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

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This Freedom of Information Act (FOIA) case involves the Office of Personnel Management's (OPM's) withholding of information on hundreds of thousands of federal civilian employees, over 40% of the federal civilian workforce, in its Central Personnel Data File (CPDF). OPM has withheld names and duty stations for all employees of the Department of Defense (DoD); the Drug Enforcement Agency (DEA); the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); the U.S. Mint; and the Secret Service; and for employees in 24 occupations it deems sensitive, which cut across 123 non-defense agencies and many agencies within DoD. It has also withheld bargaining units for DoD personnel and award dollar amounts for various Internal Revenue Service (IRS) employees. Until 2003, most of this information had long been available to the public.

The withheld information is vital for the public to understand the government's activities. The government is not a monolithic entity in Washington, D.C.; it is composed of individuals making decisions all across the country. Knowing who is making governmental decisions and where the government is focusing its resources allows the public to understand how the government works on the ground. It enables the public to detect nepotism and the hiring of unqualified employees, to monitor staff turnover and agency management, and to determine whether law enforcement is conducted even-handedly. It allows the public to uncover illegal, unethical, or dangerous behavior by agency employees, such as officials rewarding campaign contributors with jobs, or political staff interfering with scientific determinations, or airport screeners allowing unexamined luggage onto planes. And it facilitates necessary communication between the public and the government.

OPM seeks to justify its withholding by invoking the terrorist attacks of September 11, 2001, to claim that the records fall under FOIA Exemption 6, which exempts records whose disclosure would result in a clearly unwarranted invasion of personal privacy. But OPM has offered nothing beyond speculation that release of the withheld information would put the employees whose names

and duty stations were redacted at any real risk. And the very notion that terrorists would target specific individuals if they knew their names and duty stations defies common sense and the lessons of September 11, when terrorists targeted symbols of America, not individual employees. Given the public's interest in understanding the activities of its government, and the weakness of the government's privacy claims, the withheld information should be disclosed.

BACKGROUND

The United States government has a long history of letting the public know whom it is employing. In 1816, Congress passed a resolution requiring a register of "all the officers and agents, civil, military, and naval, in the service of the United States" to be compiled regularly by the Secretary of State. For each federal employee, the register contained a name and the location where the employee worked. *See* Declaration of Gary A. Lukowski (Lukowski Decl.), Exhibit C at 4, 7.

Currently, the most comprehensive register of federal employees is the CPDF, an automated system compiled by OPM that contains individual records on most federal civilian employees. For over a decade, plaintiffs Susan B. Long and David Burnham, professors at Syracuse University and co-directors of the Transactional Records Access Clearinghouse (TRAC), a data gathering, research, and distribution organization, have made FOIA requests to OPM for copies of the CPDF. Professors Long and Burnham have requested the CPDF data to be able to provide the American people with comprehensive information about the government's staffing and to allow meaningful oversight of the government's staffing practices. *See* Declaration of Susan B. Long (Long Decl.) ¶¶ 1-2.

In its responses to Professor Long's requests for the March, June, and September 2004, and March, June, and September 2005 CPDF files – the records at issue here – OPM withheld many records, more than it had ever withheld from plaintiffs before. *Id*. ¶¶ 7-8. In particular, the agency redacted all names, duty stations, and bargaining units for the over 650,000 civilian employees of

DoD.[1] *Id*. ¶ 13. It also redacted names and all duty-station information for over 150,000 employees in 24 occupations that OPM has labeled "sensitive," names and all duty-station information except whether the employees work within the DC Metro for employees of DEA, ATF, U.S. Mint, and the Secret Service, and names and/or duty-station information for over 900 additional employees who were not in "sensitive" occupations. *Id*. ¶¶ 11, 15, 16. In addition, OPM referred the March, June and September 2005 CPDF requests to IRS, which withheld total award dollar amounts for various IRS employees and replaced 666 names with pseudonyms.[2] *Id*. ¶¶ 12, 16; Declaration of Albert D. Adams, Jr. (Adams Decl.) ¶ 9. Finally, OPM withheld numerous additional fields and records that

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[1] The exact number of records withheld differs in each CPDF file because the workforce changes between quarters. Unless otherwise stated, references to the number of records redacted are to the numbers from the September 2005 CPDF given to plaintiffs in June 2006. In addition, which data elements OPM included in its redaction of "duty stations" differs from file to file. For example, the only data element redacted in the redaction of "duty stations" from DoD employee records in the September 2005 CPDF was the data element Duty Station, which contains city, county, and state information. When OPM redacted "duty stations" from the records of non-DoD employees, however, it also redacted Combined Statistical Area (CSA), Core Based Statistical Area (CBSA), and Locality Pay Area (LPA). Long Decl. ¶ 21.

[2] OPM initially withheld *all* records pertaining to DoD employees from the March, June, and September 2004 and March, June, and September 2005 CPDF files, and *all* names of IRS employees from the June and September 2005 CPDF files. *Id*. ¶¶ 7-8. After plaintiffs appealed the redaction of DoD records and IRS personnel names from the June and September 2005 CPDF files, OPM claimed it would refer those requests to IRS and DoD, but OPM never claimed it was referring plaintiffs' requests for the March, June, and September 2004 and March 2005 CPDF files to DoD. *Id*. ¶ 9. Only after plaintiffs filed this lawsuit did OPM release any records related to DoD personnel from the March, June, and September 2004 and March, June, and September 2005 CPDF files or IRS employee names from the June and September 2005 files. *Id*. ¶¶ 11-12.

