10-1600
10-1618

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Susan B. Long and David Burnham,
Plaintiffs - Appellants-Cross-Appellees,

v.

Office of Personnel Management,
Defendant - Appellee-Cross-Appellant.

On Appeal from the United States District Court
for the Northern District of New York

APPELLANTS/CROSS-APPELLEES' RESPONSE/REPLY

Adina H. Rosenbaum
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

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Counsel for Appellants/Cross-Appellees

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GLOSSARY

A	Appendix
ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives
BLM	Bureau of Land Management
CBSA	Core-Based Statistical Area
CPDF	Central Personnel Data File
CSA	Combined Statistical Area
DOD	Department of Defense
EPA	Environmental Protection Agency
FOIA	Freedom of Information Act
IRS	Internal Revenue Service
LPA	Locality Pay Area
OPM	Office of Personnel Management
SA	Special Appendix
TRAC	Transactional Records Access Clearinghouse
TSA	Transportation Security Administration

STATEMENT OF THE ISSUES ON CROSS-APPEAL

1) Whether disclosing Central Personnel Data File (CPDF) records containing organizational component codes of employees who work in 19 occupations that the Office of Personnel Management (OPM) deems "sensitive" would be a clearly unwarranted invasion of personal privacy.

2) Whether disclosing CPDF records containing duty-station information of employees who work in 19 occupations that OPM deems "sensitive" would be a clearly unwarranted invasion of personal privacy.

STATEMENT OF THE FACTS AND CASE

OPM is withholding organizational component codes, duty-station information, and names of all employees in five agencies and 23 occupations that it deems "sensitive"—hundreds of thousands of employees in all—in response to Freedom of Information Act (FOIA) requests for the CPDF, a database it compiles to support statistical analysis of the workforce. Our opening brief on appeal sets forth the procedural and factual history of this case. App. Br. 3-16. We incorporate that explanation and will not repeat it here. At issue in the cross-appeal is the district court's holding, in its second decision in this case, that the release of organizational component codes and duty-station information (without names) of employees in 19 of the occupations would "not involve a measurable privacy interest," SA 66, and, therefore, that OPM had not sustained its burden of

showing that those records are exempt from disclosure. SA 68. This brief addresses OPM's challenge to the validity of that holding. It also addresses OPM's response to our own arguments that the district court erred in holding that OPM may withhold equivalent occupational component codes and duty-station information of employees in five agencies and four other occupations and that it may withhold names of employees in all the agencies and occupations at issue.

SUMMARY OF ARGUMENT

OPM has applied blanket exemptions to withhold organizational component codes, duty-station information, and names of all employees in five agencies and 23 occupations. This broad withholding of records prevents members of the public from engaging in statistical and other analyses of the federal workforce that would shed light on "what their government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1988) (internal quotation marks omitted). OPM claims that all the records can be withheld under FOIA Exemption 6, 5 U.S.C. § 552(b)(6), FOIA's personal privacy exemption. Because release of the records would not constitute a "clearly unwarranted invasion of personal privacy," *id.*, however, Exemption 6 does not apply.

I. <u>Anonymous Organizational Component Codes and Duty-Station Records</u>

As an initial matter, no matter what this court decides about releasing

organizational component codes and duty-station information together with names, the organizational component codes and duty-station data are not exempt if released without names. Exemption 6 concerns personal privacy, and release of anonymous records does not invade personal privacy. Moreover, even if disclosing anonymous records ever could invade personal privacy, disclosing these records would not. Although OPM claims the records would facilitate identification of federal employees, OPM "does not explain *how* employees could be identified from the disclosure of their duty stations and organizational component codes," as the district court noted. SA 66 (emphasis in original). And OPM's invocation of the "mosaic theory" is not a talisman that frees it from having to make a logical argument.

In contrast, there is a strong public interest in this information, which would allow the public to better understand how the government is organized, where it is focusing its resources, and which communities across the country are receiving the benefits of its actions—all topics that fall squarely within the statute's purpose of "shed[ding] light on an agency's performance of its statutory duties." *Reporters Comm.*, 489 U.S. at 773. OPM's primary response is that "alternative sources of information" would serve these purposes. OPM Br. 16. Notably, however, although OPM evidently did not believe itself limited to the record in this case in

searching for evidence to support its claims, OPM does not provide any evidence of other sources that provide the type of statistical geographic information provided by the withheld records, which allows the public to see how different communities are affected by government actions. Accordingly, the Court should affirm the district court insofar as it required release of occupational component codes and duty-station information of employees in 19 of the "sensitive" occupations, and reverse insofar as it allowed withholding of the identical information for employees of four other occupations and five entire agencies.

II. Names, Organizational Component Codes, and Duty-Station Records Together

Although the Court could deny the government's cross-appeal and also extend the district court's ruling concerning organizational component codes and duty-station records to the remaining agencies and occupations by holding that those records are not exempt if released without names, our more fundamental point is that names, organizational component codes, and duty-station information are not exempt in combination and should all be released together. Thus, the Court should not only deny the government's cross-appeal and affirm the release of organizational component codes and duty-station information ordered by the district court of employees in 19 of the "sensitive" occupations, but also, in our

appeal, reverse the district court insofar as it held that the government could withhold names of employees in the 19 occupations, and names, organizational components, and duty-station information of employees in the five agencies and four remaining occupations at issue.

It is well-established that release of names and other identifying information does not necessarily invade personal privacy. Instead, whether release invades privacy depends on the consequences that would ensue. Here, OPM has not shown that releasing the withheld names, organizational component codes, and duty-station records would likely have negative consequences for employees' privacy. Its contention that disclosing the records would place employees at risk of harassment or attack, even though such records have long been released without problem, is speculative and unsupported, based solely on its declarants' say-so. And its reliance on a "sea change in security," OPM Br. 13, and on the fact that the records are in a computerized database is misplaced. OPM cannot justify its decision not to release records simply by saying there has been a "sea change" in what it is willing to release, and releasing records in a computerized database does not necessarily invade personal privacy.

Furthermore, OPM bears the burden of showing that every withheld record is exempt from disclosure, yet, despite its insistence that it has "carefully redacted

limited information," OPM Br. 13, the arguments it makes do not apply to all the withheld records. For example, although its rationale for withholding information on employees in the 23 occupations is that they are "engaged in sensitive work," OPM Br. 41, OPM concedes that not all positions in the 23 occupations are, in fact, sensitive. OPM Br. 42. OPM is correct that it does not need to make a separate evidentiary showing for each record it is withholding, but the showing it makes has to justify withholding every record: Although it can rely on arguments that are common to all of the withheld records, it cannot withhold all of the records based on arguments that only apply to some of them. And OPM's claim that it need not make individualized determinations because FOIA requires it only to conduct a reasonable search is contrary to the fundamentals of FOIA, which require the agency not only to search for responsive records, but also to release the non-exempt records that it finds.

In contrast, there is a significant public interest in the withheld records. Government work is not done by nameless, faceless automatons, but by real people, and who those people are affects what the government does. Releasing the withheld records would better inform the public about why the government undertakes certain activities, what it prioritizes, and how efficiently and effectively it operates. OPM's attempts to denigrate these significant public

interests—by, for example, insisting that the withheld information says nothing about the government's actions, or by claiming that we can achieve our goals "with the substitution of anonymous identifiers," OPM Br. 14, even though OPM concedes that it has not released anonymous identifiers for the records at issue—all fail. The significant public interest outweighs any privacy interest and the withheld records should be released.

