UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BADER FAMILY FOUNDATION, Plaintiff, v. U.S. DEPARTMENT OF EDUCATION, Defendant.	Civil Action No. 21-1741 (DLF)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

This defendant has not shown that it withheld only material that is properly exempt from release under the Freedom of Information Act. It improperly withheld material as exempt for release under FOIA Exemption 6, by inaccurately describing the nature of that redacted material – as plaintiff discovered by obtaining a copy of one such unredacted record from the author of that record, James P. Scanlan, who has submitted one of the accompanying declarations.

Nor has it shown that it conducted a thorough search for responsive records. It failed to search a private, non-official email account of a high-ranking agency official, even after plaintiff's counsel brought to defendant's attention evidence that that email account contained an email about school discipline, the subject of plaintiff's FOIA request.

Moreover, it failed to release copies of responsive records covered by plaintiff's request that were sent to that agency official's email accounts, showing that it, at a minimum, failed to conduct an adequate search. Plaintiff is aware of a couple examples of such agency records that were never produced (which are attached to the accompanying declarations), and they could very well be the tip of the iceberg. Defendant also improperly excluded responsive records *about* school discipline from the search results, by using very narrow search terms that exclude those responsive records.

In light of its inaccurate and unreliable claims, and failure to release all responsive records, defendant's motion for summary judgment should be denied. It should be ordered to conduct a more thorough search, and the court should conduct an *in camera* review of all withheld or redacted records, to see how many of them contain redacted material that is at variance with what defendant described redacting, or contain reasonably segregable material that should have been released.

ARGUMENT

I. Defendant Improperly Withheld Non-Exempt Information – the Acting Assistant Secretary's Email Address-- Under Exemption 6, Mischaracterizing It to the Court

Defendant did not disclose to the Court that it redacted the private, non-official email address of any agency official, much less a high-ranking official. Instead, it falsely indicated that it only redacted the "email addresses of non-federal employees." Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 6; Declaration of Kristine Minami ¶ 20.

But, in fact, it redacted the email address of Suzanne Goldberg, the Acting Assistant Secretary of Civil Rights,[1] sgoldb1@law.columbia.edu, from an email sent to her and other Education Department officials by Washington lawyer James P. Scanlan. *See* Declaration of James P. Scanlan (attaching that email in unredacted form).

Goldberg is a federal employee, not a "**non**-federal employee." And that email address was prominently and publicly listed on Goldberg's web page at Columbia Law School, which touted her position as "acting assistant secretary" in the Education Department's "Office for Civil Rights" and listed "sgoldb1@law.columbia.edu" as her "CONTACT" email address (see Declaration of Hans Bader ("Bader Decl."), ¶ 4 & Ex. 4 (reproducing relevant portions of the web page[2]).

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[1] *See* U.S. Department of Education, *Office for Civil Rights: Key Staff*, https://www2.ed.gov/about/offices/list/ocr/contactus2.html ("**Suzanne Goldberg** — Deputy Assistant Secretary for Strategic Operations and Outreach"); *see Nebraska v. EPA*, 331 F.3d 995, 998 (D.C. Cir. 2003) (court can take judicial notice of web site); Minami Decl. ¶ 7 (Goldberg is one of the "political appointees").

[2] As of the date this brief was filed, that web page could still be found at https://www.law.columbia.edu/faculty/suzanne-goldberg.

It is not private information of the sort that can be redacted under Exemption 6, [3] the way a private citizen's email address often can be.[4] The use of private email accounts to conduct government business is a matter of public concern, and rather than being a purely private matter, is a classic example of government activity that has long attracted public scrutiny from both the press and Congressional overseers, who view it as shedding light on government functions and operations.[5]

The presence of this email address was information that plaintiff had a right to know, because it would have further demonstrated that Goldberg's Columbia Law School email account contains agency records, reinforcing plaintiff's repeated argument to defendant[6] that it should have searched that email account for agency records. *See CEI v. OSTP*, 827 F.3d 145 (D.C. Cir. 2016) (agency records are subject to FOIA even when they are in an agency official's non-official, private email account); *Landmark Legal Foundation v. EPA*, 959 F.Supp.2d 175,

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[3] *See, e.g., Nissen v. Pierce County*, 357 P.3d 45, 56 (Wash. 2015) (rejecting argument that requiring public "employee" to produce text messages on his private cell phone in response to a public records request would violate "various provisions of the state and federal constitutions" such as the Fourth Amendment; no "privacy interest" exists in such "a public record").

[4] More sensitive and less public information has been ordered released under Exemption 6, such as private citizens' email addresses, when the addresses potentially related to a matter of public concern. *See Prechtel v. FCC*, 330 F. Supp. 3d 320, 329-34 (D.D.C. 2018) (ordering disclosure of email addresses of bulk submitters and individual commenters, given allegations of deceptive comment submissions). Moreover, in light of the fact that the private email account has already been revealed in this lawsuit and the accompanying declaration, withholding it would do nothing to preserve any privacy interest.

[5] *See, e.g.,* Senate Committee on Environment and Public Works, Minority Report, *A Call for Sunshine: EPA's FOIA and Federal Records Failures Uncovered* (Sept. 9, 2013) at 8-13, http://goo.gl/CnGgtR (discussing and criticizing the use of private email accounts to conduct government business at length); Stephen Dinan, *EPA Officials Lied About Email Use*, *Senator Says*, Washington Times, March 11, 2013, at A4 (discussing use of private email accounts to conduct government business); Dinan, *Sunshine Law Gets Cloudy When Federal Officials Take Email Home*, Washington Times, Aug. 14, 2013, at A1 (same); Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, Washington Times, Apr. 9, 2013, at A4 (same).

[6] *See Declaration of Hans Bader* ¶ 1 & Ex. 1.

181-82 (D.D.C. 2013) (denying agency summary judgment where it ignored plaintiff's request to search agency officials' private email accounts).

Defendant did not disclose that it redacted such information. Instead, Defendant's summary judgment memorandum states (pg. 6) that the

> Department redacted personal or school (*i.e.*, non-work) email addresses of **non-federal employees**; the personal cell phone number of Department employee Monique Dixon; and the cell phone number of a non-federal employee. Minami Decl. ¶ 20. The Department also withheld information of a personal nature regarding a third-party; the Department withheld the name of one individual (a non-federal employee) who was invited as a non-work affiliated panelist but did not accept the invitation and did not attend the event. *Id.* ¶ 22. Finally, the Department withheld the unique Microsoft Teams Conferencing ID numbers of Department employee Carolyn Seugling. *Id*. ¶ 25.

