IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 23-cv-1485 (CRC)

PLAINTIFF'S [CORRECTED] MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION

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> "Well, we just have to demonstrate that [Donald Trump] will not take power – if we – if he does run. I'm making sure he, under legitimate efforts of our Constitution, does not become the next President again."
>
> – *President Joseph R. Biden, Nov. 9, 2022*[1]

I. Introduction.

On November 18, 2022, Attorney General Merrick Garland appointed Special Counsel Jack Smith to investigate potential criminal wrongdoing by former President Donald J. Trump. The appointment came nine days after President Biden announced his effort to "mak[e] sure" Trump did not become president again. The unprecedented investigation – and now prosecutions – by an incumbent president of his immediate predecessor, opponent in the last election, and leading opponent in the upcoming election raises numerous questions about who Special Counsel Smith chose to assist him in this highly charged endeavor. Are these persons opponents or supporters of the former president, aligned with one of the two major political parties, or otherwise biased or conflicted, or are they unbiased, nonpartisan professionals?

Plaintiff submitted a FOIA request to the Special Counsel's Office ("SCO") on December 9, 2022 to try to answer these questions. The request seeks "[a]ll staff rosters, phone lists, or similar records depicting all employees hired by or detailed to the office of Special Counsel Jack Smith." Plaintiff previously had requested and obtained a staff roster of personnel working for Special Counsel Robert Mueller, albeit after Special Counsel Mueller's investigation had ended. Plaintiff has limited its current request to the identity of SCO staffers at the GS-14 level and above because such employees tend to be decisionmakers or supervisors or possess specialized skills, knowledge, and experience.

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[1] Remarks by President Biden in Press Conference, The White House (Nov. 9, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/11/09/remarks-by-president-Biden-in-press-conference; Plf's Stmt., ¶ 22.

Defendant's search yielded two records – staff rosters – dating from sometime before February 2, 2023. Defendant does not identify the date of either roster, but, because Special Counsel Smith was only appointed in mid-November 2022, they necessarily have to date from early in the SCO's investigation. Defendant has withheld these more-than-one-year-old rosters in their entirety, refusing to redact the names of those SCO personnel who have not been officially acknowledged. Defendant will not even disclose the number of pages of the rosters, asserting that Plaintiff will somehow be able to glean the size of the SCO's staff from the font size and page length.

Much has transpired since the rosters were prepared. The SCO's operations and staff appear to have expanded since February 2023. Most significantly, Special Counsel Smith obtained indictments of former President Trump in June 2023 in Florida and in August 2023 in the District of Columbia. A superseding indictment was issued in July 2023 in the Florida proceedings. Both cases have been litigated vigorously, and the scope, nature, and direction of the prosecutions have become clear in the more than fourteen months that have passed since Special Counsel Smith was appointed.

Defendant readily acknowledges that the SCO's investigations and prosecutions of former President Trump "have been the subject of intense public scrutiny." Def's Mem. at 2. This scrutiny will only increase as the election approaches. Yet Defendant also claims – startlingly – that there is a "dearth of FOIA public interest" in knowing the identities of SCO staffers. Brinkmann Decl., ¶ 38. Defendant could not be more wrong. Knowing who Special Counsel Smith chose to investigate and prosecute the former president is vital to informed debate about the SCO's activities. It has substantial bearing on public confidence in – or skepticism about – the SCO's actions and may help voters decide how to cast their ballots in

the upcoming election. It is vital to the functioning of our republic and at the very center of FOIA's purpose of providing citizens with information about "what their government is up to."

II. Standards.

The standards governing summary judgment are well established and need no explication. Unlike in most litigation, the defendant in a FOIA lawsuit bears the burden of sustaining its actions. *Wolf v. Central Intel. Agency*, 73 F.3d 370, 374 (D.C. Cir. 2007). An agency seeking to withhold responsive records must prove that its invocation of a FOIA exemption is "logical" or "plausible." *Id.* at 374-7. Defendant invokes FOIA Exemptions 6, 7(A) and 7(C) to withhold the rosters in full. Defendant's motion falls far short of satisfying this burden.

III. Argument.

A. Exemption 7 Does Not Apply Because the SCO's Rosters Are Not Records Compiled for Law Enforcement Purposes.

A necessary prerequisite to demonstrating that one or more of Exemption 7's six subcategories applies is that the records or information at issue must have been "compiled for law enforcement purposes. 5 U.S.C. § 552(b)(7). Both Defendant's Exemption 7(A) and 7(C) claims fail for the most basic reason that the rosters cannot logically or plausibly be said to have been compiled for law enforcement purposes." While a court may grant some deference to an agency's determination in this regard, that deference is not "vacuous." *Campbell v. United States*, 164 F.3d 20, 32 (D.C. Cir. 1998).