ARGUMENT

I. OPM CANNOT WITHHOLD ANONYMOUS ORGANIZATIONAL COMPONENT CODES AND DUTY-STATION RECORDS.

OPM's cross-appeal challenges the district court's holding that releasing the organizational component codes and duty-station records, without names, of employees in 19 of the "sensitive" occupations would not invade personal privacy. As discussed below (at II), this Court should hold that the withheld names, organizational component codes, and duty-station information are not exempt from disclosure. However, even if this Court were to hold that employee names could be withheld, this Court at a minimum should affirm the district court holding at issue in the cross-appeal, extend that holding to employees in the other four occupations and five agencies at issue in this case, and hold that it would not be a clearly unwarranted invasion of personal privacy to release the withheld

organizational component codes and duty-station information *without* names. Exemption 6—FOIA's personal privacy exemption—does not exempt records unconnected to an identifiable person. There is no privacy interest in anonymous records. And even if there could be a privacy interest in such records, there is not one here. In contrast, there is a significant public interest in releasing this information about the federal workforce.

A. Exemption 6 Does Not Exempt Records Unconnected to Identifiable People.

As the Supreme Court has explained, Exemption 6 was "'intended to cover detailed Government records on an individual which can be identified as applying to that individual.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 376 (1976) (quoting H.R. Rep. No. 1497, 89th Cong, 2d Sess. 11 (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2428). Because they cannot be identified as applying to individuals, the anonymous organizational component and duty-station records cannot be withheld under Exemption 6.

OPM insists that Exemption 6 goes beyond "'personal-identifying' information to encompass potential harm to specific persons whether they are individually identified or not." OPM Br. 78. But Exemption 6 is not a catch-all provision that allows for the withholding of any information that has the potential

to cause harm; it is a provision about "personal privacy." 5 U.S.C. § 552(b)(6). And the Supreme Court has explained that even the disclosure of "highly personal information regarding marital and employment status, children, living conditions and attempts to enter the United States . . . constitutes only a *de minimis* invasion of privacy when the identities of the [individuals] are unknown." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 175-76 (1991); *see also ACLU v. Dep't of Def.*, 543 F.3d 59, 86 (2d Cir. 2008), *cert. granted on other grounds, judgment vacated*, 130 S. Ct. 777 (2009) ("[A] privacy right attaches when information that is sensitive may be linked to certain individuals, not when the individuals involved are unknown."). FOIA contains other provisions—such as Exemption 1, pertaining to national security, and Exemption 7, pertaining to certain law enforcement records, *see* 5 U.S.C. §§ 552(b)(1) & (7)—that cover types of harm besides the invasion of personal privacy. OPM did not raise those exemptions here.

Moreover, the anonymous records are not "similar files" under Exemption 6's threshold test. Citing the statement in *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982), that "[w]hen disclosure of information which applies to a particular individual is sought from Government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy," OPM claims

that "the Court does not limit Exemption 6's reach to information that 'identifies' a particular individual." OPM Br. 79. But in the prior sentence, the Court explained that Exemption 6 "'was intended to cover detailed Government records on an individual which can be identified as applying to that individual.'" *Wash. Post. Co.*, 456 U.S. at 602 (quoting H.R. Rep. No. 1497, at 11). And this Court has explained "that a 'similar file' includes any 'detailed Government records on an individual which can be identified as applying to that individual.'" *Wood v. FBI*, 432 F.3d 78, 87 n.6 (2d Cir. 2005) (quoting *Wash. Post Co.*, 456 U.S. at 602). Moreover, in determining whether records are "similar files," this Court has emphasized the existence of identifying information. *See, e.g.*, *id.* at 86 (explaining that investigative report in prior case "was a 'similar file' under Exemption 6 because it was a 'detailed Government record' containing identifying information about the subject of the investigation"). In short, it is the connection to an identifiable person that makes a file a "similar file." Here, however, OPM stores the organizational component and duty-station records separately from name records. *See* Lukowski Decl. ¶ 21 (A 69). Therefore, if released anonymously, the records would not be attached to names as either released or as stored and would not meet Exemption 6's threshold test.

B. Without Names, the Organizational Component and Duty-Station Records Are Unconnected to Identifiable People.

OPM's primary argument on its cross-appeal, and primary response to the explanation in our opening brief that anonymous records are not covered under Exemption 6, is that release of the anonymous codes *could* lead to the identification of individuals. OPM Br. 67, 76-77. OPM claims that its declarant established that release of the anonymous organizational component and duty-station records "'would facilitate the identification of thousands of employees in sensitive positions.'" OPM Br. 76 (quoting Fourth Lukowski Decl. ¶ 18 (A 445)). As the district court noted, however, OPM "does not explain *how* employees could be identified from the disclosure of their duty stations and organizational component codes." SA 66 (emphasis in original). OPM does not explain how, for example, someone could identify an anonymous employee in the occupation "Criminal Investigating," which cuts across 74 different agencies, Third Long Decl. ¶ 10 (A 408), simply by knowing that the person works in a particular city or county, let alone in a particular state, Core-Based Statistical Area (CBSA), Combined Statistical Area (CSA), or Locality Pay Area (LPA). It does not explain how someone could determine, through the information in the CPDF file (without the names), which of the 458,336 people in Onondaga County (according to the

2000 census) are among the 2,719 federal employees in the County. Fourth Long Decl. ¶ 6 (A 452).

OPM contends that the risk of identification is particularly high "in areas where a low number of employees work." OPM Br. 76-77. But even if there is only one employee in a specific occupation in a county, OPM does not explain *how* anyone could use the CPDF information to tell which among the thousands of people in that county is that one employee. *See* Fourth Long Decl. ¶ 6 (A 451). The person could only be matched to the information if the matcher *already knew* that the person worked in that occupation in that county, in which case the CPDF information would not add any information.

Instead of offering an explanation, OPM invokes the "mosaic theory," noting that sometimes "data which might by itself appear innocuous . . . can be taken together with other publicly available information, to assemble a composite portrait which could result in an unwarranted invasion of privacy." OPM Br. 65. Invoking this theory, however, does not free OPM from having to explain how release of the information would result in a clearly unwarranted invasion of personal privacy when combined with publicly available information. *Cf. Consumers' Checkbook Ctr. for the Study of Servs. v. U.S. Dep't of Health & Human Servs.*, 554 F.3d 1046, 1049 (D.C. Cir. 2009) (explaining exactly what

publicly available information the responsive information would have to be combined with in order to reveal information that would invade personal privacy). Although OPM states that "[i]n this manner, the data at issue can be used to identify particular employees," OPM Br. 77, it never states in *what* manner the data can be so used.

OPM also seeks to avoid explaining how release of the information would lead to the identification of employees by claiming that "the special protection accorded to computerized 'lists' . . . comes into play." OPM Br. 67. OPM's contention that computerized lists get special protection that is not afforded other records—an argument OPM repeats throughout its brief, *see* OPM Br. 14, 36-38—rests on a misunderstanding of *Reporters Committee*, 489 U.S. 749. There, the Supreme Court recognized that when a lot of information about a particular person is compiled in a computerized format, such that disclosure of the compilation as a whole would violate the person's privacy, that compilation may be withheld under Exemption 6 even if the pieces of information could separately be found in other places. *Id*. at 764-67. *Reporters Committee* did not hold, however, that information is private just because it is stored in a computerized list, or that the test for determining whether the release of information would be a clearly unwarranted invasion of personal privacy is different for computerized lists

than for other information. And Congress has since made clear that computerized records are subject to FOIA to the same extent as other records. *See* Electronic Freedom of Information Act Amendments of 2006, Pub. L. No. 104-231, 110 Stat. 3048.

In short, neither the invocation of the mosaic theory nor the fact that the records are part of a computerized database frees OPM from having to explain how release of the anonymous records would lead to identification of employees. OPM has not done so here.

