IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARGARET B. KWOKA,

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

C. A. No. 1:17-cv-01157

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

Plaintiff Margaret Kwoka's Cross-Motion for Summary Judgment demonstrated that disclosing third-party requesters' names and all FOIA requesters' organizational affiliations would not lead to the release of return information, and that third-party FOIA requesters have no privacy interest in their names. In response, Defendant Internal Revenue Service (IRS) continues to incorrectly argue that "unique law and circumstances" cover third-party IRS FOIA requesters. The IRS provides only unfounded conjecture as to whether particular third-party requesters may have more than a *de minimis* privacy interest in their identities as a FOIA requesters or whether subsequent investigation would reveal a connection between a requester and another entity that would allow the public to divine a list of potential subjects of a particular third-party FOIA request. And the IRS has failed to explain persuasively why producing the responsive records will result in an unreasonable burden on the agency. Because the IRS has not carried its burden in justifying its withholding of the responsive records, the Court should grant Professor Kwoka's motion for summary judgment.

ARGUMENT

I. Exemption 3 Is Inapplicable Because the Requested Records Will Not Reveal "Return Information."

Under 26 U.S.C. § 6103(a), the IRS is prohibited from disclosing "any return or return information," which is defined to include "a taxpayer's identity." *Id.* § 6103(b)(2)(A). As Professor Kwoka explained in her summary judgment motion, she has not requested—and the requested records do not contain—return information, as she seeks only the identities of third-party FOIA requesters and the organizational affiliations of all FOIA requesters. *See* Pl.'s Cross-Mot. for Summ. J. 6–10, Doc. 10. Moreover, the short, generic descriptions in the IRS's public FOIA log could not be combined with the requested records to reveal return information. *Id.* Thus, none of the requested records are covered by § 6103(a), and exemption 3 does not apply.

The IRS does not contest that neither the requested records nor the IRS's public FOIA log contain the identity of the person or entity that is the subject of a third-party FOIA request. Nor does the IRS challenge that requests for non-tax records—that is, general information about the IRS or IRS policies—are *not* be covered by § 6103(a). *See* Rowe Decl. ¶ 20, Doc. 9-3. ("Disclosing the requester names and organizational affiliations with respect to only those requests for non-tax records would not reveal tax information that is protected under [26 U.S.C.] § 6103.").

Nonetheless, the IRS asserts that "with a few clicks in the internet, anyone could use the identities and/or organizational affiliations of FOIA requesters to discover return information protected by [26 U.S.C.] § 6103." IRS Opp'n to Cross-Mot. for Summ. J. 4, Doc. 15. The IRS's only support for this proposition, however, is speculation. The first example provided by the IRS is that revealing the name of a FOIA requester, for example, "Tom Smith," where the public FOIA log indicates a request for "examination files," combined with a subsequent "quick search

of the internet" that reveals that Tom Smith is a shareholder of a company, for example, "ABC Corp.," would reveal that ABC Corp. is under IRS examination. *Id.* at 4–5. As an initial matter, the IRS's own declarant has already explained that FOIA requests labeled in the IRS public FOIA log as "examination" requests could "refer to a request seeking generic informational material about IRS . . . examination procedures." Rowe Decl. ¶ 20. Thus, the IRS's own evidence rebuts its argument. Furthermore, even under the IRS's example, the IRS has not provided any evidence to establish that a simple internet search would uncover whether someone is a shareholder of a particular company.[1] For example, the U.S. Securities and Exchange Commission (SEC) explains on its website that, although investors will sometimes ask the SEC for a list of a company's shareholders, "the SEC does not maintain shareholder lists. *Only the company itself has access to this information*." SEC, Fast Answers-Shareholder's Lists, When You Can Get Them (Jan. 16, 2013), https://www.sec.gov/fast-answers/answerssharehlisthtm.html (emphasis added). Moreover, the SEC explains that SEC rules only require disclosure of shareholder lists even *to another shareholder* in particular situations, such as where a shareholder is soliciting proxies for a vote or where a person seeks to acquire the company's securities from shareholders. *Id.* The IRS has failed to provide any examples of publicly available shareholder information through simple internet searches that could be used to reverse engineer the subject of a third-party FOIA request.

Even where some shareholder information is publicly available, the IRS has not explained why knowledge that Tom Smith made a FOIA request for "examination files" would

[1] For large investors in major publicly traded companies, this information may be available. *See, e.g.*, Craig Anthony, *The Top 4 Amazon Shareholders (AMZN)*, Investopedia (Oct. 4, 2017), https://www.investopedia.com/articles/insights/052816/top-4-amazon-shareholders-amzn.asp (identifying Jeff Bezos, Andrew Jassy, Jeffrey Blackburn, and Tom Aldberg as the four largest individual shareholders of Amazon). But the IRS has neither limited its argument to this situation, nor identified how often or whether this scenario occurs in the requested records.

necessarily demonstrate that he requested files about ABC Corp. First, an investor may own stock in more than one company, and most investors will likely choose to diversify in a range of investments rather than focus on only one company. *Cf.* Sally French, *All the Companies in Jeff Bezos's Empire, in One (Large) Chart*, MarketWatch (Aug. 28, 2017), https://www.marketwatch.com/story/its-not-just-amazon-and-whole-foods-heres-jeff-bezos-enormous-empire-in-one-chart-2017-06-21 (identifying several companies owned by or invested in by Jeff Bezos). Nothing in the requested records or the IRS public FOIA log would connect a third-party FOIA request by a shareholder of multiple companies to one company rather than another. Second, as IRS declarant William Rowe identified in his first declaration, the law provides that a person may receive authorization from a third party to request the third party's tax records. Rowe Decl. ¶ 12. Yet a "quick search of the internet" could not reveal which of Tom Smith's numerous connections (family members, close friends, or clients) authorized him to request his, her, or its tax information. Finally, many individuals not familiar with applicable law will not know that they cannot generally request another taxpayer's examination files. Thus, Tom Smith may have requested the files (because he is researching a future investment, read an article about the company in the news, or is simply curious) about which he has no current connection at all.

Moreover, neither the IRS nor its declarants have even presented evidence that the scenario they describe *actually exists* in the requested records, relying instead on the mere possibility that it may. Surely this unsupported speculation is not enough for the IRS to meet its burden of justifying withholding "with reasonably specific detail" to "demonstrate that the information withheld logically falls within the claimed exemption." *Military Audit Project v. Case*, 656 F.2d 724, 738 (D.C. Cir. 1981).

The second example offered by the IRS fares no better. According to the IRS, knowledge of a FOIA requester's identity, for example, "Margaret Jones," where the public FOIA log indicates a request for "estate tax return" or "gift tax estate," combined with the requester's relative's name in a publicly available obituary would reveal that the relative's estate is a taxpayer. *Id.* at 5. Again, the IRS offers no explanation for why that is the necessary conclusion. Margaret Jones could be researching estate taxes, educating herself about how gift taxes operate, or any of a number of other possibilities. Moreover, if she is requesting a particular "estate tax return," the IRS has not explained why the necessary conclusion is that this particular relative's estate was the subject of the request. She might instead be an administrator, executor, trustee, heir, next of kin, or beneficiary of other estates, *see* 26 U.S.C. § 6103(e)(1)(E), or she might be a former colleague, neighbor, or someone excluded from the will of other estates where even though applicable law would not permit her to obtain the estate tax records, she still requested them. And again, the IRS provides no evidence that the scenario it posits is present in the requested records. To the extent that it is, this example applies to, at most, 15 of the FOIA requests at issue in this case. *See* Kwoka Suppl. Decl. ¶ 14.

Beyond this unsupported conjecture, the IRS has offered nothing additional in support of its reliance on exemption 3 for the names of third-party FOIA requesters. As to organizational affiliations, the IRS argues in conclusory manner that the "broad sweep of section 6103" means disclosure of the organizational affiliations of third-party FOIA requesters presents an identical risk of revealing "return information" as disclosure of the requesters' identities. IRS Opp'n 5. But the IRS's speculative argument relies heavily on identifying very particular connections with a specific individual, which would be nearly impossible based simply on organizational affiliation, for the reasons in explained Professor Kwoka's summary judgment motion. Pl.'s

Cross-Mot. 9. Moreover, the IRS has yet again failed to provide sufficient argument for the Court to rule in its favor on this issue. *See Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001) ("A litigant does not properly raise an issue by addressing it in a cursory fashion with only bare-bones arguments. (internal quotation marks omitted)). Accordingly, for the reasons stated in Professor Kwoka's summary judgment motion, Pl.'s Cross-Mot. 5–10, the Court should grant judgment to Professor Kwoka on the inapplicability of exemption 3 to the requested records.

II. The Minimal Privacy Interests of Third-Party FOIA Requesters Are Insufficient to Justify Withholding Under Exemption 6.

"[U]nder Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in [FOIA]." *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 261, (D.C. Cir. 1982). As Professor Kwoka explained in her summary judgment brief, the longstanding rule in this court—and within the Department of Justice (DOJ)—is that FOIA requesters have no more than a *de minimis* privacy interest in the fact that they made a FOIA request. Pl.'s Cross-Mot. at 10–16. Moreover, there is a strong public interest in disclosure that outweighs those privacy interests. *Id.* at 16–17. Thus, exemption 6 does not apply in this case.

A. Third-party FOIA requesters to the IRS do not uniquely possess more than a *de minimis* privacy interest in their identities.

The IRS does not challenge that FOIA requesters generally have no privacy interest in their identities as FOIA requesters but purports to rely on "the unique law and circumstances of this case" to urge a different outcome here. The IRS thus focuses on attempting to distinguish third-party FOIA requesters to the IRS based entirely on the availability of (1) the generic, short descriptions of FOIA requests in the IRS's public FOIA log, and (2) the internet. But neither the IRS's FOIA log nor the existence of the internet makes third-party FOIA requesters to the IRS

unique, nor do they undercut the rationale of case law and DOJ guidance concluding that FOIA requesters lack a privacy interest in their names.

As an initial matter, the IRS incorrectly suggests that it is unique in releasing a FOIA log that provides a description of the records requested that can be linked with a specific FOIA requester. In fact, the FOIA logs of several other agencies provide far *more* detail regarding the subject of the request, as well as proactively including the name of the requester. Kwoka Suppl. Decl. ¶¶ 1–6; *see, e.g.*, U.S. Environmental Protection Agency, All FOIA Requests Pending as of October 31, 2017, https://www.epa.gov/sites/production/files/2017-11/documents/all_pending_report_20171031.pdf; U.S. Department of Defense, FOIA Log-Fiscal Year 2016, www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/FOIA_Logs/FOIA%20Log-FY16.xlsx; U.S. Agency for International Development, Fiscal Year 2016 Q2 FOIA/PA Log, https://www.usaid.gov/sites/default/files/documents/1868/FOIA-REQUEST-LOG-FY2016-2Q.pdf. Accordingly, not only is the IRS not unique in this regard, its minimal descriptions of the FOIA requests provide even less information than other agencies. With respect to the information included in the IRS's public FOIA log, nearly all of the descriptions of the requests are so vague that they provide either no information—"documents," "all records," "multiple," "request for records"—or at most extremely limited information—"examination," "transcripts," "collection"—regarding the request. *See* Llewellyn Decl. ¶ 2, Doc. 11-2.

Moreover, the IRS has not explained how disclosure of the FOIA requesters' identities in that log would reveal "personal private information." Although the IRS claims that disclosing the names of third-party FOIA requesters will reveal "details of their personal lives and confidential tax return information," it relies *only* on examples that, at most, relate to a total of 36 FOIA requests. *See* IRS Opp'n 8–11. In other words, the IRS relies on the *possibility* that about 0.36

percent of the records (36 out of 9,882 requests) *may* implicate some form of privacy interest to withhold 100 percent of the requested records. This scant possibility cannot satisfy the agency's burden for withholding *all* of the records. And even as to these 36 requests, the IRS has not provided any evidence that the alleged harm would occur. Contrary to the IRS's assertion, Professor Kwoka did not concede that these 36 FOIA requests necessarily trigger a greater privacy interest than other third-party FOIA requests. Instead, because the IRS agreed that the exact subject of these 36 requests affected whether any additional privacy interest attached to these requests, i.e. whether the request was for a person seeking to file for innocent spouse relief or an academic researching innocent spouse relief, and had not provided any explanation for the bases of these requests, Professor Kwoka argued that—even accepting the IRS's argument—the IRS had not shown that these 36 requests involved a greater than *de minimis* privacy interest. *See* Pl.'s Cross-Mot. 15–16 (citing *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 818 F. Supp. 2d 122, 130 (D.D.C. 2011)). In this regard, nothing has changed: The IRS still provides no explanation as to the specific subject matter of these requests. Accordingly, even as to these 36 requests, the IRS has not met its burden of establishing the requesters have more than a *de minimis* privacy interest.

Failing to identify any cases concluding that FOIA requesters have an identifiable privacy interest in their identities, the IRS attempts only to distinguish one case on which Professor Kwoka relies, *Stauss v. Internal Revenue Service*, 516 F. Supp. 1218 (D.D.C. 1981). Although *Stauss* directly addressed the privacy interests in this case, the IRS argues it is not applicable because *Stauss* was decided before the rise of the internet and when a description of the FOIA requests was not publicly available. This argument is incorrect for two reasons. First, the IRS is wrong that the identities of the FOIA requesters were divorced from the subject of their requests

in *Stauss*. There, the plaintiff had requested "records pertaining to the Baltimore District Office's tax protest project," and included within the responsive records were FOIA requests from other individuals, from which the IRS had redacted addresses. *Stauss*, 516 F. Supp. at 1220. In other words, the documents at issue were the FOIA requests themselves, which would necessarily reveal the subject matter of the request. Second, *Stauss* focused on FOIA requesters' *expectation of privacy*, explaining that FOIA requesters "freely and voluntarily addressed their inquiries to the IRS, without a hint of expectation that the nature and origin of their correspondence would be kept confidential." *Id.* at 1223. The IRS does not explain why the passage of time has resulted in an increased expectation of privacy by FOIA requesters—and the rise of the internet and availability of online FOIA logs more likely indicate that modern-day FOIA requesters have even *lower* expectations of privacy. Moreover, the IRS fails to address the other cases that Professor Kwoka cited that are in accord with *Strauss* and ignores DOJ's longstanding guidance, which also supports Professor Kwoka's position. *See* Pl.'s Cross-Mot. 11–12.

Finally, although the IRS argues in its opposition that "FOIA requesters have a clear privacy interest in keeping their names and organizational affiliations private," IRS Opp'n 7, the IRS has not explained why disclosure of organizational affiliations would implicate a privacy interest as the IRS's examples and arguments focus entirely on the names of third-party FOIA requesters, *see id.* 7–11. Because the IRS has offered no support for this argument, the Court need not consider it. *See Paleteria La Michoacana, Inc. v. Productos Lacteos Tacumba S.A. De C.V.*, 247 F. Supp. 3d 76, 101 (D.D.C. 2017) ("[I]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." (quoting *N.Y. Rehab. Car Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007))). Moreover, any *de minimis*

privacy interest FOIA requesters have in their names is even more diluted in mere disclosure of their organizational affiliations.

Because the IRS has failed to establish that more than a *de minimis* privacy interest is at stake in the requested records, the Court need not engage in any balancing test. *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 870 F.2d 873, 874 (D.C. Cir. 1989) (*NARFE*). Exemption 6 does not apply.

B. The public interest in disclosure outweighs the *de minimis* privacy interest in the requested records.

In contrast to FOIA requesters' *de minimis* privacy interest in the fact they submitted requests, the public interest in disclosure is strong. In her summary judgment motion, Professor Kwoka explained that disclosure of the names and organizational affiliations of FOIA requesters will "shed light on how FOIA operates in the federal government" by identifying "who is most often using FOIA" to enable development of "opportunities for better vehicles for agency information delivery." Pl.'s Cross-Mot. 16. Professor Kwoka also noted that the requested records would inform the public about "how federal tax dollars are spent and whether such expenditures with regard to the FOIA obligations of agencies are being utilized in the best way to meet the public's needs." *Id.* The IRS argues that these public interests do not relate to the public understanding of the operations of the government and do not reveal how federal tax dollars are spent. Neither argument is persuasive.

First, information that "sheds light on the agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose" and establishes a public interest in the records containing that information under exemption 6's balancing test. *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 840 F. Supp. 2d 226, 234 (D.D.C. 2012) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). There

is no question that the IRS has a statutory duty to comply with FOIA, and the requested records will shed light on the IRS's performance of its duties under FOIA by identifying the requesters and type of requesters—individuals, media, corporations, academics, advocates, etc.—to whom the IRS is most frequently responding. That information will enable review and research into whether the methods and systems the IRS utilizes for FOIA compliance are the most effective and efficient given its FOIA-requester base. Pl.'s Cross-Mot. 16; Kwoka Suppl. Decl. ¶¶ 7–12. As Professor Kwoka explains in her supplemental declaration, "[t]he identity of the requester and organizational affiliation are crucial to understanding agency FOIA operations." Kwoka Suppl. Decl. ¶ 7.

For example, through receiving and reviewing the FOIA logs of other agencies, Professor Kwoka has identified certain agencies where third-party commercial requesters are the vast majority of the FOIA requesters. This information led to recommendations to increase proactive and affirmative disclosures of certain categories of records regularly being sought by commercial requesters, which would reduce agency expenditures in responding to these types of FOIA requests. *Id.* ¶¶ 8–9. Professor Kwoka also identified other agencies—mainly, certain components of the Department of Homeland Security—where first-person requests were the bulk of the agencies' FOIA requests; this information led to policy recommendations that would obviate the need for first-person requests, such as administrative discovery, which would reduce agency expenditures in responding to these types of requests. *Id.* ¶¶ 10–12. Moreover, because there is currently no publicly available information concerning the identities or types of requesters that most often submit FOIA requests to the IRS, disclosure of this information will significantly enhance the public's understanding of the IRS's allocation of resources for FOIA compliance. *Cf. Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314–15 (D.C. Cir. 2003)

(explaining, in the context of fee waiver determination, that the lack of public availability of the requested records supported finding disclosure of the information would significantly contribute to the public's understanding of the agency's operations or activities); *Campbell v. U.S. Dep't of Justice*, 164 F.2d 20, 36 (D.C. Cir. 1998), *as amended* (Mar. 3, 1999) (explaining, in the context of fee waiver determination, that the extent to which the requested material is already in the public domain bears on whether disclosure of the requested records will further public understanding).

Second, although Professor Kwoka's request does not include records reflecting the exact figures of "the IRS budget and expenditures for FOIA requests," IRS Opp'n at 12, the IRS cannot seriously dispute that it does, in fact, devote significant agency resources to FOIA compliance. It is simply a matter of common sense that knowing how IRS FOIA analysts are dedicating their time—that is, what requesters and types of requesters are requiring the most agency work hours—will shed light on the IRS's expenditures of agency resources. Once the identities and organizational affiliations of these FOIA requesters are disclosed, the public will have the ability to evaluate where IRS FOIA resources are being dedicated and whether to propose or petition for alternative designs to redirect agency resources. Kwoka Suppl. Decl. ¶¶ 9, 12–13. Thus, the requested records will shed light on the IRS's FOIA processing resources and who is benefitting from the IRS's expenditure of those resources.

* * *

Accordingly, Professor Kwoka has identified a substantial public interest in disclosure of the requested records that outweighs the minimal privacy interest of third-party FOIA requesters in the fact that they sent in requests and of all FOIA requesters in their organizational affiliations; thus, disclosure of the records would *not* "work a clearly unwarranted invasion of personal

privacy." *NARFE*, 879 F.2d at 874. The Court should grant summary judgment to Professor Kwoka on the applicability of exemption 6.

III. Producing the Responsive Records Will Not Be an Unreasonable Burden on the IRS.

There is no dispute in this case that meaningful, non-exempt information exists in the requested records. Because the burden on the IRS to segregate exempt and non-exempt information falls comfortably within the range of what courts have found reasonable, the IRS cannot evade its duty to segregate and produce the requested records based on its estimate of the required time to do so. Pl.'s Cross-Mot. at 19–21. Further, the IRS's estimate of the time required depends on erroneous conclusions, and the burden is less than the IRS contends. *Id.* at 21–23. Finally, the digital transition of FOIA processing was intended to increase rather decrease access to government records, such that the IRS's reliance on slow digital processing to refuse a FOIA request undermines the goal of these systems. *Id.* at 23–24.

In response to Professor Kwoka's arguments for why producing the responsive records will not result in an unreasonable burden on the agency, the IRS has simply reiterated that it is entitled to whatever method of record review it chooses, even if other methods of review exist that would substantially lessen the burden on the agency. *See* IRS Opp'n 17 (arguing Professor Kwoka "may not micromanage the agency" by identifying less burdensome review possibilities). But even if the IRS is entitled to determine its own segregability review methods, it cannot pick the least efficient method available and then unilaterally declare that because of the burden caused by the inefficiency, it cannot respond to the FOIA request. In any event, the Court should not allow the IRS to rely on slow digital processing times to evade what is, in reality, a straightforward segregability review.

As an initial matter, the IRS relies heavily on the amount of review that would be required to first sift through first-party and third-party FOIA requests, and then to sort through the third-party requests for exempt and nonexempt information. But the IRS's contention depends upon its flawed arguments that exemptions 3 and 6 apply in some way to the requested records.[2] Because neither exemption applies, the review will be straightforward: If the request is for the requester's tax records, the IRS will provide only the organizational affiliation; if the request is for anything else, the IRS will disclose the name and organizational affiliation of the requester. There will be no need to review "case activity notes" or "individual examination files or transcripts," or to "contact other IRS employees" to determine whether the request satisfies these criteria. IRS Opp'n 14–15, 16. In other words, the only "reading[] and assessing [of] each requested file" that will occur is reading likely one sentence or one paragraph of a FOIA request to determine whether the requester and the subject are the same. *Id.* at 14.

Moreover, if accepted, the IRS's arguments for why it should not be required to produce the responsive records would represent a dramatic departure from the standard agencies are held to in conducting a segregability review. "It has long been the rule in this Circuit that non-exempt portions of a document must be disclosed unless they are *inextricably intertwined* with exempt portions." *ViroPharma Inc. v. Dep't of Health & Human Servs.*, 839 F. Supp. 2d 184, 195 (D.D.C. 2012) (emphasis added) (quoting *Wilderness Soc'y v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 18 (D.D.C. 2004) (quoting *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 160 (1977))). And it is the agency's burden to establish that exempt information is inextricably intertwined with non-exempt information. *Mead Data*, 566 F.2d at 260. Thus, as

[2] Thus, the IRS concedes that, even if it prevails on the applicability of exemptions 3 and 6 to some of the requested records, there are requested records that would still be subject to disclosure.

Professor Kwoka explained in her summary judgment motion, the segregability analysis typically turns on whether culling nonexempt information that "has meaning" from exempt information is possible or will result only in "'disjointed words, phrases, or even sentences which taken separately or together have minimal or no information contact.'" *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 926 F. Supp. 2d 311, 316 (D.D.C. 2013) (quoting *Mead Data*, 566 F.2d at 261 n.55). As such, agencies ordinarily satisfy their segregability burden by conducting a "line-by-line" review to identify the existence of any meaningful, segregable information. *ViroPharma*, 839 F. Supp. 2d at 195–96; *see Johnson v. Ex. Office for U.S. Att'ys*, 310 F.3d 771, 776 (D.C. Cir. 2002).

Here, there is no question that the nonexempt information Professor Kwoka has requested would have meaning: the identities of third-party FOIA requesters and the organizational affiliations of all FOIA requesters. And the IRS has never contended that it is impossible to segregate nonexempt information with meaning from exempt information. Instead, the IRS's argument that it cannot reasonably segregate the material turns entirely on the amount of time it would take to complete the segregability review. For segregability purposes, however, the D.C. Circuit has connected the reasonableness of the burden to whether the segregable information is meaningful, explaining that "a court *may* decline to order an agency to commit significant time and resources to the separation of disjointed words, phrases or even sentences which taken separately or together have minimal or no information content." *Mead Data*, 566 F.2d at 261 n.55 (emphasis added). Even the IRS's proffered support explains that the D.C. Circuit "looks to a combination of intelligibility and the extent of the burden in 'editing' or 'segregating' the nonexempt material." *Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1982). Where, as here, there is no question that the non-exempt information would be meaningful and

intelligible when separated from exempt information, the burden on the agency must be concomitantly extreme to justify its failure to segregate. The IRS does not identify *any* case where a court concluded the segregable information was meaningful and yet too burdensome to produce.

To determine, then, whether the burden on the agency here is sufficiently high to justify the agency's failure to segregate, the best analog—as Professor Kwoka provided in her summary judgment motion—is case law analyzing whether the time and resources devoted to a FOIA search are an unreasonable burden on an agency. Rather than substantively address the cases cited by Professor Kwoka that establish that the burden on the IRS here—even accepting the IRS's unreasonable method of review—is reasonable, the IRS does little more than say they are inapplicable because Professor Kwoka has not challenged the adequacy of the IRS's search. But how could it be that manually reviewing 25,000 paper files, *Public Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003),[3] and manually reviewing an entire year's worth of unindexed files, *Nation Magazine v. U.S. Customs Serv.*, 937 F. Supp. 39, 44 (D.D.C. 1996), to search for responsive documents is a not unreasonable burden, and yet reviewing at most 9,882 FOIA requests where meaningful information is *known* to exist is an unreasonable burden? The glaring inconsistency between this case law and the IRS's position cannot be reconciled.

Moreover, as Professor Kwoka explained in her summary judgment motion, the IRS's estimation of the burden on the agency is unreliable for several reasons. First, the IRS has failed to address why *all* categories of requests will require review of the AFOIA file when several of

[3] Although the IRS points out that the court in *Public Citizen* relied in part on the lack of detail provided in the agency's affidavit, it is important to note that the court did not order the agency to provide additional information but, instead, ordered the agency to manually search the 25,000 files. 292 F. Supp. 2d at 8. Even if the court did not have the exact calculations for the amount of time required to fulfill the search, the court could not have been ignorant of the significant time required to undertake a search of that magnitude.

the categories in the IRS's public FOIA log contain descriptions clearly marking them as requests for non-tax records, such as "Internal Documents" or "Internal Forms," likely considerably reducing the review time required. Pl.'s Cross-Mot. 21. Second, the IRS has misconstrued Professor Kwoka's argument regarding the loading time in the AFOIA system. Although Professor Kwoka does not challenge that the AFOIA system takes 10–15 minutes to load each individual file—as implausible as that may be—she does challenge the IRS's inference from that fact that all time spent by an IRS analyst while that loading is occurring must be spent completing no other productive tasks. While the IRS faults Professor Kwoka not knowing "precisely" what other work these analysts could be doing, Professor Kwoka (1) cannot know what other work is available to these workers and (2) does not have the burden of proving with reasonable specificity that the segregability review would be reasonable. Professor Kwoka's argument on this point is simply a common-sense observation that most professionals have more than one task or project pending at a time and that the IRS has provided no explanation why other tasks cannot be accomplished while a file is loading in the AFOIA system.

Lastly, the IRS has only tangentially addressed Professor Kwoka's contention that, if digital review in AFOIA presents the main problem, the agency should review paper copies of the FOIA request instead. Although the IRS's declarant states that "[t]he Centralized Processing Unit only maintains a paper copy of the request for thirty days," Corrina R. Smith Supp. Decl. ¶ 5 n.1, Doc. 14-2, she has not explained whether the agency destroys the paper copies or simply maintains them in another part of the IRS. As Professor Kwoka identified in her motion for summary judgment, the IRS's current records disposition schedule requires paper copies to be kept for at least two years and often for six years. *See* Pl.'s Cross-Mot. 23. Accordingly, unless

the IRS is blatantly violating its own records disposition schedule, the IRS should be able to retrieve the records from wherever the agency stores them and undertake the review.

Because this case requires no more than a standard segregability review and the non-exempt information is indisputably meaningful and intelligible, the Court should reject the IRS's argument that conducting the segregability review places an unreasonable burden on the agency.

IV. Responding to the FOIA Request Would Not Require the IRS to Create New Records.

The IRS wrongly contends that Professor Kwoka failed to address its argument that responding to her request would require the IRS to create new records. Simple review of Professor Kwoka's summary judgment motion makes clear that the IRS's contention lacks merit. As she made clear previously, "[t]he argument that a document with some information deleted is a 'new document,' and therefore not subject to disclosure, has been flatly rejected." Pl.'s Cross-Mot. 17 (quoting *Yeager*, 678 F.2d at 321). The IRS itself explains "at issue [in this case] is the segregability of non-exempt records." IRS Opp'n 14. Thus, the Court need not be distracted by the IRS's misplaced argument.

CONCLUSION

For the reasons stated herein and in Professor Kwoka's summary judgment motion, the Court should grant her summary judgment motion and order the entry of a production schedule.

Dated: December 7, 2017

Respectfully submitted,

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