It is self-evident that the names of government employees engaged in law enforcement are fundamentally different from information those same employees "compile" in carrying out their law enforcement duties. Employee names are not the fruit of any law enforcement investigation or effort, nor do they reflect any law enforcement activity or effort. The

government can only act through people. The names of the employees on the rosters are, in effect, the government itself, not "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). Indeed, the Court in *Maydak v. U.S. Dep't of Justice*, 362 F. Supp.2d 316 (D.D.C. 2005) rejected the Bureau of Prison's assertion that a list of staff names and titles for all staff at the Ray Brook Federal Correctional Institution was compiled for law enforcement purposes. *Id.* at 322. The Court in *Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp.2d 246, 256-57 (D.D.C. 2005) held similarly that the names of government employees in U.S. Department of Justice records – paralegals in the Public Integrity Section to whom prosecutors were directed to send voter initiative reports and records – were not compiled for law enforcement purposes. *Id.* at 257. The same is true here. Defendant admits that the rosters were "created and maintained by the SCO to facilitate coordination and communication" among its staff. Def's Stmt., ¶ 12. They are common, administrative records found in every office, not records unique to a law enforcement entity. They are not meaningfully different from the prison staff names in *Maydak* or the paralegal names in *Leadership Conf. on Civil Rights*.

There also is ample precedent for the proposition that records compiled by an agency acting as an employer (*i.e.*, for oversight of its employees) do not fall under Exemption 7. *See*, *e.g.*, *Bartko v. U.S. Dep't of Justice*, 898 F.3d 51, 64 (D.C. Cir. 2018); *Jefferson v. U.S. Dep't of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002); *Rural Housing Alliance. v. U.S. Dep't of Agriculture*, 498 F.2d 73, 81-82 (D.C. Cir. 1974). Practically every office has a staff roster or its equivalent. The staff rosters at issue are far more like the ordinary records of an employer than a record compiled for a law enforcement purpose.

Relatedly, any tie between the rosters and a law enforcement purpose is far too attenuated for Exemption 7 to apply. The Court reached this conclusion in *Henderson v. U.S. Dep't of Justice*, 157 F. Supp.3d 42 (D.D.C. 2016), which concerned a FOIA request for certain expenses incurred by the government in an earlier criminal proceeding involving the requester. The records at issue were maintained in an expense file containing paperwork for stenographic services related to the case. *Id.* at 49. The Court concluded, "Nothing in the EOUSA's supporting declarations suggests that this information was found in a criminal case file. Notwithstanding the apparent connection between stenographic services and the EOUSA's law enforcement function in prosecuting plaintiff's criminal case, it cannot be said that these expense-related records fall within the scope of Exemption 7." *Id.* at 49-50.

Defendant fails to provide a single case in which phone or other types of staff rosters identifying government personnel were found to have been compiled for law enforcement purposes. Defendant's reliance on *Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003) clearly is not such a case. At issue were the names of persons held by the United States following the September 11, 2001 terror attacks, including persons held on criminal charges, under material witness warrants, and for alleged immigration law violations. *Id.* at 921. The detainees plainly came to the attention of law enforcement "as a result of" the government's law enforcement efforts. *Id.* at 926. They were not law enforcement personnel themselves. Defendant's reliance on *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice*, No. 20-cv-0212, 2022 U.S. Dist. LEXIS 179823 (D.D.C. Sept. 30, 2022) ("*CREW*") also is misplaced because the spreadsheets at issue in that case detailed travel costs and travel information, including the destination and duration of trips by U.S. Department of Justice investigators participating in a U.S. Department of Justice review of

2016 presidential campaign activities. *Id.* at **3 & 16. Unlike the rosters at issue here, the nexus between the travel expense information and the law enforcement activity at issue in *CREW* was direct and unattenuated. *Id.* at 16.

If a staff roster of government employees is a record compiled for law enforcement purposes, there is no limit to the records covered by Exemption 7, so long as the agency has a law enforcement function, which could be said of virtually every federal agency. Ordinary office expenses, invitations to a staff holiday party, even a list of food choices for a working staff lunch would fall under the exemption's purview. The requirement of a "rational nexus" between an investigation and an agency's law enforcement duties would be rendered meaningless if such an attenuated connection to a law enforcement function was upheld. That is not the law, and, importantly, Defendant has not demonstrated that it is the law.