In addition, when plaintiffs filed this lawsuit, OPM had not responded to two other FOIA requests plaintiffs had made: one for records relating to the purpose, scope, and schedule of a policy review OPM had informed plaintiffs it was undertaking regarding disclosure of individual employee records, and one for a copy of OPM's newly implemented data release policy. On June 6, 2006, OPM provided plaintiffs with a copy of the data release policy. The request for the data release policy is therefore no longer an issue in this lawsuit. In addition, after seeing defendant's Vaughn Index, filed with its motion for summary judgment on July 11, 2006, plaintiffs do not contest OPM's withholding of records relating to the policy review.

it did not inform Professors Long and Burnham about or mark as redacted in the files provided to them. Long Decl. ¶¶ 56-57. In many other instances as well, OPM did not indicate the extent of information deleted when it redacted information from the records and fields released to plaintiffs *Id.* ¶¶ 52, 54. On December 1, 2005, Professors Long and Burnham filed this lawsuit to challenge OPM's massive withholding of records and widespread failure to mark redactions.

On September 19, 2006, OPM provided plaintiffs with new copies of the CPDF files at issue in this case for non-DoD employees. These records included the field Organizational Component, which OPM had neither told plaintiffs it was withholding, mentioned in its Vaughn Index, nor indicated it was deleting in the files previously provided to plaintiffs. *Id*. ¶¶ 16-17. OPM redacted Organizational Component from records of DEA, ATF, U.S. Mint, Secret Service, and Federal Bureau of Investigation employees, from records of employees in the 24 occupations it deems sensitive, and from records of other employees as well. It did not provide Organizational Component for DoD employees. *Id*. ¶ 17. [3]

ARGUMENT

The Freedom of Information Act, 5 U.S.C. § 552, was enacted to advance "a general philosophy of full agency disclosure." *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir.1992) (internal citations omitted). FOIA establishes a strong policy in favor of disclosure of information in the possession of federal agencies, requiring disclosure unless the records are subject to one of the limited exemptions provided in 5 U.S.C. § 552(b). *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005). These exemptions are construed narrowly and "do not obscure the basic policy that disclosure, not secrecy, is the dominant

[3] Plaintiffs have not had time to fully analyze the files they received on September 19, 2006, and they reserve the right to raise at a later date issues related to those new copies of the files.

objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The government has the burden of demonstrating that a particular exemption applies, and courts review the determination de novo, giving no deference to the agency. 5 U.S.C. § 552(a)(4)(B).

FOIA Exemption 6 permits the government to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To determine whether this exemption applies, courts must balance the individual's privacy interest against the public's interest in "open[ing] agency action to the light of public scrutiny." *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 175 (1991) (internal quotation marks and citation omitted). Although government employees retain some personal privacy rights, those rights are "diminished" due to the nature of their employment. *Perlman v. U.S. Dep't of Justice,* 312 F.3d 100, 107 (2d Cir. 2002), *vacated,* 541 U.S. 970 (2004), *reaff'd,* 380 F.3d 110 (2d Cir. 2004) (citation omitted). The requirement that the invasion of privacy be "clearly unwarranted" instructs the court to "tilt the balance . . . in favor of disclosure." *Wash. Post Co. v. U.S. Dep't of Health and Human Servs*., 690 F.2d 252, 261 (D.C. Cir. 1982) (citation omitted). Here, the balance tilts strongly in favor of releasing the withheld information.

A. OPM Cannot Withhold the Names of Over 40% of the Federal Civilian Workforce Under Exemption 6.

1. The Privacy Interest in Federal Employee Names is Minimal or Non-Existent.

Federal civilian employees generally have a negligible privacy interest in their names, which have long been made public. As early as 1816, the federal government was releasing federal employee names. In 1966, the U.S. Civil Service Commission, the precursor to OPM, noted that the Official Register of the United States "for many years contained the names of all Government employees, with title, salary, State of origin, and duty station." 112 Cong. Rec. A1598 (1966). In

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

Even today, DoD regulations provide that names and duty stations of DoD civilian employees "normally may be released," 32 C.F.R. § 310.41, and OPM's regulations claim that name, title, salary, duty station, and position description of "most" federal employees are available to the public. 5 C.F.R. § 293.311. As the government itself admits, "OPM, DoD, and IRS have made information that would identify federal personnel available to the public in the past as a matter of course." Def. Mem. 11, n.11. Indeed, until the FOIA requests at issue here, plaintiffs regularly received names of most federal civilian employees in response to their FOIA requests to OPM, including names of employees at DoD, DEA, the Secret Service, and the U.S. Mint, and in the 24 "sensitive" occupations. Long Decl. ¶ 2. Under these circumstances, federal civilian employees cannot have a reasonable expectation that their names will not be disclosed to the public in response to requests for government files. *See Associated Press v. U.S. Dep't of Def.*, 410 F. Supp. 2d 147, 155 (S.D.N.Y. 2006) ("How, indeed, can one meaningfully speak in the informational context of a right to 'personal privacy' (as in Exemption 6) where the person or class of persons involved has no expectation of privacy?"). No individual taking a job with the government would expect that his name, and the fact of his employment, would be kept secret.

