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| CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,<br><br>Plaintiff,<br><br>v.<br><br>U.S. DEPARTMENT OF HOMELAND SECURITY,<br><br>Defendant. | ) | Civil No. 20-1400 (CRC) |

**PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Based on little more than conjecture and scattershot observations from other courts, defendant U.S. Department of Homeland Security ("DHS") urges this Court to take it on faith that the harms it claims will result from disclosing certain of the costs the Secret Service incurred for a single presidential trip to the Trump Turnberry Golf Resort adequately support the agency's invocation of Freedom of Information Act ("FOIA") Exemptions 7(E) and 7(F). Nothing in the FOIA, however, requires this Court to abandon common sense and logic. The simple truth, as Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") demonstrated in its cross-motion for summary judgment, is that disclosing the historical data CREW seeks—the room rates and total costs of meals and incidentals for a one-time trip by the Secret Service to Scotland—would not reveal the size of the President's protective detail for that or any other trip. As a necessary consequence, disclosure would neither threaten the security of the President nor reveal a law enforcement technique or procedure. As for its failure to satisfy the statutory requirement of demonstrating foreseeable harm, DHS has not even attempted to fill the gap between what the FOIA requires and DHS's initial proffer. For all these

reasons, DHS's motion for summary judgment should be denied and the Court should enter summary judgment in favor of CREW.

**1. Because the requested information concerns a single trip that already has occurred it is properly considered as "historical" data that reveals nothing about the current staffing of the President's Secret Service detail.**

DHS's arguments flow from its fundamental mischaracterization of the information at issue as current and therefore revealing the techniques and procedures the Secret Service uses to protect the President. At the same time, however, DHS concedes that the Secret Service develops a specific "security plan for each" of the President's trips that is "based on the most current information about conditions and intelligence[.]" Defendant's Reply ("D's Reply") at 6. This concession is fatal to its arguments as it reinforces the historical nature of the expenses the Secret Service incurred for the President's Turnberry trip.

Moreover, common sense bolsters this conclusion. In considering the size of a particular presidential detail for a particular trip the Secret Service necessarily must consider the specific location and purpose of the trip and any unique challenges they may pose. In this regard, the President's multi-day trip to his golf resort in Scotland differs significantly from a security perspective from a visit to his downtown D.C hotel for a single dinner. A trip abroad also poses unique challenges for the Secret Service, which must travel with the full complement of agents and cannot, as it can in Washington D.C., readily add additional agents as the situation warrants. Likewise the President's agenda necessarily would play a part in the planning for a specific trip whether it involves a one-on-one meeting with a foreign head of state or attending a large crowd event. Similarly, the location itself may pose specific challenges—a trip to North Korea like the President

took on June 30, 2019[1] quite obviously differs radically from his June 2019 trip to France.[2] That is why, as the Secret Service acknowledges, for each trip it must consider "the most current information about conditions and intelligence[.]" D's reply at 6.

Having failed as a factual matter to demonstrate that the information at issue is "current" not historical, the Secret Service looks to an unpublished opinion from another court, *New York Times Co. v. U.S. Secret Service*, Civ. Action No. 17-1885, 2018 WL 722420 (S.D.N.Y. Feb. 5, 2018), for support. *See* D's Reply at 4. But the *New York Times* decision differs significantly from this case. The request at issue there sought billing and payment information for the air transportation costs incurred by the Secret Service protective details for the two 2016 presidential candidates during the course of the 2016 campaign. Not only was the requested information not a one-time, historical expense—as the requested information at issue here is—but, as aggregate information, it formed part of the data that the Secret Service looked to "in order to plan for what may happen in the future[.]" 2018 WL 722420, at *7. The record here lacks this level of detailed connection between the requested data and staffing for future presidential trips. At best DHS's declarant suggests the redacted information is "closely tied" to "staffing "guidelines and techniques," Rowe Decl. ¶ 7, which is a far cry from demonstrating that its disclosure risks revealing a law enforcement technique or procedure.