Similarly, the Declaration of Kristine Minami states in ¶ 20 that

> The Department withheld the personal cell phone number of Department employee Monique Dixon, the personal or school (*i.e.*, non-work) email addresses **of non-federal employees** including third parties and students, and the cell phone number of a third party.

This phrasing was very misleading, and failed to disclose that at least one email address of a federal employee had been redacted and withheld. Even if one charitably assumes that defendant did not intentionally mislead the court in how it described the redacted material, it is still a clear discrepancy.

The discrepancy was made more difficult to detect by the general nature of the defendant's declaration and memorandum, which do not make exemption claims on a document-by-document basis, as is the norm in FOIA cases, but rather make claims about what is found in the redacted material as a whole. Defendant has made generalized claims of exemptions without even explaining why they apply on a document-specific basis, as is required for the *Vaughn* Index mandated in FOIA cases. And it has submitted no *Vaughn* Index at all.

That generality and vagueness are a reason for order this court to conduct *in camera* review of the redacted and withheld records. So is the fact that the agency falsely characterized the redacted material such including Suzanne Goldberg's email address – which is evidence of possible bad faith.[7] As the D.C. Circuit has explained, "in camera review may be particularly appropriate when either the agency affidavits are insufficiently detailed to permit meaningful review of exemption claims or there is evidence of bad faith on the part of the agency." *Quiñon v. FBI,* 86 F.3d 1222, 1228 (D.C. Cir. 1996).[8] "If the [Vaughn Index] categories remain too general, the district court may also examine the disputed documents in camera to make a first hand determination." *In re DOJ*, 999 F.2d 1302, 1310 (8th Cir. 1993) (en banc).

Even if bad faith did not explain defendant's misleading claim, *in camera* review is still appropriate in light of the discrepancy, and what it says about the inaccuracy and unreliability of the agency's claims. *See also Mehl v. EPA*, 797 F.Supp. 43, 48 (D.D.C. 1992) (contradiction between agency's affidavits and information in published report justified in camera inspection); *People for the American Way Foundation v. National Park Service*, 503 F.Supp.2d 284, 307 (D.D.C. 2007) ("discrepancy...between an agency's affidavit and other information" justifies in camera review).

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[7] *See Landmark Legal Foundation v. EPA*, 959 F.Supp.2d 175, 182 (D.D.C. 2013) (evidence that the agency made inaccurate claims about documents "rebut the presumption of good faith" on the part of the agency, defeating summary judgment).

[8] *See also Islamic Shura Council of S. Cal. v. FBI*, 635 F.3d 1160, 1166 (9th Cir. 2011) ("If the [agency's] affidavits are too vague, the court 'may examine the disputed documents in camera to make a first hand determination of their exempt status.'"); *Spirko v. USPS*, 147 F.3d 992, 997 (D.C. Cir. 1998) ("If the agency fails to provide a sufficiently detailed explanation to enable the district court to make a de novo determination of the agency's claims of exemption, the district court then has several options, including inspecting the documents in camera.").

So this court should conduct *in camera* review of the withheld records, to see whether their content actually matches the claims made by the defendant, or whether it instead contains non-exempt information.

Because the agency's claims are unreliable, it has not met its burden of proving that the redactions contain only exempt information. The "burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' 'withheld.'" *Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *see also Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) ("the burden is on the agency to prove de novo in trial court that the information sought fits under one of the exemptions to the FOIA"); *Goland v. CIA*, 607 F.2d 339, 352 (D.C.Cir.1978)(agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is . . . exempt").

II. Defendant Failed to Conduct An Adequate Search for Responsive Records

Defendant also failed to conduct an adequate search for responsive records. It failed to search Suzanne Goldberg's Columbia email account, sgoldb1@law.columbia.edu, even after that account was brought to defendant's attention as containing agency records. *See* Bader Decl. ¶ 1 & Ex. 1. And it failed to certain produce responsive records from her email accounts, which both improperly withheld those agency records, and demonstrated a genuine issue of material fact as to whether defendant's search was adequate. *See* Bader Decl. ¶ ¶ 2-3, Ex. 2 & 3. And it used overly narrow search terms, that would exclude most responsive records about the specified topic, school discipline.

A. Defendant Failed to Search Assistant Secretary Goldberg's Columbia Email Account, Even After Plaintiff Pointed to Evidence It Contained Agency Records

"If an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search" them, even if they are away from the agency's offices. *See Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327-28 (D.C.Cir.1999) (notice to agency of possibly "overlooked materials" located in Georgia, far away from its office, barred summary judgment in its favor); *accord Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested."); *CEI v. OSTP*, 827 F.3d 145 (D.C. Cir. 2016) (reviving lawsuit seeking correspondence from email account at Woods Hole Research Center in Massachusetts, hundreds of miles away from the agency's offices in Washington, DC).

The agency bears the "burden of showing that its search was adequate," rather than the requestor having to prove that it was inadequate. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.1994). It must demonstrate that "each document that falls within the class requested" has either "been produced" or is "exempt." *Goland v. CIA*, 607 F.2d 339, 352 (D.C.Cir.1978).

Yet here, the agency has not met its burden, because it has not alleged searching Secretary Goldberg's Columbia email account, sgoldb1@law.columbia.edu, even after plaintiff pointed to signs that it contained agency records. *See* Bader Decl. ¶ 1 & Ex. 1.

The D.C. Circuit has ruled that agency records are subject to FOIA even when they are in an agency official's non-official, private email account. *CEI v. OSTP*, 827 F.3d 145 (D.C. Cir. 2016) (agency records are subject to FOIA even when they are in an agency official's non-official, private email account).

Plaintiff's search declaration does not mention searching any private email account, and thus does not meet its burden of proving it searched any such account. *See Landmark Legal Foundation v. EPA*, 959 F.Supp.2d 175, 181-82 (D.D.C. 2013) (concluding that agency

obviously "did not search the *personal* email accounts" of agency officials where agency's summary judgment filing "never addresses [plaintiff]'s allegation that official business was being conducted from the personal email accounts. Instead, it states only that it 'searched for and produced responsive documents from outside parties and accounts *that were in its possession and control.*'").

