UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendant.

Civil Action No. 20-1400 (CRC)

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

By and through its undersigned counsel, Defendant the United States Department of Homeland Security ("Defendant" or "DHS") respectfully submits this reply in further support of its motion for summary judgment and in opposition to Plaintiff's cross-motion for summary judgment.

Plaintiff's response to Defendant's summary judgment motion narrows the issues and otherwise fails to demonstrate why Defendant's motion for summary judgment should not be granted. This dispute concerns the redaction of certain information from an Office of Inspector General report of an audit of expenses associated with travel by President Trump to the Trump Turnberry Resort in Scotland from July 14 to 15, 2018 ("OIG Report"). Defendant has neither challenged nor minimized the legitimate public interest in the costs associated of the Secret Service's protective mission as reflected in the OIG Report.

Defendant has disclosed certain sub-total cost information when doing so does not reveal information about the number of Secret Service personnel assigned to the protective detail for the

President's trip. For example, the cost of the Secret Service's use of nine golf carts for two days are less closely identified with the strength of the protective detail because the number of agents utilizing the golf carts is substantially less than the size of the entire protective detail. So the Secret Service has released the cost of the golf carts, among other categories of costs. But other information directly linked to the number of people assigned to protective details, in particular, falls squarely within the Freedom of Information Act ("FOIA") exemptions Congress created to protect sensitive law enforcement information from public disclosure to avoid foreseeable risk to the physical safety and lives of the President, his family, and other high level government officials, as well as the agents and other personnel providing and supporting the Secret Service's mission.

Plaintiff's response indicates that it "does not challenge" the withholding of information concerning "certain protective equipment used by the protective detail" (Pl.'s Opp. at 5 n.4), and Plaintiff also does not challenge that the information in the OIG Report was compiled for law enforcement purposes. *See* Def.'s Mem. of Points & Authorities in Support of Motion for Summ. J. ("Open. Br.") at 7-10. For each of these discrete issues, summary judgment should be entered in Defendant's favor as there is nothing in the record demonstrating any "genuine issue as to any material fact[.]" Fed. R. Civ. P. 56(a).[1]

In reviewing the remaining withholdings in the OIG Report, Plaintiff erroneously contends that the Court should narrowly construe the exemptions (Pl.'s Opp. at 4), but the Supreme Court recently noted that the statute is to be fairly construed for all parties and that applying the plain language of the statute, including the exemptions, protects "important interests." *Food*

[1] With respect to the Exemption 7 threshold, Plaintiff's response to Defendant's Statement of Material Fact No. 3 disagrees only that the purpose of compiling the OIG report is fact rather than a conclusion of law (ECF No. 10-1 at 2), but Plaintiff's failure to argue the point in its memorandum waives or forfeits the argument. *See, e.g., Bloche v. Dep't of Def.*, 414 F. Supp. 3d 6, 23 n.5 (D.D.C. 2019).

Marketing, Inc. v. Argus Media Leader, 139 S. Ct. 2356, 2366 (2019) (citing *Milner v. Dep't of Navy,* 562 U.S. 562 (2011)). In other words, the statute's exemptions stand on an equal footing with its disclosure requirements. *See id*.

As for another of Plaintiff's misconceptions, the fact that the costs are estimated (Pl.'s Opp. at 3) should not cause the Court to find the material non-exempt. *Cf. Kansas ex rel. Schmidt v. Dep't of Def.*, Civ. A. No. 16-4127, 2018 WL 1412066 (D. Kan. Mar. 21, 2018) (estimated cost information relating to consideration of closing Guantanamo Bay detention facility exempt from disclosure under Exemption 5). The OIG Report is the product of an audit of past incurred expenses and it is plain that the OIG based its statements and conclusions on source documentation obtained from the Secret Service. *See* Def.'s Ex. 3 (ECF No. 9-4) at 1 (in the chart entitled "Estimated Total Costs," the source is identified as "OIG analysis of agency data" and the amounts are down to the round dollar). The estimated nature of the payments also takes into account that certain costs for the salaries of government personnel and others are excluded. *Id*. In other words, it may be more accurate to describe the report as an audit of payments by the Secret Service rather than the costs of the Secret Service's providing security, but these semantic distinctions are not material facts for determining the applicability of FOIA exemptions. *See Aguiar v. DEA*, 865 F.3d 730, 734–35 (D.C. Cir. 2017) (summary judgment in FOIA cases is appropriate based on the agency's declaration as long as they are reasonably specific and detailed and not "called into question by contradictory evidence in the record or by evidence of agency bad faith."). Notably, Plaintiff makes no effort to distinguish *Associated Press v. FBI*, 265 F. Supp. 3d 82, 100 (D.D.C. 2017), or *Fabricant v. Department of Justice*, Civ. A. No. 15-0294, 2017 U.S. Dist. LEXIS 128878 (D. Ariz. Aug. 11, 2017), both of which were cited in Defendant's Opening Brief (at 12) in support