B. Defendant's Exemption 7(A) Claim.

Even if Defendant could demonstrate that the rosters were compiled for law enforcement purposes, Defendant's Exemption 7(A) claim would fail because it cannot demonstrate that disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Defendant makes two arguments in support of its Exemption 7(A) claim. First, it asserts that disclosing the more-than-one-year-old rosters will reveal details about the scope, nature, and direction of the SCO's ongoing activities. Second, it claims that disclosing the rosters will create a risk of threats and harassment. Again, "deference is not vacuous." *Campbell*, 164 F.3d at 32. Neither argument is logical or plausible.

1. "Scope, nature, and direction."

Defendant does not identify a single case in support of its "scope, nature, and direction" argument in which a court has upheld an Exemption 7(A) withholding based on a link between a

record and an investigation that is as weak as the purported link between the more-than-one-year-old rosters and the SCO's investigation. The three cases Defendant cites, *Swan v. Securities and Exchange Comm'n*, 96 F.3d 498 (D.C. Cir. 1996), *Alyeska Pipeline Serv. Co. v. U.S. Envt'l. Prot. Agency*, 856 F.3d 309 (D.C. Cir. 1998) and *Boyd v. Crim. Div. of U.S. Dep't of Justice*, 75 F.3d 381 (D.C. Cir. 2007), bear no resemblance to this case. At issue in all three cases was the contents of investigative files, not mundane administrative records like old staff rosters. *Swan*, 96 F.3d at 499 (records at issue contained the identities of witnesses, information obtained from sources, and agency staff's selective recordings of information); *Alyeska Pipeline Serv. Co.*, 856 F.2d at 310 (records at issue consisted of select corporate records of the target of the agency's investigation provided by a third-party source); *Boyd*, 96 F.3d at 385 (various law enforcement investigative materials). None concern records as thinly linked to any actual investigative materials as is a staff roster. If anything, the facts of *Swan*, *Alyeska Pipeline Serv. Co.*, and *Boyd* are so far removed from the facts of this case that they demonstrate just how misplaced Defendant's argument is.

Defendant's argument also ignores the fact that much has transpired since the rosters were prepared sometime before February 2, 2023. Special Counsel Smith obtained indictments of former President Trump and two other individuals in June 2023 in Florida and in August 2023 in the District of Columbia, and a superseding indictment was issued in July 2023 in the Florida criminal proceeding. Plf's Stmt., ¶ 23. Both cases have been litigated vigorously and have included at least two appeals. *Id.* The trial of the District of Columbia case was scheduled to begin on March 4, 2024, until it was stayed on December 13, 2023 – two days after Defendant filed its motion for summary judgment – pending the outcome of former President Trump's appeal of his claim of immunity. *Id.*, ¶ 24. The oral argument on that appeal took place on

January 9, 2024. *Id.*, ¶ 25. A January 16, 2024 filing by the former president seeking to compel discovery presents a trove of information about the history and background of the investigation even though substantial portions of the 223-page submission were filed under seal.[2] *Id.*, ¶ 26. Relatedly, the social media site known as X, formerly Twitter, litigated a search warrant issued to it by the SCO for information regarding the former president's Twitter account, and, although the matter was initially sealed, various portions of the case file were unsealed over time and additional portions were unsealed in October 2023. *Id.*, ¶ 27. The scope, nature, and direction of the SCO's efforts are both well-established and can be discerned from the indictments, publicly available case files, and transcripts and recordings of arguments. Defendant does not address how disclosure of the more-than-one-year-old rosters would reveal anything not already publicly known about the scope, nature, and direction of SCO's investigation.

Defendant is particularly fixated about revealing the size of SCO's staff. Def's Stmt., ¶ 15. Defendant makes no claim that the size of the staff has remained constant since the two staff rosters were prepared sometime before February 2, 2023, and it appears that the SCO's staff has expanded over time. According to the SCO's statement of expenses for the period from November 18, 2022 through March 31, 2023, the SCO spent $2.7 million on personnel compensation and benefits[3] and its expenses totaled $5.4 million. Plf's Stmt., ¶ 28. The SCO's statement of expenses for the period from April 1, 2023 to September 30, 2023 shows

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[2] A coalition of media organizations has moved to unseal the filing, citing the substantial public interest in the prosecution. Plf's Stmt., ¶ 26.

[3] This figure includes both SCO employees and DOJ employees detailed to the SCO. Plf's Stmt., ¶ 28.

expenditures of $4.8 million on personnel compensation and benefits[4] and total expenses of $7.4 million. Plf's Stmt., ¶ 29. The statements suggest that the size of the SCO's staff has changed over time, which would seem to render the pre-February 2023 rosters poor indicators of the current size of the SCO's staff. Under the circumstances, the snapshot of the SCO's staff provided by rosters says little about the SCO's current staff size. Correspondingly, the now more than one-year-old rosters can say nothing meaningful about the current scope, nature, and direction of the SCO's efforts. And, of course, Plaintiff does not seek the identities of the entire staff; it only seeks those staffers at or above the GS-14 pay grade. It would not be possible to identify the full size of the SCO's staff as of February 2, 2023 even if the rosters were disclosed.

