result in interference with any proceeding or investigation," the Seventh Circuit observed. Id. at 635. "ATF's hypothetical scenarios do not convince us that disclosing the requested records puts the integrity of any possible enforcement proceedings at risk." Id.

This Circuit reached a similar conclusion in a FOIA Exemption 6 case in which the government claimed, as the Department does here, that someone might be able to determine the subject of the records even though names and other identifying information were not disclosed. In Arieff v. United States Dep't of Navy, 712 F.2d 1462 (D.C. Cir. 1983), the agency withheld a list of prescription drugs on the theory that it was possible that, for some of the drugs on the list, someone with special knowledge might be able to pick-out the individuals receiving the drugs from within a group of over 600 people. Id. at 1466. The Court of Appeals first observed that the agency's claim that *some* drugs might carry this risk could not justify withholding the names of *all* of the drugs because "the exemptions of the FOIA do not apply wholesale" and the statute expressly requires that segregable information -- in this case the drugs that could not lead to

identification -- must be released. Id. at 1467. The Court also concluded that the agency claim could not be upheld even for selected drugs because its theory that disclosure of a drug could provide the “missing link” that allowed a person with knowledge from other sources to identify an individual was “fanciful,” and the FOIA did not permit the agency to withhold the information based on theoretical possibilities. Id. For the same reason, the Department's hypothetical theories concerning the possibility that a lead charge entry could lead to disclosure of the subject in a particular investigation are “fanciful.” Such speculation cannot support summary judgment in the agency’s favor, or provide a basis for defeating summary judgment for plaintiffs.⁸

Three specific considerations show that the Department’s new theory for withholding the lead charge is not only speculative, but wrong: (1) the population of individuals who could be the subject of a database entry is too large; (2) the lead charge entries themselves are not sufficiently specific; and (3) the Department’s assertion that *other* information could lead to a suspect realizing that a particular record relates to his or her crime does not justify redacting the lead charge entries.

1. The Population Of Potential Suspects Is Not Sufficiently Limited To Permit Indirect Identification From The Lead Charge and Office Information.

⁸ Indeed, in the context of the FOIA’s privacy exemptions, courts have repeatedly reached the same conclusion as Arieff, and have rejected government claims that the risk of indirect identification justifies withholding information that did not identify the individuals who were the subject of the records. See Norwood v. FAA, 993 F.2d 570, 574-75 (6th Cir. 1993) (rejecting argument that protecting privacy required “excluding from disclosure any and all fragments of information that might assist a diligent researcher in identifying a person”); Dayton Newspapers, Inc. v. Dep’t of Air Force, 107 F. Supp. 2d 912, 919 (S.D. Ohio 1999) (rejecting argument that disclosure of malpractice amounts from database could lead to indirect identification of physicians as “much too speculative.”); Citizens for Environmental Quality, Inc. v. USDA, 602 F. Supp. 534, 538-39 (D.D.C. 1984) (rejecting agency’s claim that medical test data was properly withheld because subjects might be indirectly identified where agency failed to prove identification was possible).

The Department's speculation is without merit because the number of individuals who could be the unidentified target of a given investigation is too large. The Department's concern about indirect identification is regularly confronted by Bureau of the Census, the National Center for Health Statistics, and other experts in statistical methodology. For example, the Bureau of the Census must ensure that the data that it releases about size of household, age, ethnicity, or similar characteristics, does not permit identification of individuals who have unusual characteristics. See Maltz Decl. ¶ 17-18. The Bureau of the Census' benchmark for protecting personal privacy in such data provides that the data generally may be released if it does not contain geographic codes that identify areas of less than 100,000 persons. Id. ¶ 17. Other federal agencies, including the Bureau of Justice Statistics, employ this same standard in determining whether data can be made public.⁹

The EOUSA case management database entries do not include geographic identifiers that would narrow the population of individuals who might be identified in a record to 100,000. Indeed, the case management records do not include any codes with information on the location of the suspect or the location of the offense that is being investigated. Seventh Long Decl. ¶ 14.

⁹ Federal Committee on Statistical Methodology, *Report on Statistical Disclosure Limitation Methodology*, 29, 32, 38 (Statistical Policy Working Paper 22, May 1994), available at, <http://www.fcs.gov/working-papers/wp22.html>; see also 65 Fed. Reg. 82710-11 (2000) (describing Bureau of the Census studies and standards); Jabin, *Statistical Disclosure Limitation Practices of United States Statistical Agencies*, 9 J. of Official Statistics 2: 427, 429, 431, 436, 442-43, 453 (1993). These standards are supported by studies that show that, at a certain point, increasing the size of the population covered by a data set does not significantly decrease the percentage of unique records. See Greenberg and Voshell, Bureau of the Census Statistical Research Division Report, *The Geographic Component of Disclosure Risk for Microdata* (Oct. 1990). The Department of Health and Human Services has concluded that these studies support the conclusion that the privacy of health data with a relatively low number of variables is adequately protected by permitting geographic identifiers that define populations as low as 20,000. See 65 Fed. Reg. at 82712. Where a database contains a large number of variables that increase the risk of indirect identification (such as income surveys), the standards require populations of a least 250,000. Maltz Decl. ¶ 17.

The only “location” information provided in the records is the location of the United States Attorneys’ Office that is responsible for the investigation. See Defs’ Exhibit 0, Field 1 (DIST); Plfs’ Exhibit 4, pages B-3 (Branch).

Even if one assumed that the district in which the investigating office is located will usually correspond to the district in which the offense occurred on the theory that the Federal Rules generally require that charges be brought in this venue, see Fed. R. Crim. P. 18, this assumption would not limit the population to a defined geographic region. The population of individuals that could be the target of an investigation assigned to a particular office would include anyone who had been in, or had passed through the district long enough to commit the offense – a population that would be too large and uncertain for someone to identify the target simply because the lead charge field had been disclosed. The populations within the jurisdiction of the USAOs are generally over 1 million and the districts with the smallest populations are still close to a half a million. See Maltz Decl. ¶ 18.

The EOUSA offers no basis for disregarding these statistical standards, or believing that indirect identification is even remotely possible given that the case management data does not indicate that the suspect is within a specific geographic population. Instead, the Department relies on a hypothetical in which it assumes that “there is only one major drug ring in a city,” and the entry in the criminal master files lists the lead charge as 21 U.S.C. § 848 (the “continuing criminal enterprise” statute). Combined Memorandum at 48. This hypothetical is flawed because it is not consistent with the information that appears in the EOUSA data. Nothing in the case management database identifies the city in which the suspect or a drug ring is located. See Seventh Long Decl. ¶ 14. The district of each USAO covers a population that is at least the size of a large city (such as Washington, D.C.) . The fact that a case management record might reveal that the prosecutors responsible for investigating crimes in a city the size of

Washington are investigating possible drug enterprises under 21 U.S.C. § 848 would hardly be remarkable and such information would not give suspects a special means to interfere with the investigation.¹⁰

2. Criminal Statutes Are Too General To Permit Indirect Identification.

Even if the Department could overcome the fact that the potential population of suspects is too large, disclosure of the lead charge could reasonably be expected to interfere with the investigation only if the lead charge provided enough details to permit a suspect to identify himself or herself as the target of the investigation. The lead charge entries do not disclose such details.

Of course, disclosure of the lead charge entries will reveal that a given United States Attorneys' Office is investigating the possibility of bringing charges under the federal statutes concerning racketeering, mail fraud, drug conspiracies, and other offenses. But such disclosures cannot justify withholding under Exemption 7(A), because the United States Attorneys' Offices already disclose -- indeed, publicize -- that they are investigating such crimes. The Department's 7(A) claim is reasonable only if a particular statute listed in the EOUSA databases described the conduct covered by the statute so precisely that it effectively identified the suspect. See Maltz Decl. ¶¶ 19, 23. The statutes, however, describe general conduct, not identifying details. For example, the general false statements statute, 18 U.S.C. § 1001, the

¹⁰ The Department identifies three fields as relevant location information: district, branch and the initials of the Assistant United States Attorney. However, nothing in the data indicates that investigations are assigned to a particular branch only if the suspect or the offense is located near that branch, and the initials of the Assistant United States Attorney do not provide any information about location. See Seventh Long Decl. ¶ 15 (AUSA initials are not consistently associated with particular branches). Moreover, even if the branch codes indicated that the suspect under investigation was located in a particular subdivision of a district (and they clearly do not), the appropriate remedy would be to redact these geographic codes, not to redact the lead charge information. See Maltz Decl. ¶ 26.

conspiracy statute, 18 U.S.C. § 371, and the continuing criminal enterprise statute cited in the Department’s example above, describe a range of conduct and use conjunctive clauses to list several types of actions that can be charged under the statute. See id. ¶¶ 20, 21. Consequently, a citation to such statutes does not provide enough information about what is being investigated to reasonably expect that suspects will be able to identify themselves as targets of a given investigation. Id.

The Department concedes that most statutes do not support its claim, but asserts that its hypothesis is valid for “relatively infrequent offenses, such as certain mail fraud schemes.” Combined Memorandum at 48. The “certain mail fraud schemes” are never specified. Examination of some of the fraud statutes that are listed less frequently than others does not support the government’s claim. Even the statutes that concern offenses directed at distinct federal interests, see 18 U.S.C. § 1003 (demands against the United States), or specified federal programs, see id. § 1010 (fraud in HUD programs), list the conduct that may be charged with conjunctive clauses that describe several types of conduct that fall under the statute.