of withholding cost information for law enforcement techniques and procedures. Plaintiff's other arguments are addressed below.

Exemption 7(E)

Plaintiff argues that DHS has withheld "historical staffing" information reflecting "budgetary choices about the assignment of personnel' rather than specific methods of law enforcement. Pl's Opp. at 6. That is incorrect. The Declaration of Ronald L. Rowe, Jr. ("Rowe Decl.") describes operational information for international travel by the President on a particular trip rather than budgetary decisions. *See* Rowe Decl. ¶¶ 6-14. Special Agent Rowe explains that staffing decisions for protection of the President continue to be used and the relationship between the cost information being withheld and those techniques. *See id*. ¶¶ 8-9. 13. This is highly similar to *New York Times Co. v. U.S. Secret Service*, Civ. A. No. 17-1885, 2018 WL 722420 (S.D.N.Y. Feb. 5, 2018), in which a district court held that highly similar information regarding the number of Secret Service staff traveling on an air-plane in connection with a protective detail falls within the law enforcement guidelines that Exemption 7(E) is intended to protect. *N.Y. Times*, 2018 WL 722420, at *5-7.

Plaintiff's effort to distinguish *New York Times* is unpersuasive because it depends heavily on something within the control of FOIA requesters to manipulate (how FOIA requests are constructed and segmented). *See* Pl.'s Opp. at 7. There is little doubt that similar information about the lodging and meal costs associated with Presidential protection during trips outside of Washington, D.C. in the aggregate for an entire year would be far less revealing about the strength of an operational detail than on one particular trip, but that is not the type of information withheld in this case. This Court should reach the same result as in *New York Times* because Plaintiff's effort to create a genuine issue of material fact with respect to the facts in Special Agent Rowe's

declaration not only fail to cite admissible evidence but also defy logic. *See* Pl.'s Resp. to Def.'s Smt. of Fact ¶¶ 7-11. As such, Plaintiff's opposition rests on its professed skepticism and, at most, suggests metaphysical doubt about the material facts, but that is insufficient to resist summary judgment. *See, e.g.*, *Lopez v. Exec. Off. For U.S. Attorneys*, 598 F. Supp. 2d 83, 86-87 (D.D.C. 2009) (discussing burden on requester at summary judgment in FOIA case).

In the sole case Plaintiff cites, *Families for Freedom v. Customs & Border Protection*, 837 F. Supp. 2d 287 (S.D.N.Y. 2011), the district court upheld the agency's withholding of staffing statistics for regions other than the Buffalo, New York district because Buffalo was the only one requested (*id.* at 298-99)[2] and because complete staffing statistics revealed a current law enforcement technique rather than historical information. *See id.* at 299. In *Families for Freedom*, the court noted:

> Defendants do not assert that the current distribution of agents is similar to the distribution of agents in 2009. Plaintiffs, on the other hand, have pointed to evidence showing that Border Patrol's practices have changed dramatically in recent months . . .

Id. In contrast, the Rowe Declaration explained that the techniques and procedures used by the Secret Service for protecting the sitting President are implicated in the information being withheld from Plaintiff in this case. *See* Rowe Decl. ¶¶ 7, 9, 13.

Plaintiff has not suggested that there has been any relevant, let alone "dramatic" change in the Secret Service's protective techniques and procedures. The court in *Families for Freedom* went on to recognize that historical staffing information poses less of a threat than current staffing information, and determined that historical information should be disclosed. 837 F. Supp. 2d at

[2] Withholding of information as non-responsive that appears in the same records as responsive information is not permitted in the D.C. Circuit. *See Am. Immigration Lawyers Ass'n v. Exe. Office for Immigr. Review*, 830 F.3d 667, 678-79 (D.C. Cir. 2016).