Defendant's claim that disclosure of the SCO's staff size, in combination with the information contained in the SCO's statements of expenditure, will reveal details about the scope, nature, and direction of the SCO's investigation (*see* Def's Stmt., ¶ 15) is a *non sequitur*. Defendant never clearly explains how this might be the case. Even if it were to be disclosed that, sometime prior to February 2022, the SCO employed some 30 persons at or above the GS-14 pay grade, that fact combined with the disclosure that the SCO spent $2.7 million on personnel compensation and benefits between November 18, 2022 and March 31, 2023 says nothing meaningful about the scope, nature, and direction of the SCO's investigation, either then or now. One need only look at the indictments and case files for a far more meaningful picture of the scope, nature, and direction of the SCO's efforts. Whatever point Defendant was trying to make, it plainly has not satisfied its burden.

[4] Again, this figure includes both SCO employees and DOJ employees detailed to the SCO. Plf's Stmt., ¶ 29.

2. Threats and Harassment.

Defendant's argument that disclosing the more-than-one-year-old rosters could reasonably be expected to interfere with the SCO's work because it could lead to the SCO's staff being threatened and harassed is entirely conclusory, little more than speculation, and lacks meaningful evidentiary support. It also ignores the fact that the names of at least 23 SCO staffers are readily available from public sources, yet the public availability of these names and in some instances email addresses and a cell phone number does not seem to have had any discernable impact on the functioning of the SCO. Plf's Stmt., ¶¶ 30-31. Its prosecution of the former president and the two other individuals certainly appears to be proceeding apace, and Defendant has neither claimed nor demonstrated otherwise.

Defendant makes the generic assertion that "there have been instances of harassment and threats against SCO staff," including a single instance of a piece of mail sent to an SCO staff's residence, and that these "threats and harassing communications distract, disrupt, and inhibit SCO staff's ability to conduct their work." Brinkmann Decl., ¶ 22. Other than the single piece of mail sent to a private residence and a non-specific reference to emails sent to work accounts, Defendant provides no information at all about the facts and circumstances surrounding these purported incidents. Defendant does not say how many such communications were received or when they were received. It says nothing about the content of the communications or who determined that they were threatening or harassing. Defendant does mention "partisan political attacks." *Id.* Is it defining "threats and harassing communications" to include statements made in the media, on cable television, or Congress by critics of Special Counsel Smith and his investigation? An impolite sign carried by a protester outside the courthouse in Florida or the District? An idle expletive or vulgar comment uttered at the courthouse entrance? Defendant

doesn't say. It also provides no information about how or even whether any alleged threat or harassing communication was even linked to a staffer's work at the SCO. Was it ever determined that the piece of mail sent to the SCO staffer's residence was sent because the staffer works at the SCO? If so, who made this determination? Again, Defendant doesn't say. Plaintiff obviously does not condone such actions, but the analysis for purposes of Exemption 7(A) is whether disclosure of the records at issue "could reasonably be expected to interfere with enforcement proceedings," and Defendant's failure to provide any meaningful information means this analysis fails.

What measures, if any, has the SCO put in place to prevent the disclosure of staffers' identity? Are those measures followed? Have they been evaluated to determine whether they are effective, and, if so, what does the evaluation show? Do staffers themselves disclose the fact that they work at the SCO to family, friends, neighbors, or colleagues, or on social media? Again, Defendant doesn't say. If all Defendant is doing to prevent the disclosure of staffers' identities is denying FOIA requests, it cannot reasonably be said that disclosure of the rosters, as opposed to disclosure of staffers' identities from other sources, could be expected to interfere with the SCO's work. Defendant's failure to provide meaningful information about these efforts creates a causation problem for Defendant.

Also completely absent from Defendant's submission are any facts about how the alleged threats and harassing communications may have impacted the SCO's work. Defendant's bald claim about distracting, disrupting, and inhibiting the SCO's staff is entirely conclusory in this regard. Defendant indicates that SCO has a security department headed by a Chief Security Officer (Brinkmann Decl., ¶ 22), so it would appear that security issues were contemplated and measures have been taken to address them. Are the measures in place really insufficient to

prevent SCO's staff from being distracted, disrupted, or inhibited by the disclosure of a pair of more-than-one-year-old staff rosters?

Plaintiff was able to identify with relative ease – reviewing the public dockets of the SCO's litigation and a quick internet search – a total of twenty-three SCO staffers, far more than the nine Defendant identified to Plaintiff. Plf's Stmt., ¶ 30. Other than SCO spokesperson Myron Marlin, all but four of these twenty-three are attorneys whose names appear on the dockets as counsel for the United States in various SCO litigation.[5] *Id.* Plaintiff identified the remaining four – also attorneys – from media reports. *Id.* Plaintiff also located on the "Unsealed Orders, Opinions, Documents and Docket Reports" section of this Court's website records disclosing the email addresses of several SCO attorneys and the cell phone number of another.[6] *Id.*, ¶ 31. It appears from the common formatting of the SCO attorneys' email addresses on these records that it is possible to identify the likely email addresses of other SCO staffers. *Id.* Defendant's argument fails to account for the substantial number of SCO staffers whose identities are already publicly available, if not already known to the public.

Defendant's assertion about alleged threats and harassing communications received by SCO staffers also suffers from a hearsay problem. *See*, *e.g.*, *White Coat Waste Project v. U.S. Dep't of Veterans Affairs*, 404 F. Supp.3d 87, 105-06 (D.D.C. 2019); *Humane Soc'y v. Animal and Plant Health Inspection Serv.*, 386 F. Supp.3d 34, 44 (D.D.C. 2019); Fed. R. Civ. P. 56(c)(2). The declarant, a Senior Counsel in Defendant's Office of Information Policy ("OIP") does not say how she obtained her information. Brinkmann Decl., ¶ 1. She says OIP conferred

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[5] These appearances plainly constitute official acknowledgment that the attorneys work for the SCO. *See*, *e.g.*, *Mobley v. Central Intelligence Agency*, 806 F.3d 568, 583 (D.C. Cir. 2015).

[6] Again, Plaintiff does not seek the email addresses or phone numbers of SCO staffers; it seeks only the names of those staffers at the GS-14 level and above.

with the SCO's Chief Security Officer, but she does not say she did so herself. *Id.* She also does not say who at OIP conferred with the security chief or how she learned whatever information the security officer conveyed to the unidentified OIP personnel. *Id.* Nor does she say how the security officer obtained the information. *Id.* It is not even known who saw the communications or assessed them to be threats or harassment. Defendant's assertion fails because its declaration fails to establish that it is based on any identified individual's actual, personal knowledge. *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 369 (D.C. Cir. 1980).

Finally, Defendant's citation to two indictments unrelated to anything having to do with FOIA does nothing to demonstrate that disclosure of the more-than-one-year-old lists could reasonably be expected to interfere with the SCO's work. The first concerns a Texas woman who is alleged to have left a voicemail message on Judge Tanya Chutkan's chambers telephone line – which is published on this Court's website – threatening to kill the judge, "anyone who went after former President Trump," a specific member of Congress, "all democrats in Washington, D.C., and all people in the 'LGBTQ' community." Plf's Stmt., ¶ 32. According to the docket, the woman is receiving substance abuse treatment and is scheduled to be tried beginning on February 26, 2024. *Id.* The second concerns a Tennessee man indicted in this Court for alleged offenses on January 6, 2021 at the U.S. Capitol and indicted a second time in Tennessee for allegedly conspiring to kill the FBI agents who investigated and arrested him on the earlier set of charges. *Id.*, ¶ 32. He has pled not guilty and is scheduled to be tried beginning on March 26, 2024.[7] *Id.* Defendant makes no claim about where or how the Tennessee man allegedly obtained information about the identities of the FBI agents. It

[7] According to the docket, a co-conspirator pled guilty on January 22, 2024. Plf's Stmt., ¶ 33.

certainly makes no claim that the information was obtained through FOIA. Defendant only appears to have referenced the matter because it involves the events of January 6, 2021 and a generic list. Neither case has any bearing on the more-than-one-year-old rosters or whether the rosters' disclosure could reasonably be expected to interfere with the SCO's investigation.

C. Defendant's Exemption 7(C) Claim.

For purposes of an Exemption 7(C) claim, an agency must not only satisfy the threshold test of proving that the records at issue were compiled for law enforcement purposes, but also that disclosure of the records "could reasonably be expected to constitute an unreasonable invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) "turns on a balance of the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *CEI Wash. Bureau, Inc. v. U.S. Dep't of Justice*, 469 F.3d 126 128 (D.C. Cir. 2006). Defendant is coy about the alleged privacy interests it claims are at stake. It is not clear whether Defendant is arguing that employees have separate privacy interests in (1) their names and/or association with the SCO and (2) avoiding threats and harassment, or (3) some combination of both. Defendant does not even try to address the public interest side of the balancing test, dismissing what it describes as "the dearth of FOIA public interest in disclosure of [staffers'] identities." Brinkmann Decl., ¶ 38.