An agency needs to be *specific* about what files it searched, to make clear that it searched all relevant files and record systems. *See Ancient Coin Collectors v. State Dept.*, 641 F.3d 504, 515 (D.C. Cir. 2012) (summary judgment denied where agency failed "to inform the court" whether "backup tapes of any potential relevance exist.") Yet Defendant merely mentions searching "custodians" "**within** the Office for Civil Rights." *See* Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 4 (emphasis added).

But private email accounts outside the Education Department's Office for Civil Rights were clearly covered by plaintiff's FOIA request, which stated, "Emails are covered regardless of whether they are in an official Education Department email account, or an Education Department employee's non-official or private email account." Declaration of Kristine Minami, Exhibit A; Amended Complaint, ¶ 12.

Moreover, plaintiff specifically requested, over and over again, that defendant search the email account sgoldb1@law.columbia.edu. Bader Decl. ¶ 1 & Ex. 1. *Compare Landmark Legal Foundation v. EPA*, 959 F.Supp.2d 175, 181 (D.D.C. 2013) (agency should have searched agency officials' "personal email accounts" in case where plaintiff "raised this issue" with the agency "in a meeting" and "emphasized it again in their opposition brief"). And plaintiff pointed to specific evidence that agency records would be found in that account if it were searched, such

as enclosing an email about school discipline sent to that account. *See, e.g.,* Bader Decl., Ex. 1 (Oct. 19, 2021 email to defense counsel).

On September 3, 2021 at 5:20 pm, plaintiff's counsel Hans Bader wrote to Assistant U.S. Attorney Kathleene Molen, who was then counsel for defendant in this case, stating,

> "I believe that correspondence covered by plaintiff's FOIA request was sent to Suzanne Goldberg's Columbia email account, sgoldb1@law.columbia.edu, such as from attorney James P. Scanlan. Did the Education Department search that email account for responsive records? *Compare Competitive Enterprise Institute v. OSTP*, 827 F.3d 145 (D.C. Cir. 2016) (ruling that agency officials' private non-official email accounts, not merely their official email accounts, are subject to FOIA, and that my client accordingly could seek records in OSTP Director John Holdren's private email account, jholdren@whrc.org)."

Bader Decl. ¶ 1 & Ex. 1. (The email attached to the Declaration of James P. Scanlan indicates that it was sent to Goldberg's Columbia email account, sgoldb1@law.columbia.edu).

Molen never responded to this email.[9] Bader mentioned this issue to Molen telephonically and in writing thereafter, but Molen never addressed whether defendant would search that account. See Bader Decl. ¶ 1 & Ex. 1.

Bader pointed to additional evidence of work-related correspondence found only in that account. For example, in an October 19 7:58 pm email to Assistant U.S. Attorney Molen, Hans Bader wrote: "Here's an additional example of a work-related email being sent to sgoldb1@law.columbia.edu. To support plaintiff's request that that non-official email account be searched for responsive records (a request I've previously made, such as in my Sept. 3 at 5:20 pm email). In addition to the responsive emails I mentioned earlier that involve correspondence with sgoldb1@law.columbia.edu." See Bader Decl. ¶ 1 & Ex. 1.

Bader's email to Molen forwarded a May 11, 2021 email about school discipline and civil-rights issues that was addressed to "Dear Acting Assistant Secretary Goldberg" at

[9] Molen did respond to an unrelated email sent by Bader on September 3, 2021 at 6:32 pm, in a reply email on September 7, 2021 at 9:23 am. That shows Bader's emails were being received and read. *See* Bader Decl., fn. 1.

sgoldb1@law.columbia.edu, which had been blind carbon copied to Hans Bader's Yahoo email account. (See Bader Decl. ¶ 1 & Ex. 1). This email had not been addressed to any email account other than Goldberg's Columbia email account, meaning that failing to search that account would leave records like this unproduced in response to FOIA requests.

The email, dated May 11, 2021, was indeed work-related enough to constitute an agency record covered by FOIA,[10] because it discussed "racial disparities in school discipline rates," whether "the Education Department's Office for Civil Rights should target them under Title VI of the Civil Rights Act" in light of "the Education Department's own statistics," and how "ED and DOJ should examine such realities with a broad lens, in their May 11 joint event, 'Brown 67 Years Later: Examining Disparities in School Discipline and the Pursuit of Safe and Inclusive Schools.'" (See Bader Decl. ¶ 1 & Ex. 1).

But defense counsel Kathleene Molen never responded to this request in Bader's October 19 email, either, even though she responded to many other Bader emails. See Bader Decl. ¶ 1.

Bader's query remained unaddressed on November 2, 2021,at 3:36 am, when Molen sent her final email to Bader, stating that she was withdrawing from the case.[11] Given that Molen consistently received and responded to Bader's emails on other topics, it seems evident that Molen was avoiding responding to this particular query.

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[10] *See, e.g., Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ*, No. 17-6335, 2019 WL 2717168, at *2 (S.D.N.Y. June 28, 2019) (rejecting defendant's position that certain emails were personal records because "[t]he emails, which concern voting integrity, and which were received and created by CRT employees who enforce voting law, 'reflect substance related to, and therefore shed[] light on' the conduct of their official duties.").

[11] Molen wrote, "I'm reaching out to you regarding BFF v Ed, case no. 21-1741. Going forward, AUSA Doug Dreier (copied) will be handling this case. AUSA Dreier will be filing a substitution of counsel shortly."

Defendant's failure to ever to deny that responsive emails are found in Goldberg's private email account, even after plaintiff raised it, strongly indicates that it does in fact contain such responsive records, and warrants drawing an adverse inference against it on this issue. *See, e.g., Gray v. Great American Recreation Ass'n,* 970 F.2d 1081, 1082 (2d Cir.1992) (adverse inference drawn when a litigant fails to provide relevant information within its possession).[12]

Moreover, Goldberg's Columbia email account contained yet another responsive record, clearly within the scope of plaintiff's FOIA request, that was blind carbon copied to the email account of plaintiff's counsel Hans Bader, yet was never produced by defendant. Bader Decl. ¶ 2 & Ex. 2.[13]

The existence of that record is an additional reason to order that account to be searched. *See Landmark Legal Foundation v. EPA*, 959 F.Supp.2d 175, 181-82 (D.D.C. 2013) (fact that plaintiff had "one disclosed record" from an agency official's non-agency "personal email account" supported its demand that agency officials' non-official personal email accounts should be reached).

