UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RICHARD BEHAR,

Plaintiff,

v.

Nos. 17 Civ. 8153(LAK)
18 Civ. 7516(LAK)

U.S. DEPARTMENT OF HOMELAND SECURITY,

Defendant.

.....x

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Preliminary Statement

In these related lawsuits, Plaintiff Richard Behar seeks public disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, of records in the possession of the United States Secret Service ("Secret Service" or "USSS"), a component of defendant the Department of Homeland Security ("DHS"), reflecting visitors to then-candidate or President-elect Donald J. Trump between November 1, 2015, and January 21, 2017. The Secret Service located a handful of responsive emails and a number of schedules for Mr. Trump. These records, or the information contained within them regarding Mr. Trump's meetings and visitors, were provided to the Secret Service by campaign or transition staff on a confidential basis, so that the Secret Service would have information about Mr. Trump's whereabouts and activities in order to carry out its investigative and protective functions.

The Secret Service properly withheld the emails and schedules under FOIA exemptions 6 and 7(C), 5 U.S.C. § 552(b)(6) ("Exemption 6") & § 552(b)(7)(C) ("Exemption 7(C)"), to protect personal privacy. These records reflect the personal, confidential schedules and meetings of an individual who remained a private citizen until he was sworn in as President, and they therefore shed no light on the operations or activities of the government—the only public interest that FOIA protects. To the extent the schedules reflect planned meetings of President Trump during the two-day period after he was sworn in on January 20, 2017, they were properly withheld because Presidential schedules are not "agency records" subject to disclosure under FOIA. Finally, the Secret Service properly withheld limited law enforcement information from four of the emails under FOIA exemption 7(E), 5 U.S.C. § 552(b)(7)(E) ("Exemption 7(E)"), to protect the USSS's techniques and procedures for protecting candidates, Presidents-elect, and

other protectees. The Secret Service's withholdings are logical and plausible, and DHS is therefore entitled to summary judgment pursuant to Federal Rule of Civil Procedure 56.

BACKGROUND

A. Plaintiff's Original FOIA Request and the *Behar I* Lawsuit

Plaintiff filed a FOIA request on or about September 22, 2017, seeking records identifying every individual who was screened and/or noted by the U.S. Secret Service because they either (a) sought to visit Donald Trump or certain of his family members and campaign officials,[1] and/or (b) sought access to a secured area at which those individuals were present, between November 1, 2015, and January 21, 2017. Case No. 17 Civ. 8153 ("*Behar I*"), ECF No. 1-1 (September 2017 FOIA Request). Behar filed this lawsuit on October 23, 2017, to compel disclosure of records in response to the FOIA request. *Behar I*, ECF No. 1 (Complaint).

The parties met and conferred over several months and ultimately agreed upon a Joint Stipulation governing the Secret Service's searches for responsive records. *See Behar I*, ECF No. 23 (Joint Stipulation and Order). Among other things, the Secret Service agreed to perform certain searches of defined sets of emails of the USSS Detail Leaders, Assistant Detail Leaders, and Operations Supervisors for USSS protectee Donald Trump during the relevant time period, review the emails (and attachments) captured by those searches, and process responsive records. *Id.* ¶¶ 1–6. The parties agreed that the searches conducted pursuant to the Joint Stipulation shall satisfy DHS's obligation to conduct an adequate and reasonable search for responsive records in response to Plaintiff's request, and Plaintiff waived any further challenge to the adequacy of

[1] The family members and campaign officials identified in the FOIA request are Eric Trump, Donald Trump, Jr., Ivanka Trump, Jared Kushner, Paul Manafort, Michael Flynn, Corey Lewandowski, Michael Cohen, Stephen Bannon, and Kellyanne Conway.

DHS's search. *Id.* ¶ 10. This Court so-ordered the Joint Stipulation on February 21, 2018. *Behar I*, ECF No. 23.