C. Even if Exemption 6 Applied to Anonymous Records, Release of the Anonymous Organizational Component Codes and Duty-Station Records Would Not Invade Personal Privacy.

Even if Exemption 6 could ever cover records unrelated to an identifiable person, the anonymous organizational component code and duty-station records would not be exempt because OPM has not shown that their release would invade personal privacy. OPM argues that release of the records would invade privacy because they could "be used to discover street addresses" of employees' offices. OPM Br. 64 (quoting Second Lukowski Decl. ¶ 2 (A310)). As an initial matter, however, work addresses, even street addresses, are not, in general, personally private information. *See, e.g.*, 5 C.F.R. § 293.311(a)(5) (providing that OPM will make available to the public information identifying buildings and even room

numbers about "most" federal employees); *cf. FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011) (noting that "we often use the word 'personal' to mean precisely the *opposite* of business-related" (emphasis in original)). Office addresses are not the "the type of information that a person would ordinarily not wish to make known about himself or herself." *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 292 (2d Cir. 2009).

OPM claims that releasing duty-station information would nonetheless invade personal privacy because terrorists could use it to "harass and attack federal employees[,] . . . devis[ing] a devastating attack on the duty station that brutally maximized the number of personnel killed and disabled." OPM Br. 64-65 (quoting Second Lukowski Decl. ¶ 2 (A 310)). Putting aside that OPM has not actually shown that each of the hundreds of thousands of employees whose organizational component code and duty-station information it is withholding would be at increased risk of attack if his or her work address were revealed—an issue we address below, *see infra* pp. 27-37—the information at issue does not reveal street addresses. The most detailed information is city and county, and much of the withheld duty station information is at a far broader level.

Of course, as we pointed out in our opening brief (at 43), government agencies often make their buildings' addresses public in telephone books or on the

internet, and people therefore will sometimes be able to use those sources to identify anonymous employees' possible office addresses. OPM claims "[t]hat is precisely the point," OPM Br. 64—that is, OPM claims that the fact that street addresses are generally public information is precisely why it would invade an unidentified person's privacy to reveal the city or state in which the employee's office is located. But if, for example, a person is seeking to find anonymous Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) employees and uses Google to find the ATF's address in a particular city, then the CPDF is not providing him with the information about how to find the employees. He will know even without the CPDF that there are anonymous ATF employees at that address. And the CPDF will not reveal either whether any specific employee works at that address or the number of ATF employees at that address overall. As OPM concedes, agencies may publicize multiple street addresses for the same agency within one city. Second Lukowski Decl. ¶ 2 (A 310); *see also* Second Long Decl. ¶ 3 (A 361-62). And even if an agency publicizes only one street address, someone looking to find employees or to determine the number of employees at a specific address will not know whether the agency has other, unpublicized addresses in the same city. Indeed, one would expect that if a government agency believed that certain of its employees could be targeted

because they work for that agency, it would place those employees at an unpublicized address. In addition, the geographic information in the organizational component field tends to provide information about the headquarters of the component, not necessarily information about where each employee is located. Fourth Long Decl. ¶ 3 (A 448).

In short, releasing the broad geographical information at issue here will not inform the public about where any specific anonymous person works. Nor will it provide the public with statistical information about the number of employees in a specific occupation or agency at a specific address. Moreover, to the extent that the government's argument is that it does not want to disclose the aggregate number of employees in a particular geographical area or organizational component, that interest is not a *personal privacy* interest. *See* H.R. Rep. No. 1497, at 11 (explaining that Exemption 6 was not intended to cover "the compilation of unidentified statistical information").

Furthermore, even if it were a clearly unwarranted invasion of personal privacy to release some geographic information from the CPDF, the duty station fields are segregable from each other. For example, even if it did not release city or county, OPM could release the "state" field; OPM has not demonstrated how that field would place any employees at risk given that OPM's website contains a

tool that already permits the public to run reports on the number of employees in any particular occupation in any particular state. Third Long Decl. ¶ 23 (A 413-14). And although OPM lumps organizational component codes in with the duty-station fields, *see* OPM Br. 68, OPM is withholding all organizational codes even though many of them contain *no geographic information at all*. *See* Long Decl. ¶ 26 (A 198).

OPM claims that it is not required to release the organizational component codes that lack any geographic information because FOIA requires only that it "conduct a reasonable search for 'for [sic] the purpose of locating those records which are responsive to the request.'" OPM Br. 69-70 (citing 5 U.S.C. § 552(a)(3)(D)). Of course, however, FOIA does not only require the agency to conduct a reasonable search to locate responsive records. FOIA also requires the agency to *release* the responsive records it has found, unless they are exempt from disclosure. *See* 5 U.S.C. § 552(a)(3)(A)(ii) (requiring the agency to "make the records promptly available to any person"). Here, although OPM has located responsive records (the organizational component codes), it has proffered no argument that the organizational component codes without geographic information are exempt from disclosure. Accordingly, the records should be released.

Moreover, FOIA requires the agency to release all reasonably segregable

portions of a record, *id*. § 552(b), and thus, even if this Court determines that the geographical data in the organizational component codes should be withheld, OPM should be required to release the other digits of the codes. OPM claims that it cannot do so because it would have to manually review 350,000 codes every six months to determine which ones contain geographic information. OPM Br. 69. Manually reviewing each entry, however, is not the most efficient way to identify the geographic components in the organizational component codes. Second Long Decl. ¶ 11 (A 365). A computer program can help determine which organizational codes share the same structure and, for each of those groups, which parts of the code (if any) contain geographic information. *Id*. ¶ 12 (A 366). And after this is done for one CPDF, a computer program can easily identify any changes in the codes in later CPDFs. *Id*. ¶ 15 (A 367); *see also* Fourth Long Decl. ¶ 5 (A 449-51). In short, OPM can reasonably determine which portions of which organizational component codes contain geographic information and release the codes and portions of codes that do not.

D. There Is a Significant Public Interest in the Organizational Component Codes and Duty-Station Records.

1. As explained in our opening brief, in contrast to the de minimis privacy interest at stake, there is a significant public interest in the withheld organizational

component codes and duty-station information, even when they are released without accompanying names. *See* App. Br. 45-48; 51-52; 60-61. These explanations of how organizational component codes and duty-station information shed light on the operations and activities of the government apply to the organizational component records and duty-station information of employees in the 19 occupations at issue in the cross-appeal, as well as to the employees in the five agencies and four occupations at issue in the appeal.

To begin with, the withheld organizational component codes reveal the number of staff assigned to different organizational components. Like a detailed organizational chart, the codes provide information about how the government is organized and where the government is hiring and assigning its staff. Moreover, the number of staff assigned to a particular organizational component helps determine what that component can accomplish. For example, the decision by government officials to assign more employees to the "Employer Sanctions Branch" and fewer to the "Immigrant Visas Branch" in the Immigration and Customs Enforcement agency can affect both how often employers are sanctioned and how quickly visas are processed. Long Decl. ¶ 46 (A 211-12). Releasing the number of employees assigned to particular organizational components therefore allows the public to see how the agency is spending its resources, a topic of great

public interest in this era of focus on fiscal accountability, and to analyze whether the agency is prioritizing the efforts that the public considers most important. *Id*. Knowing the number of employees assigned to various organizational components also gives the public a sense of the personnel costs of different government activities and the opportunity to participate in a more educated manner in the public debate over how to reduce the debt. *Id*.