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[12] When a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to' that party" under "the adverse inference rule." *Radio TV Reports v. Ingersoll*, 742 F.Supp. 19, 22 (D.D.C. 1990), *quoting UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C.Cir.1972); *accord Baxter v. Palmigiano,* 425 U.S. 308 (1976); *Clifton v. U.S.*, 45 U.S. 242, 247 (1846). The nonproduction of available evidence "permits the inference that its *tenor is unfavorable to the party's cause.*" 2 Wigmore, *Evidence In Trials At Common Law,* § 285 (Chadbourn rev. 1979).

[13] If the email was sent to and received by plaintiff, it was simultaneously sent to and received by defendant, too. Unlike postal mail, which can easily be lost or delayed, emails are automatically and almost instantaneously received. So proof that an email was sent is also proof that it was received by the email accounts it was sent to, absent contrary evidence. *See, e.g., Bottega Veneta Intern., S.A.R.L. v. Xuefeng Pan*, 2010 WL 8424472, *2 (S.D. Fla. Dec. 9, 2010); *Government Relations Inc. v. Howe*, No. 5-1081-CKK, 2007 WL 201264, *5 (D.D.C. Jan. 24, 2007); *cf. Rio Properties, Inc. v. Rio International Interlink,* 284 F.3d 1007, 1017-18 (9th Cir.2002) ("If any method of communication is reasonably calculated to provide [defendant] with notice, surely it is email,' the only "method of service aimed directly and instantly" at the defendant).

A May 11, 2021 6:26 PM email sent to sgoldb1@law.columbia.edu from fredwoerhle@gmail.com begins:

> Dear Acting Assistant Secretary Goldberg:
>
> In your opening remarks at today's event, you cited "a 1995 report from the Children's Defense Fund called 'School Suspensions: Are They Helping Children?' This report found based on OCR's Civil Rights Data Collection that black students were being disciplined at a higher rate than any other students and not because of higher rates of misbehavior."
>
> Is this old report's claim about misbehavior rates -- which is not actually shown by CRDC data -- obsolete in light of more recent surveys and studies showing that black students do in fact have higher rates of misbehavior in school?
>
> For example, data from the National Center for Education Statistics shows a much higher rate of misbehavior among black students for certain offenses, such as fighting in school.

The above email was also blind carbon copied to Hans Bader, the counsel for plaintiff, at "Bcc: hfb138@yahoo.com." Bader Decl. ¶ 2 & Ex. 2.

The above email is clearly within the ambit of plaintiff's May 21, 2021 FOIA request, which sought emails about precisely this topic and between precisely these email addresses. Plaintiff's FOIA request sought "Emails about school discipline or school disciplinary policies sent or received by … any presidential appointee or political appointee … in the Office for Civil Rights…that were also sent or received by any of the following people or email accounts," including "Fred Woehrle" or "fredwoerhle@gmail.com" between "January 20, 2021" and "the date you process this request." Defendant's Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 8; Declaration of Kristine Minami, ¶ 4 & Exhibit A. The subject line of this email contains the words "school discipline," it is addressed to a covered political appointee (Goldberg), and it falls within the date range covered by the FOIA request (from January 20,

2021 to no earlier than May 25, 2021[14]), and it contains the words "From: Fred Woehrle (fredwoerhle@gmail.com)." *See* Bader Decl. ¶ 2 & Ex. 2.

Yet defendant never released this email to plaintiff. Nor did plaintiff produce any responses by Goldberg to this email, even though Education Department officials often acknowledge receiving emails or answer concerned citizens' questions. Bader Decl. ¶ 9.

(Note that in defendant's electronic files, this email may bear a slightly different time of day – for example, "6:27 PM" rather than "6:26 PM" -- because emails can take a few minutes to reach a recipient, and sometimes reach different recipients at slightly different times[15]).

Defendant ignored plaintiff's specific advice to search more thoroughly for emails from this particular account. As Bader warned Molen in a September 1, 2021 10:38 AM email (that is found in Bader Decl., Ex. 1),

> there should be more responsive records. There were various emails forwarded or blind carbon copied to people I know that appear in the produced records (like James P. Scanlan's in the 301-357 tranche of responsive records -- Scanlan customarily copies or forwards his emails to various think-tanks or lawyers after writing to the Department of Education or DOJ) but not others, which don't show up in the produced records -- there are very few in the responsive records produced thus far, suggesting records were overlooked, or certain search terms not used…. I see a few emails from jps@jpscanlan.com, a prolific emailer, but I don't see any emails from fredwoerhle@gmail.com, which I would expect to see).

But defense counsel displayed no concern about such potentially missing records, nor any interest in examining how defendant's search might have been inadequate or could have been made more thorough. Defendant remained indifferent to the lack of thoroughness of its search,

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[14] The date range for the FOIA request is from January 20, 2021 to the date Defendant processed plaintiff's request. *See* Defendant's Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 1. Defendant did not process Plaintiff's FOIA request before May 25, 2021. *See* Defendant's Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 3 ("On May 25, 2021, a search for responsive records was initiated").

[15] For example, the email of James P. Scanlan is shown as having the time "3:27 PM" as produced by defendant (see Bader Decl. ¶ 5 & Ex. 5), but the same email is shown as having a "3:26 PM" time on the unredacted version of the email attached to Mr. Scanlan's declaration.

even when plaintiff specifically noted that responsive records had likely been overlooked that came from particular email accounts, such as fredwoerhle@gmail.com, from which defendant failed to produce the responsive record discussed above.

The fact that Goldberg's account contains agency records like this one and the one from Scanlan raises genuine issues of material fact about defendant's compliance with its FOIA obligations in general, making summary judgment inappropriate. *See, e.g., Brennan Ctr. for Justice v. DOJ*, 377 F.Supp.3d 428, 435 (S.D.N.Y. 2019) (finding that "[e]vidence of a record on a personal account is sufficient to raise a question of compliance with recordkeeping obligations, rendering the presumption of compliance inapplicable").

When people email the Education Department about school discipline, they sometimes forward or copy their emails to lawyers and think-tank scholars, including Bader. *See* Bader Decl. ¶ 8 & Ex. 1 (Sept. 1, 2021 10:38 AM email to defense counsel). Thus, hiding responsive records from FOIA requesters (or failing to search for them) can be risky, because lawyers -- such as plaintiff's counsel -- may already have them and know that they are being withheld. Yet defendant did not bother to go back and conduct a thorough search for the responsive records.