Moreover, unlike categories used in census surveys, lead charges are not designed to be mutually exclusive; a suspect’s offense could be categorized as a possible violation of more than one statute. See Maltz Decl. ¶ 22. For example, prosecutors investigating conduct that might fall under 18 U.S.C. § 1003 might also choose to list 18 U.S.C. § 1001 as the potential charge. A suspect trying to identify investigations from database entries would have no way of knowing which of an array of possible statutes was chosen as the lead charge. Consequently, the fact that one statute appears infrequently does not help in identifying a specific individual from the lead charge if that individual’s conduct could be categorized under several different statutes.

3. Information in Other Fields Does Not Justify Withholding Lead Charge Entries.

The Department's Motion also suggests that the lead charge fields are properly withheld under Exemption 7(A) because fields that reveal information *other than* the lead charge and location of the investigation may indirectly alert the target of an investigation that the record concerns his or her conduct. See Combined Memorandum at 59; Wainstein Decl. ¶¶ 4, 7 (referring to "information in other fields" and "other particularized information in that record.") The hypothetical examples offered to support this theory underscore the speculative nature of the Department's claim and, even if they were not hypothetical, would only provide a justification for withholding the other information – not the lead charge entries.

The Department hypothesizes that a suspected embezzler could identify an investigation pertaining to him/herself if, in addition to the lead charge and location of the investigation, a case management record also listed "a specific amount" in the field labeled "estimated dollar loss." Wainstein Decl. ¶ 5. There are two problems with this hypothetical. First, it only supports withholding information under Exemption 7(A) if and where such a combination of entries exists. The estimated loss field is empty for 93.1% of the entries from which the lead charge information has been redacted, and the few entries that do appear show that, as the field name implies, the database generally does not provide a specific amount, but an estimate with imprecise, rounded numbers. Seventh Long Decl. ¶ 16. Second, if such record existed, the remedy would be to redact information from the "estimated dollar loss" entry. Indeed, withholding the lead charge in this example would not prevent the suspected embezzler from

identifying the investigation because it would still reveal that a particular jurisdiction was investigating a crime involving the loss of a specific dollar amount.¹¹

Finally, the Department suggests 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 do not justify the lead charge withholdings here because these fields contain no information in over 97% of the records in which the EOUSA has withheld the lead charge. See Seventh Long Decl. ¶¶ 17, 18. Moreover, entries in these fields identify events that will have already alerted the suspect to an investigation. 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 Dep’t 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). Where the suspect is already aware of the investigation, the government cannot show that disclosure of the lead charge “would, in some particular, discernible way, disrupt, impede, or otherwise harm the enforcement proceeding.” North v. Walsh, 881 F.2d at 1100.¹²

¹¹ Because the risk of identification is created by the specificity of the amount, redaction of the entire entry is not necessary. Redaction of part of the entry would eliminate the specificity, defeat identification, and conform to the methods commonly used to prevent indirect identification in data records. See Maltz Decl. ¶ 26.

¹² An additional flaw in the Department’s Exemption 7(A) claim is that the Department has redacted lead charge from records that show that the suspect is already aware of the USAO’s investigations. For example, other fields in the case management records show that the Department is withholding lead charge information in criminal cases in which the defendant has negotiated a pre-trial diversion agreement to resolve the potential charges. See Seventh Long Decl. ¶ 19. In these records the Department is still withholding information that does not fall within its own interpretation of Exemption 7(A).

B. The Department Has Improperly Withheld Court Docket Information That The Government Publicly Disseminates In Electronic Databases.

The Department has withheld a long list of fields on the basis that the information in these fields identifies “defendants or other individual parties and/or personal information relating to those parties.” Davis Decl. ¶ 94 (listing fields withheld on this ground). To justify withholding these entries, the Department cites Exemptions 6 and 7(C), which exempt information if disclosure would result in a “clearly unwarranted” or “unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6), 7(C).

Plaintiffs do not contest the Department’s decision to withhold private information about individuals who have *not been publicly charged* with any offense. But the Department is also claiming that the privacy exemptions extend to information on individuals who have been publicly charged or named in a civil action and is withholding three elements of information that are readily available to the public in these circumstances: the case number assigned by the court, the caption of the case, and the name of individual or entity opposing the government in the litigation.¹³

The government disseminates this information in databases on federal court litigation. As part of the Public Access to Court Electronic Records (PACER) service, the Administrative Office of the United States Courts makes available a national “U.S. Party/Case Index” that allows anyone with access to the Internet or a modem to search the judiciary’s index of cases by case number, filing date, or the name of a litigant/defendant, and obtain a list of cases that match the search criteria. The PACER database discloses the names of the litigants, the court number,

¹³ These fields are identified in the database and the Department’s papers as the COURT NUMBER, FILE NAME, DEFENDANT NAME (criminal) and LITIGANT NAME (civil) in the criminal and civil master records. See Defs’ Exhibit O, Fields # 5, 23, 59, 163, 179, 194. In some actions, the opposing litigant is not an individual, but an item of property subject to forfeiture or a business. See below.

the names of the parties, and the nature of the civil action or the criminal offense for each case. See Plfs' Exhibits 10, 11. For federal court cases during fiscal FY74-89, the Department of Justice made this information available to the public over a decade ago when it deposited with the National Archives electronic copies of the EOUSA case management data for these years. In this National Archives copy of the data the Department did not redact the court numbers and litigant/defendant names. Seventh Long Decl. ¶ 6.a.

Because this court docket information is already publicly available, the Department's claim that withholding it is necessary to prevent an "unwarranted invasion of personal privacy" is untenable. Exemptions 6 and 7(C) apply only if "disclosure would compromise a substantial, as opposed to a *de minimus*, privacy interest." National Association of Retired Federal Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990) ("*NARFE*"). "If no significant privacy interest is implicated (and if no other Exemption applies), FOIA demands disclosure." Id. Three considerations show that disclosure of the court docket information in the EOUSA civil and criminal databases does not constitute an unwarranted invasion of privacy.

First, neither the law nor practical experience recognize disclosure of this information as an invasion of privacy. Judicial records are subject to a well-established common law right of public access. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). The docket information at issue has long been freely available and widely circulated, and litigants are permitted to shield their identities only upon making an extraordinary showing. See, e.g., Southern Methodist University Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707 (5th Cir. 1979.) The common law right of access and longstanding practice of disclosing the identities of parties to litigation forecloses any credible privacy claim.

This conclusion is underscored by the Judicial Conference's recent study on whether it was appropriate to restrict public access to electronic filings in the interests of privacy. Plfs' Exhibit 13, "Report on Privacy and Public Access in Electronic Case Files" (June 26, 2001). The study and the Judicial Conference's final decision concluded that privacy concerns did not warrant restricting electronic access records filed in court, with a few narrow exceptions (e.g., sealed materials and social security numbers). Id. A-6 to A-10 and Plfs' Exhibit 12. The Judicial Conference did not recognize any privacy interest in restricting public access to the minimal information at issue here.

Second, because the information is already readily available to the public, the EOUSA's release of the same information cannot cause an impairment of privacy. For example, in Avondale Industries, Inc. v. NLRB, 90 F.3d 955 (5th Cir. 1996), the Sixth Circuit rejected the agency's claim that the disclosure of marked voting lists would cause an unwarranted invasion of privacy because the information upon which the agency's claim was based, the voters' names and addresses, was already available to the public in unmarked lists. Id. at 961; accord National Western Life Ins. Company, 512 F. Supp. 454, 461 (N.D. Tx. 1980) (privacy concerns do not justify withholding names and addresses of government employees because this information is routinely published). In this case, the Department's Exemption 6 and 7(C) claims are based on the premise that disclosure of these database would impair privacy because it would make it possible to perform a computer search to identify every court action that has been brought against a given defendant "in any district court since 1974." Combined Memorandum at 43-44 & n.9. However, the Department of Justice made it possible to perform such a search over a decade ago when it first made electronic copies of the FY74-FY89 data available *with the court numbers and litigant names*, and the PACER U.S. Party Index makes it possible to conduct such searches in the latest court records. Thus, even if the Department's claim that privacy interests

are infringed when such information is made available in a database had merit, the release of the data under the FOIA is not the cause of this infringement. 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 287 (May 2000 ed.)

Third, while the EOUSA’s decision to withhold this information does not serve any privacy interests, it does prevent the use of this information to evaluate the government’s conduct. Although both PACER and the EOUSA case management data both contain the court number and litigant information, the EOUSA data contains additional fields with details about the government’s actions that is not available in the PACER data, such as the identity of the law enforcement agency that initiated the investigation and referred the matter for prosecution. Disclosure of the EOUSA data with the identity of the litigants allows researchers to evaluate the relationship between the litigant’s identity and the government’s action. See Second Burnham Decl. ¶ 6-8. Moreover, disclosure of the court numbers and litigant names is in the public interest because it allows researchers to compare the EOUSA’s information with the data compiled by the courts to identify differences and expand the possible topics of inquiry about the civil and criminal litigation process. See Maltz Decl. ¶ 13; Seventh Long ¶ 40.

