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.	)	
	)	

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In this Freedom of Information Act (FOIA) case, OPM continues to withhold vast numbers of records from its Central Personnel Data File (CPDF), a database it maintains to support statistical analyses of the federal workforce. The withheld records include organizational component records on over 40% of the federal workforce, names and geographic information of employees in 19 occupations OPM calls sensitive, and award-dollar amounts of some IRS employees.

In trying to justify its withholdings, OPM attempts to apply FOIA's personal-privacy exemption, Exemption 6, to records it does not cover: anonymous records that cannot be connected to an identifiable person. OPM paints with too broad a brush, applying 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 county, state, and regional level—based on the argument that it can be harmful to identify "location." And it seeks to withhold names and duty-station records based on arguments about the assignments of some, but not all, of the employees in the 19 occupations. OPM has still failed to show that the withheld records are exempt from disclosure.

BACKGROUND

For over a decade, plaintiffs Susan B. Long and David Burnham have requested copies of the CPDF to provide the public with comprehensive information about government spending, staffing, and enforcement. *See* First Declaration of Susan B. Long (dkt. no. 15, attach. 5) (1st Long Decl.) ¶¶ 1-2. In its responses to plaintiffs' requests for the March, June, and September 2004 and 2005 CPDF files, OPM withheld records on hundreds of thousands of employees. *Id*. ¶ 15. Plaintiffs filed suit, and, after cross-motions for summary judgment, this Court held that OPM could withhold name and duty-station information for employees engaged in three specific occupations or who work for the ATF, DEA, Secret Service, U.S. Mint, or DoD. *Long v. OPM*, No. 5:05-CV-1522 (NAM/DEP) (N.D.N.Y. Sept. 30, 2007) (dkt no. 25) (Mem. Dec.). However, the Court found that

OPM had not demonstrated that releasing names and duty-station information for employees in the 20 other occupations listed in OPM's Vaughn Index would be an invasion of personal privacy. *Id*. at 23. It directed OPM to file supplemental declarations on those occupations and on whether it is possible to deduce employees' performance-appraisal scores from the "Total Award" field. *Id*. at 29-30, 33. The Court also directed the parties to file further briefing on the field "Organizational Component," which OPM withheld for employees in all of the occupations and agencies it deems sensitive, and permitted further briefing on whether OPM properly marked redactions. *Id*. at 34.

OPM's new declarations still fail to meet its burden of showing that release of name and duty-station information for employees in the 19 remaining occupations,[1] the organizational component records, and the withheld IRS award amounts would be a clearly unwarranted invasion of personal privacy. Nor has it shown that it properly indicated the redactions it made on the released portions of the records.

ARGUMENT

FOIA was enacted to "assure the existence of an informed citizenry to hold the governors accountable to the governed." *Grand Cent. Partnership v. Cuomo*, 166 F.3d 473, 478 (2d. Cir. 1999) (citation and quotation marks omitted). FOIA "strongly favors a policy of disclosure," *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005), requiring disclosure of records unless they fall within "one of the specific, enumerated exemptions set forth in the Act," which, "[c]onsistent with FOIA's purposes, . . . are narrowly construed." *Id*. at 355-56.

FOIA's Exemption 6 exempts "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).

[1]In the CPDF files at issue, no positions were classified as being in "Customs and Border Interdiction." *See* Third Declaration of Susan B. Long (3d Long Decl.) ¶ 15. Thus, OPM is not withholding records on employees in that occupation and there are 19, not 20, remaining occupations.

To come within Exemption 6, records must be personnel, medical, or similar files. If this threshold test is met, 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) (citation and quotation marks omitted). "An invasion of more than a *de minimis* privacy interest protected by Exemption 6 must be shown to be 'clearly unwarranted' in order to prevail over the public interest in disclosure." *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 510 (2d Cir. 1992).

I. OPM Cannot Withhold Organizational Component Records.[2]

A. Organizational Component Records Are Not Personnel or Similar Files.

Despite the word "personnel" in CPDF's name, neither the organizational component records nor the CPDF overall are personnel files. As OPM explains on its website, "CPDF is an information

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[2]The history of the relationship between OPM and plaintiffs with regard to organizational component makes clear that plaintiffs both exhausted their administrative remedies with respect to organizational component and included that field in this lawsuit. OPM had historically provided organizational component to plaintiffs in response to their requests for the CPDF file. *See* First Long Decl. ¶ 56. There can therefore be no question that plaintiffs were requesting that field, among others, when they requested the CPDF files. Nonetheless, OPM withheld the field, without indicating the withholding on the released file, *see* 5 U.S.C. § 552(b), or otherwise telling plaintiffs of the withholding. *See* First Declaration of Gary A. Lukowski (dkt. no. 12, attach.15) (1st Luk. Decl.) Exh. I, L, & N. Although FOIA requesters only need to appeal if the agency informs them of their right to do so, *see Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 65 (D.C. Cir. 1990), which OPM had not done, *see* 1st Luk. Decl. Exh. I, L, & N, plaintiffs appealed the withholdings in the June and September 2005 CPDF files, explicitly stating that they sought "release of all withheld materials." 1st Luk. Decl. Exh. O. OPM still did not release the organizational component field. Plaintiffs then filed this lawsuit, seeking an order that OPM "make the requested records available to Plaintiff." Am. Complaint (dkt. no. 9) at 13. OPM still did not release the field, mention that it was withholding that field in its Vaughn Index, or explain the withholding in its initial motion for summary judgment. *See* dkt. no. 12, attach. 2, 36.