In the same way, knowing broad geographic information about where employees are located allows the public to see *where* the government is acting and on what parts of the country it is focusing its resources. Release of the withheld duty-station information thereby allows members of the public to better understand what services they and their communities are receiving and to determine whether certain areas are receiving greater or fewer resources than are appropriate. *Id*. ¶ 29 (A 199). For example, in 1993, a subcommittee of the House Government Operations Committee commissioned the Transactional Records Access Clearinghouse (TRAC) to do a study on federal prosecutors. The study, which was based on CPDF data, found that prosecutorial staffing levels varied widely: Whereas one federal judicial district had only 8 federal prosecutors per million people, another had 30 prosecutors per million people. As a result of the study and the subcommittee's hearing on it, the Attorney General ordered a study

of the distribution of prosecutors around the country and the Executive Office of the United States Attorneys made changes in the allocation of employees. Duty-station information made this study possible. *Id*. (A 199-200).

Access to duty-station information can also enable the public to see the connections between staffing decisions and activities conducted by the government and to better understand why the government undertakes certain actions. For example, Internal Revenue Service (IRS) Internal Revenue Officers are responsible for securing payment of past due taxes and have discretion to give taxpayers more time by working on an installment plan. Using CPDF data, TRAC found that the odds that a taxpayer was allowed to pay on an installment plan was often related to the ratio of revenue officers to the number of taxpayer delinquent accounts in the geographical area. The IRS was more likely to use the quicker route of seizing taxpayer assets, rather than using an installment plan, when there were fewer revenue officers compared to delinquent accounts. Today, a similar study would not be possible because OPM is withholding duty-station information on revenue officers. *Id*. ¶ 31 (A 201-02); *see also id.* ¶ 34 (A 203-04) (providing other examples in which the withholding of duty-station information prevents TRAC from conducting studies that would inform the public about the government's activities).

Moreover, disclosure of information about where the government is deploying its personnel can demonstrate whether the government is properly prepared to address crises, shed light on whether the government has responded to recognized problems, and explain changes in government enforcement rates. *See id.* ¶¶ 31-33 (A 201-03). The information can also help members of the public determine the effect that proposed policies, such as shutting down military bases or outsourcing workers, will have on employment in their communities, an issue of particular concern in this time of high unemployment rates. *See* Ruch Decl. ¶ 5 (A 306).

2. Our opening brief provides numerous other examples of how releasing the organizational component codes and duty-station information would shed light on the operations and activities of the government. We explained, for instance, that "[b]y comparing staffing levels with statistics that indicate what types of law enforcement are needed, the public can learn whether investigation rates that differ across locality are based on different needs or just on different staffing decisions by management." App. Br. 46. And we provided examples in which differences in corporate tax audit rates were traced to different IRS staffing levels in different districts and in which the proliferation of new Environmental Protection Agency (EPA) offices was found to have led to a greater number of employees being

supervisors, rather than investigators, which correlated with a decrease in the number of criminal cases referred by EPA for prosecution. *Id*.

OPM dismisses all of the examples we provided as too "attenuated" and claims that they say nothing "directly" about what the government is up to. OPM Br. 70 (citations omitted). But unlike in any of the cases cited by OPM for the proposition that there must be a nexus between the records and the public interest, in all of the examples we provided, both in our opening brief and above, *direct analysis* of organizational component or duty-station records—that is, of the exact records being withheld—provided the public with information about where the government was acting, why it was undertaking certain activities, or how its actions would affect the public.[1]

Conceding that there is a public interest in being able to monitor where the government spends its resources, OPM also claims that the public interest in the withheld data should be "discounted" because there are "alternative sources of information available" for the information the CPDF provides. OPM Br. 71. OPM relies exclusively on evidence outside the district court record in this part of its brief, *see id.* at 73-74, notwithstanding Federal Rule of Appellate Procedure

[1] We address OPM's arguments that the connection between the withheld records and learning about the government is "too attenuated" at greater length below, *see infra* pp. 46-55.

10(a). But even outside the bounds of the record, OPM does not point to any publicly available sources that provide a breakdown of how the government deploys its personnel around the country or a breakdown of the employees into organizational components. For example, although OPM claims that the public's interest in understanding how the government is spending its resources is "more than satisfied by alternative sources of information, both public and private, which analyze in detail the government's budgetary allocations," OPM Br. 74, the source on which it relies provides only national budgetary information, not budgetary information broken down by community. It therefore does not allow for the same sort of analysis as the withheld information about where the government is acting, what communities it is affecting, and whether it is making rational decisions about where to concentrate its resources.

Likewise, OPM responds to the example in our opening brief that knowing the number of FEMA employees employed near New Orleans in August 2005 is necessary to assess whether the government was adequately prepared for Hurricane Katrina by stating that "myriad [reports] critically review the role of FEMA in response to Hurricane Katrina in a more comprehensive and useful manner than plaintiffs propose here." OPM Br. 73. It cites as evidence two reports about Hurricane Katrina that were released by the government

approximately six months after the hurricane. *Id.* But the purpose of FOIA is to open government records to the public so that the public is not limited to the story the government chooses to tell. *See Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 264 (D.C. Cir. 1982) ("[T]he purpose of FOIA is to permit the public to decide for itself whether government action is proper."). That the government will eventually release its official view of an event does not decrease the public interest in being able to gain access to data that sheds light on governmental activities in the weeks and months following that event and to come to its own conclusions about whether the government fulfilled its duties.[2] Moreover, Hurricane Katrina garnered an unusual amount of self-examination by the government. The government does not release reviews of whether it was prepared, in terms of the number of staff deployed, for every event, concerning every agency, in every community around the country. The withheld organizational component and duty-station records, however, allow the public to

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[2]OPM claims that plaintiffs "only requested data for September 2005" and thus that "the requested data would not show how many FEMA employees were employed near New Orleans in August 2005." OPM Br. 72 n.11. However, plaintiffs also requested the June 2005 CPDF file, *see* First Lukowski Decl. Ex. M (A 117), and the CPDF file includes both information from the status file, which discusses the status of each employee at the end of a reporting period, and from the dynamics file, which contains information on all personnel actions such as duty-station changes occurring during a particular reporting period. *Id.* ¶ 20 (A 68).

undertake a part of that analysis.

In sum, the withheld organizational component and duty-station records go to "the core purpose of the FOIA," "contribut[ing] significantly to public understanding *of the operations or activities of the government*." *Reporters Comm.*, 489 U.S. at 775 (citation omitted) (emphasis in original). Because of this significant public interest, even if there were a cognizable privacy interest in the anonymous organizational component and duty-station records, the balance would weigh in favor of disclosure.

II. OPM Cannot Withhold Names, Organizational Component Codes, and Duty-Station Information on Over 40% of the Federal Civilian Workforce.

As both the Supreme Court and this Court have recognized, releasing names and other identifying information does not necessarily invade personal privacy. *Ray*, 502 U.S. at 176 n.12; *Wood*, 432 F.3d at 88. Instead, whether disclosure of names threatens a cognizable privacy interest depends "on the consequences likely to ensue from disclosure." *Id.* Here, OPM has not demonstrated that releasing the withheld organizational component codes, duty-station records, and names—records that for years were released without incident—would have negative consequences for employees' privacy. Its claims that releasing the records will put employees at risk are speculative and unsupported, based solely

on its declarants' say-so, and its system of applying blanket exemptions to agencies and occupations has led it to withhold records to which even its own arguments do not apply. In contrast, there is a significant public interest in release of the withheld records, which would shed light on, among other things, how the government is organized, what it is prioritizing, where it is acting, and why it is engaging in certain activities.[3]

A. OPM Has Not Demonstrated a Privacy Interest in the Withheld Records.

1. Names, organizational component codes, and duty-station records are not the sort of information "that a person would ordinarily not wish to make known about himself or herself." *Associated Press*, 554 F.3d at 292. Federal employee names and duty-stations have long been released to the public and are often available on government websites and official government documents. *See, e.g.*, Long Decl. ¶¶ 61-64 (A 219-21). People generally know the names of government employees with whom they have had contact. *See, e.g.*, Third Long Decl. ¶ 16 (A 410-11); Ruth Decl. ¶ 4 (A 433). The Department of Defense's (DOD) regulations acknowledge that DOD employee names and duty stations can normally be released "without a clearly unwarranted invasion of personal privacy." 32 C.F.R.