1. SCO staffers' interests in their names.

To the extent Defendant's argument is that SCO's staffers have a privacy interest in their names, that argument misses its mark. Office of Personnel regulations provide for the release to the public of federal employees' names, present and past position titles, and even their present and past annual salary rates. 5 C.F.R. § 293.311(a). Accordingly, an employee's privacy interest in his or her name alone is *de minimis.*

Many of the cases on which Defendant relies in support of its "names" argument are inapposite. At issue in *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1992) was the citizenship status of two foreign nationals living abroad, not the names of federal employees. At issue in *Niskanen Center v. Federal Energy Regulatory Comm'n*, 20 F.4th 787 (D.C. Cir. 2021) were the names and addresses of private property owners along the route of a proposed pipeline, again not federal employees. *U.S. Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487 (1994) concerned union efforts to obtain the home addresses of federal employees, not their names. *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141 (D.C. Cir. 2006) (addressing Exemption 6) concerned the names and addresses of manufacturers of the controversial drug mifepristone, again not federal employees. It is well established that FOIA's privacy provisions do not "categorically exempt individuals' identities. *Id.* at 153. Rather, "[t]he scope of a privacy interest under [FOIA's exemptions] will always be dependent on the context in which it has been asserted." *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 581 (D.C. Cir. 1996) (addressing Exemption 6).

Plaintiff recognizes, however, that, depending on the context, courts have found that federal employees may have a privacy interest in being associated with particular government action, and that the public has a less substantial interest in knowing the identity of lower level or non-supervisory federal personnel. Plaintiff has limited its request to the identity of SCO staffers at the GS-14 level and above because such employees tend to be decisionmakers or supervisors or possess specialized skills, knowledge, and experience. Defendant largely ignores this limitation, failing to identify any particular interest SCO staffers at the GS-14 level and above have in avoiding disclosure of the fact of their association with the SCO and making

no distinction between these staffers' purported privacy interests and the privacy interests of lower level or non-supervisory staffers.

Defendant also does not claim that the SCO staffers in question were ordered to work for the Special Counsel. Plaintiff submits that, whether these individuals specifically sought out positions or otherwise volunteered to join the SCO's staff weighs substantially on any purported privacy interests. Those who willingly joined the SCO's high profile, unprecedented, historic, and potentially career-making prosecutions plainly have diminished privacy interests in being associated with the SCO. *See*, *e.g.*, *Nat'l Assoc. of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002) (declining to apply Exemption 6 protection to private landowners' addresses where, among other factors, the landowners voluntarily provided information to a State agency about rare bird sightings on their property "with the understanding that the information, although confidential, might be subject to release under disclosure laws.").

Defendant also ignores the fact that the identities of a great many SCO staffers – twenty-three by Plaintiff's count; nine by Defendant's – are already public. Plf's Stmt., ¶ 30. Are the privacy interests of these, publicly known SCO staffers any different from the privacy interests of staffers whose identities are not publicly known? Is the difference because of their job duties or because their privacy interests were overridden or superseded by some other interest? Defendant never explains.

Defendant also fails to show that all SCO staffers at the GS-14 level and above have the same privacy interests. Obviously, the privacy interests of some – attorneys who appear and argue in court or on paper, including signing subpoenas served on third-party witnesses – are different from staffers who have no interaction with the courts or the public. Investigators who

interview or participate in interviews of third-party witnesses are more public-facing than administrative staff, as are communications staff who interact with the media or Congress. Instead, Defendant lumps all SCO staffers together into one undifferentiated mass. Defendant has not made a sufficient showing that the privacy interests at stake are uniform such that balancing would yield a clear answer. *American Immigration Lawyers Assoc. v. Exec. Office for Immigration Review*, 830 F.3d 667, 675-76 (D.C. Cir. 2016) (applying Exemption 6). A categorical rule for all employees is inappropriate. *Id.* Its failure to address these obvious issues highlights the vague, ambiguous, and unsupported nature of Defendant's privacy argument with respect to staffers' names.

