**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| NICHOLAS SURGEY,<br><br>Plaintiff,<br><br>v.<br><br>ENVIRONMENTAL PROTECTION AGENCY,<br><br>Defendant. | ) | Civil Action No. 18-cv-00654 (TJK) |

**REPLY MEMORANDUM IN SUPPORT OF**
**PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

In the time since Plaintiff Nicholas Surgey filed his Cross-Motion for Summary Judgment, Defendant Environmental Protection Agency (EPA) has made two supplemental releases of records or portions of records previously withheld. These records contain some previously undisclosed material related to former EPA Administrator Scott Pruitt's trip to Pasadena, California, from December 2017 into January 2018. EPA did not, however, conduct any additional searches and has failed to demonstrate that it conducted an adequate search for records originally. Moreover, the records still include disputed redactions that EPA cannot justify. For the following reasons, EPA's contrary arguments should be rejected and summary judgment should be entered for Mr. Surgey.

## ARGUMENT

### I. EPA's Search Was Inadequate.

#### A. The FOIA request was not limited to records referencing the Rose Bowl.

EPA continues to maintain—wrongly—that it did not need to search its records for any terms beyond a narrow set pertaining specifically to the Rose Bowl game.[1] EPA misconstrues both the facts and the law.

First and foremost, EPA incorrectly asserts that Mr. Surgey has now expanded his request to include more records than originally sought. According to EPA, Mr. Surgey's FOIA request required it to search for records containing only terms such as "Rose Bowl" and "Pasadena" because the request "specifically seeks records related to meetings and events 'associated with' the Rose Bowl in Pasadena." Def. Opp. to Pl. Mot. for Summ. J. & Reply in Further Supp. of Def. Mot. for Summ. J. 4 (Doc. 21) (EPA Opp.). EPA fails, however, to acknowledge the full language of the request: Mr. Surgey sought all records "that describe the trip to Pasadena, the Rose Bowl game, and any associated meetings or events that took place on the same trip." *See* EPA Ex. A at 2 (Doc. 13-4 at 3). EPA ignores that the request sought documents related to "the trip" and events "that took place on the same trip," not only records describing attendance at the Rose Bowl.

EPA further insists that things like dining and lodging arrangements are neither "'associated with' the Rose Bowl" nor properly classified as "meetings or events." EPA Opp. 5. The everyday definitions of "associated" (meaning "related"), and "event" (meaning "something that happens") contradict EPA's argument. *See* "Associated," *Merriam-Webster Online Dictionary*, http://www.m-w.com/dictionary/associated (last visited Dec. 27, 2018); "Event,"

[1] EPA searched its electronic system for the terms "football," "rose bowl," "Pasadena," "Huntington Beach," "sooner*," and "bulldog*". A search term ending with an asterisk would also return results for the plural form of that term. *See* White Decl. (Doc. 13-2) ¶¶ 9-10.

*Merriam-Webster Online Dictionary*, http://www.m-w.com/dictionary/event (last visited Dec. 27, 2018). Indeed, EPA faults Mr. Surgey for not asking for records of "anything that occurred" on the trip, EPA Opp. 4, but "occurrence" is a primary synonym for "event." *See* "Event," *Merriam-Webster Online Dictionary*, http://www.m-w.com/dictionary/event (last visited Dec. 27, 2018).

Moreover, EPA continues to ignore that Mr. Surgey's request also specifies the following: "Details of who paid for travel, Rose Bowl tickets, and any other associated costs incurred on this trip should be provided in the response. These records should concern travel by Scott Pruitt, as well as any other EPA staff (including security staff) that traveled to Pasadena as part of the same trip or attended the game with the Administrator." EPA Ex. A at 2. There can be no question that lodging and meal costs are customarily included within the rubric of travel expenses. *See, e.g.*, 26 U.S.C. § 162(a)(2) (including within tax-deductible "traveling expenses" "amounts expended for meals and lodging"); 5 U.S.C. app. § 505(4) (defining "travel expenses" as "the cost of transportation, and the cost of lodging and meals").