B. Defendant Withheld At Least Two Responsive Records That Are In Plaintiff's Possession, Demonstrating An Inadequate Search and the Existence of Improperly Withheld Agency Records

In addition to the May 11, 2021 6:26 pm email to Goldberg's sgoldb1@law.columbia.edu email account discussed above that was not produced even though it is now in plaintiff's possession, there was also an almost identical 6:22 PM email from the same email address, fredwoerhle@gmail.com, sent to Goldberg's official Education Department account, suzanne.goldberg@ed.gov. Bader Decl. ¶ 3 & Ex. 3. This 6:22 PM email also has not been released by defendant.

> This email, too, was blind carbon copied to Hans Bader, and began:
>
> Dear Acting Assistant Secretary Goldberg:
>
> In your opening remarks at today's event, you cited "a 1995 report from the Children's Defense Fund called 'School Suspensions: Are They Helping Children?' This report found based on OCR's Civil Rights Data Collection that black students were being disciplined at a higher rate than any other students and not because of higher rates of misbehavior."
>
> Is this old report's claim about misbehavior rates -- which is not actually shown by CRDC data -- obsolete in light of more recent surveys and studies showing that black students do in fact have higher rates of misbehavior in school?.....

Bader Decl. ¶ 3 & Ex. 3. Neither of these two emails was produced to plaintiff, even though they both are clearly responsive records, because they are emails explicitly about a topic specified by the FOIA request ("school discipline") and are between parties and email addresses specified in plaintiff's FOIA request.[16]

If Defendant had actually conducted a search that included "Fred Woehrle" or "fredwoerhle@gmail.com," it would have found the two emails to Suzanne Goldberg about school discipline that are attached as Exhibits 2 & 3 of the Declaration of Hans Bader ("Bader Decl."). *See* Bader Decl., Ex. 2 & 3. Both emails say "From: Fred Woehrle (fredwoerhle@gmail.com)," and thus would have come up in any search for emails from either "Fred Woehrle" or "fredwoerhle@gmail.com". *See* Bader Decl. ¶¶2-3 & Ex. 2-3. But not only did Defendant fail to identify or produce *these* two emails. Bader Decl. ¶¶2-3. Defendant did not produce *any* emails from "Fred Woehrle" or "fredwoerhle@gmail.com". Bader Decl. ¶10.

[16] Plaintiff's May 21 FOIA request sought "Emails about school discipline or school disciplinary policies sent or received by … any presidential appointee or political appointee … in the Office for Civil Rights…that were also sent or received by any of the following people or email accounts," including "Fred Woehrle" or "fredwoerhle@gmail.com" between "January 20, 2021" and "the date you process this request." Defendant's Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 1.

In short, Defendant did not conduct any search for emails sent to or from "Fred Woehrle" or "fredwoerhle@gmail.com"[17] even though they fell within the scope of plaintiff's FOIA request.[18]

Moreover, defendant has not produced any email from Goldberg responding to either of these emails. These emails posed a factual question, so one might expect that Goldberg would reply to them. It is common for Education Department officials to send a reply at least perfunctorily acknowledging receipt of an email from a member of the public raising a concern. Officials may even respond substantively, especially when a citizen asks a factual question like the one in this email. See Bader Decl. ¶ 9. Undersigned counsel knows this from personal experience, from having once worked in the Education Department's Office for Civil Rights and its Office of General Counsel, including reporting to two of Goldberg's predecessors. *Id.*

But defendant has not produced any correspondence from Goldberg responding to either of these emails, either. So there are multiple instances of agency records being improperly withheld, and likely still more. This buttresses the fact that the agency has not conducted an adequate search for agency records, a fact already evident from defendant's failure to even search Goldberg's Columbia email account even after being advised to do so. *See Raulerson v. Reno*, No. 96-120, slip op. at 5 (D.D.C. Feb. 26, 1999) (agency's failure to locate complaints filed by plaintiff, existence of which agency did not dispute, "casts substantial doubt" on adequacy of agency's search), *summary affirmance granted*, No. 99-5300 (D.C. Cir. Nov. 23, 1999); *Immigrant Def. Project v. ICE*, No. 14-6117, 2017 WL 2126839 at *2 (S.D.N.Y. May 16,

[17] *See* Bader Decl. ¶¶2-3, 10, Ex. 2 & 3.

[18] Minami Decl. ¶ 6; Defendant's Statement of Material Facts As To Which There Is No Genuine Issue, ¶ 3.

2017) ("Plaintiffs point to 'tangible evidence' of outstanding materials at the field offices in question, indicating that Defendants' earlier search of these offices was not complete.").

If Defendant had actually conducted a search of Suzanne Goldberg's email accounts using the search criteria and parameters it claims to have used, *see* Minami Decl. ¶6, it would have found the two emails to Suzanne Goldberg about school discipline found in Exhibits 2 & 3 of the Declaration of Hans Bader. *See* Bader Decl. ¶¶2-3 & Ex. 2-3. But Defendant did not produce any emails sent solely to Suzanne Goldberg's email addresses, or sent from Suzanne Goldberg's email addresses. Bader Decl. ¶10. Thus, defendant has not shown it conducted a search of either of Suzanne Goldberg's email accounts – neither suzanne.goldberg@ed.gov, nor sgoldb1@law.columbia.edu.

Defendant now has a duty to produce these responsive records to plaintiff. That includes not just any emails sent by Goldberg, but even the emails to her that are already attached to the accompanying Declaration of Hans Bader. A FOIA requester can obtain records from an agency even when those records are available from other sources (such as blind carbon copies sent by those communicating with the agency, rather than the agency itself). *See U.S. Dep't. of Justice v. Tax Analysts*, 492 U.S. 136, 150 (1989) (rejecting argument that records "were not 'improperly' withheld because of their public availability" from another source).

FOIA does not even "foreclose an individual from seeking the production of records already disclosed to him" by the agency itself, "particularly in a situation like the instant case where an individual seeks redundant documents in order to obtain a new piece of information" about the agency, *Nat'l Sec. Counselors v. CIA*, 931 F. Supp. 2d 77, 104-05 (D.D.C. 2013). In

this case, that "new piece of information" is ironclad proof that defendant fails to comply with FOIA requests, or at the very least, is sloppy in searching for responsive records.[19]

C. Defendant Used Narrow Search Terms That Improperly Excluded Many Records About School Discipline

The search terms used in the search also were inadequate, because they did not include common synonyms for school discipline, or typical forms of school discipline. The only search terms allegedly used in the administrative search were "Terms: 'school discipline' or 'school disciplinary policies.'" Minami Decl. ¶ 6.

But the FOIA request sought records *about* "school discipline" or "school disciplinary policies," not just records that *contained* these particular words. Defendant had a duty to conduct a search "reasonably calculated to uncover all relevant documents," *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). It also had a duty to "construe a FOIA request liberally." *See Nation Magazine v. U.S. Customs Service,* 71 F.3d 885, 890 (D.C.Cir.1995) (FOIA request seeking information "pertaining to" Perot reached "information about Perot" even if it "does not mention Perot's name").

Many records about school discipline do not contain the word "school discipline," but nevertheless obviously involve *kinds* of school discipline, such as suspensions or expulsions, or involve common *synonyms* for school discipline, such as "student discipline," "discipline by

[19] Moreover, the versions of these emails received by defendant may well contain metadata not found in the emails blind carbon copied to plaintiff. Such "embedded metadata, is subject to disclosure." *Lake v. City of Phoenix*, 218 P.3d 1004, 1008 (Ariz. 2009). The "metadata associated with [the] original e-mail … is a 'public record' subject to disclosure." *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1153 (Wa. 2010); *see also Online DVD Rental Antitrust Litig.,* 779 F.3d 914, 927 (9th Cir.2015) ("The faithful production of electronically stored information may require . . . preservation of metadata."). And the versions of the emails in defendant's possession may bear a slightly different time of day than the versions in plaintiff's possession. See this memorandum, pg. 13 fn. 15. For these reasons as well, the emails should be produced.

school officials" "disciplinary sanctions," "pupil discipline," "indiscipline," "disciplinary consequences" or "disciplinary record."

Education Department records that focus on school discipline – such as civil-rights guidance to schools about the need to punish students who commit racial or sexual harassment – often do not even contain the words "school discipline." For example, the Obama administration's interpretation of Title IX and Title VI as requiring schools to take disciplinary action against certain kinds of racial and sexual bullying by students obviously involved school discipline – that was its entire purpose! -- but the "Dear Colleague" Letter that first enunciated these obligations does not contain the words "school discipline." *See, e.g., Dear Colleague Letter: Harassment and Bullying: Background, Summary, and Fast Facts* (Oct. 26, 2010) ("Some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department's Office for Civil Rights (OCR)").
(https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf).

Similarly, lengthy court rulings about school discipline policies do not contain the words "school discipline." *See, e.g., People Who Care v. Rockford Board of Education*, 111 F.3d 528, 537-38 (7th Cir 1997) (overturning "decree [that] forbids the school district to refer a higher percentage of minority students than of white students for discipline unless the district purges all 'subjective' criteria from its disciplinary code."); *Coalition to Save Our Children v. State Board of Education*, 90 F.3d 752, 775 (3d Cir. 1996)(rejecting the "assumption 'that "undiscipline" or misbehavior is a randomly distributed characteristic among racial groups'"; overturning provision dealing with "racially nondiscriminatory discipline").

And the body of emails responsive to plaintiff's FOIA request don't necessarily include the words "school discipline," either. Two responsive emails that Defendant failed to produce, which are attached as Exhibits 2 & 3 to the Bader Declaration, don't mention "school discipline" in the body of those emails. (The subject lines of those emails do contain the words "school discipline," though).

It is not enough for an agency to choose search terms that yield some responsive records. The search terms chosen must be reasonably calculated to capture "all" of them. *See Weisberg*, 705 F.2d at 1351. At a minimum, defendant should have used alternative words for "school discipline," including records that contain the terms "suspension" or "expulsion," or contain the term "discipline" within three words of the word "school," "policy," or "policies."

III. Defendant Improperly Withheld the Name of an Intended Panelist

On page 32 of the released records, Defendant redacts the name of a person it invited to be on a public May 11 panel discussion about school discipline and civil-rights policy that was held by the Education and Justice Departments. Bader Decl. ¶6 & Ex. 6.[20] In its summary judgment papers, defendant claims it is withholding "the name of the individual" as "information of a personal nature."[21]

But this information is not of a personal nature. The fact that Biden administration officials viewed this individual's input as relevant to setting school discipline policy is itself of public interest – even if this official was unable to appear on this particular panel. The mere presence of this individual's name on a list of panelists means that the Biden administration

[20] This redaction occurs in an April 28, 2021 5:26 PM email from Carolyn Seugling. For "Panel Three," on "Addressing Disparities in Discipline."

[21] Declaration of Kristine Minami at ¶22 ("The Department withheld information of a personal nature about an individual that was invited to be a panelist at the Discipline Convening but did not accept or attend. This information withheld consists of the name of the individual.").

likely shares his or her thinking about school discipline, and this individual may be in a position to influence Biden administration policy about school discipline.

The Education Department told the panelists it invited, "The Office for Civil Rights and Civil Rights Division have invited you as panelists because of your expertise in issues related to school discipline and climate." Bader Decl. Ex. 6 (April 28, 2021 5:26 PM email).

Courts will not allow agencies to withhold people's names when knowing their names may shed light on who is influencing agency policy. *See People for the Am. Way Found v. National Park Service*, 503 F. Supp. 2d 284, 306 (D.D.C. 2007) (names of people who submitted comments were releasable, such as to shed light on who was influencing agency decisions; "Disclosing the mere identity of individuals who voluntarily submitted comments regarding the Lincoln video does not raise the kind of privacy concerns protected by Exemption 6 . . . . Moreover, the public interest in knowing who may be exerting influence on [agency] officials sufficient to convince them to change the video outweighs any privacy interest in one's name.").

Similarly, people's names should be released when that will shed light on an agency's thinking, or its approach to decisionmaking or public policy. *See, e.g., Lardner v. DOJ,* No. 03--0180, 2005 WL 758267, at *17 (D.D.C. March 31, 2005) (ordering release of the names of unsuccessful pardon applicants, which would assist the public in analyzing the "circumstances in which the executive chooses to grant or deny a pardon and the factors that bear on that decision"); *Lardner v. DOJ*, 398 Fed. Appx. 609, 610 (D.C. Cir. 2010) (per curiam) (holding that public interest in names of unsuccesssful clemency applicants outweighed applicants' privacy interests).