2. SCO staffers' privacy interest in avoiding threats and harassment.

Defendant's argument about SCO staffers' privacy interest in avoiding threats and harassment fails for the same reason its Exemption 7(A) argument about threats and harassment fails: it is too generalized, too speculative, too conclusory, and it lacks evidentiary support. Not only is Defendant's "threats and harassment" privacy argument seriously lacking, but Defendant cannot, despite at least twenty-three members of the SCO's staff being publicly identified, come up with admissible evidence of a single, concrete instance in which an SCO staffer was threatened or harassed after his or her association with the SCO was made public. Tellingly, Defendant fails to demonstrate that anyone on Special Counsel Mueller's staff was threatened when Defendant released a staff roster from that investigation to Plaintiff in response to an earlier FOIA request. Plf's Stmt., ¶ 34. It is irrelevant that that extraordinarily controversial investigation had concluded when Defendant released the roster because, obviously, the conclusion of the investigation did not erase the motive or opportunity that anyone inclined to threaten or harass a former special counsel staff member had to do so. If

anything, it demonstrates that Defendant's "threats and harassment" privacy argument is without merit. And if SCO staffers' purported privacy interests in avoiding threats and harassment were substantial rather than generalized, speculative, and conclusory, Defendant surely would have made some effort to identify what, other than denying Plaintiff's FOIA request, it has done to try to protect these privacy interests.

Defendant principally relies on two cases for its "threats and harassment" privacy interest argument, *CREW*, *supra*, and *Freedom Watch, Inc. v. Mueller*, 453 F. Supp.3d 139 (D.D.C. 2005). A careful reading of *CREW* shows that employee names were not at issue; the requester sought only travel, expense, and salary information about investigators, not the names of the personnel assigned to the internal review. The Court's opinion regarding these employees' privacy interest – which it admitted it only considered "briefly" – was only dicta. *CREW*, 2022 U.S. Dist. LEXIS 179823 at *22. While the Court found investigators had a generalized privacy interest in avoiding harassment and "questioning as to the scope of their involvement" in the review (*id*. at *23), the public interest side of the balancing was very different from the public interest here. In *CREW*, the incumbent administration had initiated the review; it was not an investigation by an incumbent president's administration of the incumbent's predecessor and leading challenger the incumbent's upcoming reelection campaign. The only public interest apparently asserted by the requester was a general interest in "learn[ing] more about the resources DOJ was expending" on the review. *Id.* at *2. *CREW* raised none of the compelling transparency interests raised in this case. The Court's dicta upheld the agency's Exemption 6 and 7(C) claims on top of the agency's Exemption 7(A) claim.

With respect to *Freedom Watch, Inc.*, the Court found that "Freedom Watch has not demonstrated how the personal information of the government employees, reporters, and third

parties will 'help the public stay informed about what their government is up to.'" 453 F. Supp.3d at 158 (cleaned up). Also unexplained in the decision is what privacy interest government employees had in their identities when the request at issue only sought "records of communications to and from the media rather than purely internal communications." *Id.* at 145. Plaintiff submits that government employees' privacy interests in their communications with reporters are *de minimis* if not nonexistent. *Freedom Watch, Inc.* does not aid Defendant here.

The remainder of the cases on which Defendants rely offer little insight into federal employees' purported privacy interests in avoiding threats and harassment but instead focus on the balancing test and the relatively insubstantial public interest shown in the records at issue in those cases. That plainly is not true here, where the public interest in knowing who Special Counsel Smith chose for his historic prosecutions of former President Trump is far greater than in any of Defendant's cases.

3. The substantial public interest.

There can be no real dispute that knowing the names of the persons involved in prosecuting the incumbent president's opponent in the last election, immediate predecessor, and chief opponent in the upcoming presidential election, now less than ten months away, will "help the public stay informed about what their government is up to." *American Immigration Lawyers Assoc.*, 830 F.3d at 674 (cleaned up). Defendant makes no meaningful argument to the contrary in this regard, ignoring the unique facts of this case and making the startling-but-bald assertion that there is a "dearth of public interest" in the identities of these persons. Brinkmann Decl., ¶ 38.

Knowing who Special Counsel Smith chose to prosecute the former president is vital to informed debate about the SCO's activities. It also has substantial bearing on public confidence in – or skepticism about – the prosecutions. Are the prosecutions an undertaking by neutral, unbiased, career professionals following wherever the facts and the law lead them, part of President Biden's effort to "mak[e] sure" former President Trump "does not become the next President again," something in between, or something else entirely different? If Special Counsel Smith filled his staff with partisans, persons affiliated with one of the two major political parties, opponents or supporters of the former president, or persons who otherwise appear to be biased or conflicted, that choice may likely have an adverse impact on public perception of the prosecutions. If he chose persons who are neutral or non-partisan or an equal mix of staffers from both of the two major parties, it may have a positive impact on public perception. Any reliable information that the public has about the prosecutions also may help voters decide how to cast their votes, which only further increases the public interest in disclosure.

