UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SUSAN B. LONG and DAVID BURNHAM,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 5:5cv1522
	)	(NAM/DEP)
OFFICE OF PERSONNEL MANAGEMENT,	)	ECF
	)	
Defendant.	)	
	)	

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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OPM cites vast amounts of caselaw on various aspects of FOIA and makes broad statements about the "world security climate," but fails to carry its burden of demonstrating that release of the specific records at issue would invade privacy or of refuting the significant public interest in understanding who the government employs and where the government focuses its resources.

A. OPM Has Still Failed to Establish That Release of the Withheld Names and Duty Stations Would Be a Clearly Unwarranted Invasion of Privacy.

Federal employees generally have a negligible privacy interest in their names and duty stations, which even OPM states should be publicly available as to "most" federal employees. 5 C.F.R. § 293.311; Pl. Mem. 5-7, 15-16. OPM's argument that releasing names and duty stations would be an invasion of privacy thus rests on the notion that employees in enumerated agencies and occupations are "at a heightened risk of endangerment and harassment." Def. Mem. Opp. 13. But despite its talk of a "post-September 11, 2001, security-conscious world," *id*., OPM still has done nothing but speculate that release of the *specific records at issue* would place employees in harm's way.[1] *See Wood v. FBI*, 432 F.3d 78, 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.").[2] Nor has OPM shown that all the specific employees whose names and

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[1]The overbreadth of OPM's argument is underscored by its new disclosure that it is withholding names and duty stations of people who *no longer work* in the enumerated agencies or occupations. Second Lukowski Decl. ¶ 5. Even under the agency's logic, releasing these names and duty stations would not put employees at risk. Because there is no "prior agency" field (and OPM does not release the "prior occupation" field even though its December 2004 policy declares it releasable), *see* Long Decl. Exhibit A; Second Long Decl. ¶ 26, release of these employees' names 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 names and/or duty stations OPM says it is withholding for this reason are, in fact, recent former employees of the enumerated agencies or occupations. Second Long Decl. ¶ 27.

[2]OPM's repeated emphasis on the anthrax attacks and its recognition at various points that the addresses of many government facilities are publicly available undercut its assertion that withholding names and duty stations of particular employees will protect them from attack. As the anthrax attacks (as well as the 9/11 attacks) demonstrate, terrorists do not need the identities of particular employees to target government facilities whose locations they know.

duty stations it is withholding are at a particularized risk of attack.[3]

Instead of providing evidence that release of the records would lead to harassment or attack, OPM repeatedly says it "determined," or "decided," *see, e.g.*, Def. Mem. Opp. 16, that releasing records would be an invasion of privacy.[4] But this Court reviews agency FOIA determinations de novo. 5 U.S.C. § 552(a)(4)(B). OPM's burden is not to prove that it *decided* releasing the records would invade privacy, but that release of the records would, *in fact*, be a clearly unwarranted invasion of privacy. Unable to do so, OPM claims the Court should defer to it because the issue involves national security. The cases it cites, however, provide for deference to agencies and personnel with expertise in security issues when considering records with clear implications for national security. *See CIA v. Sims*, 471 U.S. 159, 179 (1985) (deferring to CIA Director on whether records would reveal intelligence sources); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 1998) (deferring to high-ranking Department of Justice and FBI counter-

[3]OPM has not explained why it deems 21 of the occupations sensitive, except to say that they relate, somehow, to law enforcement, national security, or homeland security. OPM only describes three occupations by name in its declarations, and it has not provided sufficient detail even on why those occupations are sensitive. *See* Second Lukowski Decl. ¶ 4.

[4]OPM says its decision to withhold arose from an "intense review," Def. Mem. Opp. 16, but the record belies the idea that OPM engaged in a well-considered, organized decision-making process. For starters, OPM's December 12, 2004 policy makes clear that it will rubber-stamp any agency's request to "exempt any and all personnel information from release," if it is at all legally defensible. *See* Long Decl. Exhibit A. And it is withholding records on one occupation, "criminal investigating," that its current policy does not consider sensitive. *See* Long Decl. Exhibit B. Moreover, OPM did not even notice that it was redacting records from the fields LPA, CBSA, and CSA, or that it was withholding the entire field "Organizational Component," until after it filed for summary judgment, leaving all of those fields out of its original Vaughn Index, memorandum, and declarations. *See* OPM Amended Vaughn Index. And although OPM's Vaughn Index now says it is withholding CBSA, CSA, and LPA for DoD employees, those records were not redacted from the DoD files released in June, 2006, s*ee* Long Decl. ¶ 21, and Michael B. Donley's first declaration stated that DoD did not object to OPM releasing CSA and CBSA. Donley Decl. ¶ 4; DoD Vaughn Index. Further, OPM's Vaughn Index still does not mention that it is withholding information on over 900 employees not in the enumerated agencies or occupations. *Compare* OPM Second Amended Vaughn Index, *with* Second Lukowski Decl. ¶ 5. OPM's confusion about what it is and is not withholding raises questions about how much thought OPM in fact gave to what to withhold.