The subject matter of the responsive records, school-discipline policy, is a matter of ongoing public interest and concern. The Education Department's school-discipline policies and

stances are the subject of frequent media coverage, and were at the time of this FOIA request.[22] Courts have recognized that the subject of school discipline itself is a matter of quintessential public concern. *See Bowman v. Pulaski County*, 723 F.2d 640 (8th Cir. 1983) (speech about student discipline was protected speech on a matter of public concern); *Cox v. Dardanelle Public School Dist.,* 790 F.2d 668, 673 (8th Cir.1986) (school discipline dispute was a matter of public concern, because "[t]he questions how we teach the young…and the environment in which we teach them are of the most central concern to every community in the nation.").

Even if there is a significant privacy interest in nondisclosure (as is not the case here), it must be balanced against the public interest in disclosure. *See Wash. Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982) ("Finally, we balance the competing interests to determine whether the invasion of privacy is clearly unwarranted."). Courts have found that public interest can outweigh even a strong personal privacy interest in requested records. *See Roth v. DOJ*, 642 F.3d 1161, 1166 (D.C. Cir. 2011) (concluding that "(1) the public has an interest in knowing whether the federal government is withholding information that could corroborate a death-row inmate's claim of innocence, and (2) that interest outweighs the three men's privacy interest in having the FBI not disclose whether it possesses any information linking them to the murders") (Exemption 7(C)); *Lardner v. DOJ*, 398 F. App'x 609, 610 (D.C. Cir. 2010) (per curiam) (holding that public interest in names of unsuccessful clemency applicants outweighed applicants privacy interests);

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[22] *See, e.g.,* Jason Riley, *Classroom Chaos in the Name of Racial Equity is a Bad Lesson Plan*, Wall Street Journal, May 12, 2021, available at https://www.wsj.com/articles/classroom-chaosin-the-name-of-racial-equity-is-a-bad-lesson-plan-11620771445; Ashe Schow*, Biden Administration Expected To Bring Back Obama-Era School Discipline Rules, Which Led To Racial Quotas*, Daily Wire, May 12, 2021, available at https://www.dailywire.com/news/bidenadministration-expected-to-bring-back-obama-era-school-discipline-rules-which-led-to-racial-quotas; Will Flanders, *Joe Biden Plans to Revive School Rules Punishing Kids According to Skin Color*, The Federalist, May 21, 2021, available at https://thefederalist.com/2021/05/21/joe-bidenplans-to-revive-school-rules-punishing-kids-according-to-skin-color/

Rosenfeld v. DOJ, No. 07-3240, 2012 WL 710186, at *8 (N.D. Cal. Mar. 5, 2012) (privacy interest in a traffic violation is "outweighed by the public interest" in disclosure).

The mere fact that a record might reveal even a little known private person's identity is not automatically a reason to withhold it, even when (as is *not* the case here), that could lead to a hostile reaction against that person. *See, e.g.*, *Cardona v. INS*, No. 93-3912, 1995 WL 68747, at *3 (N.D. Ill. Feb. 16, 1995) (ordering release of name and address of individual who wrote letter to INS complaining about private agency that offered assistance to immigrants); *Baltimore Sun v. U.S. Marshals Service*, 131 F.Supp.2d 725, 729-30 (D. Md. 2001) (releasing the "names and addresses" of purchasers of seized property).

And here, defendant has not alleged that this individual is little-known, or works in a sensitive occupation, but merely that the individual is a "non-federal employee." But many non-federal employees, such as outspoken political activists and other public figures, have little privacy interest in their identity. *See Rosenfeld v. DOJ*, No. 07-3240, 2012 WL 710186, at *4 (N.D. Cal. Mar. 5, 2012) (finding that privacy interest "is low because . . . the subject is a public figure"). Political activists, state, local, and school officials, and nominated-but-not-yet confirmed political appointees are all "non-federal employees," but that does not mean disclosure of their name would be a "clearly unwarranted invasion of privacy."[23]

In any event, Exemption 6 does not allow agencies to withhold information merely because its release would have an impact on privacy. It only exempts information in "personnel and medical files and similar files" when the disclosure of such information "would constitute a

[23] *See, e.g., International Federation of Professional and Technical Engineers v. Superior Court*, 64 Cal.Rptr.3d 693 (Cal. 2007) (state government employees had no privacy right in their names or salaries, which had to be produced in response to public-records request); *National W. Life Ins. v. United States*, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (no expectation of privacy in names and duty stations of Postal Service employees); *Core v. U.S. Postal Service*, 730 F.2d 946, 948 (4th Cir. 1984) (privacy not infringed by release of information on successful job applicants).

clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (italics added). If the information is relevant to public policy, its release is not "clearly unwarranted."

IV. Defendant Wrongly Redacted A Cell Phone Number in An Employee's Signature Block

Defendant wrongly redacted the cell phone number used for work purposes by Monique Dixon, the Deputy Assistant Secretary for Policy in the Office for Civil Rights. *See* Minami Decl. ¶ 20 (Dixon's cell phone number was redacted), ¶ 7 ("Monique Dixon" was one of "the political appointees working in OCR").

This was not sensitive information, which is precisely why Dixon shared it with the public, by using it in the signature block of her email – using it in the course of her work. *See* Bader Decl. ¶ 11 & Ex. 8. The whole point of including such a number in your signature block is to share it with the public, and enable members of the public to call you on it, rather than keeping the number private for purely personal use.

Such cell phone numbers in signature blocks are subject to disclosure under FOIA, not exempt under Exemption 6. *See Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) ("no privacy interest" in telephone numbers used for work); *Brown v. FBI* , 873 F.Supp.2d 388, 402 (D.D.C. 2012) ("Work telephone numbers are different from personal information that would be protected ... such as 'place of birth, date of birth, date of marriage, employment history, and comparable data.").[24] There is no protectable privacy interest in information that is routinely shared with everyone.

[24] *See also Kleinert v. BLM*, 132 F.Supp.3d 79 (D.D.C. 2015) (finding that defendant did not meet its burden to support use of Exemption 6 to withhold email addresses because "'[t]he disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed; whether it is a significant or a de minimis threat depends upon the characteristic(s) revealed . . . and the consequences likely to ensue'" (*quoting Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 877 (D.C. Cir. 1989).

Here is roughly how it looks in the email from which it was redacted, in a May 7, 2021 5:36 PM email that was sent to people both inside and outside the government:

> **Monique L. Dixon**
> Deputy Assistant Secretary for Policy
> Office for Civil Rights
> U.S. Department of Education
> 400 Maryland Avenue, SW
> Washington, DC 20202
> Mobile: (b)(6)
> Email: Monique.Dixon@ed.gov

See Bader Decl., Ex. 8.