The Secret Service argues these differences are inconsequential because FOIA requesters have control over their requests and can "manipulate" how they are

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[1] *See, e.g.*, Peter Baker and Michael Crowley, Trump Steps Into North Korea and Agrees With Kim Jong-un to Resume Talks, *New York Times*, June 30, 2019, https://www.nytimes.com/2019/06/30/world/asia/trump-north-korea-dmz.html.

[2] *See, e.g.*, Jordyn Phelps, Trump, Macron mark D-Day 75th anniversary at Normandy, *ABC News*, June 6, 2019, https://abcnews.go.com/Politics/donald-trump-visits-normandy-75-year-anniversary-day/story?id=63523054.

"constructed and segmented" as either for a single trip or "in the aggregate for an entire year[.]" D's Reply at 4. As even DHS concedes, however, Plaintiff here does not seek aggregate information, *id.*, and DHS's speculation about the security implications of a different FOIA request is just that—speculation that cannot substitute for the factual predicate it must establish to support its invocation of Exemption 7(E) here.

**2. DHS has failed to demonstrate how disclosing the requested information would reveal the size of the President's protective detail.**

In its cross-motion for summary judgment CREW demonstrated how disclosing the total costs of meals and incidentals and the individual room rates the Secret Service paid for single and double rooms could not effectively be used to reverse-engineer the specific size of the President's protective detail. DHS all but concedes this with its assertion that "the exact number could only be reliably estimated using published rates for reimbursing government employees on travel and knowing how many days some or all of the detail was present in Scotland[.]" D's Reply at 6. Those are some of the very facts that remain unknown, along with information about how many personnel stayed in single versus double occupancy rooms and how many individuals stayed in each double occupancy room. Without this information it simply is not possible to derive the size of the protective detail with any accuracy, the information DHS seeks to protect under Exemption 7(E).

**3. DHS's waiver argument is irrelevant.**

Having failed to rebut plaintiff's arguments that are rooted in facts and logic, DHS suggests Plaintiff is relying on a waiver or "official acknowledgment" of the requested data, which cannot succeed because waivers based on information from public

sources are "limited to the identical information." D's Reply at 7. This completely misapprehends CREW's arguments. CREW noted DHS's previous disclosures of room rates in response to other FOIA requests not to support a waiver argument, but to further demonstrate the irrationality of DHS's arguments here. *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("P's Opp.") at 9. Having released comparable information in the past, DHS is hard pressed to explain why it cannot release the information CREW has requested. Waiver plays no part in that argument.

**4. DHS has failed to connect the dots between disclosure of the requested information and any reasonable expectation of harm to the life or safety of any individual.**

Proper invocation of FOIA Exemption 7(F) requires a showing that revealing the requested information "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). As CREW demonstrated in its opening brief, nothing in DHS's declarations makes this necessary connection between the room rates and total food and incidentals costs that DHS has withheld and the life or safety of either the President or his security detail. DHS offers no new evidence in response, relying instead on a decision that highlights the flaws in DHS's argument, not its strengths.

In *Public Employees for Envtl. Responsibility v. Int'l Boundary & Water Comm'n*, 740 F.3d 195 (D.C. Cir. 2014), the D.C. Circuit considered whether the disclosure of inundation maps, considered to be critical infrastructure information, would cause the kind of harm protected by Exemption 7(F). In concluding that it would, the court relied specifically on the evidence of record, which "confirms what common sense suggests: The inundation maps, if disclosed, could reasonably be expected to endanger life or

physical safety." *Id.* at 205. That evidence included specific intelligence about a plot to blow up a dam, which led to an evacuation warning to protect people who would be affected by such an act of violence. *Id.* The current case, by contrast, lacks any such evidence and relies instead on unsupported speculation with no logical connection between the information at issue and the harm that allegedly will flow from its disclosure. Far from proving DHS's case, the cited decision highlights the inadequacies here, where the record is devoid of information that would allow the Court to draw a connection between disclosure of cost data and harm to the life or safety of any individual.

**5. DHS has failed to supplement its patently inadequate showing of foreseeable harm.**

CREW's opening brief explained how DHS had failed to satisfy the statutorily mandated "foreseeable harm" showing that the 2016 FOIA Improvement Act codified. P's Opp. at 11-12.[3] In its reply DHS makes no effort to fill this gap, relying instead on a statutory construction argument that finds no support in the FOIA or its legislative history and that has been roundly rejected by other courts in this district.

Faced with what Sen. Chuck Grassley, chair of the Senate Judiciary Committee, characterized as "knee-jerk secrecy," Congress codified a presumption of openness, which "tells agencies to make openness and transparency their default setting." 162 Cong. Rec. S1495 (2016). The bill's co-sponsor, Sen. John Cornyn, echoed a similar sentiment, explaining that "[i]t shouldn't be incumbent on an American citizen asking for information from their own government—information generated and maintained at taxpayer expense—they shouldn't have to come in and prove something to be able to get

[3] In its opening brief CREW mistakenly referred to these amendments as the 2015 FOIA Improvement Act. P's Opp. at 11.

access to something that is theirs in the first place." 162 Cong. Rec. S1495-96. The presumption of openness that Congress added to the FOIA in 2016 "put[] the force of law behind the presumption" to "help reduce the perfunctory withholding of documents through the overuse of FOIA's exemptions." 162 Cong. Rec. S1496 (Statement of Sen. Patrick Leahy). As this legislative history reflects, Congress understood it was doing more than freezing the status quo in place.

In arguing for a "low bar" that existed before the amendment, D's Reply at 9, DHS ignores this history, the plain language of the statute,[4] and Congress' clear intent to elevate this requirement to something that would dramatically change the existing dynamic where agencies withheld because they could. This is precisely how courts in this district have construed the foreseeable harm requirement codified in the 2016 legislation: as imposing a "heightened standard," *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019), that imposes an "independent and meaningful burden," *Center for Investigative Reporting v. U.S. Customs & Border Protection*, 436 F.

[4] DHS makes the curious argument that adopting the heightened standard that other courts in this district have applied would conflict with the Supreme Court's "plain language" approach articulated in *Food Marketing, Inc. v. Argus Media Leader*, 139 S. Ct. 2356, 2366 (2019). D's Reply at 9. It is DHS, however, that ignores basic rules of statutory construction by arguing that the addition of the foreseeable harm requirement made no change whatsoever to what agencies must demonstrate to properly withhold information under the FOIA. Nor, contrary to DHS's arguments, does *Argus Media Leader* place the FOIA's exemptions "on an equal footing with its disclosure requirements." D's Reply at 3. The Supreme Court noted it could neither expand nor contract the meaning of a specific exemption under the broader principle that the Court must give a statutory exemption "a fair reading." *Id.* at 2366. But nowhere did the Court suggest it disagreed with or was cutting back on the well-established principle, established in a long line of cases, that FOIA exemptions are to be construed narrowly. *See, e.g.*, *Department of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976); *Milner* v. *Dep't of Navy*, 562 U.S. 562, 565 (2011); *FBI* v. *Abramson*, 456 U.S. 615, 630 (1982) (noting Court's "oft-repeated caveat that FOIA exemptions are to be narrowly construed").

Supp. 3d 90, 106 (D.D.C. 2019). DHS offers no cogent rationale for departing from that approach.

Taken as a whole, DHS has offered nothing more than speculative and abstract concerns that defy common sense and logic. Its showing satisfies neither the heavy burden it carries to demonstrate the propriety of its withholdings under FOIA Exemptions 7(E) and (F) nor its burden to show foreseeable harm from disclosure.

## CONCLUSION

For the foregoing reasons and those set forth in Plaintiff's opening brief, the Court should deny Defendant's motion for summary judgment and grant Plaintiff's cross-motion for summary judgment.

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Respectfully submitted,

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