However, after plaintiffs filed this lawsuit, OPM released its new data release policy, and plaintiffs noticed that, according to the policy, the field "organizational component" still existed. *See* 1st Long Decl. Exh. A; 1st Long Decl. ¶ 56. Plaintiffs therefore inquired about the omission to OPM. Three days before plaintiffs' cross-motion for summary judgment was due, OPM released organizational component as to some employees, but withheld it as to employees in the occupations and agencies it deemed "sensitive." *See* 1st Long Decl. ¶ 17. Despite the short time frame, plaintiffs briefed the withholding of organizational component in their cross-motion. Dkt. no. 15, attach. 2.

system to support statistical analyses of Federal personnel management programs. It is not intended to be a Governmentwide personnel accounting system." *See* 3d Long Decl. Exh. 1. Agencies are responsible for reviewing the efficiency and effectiveness of their human resources management programs, *see, e.g.*, 5 U.S.C. § 305; *id*. § 1103(c)(2)(F), and the CPDF provides official data that can be used for both OPM oversight and analysis within the agency. As OPM's website states, "[t]he system's primary objective is to provide a readily accessible data base for meeting the workforce information needs of the White House, the Congress, the Office of Personnel Management, other Federal agencies and the public." 3d Long Decl. Exh. 2.

The CPDF's organizational component codes are 18-digit codes, unintelligible without a translation file, that provide a hierarchical outline of agencies' organizational charts, detailing how agency responsibilities are organized into components and how more specific responsibilities are subdivided into subcomponents. The organizational component records allow for statistical analysis of the distribution of an agency's employees across its divisions and subdivisions. 3d Long Decl. ¶ 18. In contrast to the series of coded numbers and letters that constitute the organizational component records and the CPDF overall, OPM requires that every federal employee have a "single personnel folder." *Id*. ¶ 6. The CPDF is not that folder.

In *Department of Air Force v. Rose*, 425 U.S. 352, 377 (1976), the Supreme Court held 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." *Id*. Here, like in *Rose*, access to organizational component records, and the CPDF overall, is not limited to supervisory personnel; the CPDF does

not contain the personal information listed in *Rose*, such as high school records or parents' names, but only information related to employees' federal employment or necessary to allow the government to conduct demographic analyses of its workforce; and OPM does not use the CPDF to supervise or manage employees, but as a tool for statistical analysis. 3d Long Decl. Exh. 1. Such records "cannot reasonably be claimed to be within the common and congressional meaning of what constitutes a 'personnel file' under Exemption 6." *Rose*, 425 U.S. at 377.

Nor are the organizational component records "similar files." In *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982), 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, 89th Cong., 2nd Sess., 11 (1966)). 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 v. U.S. Dep't of Justice*, 312 F.3d 100, 106 (2d Cir. 2002), *vacated*, 541 U.S. 970 (2004), *reaff'd*, 380 F.3d 110 (2d Cir. 2004) (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] can 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).[3]

[3]Records can sometimes be tied to identifiable individuals even when they do not contain

Here, for every single record for which OPM is withholding organizational component, it is also withholding name.[4] And before the CPDF files are released, OPM stores organizational component records separately from name records, *see* 1st Luk. Decl ¶ 21 (explaining that, in answering FOIA requests, OPM had to match the quarterly files to the name files to append names to the records), so the records are not attached to names either as released or as maintained. Unattached to names, the organizational component records 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.[5]

B. Exemption 6 Does Not Exempt Records Without Identifying Information.

Because the organizational component records do not relate to identifiable people, even if they were personnel, medical, or "similar files," Exemption 6 still would not authorize withholding them. Exemption 6 was "'intended to cover detailed Government records on an individual which can be identified as applying to that individual.'" *Wash. Post*, 456 U.S.at 602 (quoting H.R. Rep.

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names. In *Rose*, the Court found that the honor-code violation case summaries were "similar files," even with names redacted, where "identification of disciplined cadets [was] a possible consequence of even anonymous disclosure." 425 U.S. at 376-77 (citation omitted). By contrast, the CPDF does not contain the sort of detailed data that would permit identification by those who did not already know the employees' identities.

[4]The arguments for releasing organizational component and duty-station records that rest on OPM's withholding of names will not, of course, be applicable to the records of employees in the 19 occupations if this Court holds that their names must be released. In that case, release of those employees' organizational component and duty-station records would not be a clearly unwarranted invasion of personal privacy for the same reasons that release of their names would not be, see below at 16-22, as well as for the other reasons, below, at 7-16, that do not rest on OPM's failure to release names.

[5]In its earlier opinion, at 21, the Court stated that the parties agreed that the withheld records were personnel files. What plaintiffs did not challenge, however, was not that the records were personnel files, but that, *when tied to names*, and therefore to particular, identifiable people, they were "similar files." Indeed, in its first motion for summary judgment, OPM argued that the records were "similar files," not personnel files. *See* dkt. no. 12, attach. 2, at 8 n.8 (quoting *Wash. Post*, 456 U.S. at 602). Without names, the withheld records are neither personnel files nor "similar files."

No. 1497). It was not intended to permit withholding of anonymous records.