Pursuant to the Joint Stipulation and Order, the Secret Service reviewed thousands of emails captured by the searches. Declaration of Kim E. Campbell dated October 3, 2018 ("Campbell Decl.") Decl. ¶ 11. The Secret Service identified a total of nine email records that it deemed responsive to the September 2017 FOIA request. *Id.* ¶ 13. Two of the emails (and their attachments) were produced to Behar in redacted form, *id.* ¶¶ 14–15, and Plaintiff does not challenge those redactions.[2] Of the remaining seven emails (the "Withheld Emails" or "Emails"), five are from the campaign period and two are from the transition period that followed the election and preceded President Trump's inauguration. *Id.* ¶ 16. The five emails from the campaign period consist of:

- an April 2016 email chain referring to a contemplated meeting between Mr. Trump and a specific individual assisting with preparation for a speech;
- a July 2016 email referring to an ongoing meeting between Mr. Trump and a specific individual and staff at Trump Tower;
- an August 2016 email referring to three specific individuals who were potentially going to accompany Mr. Trump or meet with him during an upcoming trip (Wisconsin Governor Scott Walker, Rudolph Giuliani, and Milwaukee County Sheriff David

[2] Pursuant to the Joint Stipulation and Order, the Secret Service also produced to Plaintiff copies of redacted visitor records from the Presidential Transition Office ("PTO") that were processed and produced in a separate FOIA case, although the USSS did not make a determination that those PTO records were responsive to Plaintiff's September 2017 FOIA request in this case. Campbell Decl. ¶ 12 n.1; Joint Stipulation and Order ¶ 7. The Secret Service understands that Plaintiff does not challenge the withholdings from the PTO records.

Clarke),[3] containing *specific information concerning security planning for the trip, including an intelligence and threat assessment and details regarding staffing of security personnel (including local law enforcement assistance), and attaching site diagrams and photographs*;

- a September 2016 email chain referring to a then-anticipated meeting between Mr. Trump and a specific individual, and noting (in the first email in the chain) the non-public nature of the meeting; and
- a July 2016 email referring to a meeting that day with a specific individual, and containing *specific information concerning USSS staffing and screening responsibilities.*

Id. ¶ 16a. The two emails from the transition period consist of:

- a November 2016 email providing a list of individuals who would need access to certain secure areas within Trump Tower, and describing *related security arrangements for access to secure areas of Trump Tower*; and
- a January 2017 email referring to a meeting that day with a specific individual (Martin Luther King III)[4] and other unidentified individuals, and containing *information regarding USSS staffing and responsibilities of specific USSS personnel with regard to screening and other protective activities*.

Id. ¶ 16b. With the exception of the names of visitors whom the Secret Service determined had appeared in public with Mr. Trump on the dates in question, the Secret Service withheld the

[3] The Secret Service has determined that these individuals appeared in public with Mr. Trump during the trip in question, and therefore has provided Plaintiff with a redacted version of this email that releases their names. Campbell Decl. ¶ 16a n.2.

[4] The Secret Service has determined that this individual appeared in public with Mr. Trump at Trump Tower on the date in question, and therefore has provided Plaintiff with a redacted version of this email that releases his name. Campbell Decl. ¶ 16b n.3.

Emails pursuant to FOIA Exemptions 6 and 7(C) to protect personal privacy. *Id.* ¶¶ 17–18. The information italicized above in four of the Emails was also withheld pursuant to Exemption 7(E) to protect law enforcement techniques and procedures. *Id.* ¶ 18.

In the course of its review pursuant to the Joint Stipulation and Order, the Secret Service also identified a number of schedules reflecting potential meetings with Mr. Trump (the "Schedules"). Campbell Decl. ¶ 20. However, because the Schedules did not reflect any screening or notation of individuals by the Secret Service, the Secret Service determined they were not responsive to the September 2017 FOIA request. *Id*. ¶ 21. The Secret Service nevertheless advised Behar, through counsel, of the Schedules and explained that he could file an additional FOIA request for them. *Id*.

B. Plaintiff's Second FOIA Request and the *Behar II* Lawsuit

Although Plaintiff disagreed with the Secret Service's determination that the Schedules were not responsive to his original FOIA request, he filed a second FOIA request on May 14, 2018, seeking the Schedules identified during the course of the Secret Service's review pursuant to the Joint Stipulation. Case No. 18 Civ. 7516 ("*Behar II*"), ECF No. 7-2 (May 2018 FOIA Request).[5] Plaintiff commenced his second lawsuit on or about August 17, 2018, to compel disclosure of the Schedules. *Behar II*, ECF Nos. 1, 7 (Amended Complaint).

[5] In the May 2018 FOIA request, Behar also requested "any additional documents" located during the Secret Service's review that reference "any individuals attending or expecting to attend meetings with Mr. Trump" or the Trump family members or campaign officials identified in the original FOIA request. Apart from the Schedules and the Withheld Emails, however, the Secret Service did not identify any additional records responsive to the May 2018 FOIA request. Campbell Decl. ¶ 23.

The parties agreed that the outstanding issues regarding the Secret Service's withholding of the Schedules and the Withheld Emails could be addressed in consolidated cross-motions for summary judgment. *Behar I*, ECF No. 24; *Behar II*, ECF No. 9.

ARGUMENT

FOIA is intended to strike "a workable balance between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, 110 S. Ct. 471, 475 (1989). FOIA mandates disclosure of "agency records" upon request "unless they fall under one of nine enumerated and exclusive exemptions." *N.Y. Times Co. v. DOJ*, 101 F. Supp. 3d 310, 317 (S.D.N.Y. 2015); *see also* 5 U.S.C. § 552(a)-(b). The exemptions "reflect Congress' recognition that releasing certain records might prejudice legitimate private or governmental interests." *A. Michael's Piano, Inc. v. FTC*, 18 F.3d 138, 143 (2d Cir. 1994).

Summary judgment pursuant to Federal Rule of Civil Procedure 56 is the procedural vehicle by which most FOIA actions are resolved. *See, e.g., Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Carney v. U.S. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). "In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA." *Long v. OPM*, 692 F.3d 185, 190 (2d Cir. 2012) (quoting *Carney*, 19 F.3d at 812).[6] Summary judgment as to the applicability of a FOIA exemption is "warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within

[6] Because the Secret Service conducted the searches specified in the Joint Stipulation and Order, there should be no dispute concerning the adequacy of those searches. Nevertheless, the Campbell declaration describes the searches conducted by the USSS. Campbell Decl. ¶¶ 7–12.

the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)); *see also Long*, 692 F.3d at 190 ("In resolving summary judgment motions in a FOIA case, a district court proceeds primarily by affidavits in lieu of other documentary or testimonial evidence . . . ."); *Carney*, 19 F.3d at 812 (summary judgment warranted if agency affidavits are "adequate on their face)."

Although this Court reviews *de novo* the agency's determination that requested records or information fall within a FOIA exemption, *see* 5 U.S.C. § 552(a)(4)(B), the declarations submitted by the agency in support of its determination are "accorded a presumption of good faith," *Carney*, 19 F.3d at 812 (citation and internal quotation marks omitted). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible." *Wilner*, 592 F.3d at 73.[7] That standard is easily met here, as demonstrated by the Declaration of Special Agent in Charge Kim E. Campbell, submitted by the Secret Service. DHS is therefore entitled to summary judgment.

I. The Schedules and Withheld Emails Are Exempt from Disclosure Pursuant to Exemptions 6 and 7(C)

FOIA Exemption 6 exempts from public disclosure "personnel, medical, or other similar files," the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal

[7] Courts in this district have deemed the submission of statements pursuant to Local Rule 56.1 to be unnecessary in FOIA matters. *See, e.g.*, *Am. Civil Liberties Union v. DOJ*, No. 15 Civ. 1954 (CM), 2016 WL 8259331, at *2 n.3 (S.D.N.Y. Aug. 8, 2016) ("Because agency affidavits alone can support summary judgment in a FOIA case, Local Rule 56.1 does not apply and statements are unnecessary."); *accord Doyle v. U.S. DHS*, __ F. Supp. 3d __, 2018 WL 3597513, at *8 n.11 (S.D.N.Y. 2018).

information." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599, 102 S. Ct. 1957, 1960 (1982). Exemption 7(C) accords even broader protection to personal information, exempting from public disclosure all "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In determining whether personal information is exempt from disclosure under Exemptions 6 and 7(C), the Court must "balance the public need for the information against the individual's privacy interest." *Assoc. Press v. DOD*, 554 F.3d 274, 291 (2d Cir. 2009); *Wood v. FBI*, 432 F.3d 78, 86 (2d Cir. 2005).

A. The Schedules and Withheld Emails Satisfy the Threshold Requirements of Exemptions 6 and 7(C)

The threshold inquiry under Exemption 6 is whether the records at issue constitute "personnel, medical, or other similar files." 5 U.S.C. § 552(b)(6). The statutory language concerning files "similar" to personnel or medical files has been read broadly by the Supreme Court to encompass any "information which applies to a particular individual . . . sought from Government records." *Washington Post Co.*, 456 U.S. at 602, 102 S. Ct. at 1961-62; *see also Cook v. NARA*, 758 F.3d 168, 174–75 (2d Cir. 2014). The Schedules and Withheld Emails qualify as "similar files" under this standard, as they contain information about the personal schedule and meetings of a specific individual, Mr. Trump, as well as the names of individuals who met or were scheduled to meet with Mr. Trump (and in some cases the nature and/or circumstances of the visit), and the names, certain e-mail addresses, and phone numbers of non-visitor third parties whose names and contact information appear in the documents. Campbell Decl. ¶ 30.[8]

[8] The Schedules and Withheld Emails also contain the names, email addresses, and phone numbers of individual Secret Service agents. Campbell Decl. ¶¶ 30, 33. The Secret Service

The Schedules and Withheld Emails were also "compiled for law enforcement purposes" within the meaning of Exemption 7(C). The Secret Service is a criminal law enforcement agency created under 18 U.S.C. § 3056. Campbell Decl. ¶ 29. The Schedules and Withheld Emails were provided to, and thus compiled by, the Secret Service to allow the agency to carry out its investigative and protective functions. *Id.*

B. The Privacy Interests at Stake

"The privacy side of the balancing test is broad and encompasses all interests involving the individual's control of information concerning his or her person." *Wood*, 432 F.3d at 88; *see also Assoc. Press v. DOJ*, 549 F.3d 62, 65 (2d Cir. 2008) (per curiam). "[T]he bar is low: FOIA requires only a measurable interest in privacy to trigger the application of the disclosure balancing test." *Long*, 692 F.3d at 191; *see also Assoc. Press v. DOD*, 554 F.3d at 285. The Schedules and Withheld Emails implicate significant privacy interests of both Mr. Trump and the individuals identified in documents.

Mr. Trump has a substantial privacy interest in his personal schedule and other records reflecting his private meetings.[9] Although he was a candidate for President or President-elect during most of the time period in question, he was not yet President; he remained a private citizen. Presidential candidates and Presidents-elect have a significant interest in being able to meet confidentially with advisors and other individuals. Indeed, even once in office, Presidents retain a significant interest in being able "to meet confidentially with foreign leaders, agency

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understands that Plaintiff does not challenge the withholding of this personal information under Exemptions 6 and 7(C).

[9] In many cases, the Secret Service identified multiple drafts of a schedule for the same date. Campbell Decl. ¶ 20. Collectively, therefore, the Schedules also reflect the evolution of the candidate's and President-elect's schedule over time.

officials, or members of the public." *Judicial Watch, Inc. v. USSS*, 726 F.3d 208, 226 (D.C. Cir. 2013), *quoted in Doyle*, __ F. Supp. 3d __, 2018 WL 3597513, at *11.

That Mr. Trump has a significant privacy interest is apparent from the Schedules themselves. Many of the Schedules bear headings or logos which identify them as emanating from the Trump campaign or the President-elect, underscoring their private nature. Campbell Decl. ¶ 34. And most of the Schedules in this case are explicitly marked as confidential. Many of them bear the label, "**Confidential: For Internal Planning Purposes Only[,] Not to be copied or shared**." *Id*. Others contain statements such as "Reminder to please not distribute this calendar as it is highly confidential." *Id*. All of the Schedules were provided by the Trump campaign or transition staff to the Secret Service with the understanding and expectation that they would be maintained as confidential, and they were treated as such by the Secret Service. *Id*.

For the same reasons, Mr. Trump also has a significant interest in the Withheld Emails referring to his private meetings, as they indicate with whom he conferred at a particular time and place, and in one case the subject matter of the meeting (preparation for a speech). Campbell Decl. ¶ 16. One of the Emails specifically notes the non-public nature of the meeting referenced in the email. *Id.* ¶ 16a. Candidates and Presidents-elect ought to be able to meet with advisors and others on a confidential basis, without fear that their private interactions will be opened to public scrutiny. Indeed, if such records were publicly available from the Secret Service under FOIA, non-incumbent Presidential candidates may be placed at a disadvantage, as similar records for incumbent Presidents running for reelection are not subject to disclosure under FOIA. *See Doyle*, __ F. Supp. 3d __, 2018 WL 3597513, at *20 (Presidential schedule

documents in the hands of the Secret Service "are not agency records subject to FOIA"); *infra* Point II.

In addition to Mr. Trump, the individuals identified in the Schedules and Withheld Emails also have well-recognized privacy interests protected by Exemptions 6 and 7(C). The Schedules and four of the Emails identify specific individuals who met, or were scheduled to meet, with Mr. Trump at a particular point in time, and in some cases provide information about the nature and/or circumstances of the meetings. Campbell Decl. ¶¶ 16, 30, 34.[10] Another Email identifies several individuals who needed regular access to certain secure areas within Trump Tower. *Id.* ¶ 16b. The Withheld Emails also contain the names and contact information of non-visitor third parties, including campaign or transition staff members who transmitted them to the Secret Service. *Id.* ¶ 30. All of these individuals have well-established privacy interests in avoiding public dissemination of their names and private information. *See Assoc. Press v. DOD*, 554 F.3d at 285 ("It is well established that identifying information such as names, addresses, and other personal information falls within the ambit of privacy concerns under FOIA.").

C. The Public Interests at Stake

On the other side of the ledger, the Supreme Court has clearly instructed that the "*only* relevant public interest in disclosure to be weighed in [the Exemption 6 and 7(C)] balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding *of the operations or activities of the government*." *DOD v. FLRA*, 510 U.S. 487, 495, 114 S. Ct. 1006, 1012 (1994) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775, 109 S. Ct. 1468, 1483 (1989)) (first emphasis added,

[10] As noted *supra* nn.3–4 the Secret Service has released these names in two of the Withheld Emails.

internal quotation marks and alteration omitted); *see also Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991). This purpose is not furthered by disclosure of information that "reveals little or nothing about an agency's own conduct." *Reporters Comm.*, 489 U.S. at 773, 109 S. Ct. at 1482 (citation and quotation marks omitted). "Goals other than opening agency action to public scrutiny are deemed unfit to be accommodated under FOIA when they clash with privacy rights." *Assoc. Press v. DOD*, 554 F.3d at 293 (citation and quotation marks omitted).

"The requesting party bears the burden of establishing that disclosure of personal information would serve a public interest cognizable under FOIA." *Assoc. Press v. DOJ*, 549 F.3d at 66 (citing *NARA v. Favish*, 541 U.S. 157, 172, 124 S. Ct. 1570, 1580 (2004)). To date, Plaintiff has not identified any legally cognizable public interest in disclosure of the identities of individuals who met with, or were scheduled to meet with, Mr. Trump before he was sworn in as President. Plaintiff has not shown—nor could he show—that this information would "shed[] light on an agency's performance of its statutory duties." *Reporters Comm.*, 489 U.S. at 773, 109 S. Ct. at 1482. The identities of the individuals with whom Mr. Trump met, or was scheduled to meet, certainly reveals nothing about how the Secret Service performed its duties. Campbell Decl. ¶ 34; *see Assoc. Press v. DOD*, 554 F.3d at 288–89; *Wood*, 432 F.3d at 88–89.

Rather than attempting to establish that the information sought pertains to the functioning of a government agency, Plaintiff has argued that "[t]he public has a significant interest in the records of individuals who visited candidate Trump, President-elect Trump, or high-level officials in his campaign because those records would shed light on why those individuals sought to visit the candidate and indicate whether and to what extent private individuals hold sway with the current administration." *Behar II*, ECF No. 74 at 8. Even apart from the dubious logic that records that merely identify meetings or potential meetings with candidate Trump or President-

elect Trump would "indicate whether and to what extent" such individuals "hold sway with the current administration," Plaintiff's focus is misplaced. Mr. Trump was a private citizen at the time, and the names of individuals with whom he met or was scheduled to meet do not reveal "what *[the] government* is up to." *Assoc. Press v. DOJ*, 549 F.3d at 66 (emphasis added, internal quotation marks omitted). Mr. Trump's Schedules do not shed any light on the actions of the Secret Service or any other federal agency. And while some of the Withheld Emails contain limited security-related information that reflect the Secret Service's law enforcement techniques and procedures—which information is exempt from disclosure under Exemption 7(E), *see infra* Point III—the names and identifying information of visitors contained in the Emails reveal nothing about the Secret Service's conduct or the conduct of any other federal agency. Those names do not contribute—let alone "significantly"—"to public understanding *of the operations or activities of the government*." *FLRA*, 510 U.S. at 495, 114 S. Ct. at 1012. There is therefore no legally cognizable public interest in public release of the identities of individuals who met or were scheduled to meet with Mr. Trump before he became President. In short, the public interest posited by Plaintiff "is not the type of interest protected by the FOIA." *Reporters Comm.*, 489 U.S. at 774, 109 S. Ct. at 1483.

Meanwhile, the public has a significant interest in maintaining the confidentiality of schedules and similar records provided by Secret Service protectees—especially Presidential candidates and Presidents-elect—to ensure that the Secret Service continues to receive the information necessary to protect them. *See Perlman v. U.S. DOJ*, 312 F.3d 100, 106 (2d Cir. 2002) (in evaluating whether the names of witnesses and third parties in an investigative report were protected from disclosure under Exemptions 6 and 7(C), considering the "strong public interest in encouraging witnesses to participate in future government investigations"), *vacated by*

541 U.S. 970 (2004), *reinstated after remand*, 380 F.3d 110 (2d Cir. 2004); *see also, e.g.*, *Conti v. DHS*, No. 12 Civ. 5827(AT), 2014 WL 1274517, at *18 (S.D.N.Y. Mar. 24, 2018) (noting disclosure of third-party information withheld under Exemptions 6 and 7(C) "might, for example, dissuade agency employees from participating in internal investigations," and citing *Perlman*); *Brannum v. Dominguez*, 377 F. Supp. 2d 75, 84 (D.D.C. 2005) (holding names and signatures on personnel board vote sheets protected by Exemption 6 because disclosure would "create opportunity for misappropriation of the signatures and make participants less likely to voluntarily participate in the process"); *Diamond v. FBI*, 532 F. Supp. 216, 225 (S.D.N.Y. 1981) (noting "interviewee's names should be withheld [under Exemption 7(C)] to insure that individuals may talk freely with FBI officials without fear of subsequent disclosures and possible reprisals"), *aff'd*, 707 F.2d 75 (2d Cir. 1983).

The Secret Service relies on protectees to provide information about their schedules and future meetings. Campbell Decl. ¶ 35. This information is necessary for the Secret Service to staff its protective details appropriately, advance and secure locations as needed, and provide for its agents to be physically located where needed at any given time. *Id.* Protectees like Mr. Trump provide this information to the Secret Service on a confidential basis, with an understanding and expectation that the information will be maintained as confidential and not disseminated beyond those within the Secret Service who need to know the information to fulfill their duties. *Id.* ¶ 34. But protectees will be reluctant to provide this information to the Secret Service if they believe that by doing so the information will become subject to public disclosure under FOIA. *Id.* ¶ 35. Compelled disclosure under FOIA of the names of individuals who meet with Presidential candidates and Presidents-elect would harm the public interest, by jeopardizing the flow of information from protectees to the Secret Service and thereby making it more

difficult for the Secret Service to protect candidates and Presidents-elect. *Id.* The public interest therefore favors *non*-disclosure of the Schedules and Withheld Emails, as there is a "strong public interest in encouraging" Presidential candidates, Presidents-elect, and other protectees to continue to provide such information to the Secret Service, and thereby ensure that the Secret Service can adequately do its job. *See Perlman*, 312 F.3d at 106.

D. The Balancing of Privacy and Public Interests

The balance of privacy and public interests weighs heavily against disclosure of confidential schedules and similar information provided confidentially to the Secret Service by Presidential candidates and Presidents-elect, and other personal information contained in such records.

Courts have recognized that where, as here, there is no cognizable public interest in disclosure of personal information, "the information should be protected; something, even a modest privacy interest, outweighs nothing every time." *Estate of Ghais Abduljaami v. U.S. Department of State*, No. 14 Civ. 7902 (RLE), 2016 WL 94140, at *8 (S.D.N.Y. Jan. 7, 2016) (quoting *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F. 2d 873, 879 (D.C. Cir. 1989)); *see also, e.g.*, *FLRA v. U.S. Dep't of Navy*, 941 F.2d 49, 57 (1st Cir. 1991) ("Whatever non-zero privacy interest [is] at stake, under *Reporters Committee*, that interest cannot be outweighed by public interest in disclosure—whatever its weight or significance—that falls outside of the FOIA-cognizable public interest in permitting the people to know what their government is up to."); *Seized Prop. Recovery Corp. v. U.S. CBP*, 502 F. Supp. 2d 50, 56 (D.D.C. 2007) ("If no public interest is found, then withholding the information is proper, even if the privacy interest is only modest."). Because the names of individuals who met or were scheduled to meet with candidate or President-elect Trump provide no information about how the Secret Service or any

other agency conducted itself, they shed no light on what the government was up to, and therefore do not implicate any public interest recognized by FOIA.

The non-existent public interest in disclosure is further "offset" by the "strong public interest in encouraging" Secret Service protectees to provide necessary information to the agency—an interest that would be significantly undermined if schedules and other records reflecting the meetings of Presidential candidates and Presidents-elect were subject to disclosure under FOIA. Campbell Decl. ¶ 35; *see Perlman*, 312 F.3d at 106. That is precisely because Presidential candidates and Presidents-elect have a significant privacy interest in their personal and confidential schedules and meetings. The individuals with whom they meet, and campaign and transition staff identified in the documents, also have well-recognized privacy interests in avoiding public dissemination of their names and personal information.

Because the privacy *and* public interests favor protection of the confidential schedules and meetings of Presidential candidates and Presidents-elect, and there is no cognizable public interest in disclosure, the Court should uphold the Secret Service's withholding of the Schedules and Emails under Exemptions 6 and 7(C).

II. To the Extent They Reflect the President's Schedule After His Inauguration on January 20, 2017, the Schedules Are Not "Agency Records" Subject to Disclosure Under FOIA

Plaintiff's FOIA requests sought records from November 1, 2015, through January 21, 2017. *Behar I*, ECF No. 1-1; *Behar II*, ECF No. 7-2. Mr. Trump was sworn in as President mid-day on January 20, 2017. As a result, although Plaintiff has indicated he seeks records of visitors to Mr. Trump prior to his inauguration, some of the Schedules responsive to Plaintiff's May 2018 FOIA request include periods of time after the inauguration on January 20, 2017 and on January 21, 2017. Campbell Decl. ¶ 20. To the extent they reflect the President's schedule

during this time, the Schedules are not "agency records" subject to FOIA. *Id.* ¶ 25; *see Doyle*, __ F. Supp. 3d __, 2018 WL 3597513, at **19–20.

FOIA mandates disclosure of non-exempt "agency records." 5 U.S.C. § 552(a)(4)(B). An "agency" within the meaning of FOIA does not "include 'the Office of the President,' meaning the President, 'his immediate personal staff, or units in the Executive Office whose sole function is to advise and assist the President.'" *Doyle*, __ F. Supp. 3d __, 2018 WL 3597513, at *9 (quoting *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156, 100 S. Ct. 960, 971 (1980), in turn quoting H.R. Rep. No. 93-1380, at 232 (1974)) (alterations omitted). In particular, Congress made "clear that it intended to place documents like the President's appointment calendar beyond the reach of FOIA." *Judicial Watch*, 726 F.3d at 233.

Allowing FOIA requesters to obtain Presidential schedules from the Secret Service under FOIA that they would not be able to obtain from the President himself would also raise substantial separation-of-powers concerns. *Judicial Watch*, 726 F.3d at 225; *Doyle*, __ F. Supp. 3d __, 2018 WL 3597513, at *19. As both the D.C. Circuit and Judge Failla of this Court have concluded, "[i]n removing the Office of the President from FOIA's scope, Congress surely did not 'intend to require the effective disclosure of the President's calendars in this roundabout way.'" *Doyle*, __ F. Supp. 3d __, 2018 WL 3597513, at *19 (quoting *Judicial Watch*, 726 F.3d at 225); *see also Judicial Watch*, 726 F.3d at 233 ("At bottom, we do not believe Congress intended that FOIA requesters be able to obtain from the gatekeepers of the White House what they are unable to obtain from its occupants.").

Although the Schedules in this case were prepared before Mr. Trump became President, some of them unmistakably reflect the President's schedule between the inauguration on January 20, 2017, and the end of the day on January 21, 2017. Campbell Decl. ¶¶ 20, 25. Those

Schedules are functionally no different from the Presidential schedule documents in *Doyle* that Judge Failla ruled were beyond the scope of FOIA. As in *Doyle*, it was "essential" to provide the Schedules to the Secret Service, to "ensur[e] that the President can go about [his] core activities without risking his security or that of his family and staff." *Doyle*, __ F. Supp. 3d __, 2018 WL 3597513, at *20 (quoting *Judicial Watch*, 726 F.3d at 228). The Schedules are therefore not "agency records" to the extent they reflect the President's schedule after his inauguration on January 20, 2017, and the Secret Service properly withheld them on that basis.

III. Portions of Four Withheld Emails Are Exempt from Disclosure Pursuant to Exemption 7(E)

FOIA Exemption 7(E) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). This exemption covers "investigatory records that disclose investigative techniques and procedures not generally known to the public," *Doherty v. U.S. DOJ*, 775 F.2d 49, 52 n.4 (2d Cir. 1985), including where the "the manner and circumstances of the techniques are not generally known." *Bishop v. DHS*, 45 F. Supp. 3d 380, 391 (S.D.N.Y. 2014).

"Exemption 7(E) sets a 'relatively low bar for the agency to justify withholding: rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the agency demonstrate logically how the release of the requested information might create a risk of circumvention of the law.'" *N.Y. Times Co.*, 101 F. Supp. 3d at 319 (quoting *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011)). Moreover, the requirement that "disclosure could reasonably be expected to risk circumvention of the law" applies to law

enforcement "guidelines" but not "techniques and procedures." *Allard K. Lowenstein Human Rights Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010); *see also N.Y. Times Co.*, 101 F. Supp. 3d at 319–20 ("The qualifying phrase 'if such disclosure could reasonably be expected to risk circumvention of the law' modifies only 'guidelines' and not 'techniques and procedures.'"); *Keys v. DHS*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007) (concluding that the "first clause of Exemption 7(E) provides categorical protection for techniques and procedures" without need for "demonstration of harm" (internal quotation marks omitted)).

The Secret Service properly withheld limited information regarding law enforcement techniques and procedures from four of the Withheld Emails. As noted above, the Emails were compiled for law enforcement purposes, as the Secret Service is a criminal law enforcement agency, and the Emails were compiled in the course of the agency's investigative and protective functions. Campbell Decl. ¶ 29. The information withheld from the Emails pursuant to Exemption 7(E) consists of specific information regarding (1) staffing of protective details, including numbers of security personnel assigned to particular details; (2) responsibilities of individual Secret Service agents or groups of agents with regard to screening and securing physical spaces and the protectee (Mr. Trump); (3) specific security arrangements for an upcoming trip by candidate Trump, including an intelligence and threat assessment, details regarding staffing of security personnel (including local law enforcement assistance), and site diagrams and photographs; and (4) security arrangements for access by certain individuals to secure areas of Trump Tower. Campbell Decl. ¶ 37.[11] The particular manner and circumstances in which the Secret Service uses these techniques and procedures is not publicly known, and

[11] No names or other identifying information have been withheld pursuant to Exemption 7(E). Campbell Decl. ¶ 37.

would be revealed by release of the information withheld under Exemption 7(E). *Id.*; *see Bishop*, 45 F. Supp. 3d at 391.

Courts have repeatedly held that information of this sort constitutes law enforcement techniques and procedures protected under Exemption 7(E). *See, e.g.*, *Leopold v. DOJ*, 301 F. Supp. 3d 13, 29–30 (D.D.C. 2018) (specific techniques that USSS uses to detect and investigate potentially threatening comments against Presidential candidates); *Friedman v. USSS*, 282 F. Supp. 3d 291, 305–07 (D.D.C. 2017) (internal briefing packet describing protective technologies); *Elec. Privacy Info. Ctr. v. U.S. DHS*, 926 F. Supp. 2d 311, 316–17 (D.D.C. 2013) (records involving software and systems used by USSS in carrying out protective intelligence functions); *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp. 2d 142, 150 (D.D.C. 2000) (code name for USSS vehicle, White House gate numbers, and information concerning personal characteristics used by the agency in evaluating dangerousness of subject and threat potential to protectees).

Although the Secret Service is not required to demonstrate a risk of harm in order to withhold law enforcement techniques and procedures under Exemption 7(E), the Secret Service's declaration establishes that public release of the specific information regarding USSS techniques and procedures withheld from the Emails could reasonably be expected to risk circumvention of the law. That information—particularly when collected and pieced together from multiple records—could provide a roadmap to individuals who may wish to circumvent those techniques and procedures and do harm to future Secret Service protectees. Campbell Decl. ¶ 37; *see N.Y. Times Co. v. USSS*, No. 17 Civ. 1885(PAC), 2018 WL 722420, at *7–9 (S.D.N.Y. Feb. 5, 2018) (disclosure of records of historical staffing for protecting Presidential campaigns on flights would risk circumvention of the law because it would lead to dissemination of information about

future operations and allow adversaries to circumvent USSS protective techniques); *Leopold*, 301 F. Supp. 3d at 29–30 ("release of the information would offer would-be violators of the law a powerful road map which would enable the targets of those methods and techniques to avoid detention and to develop countermeasures"); *Friedman*, 282 F. Supp. 3d at 306 (disclosure of information regarding techniques and procedures could "nullify the future effectiveness of these protective measures"). The Court accordingly should uphold the Secret Service's withholdings pursuant to Exemption 7(E).

CONCLUSION

For the foregoing reasons, DHS respectfully requests that the Court uphold the Secret Service's withholdings, grant DHS's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, and dismiss the complaints in these actions.

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