To the extent federal employees do have a privacy interest in their names, that interest is limited to keeping confidential information that could "subject them to embarrassment and

harassment in the conduct of their official duties and personal affairs." *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993); *see Wood v. FBI*, 432 F.3d 78, 88 (2d Cir. 2005) ("Names and other identifying information do not always present a significant threat to an individual's privacy interest. . . . . Instead, whether the disclosure of names of government employees threatens a significant privacy interest depends on the consequences likely to ensue from disclosure.") (internal citation omitted). Thus, courts have sometimes permitted the withholding of names of law-enforcement personnel based on findings that disclosure would subject them to harassment by making clear that they were involved in specific investigations or particularly sensitive policy decisions. For example, in *Lesar v. United States Department of Justice*, 636 F.2d 472, 488 (D.C. Cir. 1980), the D.C. Circuit permitted the withholding of names of FBI agents involved in investigating Martin Luther King, Jr. because of the "contemporary and controversial nature of the information." More recently, in *Gordon v. FBI*, 388 F. Supp. 2d 1028, 1044-45 (N.D. Cal. 2005), a court permitted withholding the names of FBI agents involved in the distribution, implementation, and maintenance of terrorist watch lists. *See also, e.g., Wood*, 432 F.3d 78 (permitting withholding of names of FBI personnel who investigated other FBI agents accused of lying in affidavits). The holding that employees have a privacy interest in not being harassed or embarrassed as a result of disclosure of their involvement in specific sensitive actions, however, does not authorize a "blanket exemption" for the names of all employees within a law enforcement agency. *Lesar*, 636 F.2d at 487; *Baez v. U.S Dep't of Justice*, 647 F.2d 1328, 1339 (D.C. Cir. 1980) (cautioning that the court did "not mean to imply a blanket exemption for the names of all FBI agents in all documents" because "[c]ertainly Congress did not intend this result"); *see also Armstrong v. Executive Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1995). Withholding is justified only by a particularized likelihood of embarrassment or harassment based on the specific work the employee performs.

Here, disclosure of the withheld names would not reveal specific facts about the employees outside of their employment within certain federal agencies or occupations, nor would it inform the public that these employees were involved in a particular investigation or policy decision. Instead of seeking an exemption targeted at such sensitive information, OPM seeks an exemption for *all* employees in five agencies and 24 occupations, over 40% of the federal civilian workforce.[4]

The government's sole explanation for its claim of a categorical exemption for the names of employees in DoD, DEA, ATF, the Secret Service, the U.S. Mint, and in the 24 occupations it deems sensitive is that those 800,000+ employees are *all* particularly subject to harassment and attack. Specifically, it claims that September 11, 2001, "made clear that federal employees, especially those involved with national security, homeland security, and law enforcement," are "prime terrorist targets." Def. Mem. 10. Although references to September 11 are rhetorically powerful, "[e]xemption 6 was directed at threats to privacy interests more palpable than mere possibilities," *Rose*, 425 U.S. at 380 n.19, and the government has done nothing but speculate that releasing the withheld names would make the employees vulnerable to harassment or terrorist attack.

For starters, OPM has provided no evidence beyond speculation that all employees in the enumerated occupations and agencies would be particularly vulnerable to attack if their names were released, nor has it even explained how it chose the 24 occupations, and the DEA, ATF, the U.S. Mint, and Secret Service to be subject to withholding.[5] *See Gordon*, 388 F. Supp. 2d at 1040 (agency

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[4]OPM also redacted names, organizational components, and/or duty stations for over 900 employees who do not work in any of the 5 enumerated agencies or 24 occupations. Long Decl. ¶ 14. It has provided no explanation for redacting those records, and they should be released.

[5]Although OPM's Vaughn Index claims it is withholding names and duty stations of Secret Service employees, neither Gary Lukowski's declaration nor Defendant's Memorandum provides an explanation for withholding that data.

had not met its burden where it offered "no evidence to support its speculation that the employees are likely to be harassed if their names are released"). With regard to the occupations, OPM has stated only that they are "national security, homeland security, law enforcement or other sensitive occupations" and that employees in those occupations "by virtue of their work or their agency's mission, are themselves and their families, potentially put in harm's way." Lukowski Decl. ¶ 31. Similarly, with regard to ATF, DEA, and the U.S. Mint, the government has claimed only that it determined that "the mission and nature of the work performed by those agencies rendered not only individuals in specific occupations within the agencies, but any employee in the agency, vulnerable to harassment or attack." *Id*. ¶ 32. OPM has offered no explanation of why terrorists would be interested in attacking all of these particular employees. It has presented no evidence, for example, that employees involved in "Hearings and Appeals," who adjudicate cases in formal and informal hearings, are subject to harassment, nor that the "General Biological Science" employees who are involved in regulatory enforcement and licensing are particularly vulnerable to attack. It has given no explanation why an accountant at DEA, or a legal technician at ATF, or a diversity manager at the U.S. Mint, has a strong privacy interest in his name. And it has offered no proof that releasing the name of an army pool lifeguard, or a military academy professor, or a commissary teller will subject that person to harassment or attack. In short, OPM's conclusory assertions are insufficient to demonstrate that these employees have a heightened privacy interest in their names.

Evidence indicates that, in fact, federal government employees in general and employees in criminal investigatory positions in particular have not been at increased risk of attack in recent years. Whereas, in fiscal year 1986 there were 627 recommendations by investigators that individuals be prosecuted under 18 U.S.C. § 111, which criminalizes assaulting or otherwise intimidating or interfering with United States employees, in fiscal year 2005, there were only 558 such referrals.

Long Decl. ¶ 66. A similar downtrend is noticeable in statistics regarding state and local law enforcement officers. Whereas in 1995, 74 such officers were killed in the line of duty, in 2004, 57 were killed. *See* FBI, Law Enforcement Officers Killed and Assaulted 2004, Table 1, available at http://www.fbi.gov/ucr/ killed/2004/table1.htm. These statistics hardly suggest an increased need to protect the names of all federal civilian employees somehow connected to law enforcement.

More fundamentally, the very notion that public knowledge of federal employees' names increases their chances of being targets of terrorist attack offends common sense. Defendant repeatedly invokes the attack on the Pentagon on September 11, 2001, as an explanation for its redaction of names, yet no one claims that the terrorists who hit the Pentagon were targeting specific individuals – except perhaps high-level officials, such as Donald Rumsfeld, whose names will be known anyway – or that knowing the names of specific Pentagon employees influenced their choice of target. The terrorists aimed not at specific employees, but at government facilities and other symbols of America itself. And although they killed many federal employees, the question here is not whether federal employees are sometimes the victims of terrorism, but whether releasing their names will make them more vulnerable to harassment or attack.

DoD invents a scenario in which hostile enemy forces use names from the CPDF files to find employees' home addresses and attack them and their families. Declaration of Michael B. Donley (Donley Decl.) ¶ 14. But if someone is determined to attack DoD personnel, there are many ways to figure out where they live. The locations of military installations, for example, are known to the public. *See* Long Decl. ¶ 61. Other government buildings are also identifiable, and employees could easily be followed home from work. In addition, members of the public often know – and are entitled to know – the names of federal employees with whom they have had contact and against whom they are therefore more likely to have a personal animus. Law enforcement personnel, for

example, often wear name tags or carry identification cards so that the public knows with whom they are dealing. And while OPM is redacting the names of all Internal Revenue Agents and Internal Revenue Officers, federal law requires that "any manually generated correspondence received by a taxpayer from the Internal Revenue Service shall include in a prominent manner the name, telephone number, and unique identifying number of an Internal Revenue Service employee the taxpayer may contact with respect to the correspondence." *IRS Restructuring and Reform Act of 1998*, Pub. L. No. 105-206, § 3705, 112 Stat. 685, 777 (1998). Similarly, Federal Register notices include both the name of the officer signing the policy and the name of an employee to contact for further information, 1 C.F.R. § 18.12, and a recent executive order requires agencies to post contact information for FOIA Public Liaisons on their websites. Exec. Order No. 13392, 70 Fed. Reg. 75373, 75374 (Dec. 14, 2005). And although OPM is redacting the names of U.S. Marshals and DoD employees from the CPDF, U.S. Marshal names are posted on the Department of Justice's website, and DoD's website names, among others, senior defense officials and key leaders in the Defense Finance and Accounting Service. *See* Long Decl. ¶¶ 62, 64. Releasing employee names can hardly put the employees at risk when the names have already been made public, often even to people with whom the employees have had personal contact. Indeed, even the memorandum by David Cooke upon which OPM relies to withhold all DoD names notes that names of personnel who interact with the public may be released. *See* Donley Decl., Exhibit 1. Yet OPM is redacting such names from CPDF records that do not tie them to particular issues or investigations.

Moreover, although DoD is withholding names and duty stations of all DoD personnel, DoD regulations state that such information is normally releasable, 32 CFR § 310.41(c)(1), and Navy regulations require lists of Navy employee names and duty stations to be released. *Id*. § 701.11(f)(3).

Of course, there may be some federal employees who, based on their specific work, are at

a real, particularized risk of harassment or attack. Recognizing this possibility, plaintiffs do not challenge the withholding of real names of IRS employees who have received pseudonyms because they have presented credible evidence of harassment or threats to their personal safety that have been reviewed by multiple levels of supervisory management.[6] *See* Adams Decl. ¶¶ 8-9. IRS's pseudonym program, however, highlights the overreaching in OPM's redaction of names overall. Although IRS has provided pseudonyms to only 666 employees, OPM redacted the names of the over 20,000 IRS employees in occupations it labels sensitive. Long Decl. ¶ 12. These thousands of employees, along with the hundreds of thousands of others without a particularized fear of harassment or attack, have no heightened privacy interest in their names.

2. The Public Interest in Disclosure is Strong.

In contrast to the minimal (or non-existent) privacy interest that OPM claims justifies its widespread withholding of names, the public has a strong interest in the disclosure of the names so it can "be informed about what [its] government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (quotation marks and citation omitted). OPM contends the public does not learn anything about the government's workings by knowing the names of individuals conducting the government's work, Def. Mem. 16, but that is not so. Government work is done by actual people, and who those people are makes a difference in how the work is done.

For example, TRAC conducted a study that found wide disparities in the rate at which immigration judges deny asylum requests: While one Miami judge turned down 96.7% of requests, a New York judge denied only 9.8%. Long Decl. ¶ 42. Similarly, TRAC traced a large drop in the

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[6]Plaintiffs do contest the replacement of real names with pseudonyms for those IRS employees who were allowed to keep pseudonyms provided before the enactment of the IRS Restructuring and Reform Act of 1998, when any employee who thought he could be identified by name was allowed a pseudonym. *See* Adams Decl. ¶ 9 n.4 & Exhibit B at 1.2.4.1(3).

enforcement of wildlife laws to the retirement of one employee. *Id*. ¶ 37. Being able to see how individuals affect an agency's actions can explain disparities in how the agency operates in different geographic areas or at different points in time and allow the public to determine whether the agency is operating in a fair and even-handed manner. *Id*. ¶¶ 37, 42. And because law enforcement personnel often have wide discretion in their enforcement activities, it is particularly important for the public to have access to their names to understand the government's actions. *Id*. ¶ 36. In short, "knowing *who* is making government policy . . . is relevant to understanding *how* the government operates." *Gordon*, 388 F. Supp. 2d at 1041 (emphasis in original).

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

Furthermore, disclosure of federal employee names helps the public uncover unethical or illegal agency activities, fulfilling "the basic purpose of FOIA," "to ensure an informed citizenry . . . needed to check against corruption." *NLRB v Robbins Tire & Rubber Co.*, 437 U.S. 214, 242

(1978). For example, using CPDF data, Associated Press reporters compared the names of Bureau of Land Management (BLM) employees against the names of people who had adopted horses through the U.S. Wild Horse and Burro Program and found that BLM employees were profiting from adopting horses and selling them for slaughter. Port Decl. ¶ 4. Similarly, Public Employees for Environmental Responsibility (PEER) used CPDF data to learn the names of and send surveys to more than 1,400 Fish and Wildlife Service (FWS) science professionals in ecological services field offices. Many of the scientists reported political interference in scientific determinations. Declaration of Jeff Ruch ¶ 8; *see* Long Decl. ¶ 19 (noting that BLM and FWS have employees in the 24 sensitive occupations).

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

In addition, although the defendant asks this Court to reject any interest the public has in being able to contact government personnel, Def. Mem. 12-13, the public often does need to get in touch with federal employees, and the names in the CPDF file can help the public know whom to

contact. Having access to federal employee names can also help individuals determine with whom in the government they have had contact and report instances of mistreatment or abuse. And public disclosure of whom the government is employing, and who is exercising the government's vast law enforcement powers, promotes public trust in the government and facilitates necessary communication between the government and the people.

In short, because the conduct of federal employees acting in their official capacity is "the agency's own conduct," *Reporters Committee*, 489 U.S. at 773, disclosure of the names of federal government employees – including those in the 5 agencies and 24 occupations for which names are being withheld – "sheds light on an agency's performance of its statutory duties." *Id*. It allows the public to better understand agencies' actions and policies, to determine whether agency offices are being efficiently run, to ascertain whether agencies are acting evenhandedly, to uncover unethical and illegal behavior by federal employees, and to know whom to contact when engaging in necessary interactions with the government. When compared to the negligible interest that federal employees have in their names, and given the speculative nature of the claim that release of the withheld names will put the employees at risk, the balance weighs heavily in favor of releasing the withheld names.

B. OPM Cannot Withhold Duty Station Information Under Exemption 6.

OPM's claim that duty-station information can be redacted pursuant to Exemption 6 is even weaker than its claim that names can be redacted.[7] Exemption 6 protects individuals against clearly unwarranted invasions of *personal* privacy. "The primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters." *Rose*, 425 U.S. at 375 n.14.

[7]Because OPM's sole explanation for redacting DoD bargaining units is that they would reveal duty stations, this section also applies to that information. It also applies to CSA, CBSA, LPA, and Organizational Component, where that information was withheld.

Thus, although the exemption applies to "intimate details of personal and family life," it does not protect "business judgments and relationships." *Sims v. CIA*, 642 F.2d 562, 575 (D.C. Cir. 1980). The duty station information OPM redacted is not personal.[8] Federal government employees thus do not have even a de minimis personal privacy interest in their duty stations which, like names, have long been available to the public, *see supra* pp. 5-6, and are recognized by OPM and DoD as generally releasable. 5 CFR. § 293.311; 32 CFR § 310.41(c)(1); *see also* 32 CFR § 701.11(f)(3).

Just as with names, however, OPM claims that releasing duty-station information for the hundreds of thousands of employees for whom it was redacted would render the employees vulnerable to harassment or attack. That is not the case. To begin with, though OPM describes the withheld information as "work addresses," Def. Mem. 10, the redacted information does not provide street addresses. Rather, the most specific duty-station information it provides is at the city or county level. Long Decl. ¶ 20. Release of the redacted information therefore would not enable individuals to harass, embarrass, or otherwise contact the employees at work (or, for that matter, at home).

Instead of claiming that release of the redacted duty stations would lead to intrusions on the employees' personal privacy, OPM claims that releasing the redacted information would place federal employees at risk by enabling terrorists to plan attacks designed to maximize the number of personnel killed (Donley Decl. ¶ 13) or kill people in specific occupations or agencies (*Id.*; Lukowski Decl. ¶¶ 31-32). In effect, OPM is arguing that national security concerns prevent the government from releasing the number of workers in the 24 occupations or five agencies who work in particular counties. *See* Donley Decl. ¶ 15. But Exemption 6 is designed to protect personal privacy, not national security. A different FOIA exemption, Exemption 1, exists for records related to national

[8]Indeed, when names are redacted, duty stations cannot even be associated with an individual.

defense or foreign policy. *See* 5 U.S.C. § 552(b)(1). OPM does not argue that Exemption 1 applies to the requested information, however, because the requested records do not satisfy Exemption 1: They are neither authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy nor have they, in fact, been properly classified pursuant to such an executive order. OPM cannot avoid the requirements of Exemption 1 by invoking Exemption 6 for what is an Exemption 1-type claim.

Moreover, once again, OPM has done nothing but speculate that releasing duty stations would make the employees more vulnerable to attack. OPM cannot demonstrate that release of the redacted information would put employees at increased risk. First, because duty-station information is provided only at the city or county level and higher, its release would not actually enable terrorists to know how many employees of a particular agency, or in a particular occupation, work at a specific street address. Second, just as terrorists do not choose their targets based on the names of individuals inside, they do not choose their targets based on the exact numbers of employees in specific occupations who work there. The terrorists who hit the Pentagon on September 11 chose that target because of its symbolism, not because they knew the exact number of civilian DOD employees working in Arlington county on that date. It is widely known that large numbers of DoD employees work at the Pentagon; the terrorists did not need an unredacted copy of the CPDF to know that hitting the Pentagon would result in high casualties for DoD personnel. Many other federal buildings are similarly already public, *see* Long Decl. ¶¶ 63-64 , and already obvious targets for terrorists. Once again, however, that certain federal employees could be at risk of terrorist attack does not mean that releasing the particular information at issue here would increase that risk.

Moreover, some of the duty-station information withheld by OPM is available through other means. For example, although OPM withheld border patrol agents' duty stations, the U.S. Border

Patrol, upon request, provided TRAC with sector-by-sector information on its employees. *Id*. ¶ 65. Similarly, OPM withheld duty stations for DoD employees, but DoD released the number of civilian employees, base by base, who would lose their jobs if particular bases were closed as part of its Base Realignment and Closure recommendations. *See* 2005 Defense Base Closure and Realignment Commission Report, Appendix K, *available at* http://www.brac.gov/docs/final/AppendixK.pdf. OPM redacted the duty stations of DoD, U.S. Mint, and ATF employees, but those agencies' websites provide information about many of their facilities and offices, including street addresses, that is far more specific than that in the CPDF, Long Decl. ¶¶ 61, 63, demonstrating that those agencies do not see a danger in public release of their facilities' locations. And although OPM redacted U.S. Marshals' duty stations, the Department of Justice's website lists their street addresses, and other agencies post names or contact information for other employees in the 24 occupations. *Id*. ¶ 64. Because duty-station information is sometimes easily available through other means, withholding it from the CPDF files does not protect the employees about whom information was withheld. It just denies the public the ability to conduct analyses with data that is in a standardized format and has undergone OPM's quality control checks. *See id*. ¶ 28.

While government employees have no privacy interest in their duty stations, release of duty-station information is extremely useful to the "public understanding of the *operations or activities of the government*." *U.S. Dep't of Defense v. Fed. Labor Relations Auth*., 510 U.S. 487, 495 (1994) (citation omitted) (emphasis in original). For many government activities, *where* federal employees are deployed determines who gets the benefits. Federal employee duty-station information thus provides individuals with a detailed picture of how the federal government operates in their backyards; it informs them of what services they are receiving for their tax dollars. By looking at duty-station information, the public can monitor where the government is spending its resources, see

whether some areas are receiving disproportionate resources, and judge whether the government is making rational decisions about where to concentrate its resources. Long Decl. ¶ 29.

Disclosure of duty stations can also explain differences in governmental activities across localities. Law-enforcement agency employees, for example, typically concentrate on investigations in their own geographical areas. By comparing staffing levels with statistics that indicate what types of law enforcement are needed, the public can learn whether investigation rates that differ across locality are based on different needs or just on different staffing decisions by management. *Id*. ¶ 31. A TRAC study on IRS audit rates, for example, found that differences in corporate audit rates were traceable to different staffing levels in different districts. Id. ¶ 30. Similarly, disclosure of duty stations can explain changes in law enforcement rates. For example, in the Environmental Protection Agency (EPA), agents who have supervisory duties do not investigate individual cases. Using CPDF duty-station data, PEER documented how the proliferation of new field offices within EPA's Criminal Investigations Divisions, by increasing the number of agents with supervisory duties, led to a decrease in the number of agents investigating potential criminal violations, which, in turn correlated with a decrease in the number of cases referred for prosecution. Ruch Decl. ¶ 7.

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

Disclosure of duty stations can also shed light on whether the government has responded to recognized problems, including in areas related to national security. For example, September 11 focused public concern on the porousness of the nation's border with Canada. To determine whether the government has increased patrol of the northern border in response to September 11, it is necessary to know the duty stations of Border Patrol agents, not just the number Border Patrol agents overall. *Id*. ¶ 33. However, OPM considers "border patrol agent" to be a "sensitive" occupation.

Just as it can shed light on the wisdom of the government's past policies and practices, disclosure of federal employees' duty stations can allow evaluation of proposed policies. For example, when agencies outsource jobs, lower-level jobs are often replaced. By looking at grade and duty-station information, the public can determine what localities will be most affected by a proposal to outsource jobs at certain agencies. Ruch Decl. ¶ 5.

Given the many ways in which knowing how the government distributes its staffing resources contributes to the public's understanding of "what the government is up to," the public interest in the withheld duty stations far outweighs the non-existent privacy interest in the records.

C. OPM Cannot Withhold Organizational Component Under Exemption 6.

The public has additional interests in the field Organizational Component that tilt the balance even further towards disclosing that field. Knowing how many employees are assigned to particular units within agencies informs the public about where an agency is focusing its resources and what activities it is undertaking. It also allows the public to see the personnel costs involved in conducting each unit's tasks. Long Decl. ¶ 46.

Moreover, not all codes in the Organizational Component field include geographic information, Long Decl. ¶¶ 26-27, and, even when they do, not every part of the 18-digit code reveals geographic information. The whole field should be released, but, in the alternative, the codes and

portions of codes that do not contain geographical information are segregable.[9]

D. OPM Cannot Withhold IRS Bonus Information Under Exemption 6.

OPM withheld award dollar amounts for certain IRS awards, claiming that release of those award amounts would enable the public to determine employees' average performance appraisal scores. The connection between the award field and employees' performance scores, however, is not as direct as OPM claims. OPM does not provide plaintiffs with information on each award an employee receives; instead, it sums up all awards an employee receives each quarter and releases them in a field titled "Total Award." Long Decl. ¶ 48. Because IRS gives awards that are not performance awards, *see id*., someone looking at an employee's total award amount would not be able to determine that employee's performance appraisal score. Moreover, factors such as the amount of time the employee has been in the bargaining unit affect award amounts, and the Internal Revenue Manual states that monetary awards can be distributed as a combination of cash and time-off, thereby making reverse-engineering even more difficult. *Id*.

Moreover, the public has a strong interest being able to see whom the government is rewarding. *See* Long Decl. ¶ 49. The IRS is prohibited from using records of tax enforcement results to evaluate employees or impose production quotas or goals. *See IRS Restructuring and Reform Act of 1998*, 112 Stat. 685, 722. Learning who is receiving performance awards, and the levels of those awards, enables the public to better understand what behavior the IRS values and to see if the IRS is rewarding its most aggressive employees, "rank[ing] employees or groups of employees based solely on enforcement results . . . or otherwise undermin[ing] fair treatment of

[9]Similarly, if this court holds that OPM can redact LPA for the enumerated agencies and occupations, it should require OPM to segregate and release the code that indicates just that employees are not in a locality requiring special pay. *See* Long Decl. ¶ 23.

taxpayers," H. R. Conf. Rep. No.105-599, at 47 (1998), *reprinted in* 1998 U.S.C.C.A.N 288, as it has often been suspected of doing. *See* David Burnham, *A Law Unto Itself: Power, Politics, and the IRS* 154-56 (Random House 1989) (discussing hearing testimony that IRS based promotions on production requirements). In addition, knowing the dollar amount of awards is necessary for the public to see whether the agency is rewarding an inner circle of people, *see* Long Decl. ¶ 50, and to understand how much money the agency is actually spending on employee compensation.

E. OPM Has Not Properly Justified Its Invocation of Exemption 3.

OPM also claims that it is withholding names and duty stations of an unspecified number of DoD employees under Exemption 3, which permits agencies to withhold records that are specifically exempted from disclosure by statute. 5 U.S.C. § 552(b)(3). OPM has not justified its invocation of that exemption. The statute upon which OPM relies is 10 U.S.C. § 130b, which permits the Secretary of Defense to authorize the withholding of certain personally identifying information of employees assigned to overseas, sensitive, or routinely deployable units. OPM has neither stated how many names and duty stations it is withholding under Exemption 3, specified *which* records it has redacted under that exemption, nor provided any substantiation for its claims that the specific records it is withholding are covered by the statute. *See* 10 U.S.C. § 130b(c)(3)-(5) (providing definitions of overseas, sensitive, and routinely deployable units). Because the burden is on the agency to demonstrate that a FOIA exemption applies, the government must correlate claimed exemptions with the records it is withholding under those exemptions, *Mead Data Cent. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977); *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), and must provide a fact-specific justification of why the withheld "information logically falls within the claimed exemption." *Halpern v. FBI*, 181 F.3d 279, 291 (2d Cir. 1999) (quoting *Lesar*, 636 F.2d at 481). Without any explanation of which records are being withheld under

Exemption 3 or a justification for why OPM believes 10 U.S.C. § 130b applies to those particular records, plaintiffs cannot "contest the [withholdings] in adversarial fashion," and this Court cannot "engage in effective *de novo* review of [the agency's] redactions." *Halpern*, 181 F.3d at 293

Moreover, 10 U.S.C. § 130b does not permit OPM to withhold duty stations for *any* federal employee. "Personally identifying information," as defined in the statute, "means the person's name, rank, *duty address*, and official title and information regarding the person's pay." 10 U.S.C. § 130b(c)(1) (emphasis added). 32 C.F.R. § 286.12(f)(2) clarifies that duty addresses are "postal and/or e-mail" addresses. *See also id*. § 518.13(c)(1) (same); *id*. § 701.59(f)(3) (same); *Ward v. Alabama*, 31 F. Supp. 2d 968, 969 (M.D. Ala. 1998) (mentioning military personnel receiving mail at their "duty addresses"); *United States v. Hock*, 31 M.J. 334 (C.M.A. 1990) (same for "duty address"); P.L. 104-193, Title III, § 363(a), 110 Stat. 2247 (Aug. 22, 1996) (treating "duty address" as having the same level of specificity as "residential address"). As noted, the withheld duty-station information does not contain postal or e-mail addresses; it provides employees' locations on a city or county level and higher. In other words, "duty station" and "duty address" are not equivalent, *see* 32 C.F.R. § 113.6(b)(1)(iv)(A) (discussing inclusion of "duty station *and* duty address" on an application) (emphasis added), and 10 U.S.C. § 130b does not authorize withholding duty stations.

F. OPM Has Not Indicated the Amount of Information Deleted from the CPDFs.

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 not abided by this requirement. Because OPM does not indicate when it makes redactions, plaintiffs do not know what fields and records exist in the master CPDF files or which CPDF records contain information and which are blank. Therefore, plaintiffs can never be

certain of the scope of OPM's withholdings. *See* Long Decl. ¶¶ 53-59 .

In some instances, OPM has redacted information without indicating that it has done so. For example, plaintiffs received only blanks in the fields Prior Duty Station, Prior Pay Plan, Prior Grade, Prior Step, Prior Pay Rate Determinant, Prior Pay Basis, Prior Basic Pay, and Prior Work Schedule for records of employees of DEA, ATF, the U.S. Mint, and Secret Service. *Id*. ¶ 52. Unless OPM has no information in these fields on any employees in those agencies, it has redacted information from that field without indicating the amount of information redacted. In other instances, OPM indicated that it had redacted information when it had not done so. For example, OPM places asterisks in the duty station field when it is has no information in that field for an employee in the original file. However, it did not place asterisks in the duty station field for any DoD, DEA, ATF, U.S. Mint, or Secret Service employees. It thus seems likely that OPM is marking that it redacted records in those fields that had no information in them to begin with. *Id*. ¶ 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.[10]

In addition, OPM withheld numerous fields and records that are not mentioned in its Vaughn Index, some of which its 2004 data release policy even mentions as being releasable by name, *see* Long Decl. Exhibit A, and it did not indicate the amount of information that was in those fields and records. For example, although Gary Lukowski's declaration asserts that there are approximately 100 fields in the CPDF, Lukowski Decl. ¶ 20, and OPM's data release policy dated December 4,

[10]Because of the very nature of the problem, that OPM does not make clear when and where it has redacted information, and because OPM has not listed all its withholdings in its Vaughn Index, plaintiffs are unable comprehensively to list for the Court every instance in which OPM has not indicated its redactions. Moreover, the problem is more systemic than the few examples listed here.

2004, lists 59 fields in the status file and 69 fields in the dynamics file, Long Decl., Exhibit A, OPM provided plaintiffs with records from only 45 fields. *See* Lukowski Decl. ¶ 26. Similarly, OPM withheld all records on employees who did not have "P" in the pay status field, *id*. ¶ 21, and withheld quarterly file records if they could not be matched to employees in the status file. *Id*. And OPM did not release portions of the code table containing definitions of codes that related to fields it did not release. Long Decl. ¶ 58. It would be technically feasible for OPM to indicate the amount of information deleted from fields and records not mentioned in its Vaughn index at the place in the files where those deletions were made, and OPM should be required to do so.

CONCLUSION

This court should grant plaintiff's motion for summary judgment, and order OPM to release the withheld names, duty stations (including CSA, CBSA, and LPA), organizational components, bargaining units, and award amounts, and to mark the extent of information redacted on the released files in the places where the redactions were made.

Dated: September 22, 2006

Respectfully submitted,

/s/

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