300. But that rationale is absent here because the staffing information for the President's international travel is current and a different result is warranted.

Plaintiff is not arguing that FOIA requires the Secret Service to reveal its techniques and procedures for protecting the President during international travel either in general or to a particular location (to which the President is arguably more likely to return either before or after his term in office when he will remain eligible for protection by the Secret Service because of his personal connection to the property). Rather, Plaintiff's argument (Pl.'s Opp. at 7-8) is that cost information for lodging and meals is too attenuated from those techniques and procedures for staffing protective details to warrant withholding, but that is incorrect. As the Rowe Declaration explains, the Secret Service develops a security plan for each trip the President takes based on the most current information about conditions and intelligence, but the Secret Service also repeatedly employs similar tactics and procedures. *See* Rowe Decl. ¶¶ 7-9. In other words, each plan is unique in the sense of details like the planning for any known demonstrations or adverse weather conditions, but the general techniques and procedures for staffing similar kinds of events or repeat events at identical facilities are substantially the same. *See id.*

Plaintiff questions the assertion that the number of individuals protecting the President can be reverse engineered from the costs of lodging and meals. *See* Pl.'s Opp. at 9-10. Although it may be true 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, the FOIA exemption still applies. *N.Y. Times*, 2018 WL 722420, at *5-7. Plaintiff claims that the Secret Service has revealed room rates in response to other FOIA requests, but proffers only news articles reporting what the Secret Service allegedly released without showing the released records themselves or the sources. *See* Pl.'s Opp. at 9. The articles are not

admissible evidence for the truth of the matters contained in the articles. *E.g.*, *Democracy Forward Found v. Pompeo*, Civ. A. No. 19-1773 (TNM), 2020 WL 4219817, *10 (D.D.C. July 23, 2020) (limiting consideration of hearsay to search issues in FOIA cases and declining to consider newspaper articles with regard to exemption claims on hearsay grounds). In any event, when revealing the room rates does not reveal the strength of a protective detail such as rates for operational spaces, the Secret Service does release the same kind of information being withheld here precisely because it cannot be directly tied to the strength of a particular protective detail on a discrete international trip involving the President. Nothing about that difference amounts to a genuine issue of material fact.

Moreover, FOIA waivers based on information available in public sources is limited to the identical information. *Davis v. Dep't of Justice*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (holding that "the government cannot rely on an otherwise valid exemption claim to justify withholding information that has been 'officially acknowledged' or is in the 'public domain.'") (quoting *Afshar v. Dep't of State*, 702 F.2d 1125, 1130-34 (D.C. Cir. 1983)). For information to qualify as "officially acknowledged," it must satisfy three criteria: "(1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure." *ACLU v. Dep't of Def.*, 628 F.3d 612, 620-21 (D.C. Cir. 2011). Because Plaintiff's proffered news articles concern different cost information than the information being withheld from the OIG Report, Plaintiff fails to satisfy these criteria and the Court should find that Plaintiff has not met its "burden of identifying specific information that is already in the public domain due to official disclosure." *Mobley v. CIA*, 806 F.3d 568, 583

(D.C. Cir. 2015); *Shapiro v. Dep't of Justice*, 153 F. Supp. 3d 253, 285 (D.D.C. 2016) (describing the standards for invoking the official acknowledgment doctrine as "high").

For all these reasons and those set forth in Defendant's opening memorandum, the Court should uphold DHS's application of Exemption 7(E) to the information redacted from the OIG Report.

Exemption 7(F)

Plaintiff argues that even accepting what it mischaracterizes as a "dubious proposition" that the cost information reveals part of the secret Service's techniques for staffing protective details for the President on international travel, revelation of that information would not endanger the lives or physical safety of the President or employees protecting him. Pl.'s Opp. at 10-11. Plaintiff contends with little explanation that there is no "logical" basis for something that seems at least as obviously useful to people planning harm as the inundation maps that were withheld in full "comfortably" under Exemption 7(F) in *Pub. Emps. for Envtl. Responsibility v. Int'l Boundary & Water Comm'n*, 740 F.3d 195 (D.C. Cir. 2014). *Id*. at 206. In that case, the D.C. Circuit recognized the connection between the inundation maps and harm to the individuals living in communities downstream from the dam which the government showed had been the subject of an intelligence report concerning an alleged terrorist plot. *See id*. at 205-06.

Based on the Rowe Declaration, the dots are just as easily connected here (Rowe Decl. ¶¶ 4, 9), and Plaintiff's opposition to Defendant's motion for summary judgment fails to show any reason why the cost information in the OIG Report falls outside Exemption 7(F), which is something the Court need only even consider were it to find that Exemption 7(E) does not apply. *See Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 854 F.3d 675, 681 (D.C. Cir. 2017). Plaintiff's failure to distinguish the cases cited in Defendant's memorandum is telling. *See*

Open. Br. at 12-16. Accordingly, the Court should conclude that the information being withheld in this case falls squarely within Exemption 7(F).

Adequacy of Foreseeable Harm Showing

Although the "foreseeable harm" requirement grafted onto the FOIA in the 2016 amendments to the statute increases the burden on the agency, the addition is only to the low burden of satisfying Exemption 7(E) as recognized in *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). The D.C. Circuit has yet to articulate what is generally required to demonstrate foreseeable harm based on the 2018 amendments to the statute, but the Court should not apply a "higher" or "tougher" standard, as Plaintiff urges (Pl.'s Opp. at 11) because that would be contrary to the plain language in the statute. *See Argus Media Leader*, 139 S. Ct. at 2366. The foreseeable harm requirement is simply an additional requirement akin to the mandate that agencies reasonably segregate non-exempt information from exempt information in fulfilling the disclosure obligation. As amended, the statute expressly allows withholding when "the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b)" or release would be otherwise unlawful. 5 U.S.C. § 552(a)(8)(A). In areas where the Court lacks expertise that agencies possess by virtue of their missions and specialized operations or experience, an appropriate level of deference to agency expertise and predictions of consequences is appropriate, as in this case. *See Shapiro v. CIA*, 248 F. Supp. 3d 53, 64 (D.D.C. 2017).

Part of the foreseeable harm analysis should acknowledge what information is already released because the harm analysis should be considered in context. Here, the fact that the costs for meals and hotels are capped by other government regulations means that significant information about those matters are already public, and there is no incentive for the DHS to withhold the information redacted from the OIG Report out of some misplaced sense of

embarrassment. *See* Pl.'s Opp. at 12. Additionally, much of the information about the costs examined by the OIG has been released already and Plaintiff has proffered news articles based on other cost information. *See* Def. Ex. 3 (ECF No. 9-4); Pl.'s Statement of Material Fact No. 3.

Rather than take on the foreseeable harms articulated in the Rowe Declaration, Plaintiff makes a sweeping and conclusory assertion that DHS failed to meet its burden. *See* Pl.'s Opp. at 12-13. Such broadside attacks are as undeveloped as they are unpersuasive. Further, the physical and other security measures for protecting the President are matters of national security, and the Court should not lightly disregard the Secret Service's assertion of the nexus between the information being withheld and its utility to individuals or organizations who might intend harm to the President. *See ACLU v. Dep't of Def.*, 628 F.3d 612, 624 (D.C. Cir. 2011) ("The [agency's] arguments need only be both 'plausible' and 'logical' to justify the invocation of a FOIA exemption in the national security context.") (quoting *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007)); *Larson v. Dep't of State*, 565 F.3d 857, 864-65 (D.C. Cir. 2009). That deference should not be limited to classified materials. *Cf. Ameziane v. Obama*, 620 F.3d 1, 8 (D.C. Cir. 2010).

The Rowe Declaration attests to a professional opinion from a highly experienced Special Agent with direct knowledge and experience in the Secret Service's performance of its protective mission that revealing the cost information to the public provides a direct link to information about the strength of the President's protective detail such that its disclosure poses a foreseeable risk to both the President and those who protect him. *See* Rowe Decl. ¶¶ 2-4, 6-7, 9-14. Because the evidence is both logical and plausible about the foreseeable harm in the context of national security, the Court should find that DHS has complied with the statute.

CONCLUSION

For all these reasons, the Court should grant Defendant's motion for summary judgment and deny Plaintiff's Cross-Motion.

Dated: September 23, 2020.

Respectfully submitted,

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