In a footnote, the Department asserts that the fact that the information is available in court docket headers is irrelevant under United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). Combined Memorandum at 43 n.9. The Department misconstrues the Supreme Court’s decision by ignoring the qualifications explicitly set forth in the opinion.

First, Reporters Committee emphasized that the information at issue was, as a practical matter, unavailable. The case involved a request for a “rap sheet” in which the FBI had

compiled information on an individual's arrests and other criminal history from state and federal authorities nationwide. The Court concluded that, even if individual entries in the rap sheet had been made available to the public at the various jurisdictions at some time, there was still a privacy interest in the FBI's compilation because of the "practical obscurity" of information that could only be obtained by traveling throughout country and making a "diligent search of courthouse files, county archives, and local police stations." Id. at 762, 764; see Avondale Indus., 90 F.3d at 961 (Reporters Committee distinguished because it concerned compilation of hard-to find information). No such practical obscurity is present here because the docket headings are readily available in electronic compilations. Consequently, under the definition of "private" cited in Reporters Committee -- namely, information is "private" if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public," 489 U.S. at 763-64 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1804 (1976)) -- rap sheets are "private," but the court docket information at issue here is not "private" because it is "freely available to the public."

Second, the Department's contention that Reporters Committee holds that the disclosure of information about law enforcement actions against an individual is always a significant invasion of personal privacy is erroneous. To the contrary, the Supreme Court concluded that the information in a rap sheet raises privacy concerns because it is hard to obtain and because there is a "web of federal statutory and regulatory provisions that limits the disclosure" of this information. 489 U.S. at 765. No comparable restrictions exists for the court docket information; the common law tradition of access to this information and the active dissemination of this data support the conclusion that its disclosure does not constitute a significant invasion of privacy.

Finally, in Reporters Committee the Supreme Court emphasized that “the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records,” and the “response to this request would not shed any light on the conduct of any Government agency or official.” Id. at 773. These conditions are not are present here. Unlike the rap sheets, the EOUSA case management records primarily reveal information about the activities of the federal agencies and the Department’s decision to withhold the court docket information within the database handicaps the ability of researchers to evaluate whether the identities of the parties opposing the government in civil and criminal actions helps explain the government’s conduct in these cases. Thus, even if the widespread availability of the court docket information does not render the privacy interests so minimal that balancing is unnecessary, when the public interest in access to this information is weighed against the privacy interest, “the scale tips in favor of disclosure.” City of Chicago, 287 F.3d at 637 (rejecting claim that names and addresses in ATF database may be withheld under Exemption 7(C)); accord Avondale Indus., 90 F.3d at 961 (public interest in monitoring agency actions favors disclosure of names and addresses). Moreover, even if the balance was close -- and here it is not -- the statutory language providing that withholding is permitted only if the effect on privacy is “unwarranted” or “clearly unwarranted” requires that the court “tilt the balance in favor of disclosure.” Getman v. NLRB, 450 F.2d 670, 674 (D.C. Cir. 1971) (exemption 6); Congressional News Syndicate v. U. S. Dept. of Justice, 438 F. Supp. 538, 542 (D.D.C. 1977) (exemption 7(C)).

C. The Department Has Improperly Withheld Entries That Do Not Identify Persons On The Basis Of Exemptions That Apply Only To Personal Privacy.

Although the Department's papers often suggest that the names that the EOUSA is withholding under the personal privacy exemptions are always the names of individuals, that is not so. 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. Entries that do not identify individuals are not properly subject to any claim under Exemptions 6 and 7(C) because disclosing the names of these entities does not invade "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 Ass'n 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.").

Accordingly, courts have repeatedly held that when an agency withholds names from a list or series of documents in reliance on personal privacy, the agency may only withhold the names of individuals. For example, in Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. 1560 (D.D.C. 1985), the court observed that "[i]t is well established . . . that neither corporations nor business associations possess protectable privacy interests." Id. at 1567. Consequently, these business entities could not prevail in a reverse FOIA action in which they sought to prevent the disclosure of their names in lists concerning a marketing referendum. Id. In Washington Research Project, Inc. v. Dep't 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), the court held that the names of unsuccessful individual applicants for grants could be withheld under Exemption 6, but the names of the institutional applicants could not be withheld because “the right of privacy envisioned in the Act is personal and cannot be claimed by a corporation or association.” Accord Robertson v. Dep’t of Defense, 402 F. Supp. 1342, 1348-49 (D.D.C. 1975) (corporation cannot claim rights under FOIA exemption protecting personal privacy); Public Citizen Health Research Group v. Dep’t of Health, Education and Welfare, 477 F. Supp. 595, 603 n.11 (D.D.C. 1979) (hospitals have no privacy interest under FOIA).

Nonetheless, the Department asserts that it has properly withheld the names in the records that concern “corporations, items of property and other non-individual entities,” because it would be too difficult for the agency to distinguish the names that are protected from those that are not. Combined Memorandum at 56. These claims do not withstand scrutiny.

1. Institutional Entries in Civil & Criminal Databases.

In the most recent civil and criminal databases, the records that concern businesses and governmental entities are readily identifiable because those entering the data are required to enter codes that distinguish the records based on whether they involve property, businesses or individuals.¹⁴ EOUSA acknowledges that it “could match the records in its Central System against the corresponding records” with these codes to identify the records that do not concern individuals. Defs’ Declarations and Exhibits, Tab C, Hamilton Decl. ¶ 13. Nonetheless, the Department asserts that two categories of business entries are protected by Exemptions 6 and

¹⁴ When entering records in the system that is currently used by the district offices (known as LIONS), the USAOs identify each record with one of four codes: I (for Individual), B (for Business), A (for agency) or P (for Property). See Plfs’ Exhibit 4 at A-41. A “business” in this context includes just about any suable institution, including organizations and governmental entities (which often are named in records concerning civil or criminal civil rights actions).

7(C), and it has withheld all institutional entries on the theory that it would be too difficult for the agency to decide which records fall within these special categories. The Department's claim fails because neither of the categories that it identifies are protected by the personal privacy exemptions.

First, the Department asserts that "in the case of closely held corporations or sole proprietorships" the personal privacy exemptions "may still apply" and, therefore, the Department would need to conduct research to determine which businesses had these characteristics. Combined Memorandum at 55-56. As an illustration, the Department asserts that where a business or corporation is named after an individual, the portion of the business or corporate name that identifies the individual is exempt from disclosure. See Halbrooke Decl. ¶ 17 (withholding identity of the corporation "[Name] Farm").

The Department's contention that proprietors and closely-held corporations "may" be exempt from the rule that only individuals are protected by Exemptions 6 and 7(C) has no basis in the case law. In the leading case in this Circuit, National Parks, the Court of Appeals stated that the personal privacy exemptions do not protect businesses or corporations, and left open the possibility that an individual's privacy interest might be implicated if financial information concerning a business was so "personalized" that it could be "attributed divisibly and accurately to individual stockholders or partners." 547 F.2d at 685. In doing so, the Court did not suggest that corporations or businesses have personal privacy rights, or that the names of these entities can be withheld on privacy grounds when they appear without such personalized financial information. Other cases have likewise stated that these Exemptions are implicated only if the record discloses financial information that can be attributed to an individual. See Miami Herald Pub. Co. v. United States Small Business Administration 670 F.2d 610, 615 (5th Cir. 1982) (records concerning small business loans do not raise privacy concerns where matters such as

the general financial condition or the personal background of loan applicants are not disclosed in the records); Providence Journal Co. v. FBI, 460 F. Supp. 778, 785 (D.R.I. 1978), rev'd on other grounds, 602 F.2d 1010 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980) (citing National Parks, court says corporations have no privacy rights but personal financial information is protected). These precedents only confirm that the names of proprietorships and corporations do not give rise to claims based on personal privacy because the records do not disclose any financial information that could be attributed to individuals.

Even the decision cited by the Department does not support its claim. In Campaign v. Family Farms v. Glickman, 200 F.3d 1180 (8th Cir. 2000), the court held that the signature of individuals who signed a petition to initiate a referendum should be withheld under Exemption 6 to protect the anonymity of the vote, regardless of whether the individuals signed in an individual capacity or as agents of a business that was entitled to vote. Id. at 1188-89. The decision protected only the names of the individuals who voted, and did not recognize any “personal privacy” rights for the names of closely-held corporations or businesses.¹⁵

Thus, for those entries in which the subject of the record is a business or governmental body rather than an individual (as evidenced by the government deciding that the appropriate

¹⁵ The government also cites a treatise, Braverman & Chetwynd, INFORMATION LAW (1985), as support for this claim. The treatise is not authoritative and other treatises do not support the Department’s claim. See Pierce, ADMINISTRATIVE LAW TREATISE § 512 at 283 (2002) (“Since exemption six provides a qualified exemption only for ‘personal privacy,’ it does not extend to information considering corporations or business associations.”). Moreover, in context, the INFORMATION LAW treatise does not support the government’s argument. The treatise states that “information about closely held corporations or sole proprietorships may be protected *if the information can be identified as applying to a particular individual.*” Id. § 10-4.1.3, at 412 (italics added). As authority for this statement, the treatise cites Florida Medical Ass’n v. Dep’t of Health and Human Services, 479 F. Supp. 1291 (M.D.Fl. 1979), in which the court concluded that the names of the businesses receiving Medicaid payments, but not the amount of the payments, could be withheld where the recipients were sole proprietors because disclosing the amounts paid to these individuals would reveal “‘personalized’ financial information.” Id. at 1310. No such disclosure of financial information is at issue here.

code is “B,” not “I”), Exemptions 6 and 7(C) do not apply. Indeed, courts have generally held that FOIA’s personal privacy exemptions do not apply to disclosure of individual names in contexts relating to business activities and relationships, “even if disclosure might tarnish someone's professional reputation.” Washington Post Co. v. U.S. Dept. of Justice, 863 F.2d 96, 100 (D.C. Cir. 1988). For example, the Fifth Circuit concluded that Small Business Administration records containing names of non-corporate firms that received SBA advances were subject to disclosure under the FOIA -- even where the businesses were not the subject of a public legal proceeding and the SBA had classified the borrowers as delinquent -- because Exemption 6 does not protect information on business activities from disclosure. Miami Herald Pub. Co. v. SBA, 670 F.2d at 615. Similarly, this court has held that names appearing in EPA notice letters concerning liability for hazardous waste could not be withheld, even where the letters contained the names of individuals, because letters that identified individuals “only in their public roles as users of hazardous waste disposal sites” did not implicate the personal privacy interest protected by the FOIA. Cohen v. EPA, 575 F. Supp. 425, 430 (D.D.C. 1993). The Department’s claim here ignores these precedents and improperly seeks to use “personal privacy” as a basis for withholding information that relates to business activities.