[3]The arguments in this section apply to all the records at issue in this lawsuit, including those at issue in the appeal and those at issue in the cross-appeal.

§ 310.22(b)(5)(i)(A). And OPM's regulations state that names and duty-stations are "available to the public" for "most" federal employees. 5 C.F.R. § 293.311(a). Simply put, in general, releasing federal employee names, duty stations, and organizational component codes does not invade the employees' personal privacy. *See, e.g.*, *Morley v. CIA*, 508 F.3d 1108, 1128 (D.C. Cir. 2007) ("To the extent the [agency] suggests that the privacy interest in biographical information is self-evident, it is mistaken.").

OPM notes that in addition to stating that names and duty stations of most employees are available to the public, its regulation states that it will generally not disclose a list of names, present or past position titles, grades, salaries, performance standards, and/or duty stations if the official in charge decides that list is exempt under FOIA. OPM Br. 36-37. OPM misses the point. The question is not whether, by withholding this information, OPM violated its regulation. The question is whether it violated FOIA by withholding information the release of which would not constitute a clearly unwarranted invasion of privacy. OPM's admission that names and duty-stations (including room numbers, which are far more specific than the duty-station information in the CPDF) are available on most federal employees demonstrates that this is not the sort of information the release of which invades personal privacy.

OPM does not dispute the long history of release of federal employee names, duty-stations, or organizational components, or that, in recommending the enactment of FOIA, the House Committee on Government Operations referred to the withholding of this type of information as an "abuse" of the pre-FOIA law. H.R. Rep. No. 1497, *reprinted* in 1966 U.S.C.C.A.N. 2418, 2422-23. And it concedes that, in addressing the privacy side of the balancing test, "[t]his Court has made plain that 'the focus . . . must be solely upon what the requested information *reveals*, not upon what it might lead to.'" OPM Br. 55 (quoting *Associated Press*, 554 F.3d at 292 (emphasis in original) (citation omitted)). Nonetheless, it claims that it can withhold the records because it has "demonstrated" that releasing the withheld records would make the "employees and their families targets for harassment or attack." OPM Br. 12-13; *see also id.* 26-30. But OPM has provided nothing more than its declarants' statements that releasing the withheld records—which have been released without consequence for years—would put people at risk. That OPM's declarants say that every employee in DOD, ATF, the Drug Enforcement Agency, the U.S. Mint, the Secret Service and 23 different occupations would be at risk of harassment or attack if the employee's name, or the county where he works, or the organizational component to which he is assigned is made public does not necessarily make it so.

See ACLU v. U.S. Dep't of Justice, 655 F.3d 1, 10-11 (D.C. Cir. 2011) (rejecting invasion of privacy argument that was based on "little more than speculation"); *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 34-35 (D.C. Cir. 2002) (stating, despite declarant's claim that releasing landowners' names and addresses would lead to trespass, that "the evidentiary support for unlawful trespass" was weak and "the Secretary has failed to show that unlawful trespass is likely to occur"); *see also Rose*, 425 U.S. at 381 n.19 ("Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." (citation omitted)).

OPM also claims that the long history of release of federal employee names and duty stations is irrelevant because of the "dramatically different circumstances" following the September 11, 2001, and anthrax attacks. OPM Br. 34. The only dramatically different circumstance to which OPM points, however, is the government's *own* decision to enact a more restrictive disclosure policy; OPM provides no evidence that federal employees are in fact at greater risk than they were before September 11. Plaintiffs do not question that, after September 11, OPM became more secretive; indeed, that change led to this lawsuit. But OPM's decision to withhold millions of records from the public does not itself constitute a "unique circumstance[]" that provides OPM with the legal authority to withhold those records. OPM Br. 35.

OPM further claims that there is a special privacy interest in the withheld records because they are stored in a computer database. OPM Br. 36-38. As explained above, however, *see supra* pp. 13-14, OPM's argument is based on a misunderstanding of *Reporters Committee*, 489 U.S. 749, which recognized that computers allow for the accumulation of vast amounts of data, and that the compilation of a lot of data on a person in one place can invade that person's privacy even when the pieces of information can be found separately in other places. *Id*. at 764-67. In contrast, where, as here, the database only contains bits of information about each employee, and that information's release would not invade privacy, it makes no difference that the information happens to be stored in a computerized database with information about other employees as well.

OPM is similarly misguided in asserting that the availability of many federal employees' names and duty stations on agency websites, in official documents, and in correspondence from the agency does not reduce any privacy interest in that information. OPM Br. 45-46. *See, e.g.*, *Reporters Comm.*, 489 U.S. at 763 (recognizing that "the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact"); *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) (upholding conclusion that there was "only a 'minor' privacy interest" in names of employees

of a private company "given that these individuals have been identified in public documents"). As we understand it, OPM's argument is that releasing names and broad geographical information about office locations would enable people who want to harass or attack employees to identify and locate them. *See, e.g.*, Lukowski Decl. ¶ 31 (A 72). But if the names and specific addresses of the employees are already publicly available, then releasing names and the less precise duty-station information through the CPDF would *not* help harassers or attackers to identify and find them; they would *already* be able to do so.

For example, the U.S. Marshals Service's website says that the name of the U.S. Marshal in the Northern District of New York is James Parmley. Third Long Decl. ¶ 17 (A 411). Given that his name is already on the Marshals Service's website, release of his name in response to a FOIA request for the CPDF would not expose him to harassment or attack. OPM asserts that he might still have a privacy interest because his name would be released as part of a "comprehensive database," OPM Br. 46, but all being part of a database means is that, at the same time it releases his name, OPM would also release names of *other* people. Mr. Parmley does not have a privacy interest in the names of other people—information that says absolutely nothing about him. And although OPM seeks to invoke the "'practical obscurity' doctrine," under which "privacy interests

can exist in personal information even though the information has been made available to the general public at some place or point in time," OPM Br. 46, it cannot seriously be claimed that an agency's website would be an "obscure" place for someone to look if he wanted to identify an agency employee or find the agency's address, or that the signature line or letterhead of a letter would be an "obscure" place for someone to look for the name and address of the employee who wrote the letter.

2. OPM's withholding of names that agencies make available on their websites highlights an additional problem with OPM's arguments: OPM's exemption claims are overly broad. As our opening brief explains (at 25-28), OPM is withholding records based on arguments that do not apply to all of the withheld records. It has applied blanket exemptions to five agencies and 23 occupations, withholding organizational component codes, duty-station information, and names of every employee in those agencies and occupations, regardless of whether it would invade any particular employee's privacy to release that organizational component code, duty-station information, or name. Indeed, OPM concedes that although it is withholding information on all employees in "sensitive" occupations, "not all positions within [a 'sensitive'] occupation are 'sensitive.'" OPM Br. 42.