Two recent examples highlight the importance of knowing the identities of the SCO's staffers. Notorious FBI employees Peter Stzrok and Lisa Page were both members of Special Counsel Robert Mueller's investigation of then-President Trump. Plf's Stmt., ¶ 34. Stzrok was the lead FBI investigator assigned to the probe, and Page was a "general attorney" on Special Counsel Mueller's staff. *Id.* During the investigation, it was discovered that Strzok and Page, had exchanged voluminous texts disparaging then-candidate Trump during the 2016 presidential campaign, commenting that "we'll stop" Trump from becoming president, and citing having an "insurance policy" in case he did. *Id.* A subsequent report by the U.S. Department of Justice Inspector General was highly critical of the exchanges, noting with respect to the "we'll stop it" text in particular:

> [W]hen one senior FBI official, Strzok, who was helping to lead the Russia investigation at the time, conveys in a text message to another senior FBI official, Page, "No. No he won't. We'll stop it" in response to her question "[Trump's] not ever going to become president, right? Right?!", it is not only indicative of a biased state of mind but, even more seriously, implies a willingness to take official action to impact the presidential candidate's electoral prospects. This is antithetical to the core values of the FBI and the Department of Justice.

Id.

Fulton County, Georgia District Attorney Fani Willis, who also has brought criminal charges against the former president, is now reportedly under investigation herself for allegedly choosing her paramour, Nathan Wade, to lead the prosecution. Plf's Stmt., ¶ 35. Although Wade's identity was already known, it led to the discovery of new, previously unknown information that bears on the public perception of the prosecution. It helps the public to know "what their government is up to." This case is no different. The public interest in knowing the identities of the persons prosecuting the former president and current leading presidential contender is substantial, whether the prosecution is in Georgia, Florida, or the District of Columbia.

The names of the SCO staffers on the withheld rosters are precisely the type of information that will contribute significantly to the public's understanding of the operations or activities of the government. Serving this "core purpose of FOIA" far outweighs Defendant's speculative, conclusory, and unsupported assertions about privacy.

F. Defendant's Exemption 6 Claim.

In the event that the Court rejects Defendant's Exemption 7 withholdings on the grounds that the rosters were not "compiled for law enforcement purposes," only Defendant's Exemption 6 claim would remain. The analysis is not even close. "[U]nder Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Washington Post Co. v.*

U.S. Dep't of Health & Human Servs., 690 F.2d 252, 261 (D.C. Cir. 1982). The responding agency must demonstrate that disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

Plaintiff does not disagree with Defendant that the analysis under Exemption 6 is substantially similar to the analysis under Exemption 7(C). Def's Mem. at 11, n. 2. As set forth above, both "turn[] on a balance of the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *CEI Wash. Bureau, Inc.*, 469 F.3d at 128. Exemption 6's "clearly unwarranted invasion of personal privacy" presents a higher standard than Exemption 7(C)'s "reasonable expectation of an invasion of personal privacy" standard. Defendant's evidence fails to satisfy Exemption 6's "clearly unwarranted invasion of personal privacy" for the same reasons it fails to satisfy Exemption 7(C)'s "reasonable expectation of an invasion of personal privacy" standard. The public interest in knowing the identities of the SCO personnel prosecuting President Trump far outweighs whatever privacy interests the SCO's GS-14 and above employees and detailees might have.

E. Segregability.

Defendant bears the burden of demonstrating that it took "reasonable steps necessary to segregate and release nonexempt information." 5 U.S.C. § 552(a)(8)(A)(ii)(II). Defendant's segregability argument, which appears to be based on Exemption 7(A) only, is baseless, if not specious. As Plaintiff understands it, Defendant's argument is that, if it were to produce the rosters with everything but the names of Special Counsel Smith, spokesperson Myron Marlin, and the eight attorneys identified in its August 9, 2023 letter redacted – assuming that all of these individuals were on the SCO's staff at the time the more than one-year-old rosters were prepared – Plaintiff could discern the size of SCO's staff from the font size of the type face used to print the names. Doing so would apparently involve a mathematical calculation using the number of

names that could fit on however many pages make up the rosters and the page size. Of course, this would assume there are no empty lines or gaps on the pages and that every page is filled with names only. Even then, Defendant would have to show that knowing these calculated staff sizes – hardly the "exact" size Defendant claims (*see* Def's Mem. at 9) – reveals something meaningful about the SCO's investigation that is protected by Exemption 7(A), which Defendant has not done. Accordingly, Defendant has failed to satisfy its burden of demonstrating that redacted rosters cannot be produced. If anything, Defendant's segregability argument shows the lengths Defendant is willing to go to avoid any scrutiny of the SCO's unprecedented prosecution of the former president and the incumbent president's leading opponent in the 2024 election.

IV. Conclusion.

Defendant's submission is plainly insufficient to satisfy its burden of proving that its withholdings are lawful. Defendant's motion for summary judgment should be denied, and Plaintiff's cross-motion should be granted.

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Respectfully submitted,

/s/ Paul J. Orfanedes

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