In short, Dixon included this cell phone number as a matter of course in her emails, rather than treating it as private information whose release would be an unwarranted invasion of privacy. Even if releasing it had some *de minimis* impact on Dixon's privacy, that would not be grounds to redact it. Private information must implicate a "significant privacy interest" to trigger protection, not just any privacy interest. *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)).

V. Defendant Redacted Lengthy Chains of Information That Do Not Seem to Match Its Stated Redactions

There may be additional names redacted without justification as well, given the prolonged nature of some of defendant's redactions, which are so long that they may encompass both names and email addresses of recipients, not merely email addresses. That could leave plaintiff entirely in the dark about who some recipients were.

That would be inappropriate, because agencies usually cannot redact citizens' names, as opposed to their email addresses, because the identity of people interacting with or influencing

government officials is a matter of public interest, even when the digits or characters in their email address aren't.[25]

Defendant has not explained its redactions on a document-by-document basis, as is the norm in FOIA cases, and required for a *Vaughn* Index.[26] It has merely asserted that a large number of redactions fall within certain types. As a result of this unwarranted vagueness and generality, and failure to address individual redactions, it has left open the possibility that there may be undisclosed recipients of responsive emails for whom all identifying information has been redacted, leaving neither their name nor their email address. By leaving open this possibility, it has not met its burden of showing the material is in fact exempt from disclosure.[27]

All information about some recipients may have been redacted for certain recipients on pp. 314-17 of the released records, because there is a prolonged redaction of multiple fields, that suggests not merely the redaction of an email address, but *both* a name *and* an email address. *See* Bader Decl. ¶ 7 & Ex. 7 (attaching these records).

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[25] *See, e.g.*, *People for the Am. Way Found v. National Park Service*, 503 F. Supp. 2d 284, 306 (D.D.C. 2007) (names of people who submitted comments were releasable, such as to shed light on who was influencing agency decisions; "Disclosing the mere identity of individuals who voluntarily submitted comments regarding the Lincoln video does not raise the kind of privacy concerns protected by Exemption 6 . . . . Moreover, the public interest in knowing who may be exerting influence on [agency] officials sufficient to convince them to change the video outweighs any privacy interest in one's name.").

[26] *Metropolitan St. Louis Sewer Dist. v. U.S. E.P.A.*, 2012 WL 685334, *3 (E.D.Mo. March 2, 2012) (In agency's Vaughn Index, "Each entry identifies the subject of the record, generally in the form of the subject line of an email, the date and time for the email or record, the author, the recipients, and any attachments"); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 88 (D.D.C.2009)(to withhold material, agency should identify the "originating component agency" and "the author, and . . . the recipient" of each "document.");.

[27] *See Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973) ("the burden is on the agency to prove de novo in trial court that the information sought fits under one of the exemptions to the FOIA"); *Goland v. CIA*, 607 F.2d 339, 352 (D.C.Cir.1978)(agency must demonstrate that "each document that falls within the class requested either has been produced, is unidentifiable, or is . . . exempt")

For example, there are three successive redactions ("(b)(6) (b)(6) (b)(6)") in a row before makenzie.schiemann@tngconsulting.com., on pg. 316 of the released records. *See* Bader Decl., Ex. 7. There is both a blue (b)(6) redaction and a pinkish (b)(6) redaction, redacting all material between two semi-colons, between "Morgan-Cosic, Letisha" and "lfont@wcpss.net." *Id.* There is a lengthy pinkish (b)(6) redaction redacting all material between two semi-colons (seemingly far more than just an email address), between "lm.mcwilliams@assumption.edu" and "lcliment@ed.sc.gov." *Id.* There are two successive redactions -- "(b)(6) (b)(6)" -- in a row in many places on pp. 314-317, such as before hayley@cfrights.org, jalas@lonestarlegal.org, jnance@mdlab.org, kala_goodwine@charleston.k12.sc.us and kpolishchuk@apa.org and landerso@umd.edu and lauriericard@sclegal.org and "Valtierra, Loredana" and lschrader@azdot.gov and maryb@vlas.org and melina_kiper@newprofit.org. Bader Decl. ¶ 7 & Ex. 7 (attaching these emails).

The Minami Declaration does not mention redacting additional names. But then, it also did not mention redacting *any* federal employee's email address at all, indicating such redactions only occurred for "non-federal employees"[28] -- even though such a redaction in fact occurred with regard to Acting Assistant Secretary Goldberg, as we explained in Part I of this memorandum, and is illustrated in the Declaration of James P. Scanlan.

So the Minami Declaration is not reliable. Accordingly, the mere fact that the Minami Declaration's generalizations do not specifically mention redacting additional names does not guarantee that such individual redactions of names did not occur, and the absence of such redactions cannot be shown absent *in camera* review, or production of the unredacted records.

[28] Minami Decl. ¶ 20; Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 6.

VI. The Minami Declaration Is Too Vague and Lacking in Detail To Support Summary Judgment

The Minami Declaration is also too conclusory and lacking in detail to support the grant of summary judgment. Declarations that "do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the plaintiff] to challenge the procedures utilized," have been held to be "inadequate and too conclusory to justify a grant of summary judgment." *Santos v. Drug Enforcement Agency,* 357 F.Supp.2d 33, 37 (D.D.C.2004) (quoting *Weisberg v. U.S. Dep't of Justice,* 627 F.2d 365, 371 (D.C.Cir.1980)).

The Minami declaration says Minami was "notified by the FOIA E-Discovery Team that the administrative search had been completed," but it doesn't say *who* ultimately did the search. Minami Decl. ¶ 14. So it does not provide the required information about "by whom" agency files were searched. *See Santos*, 357 F.Supp.2d at 37.

The Minami declaration also fails to allege that "all files likely to contain responsive materials ... were searched," as case law requires, or that all responsive records were produced.[29] Minami merely states that "The Department performed an adequate and reasonable search for responsive records." Minami Decl. ¶ 28. But even if many responsive records are overlooked, the result may seem "adequate" to busy agency officials. Even if Defendant searched all places Minami deems "reasonable," that merely begs the question of what *is* reasonable.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment should be denied.

[29] *See Nation Magazine v. U.S. Customs Service,* 71 F.3d 885, 890 (D.C.Cir.1995) (noting agency affidavits submitted in support of an adequate search "must be reasonably detailed ..., setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials ... were searched") .

Respectfully submitted,

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