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, 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." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 175-76 (1991). Indeed, for this very reason, since *Rose*—in which the Supreme Court held "that the statute required disclosure of summaries of Air Force Academy disciplinary proceedings 'with personal references or other identifying information deleted,'" *id*. at 175 (quoting *Rose*, 425 U.S. at 380)—neither the Supreme Court, the Second Circuit, nor this Court has ever even *considered* (at least in any case available through Westlaw) whether Exemption 6 applies to anonymous records. Exemption 6 cases tend to be about identifying information itself, *see, e.g.*, *Ray*, 502 U.S. 164; *Wood*, 432 F.3d 78; *Perlman*, 312 F.3d 100; *Fed. Labor Relations Auth*., 958 F.2d 503, or about records requested by name, *see, e.g. Wash. Post*, 456 U.S. 595, not about the portions of records left after identifying information is removed.

The withheld organizational component records are exactly the type of records that Exemption 6 was not intended to exempt. Exemption 6 was not intended to cover "'the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records.'" *Rose*, 425 U.S. at 376 (quoting H.R. Rep. No. 1497). Without names, however, the organizational component records are not personal records of identifiable individuals who may be embarrassed or injured if the records are released. They are just raw data used for statistical analysis, "facts concerning" how agencies are organized.

In *Rose*, the Supreme Court agreed that it "is only the identifying connection to the individual that casts the personnel, medical, and similar files within the protection of [the] sixth exemption." 425 U.S. at 371 (citation omitted). Simply put, FOIA's personal privacy exemption does not cover

records that cannot be tied to an identifiable person. Exemption 6 should not be expanded beyond its accepted and intended scope to encompass the anonymous organizational component records.

C. The Public Interest in Disclosure Outweighs Any Privacy Interest in the Withheld Organizational Component Records.

Even if Exemption 6 could exempt records without identifying information, the organizational component records would not be exempt from disclosure, because any privacy interest in them is de minimis and is outweighed by the public interest in disclosure. OPM claims, at 19, that there is a privacy interest in the records because "it is well established that an employee working in a sensitive occupation has a strong right to privacy against harassment or attack, and that the disclosure of his location can endanger him." However, even where the organizational component records contain geographic information (and not all do), their release would not disclose the "location" of government employees. The geographic information in the organizational component record is not more specific than the city associated with the component, *see* Second Declaration of Gary A. Lukowski (dkt no. 20, attach. 1) (2d Luk. Decl.) ¶ 11, and is often much less specific than that, indicating, for example, just a state or region. *See* 1st Long Decl. ¶ 26. Even assuming employees in the agencies and occupations OPM deems "sensitive" are at a heightened risk of attack (and, as explained below at 9-22 and in the memorandum accompanying plaintiffs' earlier motion for summary judgment, dkt. no. 15, attach. 2, OPM has not met its burden of demonstrating that these hundreds of thousands of workers are indeed each at a heightened risk of harassment or attack) knowing that an anonymous employee is assigned to the Western Office of FEMA's Office of Inspector General or DEA's South Carolina Resident Office, *see* 1st Long Decl. ¶ 26; Second Declaration of Susan B. Long (2d Long Decl.) (dkt. no. 22, attach. 1) ¶ 10, would not enable a terrorist or other potential attacker to target that person. The organizational component 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 outside of work. OPM has failed to make a logical argument about how release of the records would be an invasion of personal privacy.

In contrast to the non-existent privacy interest, the public has a strong interest in the information in the organizational component records. Similar to the organizational charts many agencies place on their websites, the organizational component records 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. 3d Long Decl. ¶ 18. 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. 1st Long Decl. ¶ 46. Despite OPM's labels, at 19, there is nothing "derivative" about this information. *Cf. Norton*, 309 F.3d at 36 (recognizing that public interest in examining agency's use of data is cognizable under Exemption 6). 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.

D. The Organizational Component Records Are Segregable.

Finally, 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* 1st Long Decl. ¶¶ 26-27; 2d Long Decl. ¶¶ 9-10; 2d Luk. Decl. ¶ 11. It would not be overly burdensome for OPM to segregate and release the digits that do not represent geographic information. 2d Long Decl. ¶¶ 11-15. At the very least, OPM should be required to do so.

II. OPM Cannot Withhold Combined Statistical Area (CSA), Core Based Statistical Area (CBSA), Locality Pay Area (LPA), State, County, or City

OPM is withholding CSA (which groups together counties with social and economic

interactions for statistical analysis purposes), CBSA (which groups together counties with stronger social and economic interactions for statistical analysis purposes), LPA (which indicates whether special pay is provided to federal employees on the basis of their location), city, county, and state—collectively referred to as "duty station" throughout this case—for the 19 remaining occupations it deems sensitive. These records are not exempt from disclosure.

A. The Withheld Duty-Station Records Are Not Within the Scope of Exemption 6.

For all employees for whom it is withholding duty-station information, OPM is also withholding names. Accordingly, for the same reason that the organizational component records are not within the scope of Exemption 6, the withheld duty-station records fall outside Exemption 6. The records are anonymous series of codes, without identifying information tying them to individuals, used for statistical analyses of the federal workforce; they are not the type of records FOIA's personal-privacy exemption was meant to cover.

Plaintiffs recognize that this argument would apply with equal force to the duty-station records of employees in the occupations and agencies on which this Court ruled in its earlier decision in this case. Accordingly, the implication of plaintiffs' argument is that this Court should reconsider its decision that the duty-station records of employees in the three occupations and five agencies about which this Court previously ruled are exempt from disclosure.