Second, the Department asserts that in records “that reveal the court docketing number or the caption of the case,” the EOUSA would not be able to release the names of corporations without first determining if documents filed with the court identify “individuals who are co-defendants or otherwise involved with the defendant corporation.” Tab A, Davis Decl. ¶ 106. Because the docket number or case caption “could therefore allow Plaintiffs ready access to information” in the court files that the Department considers “exempt from disclosure,” the agency asserts that the names of corporations could be withheld in these entries. Combined Memorandum at 57.

This argument is a *non sequitur*. Plaintiffs have “ready access” to information in the court file because the information is already part of the public court record, not because the name of the case is not redacted from the EOUSA databases. Moreover, the disclosure of the court number and case caption information contained in the EOUSA databases does not reveal anything that is not already disclosed to the public in the court filings and available online through PACER. For the reasons discussed above, we do not believe that the disclosure of individuals names in the court dockets constitutes an invasion of personal privacy (and the privacy policy adopted by the Judicial Conference confirms this conclusion, see supra). But even if the court files contain details that implicate personal privacy concerns, the fact that some court records contain such details cannot justify withholding information from EOUSA records that do not contain personal details.

2. Institutional Entries in Collection Databases.

The system of collection records known as “TIGAS,” which has been in use since FY98, has a field called “CORPORATION” which allows the agency to quickly identify records in which the debtor is a corporation, proprietorship or other business entity. Hamilton Decl. ¶ 14. The database manuals state that where the debtor on a collection matter is a business, the name of the business should be entered in the field for last name. Plfs’ Exhibit 5, Chapter 3 at page 4.

As with the civil and criminal records, the Department asserts that the business names in TIGAS are properly withheld because they might include closely-held corporations or court records might reveal details not found in TIGAS. The Department claims that there is an additional reason for withholding names in TIGAS because it discovered that a sample of TIGAS records that identify businesses and legal entities “occasionally contained the name of an individual along with, or instead of, the name of the entity.” Tab C, Hamilton Decl. ¶ 14. On the theory that the EOUSA would need to find and redact each individual name that

“occasionally” appears in these TIGAS records, the Department claims that the records are not reasonably segregable and has withheld all of these entries based on personal privacy.

Combined Memorandum at 57. This claim is without merit for three reasons.

First, the Department has not shown that disclosure of the individual’s names would constitute an unwarranted or clearly unwarranted invasion of personal privacy. If the individual names that the EOUSA observed are simply the name or part of the name of the business (e.g., C.H. Robinson Worldwide or J.C. Penney), there is no valid privacy claim. If the individual names identify individuals who are officers of a corporation, the identities of these individuals are matters of public record and disclosure that they are associated with the business identified is not precluded by the FOIA. See Avondale, 90 F.3d at 961 (FOIA privacy exemption cannot be invoked to withhold names and addresses that already appear in files open to public inspection); Cohen v. EPA, 575 F. Supp. at 429-30 (FOIA privacy exemption does not exempt disclosure of individual names in context that discloses professional or business activities).

Second, even if some small fraction of the records contain names of the individuals that are exempt from disclosure to protect personal privacy, the names of the individuals are “reasonably segregable” because they can be redacted without rendering the contents unintelligible. No decision has ever held that a list that contains some exempt and non-exempt items is not “reasonably segregable.” Rather, segregability issues arise where either (i) exempt and non-exempt information is “inextricably intertwined,” or (ii) the exempt material encompasses such a large portion of the document that segregation would not only be laborious, but would leave so little information that the document would be unintelligible. See Mead Data Cent., Inc. v. United States Dep’t of the Air Force, 566 F.2d 242, 261 (D.C. Cir. 1977).¹⁶

¹⁶The cases cited by the Department to support its claim that the records are not reasonably segregable do not involve the issue of segregability, but instances in which the courts

Neither situation is presented here. Indeed, removal of isolated items of exempt information from long lists is required under the FOIA. For example, in Simpson v. Vance, 648 F.2d 10 (D.C. Cir. 1980), the Court of Appeals rejected the agency's claim that requiring the agency to remove information on marital status from a directory listing 31,000 to 36,000 agency employees was unreasonably burdensome. Id. at 17.

Third, the Department's evidence concerning the burden of removing personal names that erroneously appear in the records is hopelessly flawed. In evaluating the Department's non-segregability claim, "the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." Miller v. United States Dep't of State, 779 F.2d 1378, 1382 (D.C. Cir. 1985); accord Steinberg v. United States Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994). The Department's evidence states only that individual names were observed "occasionally," Hamilton Decl. ¶ 14 -- without indicating whether these names were simply part of a trade name that would not be exempt. Moreover, even if one assumes that the TIGAS files in which names were "occasionally" observed must be inspected as the Department claims, the total number of name entries to be inspected is only 2,482 -- the equivalent of scanning 50 pages that list 50 names on each page. See Seventh Long Decl. ¶ 25.¹⁷

concluded that a request did not reasonably describe the records, or that the requester was demanding an unreasonably extensive search of the agency's files. See Combined Memorandum at 58.

¹⁷ The Department arrives at a much higher estimate of the records that must be reviewed if it were determined that the names must be redacted for two reasons: (a) the Department assumes that all the business entries in the criminal, civil and collection files must be examined to remove entries that identify closely held corporations and sole proprietorships, id. ¶ 17; and (b) the Department includes in its estimate 23 years of civil, criminal and collection records that predate the codes that identify records concerning businesses. See Davis Decl. ¶ 17 (Department's count includes criminal, civil and collection files from FY74-97).

3. Property Entries in Civil, Criminal and Collection Databases.

The most recent civil and criminal records allow the EOUSA to isolate the records that identify property, see supra note 14, and the collection records for FY85 and later years contain codes that identify records that concern property forfeiture actions.¹⁸ The Department acknowledges that it not only could, but that it has, used these codes to isolate records that pertain to property. Hamilton Decl. ¶¶ 14-16.

The Department acknowledges that the names of properties are not protected by “personal privacy,” but it asserts that even the property entries that can be identified with these codes are exempt because the owners’ names might appear in court filings, Davis Decl. ¶ 106, and because an EOUSA staff member has observed that a “significant proportion of the entries contained the names of individuals.” Hamilton ¶ 15. The analysis presented above concerning the Department’s claims for withholding institutional names also shows that the Department’s efforts to extend FOIA’s personal privacy exemptions to properties is untenable.

First, as with the business entries, the Department’s claim that it must withhold property records that concern court cases because public court documents might disclose “individuals associated with the property,” Davis Decl. ¶ 108, is a *non sequitur*. The Department cannot withhold the name of a property that appears in EOUSA records because the Department thinks that the information about the property that already appears in public judicial court records should not have been disclosed.

Second, the Department has not shown an “unwarranted invasion of privacy.” The Department’s instructions concerning this data state that the database should contain the name

¹⁸ Both TIGAS system and the Central Collection files contains a field that identify when the record concerns a forfeiture matter involving property with one of 5 codes. Seventh Long Decl. ¶¶ 26, 28.

of the property, not the property owner. See Seventh Long Decl. ¶¶ 22, 30, 31. If, however, the name of the property owner has erroneously been entered in some records, disclosure of these names is not an “unwarranted invasion of personal privacy” because the owner’s identity is already a matter of public record. Cf. Avondale, 90 F.3d at 961 (agency cannot withhold names on voting lists where names are already available for public inspection).

Third, the names of individuals are reasonably segregable from the names of the property. The Department has the burden of proving that the names are not segregable, and the facts that it has presented are remarkably selective and inflate the number of records to be reviewed by at least ten-fold. For example, as with the count of business records discussed above, the Department includes in its total estimate the burden of reviewing 23 years of civil and criminal records that predate the introduction of the field that separately identifies property records. See supra note 40, and three years of collection records that predate the codes that identify forfeitures. See Hamilton Decl. ¶ 17 (Department’s count includes criminal and civil files from FY74-97, and DNR collections files from FY 1982-85). The Department’s estimate of the percentage of civil and criminal records that must be reviewed also does not distinguish between corporate and property entries. Id. ¶ 16.

A realistic estimate shows that the number of records that are identifiable as property records is modest. With respect to the collections data, the sum of the number of records identified as property forfeiture actions in TIGAS and Central Collections is just over 31,000 unique records. Seventh Long Decl. ¶¶ 27, 29. With respect to civil and criminal databases, the property entries constitute roughly 3.5-5% of the records from FY99 and FY00, which means that the total number of records with this characteristic is about 27,000-40,000. Id. ¶ 23. Moreover, if the names of individuals occasionally appear in records concerning property and businesses, such entries represent data-entry errors, and the burden of examining a list of names

to correct such errors should not be considered a burden that precludes release of information that is not exempt under the FOIA.

Finally, there is a public interest in the disclosure of the identity of the property, businesses and governmental entities that the EOUSA has withheld because this information will enable researchers to better evaluate the litigation and law enforcement decisions made by federal agencies. See Second Burnham Decl. ¶¶ 7, 8. Consequently, to prevail on this issue, the Department must not only prove that individual names that appear are not already matters of public record, and prove that the individual names cannot be segregated from the property descriptions -- it must also prove that the individual names appear so frequently, and the invasion of privacy is so serious, that disclosure outweighs the public interest in disclosure of the non-exempt information. The Department's vague claim that an undetermined portion of these records contain the names of individuals does not even satisfy its threshold burden of production on this issue.

D. The Agency File Numbers Are Not Exempt from Disclosure.

The Department is withholding fields that contain numbers “used by a law enforcement agency involved in the case as part of [the agency’s] administrative case tracking system.” See Davis ¶ 113. The Department uses these numbers “to reconcile cases with the different agencies” that refer cases to the USAOs. Plfs’ Exhibit 7.

The Department offers two theories for withholding these records: (1) that these numbers are covered by Exemption 2, which exempts matters “related solely to the internal personnel rules and practices of an agency,” 5 U.S.C. § 552(b)(2), and (2) that all of the entries may be withheld because some fields do not contain agency file numbers, but contain names of individuals, social security numbers, or telephone numbers that raise personal privacy concerns. The Department’s Exemption 2 claim is without merit and the claim based on personal privacy,

at best, warrants redacting the information that identifies individuals, not those numbers that have no bearing on personal privacy.

1. The Agency File Numbers Are Not Related To Personnel Rules And Practices, And There Is A Public Interest In Their Disclosure.

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).¹⁹ To sustain this claim, the agency must show that (a) the information relates predominately to internal personnel rules and practices of an agency, and (b) there is no legitimate public interest in disclosure of the information. The Department fails on both counts.

First, to come within the statutory language of 5 U.S.C. § 552(b)(2), the information must be part of the agency’s internal personnel rules and practices. In Schwanner v. Department of Air Force, 898 F. 2d 793 (D.C. Cir.1990), the Court of Appeals rejected the claim that Exemption 2 allows the government to withhold information solely on the basis that it is trivial and internal, and held that lists of names and addresses of agency personnel were not exempt because such “lists do not necessarily (or perhaps even normally) shed significant light on a rule or practice; insignificant light is not enough.” Id. at 795-96, 797. Similarly, in Fitzgibbon v. United States Secret Service, 747 F. Supp. 51 (D.D.C. 1990), this court held that an agency’s administrative file markings are not covered by Exemption 2 because they are not related to an

¹⁹ “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).

agency personnel rule or practice.²⁰ While some cases have found that certain agency codes and file numbers were covered by Exemption 2, see, e.g., Lesar v. United States Dep't of Justice, 636 F.2d 472 (D.C. Cir. 1980), these decisions either pre-date Schwaner, addressed codes that shed light on sensitive personnel practices (such as codes identifying agency sources), or do not discuss the personnel matter requirement at all.

Second, Exemption 2 is inapplicable here because there is a legitimate public interest in the disclosure of these numbers. The Department uses the agency file numbers to reconcile its data with that of the referring agencies, see Plfs' Exhibit 7, and there is a legitimate public interest in disclosure for this same purpose. Where more than one agency is engaged in an activity, the agencies occasionally issue inconsistent reports and statistics. See Second Burnham Decl. ¶¶ 3-5 (IRS example); Maltz Decl. ¶¶ 8, 9, 12 (criminal justice statistics). The agency file numbers allow researchers to correlate data reported by different agencies and identify the reasons for these conflicting reports. See 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.

²⁰ Accord Goldstein v. Office of Independent Counsel, 1999 WL 570862, 6 (D.D.C. 1999) (records of reservations and phone calls are not exempt because they do not "implicate or relate in a significant way to any internal rule or practice."); DeLorme Pub. Co., Inc. v. National Oceanic and Atmospheric Admin. of U.S. Dept. of Commerce, 917 F. Supp. 867, 876 (D.Me. 1996) (digitized versions of nautical charts were not covered by Exemption 2 because they "do not shed significant light upon anything having to do with personnel matters or rules or practices governing agency personnel, and they are neither solely nor predominantly related to such matters."); Retired Officers Ass'n v. Department of Navy, 716 F. Supp. 662, 665 (D.D.C. 1989), vacated in part on other grounds, 744 F. Supp. 1 (D.D.C. 1990) ("To fall within the ambit of Exemption 2, it is not enough that the requested information be generated and used for the purpose of facilitating matters of internal management.")

2. The Department's Claim That Exemptions 6 and 7(C) Justify Withholding All Agency File Numbers Is Without Merit.

As an alternative ground for withholding all of the agency file numbers, the Department states that it has discovered that, in some instances, the agency file numbers field contains numbers that the Department assumes are social security numbers because they are in the format xxx-xx-xxxx. Defs' Declarations and Exhibits, Tab C, Hamilton Decl. ¶ 18. The Department also states that some entries contain individual names or phone numbers of agency officials. Tab F, Rupert Decl. ¶ 9. On the theory that these abnormal entries may be covered by FOIA's provisions on personal privacy, the Department has withheld all agency numbers under Exemptions 6 and 7(C). Tab A, Davis Decl. ¶ 118.

On its face, this claim is inconsistent with rule that FOIA exemptions cannot be applied on a wholesale basis because the statute explicitly requires that the agency disclose any segregable, non-exempt material. Arieff, 712 F.2d at 1467. The Department's papers do not even claim that the social security numbers are not reasonably segregable. See Combined Memorandum at 51. Moreover, the Department bears the burden of proving that social security numbers appear so frequently in these fields that the agency is justified in withholding all of the agency file number entries, but the Department has made no such showing. The proportion of entries that contain personal information is not specified or even estimated. See Tab F, Rupert Decl. ¶ ¶ 9-10; Tab C, Hamilton Decl. ¶ 18. The Department does not specify whether the social security numbers appear only in the files from certain years, or whether the entries reflect data entry practices at a few, specific USAOs. To the contrary, the agency candidly acknowledges that its declarant cannot say. See Rupert Decl. ¶ 110.

Three considerations show that the presence of social security numbers in some records does not warrant withholding the non-exempt agency file numbers that appear in these fields.

First, the Department has already made public all the agency file number entries that appear in the civil and criminal master databases for FY74-FY89. When the Department deposited a copy of the EOUSA case management files for these years with the National Archives for public use it did not remove the agency or program entries. Seventh Long Decl. ¶¶ 6.b, 6.c. Thus, the only issue presented in this case is whether the Department has a basis for withholding the agency file number entries in the civil and criminal master databases for FY90 and later years, the civil and criminal immediate declination files (since FY85), and the collection databases (since FY80).

Second, the central premise of the Department's claim is that some of the entries do not contain agency file numbers because the fields are "discretionary fields" in which district offices are permitted to enter other information if they wish. Davis Decl. ¶ 113. This assertion is contradicted by the Department's own documents. The EOUSA databases are compiled from various database systems used by the USAOs over the years. The EOUSA's documentation concerning these systems states that, for nearly all of the systems used since 1990, the EOUSA required that agency file numbers be entered in these fields and even conducted quality control reviews to ensure that the numbers were properly entered. See Seventh Long Decl. ¶¶ 33, 34.

For example, a 1991 manual on entering data into one of the tracking systems from which the EOUSA case management data is derived identifies the agency file number as a required field and admonishes that, "[i]t is important that this number be entered as soon as it is available to permit computer matching of U.S. Attorney records with agency files. If a number is not provided by the agency, enter 'NOT AVAILABLE.'" Id. ¶ 33.b. Similarly, a 1997 manual concerning entering information on collections identifies the agency number as a required field and states "NOT AVAILABLE" should be entered if it is not provided. Id. ¶ 33.a. Moreover, several of these systems contain a separate field for the social security number, so

there would be no reason to use the agency file number field to store such numbers. Id. This documentation shows that -- at least for several systems that were used during identifiable periods -- the agency file number fields should contain only the agency file numbers.

Third, when the pre-FY90 criminal and civil files, and the files for periods in which the EOUSA required entries in the agency file number fields are set aside, the Department's claim that all the information in these fields has been properly withheld is based solely on evidence that *some* of the entries in a few of the data files contain numbers that may be social security numbers.²¹ These entries are reasonably segregable. Because these numbers appear in a particular format, a computer can automatically and readily distinguish between the entries that contain the non-exempt agency file numbers and numbers that have the format of a social security number. Seventh Long Decl. ¶ 35. Consequently, FOIA requires that the Department segregate the social security numbers and release the non-exempt remaining entries in these fields.

7II. THE EOUSA'S FORM NOTICES VIOLATE THE NOTICE PROVISIONS OF THE FOIA.

Count Four of Plaintiffs' Second Amended Complaint charges that the EOUSA failed to comply with FOIA's notice requirements when responding to Plaintiffs' April 3, 2000, and May 2, 2000 requests, and that the EOUSA's failure reflects its regular practice. Second Amended Complaint ¶¶ 41-47. The Department does not dispute it sends requesters the standard-form notices that Plaintiffs received, but it contends that these notices fulfill the agency's obligations.

²¹ For the reasons discussed above, the appearance of an individual's name, by itself, does not give rise to a basis for withholding under Exemptions 6 or 7(C). See Armstrong v. EOP, 97 F.3d 575 (D.C. Cir. 1996) (rejecting categorical policy of withholding names of FBI agents). The only other information identified by the Department is office telephone numbers of agency officials, which is not personal information.

Combined Memorandum at 36-37. The Department's position is without merit because it ignores the language of the statute and the Department's own regulations.²²

FOIA's notice provisions mandate that, if an agency cannot respond within the statutory deadline of twenty working days, the deadline may be extended by sending a notice that sets forth both (1) the "unusual circumstances" that preclude the agency from meeting the statutory deadline; and (2) "the date on which a determination is expected to be dispatched." 5

U.S.C. § 552(a)(6)(B)(i). The Department's regulations require that the EOUSA provide this notice "as soon as practicable." 28 U.S.C. § 16.5(c). The content of these notices is critical to the statutory scheme because, if the anticipated delay is more than ten working days, the agency must also provide the requester the opportunity to modify the request so that it can be processed within a period that is shorter than the delay predicted by the agency. 5 U.S.C. § 552(a)(6)(B)(ii). If the agency does not give a meaningful estimate of how long it anticipates it will take to respond to the specific request that the requester has presented, both the notice and the requesters' statutory right to seek an alternative date become meaningless.

In response to Plaintiffs' April and May 2000 requests, the Department sent Plaintiffs a "form letter." See Davis Decl. ¶¶ 45, 73. The form is generic and the only paragraph that discusses the timing of the EOUSA's response states:

EOUSA makes every effort to process most requests within a month (20 working days). There are some exceptions, for example, Project Requests take

²² Because the Department defends the EOUSA's form notices on the merits, it does not contend that Plaintiffs' challenge to this practice is moot. Such a claim would be in error in any event because the Court of Appeals has repeatedly held that when a plaintiff challenges an agency practice that the plaintiff will continue to confront in future dealings with the agency, the challenge is not moot – particularly where the agency defends the practice as lawful. See Public Citizen v. Department of State, 276 F.3d 634, 641-42 (D.C. Cir. 2002); Better Government Ass'n v. Department of State, 780 F.2d 86 (D.C. Cir. 1986); Doe v. Harris, 696 F.2d 109, 112 (D.C. Cir. 1982).

approximately nine months to process. Requests for “all information about myself in criminal case files” are Project Requests. If you have made such a request, you may either write us and narrow your request for specific items, or we will consider that you have agreed to a due date of nine months from the date of this letter.

Defs’ Exhibits 22, 27.

This form does not comply with the statute or the Department’s regulation on notice because it does not identify any “unusual circumstances” that will preclude the agency from responding on time or provide a reasonable estimate of the date by which the agency expects to complete work on Plaintiffs’ requests. The Department’s arguments that these generic notices comply with the law are disingenuous.

First, the Department quotes the language of 5 U.S.C. § 552(a)(6)(B)(ii) stating that the agency “shall provide an opportunity to limit the scope of the request” and asserts that its form notice fulfills this requirement. Combined Memorandum at 36. In doing so, the Department ignores section (a)(6)(B)(i) and the Department’s regulation, 28 U.S.C. § 16.5(c), which require that the agency also provide the requester with the reason for the delay and the date that the agency expects to respond.

Second, the Department misrepresents the contents of the form notices by asserting that the letters informed Plaintiffs “that, to the extent Plaintiffs were requesting a very large amount of material, the requests would take approximately nine months to process.” Combined Memorandum at 36. The notices contain no such language. The notices state that “Project Requests take approximately nine months to process,” but they do not define the term or state that the Department classifies Plaintiffs’ requests as Project Requests. Indeed, Plaintiffs have never been informed by the Department that it classified their requests as “Project Requests,” see Seventh Long Decl. ¶ 39, and the Department’s letter identifies such requests as a request

“for ‘all information about myself in criminal case files.’” Defs’ Exhibit 22. Plaintiffs’ requests April 3, 2000 and May 2, 2000 requests do not remotely fit this description.²³

Moreover, even if the Department issued a generic form notice to all requesters stating that the Department expects to complete processing of “large” FOIA requests in approximately nine months, such a notice would not satisfy FOIA or the Department’s regulations. The purpose of the notice is to let individual requesters know the reason for, and the expected length of, the delay in processing his or her particular request so that the requester can decide how to respond. A notice that always states that the anticipated delay is nine months -- regardless of whether a realistic estimate by the agency would indicate that the time will be shorter or longer -- does not provide meaningful information.

Finally, the Department also asserts that, “[b]ecause Plaintiffs did not contact EOUSA to inform them otherwise,” the agency “reasonably concluded” that Plaintiffs agreed to a nine-month delay in processing their request. Combined Memorandum at 36. This argument is absurd. The EOUSA’s notices do not state that anyone who submits a request that the agency might not be able to process within the normal deadlines is deemed to have agreed to a nine month delay if they do not narrow their request, and the agency could not have reasonably thought Plaintiffs interpreted the letter in this manner. Moreover, the EOUSA’s characterization of the notice underscores that the agency does not intend for these generic notices to give the requester a meaningful opportunity to choose between the expected delay and modification of the FOIA request. Instead, the EOUSA treats the notice as ultimatum: requesters must narrow

²³ The April and May 2000 requests at issue here are not requests that would be expected to take nine months for a response. The April 2000 requests sought EOUSA case management data for a six month period, and the May 2000 request sought disclosure of a specific set of computer programs. See Defs’ Exhibits 21, 27.

their request or “consent” to a nine-month delay -- even if nine months is not an appropriate estimate for their particular request.

In short, the EOUSA’s form notices violate FOIA and the Department’s own regulations because they do not notify the requester of the reason for delay or provide an estimate of the date of response that is based on the request. Accordingly, the EOUSA’s practice of responding to Plaintiffs’ requests with such notices violates 5 U.S.C. § 552(a)(6)(B)(i) and 28 U.S.C. § 16.5(c).

III. THE DEPARTMENT IMPROPERLY CONDITIONED DETERMINATION OF TRAC’S FEE STATUS ON DISCLOSURE OF RECORDS CONCERNING TRAC’S FEES AND FUNDING.

As noted above, TRAC uses the data that it obtains from the EOUSA to publish reports that analyze the work of the Department of Justice and other federal agencies.²⁴ These reports are not always flattering to the government. Moreover, TRAC provides research assistance and data analyses on a non-partisan basis to academic researchers, journalists, and advocacy organizations. These entities often publish reports that are critical of the Department or its positions. Declarations and Exhibits Submitted in Support of Plaintiffs’ Motion for Partial Summary Judgment, Tab B, Burnham Decl. ¶¶ 5-10.

Consequently, the Department’s claim that it is entitled to examine all TRAC’s records concerning funding and fees for the past five years as a precondition to deciding TRAC’s status under FOIA’s fee provisions raises serious issues about agency misuse of the fee determination process to discourage reporting on government activities. See 132 Cong. Rec. 14270-71 (daily

²⁴ See “A Special TRAC Report: Criminal Enforcement Against Terrorists,” *available at* <http://trac.syr.edu/tracreports/terrorism/report011203.html>; “Protecting the Nation: The FBI in War and Peace,” *available at*, <http://trac.syr.edu/tracfbifindings/aboutFBI/keyFindings.html>; “Recent Trends in ATF Enforcement,” *available at* <http://trac.syr.edu/tracatf/findings/aboutATF/atfTrends.html>.

ed., Sept. 30, 1986) (remarks of Sen. Leahy) (“experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information may cast them in a less than flattering light or may lead to proposals to reform their practices.”). The entities that fund TRAC’s activities or support it as subscribers have an obvious interest in controlling disclosure of their identity and the details of their research. Requiring TRAC to give the Department access to “any and all” records concerning its financial supporters and subscribers in order to receive a determination of its fee status is analogous to demands that the courts have rejected in other contexts because they impermissibly chill freedom of speech and association. See, e.g., Bates v. City of Little Rock, 361 U.S. 516 (1960) (statute that requires organizations to disclose the names and addresses of all contributors and subscribers as a condition of doing business is unconstitutional); Jones v. Unknown Agents of the Federal Election Comm’n, 613 F.2d 864, 875 (D.C. Cir. 1979) (exacting scrutiny is required when government compels disclosures that implicate speech and associational interests); Wyoming v. U.S. Dept. of Agriculture, 2002 WL 1494439, at 4 -5 (D.D.C. 2002).

Accordingly, Count Five of the Second Amended Complaint challenges the Department’s handling of TRAC’s request for a fee determination and its demand for “any and all” records as excessive and unlawful. Below, we show that (A) the Department’s argument that this claim is not justiciable is without merit; (B) TRAC provided ample evidence that its request is not for a commercial purpose, and that TRAC qualifies as an educational institution and representative of the news media under the FOIA; and (C) the Department does not have authority to demand disclosure of TRAC’s records as a condition of making a fee determination.

A. Plaintiffs’ Challenge To The Department’s Interpretation of FOIA’s Fee Waiver Provisions Is Justiciable.

1. The Department's ultimate defense to the Fifth Count is that the issue of Plaintiffs' fee status is "moot" because Plaintiffs were "effectively" granted a waiver of fees when the EOUSA "provided the requested documents without charge." Combined Memorandum at 65, 67. This argument is without merit. The EOUSA has carefully avoided stating that Plaintiffs have been given a waiver and states only that the EOUSA has not charged Plaintiffs fees "[t]o date." Davis Decl. ¶ 82. This qualified statement deliberately leaves open the possibility that the EOUSA will charge fees at a later date for records that have been released, or for records that will be released if Plaintiffs succeed in challenging the Department's exemption claims. Although the Department's regulations state that fees will "ordinarily" be collected before records are sent, 28 C.F.R. § 16.11(a), the regulations leave open the possibility that fees may be charged after the records are released (with interest, *id.*, § 16.11(g))-- and the EOUSA has left itself free to levy such charges here.

For this reason, the Department's claim that this case is analogous to Long v. Bureau of Alcohol, Tobacco and Firearms, 964 F. Supp. 494 (D.D.C. 1997), is disingenuous. In that case this Court concluded that the issue of whether TRAC is an educational institution or media representative became moot when the ATF had granted Plaintiffs a complete waiver of all fees associated with the requests at issue. In this case, the EOUSA has not granted such a waiver.

2. The Department also makes a convoluted argument that, even though the Department has refused to make a determination on Plaintiffs' fee status for over two years, the Administrative Procedure Act (APA) precludes judicial review of whether its refusal to grant the Plaintiffs' request is lawful or reasonable. Combined Memorandum ¶¶ 65-66. This argument is untenable. Independent of the APA, FOIA expressly provides for *de novo* judicial review of fee waiver issues, 5 U.S.C. § 552(a)(4)(vii), and the statute provides that a requester is deemed

to have exhausted its administrative remedies if the agency fails to determine whether it will comply with the request within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i) & (C).

The Department asserts that FOIA’s deadline for the agency to determine “whether to comply with [a FOIA] request,” id. § 552(a)(6)(A)(i) does not apply to fee determinations. See Combined Memorandum at 66. There is no basis for this assertion. The statute does not distinguish the agency’s determinations to disclose records from its determinations concerning what fees must be paid if the records are released. Neither the statute nor the case law supports the Department’s contention that, although FOIA plainly allows a requester to go to court to challenge an agency’s failure to act on a request within the statutory deadline, the requester cannot raise the fee issues presented by the same request as long as the agency declines to make a determination.²⁵

Moreover, the Department has taken a final action insofar as it has declared that it will not determine Plaintiffs’ fee status based on the materials submitted by TRAC in April and May 2000. TRAC informed the EOUSA over two years ago that it would not supply the “any and all” records that the Department had requested. Plfs’ Exhibit 15 at 1; Davis Decl. ¶ 81. For the past two years the EOUSA has maintained that it will not make a determination unless TRAC yields and discloses five years of financial records. The parties are at a standoff on whether this demand is proper, and the Department’s determination that it may impose this precondition is a

²⁵ Indeed, the Department’s claim that fee determinations should not be treated like any other agency determinations under FOIA is inconsistent with the analysis applied by the Court of Appeals in Oglesby v. United States Dep’t of the Army, 920 F.2d 57, 71 (D.C. Cir. 1990). Oglesby held that, if an agency gives its initial determination on a FOIA request before the requester brings a lawsuit, the requester must pursue administrative remedies, even if the initial decision was issued after the statutory deadline. 920 F.2d at 61. In applying this rule to the requests at issue, the Court treated agency rulings on fee waiver requests in the same manner as agency denials of access to documents, and held that review was not available if the requester failed to administratively appeal denial of a fee waiver request. Id. at 70 n. 17, and 71.

final agency action that is subject to judicial review under the FOIA and the APA. The Department's assertion that Plaintiffs must await a final action in this context "makes no sense" because there is no administrative remedy to exhaust. Stewart v. Evans, 275 F.3d 1126, 1130 (D.C. Cir. 2002).

3. Although the Department does not contest that its demand for TRAC's financial records is a "final" action, it does assert that this action is not reviewable because Plaintiffs "cannot allege any actual injury as a result of the agency's request for information." Combined Memorandum at 62. To the contrary, Plaintiffs face the possibility that the Department will assess charges for records that have been disclosed, and for records that this Court finds were improperly withheld. Moreover, Plaintiffs regularly make requests for the EOUSA records. Therefore, they have standing to challenge the Department's position that the EOUSA's demand for any and all fee and funding records is lawful. In Better Government Ass'n v. Dep't of State, 780 F.2d 86 (D.C. Cir. 1986), the Court of Appeals held that "nonprofit public interest groups that routinely make FOIA requests that potentially would not be made absent a fee waiver provision," had standing to challenge the Department of Justice's interpretation of its fee waiver guidelines, even if the challenge only concerned prospective application of the agency's position to future requests for fee waivers. Id. at 93. The Court observed that, "insofar as these [requesters] are correct that the DOJ guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the nonprofit public interest groups who depend on FOIA to supply their lifeblood -- information." 780 F.2d at 93-94.

Plaintiffs have standing under this analysis. The Department's interpretation of its regulations discourage and chill the use of the FOIA in two ways. First, TRAC's funding

depends on applying for foundation grants in which TRAC must budget for the costs of obtaining data, analyzing it, and making it available to the public. Burnham Decl. ¶ 13. In making these commitments, TRAC has relied on the fact that, prior to March 2000, the Department of Justice and other agencies consistently accepted that TRAC's is not subject to the fees charged to commercial users who must pay fees for search, review and duplication costs. 28 C.F.R. § 16.11(c). If TRAC were required to pay such fees, it would not be able to fulfill its commitments under existing grants, and would need to curtail its activities in the future because of the increased cost of obtaining records. Seventh Long Decl. ¶ 37.

Second, if TRAC's fee status depends on its willingness to disclose five years of records concerning all those who have provided funding for its activities, TRAC's relationship with supporters and subscribers will be threatened. TRAC believes that many funders and subscribers will be reluctant to support its activities as they have in the past if such records must be routinely made available to the Department. *Id.* ¶ 38. These facts are more than sufficient to establish that Plaintiffs have standing under Better Government Ass'n.

Review of the Department's demand for "any and all" financial records from TRAC is analogous to cases where courts have reviewed whether agencies have the authority to require disclosure of particular information or impose other conditions. *See, e.g., Atlantic Richfield Co. v. United States Dep't of Energy*, 769 F.2d 771, 782-83 (D.C. Cir. 1984) (rejecting claim that court may not adjudicate claim that agency lacks authority to issue administrative discovery order directing company to disclose documents that the company maintains are privileged); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 n. 18 (D.C. Cir. 2000) (rejecting argument that challenge to EPA's guidance on conditions for granting permits is not ripe). Where, as here, an agency has imposed demands on private parties and the issue is whether the agency has misconstrued its authority in doing so, the courts have had no difficulty finding that the case is

justiciable. See Ciba-Geigy Corp. v. U.S. Environmental Protection Agency, 801 F.2d 430, 438 (D.C. Cir. 1986).

B. The Material Already Submitted to the Department Shows that TRAC Qualifies for FOIA's Limitation on Fees.

FOIA provides that the fees that an agency charges shall be limited to duplication costs “when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media.” 5 U.S.C. § 552(a)(4)(A). In April and May 2000, Plaintiffs submitted materials to the Department to demonstrate that TRAC qualifies under this test. See Plfs’ Exhibits 15, 16. We first show that these materials demonstrate that TRAC qualifies for the fee limitation, and then show that there is no basis for the Department’s contention that TRAC must also submit five years of financial records.

1. *Representative of the News Media.* The scope of the “representative of the news media” provision of the FOIA was interpreted by the Court of Appeals in National Security Archive v. United States Department of Defense, 880 F.2d 1381 (D.C. Cir. 1989). In that action, the Court reviewed whether a non-profit organization that gathered government documents through the FOIA (and other means) to publish “document sets” that “will be devoted to a particular topic of current interests” qualified under the statutory language. Each document set consisted of selected records enhanced with “‘detailed cross-referenced indices, other finding aids, and a sophisticated computer retrieval system’ in order to make it more accessible to potential users.” Id. at 1386 (quoting FOIA requester’s declaration). The Court of Appeals concluded that these activities made the plaintiff “a representative of the news media” because the legislative history showed that this provision was intended to provide reduced fees to “‘any person or organization which regularly publishes or disseminates information to the

public.” 880 F.2d 1386-87 (quoting 132 Cong. Rec. H9463 (Oct. 8, 1986) (italics in original).

A “representative of the news media,” the Court held, is “a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 880 F.2d at 1387.

Plaintiffs fall squarely within this standard. Indeed, there is no principled distinction between Plaintiffs’ activities and the activities of the National Security Archive. Plaintiffs use records gathered from the EOUSA and other sources to maintain six Internet sites that publish reports on the enforcement activities of the FBI, INS, DEA, INS, Customs, and the IRS. See Plfs’ Exhibit 15 at 4. These sites include both data compilation and reports in which TRAC has used statistical analysis and “editorial skills” to screen the data and produce articles on public policy issues. Id.

Congress specifically contemplated that dissemination of information on government activities in this manner would qualify a requester as a “representative of the news media” entitled to the limitation on fees:

For example, a computerized information service that provides subscribers with access to information obtained from the government qualifies as news media under the FOIA because the services [sic] furthers the availability of government information in the same way that a traditional newspaper does. Requests from these other information venders whose dissemination functions are similar to that of newspapers and broadcasters must be treated in the same fashion.

132 Cong. Rec. 29617 (Oct. 8, 1986) (Remarks of Rep. English); see also 132 Cong. Rec. S14270 (daily ed. Sept. 30, 1986) (Remarks of Sen. Leahy) (entities that use new methods of communications to disseminate information through media other than print or broadcast media should be considered “representatives of the news media.”).

2. *Educational Institution.* TRAC also qualifies for reduced fees as an educational institution whose purpose is scholarly research. Plaintiffs submitted their request for

information in their capacity as members of the faculty of Syracuse University and co-directors of TRAC. TRAC was founded as a research data center at Syracuse University in 1989. Pliffs' Exhibit 15 at 2. The staff of TRAC consists of full time and part-time employees of Syracuse University. Id. TRAC's principal office is located on the Syracuse University campus and is owned and operated by the University. Id. Plaintiffs also provide training seminars on the analysis of complex databases, under the name and sponsorship of the University. Id. at 2-3.

The FOIA requests at issue are part of the scholarly research program of the University. As co-directors of TRAC, plaintiffs carry-out an active program of research concerning both (i) substantive public policy issues regarding federal regulatory and enforcement activities; and (ii) statistical methodologies for evaluating and assessing the accuracy of government data regarding these activities. For example, TRAC has produced major studies of federal tax enforcement activities and a study on the growth in prosecutions recommended by the Immigration and Naturalization Service. Id. at 2-3. The scholarly studies produced by TRAC and its co-directors are regularly published and presented at professional meetings and seminars. Id. at 2.

3. Purpose of Request. FOIA's fee limitation provision also requires that the requester does not seek the records "for commercial use." TRAC easily satisfies this requirement because it has been uniformly acknowledged that when a requester seeks agency records in order to disseminate information from the records this use is not a "commercial use" under the statute - regardless of whether the dissemination is by a for-profit entity (as is true of many media representatives) or a non-profit entity (as is true of TRAC). The congressional sponsors of FOIA's fee provisions observed that "[t]he public redissemination of documents or information obtained from the government is specifically intended not to be treated as commercial use regardless of the identity or status of the requester." 132 Cong. Rec. 29616

(Remarks of Rep. English). The Court of Appeals reaffirmed this point in National Security Archive when it observed that a newspaper publishing a book containing government records, such as *The Pentagon Papers*, “is acting as a representative of the news media.” 880 F.2d at 1387. To treat the sale of such a publications as a “commercial use” under the FOIA would improperly frustrate Congress’ intent because “[m]ost news media organizations are for-profit enterprises.” 880 F.2d at 1387-88. The Department of Justice’s regulations also recognize that “a request for records supporting the news dissemination function of the requester shall not be considered a request that is for a commercial use.” 28 C.F.R. § 16.11(b)(6) .

TRAC has requested the EOUSA case management databases to continue disseminating data and reports on federal law enforcement activities. See Plfs’ Exhibit 15 at 4-5; Plfs’ Exhibit 16 at 1-2. Moreover, unlike many newspapers and publishers, TRAC is non-profit, which only reinforces that the limitation on fees under 5 U.S.C. § 552(a)(4)(A)(i) applies to FOIA requests that support TRAC’s efforts to publish newsworthy reports and promote academic research.

C. The Department’s Demand For All Records On TRAC’s Fees and Financing Is Improper.

In order to curb agencies’ ability to use fees to arbitrarily hinder FOIA requesters, the 1986 Freedom of Information Reform Act provided that each agency must promulgate regulations “establishing procedures and guidelines for determining when such fees should be waived or reduced.” 5 U.S.C. § 552(a)(4)(A)(i). These regulations must be subject to “notice and receipt of public comment” and must conform to government-wide guidelines issued by the Office of Management and Budget to promote uniformity in fee decisions. Id.; see 52 Fed. Reg. 10,011 (1987) (reports prior to the guidelines indicated that agencies had made inconsistent fee decisions that resulted in “inequitable treatment of users”; guidelines establish “a consistent government-wide framework”).

Apart from being an unprecedented and sweeping demand, the EOUSA's demand for five years of financial records from TRAC is not authorized. Nothing in the FOIA or the Department of Justice's fee regulations, 28 U.S.C. § 16.11, gives an agency authority to demand reams of financial records. There is no provision stating requesters who seek a determination of their fee status must disclose all records on their funding for the past five years. Nor do the regulations authorize the EOUSA to make disclosure of all records on funding and fees a precondition to classification as an educational institution or representative of the news media. Moreover, the regulations do not require that any news media organization that seeks a fee limitation must provide the Department with any and all of its records on their subscribers.

The Department asserts that -- although TRAC is the only requester from whom the EOUSA has demanded all fee and financial records -- EOUSA's demand is "in complete accordance with the regulations." Combined Memorandum at 63. This claim is belied by the regulations.

First, the Department contends that EOUSA's demand for records is authorized by a regulation that states that "[r]equesters shall be given an opportunity in the administrative process to provide explanatory information regarding [the requester's commercial interest in disclosure]." *Id.* at 63-64 (quoting 28 C.F.R. § 16.11(k)(3)(i)). However, giving a requester an "opportunity" to provide explanatory information is a far cry from the EOUSA dictating that TRAC must disclose any and all records on fees and financing. TRAC provided explanatory information two years ago, but the EOUSA has violated the regulations by maintaining that TRAC must disclose the records that EOUSA specified on March 21, 2000.

Second, the Department asserts that the EOUSA's broad demand is not only allowed, "but indeed required," because the regulation discusses the "commercial interest[s] of the requester." *Id.* at 64 (citing 28 C.F.R. § 16.11(k)(3)(i)). This argument ignores the fact that the

Department's regulations acknowledge that TRAC's interest in obtaining records in order to disseminate data and reports on newsworthy issues is categorically not considered to be "a commercial use." 28 C.F.R. § 16.11(b)(6). Moreover, both FOIA and the Department's regulations make clear that fee determinations do not involve an open-ended inquiry into whether the requester has any "commercial interests." The only relevant inquiry is whether the records that have been requested are "sought for commercial use." 5 U.S.C. § 552(a)(4)(A)(ii)(II). Similarly, many educational institutions, publishers and broadcasters have commercial interests. In considering the fee status of those entities the Department may not demand records on all such interests because the only relevant inquiry is whether their purpose in seeking the agency's records is to make commercial use of those records.

As discussed above, TRAC's purpose in seeking EOUSA records is, as a matter of law, not a commercial purpose under the statute. Moreover, TRAC has provided EOUSA with detailed information on funding for the TRAC programs in which the EOUSA database records are used, and the fees that TRAC has collected in projects that involve, even in part, data from the EOUSA records at issue here. See Plfs' Exhibit 16 at 3; Plfs' Exhibit 15 at 5. The Department's contention that the regulation's reference to commercial interest authorizes the EOUSA to demand that TRAC disclose information concerning all of its funding and fees is erroneous because TRAC's other activities have no bearing on whether TRAC is entitled to the benefit of FOIA's fee limitations. 5 U.S.C. § 552(a)(4)(A).²⁶

²⁶ The Department also asserts that the EOUSA demanded TRAC's records on March 21, 2000, because it had received a telephone call five months earlier in which an unidentified individual reported that TRAC stated that it would charge \$10,000 for records from the EOUSA's Central System. Combined Memorandum at 64. TRAC's submissions to the EOUSA and its declarations in this litigation show that it has never imposed or proposed such a charge. See Plfs' Exhibit 16 at 3; Fourth Declaration of Susan Long ¶ 21 (filed May 30, 2001). Moreover, as discussed above, such fees would not constitute a "commercial use" as a matter of law.

CONCLUSION

The Court should deny Defendant's Motion for Summary Judgment and order the Department to release to Plaintiffs the lead charge entries that have been withheld, the court numbers, captions and litigant/defendant names in cases that have been docketed in court, the names in records that the USAOs' codes identify as matters concerning business and property, and the agency file numbers in the EOUSA databases.

The Court should also grant partial summary judgment for Plaintiffs on Counts Four and Five of the Second Amended Complaint by declaring that the EOUSA has improperly failed to provide notice in accordance with the FOIA and the Department's regulations, 28 C.F.R. § 16.5(c), by declaring that Plaintiffs are entitled to fee limitation under the FOIA, and by declaring that the EOUSA's demand for disclosure of any and all records concerning TRAC's funding and fees for five years is unlawful.

Respectfully submitted,

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