In addition to mischaracterizing the substance of Mr. Surgey's FOIA request, EPA relies on case law that provides no more than the basic maxim that "adequacy [of the search] is measured by the reasonableness of the effort in light of the specific request." *Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009). Based on its selective reading of the FOIA request, EPA contends that it has complied with this obligation. As Mr. Surgey pointed out in his initial brief, however, an agency "has a duty to construe a FOIA request liberally" and, where a request could give rise to multiple interpretations, the agency "*must* select the interpretation that would likely yield the greatest number of responsive documents." Pl. Mem. in Supp. of Pl. Cross-Mot. for Summ. J. & in Opp. to Def. Mot. for Summ. J. 4 (Doc. 16) (Pl. Mem.) (emphasis added) (quoting *Rodriguez v. Dep't of Def.*, 236 F. Supp. 3d 26, 41 (D.D.C. 2017)) (internal quotation marks omitted).

None of the cases on which EPA relies are to the contrary. For instance, in *Larson*, the plaintiff submitted a FOIA request to the State Department with an addendum stating that she was renewing a previous FOIA request to which she believed she had not received all responsive records. *See* 565 F.3d at 869. Although the plaintiff argued that the addendum should have entitled her to documents pertaining to the agency's processing of her previous request, the court disagreed, concluding that her request "does not reasonably suggest to the [State Department] that it should search for and disclose internal documents arising out of" its processing of her original request as she simply indicated her later FOIA request was a "renewed request." *Id.*

Moreover, EPA has not addressed Mr. Surgey's argument that the agency had "a duty to follow-up on any known leads" arising in the course of its search for documents. Pl. Mem. 5 (quoting *Wallick v. Agric. Mktg. Serv.*, 281 F. Supp. 3d 56, 73 (D.D.C. 2017)). At this juncture, EPA has disclosed some additional material not originally turned over that references Mr. Pruitt's visit to Disneyland, among other things, in the course of his trip.[2] *See* EPA Opp. 5 n.2. Although Mr. Surgey's FOIA request did not explicitly mention Disneyland, EPA, upon finding several references to a visit to Disneyland in the responsive records, had a duty to expand its search to include records related to the visit to Disneyland on the trip. EPA has yet to conduct such a search.

By disregarding portions of Mr. Surgey's request, EPA has improperly denied him information "by narrowing the scope of its search to exclude relevant information." Pl. Mem. 4 (quoting *Nat'l Sec. Counselors v. CIA*, 849 F. Supp. 2d 6, 12 (D.D.C. 2012)). EPA's limited group of search terms does not suffice under the law.

[2] Comparison of the original production with EPA's supplemental production makes clear that EPA initially redacted every mention of the word "Disney."

**B. EPA has not established that it conducted an adequate search within its Ethics Office.**

In its reply memorandum, EPA also contends that its Ethics Office "does not have records responsive to [Mr. Surgey's FOIA] request." EPA Opp. 5–6. This contention is based on a Supplemental Declaration submitted by Elizabeth White, the director of EPA's Office of the Executive Secretariat, in which she claims to have "confirmed with the Ethics Office that they do not have records responsive to this request." White Suppl. Decl. ¶ 7 (Doc. 21-1).

As noted above, EPA's unduly narrow notion of what counts as "responsive" to Mr. Surgey's request strongly suggests that the Ethics Office did not conduct a search "reasonably calculated to uncover all relevant documents." *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994). Additionally, Ms. White's declaration fails to specify that the Ethics Office conducted a search at all, let alone what search parameters it used. Without the specific search parameters (or some other adequate explanation of methodology), Mr. Surgey and the Court cannot know on what basis Ms. White "confirmed" that the Ethics Office has no responsive documents. That omission alone dooms EPA on summary judgment. *See Reporters Comm. for Freedom of the Press v. FBI*, 877 F.3d 399, 403 (D.C. Cir. 2017) ("This circuit's precedent has long made clear that an affidavit containing 'no information about the search strategies of the agency components charged with responding to a FOIA request' and providing no 'indication of what each component's search specifically yielded' is inadequate to carry the government's summary-judgment burden." (alterations adopted) (citation omitted)).

Whatever the Ethics Office inquiry consisted of, there is further reason to question whether it satisfied EPA's obligations under FOIA. Ms. White's declaration specifies that the Ethics Office "was not consulted" about Mr. Pruitt's trip, further stating that "[t]here is no need to consult the Ethics Office when there are no anticipated gifts to be given or received." White Suppl. Decl. ¶ 7.

But the declaration says nothing about records reflecting either unanticipated gifts or gifts about which Mr. Pruitt communicated with the Ethics Office after the fact. If Mr. Pruitt reported a gift to the office after he received it, that communication would not fall within the universe of things that Ms. White says she has confirmed. Yet Ethics Office records reflecting a communication of this sort would be directly responsive to Mr. Surgey's request. *See* EPA Ex. A at 3 (seeking "[d]etails of who paid for travel, Rose Bowl tickets, and any other associated costs incurred on this trip …").

Because EPA has failed to provide any information whatsoever about any search that was potentially conducted in the Ethics Office for responsive records, EPA has not carried its burden of establishing that an adequate search occurred.[3]

## II. Exemption 6 Does Not Justify the Continued Withholdings of Details about Mr. Pruitt's Schedule.

In his opening memorandum, Mr. Surgey explained why EPA could not rely on exemption 6 to withhold the details of Mr. Pruitt's schedule while in California. *See* Pl. Mem. 8–15. In response, EPA released significant additional details that it had previously withheld concerning Mr. Pruitt's schedule. *See* EPA Opp. Ex. E (Doc. 21-5). Although EPA has disclosed some previously withheld portions of the records, many of the records still contain exemption 6 redactions of information concerning where Mr. Pruitt "dined, stayed, or spent time" while on his

[3] Mr. Surgey initially challenged EPA's failure to search for staff travel vouchers beyond those for Mr. Pruitt and members of his Protective Service Detail (PSD). Pl. Mem. 8. Mr. Surgey explained that this failure rendered the search inadequate because "EPA's declarant does not state that Mr. Pruitt and members of the PSD were the only EPA staff to participate in this trip." *Id.* Ms. White's supplemental declaration now clarifies that "[n]o non-PSD Agency staff accompanied the Administrator" on his trip. White Suppl. Decl. ¶ 10. Accordingly, Mr. Surgey no longer challenges the adequacy of the search on this basis.

trip to California.[4] *See* Suppl. *Vaughn* Index 3, 6–8 (Doc. 21-3). EPA has not, however, provided any explanation for what differentiates the continued withholdings from the released information, and it has not provided any additional explanation about what the withheld material consists of. EPA simply repeats the refrain that the withheld information concerns a "personal family vacation" and that disclosure "would only serve to invade [Mr. Pruitt's] and his family's privacy." EPA Opp. 8.

As an initial matter, EPA has failed to respond substantively to Mr. Surgey's legal arguments concerning these withholdings. EPA neither addresses Mr. Surgey's argument that Mr. Pruitt has no more than a *de minimis* privacy interest in visits to popular attractions, *see* Pl. Mem. 10–11, nor affirmatively states that all such information has been disclosed. As to the balancing of interests, EPA seeks to minimize Mr. Surgey's significant showing of the public interest at stake, calling it "various allegations made against the Administrator." EPA Opp. 7. But a finding by its own Office of Inspector General that the $1.6 million increase in PSD's costs under Mr. Pruitt occurred "without documented justification," Pl. Mem. 13 (quoting Llewellyn Decl. Ex. 1 at 9 (Doc. 17-2)), and a determination by the Government Accountability Office that EPA violated federal law by paying over $43,000 to install a soundproof booth for Mr. Pruitt, *id.* at 14 (citing Llewellyn Decl. Ex. 2 (Doc. 17-2)), are not reasonably dismissed as "various allegations" made against him. Moreover, multiple ongoing investigations by the House Committee on Oversight and Government Reform concerning Mr. Pruitt's management of agency resources—including costs for his travel and the utilization of his security detail—can hardly be brushed aside; even if

