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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STATUTE AND RULE

OPM makes illogical claims about the consequences of releasing the withheld records and sweeping claims of harm that are unrelated to personal privacy, and it admits that it determines its withholdings at a broad occupational series level, rather than individual-by-individual. OPM still has not met its burden of proof, and the withheld records should be released.

A. The Organizational Component Records Are Not Exempt.

1. OPM does not contest that the withheld records do not have the personnel file characteristics described in *Department of Air Force v. Rose*, 425 U.S. 352, 377 (1976). Instead, it notes that they contain a lot of *other* data. OPM Opp. (dkt. no. 29), at 12. But that other data does not magically transform the records into personnel files, where they are not used to supervise employees; they are disseminated beyond supervisory personnel; and employees have other personnel files.

OPM also claims the records are "similar files" because releasing them could lead to identification of employees, even though it is also withholding the names of all employees whose organizational component records it is withholding. *Id*. at 12-13. OPM fails, however, to explain how knowing what city or state an anonymous person is in (even when combined with the released data) would enable someone who did not already know that information to identify the employee.[1] *See* Fourth Declaration of Susan B. Long (4th Long Decl). ¶¶ 6-8.

2. OPM claims releasing the records would "make it relatively easy" to locate individuals because some codes contain geographic information. OPM Opp. 16. But the organizational component codes' geographic information is not more specific than city, *see* Second Declaration of Gary A. Lukowski (dkt no. 20, attach. 1) ¶ 11, and tends to provide information only about the organizational unit's headquarters, not about where any particular employee is located. 4th Long

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[1]OPM also seems to argue that the records are "similar files" because it thinks disclosure "might harm the individual." OPM Opp. 13. But that does not make them similar files. *See U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 n.4 (1982) (records unrelated to a particular person are not similar files even if disclosure "would cause embarrassment to certain persons").

Decl. ¶ 3. Moreover, organizational component is not an observable personal characteristic that would aid in identifying an employee in a city full of people. *See id*. ¶¶ 6-8.

Unable to explain how release of organizational component records would identify individual employees, OPM appears to fall back on the claim that it could be harmful to know the *aggregate* number of employees in an organizational component. OPM Opp. 16 (referring to "high yield targets"). Exemption 6, however, does not cover "the compilation of unidentified statistical information from personal records, " *Rose*, 425 U.S. at 376 (citation omitted), because the release of such information does not invade *personal privacy*.[2] In any event, because many organizational component codes contain no geographic information, 4th Long Decl. ¶ 5d, and because geographic information in the codes generally refers to the organizational unit's headquarters, not to all the employees within it, *id*. at ¶ 3, release of the records would not provide the number of federal employees overall, or even within each occupation in a specific geographic area. *Id*. at ¶ 4. And OPM fails to consider that the records do not contain street addresses, so even if it were possible to determine "yields," a potential attacker would not know what particular location to target.

3. As plaintiffs demonstrated (and OPM does not refute), the organizational component codes directly inform the public about how the government is organized and spends its resources. *See, e.g.,* Third Declaration of Susan B. Long (3d Long Decl.) (dkt no. 28, attach. 4), ¶ 18. The public interest in this information outweighs the non-existent privacy interest.

4. OPM regurgitates Gary Lukowski's claim that it would take seven weeks to manually review and segregate the organizational component records. OPM Opp. 17. But OPM does not even attempt to respond to Susan Long's explanation that many codes do not contain geographic

[2]OPM's argument that the ZX and ZZ LPA codes "would allow an individual to determine Federal workforce strength in the less urban continental United States and overseas," OPM Opp. 15 n.13, similarly is not about personal privacy. Moreover, OPM has not even tried to demonstrate how knowing workforce strength in non-specific areas would place anyone at increased risk of harm.

information, that an automated system could speed up the process, and that, because of the structure of the codes, a reviewer would not need to examine each one. *See* Second Declaration of Susan B. Long (2d Long Decl.) (dkt no. 22, attach. 1), ¶¶ 8-15; 4th Long Decl. ¶ 5c. Further, OPM would not, as it claims, have to review over 400,000 codes, because 4/5 of them currently are not in use. *Id*. ¶ 5a. And it would not have to review each code every 6 months, because a computer program could discern which codes had changed during that period, and only those few codes (fewer than 3% of the total in the September 2005 CPDF) would need to be reviewed. *Id*. ¶ 5b. The organizational component codes are reasonably segregable, and, at the very least, the characters that do not represent geographic information should be released.

B. The Duty-Station Records Are Not Exempt.

OPM's claims about duty-station records likewise ignore the nature of the files and that even if employees had a privacy interest in their duty-station information to begin with (which they did not), OPM's withholding of their names eliminated that interest.

In response to our demonstration that states, counties, CSA, CBSAs, and LPAs all cover large areas—so that they, at the least, should be segregated and released—OPM contends that it is not the size of the area that matters, but the concentration of federal employees, and that some CBSAs have only one or two federal employees. OPM Opp. 14. But OPM does not explain how knowing there is only one federal employee somewhere in an area covering thousands of square miles would enable anyone to "pinpoint[]" that employee's identity. *Id*. Identifying an anonymous person out of an entire city or county of people requires *observable* other characteristics of that person to be known, but the released CPDF fields do not include even basic observable characteristics such as gender, race, and age. That there is only one employee in a large geographic area does not make that person identifiable to people who do not *already* know who the employee is. 4th Long Decl. ¶ 6-8.

Further, despite OPM's conclusion that there is only a "negligible public interest" in

disclosure, OPM Opp.14, it does not (and cannot) respond to plaintiffs' demonstration that the withheld records provide direct information to the public about where agencies are focusing their efforts. *See* First Declaration of Susan B. Long (1st Long Decl.) (dkt. no. 15, attach. 5), ¶¶ 29-35. The public interest in understanding what the government is doing outweighs any de minimis privacy interest in the anonymous duty-station records.

C. OPM Has Not Met Its Burden of Proving Each Withheld Name is Exempt.

OPM claims plaintiffs ignore the "paramount privacy interest of employees in sensitive occupations to protect themselves from harm," OPM Opp. 8, but OPM has demonstrated neither that all employees in the 19 occupations are engaged in "sensitive" work nor that release of the employees' names is likely to result in harm.[3]

1. To meet its burden, OPM must demonstrate that each record it is withholding 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 concedes, however, that it does not determine sensitivity "on an individual-by-individual basis" but rather "in regard to an entire occupation series." OPM Opp. 4. In other words, OPM applies a blanket exemption to occupational series and withholds records on individuals in those series

[3]Contrary to OPM's implications, OPM Opp. 2, plaintiffs have not claimed that OPM must demonstrate "actual injury" from release of the records. Rather, plaintiffs contend that OPM's failure to produce any evidence that anyone has ever used the CPDF data for nefarious purposes despite OPM's historic disclosure of names helps demonstrate that its claims of "likely" harm are just speculation about "mere possibilities." *Rose*, 425 U.S. at 380 n.19. In his fourth declaration, Lukowski cited one press release, from over six years ago, in which a group threatened the IRS. *See* Fourth Declaration of Gary A. Lukowski (4th Luk. Decl.) (dkt. no. 29, attach. 2), ¶ 9. Although IRS employee names were available through the CPDF for years after that, OPM has not shown that the group ever used them to follow up on its threat or even that the availability of names would materially assist someone who wanted to harm "the IRS." One not-acted-upon threat from 2001 hardly shows that releasing the withheld records would "likely" cause harm. *See also* 4th Long Decl. ¶ 10. Similarly, OPM's claim that it is withholding names of employees who some day may (or may not) be in sensitive positions is too speculative to support OPM's exemption claims. *See id.* ¶ 13.

regardless of whether release of *those specific records* would be a clearly unwarranted invasion of personal privacy. On that ground alone, plaintiffs' motion should be granted.[4]

OPM claims it is not "feasible" to "identify each individual actually employed in a sensitive job." *Id*. at 4-5.[5] But according to Lukowski, OPM *already* determines the sensitivity of each individual position, 4th Luk. Decl. ¶ 4, even though it then labels entire series sensitive. And for some occupations, the CPDF contains data on "functional classification," the actual job duties of an employee, which could be used as a basis for determining which positions in those occupations are actually sensitive and which demonstrates the feasibility of making such determinations for other occupations. 4th Long Decl. ¶ 9. Moreover, IRS's Pseudonym Program demonstrates that agencies are capable of devising ways to protect the names of the specific people with a heightened risk of harm.[6] Instead of redacting all names in broad occupational series, OPM should use a system that identifies only those employees who would actually be at risk of harm if their names were released.

2. Despite OPM's attempt to explain the discrepancy between its claims about occupation 1802, "Compliance Inspection and Support," and the September 2005 CPDF file, OPM Opp. 10-11, OPM's treatment of that occupation continues to show the arbitrariness of OPM's designation of certain whole occupational series as "sensitive." OPM's explanation for the discrepancy is that,

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[4]Lukowski's claim that it would be "unacceptable" to release records in a series if releasing the entire series "would jeopardize the safety of [even] one individual," 4th Luk. Decl. ¶ 4, reflects OPM's misunderstanding of Exemption 6. Exemption 6 is not a catchall exemption for any record that has any chance of causing harm, *see, e.g., Wash. Post.*, 456 U.S. at 602 n.4; it applies only to invasions of *personal* privacy. Thus, OPM cannot withhold records relating to employees A, B, C, and D on the basis that release of those records might harm Employee E.

[5]OPM's assertion that it had to conduct a reasonable search, OPM Opp. 5, is true, but irrelevant because the adequacy of its search for responsive records is not at issue.

[6]OPM's explanation that the Pseudonym Program applies only to "IRS employees who have a particularized risk of actual harm" whereas its withholding policy applies to "all Internal Revenue Agents and Officers," OPM Opp. 9, reveals its misunderstanding of its burden of proof in this case. OPM must demonstrate that *all* employees whose names it is withholding would be at a particularized risk of harm if their names were released.

after September 2005, airport screeners previously classified as Safety Technicians were reclassified into occupation 1802. *Id*. at 10. But this lawsuit only covers CPDF files from 2004 and 2005. In those CPDFs, not only were employees in occupation 1802 not classified with airport screeners, but airport screeners themselves were not classified as being in a sensitive occupation. 4th Luk. Decl. ¶ 14. And although OPM mistakenly claims it withheld only the names of the four TSA employees in occupation 1802, *id*.; OPM Opp. 11, in fact, it withheld the names of *all* employees in that occupation. 4th Long Decl. ¶ 14. In other words, OPM is withholding the names of all employees in "Compliance Inspection and Support" from the records at issue in this case because, in records *not at issue in this case*, they are classified as being in the same occupation as airport screeners, even though it released the names of thousands of airport screeners from the records that *are* at issue here.

3. OPM relies entirely on Lukowski's declarations to support its claims that releasing the withheld records would cause harm, despite Lukowski's lack of personal knowledge about the effect of releasing the records on law-enforcement, tax collection, and other government activities. OPM claims Lukowski's lack of personal knowledge is irrelevant because he consulted with other officials in creating OPM's data release policy. OPM Opp. 3-4. But the "unique nature of the FOIA" does not overcome Rule 56(e)'s requirements. *Id*. at 4. *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 480 (2d Cir. 1999) (finding affidavit not based on personal knowledge insufficient for agency to meet its FOIA burden). It may be, as OPM asserts without citation, that agency officials are not required "to have personal knowledge of the subject matter of the documents withheld," OPM Opp. 4, but the issue here is not the "subject matter" of the records (which is undisputed) but the likely effects on federal law enforcement of releasing the records. Because Lukowski's statements on that issue were not based on personal knowledge, they should be given no weight.

4. In response to Lukowski's claims that if names were released, employees would be at increased risk of attack by people who had adverse interactions with them or were unhappy with the

outcome of their investigations, *see* Third Declaration of Gary A. Lukowski (3d Luk Decl.) (dkt. no. 27, attach. 4), ¶¶ 5, 9, 11, 12, 14, 15, 18, plaintiffs pointed out that members of the public generally already know the names of federal employees with whom they have interacted. OPM replies that the fact that people know the names of federal employees with whom they have had negative interactions is "irrelevant," because the CPDF is electronic and there is a "particularly strong interest in personal information stored in computer databases." OPM Opp. 6. But it defies common sense to claim that an individual who had an adverse interaction with a federal employee whose name he knows will ignore that particular employee and will instead request the CPDF and "vent [his] frustrations," *see, e.g.*, 3d Luk. Decl. ¶ 3, on some other random employee in the same agency, whose specific job he does not know and with whom he has never interacted. That records are stored in a computerized database does not automatically make their release an invasion of privacy,[7] and OPM has not demonstrated that the electronic nature of the particular records at issue makes it likely that their release would expose employees to harm.[8]

5. Plaintiffs have explained how knowing the names of federal employees can inform the public about agency activities by explaining why certain policies and practices exist in certain parts of an agency or at specific points in time; allowing the public to understand the qualifications needed

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[7] *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), is inapposite. There, the Supreme Court explained that the fact that a compilation of information contains information that is otherwise publicly available does not mean it would not invade privacy to release it, where the information is otherwise available only in a scattered, hard-to-obtain form. *Id*. at 764. Here, the identity of specific federal employees against whom particular members of the public have grievances is not hard for those members of the public to obtain and will not be facilitated by release of the names in electronic form.

[8] OPM's unsupported claim that "[i]t is irrelevant to a terrorist planning an attack on American soil what particular type of intelligence an analyst is undertaking," OPM Opp. 9, likewise defies logic. An employee in an "Intelligence" occupation who, for example, studied social trends overseas that only "indirectly affect the national security," 3d Luk. Decl. ¶ 7, would be useless to an individual seeking information on "the vulnerabilities or secrets of the Federal government," *id.*, and would be neither an attractive nor likely target for someone planning an attack on American soil.

for particular positions; and enabling the public to study turnover, which is informative about agency morale, experience, and priorities. *See, e.g.*, 1st Long Decl. ¶¶ 36-45. Nonetheless, OPM accuses plaintiffs of engaging in a "fishing expedition . . . in the hope that they might land something of public interest." OPM Opp. 7 n.7. Although OPM may not believe that the public is interested in understanding agency priorities and operations, it is precisely the public's interest in learning about the "operations or activities of the government" that weighs on the public interest side of the balancing test. *Reporters Comm.*, 489 U.S. at 775.[9]

D. IRS Award Amounts Are Not Exempt.[10]

Despite plaintiffs' efforts to correct it, *see* 3d Long Decl. ¶ 35, OPM insists on reiterating its mistaken claim that plaintiffs believe that OPM is redacting 16 different types of awards. OPM Opp. 18. What plaintiffs actually argue is that because the total award field contains the sum of 16 types of awards, it is impossible to tell from looking at the total award field whether someone received a performance-based award, or another type of award, or a combination. *See* 3d Long Decl. ¶¶ 34-38. And the absence of an amount in the total award field (or an amount too low to be a complete performance-based award) does not necessarily mean that an employee did not receive a performance-based award because employees can take awards in the form of time off.[11] *Id.* ¶ 39.

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[9]Further, it is beneficial to law-enforcement for the public to know, in general, who police officers are. *See* Declaration of Henry S. Ruth (dkt no. 28, attach. 8), ¶ 5.

[10]OPM explained in its Memorandum of Law supporting its second motion for summary judgment (OPM Mem.) (dkt. no 27, attach. 2), at 15-16, that it withheld certain IRS award amounts because release would allow people "to determine the vast majority of IRS employees' performance appraisal scores" and that this Court directed OPM to submit additional evidence on *that* "rationale." After reading plaintiffs' explanation of why performance scores could not be reverse-engineered from the total award amount, OPM reinterpreted this Court's decision and now claims that it does not need to show that the unredacted total award amounts would reveal performance scores, but just that they would reveal whether an employee received a performance-based award at all. OPM Opp. 17. That is hardly the most natural reading of this Court's decision. In any event, as plaintiffs demonstrate, an individual looking at an unredacted total award amount would not be able to tell even whether or not the employee had received a performance-based award.

[11] Further, because OPM did not redact award records of employees who did not receive

Because someone looking at a total award amount would not know whether or not the person received a performance-based award, or the amount of that award, that individual would not be able to reverse-engineer the employee's performance appraisal score. *See id*. ¶¶ 37-39.

Moreover, the released 2005 CPDF files included a generated field indicating whether an award dollar amount was redacted from that employee's records. 4th Long Decl. ¶ 19. Because of that indicator, the public already knows which employees did and did not receive a cash performance-based award (or, more accurately, an 840 or 885 award). Thus, ironically, OPM's redaction system released the exact information that it claims its redactions were meant to protect, while an unredacted total award amount would not actually have revealed that information.

E. OPM Failed to Indicate the Extent of Redactions.[12]

OPM's primary response to plaintiffs' explanation that the agency failed to indicate the extent of its redactions is that plaintiffs' examples relate to DoD, DEA, ATF, U.S. Mint, and Secret Service records, and that the Court dismissed plaintiffs' claims about those records. However, this Court granted summary judgment "in connection with [OPM's] decision to *withhold* information," Mem. Dec. (dkt no. 25), at 35 (emphasis added), but expressly reserved whether OPM properly marked redactions. *Id*. at 34. That an agency is allowed to withhold records does not excuse it from marking the withholdings. It is precisely when an agency has deleted information that FOIA requires it to mark the extent of the deletions on the released portion of the record. 5 U.S.C. § 552(b).

OPM's only other response is to admit it withheld records from numerous fields without so

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category 840 or 885 awards, those employees' privacy interests cannot be invoked to justify the redactions it made in the total award field.

[12]OPM and Plaintiffs now agree that all categories of records and fields for which OPM did not release records on any employee were outside the scope of the requests and therefore are not at issue in this case. OPM Opp. 20 n. 16. However, because many of OPM's redaction-marking problems did not relate to those fields and records, *see, e.g.*, 2d Long Decl. ¶¶ 21-23, that does not render moot the issue of whether OPM properly marked redactions.

indicating. OPM Opp. 20 n. 17. OPM's new discovery that it made a "programming oversight" that caused it to withhold records never mentioned in its Vaughn Index demonstrates the importance of FOIA's requirement that agencies indicate redactions.[13] OPM has repeatedly acknowledged that it was withholding records only after plaintiffs raised the issue. *See, e.g.,* OPM Amended Vaughn Index (dkt. no. 21, attach. 5) (amending Vaughn Index to include the fields LPA, CBSA, CSA, and Organizational Component after plaintiff pointed out that OPM had redacted records from those fields). Because OPM has not always indicated its redactions on the released portion of the records, however, plaintiffs cannot be certain that they have caught each time OPM "inadvertently," OPM Mem. 6, withheld records without informing plaintiffs or the court. *See* 2d Long Decl. ¶ 22. This Court should therefore order OPM to indicate redactions on the released portions of the records. Further, because OPM has programming problems that have kept it from properly indicating the extent of deletions—and because OPM appears only to catch specific redaction-marking mistakes when plaintiffs point them out, even when plaintiffs make clear that those mistakes are examples of a larger problem[14]—plaintiffs request that this Court order OPM to provide them with an audit trail of OPM's redaction program, including the logs and checks that are generated when the programs are run, *see* 4th Long Decl. ¶ 18, so plaintiffs can see what records OPM is, in fact, redacting.

CONCLUSION

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

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[13]OPM states that it will make a supplemental release to plaintiffs "with the proper redaction indicators where necessary." OPM Opp. 20 n. 17. However, OPM has not claimed or demonstrated that any exemption applies to any of the records in the "prior" data elements. Thus, OPM should release the records themselves, not redaction indicators.

[14]OPM "discovered," OPM Opp. 20 n. 17, that it did not mark redactions in various "prior" fields for ATF, DEA, Secret Service, and U.S. Mint employees after plaintiffs used those agencies as *examples* of OPM not marking redactions in fields not mentioned in its Vaughn Index. 2nd Long Decl. ¶ 22; 1st Long Decl. ¶ 52. However, OPM apparently did not discover that it was also redacting information from those same fields for many other employees that plaintiffs did not use as examples, including all employees in the "sensitive" occupations. 4th Long Decl. ¶ 15.

Dated: January 9, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2008, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following counsel for defendant:

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