terrorism officials on whether releasing names of 9/11 detainees would interfere with terrorism investigation); *Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982) (deferring to CIA on records relating to covert CIA contacts); *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978) (court must "accord substantial weight to an agency's affidavit *concerning the details of the classified status of the disputed record*") (emphasis added). They do not support the notion that the Court must automatically defer to agencies whenever any employee (such as OPM's Manager of Workforce Information and Planning) uses the magic words "national security" in reference to any records (such as personnel records). And even when deference is appropriate, it "is not equivalent to acquiescence," and the agency still must provide detail and specificity to justify claimed exemptions. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). OPM has failed to do so.[5]

In addition, OPM has misunderstood plaintiffs' arguments concerning the public availability of withheld records. Plaintiffs' argument is not that employees have no privacy interest in their names and duty stations because such information "may have been public at one time," Def. Mem. Opp. 11 n.11 (*quoting Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993)), but that the fact that many of the withheld names and duty stations are public undercuts OPM's claims that releasing them would put the employees at risk. For example, OPM admits that the names of district marshals are listed on the U.S. Marshals website. Second Lukowski Decl. ¶ 4. Releasing the name of a district marshal could not possibly put him at any risk when that information is already publicly available. Yet OPM is withholding the names of district marshals. That OPM is withholding names of people whose names and jobs are already public shows that, contrary to its assertions, Def. Mem. Opp. 9

[5]OPM's argument that plaintiffs have a particularly strong privacy interest because the records are computerized is a red herring. *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1988), did not hold that information is private just because it is stored in a computerized database. It merely explained that the fact that information in a database is publicly available is not determinative if the information is otherwise hard to obtain. *Id*. at 764. Plaintiffs are not seeking large amounts of otherwise-scattered information about any employee. That the CPDF is computerized does not increase any employee's privacy interest.

n.9, it is, in fact, applying a blanket exemption to all employees in the enumerated agencies and occupations, rather than making an individualized assessment of whether releasing records would invade privacy.[6]

OPM has also failed to square DoD's policy with its regulation providing that name and duty station will generally be released for DoD employees, but instead argues that DoD's current policy should trump its regulation, that it is "temporary," and that, in any event, it plans on changing its regulations. Def. Mem. Opp. 19 n.21. OPM cites no authority for the proposition that "policies" can override regulations, even temporarily, or that regulations can be ignored because an agency plans on changing them at some point in the future.

B. There Is a Strong Public Interest in Disclosing Names and Duty Stations.

In contrast to OPM's vague assertions that release of the records would invade privacy, plaintiffs have explained specifically and at length how release of the records would contribute significantly to "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). Pl. Mem. pp. 12-15; 18-20; Pl. Statement of Material Facts ¶¶ 46-49.[7] OPM makes two broad attacks on this detailed explanation, both of which ignore plaintiffs' argument and evidence.

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[6]Moreover, looking agencies up on-line often shows they have multiple offices in a city. *See* Second Lukowski Decl. ¶ 2; Second Long Decl. ¶ 3. Therefore, even if terrorists could find street addresses, they would not know how many people at each address work in the enumerated agencies and occupations, undermining OPM's sole argument for withholding duty stations. And the fact that postal addresses of people in "sensitive" agencies and occupations are often available shows that those agencies, themselves, do not think the addresses need to be protected. Finally, even if releasing duty-station information were an invasion of privacy, both duty station and organizational component are segregable–Gary Lukowski even admits that the first 12 digits of at least some Immigration and Customs Enforcement organizational codes contain no geographical information, Second Lukowski Decl. ¶ 11–and three of the LPA codes do not contain specific geographical information. *See* Long Second Decl. ¶¶ 4-5, 6, & 7-15.

[7]OPM has not responded to plaintiffs' statement of material facts. All facts in these paragraphs are therefore deemed admitted. *See* N.D.N.Y. Local Rule 7.1(a)(3).

First, OPM asserts that the public interest is too attenuated from disclosure of the records because the disclosure would only reveal government activities if people contacted the named employees. Def. Mem. Opp. 5. On the contrary, plaintiffs have offered many specific explanations of how the withheld records would shed light on the operations and activities of the government that do not involve contacting the employees. *See, e.g.*, Long Decl. ¶¶ 29-45. In a footnote, OPM attempts to paint these other public interests as "similarly derivative," simply because they involve analysis of the records together with other facts. Def. Mem. Opp. 5 n.5. Not surprisingly, OPM is unable to cite a single case for its assertion that a public interest is too attenuated if it requires the recipient of the records to analyze them.

Moreover, OPM's derision of the "derivative use" of the records is ironic given that its *entire* argument depends on derivative use. OPM does not contend that releasing the records, intrinsically, would invade privacy, nor could it. *See Wood*, 432 F.3d at 88 ("Names and other identifying information do not always present a significant threat to an individual's privacy interest.") (citing *U.S. Dep't of State v. Ray*, 502 U.S. 164, 177 n.12 (1991)). Instead, OPM's argument is that someone could use the released records, derivatively, to harass or attack federal employees. However, "derivative use on the public-benefits side, and derivative use on the personal-privacy side must surely go together (there is no plausible reason to allow it for the one and bar it for the other)." *Ray*, 502 U.S. at 181 (Scalia, J., concurring). If consideration of derivative use is prohibited, OPM, unlike plaintiffs, has offered no arguments or evidence whatsoever to support its position.[8]

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[8]In addition, unlike in *Hopkins v. United States Department of Housing and Urban Development*, 929 F.2d 81 (2d Cir. 1991), OPM's principal authority, here there is a direct link between contacting employees whose names are in the CPDF and learning about government activities. In *Hopkins*, requesters sought *private* payroll records, asserting the records would enable them to monitor HUD's enforcement of prevailing wage laws. They could do so, however, only by contacting private employees named in the records, who might dispute the accuracy of the payroll records, which might reveal violations of prevailing wage laws, which might, in turn, reveal whether HUD was properly monitoring compliance. *Id*. at 88. Given the long chain needed to connect information in the records to government activity, the court, not surprisingly, found the requested

OPM's second attack similarly requires it to ignore the bulk of plaintiffs' argument. OPM claims that "much of plaintiffs' public interest argument is based on their alleged interest in exploring possible negligence or improper actions by government personnel," and that, under *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2004), this interest is only cognizable if plaintiffs allege specific misconduct on the part of the federal employees. Def. Mem. Opp. 6. To begin with, *Favish*'s requirement of a specific showing of misconduct on the public-interest side of the balance applies to Exemption 7(C) claims, which are subject to a significantly less pro-disclosure balancing standard than Exemption 6 claims. *Contrast* 5 U.S.C. § 552(b)(7)(C) ("could reasonably be expected to constitute an unwarranted invasion of personal privacy"), *with id*. § 552(b)(6) ("*would* constitute a *clearly* unwarranted invasion of personal privacy") (emphasis added). *See Favish*, 541 U.S. at 165; *see also Wood*, 432 F.2d at 86-87. In any event, plaintiffs are not basing their public interest arguments on speculation about improper behavior, but rather have demonstrated that release of the withheld names and duty stations would educate the public about agencies' policies and practices in a variety of different ways, including by demonstrating what policies agencies are implementing and how effectively those policies work, helping to explain why practices may differ over time, location, or agency subcomponent, and enabling the public to see how agency offices are operating and what the agencies are prioritizing. That users of the records may uncover illegal or unethical behavior when agency action is exposed "to the light of public scrutiny," *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976), as they have in the past, *see* Pl. Mem.13-14, does not turn plaintiffs' request into a "fishing expedition." Def. Mem Opp. 8.