B. The Public Interest in Disclosure Outweighs the Non-existent Privacy Interest in the Withheld Duty-Station Records.

"[W]hether the disclosure of names of government employees threatens a significant privacy interest depends on the consequences likely to ensue from disclosure." *Wood*, 432 F.3d at 88. OPM has still failed to demonstrate that disclosing duty-station records is likely to cause any harm.[6]

[6]For three occupations—Game Law Enforcement, Immigration Inspection, and Alcohol, Tobacco, and Firearms Inspection—OPM provides no specific explanation of why disclosure of locations would invade employees' privacy. *See* Third Declaration of Gary A. Lukowski (docket no. 27, attach. 4) (3d Luk. Decl.) ¶¶ 16-18.

OPM makes two basic arguments about why release of the withheld duty-station records would invade personal privacy, neither of which withstands examination.[7]

First, Gary Lukowski contends that releasing the records would somehow compromise the "sensitive" work of the agencies in which the anonymous employees work. *See, e.g.*, 3d Luk. Decl. ¶ 12. He claims, for example, that disclosure "potentially compromises the ability of the Bureau of Prisons to run a safe and effective correctional environment," *id.* ¶ 3, "compromises the ability of the Federal government to conduct investigations and make arrests" *id*. ¶ 5, "potentially hamper[s] the Federal government's tax collection activities," *id*. ¶ 11, and "adversely affects the ability of the United States government to monitor and protect its borders." *Id.* ¶ 22; *see also id.* ¶¶ 4, 6-10, 13, 15, 20-21.

Lukowski's arguments that release of "locations" would compromise government activities are not about "personal privacy," which is what is weighed in the Exemption 6 balance: They are about the effect of release on government activities in general. Exemption 6, however, is not a catch-all exemption meant to include any possible harm the government can imagine following release of records. It is an exemption about personal privacy. FOIA has eight other exemptions to cover other sorts of harm. Notably, OPM has invoked none of those other exemptions here.

Moreover, Lukowski has no experience or expertise in running a prison, making arrests, collecting taxes, protecting the border, or the other activities he claims will be compromised if the duty-stations records are released. *Id*. at 1. Because Lukowski's claim that disclosing the "location" of employees in "sensitive" occupations would harm government activities is not based on personal knowledge, *see* Fed. R. Civ. P. 56(e), this Court should place no weight on it.

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[7]These arguments are found in Gary Lukowski's Third Declaration. OPM's Memorandum of Law makes no argument about employees' privacy interest in the duty-station fields, saying only (at 12) that employees in the occupations have a heightened privacy interest in their "work addresses." The CPDF does not include "work addresses," and work addresses are therefore not at issue in this case.

In contrast to Lukowski's speculation, people who work in law enforcement often think it is *beneficial* for the public to know the number of employees in different locations. For example, the U.S. Department of Justice (DOJ) regularly makes available detailed data on the number of law-enforcement personnel in local police departments throughout the country. 3d Long Decl. ¶ 43-46. The publicly available data on these 2,859 local police departments includes information far more specific than the information in the CPDF, providing street address, the number of police officers, and the number of officers assigned to specific areas, such as drug enforcement units or terrorism task forces. *Id*. at 45. The job assignment categories for which local police staffing numbers are provided closely parallel many of Lukowski's descriptions of job assignments for the law-enforcement occupations OPM calls sensitive. *Id*. Yet DOJ's Office of Justice Programs, which gathers the information, evidently sees benefits to law enforcement in making information about the number of these law-enforcement personnel in particular locations public.

In addition, for many of the occupations, Lukowski gives no explanation of *how* release of the withheld records would adversely affect the government activity; he simply asserts that it could. *See* 3d Luk. Decl. ¶¶ 4-5, 9, 11-12, 15, 22. He does not explain, for example, how it could harm the government's service of process, *see id.* ¶ 4, to know what city an anonymous deputy U.S. Marshal is in, or to know the number of deputy U.S. Marshals in that city.

For the other occupations, Lukowski provides reasoning that does not stand up to scrutiny. For example, Lukowski claims that releasing "locations" of correctional officers and compliance inspection and support personnel would expose them to risk of "being pressured to commit illegal acts under duress." *Id*. ¶¶ 3, 13. However, OPM is withholding names for all of those employees, so even if there are people who want to pressure them, those people would not know *whom* to pressure; the employees are anonymous. And the withheld duty-station information does not provide work address, so the people hoping to use duress would not know *where* to find the employees; at

most, they would know what city the employees are in. Similarly, although Lukowski states that nuclear materials couriers and nuclear engineers have "specialized knowledge" that could "be used to bring harm and unduly affect Federal operations," *id*. ¶¶ 6, 10, the withheld duty-station records would not enable a person to find the employees and capitalize on their specialized knowledge.[8]

OPM's second argument for withholding duty stations is that disclosure of "locations" would put employees and their families at increased risk of harassment or attack. *Id*. ¶¶ 3-15, 20-23. Once again, however, OPM is withholding the name of every employee for whom it is withholding duty-station information. Thus, someone who wanted to harass or attack an employee in a sensitive occupation who worked in a particular location would not be able to identify that employee or the employee's family. And because the withheld records do not provide work addresses, the potential harasser or attacker would not be able to locate the employee. In other words, release of the withheld duty-station records would inform potential harassers and attackers neither about whom to attack nor about where to locate government employees.

In sum, OPM's duty-station arguments do not take into account the actual nature of the withheld records: They are anonymous records that reveal geographic information at a level too broad to invade privacy. In the end, OPM's arguments boil down to a contention that the release of *any* geographic information about *any* employee whose job is related in *any* way to law-enforcement,

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[8]Lukowski also asserts that release of the location of police could identify geographic areas where investigations are concentrated. *Id*. ¶ 5. However, a concentration of employees could mean a number of things besides a specific investigation, such as the start of a new community partnership initiative, or the decision to increase normal staffing levels. And even if it did indicate a concentration of investigations, the duty-station information does not provide specific locations; it would not be particularly informative, for example, to know that there was a new investigation in the LPA that covers multiple counties across Pennsylvania, Delaware, New Jersey, and New York. *See* 3d Long Decl. ¶ 31. Conversely, Lukowski claims that release of locations of some employees could reveal low-risk areas where coverage has not increased and encourage illegal activities in those areas. 3d Luk Decl. ¶¶ 20-21. But the fact that coverage has not increased may just demonstrate that coverage in those areas is sufficient, and even if coverage is "thin," it could still be concentrated in specific locations within the broad areas identified by the CPDF's duty-station fields.

tax collection, or customs automatically invades personal privacy. This Court has already rejected that argument, *see* Mem. Dec. at 23 (noting that although it is logical to conclude that some of the remaining occupations are within the law-enforcement category, OPM has to provide specific evidence of why employees in the occupations would be subject to heightened risk of harassment or attack if the withheld information were released), and should do so again here.

In contrast to the de minimis privacy rights in the withheld duty-station records, release of the records 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* 1st Long Decl. ¶¶ 29-35. The public interest in this direct information about the government's activities outweighs the de minimis privacy interests in the withheld records.

C. The Duty-Station Fields Are Segregable From Each Other.

OPM has used the blunt tool of redacting *all* geographic information, no matter how broad, based on claims that releasing the "locations" of employees would cause harm. However, the various "duty-station" fields withheld by OPM are segregable from each other, so even if this Court decides that it is a clearly unwarranted invasion of personal privacy to release the city to which an employee is assigned, OPM can segregate and release the other fields—CBSA, CSA, LPA, state, and county. *See* 5 U.S.C. § 552(b) (requiring release of "[a]ny reasonably segregable portion of a record").

To begin with, although OPM redacts state from the CPDF records, its fedscope website allows members of the public to "drill down" to the state level, *see* 1st Long Decl. Exh. B, at 4, and run reports that detail the number of employees in each occupation (including the "sensitive" occupations) in each state. *See* 3d Long Decl. ¶ 23. Given that the public can already find out the number of employees in "sensitive" 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 anonymous employee is located somewhere in one of

the large areas indicated by a CSA, CBSA, LPA, state, or county code, or the number of employees in an occupation within one of those large areas, would not place any employee at heightened risk of harm. OPM's arguments about duty stations assume that releasing duty-station information would enable someone with ill intent to locate an employee, or to determine concentrations of employees in specific locations, but due to the size of the areas covered by these fields, such specific identification would be impossible.

For example, counties, the most geographically specific of these categories, tend to cover large areas. Onondaga County in New York, for example, covers 806 square miles. 3d Long. Decl. ¶ 25. When OPM releases state-level information in its fedscope tool, it releases information on the District of Columbia, which is less than one-tenth Onondaga County's size. *Id.* If it is not harmful for OPM to release the number of employees in an occupation in D.C., it is hard to conceive how it would be harmful to release the number in the much larger area of Onondaga County.

CSAs and CBSAs—statistical categories that indicate counties with social and economic ties—contain at least one county, and often groups of counties, therefore encompassing large areas. *Id.* ¶ 27-29. 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. CSAs are even broader geographic areas than CBSAs because they require weaker social and economic ties between the counties. *Id.* And LPAs generally follow CSA boundaries, but often contain additional counties on top of that. *Id.* ¶ 31. Even though OPM argued (and this Court held) that it was a clearly unwarranted invasion of personal privacy to release "duty stations" for DoD employees, OPM released CSA and CBSA for DoD employees, including for employees in the occupations OPM deems sensitive, *id.* ¶ 30, indicating that even when OPM believes employees are in sensitive jobs, it is not necessarily an invasion of personal privacy to release what CSA or CBSA they are in.

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." 2d Long. Decl. ¶ 6; 1st Long Decl. ¶ 23. These codes contain no information that would enable someone to deduce even what region of the country an anonymous employee is in and should be released.

III. OPM Cannot Withhold Names.

A. OPM Has Not Demonstrated that the Employees in the Remaining Occupations Have a Heightened Privacy Interest in Their Names.

As this Court recognized, "whether the disclosure of names of government employees threatens a significant privacy interest depends on the consequences likely to ensue from disclosure." Mem. Dec. at 22 (quoting *Wood*, 432 F.3d at 88). OPM has still failed to demonstrate that employees in the remaining 19 occupations would all be at a particularized risk of harassment or attack if their names were released. OPM's claims of harm are speculative and broad, and despite the long history of disclosure of federal employee names, OPM has produced no evidence of anyone ever using a list of names of employees in "sensitive" occupations for nefarious purposes. Moreover, OPM's arguments do not withstand examination.

1. Correctional Officer, United States Marshal, and Police

Lukowski argues that releasing names of employees in the "Correctional Officer," "United States Marshal," and "Police" occupations would potentially compromise the government's ability to run prisons, serve process, investigate crimes, and make arrests. 3d Luk. Decl. ¶¶ 3-5. Because Lukowski has no expertise in these law-enforcement activities, however, his opinions about the effect of releasing names should be given no weight. In contrast to Lukowski, people who engage in law-enforcement activities see benefit in making the names of law-enforcement employees public. *See, e.g.*, Declaration of Henry S. Ruth (Ruth Decl.) ¶¶ 2-3, 5. Police, for example, generally wear

name-tags. *Id.* ¶ 4; 3d Long Decl. ¶ 16. Moreover, for police and marshals, Lukowski has provided no explanation of *why* he thinks releasing names would harm their activities. For correctional officers, he asserts that releasing names would expose the employees to risk of "being pressured to commit illegal acts." 3d Luk. Decl. ¶ 3. However, BOP does not run in secrecy; prisoners, for example, tend to know the names of the officers who supervise them, and wardens do not keep their names secret. *See* 3d Long Decl. ¶ 16. If someone wanted to identify a correctional officer to pressure, they could easily do so without the CPDF, which does not even provide an officer's work address or explain his responsibilities.

Similarly, although Lukowski argues that releasing police names could subject police to attack by people who have had "adverse interactions with these employees," 3d Luk. Decl. ¶ 5, people tend to *already* know the names of police officers with whom they have had contact, so releasing the names in the CPDF would not increase the likelihood of attack on those officers. Ruth Decl. ¶ 4; 3d Long Decl. ¶ 16. And if people who have had adverse experiences do *not* know the names of the officers with whom they interacted, the CPDF will not inform them which officer they dealt with.

Finally, OPM claims that releasing marshals' names would compromise their safety because they "perform undercover or sting operations where concealment of identity is essential." 3d Luk. Decl. ¶ 4. However, if a marshal is undercover under a different name, releasing his name in the CPDF will not reveal his identity. Moreover, not all marshals are in undercover positions. OPM cannot redact names of all employees in this occupation based on work only some do.

2. Intelligence and Intelligence Clerk/Aide

Lukowski argues that releasing the names of employees in the "Intelligence" and "Intelligence Clerk/Aide" occupations would expose them to harm because they collect "sensitive" information. 3d Luk. Decl. ¶¶ 7-8. Despite the occupations' names, however, people in these

occupations do not necessarily deal with information that would reveal "vulnerabilities or secrets." *Id*. ¶ 7. Indeed, "Intelligence" specifically covers people working on issues that only indirectly affect national security. *Id.* And employees in the Central Intelligence Agency, Defense Intelligence Agency, and National Security Agency, the nation's primary intelligence agencies, are not included in the CPDF at all, 1st Luk. Decl. ¶ 20, so records on employees in "Intelligence" do not include employees in those agencies. Moreover, the CPDF file does not reveal the topic on which a person in one of the occupations works, so someone looking at the CPDF would not know whether an employee in "Intelligence" was working on Chinese social trends, or Russian military trends, or American geographic trends, 3d. Long Decl. ¶ 13, and therefore would not know whom to try to contact for "information about the vulnerabilities or secrets of the Federal government." 3d Luk. Decl. ¶ 7. These occupations cover many different responsibilities and the CPDF contains so little detail that release of the names of employees in these occupations would not put them at particularized risk.

3. Nuclear Engineer and Nuclear Material Courier

OPM's arguments about the harm from releasing names of nuclear engineers and nuclear material couriers relies on these employees' "specialized knowledge," *id*. ¶¶ 6, 10, but OPM's arguments are once again too broad: Employees in these occupations have differing responsibilities, and the CPDF reveals neither their work assignments nor areas of knowledge.

4. Internal Revenue Agent and Internal Revenue Officer

Lukowski claims (without basis in experience) that disclosing names of Internal Revenue Agents and Officers could hamper tax collection. *Id*. ¶¶ 9, 11. Congress, however, has determined that it is *helpful* for people to know with whom they are dealing at the IRS, and has mandated that IRS employees provide names in telephone calls, personal contacts, and all manually generated correspondence. *See IRS Restructuring and Reform Act of 1998*, Pub. L. No. 105-206, § 3705, 112

Stat. 685, 777 (1998). This statutory requirement also undermines Lukowski's other argument: that releasing names would put employees at risk from members of the public. 3d Luk. Decl. ¶¶ 9, 11. Members of the public *already know* the names of the IRS employees with whom they have dealt. Finally, IRS already has a system—its pseudonym program—for concealing names of employees who have demonstrated an actual particularized risk of harm. Although OPM is withholding the names of tens of thousands of IRS employees, *see* 1st Long Decl. ¶ 12, only 666 employees have so demonstrated. *See* First Declaration of Albert D. Adams, Jr. (dkt no. 12, attach. 11) ¶ 9.

5. Customs Patrol Officer, Customs Inspection, and Customs and Border Protection

OPM makes sweeping arguments about customs occupations, but, once again, the occupations are broad, and employees have differing responsibilities. Knowing an employee's name, along with the other released CPDF data, therefore is not informative about whom to try to contact to "further [] criminal interests." 3d. Luk Decl. ¶¶ 20, 22. And to the extent OPM's arguments rely on customs patrol officers "periodically[] posing as smugglers," *id*. ¶ 20, OPM could limit the withholding to employees who are undercover under their actual names, where release of their names might blow their cover. Finally, even people with nefarious goals are more likely to "target individuals," 3d Luk. Decl. ¶ 21, with whom they have had direct, negative interactions, but, again, people tend to *already know* the names of government employees with whom they have had personal contact, and if they do not know the employees' names, the CPDF would not tell them exactly with whom they interacted.

6. Game Law Enforcement and Immigration Inspection

OPM has made no specific argument about why releasing names of employees in these occupations would be a clearly unwarranted invasion of personal privacy. The names should therefore be released.

7. General Inspection, Investigation and Compliance, Compliance Inspection and Support, General Investigating, Criminal Investigating, and Alcohol, Tobacco, and Firearms Inspection

OPM makes broad assertions about the employees in these occupations to claim that releasing their names would place them at risk. But the occupations contain employees in many agencies with differing work assignments. For example, despite Lukowski's focus on the Department of Homeland Security (DHS) and DOJ, the "Criminal Investigating" occupation includes employees in 74 agencies, including the Government Printing Office, the National Science Foundation, the Peace Corps, and the National Gallery of Art. 3d. Long Decl. ¶ 10. Moreover, within agencies, work assignments and responsibilities vary greatly. *Id*. ¶¶ 7-9. In claiming that employee names should be redacted, Lukowski mentions activities that *some* employees in the occupations undertake, *see, e.g.*, 3d. Luk. Decl. ¶¶ 12, 18 (discussing undercover work, sting operations, and dealing with gang members), but that an occupation "includes" employees who engage in certain activities does not mean that all—or even many—employees in the occupational series perform those specific assignments. 3d Long. Decl. ¶ 12. OPM, however, bears the burden of showing that *all* records it is withholding are exempt.

The occupation "Compliance Inspection and Support" demonstrates the arbitrariness of OPM's determination of which employees would be at heightened risk of harm if their names were released. Lukowski asserts that the occupation contains 51,000+ people, over 49,000 of whom are in DHS, 3d Luk. Decl. ¶ 13, but the September 2005 CPDF included only 6,368 employees in this occupation, fewer than half of whom were in DHS. 3d Long. Decl. ¶ 14. And although Lukowski says that within DHS "these individuals are screeners, responsible for ensuring suspicious persons and items are not permitted to board aircraft," 3d Luk. Decl. ¶ 13, only four employees in the occupation were in the Transportation Security Administration (TSA), which performs airport screening. 3d Long. Dec. ¶ 14. In other words, OPM is seeking to withhold records on thousands

of employees based on an argument that applies to four employees only. Moreover, TSA airport screeners are actually classified in the occupation "Safety Technician" (0019), which OPM does *not* consider sensitive, *id.*, demonstrating that despite OPM's claims that the airport screeners in "Compliance Inspection and Support" make it a "sensitive occupation," OPM is actually quite willing to release airport screeners' names.

OPM's argument that disclosure of names of employees in these inspection and investigation-related occupations would invade their personal privacy once again rests on the notion that individuals who are unhappy with outcomes of investigations or have had other adverse interactions with employees will use the names from the CPDF for "persecution and revenge." *See, e.g.,* 3d Luk. Decl. ¶ 15. And again, this argument fails because members of the public tend to already know names of government employees with whom they have had direct contact. *See* 3d Long. Decl. ¶ 16. Government employees usually identify themselves in person, in correspondence, and over the phone, so people know with whom they have interacted. Disclosure of names from the CPDF file does not heighten risk where those names are already known.

In the end, OPM's argument boils down to the claim that employees are at a heightened risk of harassment or attack if the occupations they are in, however tangentially, are associated with enforcement of federal regulations or laws. Such an association is simply not enough to show that releasing the employees' names would be a clearly unwarranted invasion of personal privacy, as required to withhold records under Exemption 6. *See, e.g., 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.").

B. The Public Interest in Disclosure Is Strong.

Because government work is done by actual people,"knowing *who* is making government policy . . . is relevant to understanding *how* the government operates." *Gordon v. FBI*, 388 F. Supp.

2d 1028, 1041 (N.D. Cal. 2005) (emphasis in original). Disclosure of names can explain why certain policies and practices exist within certain parts of an agency, but not others, or at certain points in time, but not others. It allows the public to analyze turnover within an agency—which sheds light on human resources management and on an agency's priorities—and to detect hiring and promotion of unqualified people or other signs of mismanagement. And it can lead to uncovering of illegal or unethical behavior. *See* 1st Long Decl. ¶¶ 36-45.

In its earlier decision in this case, this Court relied on *Federal Labor Relations Authority*, 958 F.2d at 512, to state that the Second Circuit had rejected the argument that lists of names of agency employees could shed light on agency activities, and to find the link between names and agency conduct too attenuated. Mem. Dec. at 27, 29. Unlike in *Federal Labor Relations Authority*, 958 F.2d at 511-12, however, plaintiffs' arguments about how releasing names would inform the public about agency activities do not rely on members of the public contacting employees to learn about their agencies. Plaintiffs have demonstrated that the public could learn about the government's activities, priorities, and management directly through disclosure of the names themselves. This direct public interest outweighs the minimal or de minimis privacy interest in the names.

IV. OPM Cannot Withhold Award Amounts.

OPM admits that the "Total Award" field includes the sum of sixteen different types of awards, only some of which are performance-based. Because all awards are added together, it is impossible to determine the amount an employee received as a performance-based award and therefore impossible to reverse-engineer performance-appraisal scores.[9] 3d Long. Dec. ¶ 34.

[9]Indeed, IRS itself seems unable to determine exactly what portion of the Total Award field represents a performance-based award. Janet Miner claims in her declaration that "the only method of redacting the amount of an individual's Performance Award for years after 2000 is to redact category 840," Declaration of Janet R. Miner (M. Decl.) ¶ 6, which contains both performance awards and other types of awards. In other words, Miner claims that IRS itself cannot separate out the performance awards from the non-performance awards in category 840. Given that the "Total Award" field includes all awards in category 840 added together with numerous other awards, it

The 15-person hypothetical from Janet Miner's declaration that OPM uses to try to show how appraisal scores could be reverse-engineered in fact demonstrates just the opposite. *See id*. ¶¶ 37-39. Miner seems to admit that six of the employees' (B, D, F, H, J, and N's) scores could not be reverse-engineered from the total award field. M. Decl. ¶¶ 16-18. For the other nine employees, she claims that their "exact" scores could be determined. *Id*. ¶ 15. However, her claims depend on the assumption that, for those employees, the amount in the "Total Award" field represents only a performance-based award. That is not necessarily the case. For example, the $630 received by Employee A could represent just a performance-based award, or just some other type of award, or a combination of the two. 3d Long. Dec. ¶ 38. Because the CPDF does not reveal which, it is impossible to know the amount the employee received as a performance-based award and, accordingly, impossible to reverse-engineer the performance-appraisal score.

Miner also states that including the withheld award-dollar amounts would reveal that some employees did not receive a performance award. M. Decl. ¶¶ 16-17. According to the Internal Revenue Manual's section on awards, however, IRS allows monetary awards to be taken as a mixture of cash and time off, so an absence of a cash award does not necessarily mean the absence of an award. *See* 1st Long Decl. Exh. E, at 4; Third Long Decl. ¶ 39. And, in any event, the fact that an employee did not meet the criteria for receiving an award (a fact OPM releases for other types of awards) is a far cry from an exact appraisal score.

Finally, even if it were possible to deduce the amount of the appraisal *award* from the total award amount (which it is not), it would be impossible to reverse-engineer the appraisal *score* without knowing the pool-share amount. 3d Long Decl. ¶ 40. And even if someone had access to pool-share amounts (which members of the general public do not), that person would not know what pool the employee was in if the person did not know who the employee was. However, OPM

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would be even harder to disaggregate performance-based awards from the amount in that field.

redacted award-dollar amounts for 9,878 employees whose names it also redacted. *Id*. Redacting the names of the employees also reduces—indeed removes—any privacy interest they have in their appraisal scores, because the appraisal scores cannot be linked back to them.

V. Records and Fields That OPM Withheld as to All Employees

As plaintiffs stated in their reply in support of their first motion for summary judgment (dkt. no. 22, at 10), if OPM's position is that all categories of records and all fields that OPM did not release for any employees are outside the scope of the FOIA requests, and therefore outside the scope of this case, plaintiffs are willing to agree. Because OPM's discussion of records withheld as to all employees mentions only fields—and not other categories of records withheld as to all employees, such as records of all employees in inactive status—and because OPM seems somewhat confused about what those fields are, *see, e.g.*, 3d Luk. Decl. ¶ 27 (erroneously claiming OPM withheld LPA for all employees), plaintiffs are not sure whether this is, in fact, OPM's position.

VI. OPM Must Indicate the Extent of Its Redactions on the Released Files.

FOIA requires that when agencies redact portions of records, the "amount of information deleted shall be indicated on the released portion of the record . . . ." 5 U.S.C. § 552(b). If technically feasible, this indication must take place "at the place in the record where such deletion is made." *Id*. OPM has still failed to abide by this requirement.

First, OPM sometimes redacts information without indicating it has done so on the released portion of the records. 3d Long Decl. ¶ 42. For example, OPM withheld all records in the organizational component field when it released records of DoD employees on November 13, 2006, without marking the redaction of those records at the places in the released portion of the file where the redactions were made. 2d Long. Decl. ¶ 23(b). OPM also redacted the organizational component codes for DoD agencies from the organizational component code translation tables provided to plaintiffs without marking the redaction on the released portion of the files. *Id*. ¶ 23(c). And

plaintiffs received only blanks in fields including prior duty station, prior pay plan, prior grade, and prior step for records of employees of DEA, ATF, the U.S. Mint, and Secret Service. 1st Long Decl. ¶ 52. Unless OPM has no information in these fields on any employees in those agencies, it has redacted information from those fields without indicating the amount of information redacted.

In addition, OPM sometimes withheld whole categories of records without indicating it had done so on the released portions of the CPDF. For example, OPM withheld all records on employees who did not have "P" in the pay status field, 1st Luk. Decl. ¶ 21, and withheld quarterly file records if they could not be matched to employees in the status file, *id.*, without indicating those redactions in the places in the original file where the redactions were made.[10]

Finally, OPM sometimes marked that it had redacted information from records when there was no information in the records to begin with. *See* 1st Long Decl. ¶ 54. In order to indicate the amount of information deleted from the released files, OPM should be required to place redaction marks in fields from which it has redacted information and not to place redaction marks in fields in which the master CPDF file contained no information that could be redacted.

CONCLUSION

This Court should deny defendant's motion for summary judgment, grant plaintiffs' motion for summary judgment, and order OPM to release the withheld organizational components, duty-station information, names, and award-dollar amounts, and to mark the extent of information redacted on the released files in the places where the redactions were made.

[10]As noted above, if OPM's position is that additional categories of records for which OPM did not release records on any employees—including records of non-active status employees and quarterly file records that cannot be matched to employees in the status file—were not within the scope of the FOIA requests and of this case, plaintiffs are willing to agree.

Dated: December 10, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2007, 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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