OPM responds that it has no burden to demonstrate that *every* record it is withholding would, if released, put the employee at risk of harassment or attack. But OPM's claim that these records' release would be a clearly unwarranted invasion of personal privacy is based entirely on its claim that their release would put employees at such risk. Accordingly, if a record's release would not put an employee at risk, then its release would not be a clearly unwarranted invasion of personal privacy. And if its release is not a clearly unwarranted invasion of personal privacy, then the record is not exempt. Thus, at its core, OPM is claiming that it does not have to demonstrate that each record it is withholding is exempt from disclosure. Under FOIA, however, the agency has the burden of demonstrating that the records it is withholding are exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). And the agency cannot meet that burden by showing that *some* of the withheld records are exempt; it must show that *every* withheld record is exempt. *See, e.g.*, *Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973) ("To prevail, the defending agency must prove that *each* document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." (emphasis added)).

OPM points out that, in some cases, courts have found privacy interests

based on "common-sense expectations in the relevant context—without requiring an individualized showing of the likelihood of harassment or attack." OPM Br. 40. Thus, for example, OPM notes that in *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 501 (1994) (*DOD v. FLRA*), the Supreme Court found a privacy interest in home addresses without investigating whether every single person would not "want to be disturbed at home by work-related matters," and that in *Wood*, 432 F.3d at 88, this Court held that "'government investigative personnel may be subject to harassment or embarrassment if their identities are disclosed' without requiring an evidentiary showing of individualized harm." OPM Br. 40. However, although these cases relied on common-sense (non-speculative) arguments, they did not allow agencies to withhold records based on arguments that did not apply to all of the withheld records. The Supreme Court, for example, did not hold in *DOD v. FLRA* that because the agency had demonstrated a privacy interest in home addresses, it could also withhold work addresses. Likewise, this Court did not hold in *Wood* that because the agency had demonstrated that government investigative personnel may be subject to harassment or attack if their names are released, it could withhold the names of all personnel, whether or not they were investigative. Here, in contrast, OPM is seeking to withhold all of the records based on arguments that

only apply to some of the records. It claims that it is "not too far of a stretch to find that federal employees engaged in sensitive work have . . . a privacy interest in their names and identifying information," OPM Br. 41, but it has not shown that all of the employees whose names, duty stations, and organizational component codes it is withholding are in fact engaged in "sensitive" work that would place them at risk if their organizational component codes, duty-station information, or names were released. Indeed, it concedes that some of them are not.

3. Having conceded that not all positions in the "sensitive" occupations are "sensitive," OPM fights a straw man, claiming that "plaintiffs appear to argue" that OPM must demonstrate that "workers employed at sensitive agencies or engaged in sensitive occupations are doing 'sensitive' work all day every day." OPM Br. 42. We argued no such thing. Nor, despite OPM's hyperbole, do we argue that "once an employee engages in 'non-sensitive' assignments, his or her name should be released" or that agencies must report to OPM daily whether the employee was engaged in sensitive work that day. OPM Br. 44. Rather, OPM must demonstrate that the employees whose organizational components, duty stations, and names are being withheld are in positions that would place them at increased risk of harassment or attack if the withheld records were released. Where the only reason OPM has provided for thinking that releasing information

would put an employee at risk is that the employee engages in "sensitive" work, OPM's failure to demonstrate that an employee engages in such work (or its concession that an employee does not) is a failure to meet its burden.

OPM claims that even if employees do not perform any sensitive work, their information should be withheld because the employees might be assigned such duties "at any time." OPM Br. 43. Contrary to OPM's implication that all employees in an occupation are interchangeable, however, occupational series are broad categories that cut across numerous agencies within which employees occupy different positions with different work assignments at different grade levels. Third Long Decl. ¶¶ 7-10 (A 406-08). For example, although OPM focuses on the occupation "United States Marshal," contending that the names of everyone in that occupation should be withheld because the occupation includes people who engage in undercover or sting work, it cites no evidence for its claim that every person in the occupational series must meet the qualifications for doing undercover work, *see* OPM Br. 43, let alone for its suggestion that all employees in that occupational series flit back and forth between undercover work and other Marshals Service work, such as serving process and transporting prisoners.

Moreover, even if a person in the "U.S. Marshal" occupation did move from being a process server, for example, to working undercover, releasing his name

when he was a process server would not "compromise" his undercover identity. OPM suggests a Google images search would unmask him, but offers no explanation why anyone looking to unmask an undercover agent would conduct a search on a process server. Furthermore, an undercover agent presumably would take precautions to ensure that people who knew his name—whether through the CPDF or from church or school or Little League or the neighborhood watch or because he served process on them—would not be able to connect him to his undercover identity. Indeed, although U.S. Marshals' names, duty stations, and organizational component codes were available for years through the CPDF, OPM cites no instances of the information ever undermining an undercover or sting operation. In any event, Exemption 6 "was directed at threats to privacy interests more palpable than mere possibilities," *Rose*, 425 U.S. at 381 n.19 (citation omitted), and the claim that information that would not invade anyone's personal privacy can be withheld because the employee may (or may not) be assigned "sensitive" duties in the future is far too speculative to meet OPM's burden.

OPM also contends that it would not be feasible for it to determine which employees engage in sensitive work and which do not. The issue, however, is not whether a position is "sensitive" in an abstract sense, but whether release of the employee's organizational component code, duty station, or name would put the

employee at risk. As we explained in our opening brief (at 26), there are feasible ways of determining whether employees face a real risk of harm based on the work they perform. The IRS, for example, runs a pseudonym program under which employees who present evidence of harassment or threats to their personal safety may use pseudonyms instead of their real names. *See* Adams Decl. ¶ 7 (A 41). Moreover, the CPDF contains other fields that could aid OPM in determining whether or not employees would in fact be at risk if the withheld records were revealed. For instance, the organizational component field would help OPM determine which employees work in public affairs offices, and therefore would likely already be known to the public, and the type of appointment field would help OPM identify high-level political appointees whose names (because they went through Senate confirmation) would already be readily available. *See* Long Decl. Exh. A at 6 (A 229).

Finally, OPM claims that it has no obligation to determine whether the release of any particular record would invade personal privacy because "FOIA requires only that an agency conduct a reasonable search for 'for [sic] the purpose of locating those records responsive to a request.'" OPM Br. 45 (quoting 5 U.S.C. § 552(a)(3)(D)). As discussed above, however, *see supra* p 18, FOIA not only requires agencies to search for responsive records, but also to *release* the records it

finds, *see* 5 U.S.C. § 552(a)(3)(A)(ii), unless the records are exempt from disclosure. It is the obligation to release non-exempt records, not the obligation to conduct a search for those records, that OPM has violated here.

4. As an example of the arbitrariness of OPM's withholding, our opening brief discusses the occupation "Compliance Inspection and Support," App. Br. 31-34, pointing out that despite OPM's declarant's claim that the vast majority of employees in the occupation were airport screeners (approximately 49,000 of them, according to the declarant), *see* Third Lukowski Decl. ¶ 13 (A 382), in fact, in the records at issue here, only four of the employees in that occupation (of whom there were fewer than 7,000 in total) were airport screeners. Third Long Decl. ¶ 14 (A 409-10). Instead of being in "Compliance Inspection and Support," most airport screeners were classified in the occupation "Safety Technician" (a non-"sensitive" occupation) and their names were released. *Id.* OPM's response demonstrates both a failure to understand our argument and failure to pay attention to what records it is and is not withholding.[4] OPM claims that we "observe[d] that

[4]Indeed, despite OPM's claim that it has "carefully redacted limited information based upon careful review," OPM Br. 13, the record and history in this case show that OPM has often been careless about what it is and is not redacting. *See, e.g.*, Office of Personnel Management *Vaughn* Index (A 147-66) (failing to mention OPM's withholding of organizational component codes); Office of Personnel Management Amended *Vaughn* Index (A 167-186) (still failing to mention OPM's withholding of

(continued...)

the names of screeners previously were disclosed, but were redacted under the present request." OPM Br. 47. Not so. What we observed is that the names of screeners were *not* redacted under the present request. Because airport screeners' names were not withheld in the FOIA requests at issue in this case, OPM's arguments about airport screeners do not help it meet its burden of showing that releasing records of employees in the occupation "Compliance Inspection and Support" would invade their personal privacy. By the same token, OPM's other arguments about why the positions classified within "Compliance Inspection and Support" in the records at issue here are "sensitive" would not justify OPM in withholding airport screeners (or anyone else it might reclassify into the occupation) from later CPDFs just because it has lumped them together with the other employees in that occupation.

B. The Public Interest in Disclosure of the Withheld Records Is Significant.

1. As explained at length in our opening brief, in contrast to the de minimis

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[4](...continued)
organizational component codes); Fourth Lukowski Decl. ¶ 20 (A 445) (admitting, after plaintiffs pointed out that OPM had withheld the fields prior duty station, prior pay plan, prior grade, and prior step without mentioning them in its *Vaughn* Index or to the court, that "[d]ue to a programming oversight in producing these records, they were originally not disclosed"); *id.* ¶ 21 (A 445-46) (admitting, after plaintiffs noted that there was no privacy interest in the LPA code "ZY", that "[n]ot releasing this code previously was also a programming oversight").

privacy interest involved, releasing the withheld names, organizational components, and duty-station information would let citizens know "what their government is up to." *Reporters Comm.*, 489 U.S. at 773 (citation omitted); *see* App. Br. 34-38; 45-48; 51-52. Releasing names would inform the public whom the government is choosing to hire and employ and where and in what roles it is using those employees. Moreover, because individual employees and their capabilities and interests affect the work the government does, knowing the names of particular employees and understanding the roles they have in determining agency activities can explain to the public why an agency is engaging in certain activities. It can explain why certain policies and practices exist within certain parts of an agency, but not within others, and why they exist at certain points in time, but not at others. It also enables the public to see how much and what type of turnover there is within an agency, which sheds light on the efficiency, experience, morale, and priorities of that office. And it allows the public to better understand job progressions within the federal government, to detect whether unqualified people are being hired due to nepotism or favoritism, and to uncover other illegal or improper activity. *See, e.g.,* Long Decl. ¶¶ 36-45 (A 204-11); Neff Decl. ¶¶ 2-5 (A 257-59); Port Decl. ¶¶ 3-4 (A 298-99).

Similarly, as explained in greater detail above, *see supra* pp. 19-23,

disclosing the withheld organizational component codes and duty-station information would allow the public to see where the government is acting and on what functions the agency is concentrating its resources. *See*, *e.g.,* Long Decl. ¶¶ 29-35, 46 (A 199-204; A 211-12); Ruch Decl. ¶¶ 5-7 (A 306-07). Indeed, the history of the government's release of the names and duty stations of federal employees shows a long-held recognition that it benefits the public to know whom the government is employing on its behalf and where those employees are working. *See, e.g.*, Lukowski Decl. Exh. 3 at 4-10 (A 86-92) (1816 resolution requiring government to print register of federal employees).

2. OPM's primary response to the discussion of how the release of the withheld records would inform the public about the activities of the government is to contend that plaintiffs do not need the "actual names of employees in order to pursue these goals," but instead could use "anonymous identifier[s]." OPM Br. 50. OPM concedes, however, that although it *could* have provided an anonymous identifier for each name it redacted in the records at issue, it did not. *Id*. at 50 n.8. Not surprisingly, OPM is unable to cite a single case in which a court has found that there is no public interest in records because the government could have but chose not to release surrogate records that would have provided similar information.

In any event, anonymous identifiers are *not* a substitute for employee names. In many of the examples we have provided, the replacement of names with anonymous identifiers would have hindered the public's ability to learn about governmental activities. For instance, our opening brief discusses how Associated Press reporters compared the names of Bureau of Land Management (BLM) employees to the names of people who had adopted horses through the U.S. Wild Horse and Burro Program, which was created to protect and manage wild horses, and discerned that BLM employees were profiting from adopting horses and selling them for slaughter. *See* App. Br. 36-37 (citing Port Decl. ¶ 4 (A 299-300)). That comparison could not have been done if the names of BLM employees had been replaced with anonymous identifiers.

Similarly, the public would not be able to learn about the qualifications, background, and experience of a newly hired federal employee (topics that shed light on the agency's priorities in hiring that person), or to determine whether nepotism or favoritism played a role in hiring the employee if the employee's name were replaced with an anonymous identifier. And the public would not be able to follow an employee's career path unless it could link an employee's record in a current CPDF file to her records in all other CPDF files in which the employee appears. For employees who were previously in non-"sensitive"

agencies and occupations, however, and for all employees who worked for the federal government before it started withholding names, OPM would presumably not be willing to do so because that linking information would reveal the employee's name. In short, despite OPM's claims to the contrary, the names of employees inform the public about the activities and operations of the government in a way that anonymous identifiers would not. And OPM does not even claim that anonymous identifiers would take the place of the withheld organizational component codes and duty-station information.

3. OPM's other arguments are equally unavailing. First, OPM claims that although the withheld records "might disclose a great deal about individual government employees, they do not inform the public about 'what the[] government is up to.'" OPM Br. 52 (quoting *Reporters Comm.*, 489 U.S. at 773). However, release of the withheld organizational component codes, duty-station information, and names would inform the public about where the government is acting, how it is organized, and why it is engaging in certain activities. This information directly sheds light on governmental activities. Indeed, even the examples on which OPM selectively focuses go directly to the heart of understanding how the government operates. OPM claims that understanding career progression or researching employees' credentials "might disclose

something about a specific employee, but says little about 'what the[] government is up to.'" OPM Br. 52-53. But understanding who an agency is hiring sheds light on the agency's priorities and level of efficiency, enables the public to evaluate whether it approves of the management's hiring choices, and allows the public to see what personal connections exist between people at the agency and the industry the agency regulates. *See, e.g.*, Long Decl. ¶ 43 (A 210).

Next, OPM claims that the public interests in the records are too "attenuated" because they require the public to analyze the records. OPM Br. 53-55. As we pointed out in our opening brief (at 39-40), however, the Supreme Court has recognized there is a public interest in documents even if they must be analyzed to gain information from them. *See Ray*, 502 U.S. at 178 (recognizing that disclosure of summaries of interviews with Haitians served cognizable public interest in knowing whether State Department had adequately monitored Haiti's actions); *see also, e.g.*, *ACLU*, 655 F.3d at 12-13 (holding there was a "significant public interest in disclosure" of list of names, docket numbers, and courts of cases in which defendants were subject to warrantless cell phone tracking because it would "shed[] light on the scope and effectiveness of cell phone tracking as a law enforcement tool," even though it would require analysis to do so); *Norton*, 309 F.3d at 36 (finding cognizable public interest in data on locations of owl nesting

sites because they could contribute to understanding of the agency's use of the data). OPM does not address or even attempt to distinguish these cases. Instead, it cites cases noting that the public interest asserted must be in the "specific information being withheld." OPM Br. 56. True, but our entire discussion of the public interest in this case has focused on how release of the specific information being withheld would shed light on governmental activities. Accordingly, these cases do not call into question the public interest in the information here.

The statement in *Associated Press*, 554 F.3d at 292, that the focus in assessing the privacy side of the balance under Exemption 6 "must be solely upon what the requested information reveals, not upon what it might lead to," is likewise inapposite. Our demonstration of a public interest is based on what analysis of the records reveals, not on what they would lead to. Moreover, in *Associated Press*, this Court was discussing the privacy side of the balancing test, not the public-interest side. Although OPM urges this Court to treat the analysis under the public-interest and privacy sides of the balancing test the same, OPM Br. 55, OPM's claims of invasion of personal privacy are far more attenuated than the public interests that merely require analysis of the records. OPM's claims rely on the notion that people will not only analyze the released records, but use them to contact federal employees. Thus, if OPM is correct that the public interest and

privacy side of the balance should be treated the same, and if OPM is correct that arguments based even on analysis are too attenuated to be cognizable, then *none* of OPM's arguments about why release of the records would invade privacy is cognizable. As the D.C. Circuit recently noted, "if we may not consider derivative use in determining the impact of disclosure on the public interest side, we also may not consider it in determining disclosure's impact on privacy interests. And without derivative use, the Department would fail to meet the threshold for invoking Exemption [6] at all." *ACLU*, 655 F.3d at 16.

For OPM to have proffered any possibly cognizable privacy interest in this case, not only must arguments based on analysis be cognizable, but those based on contacting employees must be cognizable as well. In contrast to OPM's position on privacy interests, our discussion of how release of the withheld records would shed light on governmental activities does not depend on people contacting the employees. Nonetheless, we provided a few examples of instances in which people have used the CPDF to contact federal employees and learn from them about the government's activities. *See, e.g.*, Ruch Decl. ¶ 8 (A 307-08). OPM attacks these examples by suggesting that *any* use of the withheld information to contact federal employees would be an "'unwarranted invasion' of personal privacy," OPM Br. 59—that is, that government employees' interest in avoiding

contact with the public always outweighs any public interest that could be derived from such contact. As our examples demonstrate, however, contacting federal employees can provide important information to the public. For instance, in 2003 and 2004, journalists used information from the CPDF to identify and contact Transportation Security Administration (TSA) employees. From these interviews, the journalists learned about serious security breaches at airports, including baggage handlers loading unscreened luggage onto planes and screeners missing knives, guns, and box cutters during screenings. Neff Decl. ¶¶ 4-5 (A 258-59). Even putting aside the implausibility of OPM's position that *any* contact of federal employees by members of the public is automatically an invasion of personal privacy, *see* U.S. Const., Amend. I (recognizing the public's right to petition the government), it is difficult to imagine anyone believing that the so-called "invasion of privacy" caused by journalists interviewing employees outweighs the public's interest in ensuring that TSA employees are properly performing their duty of keeping weapons off airplanes.

OPM's contention that our public-interest arguments are not cognizable because they depend on our "own need for the requested records," OPM Br. 57, is even further afield. OPM is correct that the identity of the requester and the particular purpose for which the records are requested are not relevant to the

Exemption 6 test. That does not mean, however, that courts must ignore the ways in which the requesters will use the records to further the purposes of FOIA. Indeed, it would be strange to establish a test in which the intent of the very people who plan to use the records to inform the public about the government's activities could not be considered in determining whether releasing the records would inform the public about the government's activities. Thus, as the D.C. Circuit recently explained in rejecting this exact argument, "the quoted cases do not hold that [use of the records] may not be considered where—as here—such use (by the requester or anyone else) will further FOIA's purpose of shedding light on the operations and activities of government. Rather, they hold that the rights of all requesters are equal and that a requester's parochial interests—if unrelated to FOIA's purpose—may not be considered." *ACLU*, 655 F.3d at 15 n.26.

OPM attempts to portray our interests in the records as "parochial interests," claiming that "'conduct[ing] analyses with data that is in standardized form and has undergone OPM's quality checks,'" OPM Br. 57 (quoting App. Br. 44), is just "plaintiffs' own (irrelevant) purpose[]." OPM Br. 59. But we do not want to conduct such analyses because we enjoy having pretty graphs for their own sake. We want to conduct such analyses to further the "core purpose of FOIA"—to contribute to "public understanding of the activities or operations of the

government." *Reporters Comm.*, 489 U.S. at 775 (internal quotation marks and emphasis omitted). Such use weighs heavily on the public interest side of the balancing test.

OPM also argues (at 59) that some of the "asserted public interests" fail to "satisfy the evidentiary threshold" set forth in *National Archives and Records Administration v. Favish*, 541 U.S. 157, 174 (2004). There, the Supreme Court held that "where there is a privacy interest protected by Exemption 7(C)," under which the balancing test is weighted more towards privacy than under Exemption 6, *see id.* at 165-66, "and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly[,] . . . the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 174. However, the public interest in the withheld records in this case does not depend on whether the records reveal illegal or unethical behavior. Even if no improper behavior is revealed, the public has an interest in gaining understanding of why the government undertakes the actions it does, where the government is acting, and how it is organizing and focusing its resources. *See ACLU*, 655 F.3d at 14 (explaining that whether a policy was "legal or illegal, proper or improper" was irrelevant to whether release of records about the policy would be in the public

interest because the plaintiffs were not only seeking to show that the government's policy was illegal, but also "to show what that policy is and how effective or intrusive it is"). The public would learn about those topics through release of the withheld records.

Finally, OPM attempts to dismiss the significant public interest in the withheld records by asserting that we just want to serve as a government "watchdog," and that such a desire is "both irrelevant and not cognizable" under Exemption 6. OPM Br. 62. Contrary to OPM's assertions, however, providing the public with information about what the government is doing so that the public can scrutinize and evaluate the government's actions—that is, serving as what OPM calls a "watchdog"—is at the heart of the public interest side of the Exemption 6 test. *See, e.g.*, *Ray*, 502 U.S. at 178 (recognizing a public interest in whether the State Department had adequately performed its duties); *Reporters Comm.*, 489 U.S. at 775 (explaining that public interest analysis looks to records' relationship to "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny'" (internal quotation marks and citation omitted)); *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1232 (D.C. Cir. 2008) (finding public interest in records that "will enable the public to more easily monitor whether the agency is carrying out its statutory duty"); *Avondale Indus.*

Inc. v. NLRB, 90 F.3d 955, 962 (5th Cir. 1996) ("We have no doubt that the public's interest in monitoring [the agency's actions] meets FOIA's central purpose of opening agency action to public scrutiny."); *Hopkins v. U.S. Dep't of Housing & Urban Dev.*, 929 F.2d 81, 88 (2d Cir. 1991) (stating that the public interest in disclosure is measured by whether it would "open agency action to the light of public scrutiny" and that the "public interest in 'monitoring' governmental operations" is a recognized public interest (citation omitted)). Indeed, it is at the core of FOIA. *See, e.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed"). In short, saying that a requester wants information to be a "watchdog" is just another way of saying the requester wants to find out "what the[] government is up to"—exactly what FOIA is for. *Reporters Comm.*, 489 U.S. at 773.

Here, the withheld records would increase the public's understanding of how the government operates, informing it, among other things, about where and on what efforts agencies are focusing their resources, whether they are working efficiently, how they are organized, and why they are undertaking certain actions. The significant public interest in the withheld information outweighs any de

minimis privacy interests involved, and the withheld names, organizational component codes, and duty-station records should be released.

CONCLUSION

This Court should affirm the district court's grant of partial summary judgment in favor of plaintiffs, reverse the district court's grant of partial summary judgment in favor of OPM, and remand for the entry of summary judgment in favor of plaintiffs requiring release of the withheld names, organizational component codes, and duty-station information for all the occupations and agencies at issue.

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
arosenbaum@citizen.org

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Counsel for Appellants

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(A). The brief is composed in a 14-point proportional type-face, Times New Roman. As calculated by my word processing software (WordPerfect), the brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure) contains 12,512 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum