# 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' PRINCIPAL BRIEF**

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

September 1, 2011

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## GLOSSARY

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| 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 |
| DEA | Drug Enforcement Agency |
| DHS | Department of Homeland Security |
| DoD | Department of Defense |
| EPA | Environmental Protection Agency |
| FBI | Federal Bureau of Investigation |
| 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 JURISDICTION

This appeal is from a judgment in a Freedom of Information Act (FOIA) case, granting in part and denying in part defendant's motion for summary judgment and granting in part and denying in part plaintiffs' motion for summary judgment. The district court had jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. The district court's judgment, dated February 24, 2010, disposed of all claims of all parties, in the manner explained in two written opinions, one dated September 30, 2007, and one dated February 23, 2010. (SA 72). Plaintiff filed a timely notice of appeal on April 21, 2010. (A 461). This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1) Whether disclosing Central Personnel Data File (CPDF) records containing names of employees who work for the Department of Defense (DoD), Drug Enforcement Agency (DEA), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), U.S. Mint, the Secret Service, and in 23 occupational series the Office of Personnel Management (OPM) has labeled "sensitive" would be a clearly unwarranted invasion of personal privacy.

2) Whether disclosing CPDF records containing organizational component codes of employees who work for DoD, DEA, ATF, U.S. Mint, the Secret Service, the FBI, and in four "sensitive" occupational series—Hearings and Appeals,

Border Patrol Agent, General National Resources & Biological Science (DHS only), and Plant Protection and Quarantine—would be a clearly unwarranted invasion of personal privacy.

3) Whether disclosing CPDF records containing duty-station information of employees who work for DoD, DEA, ATF, the U.S. Mint, the Secret Service, and in the occupational series Hearings and Appeals, Border Patrol Agent, General National Resources & Biological Science (DHS only), and Plant Protection and Quarantine would be a clearly unwarranted invasion of personal privacy.

## STATUTORY PROVISIONS INVOLVED

FOIA, 5 U.S.C. § 552, provides in relevant part:

> (a)(3)(A) . . . [E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person. . . .
>
> (b) This section does not apply to matters that are . . .
>
> > (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . ..

## STATEMENT OF THE CASE

This case concerns OPM's withholding of vast numbers of records from its Central Personnel Data File (CPDF), a database it maintains to allow statistical analyses of the federal workforce. The withheld records include organizational component codes, duty-station information, and names of employees in 5 "sensitive" agencies and 23 "sensitive" occupations—over 40% of the federal civilian workforce.

On cross-motions for summary judgment, the district court, Judge Norman A. Mordue presiding, held that OPM could withhold names and duty-station information of employees in the five "sensitive" agencies and four of the 23 "sensitive" occupations. *Long v. OPM*, 2007 WL 2903924 (N.D.N.Y. September 30, 2007) (*Long I*) (SA 1-35). The court ordered additional briefing on the other 19 occupations and the organizational component codes. *Id*.

On new cross-motions for summary judgment, the district court held that organizational component codes and duty-station information of employees in the "sensitive" occupations are not exempt from disclosure under FOIA. *Long v. OPM*, 2010 WL 681321 (N.D.N.Y. Feb. 23, 2010) (*Long II*) (SA 36-71). It otherwise denied plaintiffs' motion and granted OPM's motion. *Id*.

## STATEMENT OF THE FACTS

### I. The CPDF and Plaintiffs' FOIA Requests

The United States government has a long history of letting the public know about its workforce. In 1816, Congress passed a resolution requiring a public register of "all the officers and agents, civil, military, and naval, in the service of the United States" to be compiled regularly by the Secretary of State. The register contained a name and work location for each employee. *See* Declaration of Gary A. Lukowski (Lukowski Decl.), Exh. C at 5, 8 (A 86, A 89).

Currently, the most official and comprehensive register of federal employees is the CPDF, a database compiled by OPM "to support statistical analyses of Federal personnel management programs." Third Declaration of Susan B. Long (Third Long Decl.), Exh. 1 at 2 (A 424). The CPDF contains records on most federal civilian employees,[1] including a status file that provides information about employees at a particular moment in time and a dynamics file that documents personnel actions over a period of time. *See* Lukowski Decl. ¶ 20 (A 68). The CPDF is "OPM's official source of government-wide workforce information." *Id*. (A 67). Because OPM provides its data in a standardized form,

[1]Notable exceptions include employees of the Central Intelligence Agency, Defense Intelligence Agency, and National Security Agency. *See* Lukowski Decl. ¶ 20 (A 67).

edits agencies' data submissions, and performs other quality control checks, the CPDF is unparalleled as an official, reliable source of data for conducting analyses of the federal workforce. *See* Declaration of Susan B. Long (Long Decl.) ¶ 28 (A 198-99). And, indeed,"[t]he system's primary objective is to provide a readily accessible data base for meeting the workforce information needs of [the government] and the public." Third Long Decl. Exh. 2 at 2 (A 426).

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 CPDF. Professors Long and Burnham have requested the CPDF data to be able to provide the public with comprehensive information about the government's staffing and to allow meaningful oversight of the government's staffing practices. *See* Long Decl. ¶¶ 1-2 (A 187-88). Among the fields from the CPDF that OPM released to Professors Long and Burnham for years are the fields containing organizational component codes, duty-station information, and names. *Id*. ¶¶ 2, 56 (A 188, A 216-17).

In its responses to Professor Long's requests for the March, June, and September 2004, and March, June, and September 2005 CPDF files, however,

OPM withheld millions of records from these fields, claiming that their release would be a clearly unwarranted invasion of employees' personal privacy. In particular, the agency redacted organizational component codes, duty-station information, and names of all employees of DoD, DEA, ATF, the U.S. Mint, and the Secret Service (collectively, "the 'sensitive' agencies"), and of all employees in 23 occupations that OPM has labeled "sensitive"—a total of over 800,000 employees. OPM Second Amended *Vaughn* Index (*Vaughn* Index) at 1-2 (A 339-40); Long Decl. ¶ 15 (A 193). In addition, OPM redacted organizational component codes for FBI employees, *Vaughn* Index at 2 (A 340), and organizational component codes, duty-station information, and/or names of over 900 additional employees who OPM claims used to work in one of the "sensitive" agencies or occupations. Second Declaration of Gary A. Lukowski (Second Lukowski Decl.) ¶ 5 (A 317). These redactions have prevented Professors Long and Burnham and TRAC from being able fully to analyze and share with the public information about the government's staffing practices.

## II. Description of the Withheld Records

### A. Fields from Which OPM Withheld Records

OPM withheld records from the following fields: (1) organizational component; (2) post of duty (state, city, county), bargaining unit, core-based

statistical area, combined statistical area, and locality pay area (collectively referred to in this brief as "duty-station information"); and (3) names.

**1. Organizational Component**

The organizational component field contains an 18-digit code that indicates the division of an agency to which an employee is assigned. Long Decl. ¶ 25, 27 (A 197, A 198). These codes provide a hierarchical outline of agencies' organizational charts, detailing how agency responsibilities are organized into components and subcomponents and allowing for statistical analysis of the distribution of an agency's employees across its subdivisions. Third Long Decl. ¶ 18 (A 411-12).

Some agencies also include geographical information in organizational component codes. For example, the last six digits of the organizational code for the Immigration and Customs Enforcement's "Duty Post Miami Florida – OCDETF" component, BB0109020001010000, indicate that the component is in Miami. Long Decl. ¶ 27 (A 198). The other 12 digits do not contain geographical information, however, and many organizational codes do not contain any geographical information at all. *Id*. ¶¶ 26-27 (A 197-98); Second Declaration of Susan B. Long (Second Long Decl.) ¶ 9 (A 364). When digits within an organizational code do represent geographic information, that information is never

more specific than city, and typically only means that the headquarters of the component are located in that location, not necessarily all of the employees. Fourth Declaration of Susan B. Long (Fourth Long Decl.) ¶ 3-4 (A 448-49).

OPM withheld organizational component codes for all employees of the five "sensitive" agencies, the 23 "sensitive" occupations, and the FBI. *See Vaughn* Index at 1-2 (A 339-40).

**2. Duty-Station Information**

**a. Post of Duty: State, City, and County**

The post-of-duty field contains a nine-digit code: The first two digits represent the state of the employee's post of duty, the next four represent the city, and the final three represent the county. Second Long Decl. ¶ 4 (A 362); Third Long. Decl ¶ 21-26 (A 413-15). These fields allow for statistical analysis of the workforce by broad geographic location. The post-of-duty field does not contain any information about specific work addresses. Long Decl. ¶ 20 (A 195).

OPM withheld post of duty for all employees in the 23 "sensitive" occupations. It also withheld post of duty for all employees of DoD and, except for releasing whether or not the employee worked in Washington, DC, for employees of the other four "sensitive" agencies. In addition, OPM withheld bargaining units for DoD employees on the ground that releasing the bargaining

unit information would reveal their post-of-duty information. *See Vaughn* Index at 1-2 (A 339-40).

**b. Core-Based Statistical Area (CBSA), Combined Statistical Area (CSA), and Locality Pay Area (LPA)**

Core-based statistical areas (CBSAs) and combined statistical areas (CSAs) are groups of counties that are classified together based on social and economic ties, as measured by commuting. CBSA and CSA classifications exist to allow for standardized definitions for collecting federal statistics. Third Long Decl. ¶¶ 27, 29 (A 415-16). CBSAs and CSAs may include counties in more than one state. For example, the CSA that encompasses New York City includes counties in New York, New Jersey, Connecticut, and Pennsylvania. *Id*. ¶ 28 (A 415). Counties must have a higher degree of social and economic ties to be grouped together in a CBSA than in a CSA. *Id*. ¶ 29 (A 415).

Locality pay area (LPA) indicates whether special pay is provided to federal employees on the basis of their location, thereby allowing the public to study whether special locality pay enables the government to attract and retain employees. Long Decl. ¶ 22 (A 196). The geographic boundaries of an LPA generally follow those of a CSA, although almost half include additional counties. Third Long Decl. ¶ 31 (A 416). There are only 33 different LPA code categories.

Long Decl. ¶ 22 (A 196). Among those codes are "ZZ," which stands for "Not in a Locality Pay Area," "ZX", which stands for "Rest of the Contiguous United States," and "ZY," which stands for "FBI Employee Outside Washington, DC." Second Long Decl. ¶ 6 (A 363).

OPM withheld CBSA, CSA, and LPA for employees in the 23 "sensitive" occupations and for employees in the five "sensitive" agencies who work outside DC, except for employees of DoD, for whom it released such data. *See* Long Decl. ¶ 21 (A 195-96); *Vaughn* Index at 1-2 (A 339-40).

**3. Names**

The CPDF includes a name file, the release of which allows the public to see whom the government is employing. When OPM responds to FOIA requests for the CPDF, it appends names from the name file to the released records. Lukowski Decl. ¶ 21 (A 69). OPM withheld names for employees of the five "sensitive" agencies and 23 "sensitive" occupations. *Vaughn* Index at 1-2 (A 339-40).

**B. The "Sensitive" Occupations**

As described above, OPM withheld organizational component codes, duty-station information, and names of employees in 23 occupations because it deems those occupations "sensitive." Those occupations are: Correctional Officer;

United States Marshal; Police; Nuclear Materials Courier; Intelligence; Intelligence Clerk/Aide; General National Resources & Biological Science (DHS only); Plant Protection and Quarantine; Internal Revenue Agent; Nuclear Engineering; Hearings and Appeals; Internal Revenue Officer; General Inspection, Investigation and Compliance; Compliance Inspection and Support; General Investigating; Criminal Investigating; Game Law Enforcement; Immigration Inspection; Alcohol, Tobacco, and Firearms Inspection; Custom Patrol Officer; Customs Inspection; Customs and Border Protection; and Border Patrol Agent. *Vaughn* Index at 1-2 (A 339-40).[2]

These "occupations" are actually *occupational series*—broad categories that are classified together because they are similar with regard to subject matter and basic knowledge and skill requirements, but within which specific duties, work assignments, and responsibilities can vary widely. Third Long Decl. ¶ 7 (A 406-07). Occupational series include positions at differing agencies and differing grade levels. According to OPM's handbook on classification, a "group of positions in the same occupational series may encompass a considerable variety

[2]OPM also deems the occupation "Customs and Border Protection Interdiction" to be sensitive, *Vaughn* Index at 1-2 (A 339-40), but no positions were classified as being within that occupation in the CPDF files at issue. *See* Third Long Decl. ¶ 15 (A 445).

and combination of specific types of duties," even within a grade level. *Id*. ¶ 9 (A 407). OPM determined that occupations were "sensitive" occupational series by occupational series, rather than individual employee by individual employee. Fourth Declaration of Gary A. Lukowski (Fourth Lukowski Decl.) ¶ 4 (A 438-39).

In the September 2005 CPDF, OPM redacted organizational component codes, duty-station information, and names of over 165,000 employees because they were in the 23 "sensitive" occupational series. Long Decl. ¶ 15 (A 193).[3] These employees were in 123 non-defense agencies, along with many agencies within DoD. *Id*. ¶ 19 (A 195).[4]

## III. Proceedings Below

After exhausting their administrative remedies, plaintiffs filed this action, and the parties cross-moved for summary judgment. The district court granted partial summary judgment in OPM's favor, holding that FOIA Exemption 6—which applies to medical, personnel, and similar files the release of which would be a clearly unwarranted invasion of personal privacy—permitted

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[3]Because the numbers of employees within occupations and agencies differ slightly from one CPDF file to the next, when this brief uses specific numbers, it uses them from the September 2005 file, the last file at issue in this lawsuit.

[4]Approximately 30,000 of these employees worked for one of the five "sensitive" agencies. Long Decl. ¶ 15 (A 193).

OPM to withhold names and duty-station information for employees of the five "sensitive" agencies, and in four occupations: General National Resources & Biological Science (DHS only), Plant Protection and Quarantine, Hearings and Appeals, and Border Patrol Agent. *Long I*, 2007 WL 2903924, at *22 (SA 35). The district court noted, however, that OPM had offered no explanation of why it deemed the other occupations "sensitive" and directed OPM to file supplemental declarations detailing why disclosure would threaten the privacy interests of employees in each of those occupations. *Id*. at *16, 19 (SA 23, SA 29-30). The district court also found some confusion over the organizational component field and ordered the parties to file additional briefs on that field. *Id*. at *21 (SA 34).

On new cross-motions for summary judgment, the court granted summary judgment to OPM with respect to names of employees in the "sensitive" occupations. *Long II*, 2010 WL 681321, at *16 (SA 65). The court concluded that by nature of their occupations, the employees were at a risk of harassment or attack if lists of their names were disseminated and that the employees therefore had a privacy interest in their names, or in their names and locations released together. *Id.* at *14 (SA 62). The court then found that there was no public interest in the names because, once they were released, it would take "further investigation and analysis" for the public to learn about the activities of the

government. *Id.* at *15 (SA 64).

However, the district court granted summary judgment to plaintiffs with respect to organizational component codes and duty-station information of employees in the "sensitive" occupations. *Id.* at *19 (SA 70). 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. DoD*, 554 F.3d 274, 292-93 (2d Cir. 2009)). With regard to OPM's arguments that revealing geographic information about employees would, for example, show where investigations were concentrated or identify "low risk" border entry points, the district court explained that these arguments did not "reveal anything about any individual" and therefore did not implicate privacy interests. *Id.* at *17 (SA 67).

Although the district court's reasoning for requiring the release of duty-station information of employees in "sensitive" occupations applies equally to employees of the five "sensitive" agencies and to employees in the four occupations addressed in the district court's first decision—all of whose names

OPM is withholding along with their duty stations—the court did not revisit its earlier decision that these employees' duty-station information is exempt from disclosure under FOIA Exemption 6.[5] Thus, although the court's second decision recognizes that employees do not have a privacy interest in their duty-station information when it is released without identifying information, and although the court held that OPM could withhold the names of employees in the five "sensitive" agencies and four occupations addressed in the court's first opinion, the final judgment grants summary judgment to OPM with respect to the duty-station information of these employees on the ground that release of the duty-station information would be a clearly unwarranted invasion of the employees' personal privacy. *See* Judgment (SA 71).

In addition, although plaintiffs moved for summary judgment on the

[5]Although it is clear from the second decision and final judgment that the grant of summary judgment in plaintiffs' favor applies only with respect to duty-station information and organizational component codes of employees in occupations OPM deems sensitive, *see, e.g. Long II,* 2010 WL 681321, at *19 (SA 70)—and not of employees of the five "sensitive" agencies—it is unclear whether the grant of summary judgment in plaintiffs' favor on this issue applies to *all* occupations OPM deems sensitive or only to those not addressed in the district court's first decision. To be safe, plaintiffs assume that summary judgment was granted against them as to organizational component codes and duty-station information of employees in the four occupations for which summary judgment was granted in OPM's favor in the first decision below—the occupations Hearings and Appeals, Border Patrol Agent, General National Resources & Biological Science (DHS only), and Plant Protection and Quarantine—and plaintiffs are appealing that decision.

organizational component codes of *all* employees for whom the codes were withheld, the district court granted summary judgment in plaintiffs' favor only on the organizational component codes of employees in the "sensitive" occupations. The court granted OPM's motion with regard to the organizational component codes of employees of the five "sensitive" agencies (and, apparently, of employees in the four occupations addressed in the court's original decision). The only mention the court made of the organizational component codes of these employees was in a footnote. Although plaintiffs had made extensive arguments about why *all* of the withheld organizational component codes should be released, *see infra* n. 9, the court stated in the footnote that it was granting summary judgment "only with respect to the duty stations and organizational component codes of employees engaged in 'sensitive occupations' addressed in the parties' motions for summary judgment, not Department of Defense employees—about which plaintiffs make no argument." *Long II*, 2010 WL 681321, at *17 n. 5 (SA 68). The court did not address why release of these employees' organizational component codes, without any identifying information, would be a clearly unwarranted invasion of their personal privacy.

## SUMMARY OF ARGUMENT

Release of CPDF records containing organizational components codes, duty-station information, and names of employees in agencies and occupations deemed "sensitive" by OPM would not be a "clearly unwarranted invasion of personal privacy," as required for the records to be exempt under FOIA Exemption 6, 5 U.S.C. § 552(b)(6).

OPM's position is that all employees whose jobs are even tangentially related to law enforcement or defense would be at risk if the employees' names or any geographic information about their offices were made public. But despite a long history of the government informing the American people about whom it has hired and where those employees' offices are located, OPM only speculates that release of the withheld records would place employees at risk. And the notion that terrorists would target specific individuals if they knew their names and the states or cities or CBSAs where they work defies common sense and the lessons of September 11, when terrorists targeted symbols of America, not individual employees.

Moreover, OPM paints with too broad a brush, seeking categorical exemptions based on arguments that do not apply to all (or even most) of the withheld records. It seeks to withhold all geographic information—even at a state

or broader level—based on the argument that it can be harmful to identify "location," and to withhold all of the withheld records based on arguments about the assignments of some, but not all, of the employees whose information was withheld. And OPM conceded below that it determines "sensitivity" occupation-by-occupation, rather than employee-by-employee, leading it to withhold records on employees who do not perform sensitive work.

In contrast to the minimal privacy interest at issue, the withheld records are vital for the public to understand the government's activities. The government is not a monolithic entity in Washington, D.C.; it is composed of individuals making decisions all across the country. Knowing how the government is organized, where it is focusing its resources, and who is making governmental decisions allows the public to understand how the government works on the ground. It enables the public to analyze whether the government is operating efficiently, to monitor staff turnover and agency management, and to determine whether resources are being expended even-handedly. And in a time of great public debate over how to reduce the national deficit, it allows the public to better assess where cuts in federal staffing should be made and how agencies could best be reorganized. The public interest in the withheld organizational component codes, duty-station information, and names outweighs any personal privacy interest

involved, and the records should be released.

In any event, no matter what this court decides about names (or names released in conjunction with duty stations), the organizational component codes and duty-station information records must be released. For every employee for whom OPM is withholding organizational component codes and duty-station information, it is also withholding names. But anonymous records are not within the scope of Exemption 6. As this Court has explained, without identifying information, "there is no cognizable privacy interest at issue." *Am. Civil Liberties Union v. DoD*, 543 F.3d 59, 86 (2d Cir. 2008), *cert. granted on other grounds, judgment vacated*, 130 S. Ct. 777 (2009). And OPM's claimed privacy interest is based on the potential for people to use the CPDF data to "locate" federal employees, but the geographic information in the records is not at a level specific enough to allow federal employees to be located. Because release of the anonymous organizational component codes and duty-station information would not be an invasion of personal privacy, let alone a clearly unwarranted one, those records, at the very least, must be disclosed.

## STANDARD OF REVIEW

When a district court decides a FOIA case at summary judgment, this Court reviews the decision de novo. *See, e.g.*, *Bloomberg, L.P. v. Bd. of Governors of*

*the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010).

## ARGUMENT

FOIA was enacted to advance "a general philosophy of full agency disclosure." *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992) (internal quotation marks and citations omitted). FOIA establishes a strong policy in favor of disclosure of information in the possession of federal agencies, requiring disclosure unless the records are subject to one of the limited exemptions provided in 5 U.S.C. § 552(b). *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005). These exemptions are construed narrowly, with doubts resolved in favor of disclosure, and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The government has the burden of demonstrating that a particular exemption applies, and courts review the determination de novo, giving no deference to the agency. 5 U.S.C. § 552(a)(4)(B).

FOIA Exemption 6 permits the government to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). If the records are personnel, medial, or similar files, and if more than a de minimis privacy

interest is at stake, courts must balance the privacy interest against the extent to which disclosure would "let citizens know what their government is up to." *Wood v. FBI*, 432 F.3d 78, 88 (2d Cir. 2005) (internal quotation marks and citation omitted). The requirement that the invasion of privacy be "clearly unwarranted" instructs the court to "tilt the balance . . . in favor of disclosure." *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982) (citation omitted). Here, the balance tilts strongly in favor of releasing the withheld information.

## I. OPM Cannot Withhold the Names of Over 40% of the Federal Civilian Workforce.

### A. The Privacy Interest in Federal Employee Names Is Minimal or Non-Existent.

**1.** Federal civilian employees have a minimal privacy interest in their names, which have long been made public. As early as 1816, the federal government was releasing federal employee names. Lukowski Decl. Exh. C (A 86-92). In 1966, the U.S. Civil Service Commission, the precursor to OPM, noted that the Official Register of the United States "for many years contained the names of all Government employees, with title, salary, State of origin, and duty station." 112 Cong. Rec. A1598 (1966). In response to agencies withholding employee names and salaries, the Commission issued a policy "that the names,

position titles, grades, salaries, and duty stations of Federal employees are public information" that should generally be released upon request. *Id*. The House Committee on Government Operations cited this policy in recommending that FOIA be enacted and described agencies' withholding of names and salaries as a "striking example" of the "abuse" of the pre-FOIA disclosure law. H.R. Rep. No. 1497, 89th Cong, 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 2418, 2422-23.

Even today, DoD regulations provide that names and duty stations of DoD civilian employees "normally may be released," 32 C.F.R. § 310.22(b)(5)(i)(A), and OPM's regulations state that name, title, salary, duty station, and position description of "most" federal employees are available to the public. 5 C.F.R. § 293.311. As the government admitted below, "OPM, DoD, and IRS have made information that would identify federal personnel available to the public in the past as a matter of course." *See* Mem. of Points and Authorities in Support of Def. U.S. OPM's Mot. for S.J., at 11 n.11. Indeed, plaintiffs have regularly received the names of federal civilian employees in response to their FOIA requests to OPM, including, for many years, the names of employees at DoD, DEA, the Secret Service, and the U.S. Mint, and in the "sensitive" occupations. Long Decl. ¶ 2 (A 188).

This long history of government release of federal employee names

demonstrates that one's name, combined with the fact of federal employment, is not "the type of information that a person would ordinarily not wish to make known about himself or herself." *Associated Press*, 554 F.3d at 292. As this Court has explained, "[n]ames and other identifying information do not always present a significant threat to an individual's privacy interest." *Wood*, 432 F.3d at 88.

**2.** To the extent that federal employees have a privacy interest in their names, that interest is in keeping confidential information that could "subject them to embarrassment and harassment in the conduct of their official duties and personal affairs." *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993); *see Wood*, 432 F.3d at 88 (2d Cir. 2005) ("[W]hether the disclosure of names of government employees threatens a significant privacy interest depends on the consequences likely to ensue from disclosure."). Thus, courts have sometimes permitted the withholding of names of law-enforcement personnel based on findings that disclosure would subject them to harassment by revealing that they were involved in specific investigations or policy decisions. *See, e.g.*, *Wood*, 432 F.3d 78 (permitting withholding of names of FBI personnel who investigated other FBI agents accused of lying in affidavits). At the same time, however, this Court has emphasized that "'the focus, in assessing a claim under Exemption 6, must be solely upon what the requested information *reveals*, not upon what it might lead

to,'" *Associated Press*, 554 F.3d at 292 (quoting *Dep't of State v. Ray*, 502 U.S. 164, 180 (1991) (Scalia, J. concurring) (emphasis in original)), and, therefore, that the claim that releasing records would put people at risk of retaliation by terrorists is not the proper focus of an "inquiry under Exemption 6." *Id.* And courts that have allowed employee names to be withheld because of the employees' involvement in particular investigations or decisions have emphasized that their holdings do not authorize a "blanket exemption" for the names of all employees within law enforcement agencies. *See, e.g., Baez v. U.S. Dep't of Justice*, 647 F.2d 1328, 1339 (D.C. Cir. 1980) (cautioning that the court did "not mean to imply a blanket exemption for the names of all FBI agents in all documents" because "[c]ertainly Congress did not intend this result"); *see also Armstrong v. Executive Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1996) ("[A] categorical rule forbidding disclosure of the names of lower-level FBI agents in all activities is invalid. The privacy interest at stake may vary depending on the context in which it is asserted.").

Here, disclosure of the withheld names would not reveal information about the employees outside of their employment within certain federal agencies or occupations, nor inform the public about specific investigations or policy decisions in which the employees were involved. Nonetheless, the district court

granted summary judgment in OPM's favor, holding that *all* of the employees in 5 agencies and 23 occupations—over 800,000 of them in all—could be subject to harassment or attack if their names were released. OPM did not demonstrate, however, that each employee whose name is being withheld would, in fact, be at risk of such harassment or attack if his or her name were revealed.

To begin with, it was OPM's burden to demonstrate that *each* record it withheld is exempt because release of that record would be a clearly unwarranted invasion of personal privacy. *See, e.g.*, *Jefferson v. Dep't of Justice*, 284 F.3d 172, 179 (D.C. Cir. 2002) (remanding for determination whether *all* the withheld records were law-enforcement records under Exemption 7). OPM conceded below, however, that it did not determine sensitivity "on an individual-by-individual basis" but rather "in regard to an entire occupation series." *See* Def. U.S. OPM's Opp. to Pl.'s Cross-Mot. for S.J. and Reply Mem. in Support of Def.'s Mot. for S.J., at 4 (A 436). In other words, OPM applied a blanket exemption to occupational series and withheld records on all individuals in those series, regardless of whether the individual employees were engaged in "sensitive" work and, thus, regardless of whether release of *those specific records* would be a clearly unwarranted invasion of personal privacy. *See id.* (claiming it "is irrelevant whether a particular agent within a series happens to be actively

involved in . . . sensitive work"); *Long II*, 2010 WL 681321, at *14 (SA 62) (noting that OPM's declarant "admits that not all positions within an occupation are sensitive"). On that ground, alone, the district court's grant of summary judgment to OPM should be reversed.

In permitting OPM to withhold names, the district court relied on OPM's assertion that it could not feasibly distinguish sensitive positions from non-sensitive positions. *Id*. at *14 (SA 62). However, OPM's inability to identify which records' release it thinks would be an invasion of personal privacy does not permit it to withhold records whose release would *not* be an invasion of personal privacy. Moreover, there *are* ways for agencies to identify which employees face a real, particularized risk of harassment or attack based on the specific work that they do and to withhold only those employees' names. The IRS, for example, has a program under which it provides pseudonyms to employees who have presented credible evidence of harassment or threats to their personal safety. *See* Declaration of Albert B. Adams, Jr. ¶¶ 7-9 (A 41-42). Plaintiffs do not challenge the withholding of those employees' real names. IRS's pseudonym program, however, highlights the overreaching in OPM's redaction of names overall. Although IRS has provided pseudonyms to only 666 employees, *id*. ¶ 9 (A 42), OPM redacted the names of over 20,000 IRS employees in occupations it labels

sensitive. Long Decl. ¶ 12 (A 192).

Even if OPM had not conceded that not all positions within a "sensitive" occupation are sensitive, it would not have met its burden. OPM makes overly-broad claims, seeking to withhold names of all employees of an occupation or agency based on arguments about the assignments of only a few employees in the occupation or agency. For example, OPM claims that releasing marshals' names would compromise their safety because they "perform undercover or sting operations where concealment of identity is essential." Third Declaration of Gary A. Lukowski (Third Lukowski Decl.) ¶ 4 (A 379). But not all marshals are in undercover positions, and if a marshal is undercover under a different name, releasing his true name in the CPDF would not reveal his secret identity. Similarly, OPM asserts that releasing the names of employees in the "Intelligence" and "Intelligence Clerk/Aide" occupations would expose them to harm because they collect "sensitive" information. *Id*. ¶¶ 7-8 (A 380). But despite the occupations' names, people in these occupations do not necessarily deal with information that would reveal "vulnerabilities or secrets of the Federal government." *Id*. ¶ 7 (A 380). "Intelligence" includes people working on issues that only indirectly affect national security, such as the collection of information on social trends. *Id*; Third Long Decl. ¶¶ 10, 13 (A 408, A 409). And not every

employee in the "Criminal Investigating" occupation—which includes employees of the Government Printing Office, Peace Corps, and National Gallery of Art, *id*. ¶ 10 (A 408)—deals with "members of gangs and organized crime." Third Lukowski Decl. ¶ 15 (A 383). That an occupation or agency includes employees who engage in certain "sensitive" activities does not mean that all—or even many—employees in the occupation or agency perform those specific assignments.

Moreover, as the Supreme Court has explained, "Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities." *Rose*, 425 U.S. at 380 n.19. Yet OPM has only speculated that releasing the withheld names would make employees vulnerable to harassment or attack. *See Gordon v. FBI*, 388 F. Supp. 2d 1028, 1040 (N.D. Cal. 2005) (agency had not met its burden where it offered "no evidence to support its speculation that the employees are likely to be harassed if their names are released"). For example, OPM withheld the names of all DoD employees, claiming that "[t]he attack on the Pentagon on September 11, 2001, and [the] anthrax attacks leave no doubt that *ALL* DoD personnel in *ALL* DoD locations are vulnerable to harassment or attack." Second Declaration of Michael B. Donley (Second Donley Decl.) ¶ 4 (A 328-29) (emphasis in original). But although those attacks were awful, they do not leave

"no doubt" that all DoD employees are at risk if their names are released. OPM has offered no reasoned explanation, for example, why a terrorist would target an army swimming pool lifeguard, a military academy professor, or a commissary teller, if provided with that person's name. Moreover, although OPM repeatedly invokes the attack on the Pentagon, no one claims that the terrorists who hit the Pentagon were targeting specific people or that knowing the names of specific Pentagon employees influenced their choice of target. The terrorists aimed not at specific employees, but at famous government facilities. And although they killed many federal employees, the question here is not whether federal employees are sometimes the victims of terrorism, but whether releasing their names will make them more vulnerable to harassment or attack.

As OPM suggests, people with nefarious goals who seek to target individuals are more likely to want to harm those with whom they have had direct, negative interactions. *See, e.g.*, Third Lukowski Decl. ¶ 5 (A 379) (claiming that releasing employee names would place the employees at risk from people who have had "adverse interactions" with them). But members of the public usually *already* know—are often entitled to know—the names of federal employees with whom they have had contact and against whom they are therefore more likely to have a personal animus. For example, OPM is redacting the names of all Internal

Revenue Agents and Internal Revenue Officers, claiming that their release would place the employees at risk "by persons who may seek to exact revenge" based on examination or collection activities. *Id.* ¶¶ 9, 11 (A 380-81). Federal law, however, *requires* that "any manually generated correspondence received by a taxpayer from the Internal Revenue Service shall include in a prominent manner the name, telephone number, and unique identifying number of an Internal Revenue Service employee the taxpayer may contact with respect to the correspondence." *IRS Restructuring and Reform Act of 1998*, Pub. L. No. 105-206, § 3705, 112 Stat. 685, 777 (1998). Similarly, law enforcement personnel generally wear name tags or carry identification cards so that members of the public knows with whom they are dealing. Third Long Decl. ¶ 16 (A 410); Declaration of Henry S. Ruth ¶ 4 (A 433). Because these employees' names are already known by the people with whom they have had interactions, releasing their names through the CPDF would not increase the chance that they will be attacked. And if people do *not* know the names of the employees with whom they interacted, the CPDF will not provide them with that information.

Moreover, agencies themselves publicly disclose many of the names that OPM is withholding. For example, Federal Register notices include the name of an employee to contact for further information, 1 C.F.R. § 18.12(b), and agencies

are required to post contact information for FOIA Public Liaisons on their websites. *See* Exec. Order No. 13392, 70 Fed. Reg. 75373, 75374 (Dec. 14, 2005). Similarly, although OPM is withholding the names of all DoD employees, DoD's website names, among others, senior defense officials and key leaders in the Defense Finance and Accounting Service. *See* Long Decl. ¶¶ 62. Indeed, even the memorandum by DoD's David Cooke upon which OPM relies to withhold all DoD names notes that names of personnel who interact with the public may be released. *See* Declaration of Michael B. Donley (Donley Decl.), Exh. 1 (A 33). Releasing employee names can hardly put the employees at risk when the agencies for whom the employees work have already made the name public. For example, despite OPM's declarant's emphatic claim that "*ALL* DoD personnel have" an "extremely strong privacy interest . . . in their names," Second Donley Decl. ¶ 5 (A 329), releasing the name of Donald Rumsfeld—who was the Secretary of Defense at the time of the records at issue—would not place him at any risk. Yet according to OPM's theory of this case, Mr. Rumsfeld's name is exempt from disclosure under Exemption 6 because its release would be a clearly unwarranted invasion of his personal privacy.

The occupation "Compliance Inspection and Support" demonstrates the arbitrariness and overbreadth of OPM's determination of which employees would

be at heightened risk of harm if their names were released. OPM's declarant, Gary Lukowski, asserted that the occupation contains more than 51,000 people, that more than 49,000 of them are in the Department of Homeland Security (DHS), and that within DHS, "these individuals are screeners, responsible for ensuring suspicious persons and items are not permitted to board aircraft." Third Lukowski Decl. ¶ 13 (A 382). In fact, the September 2005 CPDF included only 6,368 employees in this occupation, fewer than half of whom were in DHS, and only four of whom were in the Transportation Security Administration (TSA), the agency that performs airport screening. Third Long Decl. ¶ 14 (A 409-10). Most airport screeners—approximately 50,000 of them—were classified in the occupation "Safety Technician," which is not deemed "sensitive" by OPM. OPM therefore released these airport screeners' names. *Id*.

OPM's explanation of this discrepancy was that airport screeners were reclassified into "Compliance Inspection and Support" *after* 2005. Fourth Lukowski Decl. ¶ 14 (A 443). But this lawsuit only covers CPDF files from 2004 and 2005. Thus, OPM is withholding the names of all employees in "Compliance Inspection and Support" from the records at issue in this case based in part on arguments related to airport screeners, because, in records *not* at issue in this case, the employees in "Compliance Inspection and Support" are classified as being in

the same occupation as airport screeners, even though it released the names of approximately 50,000 airport screeners from the records that *are* at issue here. That employees will, at some later date, be classified in the same occupation as airport screeners does not demonstrate that it would be a clearly unwarranted invasion of privacy to release the employees' names, particularly when OPM did not consider it a clearly unwarranted invasion of privacy to release the airport screeners' names themselves.[6]

Further, that 50,000 employees whose names OPM willingly released in the records at issue here were reclassified as being in a "sensitive" occupation in later CPDFs shows the potential for increasingly overbroad withholding if OPM is permitted to withhold the names of all employees in an occupation irrespective of whether each employee in the occupation is engaged in work that would put him at

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[6]The overbreadth of OPM's withholding is also underscored by the fact that it is withholding names, organizational component codes, and duty-station information of people who no longer work in the enumerated agencies or occupations, but did at some point during the reporting period. Second Lukowski Decl. ¶ 5 (A 317). Even under the agency's logic, releasing this information would not put those employees at risk. Because there is no "prior agency" field (and OPM does not release the "prior occupation" field), *see* Long Decl. Exh. A at 6-8 (A 228-30); Second Long Decl. ¶ 26 (A 374), release of these employees' names and current organizational components and duty stations would not make them terrorist targets because terrorists would not know they formerly worked in "sensitive" occupations or agencies. Moreover, not all of the over 900 employees whose information OPM is withholding purportedly for this reason are, in fact, recent former employees of the enumerated agencies or occupations. Second Long Decl. ¶ 27 (A 374-75).

risk if his name were released. Under this approach, OPM could withhold the names of all federal employees just by reclassifying them as being in "sensitive" occupations. And OPM has shown that it is willing to declare additional occupations and agencies "sensitive," stating that "to the extent legally defensible, we would honor an agency's request to exempt any and all personnel information from release, on grounds that its entire workforce is engaged in national security; homeland security, and law enforcement activities." Long Decl. Exh. A at 3 (A 225). In the end, OPM could wind up withholding all federal employee names, contravening the long history of the government's informing the public about whom it is employing and the well-established policy that "most" federal employee names are public information. 5 C.F.R. § 293.311.

**B. The Public Interest in Disclosure of Names Is Strong.**

**1.** In contrast to the minimal privacy interest at stake, the public has a strong interest in the disclosure of the names so it can "be informed about what [its] government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (internal quotation marks and citation omitted). Indeed, the long history of release of employee names, the regulations specifying that most names should be public, and the IRS Restructuring and Reform Act's requirement that IRS correspondence include the relevant employee's name all

reflect a wide-spread recognition that disclosure of federal employees' names furthers the public interest.

Government work is done by people, and who those people are makes a difference in how the work is done. For example, TRAC conducted a study that found wide disparities in the rate at which immigration judges deny asylum requests: While one judge turned down 96.7% of requests, another judge denied only 9.8%. Long Decl. ¶ 42 (A 209-10). Similarly, TRAC traced a large drop in the enforcement of wildlife laws to the retirement of one employee. *Id.* ¶ 37 (A 205-06). Being able to see how individuals affect an agency's actions can explain disparities in how the agency operates in different geographic areas or at different points in time and allow the public to determine whether the agency is operating in an even-handed manner. *Id.* ¶¶ 37, 42 (A 205-06, 209-10). And because law enforcement personnel often have wide discretion in their enforcement activities, it is particularly important for the public to have access to their names to understand the government's actions. *Id.* ¶ 36 (A 204-05). In short, "[k]nowing *who* is making government policy . . . is relevant to understanding *how* the government operates." *Gordon*, 388 F. Supp. 2d at 1041 (emphasis in original).

Having access to the names of government employees can also inform the

public about the efficiency of particular agency offices. By analyzing employee names, the public can determine the extent to which there is turnover at particular agency offices, which sheds light on the morale and experience level of that office. Declaration of J. Robert Port (Port Decl.) ¶ 3 (A 299); Long Decl. ¶ 41 (A 209). The names of employees who leave a particular agency can also inform the public about changes in an agency's priorities. For example, a sudden exit in long-time civil service employees after the entry of a new agency head can indicate a change in the agency's focus. Knowing the names of federal employees can also allow the public to follow employees' progression through different government jobs, thereby providing an understanding of career progression in the federal workforce. And it enables the public to research employees' credentials and detect the hiring and promotion of unqualified people and other instances of favoritism or mismanagement. *Id*. ¶¶ 39, 41 (A 207-08, A 209).

Moreover, disclosure of federal employee names helps the public to uncover unethical or illegal agency activities, fulfilling "the basic purpose of FOIA," "to ensure an informed citizenry . . . needed to check against corruption." *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). For example, using CPDF data, 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 and found that BLM employees were profiting from adopting horses and selling them for slaughter. Port Decl. ¶ 4 (A 299-300).

Importantly, in light of the government's invocation of national security, access to personnel names can allow the public to uncover agency malfeasance in areas related to national security, thereby enhancing the public's safety by bringing dangerous government behavior to light. For example, after finding their names through CPDF data, the Seattle Times interviewed over 100 TSA screeners and supervisors, who reported numerous security breaches, disclosed instances of harassment by managers, and discussed the high injury rates, long hours, and low morale of the federal employees responsible for ensuring that weapons and explosives are not brought onto airplanes. Declaration of James Neff ¶¶ 4-5 (A 258-59) & Exhs. A, B, & C (A 261-89). Because many employees whose names OPM has withheld work in occupations related to law enforcement and national security, it is particularly important for the public to have access to their names to be able to bring unethical or dangerous behavior to light.

Finally, public disclosure of whom the government is employing, and who is exercising the government's vast law enforcement powers, promotes public trust in the government and facilitates necessary communication between the

government and the people. *See, e.g.*, Ruth Decl. ¶ 3 (A 433). Knowing the names of judges, for example, promotes trust in the system of justice. But, here, the district court allowed OPM to withhold the names of people in the occupation "Hearings and Appeals," who adjudicate cases in formal and informal hearings.

**2.** Relying on *Federal Labor Relations Authority*, 958 F.2d at 512, the district court, in its first decision in this case, held that the link between names and agency conduct was too attenuated for the release of names to serve a public interest. *Long I*, 2007 WL 2903924, at *18 (SA 27).[7] Unlike in *Federal Labor*

[7]The district court also relied on *Perlman v. U.S. Dep't of Justice*, 312 F.3d 100, 107 (2d Cir. 2002), *vacated*, 541 U.S. 970 (2004), *reaff'd*, 380 F.3d 110 (2d Cir. 2004). There, the Court stated that, in balancing an employee's interest in privacy against the public's interest in disclosure under Exemption 7(c)—in which the balance is weighted more towards withholding than under Exemption 6—courts should look at several factors, including 1) the employee's rank; 2) the degree of wrongdoing and strength of the evidence against the employee; 3) whether there are other ways to obtain the information; 4) whether the information sheds light on a government activity; and 5) whether the information sought is job-related or of a personal nature. The Court emphasized that these factors are not fully inclusive. *Id*. The test applied in *Perlman* was designed to protect the interests of a "government employee who is the subject of an investigation . . . in avoiding disclosure of the details of the investigation," *id.*, and is therefore inapposite here, where plaintiffs do not seek details of an investigation. In any event, OPM is withholding names of employees at all ranks, even department heads; there are no other ways of obtaining the information in a way that allows for the statistical analyses the CPDF makes possible; the information sheds light on governmental decision-making processes and operations; and the redacted information just contains names, work duty-stations, and organizational component codes, not information about the employees' personal lives.

*Relations Authority*, however, in which the public interest asserted by the requester was in enabling the requester to contact employees, plaintiffs' arguments about how releasing names would inform the public about agency activities do not rely on members of the public getting in touch with employees to learn about their agencies. Rather, plaintiffs demonstrated that the public could learn about the government's activities, priorities, and management *directly* through disclosure of the names themselves. In any event, in *Associated Press*, 554 F.3d at 290, this Court left open the possibility that a public interest argument that relied on people using redacted information to find out additional information about the government, which is far more attenuated than the public interest here, could be cognizable under Exemption 6.

Nonetheless, in its second decision, the district court again held that the public interest in disclosure was too "attenuated," this time because "it would take further investigation and analysis before plaintiffs, or anyone else, could glean anything useful about the agencies for which they work." *Long II*, 2010 WL 681321, at *15 (SA 64). But the fact that records must be analyzed for the public to learn how the agency is performing its statutory duties does not eliminate the public interest in the records. For example, in *Ray*, 502 U.S. at 178, the Supreme Court noted that "the public interest in knowing whether the State Department has

adequately monitored Haiti's compliance with its promise not to prosecute returnees" was served by the disclosure of interview summaries that revealed "how many returnees were interviewed, when the interviews took place, the contents of individual interviews, and details about the status of the interviewees." The records did not specifically state whether the State Department had adequately monitored Haiti, but they contained information that, when analyzed together with other information, would allow the public to make that determination. *See also, e.g.*, *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1231 (D.C. Cir. 2008) (ordering the release of a file that contained information about farms that applied for subsidy programs because, although the file "did not directly say anything about a particular subsidy program," analysis of its contents would allow the public to "monitor whether the agency [was] correctly doing its job").

The court below also cited *Associated Press*, 554 F.3d at 292, for the proposition that "'the focus, in assessing a claim under Exemption 6, must be solely upon what the requested information *reveals*, not upon what it might lead to.'" *Id.* (quoting *Ray*, 502 U.S. at 180 (Scalia, J. concurring) (emphasis in the original)). Plaintiffs' demonstration of a public interest in the withheld names, however, was based on what the information reveals—albeit with analysis—not on what additional facts revealing the information might lead to. In any event, in

*Associated Press*, the Court was talking about the *personal privacy* side of the balancing test, not the public interest in disclosure, emphasizing that what someone does with the records after they are released is not a personal privacy issue. *Id*. Given the speculative and overbroad nature of the claim that release of the withheld names will put employees at risk, and because releasing the names would "shed[] light on an agency's performance of its statutory duties," *Reporters Comm*., 489 U.S. at 773, the balance weighs heavily towards the public interest side of the balancing test, and the withheld names should be released.

## II. OPM Cannot Withhold Duty-Station Information and Organizational Component Codes.

The district court held that OPM could withhold organizational component codes and duty-station information for employees of the "sensitive" agencies and apparently in the four occupations addressed in its first decision.[8] But release of information in the organizational component and duty-station fields—which contain, at their most specific, just the city in which an employee's office is located—would not invade personal privacy. And even if there were a privacy interest involved, that interest would be outweighed by the public's interest in understanding how the government is organized and where it is focusing its

[8]In the context of organizational component codes, "sensitive agencies" includes the FBI.

resources.

### A. Duty-Station Information Is Not Exempt from Disclosure.

**1.** The information in the duty-station fields is not "the type of information that a person would ordinarily not wish to make known about himself or herself." *Associated Press*, 554 F.3d at 292. Information about federal employees' duty stations has long been available to the public. OPM's current regulations list duty-stations among the information that is available about "most" federal employees. 5 C.F.R. § 293.311(a)(5). Indeed, OPM's regulations state that even "room numbers, shop designations, or other identifying information regarding buildings of places of employment" are publicly available for most employees. *Id*. In contrast, the duty-station information that OPM is withholding from the CPDF is never more specific than city, and can be as broad as just relating the fact that someone lives in a part of the country where employees do not receive special pay based on locality.

OPM's argument for withholding duty-station information is, as with names, that all employees in the "sensitive" occupations and agencies are at heightened risk of harassment or attack if they can be identified and located. As discussed above, however, OPM has not demonstrated that these employees would, in fact, be at risk if their names, organizational components, and duty-

station information were released. Moreover, because the most specific duty-station information the CPDF provides is at the city or county level, and often is even more general than that, the release of the redacted information would *not* enable individuals to harass, embarrass, or otherwise contact the employees at work (or, for that matter, at home).

To be sure, if someone knows the agency for which an employee works and the city of his duty station, that person may be able to track down a possible address of that employee's office. As OPM points out, "A Google Map search for 'US Mint Denver,' for example, identifies two specific street addresses (320 West Colfax Ave. and 1910 Curtis St.)." Second Lukowski Decl. ¶ 2 (A 310). OPM's example just shows, however, that knowing the city in which an employee is located does *not* necessarily reveal the employee's work address. There may, for example, be multiple addresses for the agency within the city. Moreover, the easy availability of the 'US Mint Denver' addresses demonstrates that office addresses are not the type of information that even "sensitive" agencies and occupations choose to keep secret. Further, it underscores that information about where agencies and their employees are located is often available through other means, so that withholding duty-station information from the CPDF files does not protect the employees about whom information was withheld; it simply denies the public

the ability to conduct analyses with data that is in a standardized format and has undergone OPM's quality control checks. Long Decl. ¶ 28 (A 198-99).

OPM also argues that releasing duty-station information would enable "terrorists, foreign enemies, and other individuals and organizations" to "devise a devastating assault on the duty station that brutally maximized the number of personnel killed and disabled." Second Lukowski Decl. ¶ 2 (A 310). This argument ignores, however, that the duty-station information does not contain street addresses and that agencies may have employees at multiple specific locations within a city. Moreover, this argument, which is based on aggregate statistics, is not a *personal privacy* argument, and is therefore not cognizable under Exemption 6. In effect, OPM is arguing that the duty-station records can be withheld based on national security and law enforcement concerns. FOIA, however, contains *other* exemptions designed to protect certain national security and law enforcement interests. *See* 5 U.S.C. § 552(b)(1) (exempting records that are properly classified "under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy"); *id.* § 552(b)(7) (exempting certain "records or information compiled for law enforcement purposes"). 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 threat to national security or to law enforcement demonstrates that Congress was not concerned about the effect such records would have on national 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.

**2.** In contrast to the de minimis privacy rights in the withheld duty-station records, the duty-station information is extremely useful to the "public understanding *of the operations or activities of the government*." *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (citation omitted) (emphasis in original). For many government activities, where federal employees are deployed determines who gets the benefits of government programs. Duty-station information thus provides members of the public with a detailed picture of how the federal government operates in their backyards; it informs them of what services they are receiving for their tax dollars. By looking at duty-station information, the public can monitor where the government is spending its resources, see whether some areas of the country are receiving disproportionate resources, and evaluate whether the government is making rational decisions about where to concentrate its resources. Long Decl. ¶ 29 (A 199-200).

Disclosure of duty stations can also explain differences in governmental activities across localities. Law-enforcement agency employees, for example, typically concentrate on investigations in their own geographical areas. By 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. *Id.* ¶ 31 (A 201-02). A TRAC study on IRS audit rates, for example, found that differences in corporate audit rates were traceable to different staffing levels in different districts. *Id.* ¶ 30 (A 200-01). Similarly, disclosure of duty stations can explain changes in law enforcement rates. For example, in the Environmental Protection Agency (EPA), agents who have supervisory duties do not investigate individual cases. Using CPDF duty-station data, Public Employees for Environmental Responsibility documented how the proliferation of new field offices within EPA's Criminal Investigations Divisions, by increasing the number of agents with supervisory duties, led to a decrease in the number of agents investigating potential criminal violations, which, in turn correlated with a decrease in the number of cases referred for prosecution. Declaration of Jeff Ruch (Ruch Decl.) ¶ 7 (A 307).

Having access to federal government employees' duty stations also enables

the public to determine how well the agency has "perform[ed] its statutory duties." *Reporters Comm.*, 489 U.S. at 773. For example, for the public to assess whether the government was adequately prepared for Hurricane Katrina, it needs to know how many Federal Emergency Management Agency (FEMA) employees were employed near New Orleans in August 2005. Just knowing the number of FEMA employees in the country overall would not allow evaluation of the government's fulfillment of its duties with regard to disaster preparedness. Long Decl. ¶ 32 (A 202).

Disclosure of duty stations can also shed light on whether the government has responded to recognized problems, including in areas related to national security. For example, September 11 focused public concern on the porousness of the nation's border with Canada. To determine whether the government has increased patrol of the northern border in response to September 11, it is necessary to know the duty stations of Border Patrol agents, not just the number of Border Patrol agents overall. *Id.* ¶ 33 (A 202-03). Knowing whether the government is sending the Border Patrol to the Canadian or Mexican borders tells the public directly "what [the] government is up to." *Reporters Comm.*, 489 U.S. at 780.

Finally, just as it may shed light on the wisdom of the government's past policies and practices, disclosure of federal employees' duty stations may allow

evaluation of proposed policies. For example, when agencies outsource jobs, lower-level jobs are often replaced. By looking at grade and duty-station information, the public can determine what localities will be most affected by a proposal to outsource jobs at certain agencies. Ruch Decl. ¶ 5 (A 306).

**3.** Given the many ways in which knowing how the government distributes its staffing resources contributes to the public's understanding of what the government is up to, the public interest in the withheld duty-station information far outweighs the privacy interest in the records, and the withheld records should be released. However, if this Court decides that it is a clearly unwarranted invasion of personal privacy to release some geographic information, OPM should be required to segregate and release the remaining information. Although OPM has used the blunt tool of redacting all geographic information, no matter how broad, the various duty-station fields withheld by OPM are segregable from each other. *See* 5 U.S.C. § 552(b) (requiring release of "[a]ny reasonably segregable portion of a record").

To begin with, although OPM has redacted "state" from the CPDF records, its FedScope website allows members of the public to "drill down" to the state level, *see* Long Decl. Exh. B at 4 (A 235), and run reports that detail the number of employees in each occupation in each state. Third Long Decl. ¶ 23 (A 413-14).

Given that the public can already find out the number of employees in "sensitive" agencies and occupations in each state, it would not expose employees to harassment or attack to release that information as part of the CPDF file.

Just as importantly, knowing that an employee is located somewhere in one of the large areas indicated by a CSA, CBSA, LPA, or county code, or the number of employees in an agency within one of those large areas, would not place any employee at heightened risk of harm. The CBSA that includes Syracuse, New York, for example, has 2,779 square miles and is larger in area than either Delaware or Rhode Island; the CBSA that includes St. Louis encompasses a 16-county area stretching across Missouri and Illinois. *Id.* ¶ 29 (A 416). CSAs are even broader, and LPAs often even broader than that.

Finally, one of the LPA codes, "ZZ," stands for "Not in a Locality Pay Area," another, "ZX," stands for "Rest of the Contiguous United States," and a third, "ZY," stands for "FBI Employee Outside Washington, DC." Second Long Decl. ¶ 6 (A 363). These codes would not even enable someone to deduce what region of the country an employee is in, and they should be released.

### B. Organizational Component Codes Are Not Exempt from Disclosure.

The organizational component field contains an 18-digit code that reflects

the component of an agency that employs a federal employee. OPM's argument for why it would invade personal privacy to release organizational component codes is that the records would reveal the employees' "locations" and thereby subject them to harassment or attack. Second Lukowski Decl. ¶ 11 (A 321-22). But, once again, even assuming each and every employee in the agencies and occupations OPM deems "sensitive" is at a heightened risk of attack if his or her "location" is known, releasing employees' organizational component codes would not disclose the employees' locations, even where the organizational component records contain geographic information (and not all do). The geographic information in the organizational component records is never more specific than the city associated with the component, *id*. (A 320), and is often much less specific than that, indicating, for example, just a state or region. Long Decl. ¶ 26 (A 197-98). Moreover, it tends to provide information only about the organizational unit's headquarters, not about where any particular employee is located. Fourth Long Decl. ¶ 3 (A 483).

OPM's declarant also contended that it could be harmful to know the *aggregate* number of employees in an organizational component, because, when combined with addresses, those numbers could be used to deduce high yield targets for people who want to attack specific categories of employees. Second

Lukowski Decl. ¶ 2 (A 310) ("[E]nemies could employ knowledge of the Organization Components and grades and position titles of federal personnel in specific duty stations to target specific categories of personnel for death and incapacitation."). Because many organizational component codes contain no geographic information, however, and because geographic information in the codes generally refers to the organizational unit's headquarters, not to the location of each employee within the unit, release of the records would not provide the number of federal employees overall, or even within each occupation, in a specific geographic area. Fourth Long Decl. ¶¶ 3-4 (A 448-49). And because organizational components do not contain street addresses, even if it were possible to determine numbers in a city, a potential attacker would not know what particular location to target. In any event, release of aggregate statistical information does not invade *personal privacy* as required for information to be exempt under Exemption 6.

In contrast to the non-existent privacy interest, the public has a strong interest in the information in the organizational component codes. The codes provide an organizational chart of the executive branch, informing the public about how the government is organized and allowing for public analysis and feedback on whether the government is operating efficiently. Third Long Decl.

¶ 18 (A 411-12). Because the availability of federal staff helps determine what the government can accomplish, the number of staff assigned to a particular office within an agency helps determine what that office can accomplish. Long Decl. ¶ 46 (A 211-12). Knowledge of the number of employees assigned to particular organizational components therefore allows the public to see what activities the agency is prioritizing and can enable the public to analyze whether the agency is fulfilling its duties in an efficient manner. The records also let the public know how much money the government is spending on personnel costs for the tasks performed by different subcomponents and in what regions of the country it is focusing its resources. *Id*. Knowing how the government is organized and on what it is spending its money can help the public assess how the government should be *re*-organized and enable the public, for example, to participate in an educated manner in the debate over how to reduce the deficit. Release of the withheld records would directly contribute to public understanding of government operations, and this public interest in disclosure outweighs the de minimis privacy interest involved.

In any event, not all organizational component codes contain geographic information, and, for those that do, not every digit of the 18 digits in the code represents geographic information. *See* Long Decl. ¶¶ 26-27 (A 197-98); Second

Long Decl. ¶¶ 9-10 (A 364-65); Second Lukowski Decl. ¶ 11 (A 320). At a minimum, therefore, OPM should be required to segregate and release the codes and digits that do not represent geographic information.