OPM can only attack plaintiffs' explanations of how release of the withheld records would be in the public interest by knocking down a straw man. In footnote 8, OPM asserts, with regard to two of plaintiffs' examples, that "plaintiffs neither allege government misconduct nor provide any

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information too attenuated from government activity. *Id*. Here, there is no such attenuation.

evidence of misconduct," and that those examples thus do not satisfy *Favish*. But *Favish* is inapposite precisely *because* plaintiffs are not seeking to prove misconduct. Rather the two examples, involving records that would allow analysis of the number of FEMA employees near New Orleans at the time of Hurricane Katrina and of whether the government has increased border patrol agents along the Canadian border in response to September 11, show how release of the records would disclose agency action (or inaction) and allow the public to analyze agency activities. That some members of the public may think an agency's actions unwise does not mean that requesting information about those actions is a fishing expedition for improper behavior.[9] To the contrary, disclosure of potentially unpopular policies furthers FOIA's core function of enabling the public to "hold the governors accountable to the governed." *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The public interests identified by plaintiffs clearly weigh on the public interest side of the balancing test, and outweigh any privacy interest in the withheld names and duty stations.

C. OPM Has Still Not Justified Its Withholding of IRS Records.

OPM's opposition/reply fails to justify the withholding of true names of IRS employees who received pseudonyms before the enactment of the IRS Restructuring and Reform Act of 1998 (RRA), because it makes no showing that these employees were at particularized risk of harassment or attack. Instead, OPM relies on the RRA's failure to make the requirements of the pseudonym program retroactive. But Congress, in FOIA, required records to be disclosed unless they are exempt, and OPM has not proven that the names fall within Exemption 6, claimed the statutes it cites are Exemption 3 statutes, or shown the records can be withheld under any other exemption to FOIA.

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[9] In his second declaration, at ¶ 4, Gary Lukowski depicts potential weaknesses in the Border Patrol policy as weighing on the privacy side of the balancing test, because terrorists could take advantage of those weaknesses. On this reasoning, the government would never have to disclose information on any potential vulnerability, thereby contravening FOIA's purposes of exposing government activities to light and holding the government accountable for its actions. In any event, because the Border Patrol releases the number of its employees in each sector, Second Long Decl. ¶ 30; Long. Decl. ¶ 65, releasing Border Patrol agents' duty stations could not violate their privacy.

OPM also contends that plaintiffs could reverse-engineer IRS performance award amounts by subtracting other awards from the total awards field. But OPM does not disclose other individual awards in the CPDF files, just the total awards field. *See* Long Decl. ¶ 48. And given the variation in the award amounts received by IRS employees, one cannot "easily discern," Def. Mem. Opp. 21 n.25, which awards are appraisal-based awards. *See* Second Long Decl. ¶ 18.

D. OPM Has Still Not Justified Its Invocation of Exemption 3.

In our opening memorandum, plaintiffs pointed out that by not stating which records it is withholding under Exemption 3 or why 10 U.S.C. § 130b applies to those particular records, OPM has not met its burden of justifying its withholdings under that exemption. In response, OPM declares that neither it nor DoD keeps a list of civilian personnel assigned to overseas, sensitive, or routinely deployable units. Def. Mem. Opp. 23 n.27. In other words, OPM admits that the government itself does not know which records can be withheld under Exemption 3 or why!

Instead of justifying 10 U.S.C. § 130b's application to particular records, OPM estimates how many and which records *might* be covered by the statute.[10] In coming up with its estimate, OPM did not apply the definition of "sensitive unit" in § 130b, but instead determined how many DoD employees were in occupations that *OPM* labels sensitive. Second Donley Decl. ¶ 7. That categorization, however, bears no relationship to the statutory definition, which relates to units involved in special activities or classified missions. *See* 10 U.S.C. § 130b(c)(4). Because OPM has not even purported to apply the statutory criteria, OPM's Exemption 3 claim must fail.[11]

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[10]As defendant has conceded, its opposition as originally filed falsely claimed that it had provided plaintiffs with new copies of the DoD records stating which records it is withholding under this exemption. In truth, only after filing its opposition did it deliver new copies of the DoD records to plaintiffs, thus waiting until just a few days before plaintiffs' reply was due to deliver over 4.6 million records. Second Long Decl. ¶ 31; Second Donley Decl. Exhibit A. Plaintiffs respectfully request the right to address any problems with those records at a later date.

[11]In addition, it goes beyond the scope of the statute to claim that, if OPM is allowed to withhold postal addresses, it can withhold any geographical information, no matter how general, that

E. OPM Must Indicate the Extent of Its Deletions on the Released Files.

In response to plaintiffs' argument that OPM did not follow FOIA's requirement that it indicate the amount of information deleted on the released portion of the records, *see* 5 U.S.C. § 552(b), OPM describes the redaction symbols it uses in the fields mentioned in its Vaughn Index, focusing on a new data field that indicates when a valid duty-station code was changed to another code. Def. Mem. Opp. 24 n.29. However, OPM does not demonstrate that it properly *applied* those symbols–for example that it only placed redaction symbols in records that had information in them to begin with. Nor does OPM respond to plaintiffs' showing that it did not properly mark redactions in *other* fields, by, for example, sometimes redacting information without indicating it had done so.[12]

As for OPM's ongoing failure to indicate the amount of information deleted from the many records and fields it has withheld without mentioning them in its Vaughn Index or otherwise informing plaintiffs, OPM claims that plaintiffs did not exhaust their remedies. But FOIA requesters are only required to appeal denials if the agency's response includes notice of the right to appeal, *see Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 65 (D.C. Cir. 1990); *Nurse v. Sec'y of the Air Force*, 231 F.Supp.2d 323, 328 (D.D.C. 2002); *Hudgins v. IRS*, 620 F.Supp.19, 21 (D.D.C. 1985), and OPM's responses did not inform plaintiffs of that right.[13]

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is included in an address. And military installations are not the same as postal addresses. Second Long Decl. ¶ 2. Moreover, the supply center OPM uses as an example of how duty stations can reveal postal addresses, Second Donley Decl. ¶ 9, is not a duty-station code, and its website reveals that it has numerous addresses in multiple states. Second Long Decl. ¶ 3.

[12]By not responding to plaintiffs' statement of material facts, OPM has admitted that "[i]n some places, it redacted information and left blank the fields where that information had been, without informing plaintiffs about the amount of information it had redacted," and that "[i]n other places, OPM placed symbols signaling that it had redacted information in fields in which there was no information in the field to begin with." Pl. Statement of Material Facts ¶ 36. For more details about problems with OPM's redaction-marking, *see* Second Long Decl. ¶¶ 20-24.

[13]Despite not having been told of their right to appeal, plaintiffs *did* appeal OPM's response to their request for the June and September 2005 CPDF files, specifically noting that OPM had failed to indicate that redactions were made at the point in the record where information was deleted. *See*

OPM also argues that it did not need to inform plaintiffs that it was withholding these additional fields and records or indicate the amount of information deleted from them because it has a long-standing relationship with plaintiffs, who "knew or reasonably should have known," Lukoswki Second Decl. ¶ 14, what was being withheld. Precisely because OPM did not follow FOIA's requirements that it tell plaintiffs what it was withholding and indicate the extent of the redactions, however, plaintiffs did *not* know what was being withheld from the CPDF or why. Second Long. Decl. ¶ 24.

Moreover, OPM has not explained what legal significance it thinks its history with plaintiffs has. OPM may be arguing that because it never before indicated that it was redacting these fields and records on the released portions of the records, it has no duty to do so now. Not surprisingly, OPM cites no caselaw suggesting that its failure to abide by FOIA in the past justifies its failure to do so now.[14] Alternatively, OPM may be arguing that, because of its history, it did not interpret plaintiffs' requests as including these additional fields and records. If OPM clarifies that its position is that the additional records and all fields in the CPDF except the 47 for which OPM released records on at least some employees are not within the scope of the requests (and hence of this case), plaintiffs are willing to file new requests for them, in hopes that in its response to *those* requests, OPM will follow FOIA's requirements that redactions be properly indicated. Otherwise, OPM should be ordered to comply with FOIA by properly marking redactions.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be granted.

Lukowski Decl. Exhibit O. OPM's response said it was granting that part of the appeal. *See* Lukowski Decl. Exhibit P. Plaintiffs seek only to compel OPM to abide by its acknowledged legal obligation to show redactions at the points where they were made.

[14]Although OPM asks for additional briefing if the Court does not accept its argument that plaintiffs did not exhaust their administrative remedies, it has given no explanation of why it would need additional briefing and could not properly mark redactions.

Dated: November 13, 2006

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum
N.D.N.Y Bar Roll No. 513594
Scott L. Nelson
N.D.N.Y Bar Roll No. 513515
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000
(202) 588-7795 (fax)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on November 13, 2006, I electronically filed the foregoing reply with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following counsel for Defendant:

Nicholas J. Patterson

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum