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

PETITION FOR REHEARING AND REHEARING EN BANC

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

Counsel for Appellants/Cross-Appellees

October 19, 2012

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATION

RULE 35(b)(1) STATEMENT

Plaintiffs-Appellants-Cross-Appellees Susan B. Long and David Burnham seek en banc rehearing because the panel decision involves an issue of exceptional importance. The panel's holding that release of *anonymous* records can be a "clearly unwarranted invasion of personal privacy" under Exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(6), conflicts with a recent Ninth Circuit decision holding that disclosure of information only invades privacy interests if it is "linked to a particular, identifiable individual," *Yonemoto v. Department of Veterans Affairs*, 686 F.3d 681, 697 (9th Cir. 2012), and with the Supreme Court's recognition that the disclosure of even highly personal information "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, 176 (1991). Moreover, the panel's opinion reflects a completely different view of Exemption 6 than this Court's decision—later vacated on other grounds—in *ACLU v. Department of Defense*, in which the Court held that there was no "cognizable privacy interest" in records once all identifying information had been removed. 543 F.3d 59, 86 (2d Cir. 2008), *vacated on other grounds*, 130 S. Ct. 777 (2009). The panel's expansion of Exemption 6 to cover anonymous records that pose no threat to personal privacy both distorts the meaning of the statute and

deprives the public of important information about the government's activities and operations around the country.

INTRODUCTION

This case concerns the federal Office of Personnel Management's (OPM) withholding of broad geographic information—never more specific than city or county—about where federal employees work. The withheld information goes to the heart of FOIA's goal of informing the public about what its government is doing. Because the location of federal employees often determines who gets the benefits of government programs, release of the withheld information would allow the public to see where the government is spending its resources, to determine whether some areas of the country are receiving disproportionate resources, and to evaluate whether the government is making rational decisions about where to concentrate its resources.

The panel concluded that OPM could withhold these geographic information "duty-station" records. *Long v. OPM*, Nos. 10-1600/10-1618, slip op. at 23 (2d Cir. Sept. 5, 2012). It held that, even when names of government employees were withheld, making the records anonymous, the duty-station records were exempt from FOIA's mandatory disclosure requirements under FOIA Exemption 6, which applies to certain records whose release would be "a clearly

unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). But 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)). It was not intended to cover anonymous information that provides statistical information about the way the government works. *See id.*

In holding that Exemption 6 exempts from disclosure the anonymous geographic information at issue in this case, the panel decision vastly expands the scope of Exemption 6. It conflicts with prior understandings of the scope of "personal privacy" in this circuit, the Ninth Circuit, and the Supreme Court. And it allows government agencies to withhold records based on a claim of harm that is divorced from the harms Congress was trying to avoid in crafting Exemption 6. This court should grant en banc review to restore the proper parameters of Exemption 6 and order OPM to release to the public this important information about "'what the[] government is up to.'" *Ray*, 502 U.S. at 177 (citation omitted).

STATEMENT OF THE FACTS

For many years, Plaintiffs-Appellants Susan B. Long and David Burnham, professors at Syracuse University and co-directors of the Transactional Records Access Clearinghouse (TRAC), a data gathering, research, and distribution

organization, have made FOIA requests to OPM for copies of the Central Personnel Data File (CPDF), a database that OPM compiles to allow for statistical analysis of the federal workforce. *Long*, slip op. at 3-4. Professors Long and Burnham have requested data from the CPDF, which contains records on most federal civilian employees, to provide the public with comprehensive information about the government's staffing practices. App. 187-88. Among the CPDF fields that OPM released to Professors Long and Burnham for years are the employee's name and the fields containing broad geographical "duty-station" information about the employee, such as the employee's state, city, county, organizational component, and whether the employee is in a location in which special pay is provided. *Long*, slip op. at 4; App. 188, 216.

Starting in 2004, OPM began withholding these fields for over 40 percent of the federal civilian workforce, claiming that the information was exempt from disclosure under FOIA Exemption 6, which applies to certain records whose disclosure would be a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Specifically, it withheld names and broad geographical information for all employees in five agencies and 23 occupations it deems "sensitive"—a total of over 800,000 employees. *Long*, slip op. at 4-5. Because these withholdings kept Professors Long and Burnham from being able fully to

analyze and share with the public information about the government's staffing practices, they filed this case, seeking release of the records under FOIA.

In two opinions decided on successive cross-motions for summary judgment, the district court held that OPM could withhold all the employees' names and, in its first opinion, that OPM could withhold geographic information for employees in the five agencies and four of the occupations. *Long v. OPM*, 2007 WL 2903924, at *22 (N.D.N.Y. Sept. 30, 2007), SA 35. However, in its second opinion, considering names and geographic information separately for the first time, the district court held that OPM had to release the records containing geographic information on the employees in the other occupations. *Long v. OPM*, 2010 WL 681321, at *16-17 (N.D.N.Y. Feb. 23, 2010), SA 65-68. The court noted that OPM had not explained "*how* employees could be identified from the disclosure of their duty stations and organizational component codes" when OPM was also withholding their names, and found that the information in these fields "is not the kind of information 'that a person would ordinarily not wish to make known about himself or herself.'" *Id*. at *16, SA 66 (quoting *Associated Press v. U.S. Dept. of Def.*, 554 F.3d 274, 292-93 (2d Cir. 2009)). It concluded that "OPM has failed to show that disclosure of the organizational component codes and duty stations without the identities, or anything else linking the location of employment

to the individuals, amounts to more than a *de minimis* invasion of privacy." *Id.*

On appeal, the panel held that "the issue is close," but that "employees possess a cognizable privacy interest in their duty-station records de-linked from their names," and that release of the records would be a "clearly unwarranted invasion of personal privacy." *Long*, slip op. at 23.

ARGUMENT

A. The Panel's Decision Is a Vast Expansion of FOIA's Personal Privacy Exemption that Conflicts with Statements from this Court, the Supreme Court, and the Ninth Circuit on the Scope of Personal Privacy.

In holding that FOIA Exemption 6 covers anonymous geographic information, delinked from names, the panel vastly expanded Exemption 6's scope. The panel's decision conflicts with both the Supreme Court's and this Court's understandings of the scope of "personal privacy" under FOIA, as well as with a recent Ninth Circuit decision on the scope of "personal privacy." And it disrupts Congress's careful "balanc[e] of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Rose*, 425 U.S. at 372.

Both this Court and the Supreme Court have recognized that records do not implicate a cognizable privacy interest when they are delinked from identifying information. In *United States Department of State v. Ray*, the Supreme Court

considered whether the government could withhold names and other identifying information from documents describing and summarizing interviews by the State Department with Haitian immigrants who had been involuntarily returned to Haiti. The Court ultimately concluded that disclosure of the identifying information would be a clearly unwarranted invasion of personal privacy. 502 U.S. at 178. It noted, however, that, without the identifying information, the records did not invade personal privacy. *Id*. at 176. The Court explained that even though the records contained "highly personal information regarding marital and employment status, children, living conditions, and attempts to enter the United States . . . such personal information constitutes only a *de minimis* invasion of privacy when the identities of the [individuals] are unknown." *Id.* at 175-76. The invasion of privacy only becomes significant, the Court continued, "when the personal information is linked to particular interviewees." *Id*. at 176.

Likewise, this Court has previously recognized that "[d]isclosure of personal information 'constitutes only a *de minimis* invasion of privacy' when identities are unknown." *See ACLU,* 543 F.3d at 84 (quoting *Ray*, 502 U.S. at 176).[1] In *ACLU*, this Court considered whether Exemption 6 exempts from

[1]After this Court ruled in *ACLU*, the government filed a petition for certiorari, seeking review not of this Court's ruling on Exemption 6, but of its ruling on a different FOIA exemption—Exemption 7(F). While the petition was pending, Congress passed a law pertaining specifically to public disclosure of detainee

disclosure photographs depicting soldiers' abusive treatment of detainees—photographs from which all identifying information had been redacted. The Court concluded it did not, explaining that "because the district court has redacted the Army photos to remove all identifying features, there is no cognizable privacy interest at issue in the release of the Army photos." *Id*. at 86. "[A] privacy right attaches when information that is sensitive may be linked to certain individuals, not when the individuals involved are unknown." *Id*.

Most recently, in *Yonemoto v. Department of Veterans Affairs*, the Ninth Circuit considered whether an email concerning an EEO complainant, including information about her "location," could be withheld under Exemption 6. 686 F.3d at 697. On examining the email *in camera*, the court concluded that there were aspects of it "that might cause 'embarrassment, shame, stigma, and harassment,' legitimate privacy concerns under Exemption 6." *Id*. (citation omitted). It explained, however, that "disclosure would invade those privacy interests only if the information is linked to a particular, identifiable individual." *Id*. Because it could not tell what information, if disclosed, would reveal the individual's identity, it remanded to the district court. *Id*.

---

photographs. In light of that law, and certifications made under it, the Supreme Court granted the petition, vacated this Court's decision, and remanded the case. *See Dep't of Def. v. ACLU*, 130 S. Ct. 777 (2009).

Because records do not implicate personal privacy if they cannot be linked to identifiable people, Exemption 6 cases typically concern identifying information itself, *see, e.g., Ray*, 502 U.S. 164; *Wood v. FBI*, 432 F.3d 78 (2d Cir. 2005), or records requested by a name, *see, e.g., U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595 (1982). They do not generally concern the portions of records left after identifying information is removed. *See ACLU,* 543 F.3d at 85 (noting that defendants had "cited no FOIA case in which a court has found a privacy right to be at risk where identifying information has been adequately redacted").

In contrast to the cases recognizing that records do not implicate personal privacy if they do not contain identifying information, the panel held that geographic data on where federal employees work could be withheld even when their names were redacted. The panel sought to distinguish this case from the Supreme Court and Second Circuit cases by stating that, unlike those cases, this case involves "[r]isk of physical attack," presumably referring to potential terrorist attacks on *buildings* in which the anonymous employees work. *Long*, slip. op. at 27 (citing *Ray* and *ACLU*).[2] The panel did not explain how it would increase the

[2]The panel also stated that "it would be child's play for a determined researcher to deduce a name from the descriptive data if the researcher is looking for anyone specific." *Long*, slip. op. at 24. The panel did not cite anything in the record for this statement. Nor did it explain how knowing an anonymous corrections officer works somewhere in Texas, or that an anonymous Department of Defense employee works somewhere in New York City, would enable that person to be identified, even when

risk of attack to know that there are anonymous agency employees working in a federal building whose address is already known (and for the argument that there is a risk of attack to work, the address of the federal building must already be publicly known, because the CPDF does not contain street addresses).

Putting aside the plausibility that disclosure of the particular information at issue would increase risk of attack, however, that risk is not a risk to *personal privacy*. Exemption 6 exempts only certain records whose disclosure would invade "personal privacy." 5 U.S.C. § 552(b)(6). Not all risks of harm to an individual are risks of harm to that individual's privacy. Indeed, that not all threats to the life or physical safety of individuals are threats to the individual's personal privacy under FOIA is made clear by another of FOIA's exemptions, Exemption 7. *Id*. § 552(b)(7). Subsection (C) of that exemption, which applies to certain law-enforcement records, uses language similar to Exemption 6, exempting law-enforcement records whose release "could reasonably be expected to

---

combined with the other information in the CPDF, such as "job classification, pay, veteran status, and work schedule." *Id*.; *see Long*, 2010 WL 681321, at *16, SA 66 (noting that OPM "does not explain *how* employees could be identified from the disclosure of their duty stations and organizational component codes"). As Professor Long, a statistician, explained in the record, "The process of indirect identification—identifying someone whose individual name is unknown based on other known characteristics—requires the other known characteristics to be unique and observable." App. 452. "Such identification from the CPDF files is simply not feasible given the particular nature of the CPDF information available and the large number of individuals in any relevant geographic area contained in the CPDF[.]" *Id*.

constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(C). Another subsection, subsection (F), exempts law-enforcement records whose release "could reasonably be expected to endanger the life or physical safety of any individual." *Id.* § 552(b)(7)(F). If the possibility that release of records would threaten the life or physical safety of an individual were enough to make release of the records an unwarranted invasion of personal privacy, Exemption 7(F) would be superfluous. *See*, *e.g.*, *State Street Bank & Trust Co. v. Salovaara*, 326 F.3d 130, 139 (2d Cir. 2003) ("[C]ourts should avoid statutory interpretations that render provisions superfluous."); *see also Milner v. Dep't of Navy*, 131 S.Ct. 1259, 1270 (2011) (rejecting interpretation of exemption that would "engulf other FOIA exemptions").

In addition to Exemption 6's protection for personal privacy, FOIA contains *other* exemptions that protect other interests, including an exemption designed to protect against certain threats to national security, *see* 5 U.S.C. § 552(b)(1), and an exemption designed to protect certain law-enforcement interests. *See id.* § 552(b)(7). OPM has not argued that those exemptions apply here, nor could it, because the records do not meet those exemptions' criteria. That the CPDF files do not meet the standards Congress set for withholding records based on their effect on security or law enforcement demonstrates that Congress did not

authorize their withholding based on the possible effect such records would have on security or law enforcement; it does not justify attempting to shoehorn those records into a personal privacy exemption based on arguments unrelated to personal privacy. As the Supreme Court recently explained, if the existing "exemptions do not cover records whose release would threaten the Nation's vital interests, the Government may of course seek relief from Congress." *Milner*, 131 S.Ct. at 1271. But it cannot withhold documents where "Congress has not enacted the FOIA exemption the Government desires." *Id*.

Exemption 6 was "'intended to cover detailed Government records on an individual which can be identified as applying to that individual.'" *Rose*, 425 U.S. at 376 (quoting H.R. Rep. No. 1497, at 11). It was not intended to cover "'the compilation of unidentified statistical information from personal records.'" *Id*. (quoting H.R. Rep. No. 1497, at 11). The panel, however, held that Exemption 6 applies to records that cannot be identified as applying to a specific individual, records that, without names, are just an anonymous series of codes used for statistical analyses of the federal workforce. In other words, it applied Exemption 6 to exactly the type of records that Exemption 6 was *not* intended to exempt, contrary to the carefully calibrated statutory scheme, under which "disclosure, not secrecy, is the dominant objective." *Id.* at 361. This Court should grant en banc

review to confirm that, as this Court, the Ninth Circuit, and the Supreme Court have previously recognized, the disclosure of information about a person "constitutes only a *de minimis* invasion of privacy when the identities of the [individuals] are unknown." *Ray*, 502 U.S. at 176.

B. The Panel Decision Deprives the Public of Important Information about the Government.

The United States government has a long history of letting the public know where its employees are working. In 1816, Congress passed a resolution requiring a public register, including work location, of "all the officers and agents, civil, military, and naval, in the service of the United States." *See* App. 86, 89. OPM's current regulations list duty-stations among the information that is available about "most" federal employees, stating that even "room numbers, shop designations, or other identifying information regarding buildings or places of employment" are publicly available for most employees. 5 C.F.R. § 293.311(a)(5). Yet the panel decision allows OPM to withhold information revealing even the state in which an anonymous employee is located for over 40 percent of the federal workforce.

By allowing the government to withhold information about where its employees work, the panel decision deprives members of the public of important information about "'what their government is up to.'" *Ray*, 502 U.S. at 177

(citation omitted). 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 would thereby allow 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. App. 199-204.

The panel dismissed the value of the geographic information, stating that the number of employees in a location is a "rough data point that imparts virtually nothing about the function of the federal government." *Long*, slip. op. at 28. But analysis of the data can shed important light on the government's activities. For example, in 1993, a subcommittee of the House Government Operations Committee commissioned 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. App. 199-200.

Disclosure of information about where the government is deploying its personnel can also 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. App. 201-03. In addition, the information can 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. App. 306. This Court should grant en banc review and restore to the public the right to access this important government information.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc.

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

October 19, 2012

Counsel for Appellants/Cross-Appellees