## III. At the Very Least, OPM Cannot Withhold Anonymous Organizational Component Codes and Duty-Station Information.

This Court should hold that the withheld names, duty-station information, and organizational component codes are not exempt under Exemption 6 and should be released. However, even if the Court holds that it would be a clearly unwarranted invasion of personal privacy to release names or organizational component codes and duty-station information together with names, releasing organizational component codes and duty-station information *without names* would not be an invasion of personal privacy, let alone a clearly unwarranted one. Indeed, in its second decision below, the district court recognized that release of the organizational component codes and duty-station information of employees in the "sensitive" occupations would not implicate privacy interests when names are withheld. Employees of the "sensitive" agencies and in the four occupations addressed in the district court's first decision have no greater privacy interest in the anonymous organizational component codes and duty-station records than employees in the 19 other "sensitive" occupations. At the very least, the

organizational component codes and duty-station information of these employees, too, should be released.[9]

### A. Exemption 6 Does Not Exempt Records Without Identifying Information.

**1.** People do not have a personal privacy interest in records without identifying information. As the Supreme Court has noted, even disclosure of "highly personal information regarding marital and employment status, children,

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[9]The district court limited its holding that organizational component codes must be released to employees of the "sensitive" occupations on the ground that "plaintiffs ma[d]e no argument" about organizational component codes of DoD employees. *Long II*, 2010 WL 681321, at *17 n.5 (SA 68). But plaintiffs' motion stated that judgment as to "the withheld organizational component records" should be entered in their favor and their memorandum of law similarly discussed why the "withheld organizational component records" were not exempt from disclosure. Pl.'s Mot. for S.J. at 1 (A 398); Mem. in Opp. to Def.'s Mot. for S.J. and in Support of Pl.'s Mot. for S.J. at 8 (A 403). The withheld organizational component records include organizational component records of the "sensitive" agencies, as well as in the "sensitive" occupations.

Moreover, plaintiffs' memorandum of law stated that the "withheld records include organizational component records on over 40% of the federal workforce," a number that includes employees in the "sensitive" agencies as well as in the "sensitive" occupations. *Id*. at 1 (A 402). And the memorandum used an example about DEA to demonstrate the public interest in the withheld organizational component codes, *id*. at 8 (A 403), thereby demonstrating that plaintiffs were not limiting their argument to employees of the "sensitive" occupations but also seeking release of organizational component codes of employees of the "sensitive" agencies. In short, plaintiffs moved for summary judgment as to the organizational component codes of employees of the "sensitive" agencies and the arguments they made about why organizational component codes should be released applied to the organizational component codes of employees in those agencies, as well as in the "sensitive" occupations.

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." *Ray*, 502 U.S. at 175-76. Accordingly, Exemption 6 cases tend to be about identifying information itself, *see, e.g., Ray*, 502 U.S. 164; *Wood*, 432 F.3d 78, or about records requested by name, *see, e.g. United States Department of State v. Washington Post Co.*, 456 U.S. 595 (1982), not about the portions of records left after identifying information is removed. *See Am. Civil Liberties Union,* 543 F.3d at 85 (pointing out 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"). Once identifying information is removed, "there is no cognizable privacy interest at issue." *Id*. at 86.

Below, OPM argued that revealing organizational component and duty-station records could lead to identification of employees. As the district court recognized with regard to the organizational component codes and duty-station information of employees in "sensitive" occupations, however, OPM did "not explain *how* employees could be identified from the disclosure of their duty stations and organizational component codes." *Long II*, 2010 WL 681321, at *16 (SA 66) (emphasis in original). The only thing the organizational component records would reveal is the component of the agency an unnamed person worked

for, including, for some components, the region or city in which the component is located. But organizational component is not an observable personal characteristic that would aid in identifying an employee in a city full of people. Fourth Long Decl. ¶¶ 6-8 (A 451-53). To be able to connect an anonymous organizational component record to a specific person, one would have to know already that the person worked for that component, in which case there would be no harm in releasing that fact. Likewise, knowing the city or state or CBSA of an employee would not help identify that employee, unless someone already knew that the employee worked for the agency in that geographic area.

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). Without names, the organizational component and duty-station records are just an anonymous series of codes, unlinked to individuals, used for statistical analyses of the federal workforce. That is, the organizational component and duty-station records are exactly the type of records that Exemption 6 was not intended to exempt, and they should be released.

**2.** If released anonymously, the organizational component codes and duty-

station information also do not fall within Exemption 6 because they are not personnel, medical, or similar files. First, despite the word 'personnel' in the CPDF's name, it is not a personnel file. *See id.* at 377 (holding that honor-code violation case summaries were not personnel files where "access to these files [was] not drastically limited . . . only to supervisory personnel directly involved with the individual," the files did not "constitute the kind of profile of an individual ordinarily to be found in his personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records," and the files were "justified . . . solely for their value as an educational and instructional tool"). As OPM explains on its website, "CPDF is an information system to support statistical analyses of Federal personnel management programs. It is not intended to be a Governmentwide personnel accounting system." Third Long Decl. Exh. 1 at 2 (A 424). In contrast to the series of coded numbers and letters that constitute these records, OPM requires that every federal employee have a "single personnel folder." Third Long Decl. ¶ 6 (A 406). The CPDF is not that folder.

Nor are the organizational component and duty-station records "similar files." In *United States Department of State v. Washington Post Co.*, 456 U.S. at 602, the Supreme Court, in considering the category "similar files," explained that

Exemption 6 was "'intended to cover detailed Government records on an individual which can be identified as applying to that individual,'" and that, therefore, "[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." *Id*. (quoting H.R. Rep. No. 1497, at 11). In other words, "similar files" are records that are not personnel or medical files that nonetheless can be identified as applying to a particular identifiable individual. *See Perlman*, 312 F.3d at 106 (record was a "similar file" because it was a "'detailed government record' replete with identifying information" (citation omitted)); *see also Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 33 (D.C. Cir. 2002) (records arguably were "similar files" "to the extent [they could] lead to identification of individual property owners"). Because it is their ability to connect information to an identifiable individual that makes records "similar files," agencies generally do not claim records are "similar files" unless identifying information is involved. *See Wood*, 432 F.3d at 87 (listing "similar files" cases, all involving identifying information).

Here, for every employee for which OPM is withholding organizational component codes and duty-station information, it is also withholding the name.

And before the CPDF files are released, OPM stores the organizational component and duty-station records separately from name records, *see* Lukowski Decl ¶ 21 (A 69), so the records are not attached to names either as released or as maintained. Unattached to names, the organizational component codes and duty-station information are just anonymous entries in a vast database of information analyzed by OPM to facilitate improvement of human resources management programs. Because they are not records that apply to identifiable individuals, they are not "similar files" and are outside the scope of Exemption 6.

### B. Even if Exemption 6 Could Apply to Anonymous Records, the Anonymous Organizational Component and Duty-Station Records Would Not Be Exempt.

Even if Exemption 6 applied to anonymous records, the organizational component and duty-station records would not be exempt from disclosure, because the public interest in disclosure would outweigh the de minimis privacy interest. As discussed above, OPM's primary argument for why release of the records would invade personal privacy is that disclosure of "locations" would put employees and their families at increased risk of harassment or attack. *See, e.g.*, Second Lukowski Decl. ¶¶ 3, 11 (A 311-314; A 320-22); Third Lukowski Decl. ¶¶ 3-4, 6-11, 19-22 (A 379, A 380-81, A 384-86). But because the withheld records do not provide work addresses—just the broad categories of city, county,

state, CSA, CBSA, and LPA—the potential harasser or attacker would not be able to locate the employee. OPM never explains, for example, how knowing an anonymous DoD employee works somewhere in the state of Texas, or somewhere in New York City, or somewhere in the CSA that includes Philadelphia (as well as counties in four states) would enable a potential attacker to locate that employee. The records do not contain addresses, so potential harassers cannot locate employees at work, and because the records are anonymous, potential harassers cannot identify and harass employees at home. In short, OPM's organizational component and duty-station arguments do not take into account the actual nature of the withheld records: They reveal geographic information at a level too broad to invade the privacy of unidentified employees. And as discussed above, OPM's arguments based on the release of aggregate numbers of employees in a city or county are not arguments related to personal privacy, the only interest protected by Exemption 6.

In contrast to the non-existent privacy interest, releasing the withheld records would contribute greatly to the public's understanding of the government's operations. Release of the withheld organizational component codes would inform the public about what activities agencies are undertaking. It would also allow the public to see the personnel costs associated with various

governmental tasks. And release of the withheld duty-station information would inform the public about where agencies are concentrating their resources and allow the public to judge whether agencies are making sound judgments about where to focus their efforts. *See* Long Decl. ¶¶ 29-35, 46 (A 199-204, A 211-12). It would allow the public to understand how the agency's work is distributed across the country and see which communities are receiving the benefits of an agency's work and which communities have been relatively overlooked. Given the lack of privacy interest in the records, and the strong public interest in understanding how the government is organized and how it operates throughout the nation, at the very least the anonymous organizational component and duty station records should be released.

## CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of partial summary judgment in favor of OPM and grant summary judgment to plaintiffs.

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

Counsel for Appellants

September 1, 2011

**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 29(d). 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 13,673 words.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum