UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

RICHARD BEHAR, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, Defendant.	Nos. 17 Civ. 8153 (LAK) 18 Civ. 7516 (LAK)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff respectfully requests oral argument to address the public's right of access under the Freedom of Information Act to the records at issue.

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PRELIMINARY STATEMENT

This case concerns investigative reporter Richard Behar's Freedom of Information Act request for Secret Service records that identify individuals who met with candidate Donald Trump and certain members of his family and campaign staff during the 2016 presidential election.

Since the assassination of Robert Kennedy in 1968, Congress has required the Secret Service to offer protection to major presidential candidates in order to ensure the integrity of the democratic process and the continuity of government. Taxpayers spend millions of dollars on Secret Service protection for presidential candidates each election cycle.

Under the Freedom of Information Act, the public has a right to records which reveal how the Secret Service carries out its twin missions and allocates public resources. The public's interest in understanding the Secret Service's activities is particularly acute with respect to its protection of candidate and president-elect Donald Trump during and immediately after the 2016 presidential election. Mr. Trump's campaign has spawned four Congressional investigations and one Department of Justice investigation, led by Special Counsel Robert Mueller, into: Russia's interference in the election; collusion between the Trump campaign and Russia; and contacts between individuals working on the Trump campaign and Russian officials. Moreover, reports have indicated that the Secret Service's protection of Mr. Trump and his family has been extraordinarily expensive. Finally, the public has a right to records revealing who holds sway with the Trump Administration and how the Trump Administration was formed in November and December 2016.

Against the overwhelming public interest in disclosure of the records at issue, the government argues that a president-elect who has chosen to subject himself to public scrutiny for

decades by affixing his name to skyscrapers and resorts across the globe, hosting multiple reality television shows, and repeatedly running for president should be entitled to hide his activities behind narrow exemptions to a law designed to promote public access to government information. It likewise contends that anyone who met with candidate Trump has a privacy interest in the fact of that meeting, regardless of whether the individual is a public figure or has previously been associated with Mr. Trump, and despite the fact that federal campaign finance laws already require individuals to disclose much more detailed information about their political affiliations and activities.

Because the government offers no plausible justification for its conclusion that the records at issue implicate privacy interests that outweigh the public's interest in disclosure, plaintiff respectfully requests that this Court order the government to disclose the records.

BACKGROUND

This case concerns a Freedom of Information Act request for United States Secret Service records mentioning individuals who met with Donald Trump, certain members of his family, or his campaign officials, several of whom were under the protection of the Secret Service, between November 1, 2015, and January 21, 2017—*i.e.*, throughout the 2016 presidential campaign and until the inauguration. Pl.'s Statement of Material Facts ("Pl.'s SMF") ¶¶ 56, 63 & Langford Decl. Exs. A, E. The Secret Service identified two sets of responsive records. The first set of records consists of schedules or calendars reflecting meetings with Mr. Trump (the "Schedules"). The second consists of emails in the possession of the Secret Service, provided to them by campaign or transition staff (the "Emails"). These reflect individuals who attended meetings or anticipated meetings, and potentially needed access to secure areas.

A. Secret Service Protection for Presidential Candidates

The Secret Service is authorized by law to provide protection at taxpayer expense for "[m]ajor Presidential and Vice Presidential candidates," as identified by the Secretary of Homeland Security after consultation with a bipartisan advisory committee. 18 U.S.C. § 3056(a)(7) (2018). Candidates may decline protection, if they so choose. *Id.* § 3056(a). As the Secret Service explains, its "[p]rotection of a candidate/nominee is designed" to serve two primary purposes: to maintain (1) "the integrity of the democratic process," and (2) "continuity of government." Pl.'s SMF ¶ 2 & Langford Decl. Ex. I.

Secret Service protection is provided to major presidential and vice-presidential candidates pursuant to legislation enacted following the assassination of Robert Kennedy in 1968. *See* Act of June 6, 1968, Pub. L. No. 90-331, 82 Stat. 170; *see also* 114 Cong. Rec. 16169 (1968) (statement of Sen. Monroney) (noting that the assassination of Robert Kennedy "makes it clear . . . that it is in the public interest to provide protection to major candidates"). Senate debate on the legislation highlights that this Secret Service protection is intended to safeguard "the very keystone of our governmental structure, and that is the proper selection, by democratic means—and that means exposure to all the citizens of the United States, if possible—of the person of the candidate." *Id*.

B. Public Interest In The Secret Service Protection Afforded to Candidate and President-Elect Trump

On June 16, 2015, Mr. Trump announced that he would run for President of the United States of America. Compl. ¶ 6, *Behar v. Department of Homeland Sec.*, No. 17-cv-8153, ECF No. 1 ("Initial Compl."); Answer, ¶ 6, *Behar v. Department of Homeland Sec.*, No. 17-cv-8153, ECF No. 11 ("Initial Ans."). Five months later, in November, 2015, Mr. Trump received Secret Service protection. Initial Compl. ¶ 7; Initial Ans. ¶ 7. In July, 2016, Mr. Trump won GOP's

presidential nomination at the Republican National Convention.[1] Initial Compl. ¶ 8Ans. ¶ 8. On November 8, 2016, Mr. Trump secured enough Electoral College votes to become the president-elect,[2] and he was inaugurated as the 45th President of the United States on January 20, 2017.[3]

Mr. Trump's candidacy and his campaign's activities while Mr. Trump was under Secret Service protection garnered substantial public interest, as did the Secret Service's protection of Mr. Trump itself.

1. Public interest in the extent of Secret Service protection provided to Trump.

More so than other candidates and presidents in recent history, Mr. Trump and his family have proven particularly expensive for the Secret Service to protect. In advance of the election, the Secret Service paid Trump-owned businesses about $1.6 million dollars of taxpayer money to cover the cost of protection. Pl.'s SMF ¶ 3 & Langford Decl. Ex. K. Additionally, the Secret Service overpaid various 2016 presidential campaigns, including the Trump campaign, $4 million in taxpayer money for plane travel. Pl.'s SMF ¶ 4 & Langford Decl. Ex. M. Shortly after Mr. Trump's election, NBC reported that both the NYPD and the Secret Service would be increasing their security measures at Trump Tower in New York City. Pl.'s SMF ¶ 5 & Langford Decl. Ex. N. The possibility of the Secret Service renting space in Trump Tower at a

[1] Shortly after winning the Republican nomination, Mr. Trump received classified intelligence briefings. Zeke J. Miller, *James Clapper: Clinton and Trump Will Receive Classified Briefings*, Time (July 28, 2016), http://time.com/4429507/hillary-clinton-donald-trump-james-clapper-intelligence-briefings/. Candidates are granted a unique status when receiving intelligence briefings, as they do not need to obtain security clearances that are required for other people. *See* Justin Fishel, *Classified Intelligence Briefings for Presidential Candidates: Questions Answered*, ABC News (Aug. 5, 2016), https://abcnews.go.com/Politics/classified-intelligence-briefings-presidential-candidates-questions-answered/story?id=41145433 ("The candidates don't need a security clearance. But, any aides they bring do need one.").

[2] Fed. Election Comm'n, Federal Elections 2016: Election Results for the U.S. President, the U.S. Senate, and the U.S. House of Representatives 6 (Dec. 2016), https://transition.fec.gov/pubrec/fe2016/federalelections2016.pdf

[3] Peter Baker & Michael D. Shear, *Donald Trump Is Sworn In as President, Capping His Swift Ascent*, N.Y. Times (Jan. 20, 2017), https://www.nytimes.com/2017/01/20/us/politics/trump-inauguration-day.html.

high cost to taxpayers was subject of widespread media coverage, Pl.'s SMF ¶ 6 & Langford Decl. Ex. O-Q, and less than a week after the election, *Politico* reported that the presence of the Secret Service was being advertised as a "new amenity" at Trump Tower. Pl.'s SMF ¶ 7 & Langford Decl. Ex. R. Though the Secret Service stated that it "cannot discus [sic] specifically nor in general terms the means, methods, resources, costs or numbers [it] utilize[s] to carry out [its] protective responsibilities," Pl.'s SMF ¶ 8 & Langford Decl. Ex. S, the agency recently requested a program increase of $25.7 million in taxpayer money to "cover the cost" of "continued operations" related to "secur[ing] Trump Tower, and the members of the First Family's private residences." Pl.'s SMF ¶ 9 & Langford Decl. Ex. T. CNN reported that the cost of protecting Mr. Trump and his family during the transition period in New York City was more than a million dollars per day. Pl.'s SMF ¶ 10 & Langford Decl. Ex. U.

In 2017, USA Today reported in an interview with Secret Service Director Randolph Alles that the Secret Service could no longer afford to pay agents to provide statutorily mandated coverage—"in large part due to the sheer size of President Trump's family and efforts necessary to secure their multiple residences up and down the East Coast." Pl.'s SMF ¶ 11 & Langford Decl. Ex. V. An analysis showed that the Secret Service spent more than $30 million in the first 100 days of the Trump presidency, including heightened costs for protecting Trump Tower, covering Mr. Trump's leisure and business travel to various properties he owns, business trips by Eric Trump and Donald Trump, Jr., and vacations of members of the first family. Pl.'s SMF ¶ 12 & Langford Decl. Ex. W. After the Secret Service anticipated it would "run out of money to protect Mr. Trump and his family" by September 30, 2017, Pl.'s SMF ¶ 13 & Langford Decl. Ex. X, Congress ultimately allocated the Secret Service an additional $120 million to cover the costs of providing security for the Trump Administration. Pl.'s SMF ¶ 14 & Langford Decl. Ex. Y.

Throughout the Trump Administration, journalists have continued to shed light on the activities of the Secret Service. For example, a recent FOIA request revealed that Donald Trump Jr. and Eric Trump incurred nearly $250,000 in Secret Service costs in a single month. Pl.'s SMF ¶ 15 & Langford Decl. Ex. C.

2. Public interest in Russian contacts with the Trump campaign, transition team, and future administration while Trump he was under Secret Service protection.

Meetings between Donald Trump and his associates, on the one hand, and Russian officials and other individuals, on the other, have been a constant source of public interest since news broke in June 2016 that Russian hackers gained access to the DNC's computer systems. Pl.'s SMF ¶ 16 & Langford Decl. Ex. AA. Throughout the campaign, Mr. Trump and his associates are reported to have had significant contacts with Russian officials and individuals associated with the Russian government.

On August 14, 2017, the *Washington Post* reported that the Trump campaign had considered setting up meetings with Russian leadership, including President Vladimir Putin. Pl.'s SMF ¶ 17 & Langford Decl. Ex. BB. According to multiple press reports,[4] on March 31, 2016, George Papadopoulos, a campaign aide, informed Mr. Trump and top campaign officials that he had been approached about setting up a meeting with Russian President Vladimir Putin. Senator Jeff Sessions was reportedly "quite enthusiastic" about setting up the meeting. Pl.'s SMF ¶ 18 & Langford Decl. Ex. DD. Mr. Papadopoulos testified that he was introduced to another Russian with connections to the Russian Ministry of Foreign Affairs in April 2018 and was

[4] *See* Troy Griggs, K.K. Rebecca Lai & Jasmine C. Lee, *How a Trump Adviser Repeatedly Sought a Meeting with Russia*, N.Y. Times (Oct. 30, 2017), https://www.nytimes.com/interactive/2017/10/30/us/politics/papadopoulos-russia-trump.html; Hamburger et al, *supra* note **Error! Bookmark not defined.**; Daniella Silva, *Papadopoulos Says Trump Campaign Officials Were 'Fully Aware' of Efforts for Putin Meeting*, NBC (Sept. 9, 2018), https://www.nbcnews.com/politics/politics-news/papadopoulos-says-trump-campaign-officials-were-fully-aware-efforts-putin-n907891.

advised that there was "an open invitation by Putin for Mr. Trump to meet when he is ready." Pl.'s SMF ¶ 19 & Langford Decl. Ex. CC. Mr. Papadopoulos was subsequently told that the Russians had "dirt" on former Secretary of State Hillary Clinton, and a high-ranking Trump campaign official encouraged Mr. Papadopoulos to make the trip to obtain the information, though it never materialized. *Id*. Papadopoulos has since pled guilty to charges as part of the Department of Justice Special Counsel's investigation into Russian collusion with the Trump campaign. Guilty Plea, *United States v. Papadopoulos*, No. 17-cr-182 (RDM) (D.D.C.), ECF No. 19.

On July 8, 2017, the *New York Times* reported on a meeting between a Russian lawyer with Kremlin ties and Mr. Trump's son, son-in-law, and campaign chairman. Pl.'s SMF ¶ 21 & Langford Decl. Ex. EE. Subsequent *New York Times* reporting revealed that, on June 9, 2016, Donald Trump, Jr., Jared Kushner, and Paul Manafort all met with Natalia Veselnitskaya at Trump Tower and that Trump, Jr., was promised damaging information about Hillary Clinton in advance of the meeting. Pl.'s SMF ¶ 22 & Langford Decl. Ex. FF. Though it was originally reported that Mr. Trump "wasn't aware of the meeting," his personal attorney later stated that he was present "when Trump Jr. informed his father of the planned meeting, and that Trump signed off on going ahead with it." Pl.'s SMF ¶ 23 & Langford Decl. Ex. GG. There was also public discussion about the role of the Secret Service in the Trump Tower meeting. President Trump's lawyer publicly questioned the sufficiency of Secret Service's vetting of Natalia Veselnitskaya, the Russian lawyer who attended the meeting. Pl.'s SMF ¶ 25 & Langford Decl. Ex. HH. In reporting about this meeting, news organizations revealed that the "[Secret Service's] role in vetting people who meet with a U.S. president or candidates is limited to ensuring physical safety." Pl.'s SMF ¶ 26 & Langford Decl. Ex. II.

On March 1, 2017, the *Washington Post* reported that Jeff Sessions, then a Senator and advisor to the Trump campaign, met with then-Russian Ambassador to the United States, Sergey Kislyak, twice in July and September 2016. Pl.'s SMF ¶ 27 & Langford Decl. Ex. KK. The *Post* later reported that he discussed campaign-related matters with Mr. Kislyak. Pl.'s SMF ¶ 28 & Langford Decl. Ex. LL. These meetings led now-Attorney General Sessions to recuse himself from involvement in the Department of Justice's Russia investigation. *Id*. After the election, Jared Kushner met with Mr. Kislyak about establishing a secret communications channel between the Trump transition team and Moscow to discuss strategy. Pl.'s SMF ¶ 30 & Langford Decl. Ex. MM. Mr. Kushner also met with the chief executive of a Russian state-owned bank during the transition. Pl.'s SMF ¶ 31 & Langford Decl. Ex. NN.

Mr. Kislyak also played a central role in the activities that led to a guilty plea by Mr. Trump's first National Security Advisor, Michael Flynn. On January 12, 2017, the *Washington Post* reported that Mr. Flynn spoke with Mr. Kislyak on December 29, 2016—the day that the United States announced sanctions on Russia in response to attacks on the 2016 presidential election. Pl.'s SMF ¶ 32 & Langford Decl. Ex. OO. On February 9, 2017, the *Washington Post* reported that Mr. Flynn had "privately discussed U.S. sanctions against Russia with [Mr. Kislyak] during the month before President Trump took office, contrary to public assertions by Trump officials." Pl.'s SMF ¶ 33 & Langford Decl. Ex. PP. During the transition, on December 22, 2016, Mr. Flynn initially spoke with Mr. Kislyak to urge Russia to delay a pending resolution in the United Nations Security Council. Pl.'s SMF ¶ 34 & Langford Decl. Ex. QQ. They then discussed sanctions by both the U.S. and Russian governments, during which Mr. Flynn suggested the sanctions might be relieved once Mr. Trump was sworn into office and asked Mr. Kislyak to "refrain from escalating the situation." *Id.* Vladimir Putin announced he would not

take action, and on December 31, 2016, Mr. Kislyak informed Mr. Flynn that Russia's decision not to respond was because of Mr. Flynn's request. *Id.* When this information came to light, questions were raised as to whether Mr. Trump, Mr. Flynn, or other Trump associates may have violated the Logan Act, a federal law that prohibits private citizens from conducting foreign policy and that also applies to incoming presidents. Pl.'s SMF ¶ 37 & Langford Decl. Exs. RR-SS. Mr. Flynn was forced to resign and ultimately pleaded guilty for lying to the FBI about these conversations with Mr. Kislyak. Pl.'s SMF ¶ 38 & Langford Decl. Ex. TT.

Since the November 2016 presidential election, there have been five separate investigations into, among other issues, Russia's interference in the election; collusion between the Trump campaign and Russia; and contacts between individuals working on the Trump campaign and Russian officials. Pl.'s SMF ¶ 42 & Langford Decl. Exs. XX-AAA. These investigations consist of four Congressional investigations, and the Department of Justice's investigation of the Trump campaign's ties to Russia, led by special counsel Robert Mueller. Pl.'s SMF ¶ 43 & Langford Decl. Exs. XX-AAA.

In addition, the intelligence community and the Republican-led Senate Intelligence Committee have both concluded that Russia meddled in the 2016 election. Pl.'s SMF ¶ 44 & Langford Decl. Ex. BBB. The Mueller investigation into Russian collusion with the Trump campaign has resulted in indictments or guilty pleas from thirty-two people and three companies, including four former Trump advisors, twenty-six Russian nationals, three Russian companies, and others. Pl.'s SMF ¶ 45 & Langford Decl. Ex. CCC. Recently, it was revealed that the Trump campaign's director of national security socialized with suspected Russian agent Maria Butina in the final weeks of the 2016 campaign. Pl.'s SMF ¶ 46 & Langford Decl. Ex. EEE.

3. Public interest in meetings between business persons and lobbyists and candidate Trump while under Secret Service protection.

Unlike past presidents, Mr. Trump has a sprawling business empire, including significant financial stakes in "more than 500 businesses." Pl.'s SMF ¶ 47 & Langford Decl. Ex. EEE. This has led to substantial public interest in potential conflicts of interest, financial liabilities, and past corrupt practices, Pl.'s SMF ¶ 48 & Langford Decl. Ex. FFF, including concerns raised about the president's use of his properties, such as Trump National Golf Club and Mar-a-Lago, Pl.'s SMF ¶ 49 & Langford Decl. Ex. GGG, and speculation about the contents of his unreleased tax returns, Pl.'s SMF ¶ 50 & Langford Decl. Ex. HHH.

During the 2016 presidential election, there was significant reporting about then-candidate Trump and those associated with the Trump campaign meeting with lobbyists for major corporations and special interest groups. In April, 2016, for instance, Mr. Trump privately met with representatives from approximately twelve special interest groups, including lobbyists and the chief executive of a major airline trade organization, in Washington, D.C. Pl.'s SMF ¶ 51 & Langford Decl. Ex. III. The meeting was kept secret, and attendees received invitations by phone. *Id.* In June, 2016, Mr. Trump attended an invitation-only fundraiser organized by a top coal industry executive, Robert Murray. Pl.'s SMF ¶ 53 & Langford Decl. Ex. JJJ. Special interest groups donated nearly $107 million to Mr. Trump's inauguration. Pl.'s SMF ¶ 54 & Langford Decl. Ex. KKK. Reflecting the public's interest, the media reported extensively on industry's potential influence on the Trump campaign and transition team. Pl.'s SMF ¶ 55 & Langford Decl. Ex. LLL-NNN.

4. Public interest in the Trump candidacy more broadly.

Even before announcing his candidacy for President of the United States in 2015, Donald J. Trump had already developed an international reputation due to his substantial business and

entertainment endeavors; his early candidacy benefited greatly from his near-universal name recognition.[5] In the early 1970s, Mr. Trump was appointed president of his father's Manhattan real estate company, which he renamed "The Trump Organization."[6] In the following decades, he went on to build massive developments in New York, including Trump Tower, Trump International Hotel and Tower, the Trump Building at 40 Wall Street, Trump Place, Trump World Tower, and Trump Park Avenue.[7] Mr. Trump continued to expand his real estate empire with numerous resorts, casinos, hotels, and golf courses, many of which bear his name.[8] Mr. Trump had also licensed his name and brand to an extensive list of real estate endeavors, products, and services across the world.[9]

By 2015 Mr. Trump was also famous as a celebrity and reality TV personality. Mr. Trump had been a participant and host in multiple WWE shows, including the "Battle of the Billionaires" at WrestleMania 23, which attracted "a record number of viewers."[10] From 2004 to 2015, Mr. Trump served as host of NBC reality shows *The Apprentice*, which featured individuals competing for to an opportunity to help manage a Trump Organization property,[11]

[5] Nick Gass, *Trump Dominates GOP Field in Name ID*, Politico (July 24, 2015), https://www.politico.com/story/2015/07/poll-gop-2016-name-recognition-donald-trump-jeb-bush-120573 (noting that 92% of Republicans and Republican-leaning independents surveyed in July 2015 "said they were familiar" with Trump).

[6] Conor Kelly, *Meet Donald Trump: Everything You Need to Know (and Probably Didn't Know) About the 2016 Republican Presidential Candidate*, ABC News (July 27, 2015) https://abcnews.go.com/Politics/meet-donald-trump-2016-republican-presidential-candidate/story?id=32108595.

[7] The Trump Organization, https://www.trump.com.

[8] *Id*.

[9] Aaron Williams & Anu Narayanswamy, *How Trump Has Made Millions by Selling His Name*, Wash. Post (Jan. 25, 2017), https://www.washingtonpost.com/graphics/world/trump-worldwide-licensing/.

[10] *Donald Trump*, WWE, https://www.wwe.com/superstars/donald-trump.

[11] Emily Nussbaum, *The TV that Created Donald Trump*, New Yorker (July 31, 2017), https://www.newyorker.com/magazine/2017/07/31/the-tv-that-created-donald-trump.

and the related show, *The Celebrity Apprentice*.[12] Mr. Trump was well-known for making cameo appearances as himself on television and in film.[13]

Even before 2015, Mr. Trump had a highly publicized history in politics. He was a frequent donor to both Democratic and Republican candidates, totaling around $1.4 million in contributions by 2015.[14] Mr. Trump fueled speculation that he would run for president by speaking at a New Hampshire rally promoting his candidacy in 1987,[15] announcing that he was he was "very seriously" considering a bid in 2004,[16] and teasing a retirement from *The Celebrity Apprentice* in order to run in 2012.[17] He ran for the Reform Party's presidential nomination in 2000.[18]

C. Procedural Posture of Mr. Behar's FOIA Requests

On September 22, 2017, Mr. Behar submitted a Freedom of Information Act request for Secret Service records related to the agency's protection of candidate Donald Trump. Pl.'s SMF ¶ 56 & Langford Decl. Ex. A at 1. Specifically, the request sought records identifying every individual who was "screened and/or noted by the Secret Service" because they (a) sought to

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[12] *Id.*

[13] Adrienne LaFrance, *Three Decades of Donald Trump Film and TV Cameos*, Atlantic (Dec. 21, 2015), https://www.theatlantic.com/entertainment/archive/2015/12/three-decades-of-donald-trump-film-and-tv-cameos/421257/.

[14] Danielle Kurtzleben, *Most of Donald Trump's Political Money Went to Democrats – Until 5 Years Ago*, NPR (July 28, 2015), https://www.npr.org/sections/itsallpolitics/2015/07/28/426888268/donald-trumps-flipping-political-donations.

[15] Michael Kruse, *The True Story of Donald Trump's First Campaign Speech—in 1987*, Politico (Feb. 5, 2016), https://www.politico.com/magazine/story/2016/02/donald-trump-first-campaign-speech-new-hampshire-1987-213595

[16] Sam Frizell, *Trump Forming Exploratory Committee for 2016 Presidential Bid*, Time (Mar. 18, 2015), http://time.com/3748732/donald-trump-exploratory-committee-2016/.

[17] Sean Daly, *Big Trump News Due Today*, N.Y. Post (May 16, 2011), https://nypost.com/2011/05/16/big-trump-news-due-today/.

[18] Tom Squitieri, *A Look Back at Trump's First Run*, Hill (Oct. 7, 2015), https://thehill.com/blogs/pundits-blog/presidential-campaign/256159-a-look-back-at-trumps-first-run.

visit Donald Trump or a limited list of his family and top-level associates,[19] and/or (b) sought access to any secured area where any of the listed individuals were present, between November 1, 2015, and January 21, 2017. *Id.* at 2–3. Though Mr. Behar requested expedited processing of the request,[20] by October 23, 2017, Mr. Behar had received neither the requested documents, nor confirmation of his entitlement to expedited processing. Pl.'s SMF ¶ 58.

On October 23, 2017, Mr. Behar filed this lawsuit challenging the Department of Homeland Security's constructive denial of his request. *See* Initial Compl. On February 21, 2018, the Court entered an order requiring the Secret Service to conduct searches through a set of emails determined by the parties in a Joint Stipulation. *See* Joint Stip. and Order at 1–2, ECF No. 23. These included (1) searches of a larger set of Secret Service emails ("Email Set") for communications containing one or more of thirty-eight search terms[21] provided by Mr. Behar, *Id.* App'x A; (2) a review of every email in a smaller set of emails (the "Narrowed Email Set") during five time periods,[22] *Id.* ¶ 2; and (3) a review of all emails in the Narrowed Email Set containing the term "visitor," *Id.*

Between April and September, 2018, the Secret Service conducted these searches and identified a total of nine email records that the agency deemed to be responsive to the request.

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[19] The individuals included on the list were Donald Trump, Eric Trump, Donald Trump, Jr., Ivanka Trump, Jared Kushner, Paul Manafort, Michael Flynn, Corey Lewandowski, Michael Cohen, Stephen Bannon, and Kellyanne Conway.

[20] Mr. Behar requested expedited processing of his FOIA request, "because it involve[d] an urgency to inform the public about actual federal government activity," specifically there existed a "broad public interest in who the prospective president (and his colleagues) were meeting with prior to his inauguration" while under protection of the Secret Service. Pl.'s SMF ¶ 56 & Langford Decl. Ex. A at 3.

[21] Those terms included the names of prominent Russians (*e.g.*, "Vladimir Putin"), business persons (e.g., "Erik Prince"), political organizations (*e.g.*, "NRA"), politicians (*e.g.*, "Devin Nunes"), and pundits (*e.g.*, "Ed Rogers"). *See* Joint Stipulation and Order, App'x A.

[22] Those time periods include a week in April 2016, the week before and the week after the GOP National Convention in July 2016, and three randomly selected weeks between Trump's election and his inauguration. *See id.* ¶ 2.

Pl.'s SMF ¶ 59. Initially, the Secret Service withheld seven of the nine emails in full, producing two emails with attachments in redacted form on August 1, 2018. Pl.'s SMF ¶ 60 & Langford Decl. Exs. B-C. Two additional emails were produced by the Secret Service on October 3, 2018, with significant redactions. *Id.*

In the course of its review of the emails, the Secret Service also identified numerous schedules reflecting potential meetings with Donald Trump. Campbell Decl. ¶ 20. On May 2, 2018, counsel for the Secret Service informed counsel for Mr. Behar that the agency did not consider those schedules responsive to Mr. Behar's initial request.[23] Pl.'s SMF ¶ 61 & Langford Decl. Ex. D.

On May 14, 2018, Mr. Behar filed a second FOIA request, requesting the schedules located by the Secret Service. Pl.'s SMF ¶ 63 & Langford Decl. Ex. E. This request reiterated the strong public interest underlying Mr. Behar's request for the records. *Id.* at 3-5. On June 1, 2018, the Secret Service responded to Mr. Behar's second FOIA request, informing Mr. Behar that the agency was withholding the responsive documents because (1) it did not believe they were agency records,[24] and (2) even if the schedules were agency records, it believed the records

[23] Mr. Behar objected to the agency's determination of responsiveness. Langford Decl. ¶ 62 & Langford Decl. Ex. E.

[24] Def.'s Mot. for Summ. J. argues that the schedules are not agency records *only* "to the extent they reflect the President's schedule after his inauguration on January 20, 2017 . . . ." Def.'s Mot. for Summ. J. at 16-18. Defendant does not contend that documents reflecting Mr. Trump's schedule *before* January 20, 2017 or the schedules of anyone else at any time are not agency records subject to FOIA. The only records that remain at issue are those that "include periods of time after the inauguration on January 20, 2017 and on January 21, 2017." *Id.* at 16. Such schedules were all "create[d] or obtain[ed]" by the Secret Service, and under agency control at the time of the FOIA request and, therefore, plainly subject to FOIA disclosure. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144, 109 S. Ct. 2841, 2848 (1989). The government argues that these schedules "are functionally no different from . . . Presidential schedule documents," Def.'s Mot. for Summ. J. at 16, but they are distinguished because the Trump transition team does not enjoy the same broad FOIA exemptions extended to the Office of the President. *Cf. Fish v. Kobach*, 2017 U.S. Dist. LEXIS 72051, *17 (D. Kan.) ("*Nixon I* does not extend the privilege to presidents-elect"). The schedules in dispute should be provided in redacted form, making available all non-exempt material contained in the schedules before the President's inauguration on January 20, 2017. *See* 5 U.S.C. § 552(b) (2018) ("[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

to be exempt under Exemptions 6 and 7. Pl.'s SMF ¶ 64 & Langford Decl. Ex. F. Mr. Behar's administrative appeal, Pl.'s SMF ¶ 65 & Langford Decl. Ex. G, was denied by the Secret Service on August 8, 2018, Pl.'s SMF ¶ 66 & Langford Decl. Ex. H.

On August 21, 2018, Mr. Behar filed a second complaint, seeking the release of the responsive Schedules, and requested that the new lawsuit be joined with his original lawsuit, Complaint, *Behar v. Department of Homeland Security*, No. 18-cv-7516 ("*Behar II*"). This Court ordered the cases consolidated on September 30, 2018. ECF No. 26.

The Secret Service moved for summary judgment on October 3, 2018; through this motion, Mr. Behar now opposes the Secret Service's motion and cross-moves for summary judgment.

ARGUMENT

The government cannot withhold the Emails and Schedules cataloguing individuals who met with candidate Trump or his family and campaign staff under FOIA's privacy exemptions. To withhold records under Exemptions 6 and 7(C), the government must demonstrate that disclosure would constitute an unwarranted—"clearly unwarranted" in the case of Exemption 6—invasion of significant privacy interests. In addition, to invoke Exemption 7(C), the government must demonstrate that the records were compiled for a law enforcement purpose. The government has failed to meet its burden with respect to the Emails and Schedules at issue here.

As a threshold matter, Exemption 7(C) is inapplicable because the Emails and Schedules do not constitute information compiled for law enforcement purposes. The government's passing reference to the Secret Service's protective and investigative functions is conclusory and

insufficient to demonstrate that these particular records were compiled for law enforcement purposes.

In addition, neither Exemption 6 nor Exemption 7(C)'s protection for significant privacy interests are triggered because neither Mr. Trump nor anyone else has more than a *de minimis* privacy interest in these documents. Disclosing when Mr. Trump and his associates met with or were slated to meet with individuals over two years ago would not reveal any private characteristics about the parties involved or cause them embarrassment or harm. Mere disclosure of individuals' political affiliations or associations is simply not a cognizable privacy interest in light of robust campaign finance disclosure laws that require the government to publish much more detailed information about individuals' political activities. That is particularly so for individuals who have already been publicly associated with Mr. Trump and his campaign. Mr. Trump's own alleged interest is especially *de minimis*, given that he was running for federal office at the time and had been a public figure for decades before announcing his candidacy. Similarly, the individuals cited in the request are public figures with lesser privacy interests under the Act. Each of the government's alleged privacy concerns are *de minimis*, speculative, or irrelevant.

Even if the government could demonstrate the existence of a significant privacy interest, any privacy interest in the Emails and Schedules is outweighed by the overriding public interest in disclosure. Releasing the documents would shed light on the Secret Service's performance of its statutory duties, informing the public of how the Secret Service accomplishes its mandates of ensuring the integrity of the democratic process and continuity of government. The public interest in knowing how the Secret Service carries out its work is heightened given recent coverage of the agency's background check policies for meetings with presidential candidates

and their associates, and reports revealing the significant expense incurred by the agency in protecting Mr. Trump. In addition to shedding light on the Secret Service's work, disclosure would reveal the existence of conflicts of interest and how the Trump Administration's policy decisions have been, and continue to be, shaped by lobbyists and others granted access to Mr. Trump during the campaign.

For each of these reasons, the Court should order the Secret Service to disclose the Emails and Schedules at issue here.

I. THE GOVERNMENT CARRIES A HEAVY BURDEN TO ESTABLISH THAT EXEMPTIONS 6 AND 7(C) APPLY TO THE RECORDS AT ISSUE

The government bears a heavy burden in seeking to withhold documents under FOIA's privacy exemptions. In general, FOIA's purpose is to "check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S. Ct. 2311, 2327 (1978). The Act was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Associated Press v. U.S. Dep't of Def.*, 554 F.3d 274, 283 (2d Cir. 2009) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 1599 (1976)). FOIA "strongly favors a policy of disclosure." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355 (2d Cir. 2005).

A government agency must disclose requested records "unless its documents fall within one of the specific, enumerated exemptions set forth in the Act." *Id.*; *see also* 5 U.S.C. § 552(a)-(b). Exemptions to FOIA "must be construed narrowly." *Seife v. Nat'l Insts. of Health*, 874 F. Supp. 2d 248, 253 (S.D.N.Y. 2012). "All doubts are resolved in favor of disclosure." *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010) (quoting *Local 3, Intern. Broth. Of Elec. Workers v. N.L.R.B.*, 845 F.2d 1177 (2d Cir. 1988)

(alterations omitted)). An agency's decision to withhold records receives no deference and is therefore subject to *de novo* review. *Seife*, 874 F. Supp. 2d 248 at 253.

To prevail on a motion for summary judgment, the defending agency has the burden to show that any withheld documents fall within one of the exemptions enumerated in FOIA. *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). An agency may satisfy its burden by providing affidavits or "giving reasonably detailed explanations why any withheld documents fall within an exemption." *Id.* Although such agency statements are given a presumption of good faith, conclusory assertions will not suffice to carry the government's burden of proof in defending FOIA cases. *See Halpern v. Fed. Bureau of Investigation*, 181 F.3d 279, 290 (2d Cir. 1999) (noting that the government must justify its withholdings "without resort to conclusory and generalized allegations of exemptions"); *cf. Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

The government's burden is especially onerous with respect to FOIA's privacy exemptions. Exemption 6 permits the government to withhold "personnel and medical files and similar files" if disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). Exemption 7(C) permits the government to withhold "records or information compiled for law enforcement purposes," but only to the extent that such records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(7)(C).

Exemption 6's "presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (citing *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982)). To withhold documents under Exemption 6, the government bears the burden of showing (1) that

the records constitute "personnel and medical files and similar files"; (2) that they implicate a "more than *de minimis*" privacy interest; and (3) that, if more than a *de minimis* privacy interest is established, "the invasion of personal privacy outweighs the public's interest in disclosure." *Seife*, 874 F.Supp.2d 248 at 259. Similarly, to withhold documents under Exemption 7(C), the government bears the burden of showing that (1) the information was "compiled for law enforcement purposes"; (2) there is "any privacy interest in the information sought"; and (3) if more than a *de minimis* privacy interest is established, that it outweighs the public interest in disclosure. *Associated Press*, 554 F.3d at 284. Although Exemptions 6 and 7 "provide differing levels of protection once a privacy interest is implicated," this difference is "irrelevant to determining the sort of privacy interest that must first be shown before protection is afforded at all." *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 509 (2d Cir. 1992) ("[W]ere a greater degree of privacy *interest* to be required before protection is afforded against an *invasion* of that interest, it would, in effect 'double count' the differences [between Exemption 7 and Exemption 6].").

II. THE RECORDS DO NOT MEET EXEMPTION 7'S THRESHOLD REQUIREMENT BECAUSE THEY WERE NOT COMPILED FOR LAW ENFORCMENT PURPOSES

As an initial matter, the Emails and Schedules may not be withheld under Exemption 7(C) because they do not satisfy Exemption 7's threshold requirement for coverage. Exemption 7 only applies to records or information "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). To demonstrate that records were "compiled for law enforcement" purposes, the government must do more than demonstrate that the records were created or compiled by a law enforcement agency. *See Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 287, 296 (S.D.N.Y. 2011) ("[N]ot every document produced by law enforcement agencies [is]

created for law enforcement purposes under FOIA."). An agency's records do not satisfy Exemption 7's threshold "simply by virtue of the function that the [agency] serves." *Vymetalik v. Fed. Bureau of Investigation*, 785 F.2d 1090, 1095 (D.C. Cir. 1986). The government must demonstrate that the specific records at issue were themselves compiled for a law enforcement purpose. *See id.*

In addition, the government must "identify a particular individual or a particular incident as the object of its investigation and specify the connection between the individual or incident and a possible security risk or violation of federal law." *Lawyers Comm. for Human Rights v. I.N.S.*, 721 F. Supp. 552, 563-64 (S.D.N.Y. 1989) (quoting *Shaw v. Fed. Bureau of Investigation.*, 749 F.2d 58, 63 (D.C. Cir. 1984)). The government "must then demonstrate that this relationship is based on information sufficient to support at least a colorable claim of the connection's rationality." *Lawyers Comm. for Human Rights*, 721 F. Supp. at 564 (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 229 (D.C. Cir. 1987)).

Notably, not every type of investigation carried out by law enforcement agencies suffices to trigger Exemption 7's protections. The Second Circuit distinguishes "exempted documents created pursuant to a criminal investigation" from "discloseable documents created as a matter of routine, prior to and independent of [an] investigation." *John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 108 (2d Cir. 1988). The D.C. Circuit follows a similar rule, where the applicability of Exemption 7 "turns upon the type of investigation involved." *Vymetalik*, 785 F.2d at 1095. Under the D.C. Circuit's rule, records compiled with respect to an "investigation . . . for a possible violation of law" qualify as records compiled for a law enforcement purpose, whereas records related to the "customary surveillance of the performance of duties by government employees" do not. *Jefferson v. U.S. Dep't of Justice*, 284 F.3d 172, 177 (D.C. Cir.

2002); *cf. Lawyers Comm. for Human Rights*, 721 F. Supp. at 563-64 ("Material may not be considered exempt merely because it can generally be categorized as an investigatory file compiled for law enforcement purposes"). Relatedly, under the D.C. Circuit's rule, the government must demonstrate that "the agency acted within its principle function of law enforcement, rather than merely engaging in a general monitoring of private individuals' activities." *Jefferson*, 284 F.3d at 172 (internal citation and quotation marks omitted).

So, for example, in *Maydak v. United States Department of Justice*, the D.C. Circuit rejected the argument that a list of a federal prison's staff members and their titles was subject to Exemption 7 because the list was not compiled for law enforcement purposes. *Maydak v. U.S. Dep't. of Justice*, 362 F.Supp.2d 316, 323 (D.D.C. 2005). By contrast, in *American Civil Liberties Union Foundation v. United States Department of Justice*,, this Court permitted DOJ to withhold records under Exemption 7 where the agency "specifically stated" that records "were compiled as part of criminal investigations into possible criminal violations of obscenity and related statutes." *Am. Civil Liberties Union Found. v. U.S. Dep't of Justice*, 833 F. Supp. 399, 406 (S.D.N.Y. 1993).

Here, the government has not met Exemption 7's threshold requirement. The government's statement that the records satisfy Exemption 7's threshold because the Secret Service "is a criminal law enforcement agency"[25] is plainly insufficient. *See Families for Freedom*, 837 F. Supp. 2d at 296; *see also Vymetalik*, 785 F.2d at 1095. The government must do more than offer a general description of the Secret Service's status as law enforcement agency to demonstrate that the Emails and Schedules were themselves compiled for a law enforcement purpose.

[25] Def.'s Mot. Summ. J. at 9.

Nor has the government demonstrated that the Secret Service collected the Emails and Schedules in relation to its principle law enforcement function, or in relation to any specific investigation into specific individuals. The government's claim that the records were compiled to "carry out [the agency's] investigative and protective functions"[26] falls far short of Exemption 7's threshold requirement. It identifies neither a subject of any investigation, nor a possible security risk or violation of federal law. As a result, the government also fails to establish the rational connection required by Exemption 7.

In addition, the government has failed to distinguish the records at issue from routine information it collects that is unrelated to any specific investigation. Indeed, opposing counsel has represented that the Secret Service does not conduct background checks on visitors scheduled to meet with temporary protectees, rendering it unclear how the Schedules or Emails could have been used for any investigative purpose at all. Langford Decl. ¶ 12. Merely noting the Secret Service's agency status and alleging that the records were compiled to meet protective and investigative ends does not satisfy Exemption 7's threshold requirement.

III. THE RECORDS MUST BE DISCLOSED BECAUSE THE GOVERNMENT'S ALLEGED PRIVACY INTEREST IN THEM IS *DE MINIMIS*

Even if the government could meet Exemption 7's threshold requirements, the Emails and Schedules must nevertheless be disclosed because the alleged privacy interests of Mr. Trump and other individuals mentioned in the records are *de minimis* under Exemptions 6 and 7(C).[27] FOIA's Exemptions 6 and 7(C) only apply to records "where a more than *de minimis* a privacy

[26] Def.'s Mot. Summ. J. at 9.

[27] Although Exemptions 6 and 7 "provide differing levels of protection once a privacy interest is implicated," this difference is "irrelevant to determining the sort of privacy interest that must first be shown before protection is afforded at all." *Fed. Labor Relations Auth.*, 958 F.2d at 509 ("[W]ere a greater degree of privacy *interest* to be required before protection is afforded against an *invasion* of that interest, it would, in effect 'double count' the differences [between Exemption 7 and Exemption 6].").

interest is implicated." *Fed. Labor Relations Auth.*, 958 F.2d at 510; *see id.* at 509 ("Only where a privacy interest is implicated does the public interest for which the information will serve become relevant and require a balancing of the competing interests"). If the government's asserted privacy interest is *de minimis*, rather than significant, "FOIA demands disclosure." *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989); *see also Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 191 (2d Cir. 2012) ("The balancing analysis for FOIA Exemption 6 requires that we first determine whether disclosure of the files would compromise a substantial, as opposed to *de minimis*, privacy interest, because if no significant privacy interest is implicated FOIA demands disclosure").

To establish a significant privacy interest, the government must demonstrate "threats to privacy interests more palpable than mere possibilities." *Dep't of Air Force v. Rose*, 425 U.S. 352, 380 n.19, 96 S. Ct. 1592, 1608 n.19 (1976). There must therefore be "a substantial probability that the disclosure will lead to the threatened invasion." *Id.* "[W]hether disclosure of a list of names is a significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue." *Long*, 692 F.3d at 192 (quoting *U.S. Dep't of State v. Ray*, 502 U.S. 164, 175, 112 S. Ct. 541, 116 (1991)).

Here, none of the individuals listed in the records has a significant privacy interest in non-disclosure. Scheduling or having meetings with Mr. Trump or his associates is not a cognizable characteristic under FOIA's privacy exemptions, Mr. Trump and individuals cited in the FOIA request are public figures with reduced privacy interests, and the government has not otherwise established a plausible rationale for withholding the records.

1. Being a Person Who Potentially Met With Mr. Trump or His Associates During The 2016 Presidential Campaign is Not a Characteristic That Gives Rise To a Significant Privacy Interest.

Having visited Mr. Trump or his associates several years ago is not a personal characteristic entitled to FOIA's privacy protections. In general, the types of data points that implicate a significant privacy interest under FOIA are things like "marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, [and] reputation." *Rural Hous. All. v. U.S. Dep't of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974); *see also Hyatt v. U.S. Patent & Trademark Office*, 2018 WL 4682020, at *4 (D.D.C. 2018) (quoting *Nat'l Ass'n of Retired Fed. Emps.*, 879 F.2d at 875) (noting that information that triggers FOIA's privacy exemptions "normally falls into specific categories that typically includes 'place of birth, date of birth, date of marriage, employment history, and comparable data'").

Whether disclosure of a list of names would give rise to a significant privacy interest under FOIA is "context specific." *Long*, 692 F.3d at 192. "[I]n themselves a bare name and address give no information about an individual which is embarrassing." *Getman v. N.L.R.B.*, 450 F.2d 670, 674 (D.C. Cir. 1971). Courts have recognized a cognizable risk of harm or embarrassment from the disclosure of names and contact information if disclosure would inherently reveal that individuals had cooperated with a sensitive State Department investigation, *U.S. Dep't of State v. Ray*, 502 U.S. 164, 175-77, 112 S. Ct. 541, 548-49 (1991), helped make a controversial drug, *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 153 (D.C. Cir. 2006), were overseas military personnel threatened by terrorist activity, *Hudson v. Dep't of Army*, 1987 WL 46755, at *2 (D.D.C., Jan. 29, 1987), *aff'd*, 926 F.2d 1215 (D.C. Cir. 1991), or had allegedly abused Guantanamo detainees, *Associated Press*, 554 F.3d at 287. In contrast, courts have held that there is no significant privacy interest where disclosure would reveal that an individual had visited a national park, *S. Utah Wilderness All., Inc. v. Hodel*, 680 F. Supp. 37,

39 (D.D.C. 1988), was eligible to vote in certain elections, *Getman*, 450 F.2d at 675, had conducted research under contracts with the CIA, *Sims v. Cent .Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1982), or was a "trade source" who supplied information to the CFTC about a board's commercial contract. *Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 399-400 (D.C. Cir. 1980).

Notably, to demonstrate that disclosure of a list of names would subject the individuals identified to harassment, the government must point to specific concerns of reprisal. In *Department of State v. Ray*, the Supreme Court held that the government could withhold the names and addresses of unsuccessful Haitian asylum seekers because there was a "real" danger that Haiti's government would retaliate against the asylum seekers if given access to their identifying information. 502 U.S. at 177, 112 S. Ct. at 548. In *Hudson v. Department of Army*, a D.C. district court permitted the government to withhold the names of certain active duty military personnel in Europe, the Middle East and Africa who had registered motor vehicles because the government had submitted declarations "set[ting] forth in considerable detail the very extensive terrorist activity in Europe which the Army fe[lt] would be advanced by disclosure of the requested information." 1987 WL 46755, at *1.

In this case, disclosing records that presumably list Mr. Trump, members of his campaign, and the individuals they planned on meeting with would not reveal any characteristic about those individuals which is embarrassing or otherwise sensitive. The government has submitted no evidence demonstrating that knowledge of an individual's actual or potential meeting with Mr. Trump or his campaign several years ago would create any possible danger to those individuals, let alone the sort of real or officially recognized dangers in the cases discussed above.

Nor has the government demonstrated that meeting with a major party's presidential candidate, or his associates, presents a legally-relevant risk of embarrassment. At most, disclosure could suggest an individual's political affiliation or donor status. However, to confirm the *de minimis* nature of any privacy interest in such information, the Court need only look to federal laws mandating the disclosure of political contributions. *See, e.g.*, 52 U.S.C. § 30101 *et seq.* Those laws require campaigns to report the name and address of *any* individual who contributes $200 or more within a calendar year. *Id.* § 30104(b). The Federal Election Commission, in turn, makes that information—including including a donor's political affiliation, amount contributed, and address—publicly available and easily searchable.[28] The Supreme Court has repeatedly upheld the constitutionality of these sorts of disclosure provisions against all manner of challenges. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366–67, 130 S. Ct. 876, 913–14 (2010) (collecting precedent). Only where there is specific evidence that there is "a reasonable probability that disclosure of . . . contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties" is there a significant privacy interest. *Cf. id.* at 367, 130 S. Ct. at 914. Here, the government has not even attempted to make such a showing.

At a minimum, the government should disclose the names of individuals who have already been publicly associated with Mr. Trump or his associates—there can be no privacy interest in disclosing a connection that is already public. *See Citizens for Responsibility & Ethics v. U.S. Dep't of Justice*, 746 F.3d 1082, 1092 (D.C. Cir. 2014) (noting that a subject's "privacy interest in keeping secret the fact that he was the subject of an FBI investigation was diminished

[28] *See Individual Contributions*, Fed. Election Comm'n, https://www.fec.gov/data/receipts/individual-contributions/?two_year_transaction_period=2018&min_date=01%2F01%2F2017&max_date=10%2F23%2F2018 (last visited Oct. 23, 2018).

by his well-publicized announcement of that very fact"); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995) (because an individual made "several public statements" indicating his involvement in a government investigation, redacting his name in responsive documents would "not serve any useful purpose in protecting his privacy"). To identify the Emails and Schedules, the government searched, in part, for records containing the names of domestic[29] and foreign[30] officials or politicians, lobbyists,[31] and international business figures[32] provided by plaintiff's counsel. Of the thirty-six names provided, all but three have been linked to Mr. Trump, his campaign, or his transition team in mainstream news coverage. Pl.'s SMF ¶¶ 17, 39-41, 46, 68-90 & Langford Decl. Exs. BB, UU-WW, DDD, OOO-IIII. For example, Elliot Broidy was a top fundraiser for Mr. Trump's campaign who reportedly advertised his Trump connections to politicians and governments around the world, Pl.'s SMF ¶ 86 & Langford Decl. Ex. EEEE, Alexander Machkevich was an investor in Mr. Trump's SoHo Hotel, Pl.'s SMF ¶ 79 & Langford Decl. Ex. XXX, and Alexander Torshin reportedly tried to arrange a meeting between Mr. Trump and Vladimir Putin in May 2016, Pl.'s SMF ¶ 40 & Langford Decl. Ex. VV. Disclosing that any of these individuals were slated to meet with Mr. Trump or his associates before he was inaugurated would not implicate any privacy interest.

[29] Eric Trump, Donald Trump, Jr., Ivanka Trump, Betsy DeVos, Devin Nunes, Dana Rohrabacher, George Papadopoulos, JD Gordon, Rick Dearborn, and Boris Epshteyn.

[30] Nigel Farage, Vladimir Putin, Sergey Kislyak, Natalia Veselnitskaya, Mikhail Prokhorov, Maria Butina, Andrii Artemenko, and Alexander Torshin.

[31] Ed Rogers, Rick Gates, and Roger Stone.

[32] Elliot Broidy, Erik Prince, Felix Sater, George G. Lombardi, Robert Armao, Tom Barrack, Yuri Vanetik, Tevfik Arif, Len Blavatnik, Kairat Kelimbetov, Irakly Kaveladze, Giorgi Rtskhiladze, Dmitry Rybolovlev, Aras Agalorv, Alexander Mirtchev, and Alexander Machkevich.

For these reasons, disclosing the records would not implicate any significant privacy interest of those who met with Trump or members of his campaign protected under FOIA's Exemptions 6 and 7.

2. Mr. Trump and Individuals Associated With His Campaign Were and Are Public Figures With Minimal Privacy Interests.

As a public figure running for federal office and engaged in official business, Mr. Trump's privacy interests were, and are, especially *de minimis*. Similarly, the privacy interests of individuals associated with Mr. Trump or his campaign are insignificant.

In general, an individual's status as a public figure weighs in favor of disclosure under FOIA's privacy exemptions. *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 865 (D.C. Cir. 1981). Candidates for federal office in particular are "public figures" with "less privacy interest than others in information relating to their candidacies" in the context of FOIA's Exemptions 6 and 7(C). *Common Cause v. Nat'l Archives & Records Serv.*, 628 F.2d 179, 184 (D.C. Cir. 1980) (referring to *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 455-65, 97 S. Ct. 2777, 2796-2801 (1977)); *see also Nation Magazine*, 71 F.3d at 894 n.9 (noting an individual's "national prominence and former status as a presidential candidate" and that "candidacy for federal office may diminish an individual's right to privacy").

While even public figures maintain some privacy interests under FOIA, the concept of privacy under FOIA is an "elastic" right "whose boundaries are delineated by the type of information sought." *Fed. Labor Relations Auth.*, 958 F.2d 503 at 510. Thus, for instance, the Supreme Court has distinguished the president's minimal privacy interest in records "primarily relate[d] to the conduct and business of the presidency" from "'extremely private communications between [the president] and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends.'" *Nixon*, 433 U.S. 425 at 459

(distinguishing records) (quoting *Nixon v. Adm'r of Gen. Services*, 408 F. Supp. 321, 359 (D.D.C. 1976)).

Here, any privacy interest Mr. Trump has in the Emails and Schedules is particularly *de minimis*. Before announcing his candidacy in 2015, Mr. Trump had already developed an international reputation from his business and entertainment endeavors and had a highly publicized history in politics.[33] Early in his candidacy he benefited from near-universal name recognition.[34] In any event, contrary to the government's assertion, Mr. Trump was not an ordinary"private citizen" at the time the records were provided to the Secret Service, Def.'s Mot. Summ. J. at 9, but rather a presidential candidate who commanded the news cycle.[35]

The individuals affiliated with Mr. Trump's campaign who are listed in Mr. Behar's FOIA requests are also prominent figures with reduced privacy interests. As noted *supra* Section III.1., the individuals are prominent domestic and foreign officials or politicians, lobbyists, and international business figures. In addition, Mr. Behar's FOIA requests target information pertaining to Mr. Trump's candidacy by referencing prominent individuals who have been associated with Mr. Trump's political ascent, such as his political advisor Roger Stone and his inaugural committee chairman Tom Barrack. Pl.'s SMF ¶ 72 & Langford Decl. Ex. RRR. The requests also invoke terms that were heavily referenced in news coverage of Mr. Trump's campaign and investigations surrounding foreign interference with the 2016 presidential election.[36] Since the requested information pertains to public figures and their role in Mr.

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[33] Nussbaum, *supra* note 11; Squitieri, *supra* note 18*;* Williams & Narayanswamy, *supra* note 9.

[34] Gass, *supra* note 5.

[35] Lazaro Gamio & Callum Borchers, *A Visual History of Donald Trump Dominating the News Cycle*, Wash. Post (July 21, 2016), https://www.washingtonpost.com/graphics/politics/donald-trump-vs-hillary-clinton-in-media/.

[36] These terms are Mayflower, Wikileaks, NRA, Russia. *See, e.g.*, Pl.'s SMF ¶ 27 & Langford Decl. Ex. KK; *Id.* ¶ 16 & Langford Decl. Ex. AA; *Id.* ¶ 46 & Langford Decl. Ex. DDD; *Id.* ¶ 45 & Langford Decl. Ex. CCC.

Trump's candidacy for federal office, it inherently involves a reduced privacy interest under FOIA.

Any alleged privacy interest in the Emails and Schedules is further reduced because Mr. Behar's requests do not target personal information. Mr. Behar's FOIA requests do not include search terms that target personal information surrounding, for example, Mr. Trump's health or spiritual life. Instead, they focus on individuals with established connections to Mr. Trump who have since attracted additional public scrutiny in connection with the U.S. government's investigation into Russian interference with the 2016 presidential election. *See* Pl.'s SMF ¶¶ 17, 39-41, 46, 68-90 & Langford Decl. Exs. BB, UU-WW, DDD, OOO-IIII.

If the government has concerns that disclosing the records would inherently reveal personal information about Mr. Trump, such as medical or family matters, it nevertheless has the burden to provide "[a]ny reasonably segregable portion" of the documents. 5 U.S.C. § 552(b); *see Rose*, 425 U.S. at 374. An entire record may only be withheld if nonexempt material is so "inextricably intertwined" that disclosure would "leave only essentially meaningless words and phrases." *Neufeld v. Internal Revenue Serv.*, 646 F.2d 661, 664 (D.C. Cir. 1981), *overruled on other grounds by Church of Scientology v. Internal Revenue Serv.*, 792 F.2d 153 (D.C. Cir. 1986). Given that the records describe meetings with particular individuals, the government ought to be able to segregate names or other information it believes present particular privacy concerns.

3. The Government Has Asserted No Plausible Rationale For Maintaining the Secrecy of the Records.

The government asserts several rationales for maintaining the secrecy of the records, but these arguments are either speculative or irrelevant. FOIA's privacy exemptions are "directed at threats to privacy interests more palpable than mere possibilities." *Rose*, 425 U.S. at 380 n.19, 96

S. Ct. at 1608 n.19. The government bears the heavy burden of justifying its withholdings "without resort to conclusory and generalized allegations of exemptions." *Halpern*, 181 F.3d at 290.

The government argues that disclosure of the records would disadvantage non-incumbent presidential candidates by making them less likely to avail themselves of Secret Service protection, Def.'s Mot. Summ. J. at 10, but this argument fails to account for the significant time lag between the creation of the records and Mr. Behar's request. In this case, the Emails and Schedules at issue reflect meetings which were held or planned over two years ago, and over eight months before Mr. Behar filed his initial FOIA request. Contrary to the government's assertion, disclosure would not disadvantage non-incumbent presidential candidates because the information is not being made available during a presidential race. Any privacy interest Mr. Trump had in the records during the presidential race related to his interest in not revealing his political strategy lapsed with the election. A ruling in Mr. Behar's favor here would not disincentivize presidential candidates from seeking Secret Service protection.

This reality is reflected in how previous administrations have handled Secret Service records. The Obama Administration indicated no privacy, security, or strategic concerns with disclosing White House visitor records 90 to 120 days after relevant meetings took place.[37] The records at issue here reflect meetings and possible meetings several years ago, easily surpassing the 90 to 120 day privacy window established by a previous administration as applied to similar records. Thus, the government's assertion that disclosing the records would disadvantage non-incumbent presidential candidates ignores the attendant circumstances and is precisely the sort of

[37] Press Office, *White House Voluntary Disclosure Policy Visitor Access Records*, White House (2009), https://obamawhitehouse.archives.gov/VoluntaryDisclosure.

"mere possibilit[y]" rejected by the Supreme Court in *Department of Air Force v. Rose*, 425 U.S. at 380 n.19, 96 S. Ct. at 1608 n.19.

The government's contention that disclosing sequential drafts of the Schedules could reflect the evolution of Mr. Trump's schedule over time[38] is similarly speculative and irrelevant. The government has already produced two emails with attachments that were "iterations of the same document," Campbell Decl. ¶ 14, suggesting that, as a general rule, producing several versions of the same record does not raise particularly significant privacy concerns. Nor does the government explain what privacy or security interest would be served by preventing the public from observing the evolution of the schedules of a years-old presidential campaign. The government is, therefore, resting its concerns on "mere possibilities" that do not justify invoking FOIA's privacy exemptions. *Rose*, 425 U.S. at 380 n.19, 96 S. Ct. at 1608 n.19.

Nor is it relevant that, as the government notes, "once in office" presidents retain a significant interest in being able to hold confidential meetings. *See* Def.'s Mot. Summ. J. at 9. Mr. Trump was not president during the time periods identified by Mr. Behar in his requests. Thus, it is beside the point here that the Office of the President and a person's activities while holding the office enjoy special protections. As the Supreme Court has held, presidential privileges are grounded in the specific duties of the office rather than any individual privacy interest. *Nixon*, 433 U.S. at 449, 97 S. Ct. at 2793 (emphasizing that presidential privilege "is limited to communications 'in performance of [a president's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions'"(quoting *U.S. v. Nixon*, 418 U.S. 683, 708-13, 94 S. Ct. 3090, 3107-09 (1974))). Since Mr. Trump was not president during

[38] Def.'s Mem. Summ. J. at 9 n.9.

any time period targeted by the records, privacy interests surrounding presidential conduct are not at issue.

In addition, the government's claim that Mr. Trump's privacy interest in the Schedules is apparent from their headings, logos, or confidential markings misses the mark. The government's own handling of the documents belies its argument on this point—it has acknowledged that not all of the Schedules were marked confidential, but has not agreed to disclose documents without such a label. Def.'s Summ. J. at 10 (stating that "*[m]any* of the Schedules bear headings or logos . . . underscoring their private nature" and that "*most* of the Schedules in this case are explicitly marked as confidential") (emphases added). More significantly, the government's suggestion that labeling documents confidential places them beyond the reach of FOIA would undermine FOIA's fundamental purpose of informing the public about government activity. "[T]o allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 263 (D.C. Cir. 1982); *see also Ackerly v. Ley*, 420 F.2d 1336, 1339 n.3 (D.C. Cir. 1969) (holding that "a pledge of confidentiality . . . can not, in and of [itself], override [FOIA]"); *Citizens for Envtl. Quality, Inc. v. U.S. Dep't of Agric.*, 602 F. Supp. 534, 538 (D.D.C. 1984) (noting that a confidentiality pledge "is clearly not dispositive on the question of whether disclosure would create an invasion of privacy" under Exemption 6); *National Ass'n of Atomic Veterans, Inc. v. Director, Def. Nuclear Agency*, 583 F. Supp. 1483, 1488 (D.D.C. 1984) (stating that a pledge of confidentiality should not be given determinative weight because "[o]therwise, the government could subvert the requirements of FOIA at whim simply by pledging confidentiality").

The government notes that one of the Emails discloses the subject matter of a meeting – "preparation for a speech." Def.'s Mot. Summ. J. at 10. It is unclear what sort of privacy interest the government invokes here, as it is not plausible that disclosing the subject matter of a meeting about preparing for a speech would lead to embarrassment or harassment. In any event, this sort of record is subject to a "less[er] privacy interest" under FOIA because such information "relat[es] to [Mr. Trump's] candidac[y]." *Common Cause*, 628 F.2d at 184. In addition, since the election has long concluded, Mr. Trump's privacy interest in material prepared for a speech during his campaign is *de minimis*.

Further, the government's claim that one of the Emails "specifically notes the non-public nature of the meeting referenced in the email," Def.'s Mot. Summ. J. at 10, does not command authority under FOIA. First, the government withheld most of the Emails that were presumably not marked non-public, undercutting the government's own distinction. Second, the Act's purpose is to shed light on government activities. If it were sufficient to invoke the non-public nature of information to defeat its powers, the Act would be useless.

The fact that one email identifies individuals who needed "regular access to certain areas within Trump Tower," Def.'s Mot. Summ. J. at 11, does not in itself represent a privacy concern cognizable under FOIA. If the need for regular access were to reveal personal characteristics about Mr. Trump, such as health or family concerns, the government bears the burden of segregating the information and justifying its exclusion.

Finally, the government argues that the Emails implicate significant privacy interests because they contain the names and contact information of non-visitor third parties, including campaign or transition staff members, yet fails to explain how disclosure would inherently reveal any personal characteristics about these third-party visitors. Def.'s Mot. Summ. J. at 11. To the

extent that disclosure could reveal "employment information," it is "only a minimal invasion of privacy" under FOIA. *Wash. Post Co.*, 690 F.2d at 261 (emphasizing that "the government [did] not even attempt to explain" why the employment information raises privacy concerns, an "especially telling" omission "in light of the government's burden to justify nondisclosure"); *see also U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600, 102 S. Ct. 1957, 1961 (1982) (holding that "employment history . . . is not normally regarded as highly personal"). Mr. Behar did not challenge the withholding of Secret Service member names because they are not publicly available and their secrecy is required for the agency to function. Contrastingly, the non-visitor third parties identified by the government merely include campaign or transition staff members, whose names are presumably well-known. Def.'s Mot. Summ. J. at 11. Furthermore, an agency's claim that releasing the names of Mr. Trump's Presidential Transition Team would involve more than a *de minimis* privacy interest because the individuals "would be subject to unwarranted contacts and solicitations about their knowledge about the documents or their participation in the FOIA transactions" was recently dismissed as "speculation." *Am. Oversight v. U.S. Gen. Servs. Admin.*, 311 F. Supp. 3d 327, 346-47 (D.D.C. 2018) (noting that "[t]he [Presidential Transition Team] members' names, plus other identifying information, were made public by the Trump transition team on a publicly accessible website"). The government does not even attempt to justify why disclosure would violate a privacy interest in this case and therefore does not defeat FOIA's disclosure mandate.[39]

For the foregoing reasons, the government's alleged privacy interests in the Emails and Schedules are all *de minimis*, speculative, and irrelevant.

[39] Mr. Behar does not challenge the redaction of minor personal details such as the employees' contact information, which can easily be redacted without withholding the entire document. *See Perlman v. U.S. Dep't of Justice*, 312 F.3d 100, 108 (2002), *vacated*, 541 U.S. 970, 124 S. Ct. 1874 (2004) (noting that "minor personal background information" about an individual may "remain redacted").

IV. EVEN IF THE GOVERNMENT COULD ESTABLISH THAT THE EMAILS AND SCHEDULES IMPLICATE SIGNIFICANT PRIVACY INTERESTS, THE PUBLIC INTEREST IN DISCLOSURE WOULD OUTWEIGH THEM

Even assuming the Schedules and Emails implicate significant privacy interests, FOIA compels their release because there is an overriding public interest in knowing how the Secret Service performed its duties and, more generally, in knowing the activities of the government. As noted above, even if the government demonstrates the existence of a significant privacy interest, it must further demonstrate that the invasion of personal privacy outweighs the public's interest in disclosure" under Exemptions 6 and 7(C). *Seife*, 874 F.Supp.2d at 259; *Associated Press*, 554 F.3d at 284. The test is particularly stringent under Exemption 6, which requires the government to demonstrate a "*clearly unwarranted*" invasion of personal privacy. 5 U.S.C. § 552(b)(6) (2018) (emphasis added); *see Wood v. Fed. Bureau of Investigation*, 432 F.3d 78, 86 (2d Cir. 2005).

1. There Is a Significant Public Interest in Disclosure of the Schedules and Emails

The Supreme Court has held that the "only relevant public interest in disclosure . . . 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." *Fed. Labor Relations Auth.*, 510 U.S. 487, 495, 114 S. Ct. 1006, 1012 (1994) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775, 109 S. Ct. 1468, 1482 (1989)) (emphasis, quotation marks, and alteration omitted). Within that broader public interest, the Supreme Court has clarified that the "relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Federal Labor Relations Auth.*, 510 U.S. at 497, 114 S. Ct. at 1013 (1994); *see also Wood*,

432 F.3d at 88. Disclosure of the Schedules and Emails advances both interests, and the minimal privacy interests alleged do not suffice to justify withholding the records.

A. Public interest in the Secret Service's performance of its statutory duties

First, disclosure of the Schedules and Emails would directly "shed light on" the Secret Service's performance of its statutory duties. The Secret Service "is authorized to protect . . . Major Presidential and Vice Presidential candidates." 18 U.S.C. § 3056(a) (2018). The Secret Service states that "[p]rotection of the candidate/nominee is designed" to serve two primary purposes: to maintain (1) "*the integrity of the democratic process*," and (2) "*continuity of government*." (emphasis added). Pl's SMF ¶ 2 & Langford Decl. Ex. I. Public disclosure of the Schedules and Emails would illuminate how the Secret Service undertook both prongs of its protection mandate in the 2016 presidential campaign.

With respect to protecting the integrity of the democratic process, disclosure of the Emails and Schedules would shed light on the extent to which the Secret Service was made aware of improper contacts, if any, between Mr. Trump's campaign and agents of foreign governments. As noted above, the Department of Justice has appointed a Special Counsel to conduct an independent criminal investigation into interference in the 2016 election by foreign powers, including Russia. Pl's SMF ¶ 43. The Special Counsel's investigation focuses on substantially the same time frame as Mr. Behar's FOIA requests, and on numerous individuals and meetings that are covered by Mr. Behar's request. Pl.'s SMF ¶ 42 & Langford Decl. Exs. XX-AAA. As noted above, media coverage of the Special Counsel has only grown as the investigation into collusion between Russia and members of the Trump campaign and transition team—including several Secret Service protectees—has resulted in over thirty indictments and guilty pleas. Pl's SMF ¶ 45. Disclosing the Emails and Schedules would shed light on whether foreign agents were able to access Secret Service protectees and enter secure areas under the

agency's protection, illuminating how the Secret Service ensures the integrity of the democratic process.

It would also shed light on the Secret Service's decision not to conduct background checks on individuals meeting with candidates. *See* Langford Decl. ¶ 12. This policy was called into question in the wake of the June 9, 2016, meeting at Trump Tower between Donald Trump, Jr., Jared Kushner, and Paul Manafort and Russian lawyer Natalia Veselnitskaya. After Mr. Trump's lawyer publicly questioned the sufficiency of Secret Service's vetting of the meeting, Pl's SMF ¶ 25, Reuters reported that the "[Secret Service's] role in vetting people who meet with a U.S. president or candidates is limited to ensuring physical safety." Pl's SMF ¶ 26. Disclosure of requested records would therefore reveal critical information about how the Secret Service carries out its protection mandate.

Disclosure of Emails and Schedules cataloguing post-election visitors would also shed light on the extent to which the Secret Service protects the continuity of government by vetting visitors to the president-elect through the transition. There are laws in place to ensure the uniformity of government through the inauguration, *see, e.g.*, Logan Act, 18 U.S.C. § 953 (2018); Presidential Transition Act of 1963, Pub. L. No. 88-277, 78 Stat. 153 (1964). Yet, several media outlets reported public concern that members of the Trump transition team compromised the ongoing foreign policy efforts of the Obama administration, potentially in violation of federal law. Pl's SMF ¶ 37 & Langford Decl. Exs. RR-SS. Mr. Trump's first National Security Advisor pleaded guilty to lying to the FBI about such activity. Pl's SMF ¶ 38. The Schedules and Emails would illuminate what actions, if any, the Secret Service took to prevent protectees and their associates from affiliating with people and engaging in activities that undermine the transition of power.

Disclosure of the Schedules and Emails would further reveal critical information about how the Secret Service uses taxpayer funds to carry out its mandates to maintain the integrity of the electoral process and the continuity of government. The Second Circuit recognizes that "there is an obvious legitimate public interest in how taxpayers' money is being spent, particularly when the amount is large." *United States v. Suarez*, 880 F.2d 626, 630 (2d Cir. 1989). Courts consider this a substantial interest in the FOIA context. *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1192 (11th Cir. 2007) ("easily" concluding that there is a substantial public interest under FOIA Exemption 6 in "learning whether FEMA is a good steward of . . . taxpayer dollars"); *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1232 (D.C. Cir. 2008) (citing *Suarez* in determining that, under FOIA Exemption 6, "the public has a particular and significant interest . . . in data that would allow the public to more easily monitor USDA's administration of its subsidy and benefit programs").

Providing protection for Mr. Trump, his family, and his associates has proven to be particularly costly.[40] During the campaign, the Secret Service overpaid the Trump campaign for plane travel, Pl's SMF ¶ 4, and paid $1.6 million in taxpayer money to Trump-owned businesses, Pl's SMF ¶ 3. After Mr. Trump won the 2016 election, total protection costs reportedly exceeded one million dollars per day. The possibility of the Secret Service renting space in Trump Tower at a high cost to taxpayers was subject of widespread media coverage. Pl's SMF ¶ 6 & Langford Decl. Exs. O-Q. Public concern and media attention regarding the growing cost of Secret Service protection, at the taxpayers' expense, remains pronounced. By revealing

[40] *See supra* notes **Error! Bookmark not defined.-Error! Bookmark not defined.** and accompanying text.

information about the operations of the Secret Service, disclosure of the Schedules and Emails would allow the public to more easily monitor the agency's stewardship of taxpayer dollars.

To be clear, Plaintiff does not allege wrongdoing on the part of the Secret Service in the performance of its statutory duties. Rather, the public interest in these Schedules and Emails is based on enhancing the public's understanding of Secret Service activities intended to protect the integrity of the democratic process and continuity of government, and its understanding of how the agency expends taxpayer money in doing so.

B. Public interest in the Trump Administration more broadly

Disclosing the Schedules and Emails would also illuminate other significant information that will "let citizens know what their government is up to." *Fed. Labor Relations Auth.*, 510 U.S. at 497 (internal quotations omitted). There is broad public interest in knowing who is shaping federal decisions and policy. *See Am. Oversight*, 311 F. Supp. 3d. at 348 (finding, *inter alia*, that the public interest in "who is shaping federal decisions and policy" justifies disclosure of personal information about members of Trump's presidential transition team); *see also Elec. Frontier Found. v. Office of the Dir. of Nat. Intelligence*, 639 F.3d 876, 887 (9th Cir. 2010) (finding that "the public's interest in knowing which politically active groups affect government decision making" was sufficient to overcome the privacy interest in withholding agency records). The Schedules and Emails would serve this public interest because knowing who visited the president-elect is sure to provide insight into the people on whom he relied in building his cabinet, selecting presidential appointees, and determining the priorities of his administration.

There is also significant public interest in shedding light on and weighing President Trump's conflicts of interest. *See Am. Oversight*, 311 F. Supp. 3d at 348 (finding, *inter alia*, that "a public interest in shedding light on and weighing [President Trump's] conflicts of interest," justifies disclosure of personal information about members of Trump's presidential transition

team); *see also Wash. Post Co.*, 690 F.2d at 264-65 (concluding that disclosure in not "clearly unwarranted" given a "singularly strong" public interest in disclosing "conflicts of interest"). Disclosure of the Schedules would serve this public interest as knowledge of meetings with Mr. Trump during the campaign and transition would help determine whether conflicts of interest exist between the administration's activities and Mr. Trump's business holdings, in light of his significant financial stake in more than 500 businesses. Langford Decl. ¶ 47.

2. The Public Interest in Disclosure Outweighs Any Privacy Interest

Exemptions 6 and 7(C) both require courts to balance privacy interests against a public interest in disclosure. *Associated Press*, 554 F.3d at 291 (noting that Exemption 6 requires the Court to "balance the public need for the information against the individual's privacy interest"); *Halpern*, 181 F.3d at 296 (balancing under Exemption 7(C) whether "the invasion of personal privacy resulting from release of the information would outweigh the public interest in disclosure."). Exemption 7(C)'s withholding threshold is lower than Exemption 6's—"Exemption 6 refers to disclosures that would constitute an invasion of privacy, [while] Exemption 7(C) encompasses any disclosure that 'could reasonably be expected to constitute' such an invasion." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 165-66 (2004) (quoting *Reporters Comm.*, 489 U.S. at 756 (1989)). Further, while Exemption 6 requires an agency to show that disclosure would result in a "clearly unwarranted invasion of personal privacy," the term "clearly" does not appear in Exemption 7(C). Instead, 7(C) uses the term "reasonably be expected to." *Id.* ("The adverb 'clearly,' found in Exemption 6, is not used in Exemption 7(C)."). Here, under Exemption 7(C)[41]—and, by extension, Exemption 6—the

[41] If the Court determines the threshold requirement for Exemption 7 are not met, only the balancing of interests under the narrower Exemption 6 apply, tipping the balancing even more towards disclosure of the Schedules and Emails.

balancing of the significant public interest in disclosure against minimal privacy interests strongly favors disclosure of the Schedules and Emails.

Under Exemption 7(C), the Supreme Court requires satisfaction of two prongs to overcome a significant privacy interest. "First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and "[s]econd, the citizen must show the information is likely to advance that interest." *Favish*, 541 U.S. at 172, 124 S. Ct. at 1580-81; *Associated Press*, 554 F.3d at 288.

The public interests in disclosure of the Schedules and Emails are clearly "more specific than having the information for [Mr. Behar's] own sake" and the information included in the records "is likely to advance" those interests. *Favish*, 541 U.S. at 172, 124 S. Ct. at 1580. As noted above, there is an overwhelming public interest in information that sheds light on the Secret Service's performance of its statutory duties and its role in the protection of our democratic process and continuity of government. There is also a significant public interest in obtaining broader knowledge of what the government is up to, including materials that show with whom the current President and his associates met during the campaign and transition, information about who is shaping federal decisions and policies, and records that shed light on Mr. Trump's conflicts of interest. Disclosure of the Schedules and Emails is likely to advance those interests, as described in detail above. Particularly given the insubstantiality of the privacy interests at stake, the Court should find that the Schedules and Emails are improperly withheld under Exemption 7(C) and should compel the Secret Service to produce them.

As Exemption 7(C) is more protective of privacy interests than Exemption 6, the Court should similarly find that the balancing of interests under Exemption 6 also favors disclosure. Under Exemption 6, the court must "balance the public's need for the information against the

individual's privacy interest to determine whether the disclosure of the [information] would constitute a 'clearly unwarranted invasion of personal privacy.'" *Wood*, 432 F.3d at 86 (quoting 5 U.S.C. § 552(b)(6)) (citing *U.S. Dep't of State v. Ray*, 502 U.S. 164, 175, 112 S. Ct. 541, 548 (1991)). "Unless the invasion of privacy is 'clearly unwarranted,' the public interest in disclosure must prevail." *Ray*, 502 U.S. at 177, 112 S. Ct. at 549 (quoting 5 U.S.C. § 552(b)(6)); *see also Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) ("Exemption 6's requirement that disclosure be clearly unwarranted instructs us to tilt the balance (of disclosure interests against privacy interest) in favor of disclosure." (internal quotations omitted)). It must be shown that disclosure "would serve a public interest cognizable under FOIA," *Associated Press*, 549 F.3d at 66, and "a court must . . . ascertain whether that interest would be served by disclosure." *Hopkins v. U.S. Dep't of Housing and Urban Dev.*, 929 F.2d 81, 88 (2d Cir. 1991).

The minimal invasion of privacy that would result from the release of the Schedules and Emails, as noted *supra* Section III, is certainly not "clearly unwarranted" in light of the substantial public interests at stake. Therefore, "the public interest in disclosure must prevail." *Ray*, 502 U.S. at 177, 112 S. Ct. at 549. Given the Second Circuit's assertion that "Exemption 6[] . . . instructs us to tilt the balance . . . in favor of disclosure," *Morley*, 508 F.3d at 1127 (internal quotation marks omitted), the Court should determine that the Schedules and Emails are improperly withheld under Exemption 6 and should compel the Secret Service to produce them.

V. *IN CAMERA* REVIEW

If the government demonstrates that the documents reveal personal characteristics about Mr. Trump, such as his health or spiritual beliefs, we respectfully request *in camera* review. Courts are authorized to review information withheld pursuant to a FOIA exemption *in camera*.

5 U.S.C. § 552(a)(4)(B) (2018). Such review can be applied when courts are "faced with conclusory or otherwise insufficient agency affidavits." *Am. Civil Liberties Union v. Office of the Dir. of Nat'l Intelligence*, 2011 WL 5563520, at *13 (S.D.N.Y. Nov. 15, 2011). *In camera* review is appropriate if "questions remain after the relevant issues have been identified by the agency's public affidavits and have been tested by plaintiffs." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 75-76 (2d Cir. 2009). Here, *in camera* review would be warranted to assess the validity of the government's asserted privacy interests.

CONCLUSION

For the foregoing reasons, Mr. Behar respectfully requests that the Court order disclosure of the documents with appropriate redactions and grant Mr. Behar's motion for summary judgment.

Dated: October 31, 2018

Respectfully submitted,

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[42] This motion has been prepared in part by a clinic associated with the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School, but does not purport to present the school's institutional views, if any.

[43] Because this memorandum both supports Plaintiff's cross-motion for summary judgment and serves as Plaintiff's opposition to Defendant's motion for summary judgment, it complies with the page limitations set forth in this Court's Individual Rules.

CERTIFICATE OF SERVICE

I certify that on October 31, 2018, I electronically filed the foregoing memorandum and related motion papers using the Court's CM/ECF system.

By: */s/ John Langford*

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