[4] Although not specifically addressed by EPA, one email containing a list of information indicates that EPA has withheld the name and address of a restaurant at which Mr. Pruitt dined and the address of a "Private Residence" Mr. Pruitt visited. *See* EPA Opp. Ex. E at ECF p. 52 (Doc. 21-5). While not conceding exemption 6's applicability, Mr. Surgey does not seek disclosure of this information.

no findings of wrongdoing result from the congressional investigations, there can be little doubt the existence of the investigations bolsters the public interest in disclosure.[5]

Further, EPA has failed to respond to Mr. Surgey's Statement of Undisputed Material Facts, including his factual assertions that (1) "[d]isclosure of Mr. Pruitt's schedule in California will reveal the types of activities EPA apparently concluded required significant security detail and will allow the public to evaluate whether EPA's utilization of significant resources for this trip was based on a legitimate need to do so," and (2) "[t]he records EPA has produced thus far show extensive use of government resources in arranging Mr. Pruitt's and his PSD's travel to and from California, as well as coordinating transportation and scheduling while in California." Pl. Statement of Undisputed Material Facts ¶¶ 8–9 (Doc. 16). Because EPA has not "controverted" Mr. Surgey's statement with "references to the parts of the record relied on," the Court should deem these facts to be admitted. LCvR 7(h)(1); *see also Broady v. Zanzibar on the Waterfront, LLC*, 576 F. Supp. 2d 14, 16 (D.D.C. 2008) (quoting *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996)) ("Requiring strict compliance with the local rule is justified both by the nature of summary judgment and by the rule's purposes.").

Once again, EPA relies upon generic arguments about the privacy interests of public officials, observing that a public official does not "surrender all rights to personal privacy" upon entering government service. EPA Opp. 7 (quoting *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 846 F. Supp. 2d 63, 71 (D.D.C. 2012)). But EPA fails to grapple with the specifics of this

[5] Curiously, EPA argues that "[i]t is also appropriate, when considering the public interest side of the balancing equation, to consider 'the extent to which there are alternative sources of information available that could serve the public interest in disclosure.'" EPA Opp. 7 (quoting *U.S. Dep't of Def. Dep't of Military Affairs v. Fed. Labor Relations Auth.*, 964 F.2d 26, 29–30 (D.C. Cir. 1992)). It offers no information, however, about what "alternative sources of information" are available to Mr. Surgey. Accordingly, the Court need not consider this cursory and unsupported argument.

FOIA request concerning this public official—Mr. Pruitt—for which there exists a significant public interest in disclosure. *See* Pl. Mem. 11–15. Moreover, the specific case cited by EPA here is inapposite because the withholdings there (1) implicated exemption 7(C), which "establishes a lower bar for withholding material than Exemption 6," *CREW*, 846 F. Supp. 2d at 70 (internal brackets omitted), and (2) concerned law enforcement records produced during the course of a criminal investigation, *id.* at 71–73, which are not at issue in this case.

Finally, although EPA's failure to provide particularized explanations for its exemption 6 withholdings renders it difficult to address more than EPA's conclusory, generalized argument, certain redactions in the re-processed records—in the context of the information newly produced—are illustrative of EPA's continued overreliance on exemption 6. For example, EPA continues to redact a passage from an email that follows a statement by an EPA staff member explaining, "Should the stars align, this would be [Mr. Pruitt's] itinerary." EPA Ex. E at ECF p. 31. The email further discusses the need for "reserv[ing] hotels" for PSD agents based on this itinerary, which indicates that this itinerary was considered as part of EPA's determination of what travel costs would be incurred for the trip. Even more problematic, EPA continues to withhold information in email exchanges discussing hotel availability and hotel rates for the trip to California; for both emails, the email subject is "Rose bowl hotels," with the first email starting with a redaction and followed by a discussion about the availability at three hotels at "a much lower rate" with the need to "look[] into to [sic] see if we can reserve rooms now for the PSD," and the second providing "the availability is as follows:" followed by a redaction. *Id.* at 41. Not only is it difficult to imagine any privacy interest implicated by EPA staff discussing hotel availability and hotel rates for the PSD, but comparison of hotels and hotel rates falls squarely within the public interest identified

by Mr. Surgey in disclosure of these records: how agency resources were expended to cover travel expenses for the PSD on Mr. Pruitt's trip to California. *See* Pl. Mem. 11–15.

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In short, EPA has produced additional information disclosing the details of Mr. Pruitt's schedule while in California but has not stated that it provided all information concerning his schedule and, in fact, admits that it continues to invoke exemption 6 to withhold information concerning where Mr. Pruitt "dined, stayed, or spent time" while on his trip to California. *See* Suppl. *Vaughn* Index 3, 6–8. EPA has not provided additional argument or explanation about its continued withholdings under exemption 6, relying instead on generic personal privacy assertions. Because EPA has failed to carry its burden of establishing that the continued withholding of material regarding Mr. Pruitt's California trip schedule is justified by exemption 6, the Court should grant summary judgment to Mr. Surgey.

## III. EPA Has Not Argued That Exemption 6 or Exemption 7(C) Applies to PSD Travel Details Beyond Names and Contact Information.

EPA incorrectly argues that Mr. Surgey "does not address EPA's withholdings under Exemption 7(C)." EPA Opp. 2 n.1. In fact, as Mr. Surgey explicitly explained in his summary judgment motion, EPA has waived any argument that exemption 7(C)—or exemption 6—applies to any PSD travel details beyond the names and contact information of PSD members or law enforcement personnel. *See* Pl. Mem. 21–22. EPA's memoranda provide no argument that withholding of any information other than names and contact information is justified under exemption 7(C) and, yet, its *Vaughn* Index claims that it has withheld other "PSD Travel Details," including "ticket numbers, airline names, confirmation numbers, airport names and codes, and flight numbers" pursuant to both exemptions 7(C) and exemption 6. EPA Suppl. *Vaughn* Index 3. EPA has thus waived any argument that exemptions 6 or 7(C) apply to the PSD's "travel details"

beyond the names and contact information of PSD members or law enforcement personnel, which Mr. Surgey does not seek. Pl. Mem. 17 n.6. Accordingly, any additional PSD "travel details" withheld in reliance on these exemptions must be disclosed.

## IV. Exemptions 7(E) and 7(F) Do Not Justify Continued Withholdings Regarding PSD Travel Details and Logistical Coordination.

Mr. Surgey originally challenged EPA's withholding in full of PSD weekly schedules under exemptions 7(E) and 7(F), Pl. Mem. 16–19, as well as certain withholdings of PSD "logistical coordination," "travel details," or "combined passages" containing this information, *id.* at 19–21. EPA's supplemental production included redacted versions of PSD weekly schedules, *see* EPA Opp. Ex. D (Doc. 21-4), and Mr. Surgey does not seek disclosure of the information withheld from those newly produced schedules. However, EPA apparently continues to improperly withhold PSD "travel details" or "logistical coordination" under exemptions 7(E) and 7(F) that simply reflects discussions about hotel accommodations and/or rates rather than "the number of Special Agents protecting the Administrator at a given time, positioning of Special Agents in different circumstances, and strategic discussion of how to approach protection challenges." Pl. Mem. 20 (quoting *Vaughn* Index 4 (Doc. 13-5)).

For example, in an email exchange with the subject line "Disney," the initial passage of an email is redacted under exemptions 7(E) and 7(F) (previously the full content of this email had been withheld in full) but is followed by a newly disclosed passage explaining to at least one PSD member that "[t]he one night in Disney is approved and if you speak to the head of security their [sic] they will accommodate the fair [sic]. On line [sic] it's below 300 percent …," and the email concludes with noting that the EPA staff should "get some assistance on hotel costs."[6] EPA Opp.

[6] The reference to the cost being "below 300 percent" appears, based on other records produced, to pertain to an internal rule that hotel rates for PSD members can only be up to "300 percent

Ex. E at ECF p. 39. A PSD member then responds "Understood. Working now," and either the same or another PSD member sends another follow-up email stating that she is "working your reservations now; please be patient and I will conference call you all shortly." *Id.* at 36, 38. Thus, EPA appears to have withheld part of a conversation concerning only what hotel accommodations were available and the cost of such accommodations.

Other withholdings appear to discuss similar information. In one email exchange with the subject "Rose Bowl contingency," a PSD member, after a discussion of whether PSD members could be approved for hotel rates "300 percent above" the allowed rate, notes that she had another person "put together some options" for the trip to California, which is followed by a passage redacted under exemption 6 and a passage redacted under exemptions 7(E) and 7(F); the email concludes, "let's have a potential game plan – but no used [sic] getting too excited until we hear about tickets. Though he must be half way serious if he's already thinking flights and hotels." EPA Opp. Ex. E at ECF p. 58. Although the email clearly is discussing various options for accommodations in California, EPA continues to redact it under exemptions 7(E) and 7(F).[7]

As Mr. Surgey has explained, information about the particular accommodations utilized by Mr. Pruitt or the PSD—including any discussion of the various rates available—would not (1) constitute law enforcement "techniques and procedures" or "guidelines," (2) risk

above" some approved rate. EPA Opp. Ex. E at ECF p. 58 ("I had Gail do some checking – I believe thru [sic] Jeanne Concklin – to see there [sic] any provisions for more than 300 percent above rate, figuring it was only a matter of time before the situation arose. The answer – or so I was told – is no. We can check again and I will."); *see also id.* at 60 ("One issue that needs to be discussed is lodging for the agents. Gail has already highlighted that the first RON site is over 300% allowed for lodging for the agents[.]"). This reference further reinforces that these communications appear to have concerned a discussion of various options that would provide compliant rates.

[7] As explained above, withholding of this information under exemption 6 is also improper. *See supra* Part II.

circumvention of the law, or (3) endanger the life or safety of anyone. Pl. Mem. 19–21. EPA responds by indicating that it has continued withholding under exemptions 7(E) and 7(F) only the information that Mr. Surgey does not seek, that is, "the number of Special Agents protecting the Administrator at a given time, positioning of Special Agents in different circumstances, and strategic discussion of how to approach protection challenges." EPA Opp. 9. As the above examples illustrate, that is not the case. Accordingly, to the extent EPA continues to withhold information about Mr. Pruitt's or the PSD's accommodations—including the applicable rates and fares—under exemptions 7(E) and 7(F), such information must be disclosed.

## V. EPA Must Conduct an Additional Segregability Review.

EPA is withholding several blocks of texts based on a mix of exemptions. *See* Pl. Mem. 22; EPA Suppl. *Vaughn* Index 4. Because EPA continues to withhold information improperly under these exemptions, the Court should order EPA to conduct additional segregability reviews of these passages for improperly withheld information.

In particular, some of EPA's "combined passages" withholdings illustrate the need for an additional segregrability review. For example, in the "Rose Bowl contingency" email chain discussed previously, EPA has invoked a combination of exemptions 6, 7(C), 7(E), and 7(F) to withhold passages from an email that appears to include options for lodging for PSD members. The email begins by noting Mr. Pruitt's schedule and provides "Options for Rose Bowl" with redacted text following "Option 1," "Option 2," and "Option 3." EPA Opp. Ex. E at ECF pp. 59–60. The email concludes that "lodging for the agents" must be discussed and that the first location "is over the 300% allowed for lodging for the agents." *Id.* at 60. While the other content of the email suggests at least some of the withheld content may be different combinations of the available PSD members for the trip, the fact that EPA has both withheld discussions about PSD

accommodations and provided scant description of its justification for withholding "combined passages"—stating only that it has been redacted for the "reasons discussed above" in the *Vaughn* Index, EPA Suppl. *Vaughn* Index 4—makes it impossible for Mr. Surgey to ascertain whether this combined passage (and others) contain responsive, non-exempt information. *See also* EPA Opp. Ex. E at ECF pp. 76–77 (text message chain beginning "Please remind me where your guys are staying while in CA," with subsequent content redacted under a combination of exemptions 6, 7(C), 7(E), and 7(F)).

## CONCLUSION

For the reasons discussed above and in Mr. Surgey's opening memorandum, the Court should grant summary judgment for Mr. Surgey on his remaining challenges to EPA's withholdings and EPA's failure to conduct an adequate search.

Dated: January 11, 2019

Respectfully submitted,

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