UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HUMAN RIGHTS WATCH, Plaintiff, v. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, Defendant.	No. 13 Civ. 7360 (JPO) ECF Case

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

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PRELIMINARY STATEMENT

For more than three years, Human Rights Watch ("HRW") has been seeking disclosure of records from the Federal Bureau of Prisons ("BOP" or "Government") that would allow the public to understand how BOP deploys the highly restrictive conditions of Special Administrative Measures ("SAMs") and Communications Management Units ("CMUs"), and how it handles Muslim CMU inmates' requests for religious accommodations. BOP failed to produce a single document until HRW filed suit a year after submitting its request. The parties then engaged in extensive, court-ordered discussions, and after finally completing its production of records eight months ago, the Government had several months to prepare its summary judgment filing. Yet at this late stage, in its reply and opposition brief, BOP's position has continued to shift. It has dropped the bulk of its reliance on the exemption for law enforcement techniques and procedures; it has asserted for the first time an exemption for life and safety over a large swath of records relating to CMUs; and it has produced less-redacted versions of 116 pages regarding SAMs. At the same time, BOP still defends various highly unusual and aggressive positions, including redacting responsive pages on the grounds that particular words, phrases, and paragraphs are "non-responsive;" providing no public justification at all for its redaction of a "key indicators" document; and making plainly inconsistent redactions to documents when produced by separate components of the Department of Justice ("DOJ").

Moreover, BOP has no answer to HRW's central substantive arguments: Because HRW seeks only de-identified records, further redactions cannot be justified on privacy grounds. And even if there were remote privacy risks, the strong public interests at stake here clearly outweigh them. In response, BOP can only repeat its speculation that even de-identified information could be used to re-identify inmates and suggest, implausibly, that there is no public interest in

disclosure of records that would illuminate how BOP uses SAMs and CMUs in practice, and how it handles requests for Muslim religious accommodations. BOP also fails to establish that material withheld as confidential law enforcement techniques or for reasons of life and safety would in fact result in the asserted harms. This Court should order BOP to disclose all of the redacted information that HRW challenges here.

ARGUMENT

I. THE RELIGIOUS ACCOMONDATION REQUESTS AND KEY INDICATORS DOCUMENTS DO NOT MEET THE LAW ENFORCEMENT THRESHOLD.

The documents reflecting religious accommodation requests and "key indicators" do not meet the threshold for invoking Exemption 7 because there is no "rational nexus" between these documents and "enforcement of federal laws or . . . maintenance of national security." Mem. in Supp. of Pl.'s Cross-Mot. for S.J. and in Opp'n to Def.'s Mot. for S.J. 8-9 ("HRW Br.") (quoting *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982)). BOP responds that (1) a 1986 amendment to FOIA abrogated the "rational nexus" test, and (2) any records BOP generates automatically meet the law enforcement threshold. Mem. in Opp'n to Pl.'s Cross-Mot. for S.J. and in Supp. of Def.'s Mot. For S.J. 2-3 ("Gov't Reply"). Both arguments fail: the *Pratt* test remains good law, and this Court (and others) have denied BOP the *per se* exemption that it again seeks today.

The 1986 amendment upon which BOP places great weight simply removed "investigatory" from the phrase "investigatory records or information compiled for law enforcement purposes." This amendment clarified circuit court confusion over what constituted an "investigatory record," such as whether a training manual met the test. *See, e.g.*, *Cox v. DOJ*, 576 F.2d 1302, 1310 (8th Cir. 1978). But *Keys v. DOJ*, a case on which BOP relies heavily, establishes that the threshold's second half—that records be "compiled for law enforcement purposes"—"survive[d] the 1986 amendments," and *Pratt* remains "controlling precedent" on

when it is met. 830 F.2d 337, 340 (D.C. Cir. 1987). The amendment did not abrogate the *Pratt* test, as BOP contends, and judges of this Court, following the D.C. Circuit, have continued to apply the *Pratt* test after the 1986 amendment.[1]

BOP also incorrectly claims that its records automatically meet the Exemption 7 threshold because it is a law enforcement agency. This Court has rejected the *per se* rule BOP advocates. *See Lawyers Comm.*, 721 F. Supp. at 563-64. Other courts have specifically rejected the *per se* rule as applied to BOP.[2] Adopting a *per se* rule, as BOP urges, would contradict FOIA's presumption in favor of disclosure, and this Court must reject it. BOP mistakenly argues that the Second Circuit created a *per se* rule for law enforcement agencies in *Williams v. F.B.I.*, 730 F.2d 882 (2d Cir. 1984). But *Williams* held only that, under the pre-1986 FOIA statute, "investigatory records," compiled as part of an investigation did not lose their "law enforcement" status because the investigation was unsuccessful. *Id.* at 884-85. The case is thus premised on the existence of an investigation to begin with. As the Second Circuit has held since, "[b]efore it can invoke exemption 7, the government has the burden of proving the existence of a compilation of information for the purpose of law enforcement," a showing BOP has failed to make here. *Ferguson v. F.B.I.*, 957 F.2d 1059, 1070 (2d Cir. 1992).

BOP's attempt to argue, in the alternative, that it has met the *Pratt* test's requirements is equally unavailing. BOP argues that the records qualify because they were compiled in order to house and manage inmates "in connection with BOP's execution of its duties under 18 U.S.C.

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[1] *See, e.g., Lawyers Comm. for Human Rights v. I.N.S.*, 721 F. Supp. 552, 563-64 (S.D.N.Y. 1989) (citing with approval *Pratt*, 673 F.2d at 420–21); *see also Simon v. DOJ*, 980 F.2d 782, 783 (D.C. Cir. 1992) (applying the *Pratt* test); *King v. DOJ*, 830 F.2d 210, 229-30 (D.C. Cir. 1987) (same); *Elec. Privacy Info. Ctr. v. Dep't of Justice Criminal Div.*, No. CV 12-127 (BJR), 2015 WL 971756, at *6-7 (D.D.C. Mar. 4, 2015).

[2] *See, e.g.*, *Banks v. DOJ*, 700 F. Supp. 2d 9, 18 (D.D.C. 2010) (holding that BOP cannot "rely solely on its status as a law enforcement agency" to withhold records under Exemption 7 "[a]bsent a showing that the … records were compiled for law enforcement purposes"); *Benavides v. Bureau of Prisons*, 774 F. Supp. 2d 141, 146-47 (D.D.C. 2011) (rejecting *per se* rule); *Cowsen-El v. Dep't of Justice*, 826 F. Supp. 532, 533-34 (D.D.C. 1992). The only case cited by BOP to the contrary, *Jordan v. United States*, 668 F.3d 1188 (10th Cir. 2011), has never been followed in this Circuit.

§ 3621(a)," the basic statute that authorizes it to incarcerate prisoners. Second Public Decl. of Clinton Stroble ¶ 3, ECF No. 53 ("Second Stroble Decl."). But the notion that § 3621(a) is the "law" BOP is "enforcing" is just another attempt to establish the *per se* rule—under this reading, almost any BOP-generated document would meet the Exemption 7 threshold. BOP records do not meet the threshold merely because they were compiled as part of routine prison administration, with no specific law enforcement or security aim. *See, e.g.*, *Maydak v. DOJ*, 254 F. Supp. 2d 23, 38 (D.D.C. 2003); *Cowsen-El*, 826 F. Supp. at 533-34. For these reasons, neither the religious accommodation nor key indicators documents can be withheld under Exemption 7.

II. BOP IMPROPERLY WITHHELD INFORMATION UNDER FOIA'S PRIVACY EXEMPTIONS.

BOP argues that the information it has withheld under FOIA's privacy exemptions, 5 U.S.C. § 552(b)(6) and (b)(7)(C), implicates (1) a substantial privacy interest but (2) no cognizable public interest. BOP is incorrect. There is no privacy interest at stake in the records HRW seeks, which do not include names, ID numbers or other identifying information. Even if there is a residual privacy interest, it is outweighed by strong public interests in disclosure.

A. The De-Identified Withholdings Implicate No Cognizable Privacy Interests.

HRW has agreed not to seek names, register numbers, and other identifying inmate information. BOP contends that even after excising all such information, it must redact yet more based on potential threats to privacy. This argument fails. BOP's reply, like its opening brief, offers only unsupported speculation that disclosure could lead to re-identification.[3] This speculation does not establish a cognizable privacy interest under FOIA. HRW Br. 11 (citing cases). At a minimum, this Court should conduct an *in camera* review to assess any privacy risk, as the Supreme Court directed in *Dep't of the Air Force v. Rose*, 425 U.S. 352, 374, 381 (1976).

[3] HRW now agrees to withdraw its challenge to redaction of TRULINCS ID numbers, after receiving BOP's reply explaining that these ID numbers are based on BOP registration numbers. *See* Second Stroble Decl. ¶ 4.

Under *Rose* and its progeny, BOP must show that disclosure would either "directly identify" individuals or create a "substantial likelihood" of identification. HRW Br. 11-12 (citing cases). BOP's reply creates a straw man, arguing that redaction of "directly identifying information" alone may not eliminate any cognizable privacy interest. Gov't Reply 5. But HRW has agreed to the redaction of not only "directly identifying" information but a variety of other personal details as well. BOP has offered only unpersuasive speculation that disclosure of the information sought would allow individuals to be identified, far short of the "substantial likelihood" the case law requires. HRW Br. 11-12. BOP argues that re-identification is likely because those closest to the inmates might be able to recognize the details of their cases. Gov't Reply 5. But the mere speculative possibility of re-identification by those closest to the subject does not implicate a substantial privacy interest. *See, e.g.*, *ACLU v DOD*, 389 F. Supp. 2d 547, 557 (S.D.N.Y. 2005), *vacated on other grounds*, 558 U.S. 1042 (2009) (finding no cognizable privacy interest where individuals "might recognize themselves . . . or be recognized by members of the public" in photographs "even without identifying characteristics being revealed" because "that possibility is no more than speculative"). BOP's contention that inmate job and cell assignments are identifying information likewise fails because this information reflects routine prison management and many inmates are assigned the same job categories and cellblocks. Gov't Reply 7. Detached from personal identifiers like names and register numbers, it is highly unlikely that job or cell assignment alone could re-identify an inmate.

BOP's discussion of *Rose* also highlights the inconsistency of its current position. As BOP emphasizes, the Supreme Court in *Rose* directed the district court to conduct an *in camera* review to determine whether deletion of "personal references and other identifying information" is sufficient to safeguard privacy. HRW has indeed sought *in camera* review so that this Court

may determine whether the redactions it has agreed to sufficiently allay any privacy concerns. But BOP strenuously opposes *in camera* review. Gov't Reply 25. Instead it asks this Court to rely solely on its declarations, precisely what the *Rose* Court refused to do.

Moreover, BOP's definition of what information could be used to identify inmates has been inconsistent throughout this litigation. After HRW filed suit, BOP released information regarding SAMs that included the dates on which SAMs were imposed and the dates on which they expired or were last renewed. However, the Criminal Division of the DOJ ("CRM") and the Office of Information Policy ("OIP") have both redacted this information from their releases. BOP has refused to address this inconsistency, even as OIP undertook an additional review of records relating to SAMs to identify more portions that could be released without threatening privacy. Supp. Decl. of V. Brinkmann ¶¶ 4-5, ECF No. 55.

BOP contends that revealing information in the CMU Spreadsheets—specifically STG designations and information in the "Conduct" column—will lead to members of the public identifying which inmates are being held in CMUs. Gov't Reply 8-9. But these designations are given to an inmate by BOP. It is highly unlikely that a member of the public would be aware of such information and would be able to identify an inmate on that basis.

Nor can BOP's redaction of whole columns in the CMU Spreadsheets be justified under Exemptions 6 and 7(C). BOP's justifications for these wholesale redactions only apply, at most, to some material within those categories. When discussing these columns, BOP states only that "[s]ome references to STG assignments, and to associations and conduct related to STG assignments… appear in the 'Comments' column", Decl. of D. Schiavone ¶ 4, ECF No.51 ("Schiavone Decl."), and that the "CMC" column includes "broad statuses such as 'Separation', but also more specific designations," Second Stroble Decl. ¶ 6. BOP must segregate any specific

references that threaten privacy and disclose all other information in the columns. HRW asks that this Court conduct *in camera* review to assess which redactions are needed to protect privacy.

Finally, BOP argues that STG information could disclose an inmate's status as a sex offender, or association with a gang or group. Gov't Reply 9. The information is not linked to any personal identifiers, so these designations could not re-identify specific inmates and thus do not implicate their privacy interests. Even if the Court does find some particular designations to be of concern, BOP should segregate these designations and release unrelated information from the CMU Spreadsheets. BOP could easily segregate any information that could reveal a gang association or sex offender status while disclosing all other STG statuses. *See infra*, at 14 (discussing BOP's invocation of the life and safety exemption over the same information).

B. The Strong Public Interests in Disclosure Outweigh Any Privacy Interests that May Exist.

The disclosure HRW seeks would serve two vital public interests that far outweigh any privacy interests that may be at stake. First, the information would clarify how SAMs and CMUs operate, advancing "the basic purpose of [FOIA]" to "open agency action to the light of public scrutiny." *DOJ v Reporters Comm.*, 489 U.S. 749, 774 (1989). Second, it would allow scrutiny of well-founded concerns that BOP may be misusing these measures and treating religious accommodation requests from Muslims unfairly. In response, BOP contends that: (1) the withheld material would advance neither interest and (2) HRW has not amassed enough evidence to assert an interest in exploring possible misconduct under *Favish*. Both arguments fail.[4]

1. *The Withheld Information is Essential for Furthering the Important Public Interests at Stake.*

The information about SAMs and CMUs that BOP has withheld is essential for

[4] BOP contests HRW's point that inmates have diminished privacy interests in the kinds of information withheld here, citing *AP v. DOD*, 554 F.3d 274 (2d Cir. 2009). Gov't Reply 10-11. But BOP simply ignores the fact that *AP* dealt with highly sensitive information about inmate abuse of a kind not at stake here. *See* HRW Br. 13 n.12.

understanding how the agency decides to impose these restrictions on inmates. BOP argues that publicly available information is adequate. Gov't Reply 13-14, 16. But the existence of *some* information does not obviate the public interest in disclosure of *more*. In any case, the public sources it cites are too vague to help the public understand BOP's decision-making process. BOP cites the regulations authorizing SAMs without addressing HRW's argument that they are too broadly worded to reveal how SAMs operate in practice. HRW Br. 14. Similarly, the "Reason[s] for CMU Referral" currently available to the public are generic, referring to "illegal activity through" or "prohibited activity related to" communication, terrorism, and "contact victim."[5] Disclosure of the reasons that SAMs and CMUs are imposed would thus significantly illuminate the public about how these measures are actually used in practice.[6]

There is also a strong public interest in investigating concerns that BOP makes excessive and discriminatory use of SAMs and CMUs, and that BOP may engage in discriminatory treatment of Muslim inmates' accommodation requests. All of the withheld material – including the job and cell assignment information and other information redacted from records regarding religious accommodation – are necessary for HRW to investigate these concerns.[7]

2. *HRW Easily Meets the* Favish *Standard.*

A FOIA requester seeking to further the public interest in investigating potential misconduct need only "produce evidence that would warrant a belief by a reasonable person that

[5] *See* Declaration of Nicholas Handler, Ex. A ("Handler Decl.").

[6] The withheld locations of U.S. Attorney's offices requesting that SAMs be imposed would further the related public interest in understanding how specific offices use their requesting authority. HRW Br. at 14. BOP does not contest that this is an important public interest but mistakenly asserts that the publicly available U.S. Attorneys' Manual furthers it adequately. Gov't. Reply 14 n.10. However, the manual simply copies vague criteria from the SAMs regulations. *See* U.S. Attorneys' Manual, § 9-24.100, *available at* http://www.justice.gov/usam/usam-9-24000-requests-special-confinement-conditions (last accessed May 19, 2015).

[7] HRW's need for access to the job and cell assignment information follows directly from one of the main sources of its concern about discrimination, the inmates who have reported being denied medical care because of their religion. Prasow Decl. ¶ 16, Ex. A, at 139-40. This evidence suggests that BOP may be imposing special burdens on Muslim inmates as retaliation, so HRW needs to investigate whether inmates who seek religious accommodations are assigned especially burdensome jobs or living quarters.

the alleged Government impropriety *might* have occurred." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (emphasis added). HRW's 200-page report on terrorism prosecutions, and other evidence HRW has offered, easily meet this low bar. HRW Br. 15. BOP seeks to avoid this conclusion by misstating the rule of *Favish* as requiring evidence sufficient to displace a "presumption of legitimacy" applied elsewhere. Gov't Reply 12. But *Favish* explicitly held that, because of "FOIA's prodisclosure purpose," a requester need only satisfy a "less stringent standard" to assert a public interest in examining potential misconduct. *Id*.

Lower courts have found a variety of evidence sufficient to satisfy *Favish*, much of it weaker than the extensive record HRW has assembled. *See, e.g., Union Leader Corp. v. DHS*, 749 F.3d 45, 56 (1st Cir. 2014) (records showing aliens had been convicted of crimes decades before immigration arrests were evidence of ICE negligence, despite being "hardly conclusive"); *Roth v. DOJ*, 642 F.3d 1161, 1180 (D.C. Cir. 2011) (decade-old FBI failure to disclose exculpatory information was evidence that it might be withholding other such information); *Marino v. DEA*, 15 F.Supp.3d 141, 154-55 (D.D.C. 2014) (existence of notes suggesting inconsistencies in government witness's testimony was evidence of negligence). These cases suggest that any evidence which makes official misconduct more probable than it would otherwise be satisfies the *Favish* standard.

The considerable evidence of misconduct HRW has amassed makes it far more likely that official misconduct has occurred. The cumulative effect of this evidence easily meets the *Favish* standard, and BOP's piecemeal attacks on a handful of HRW's assertions are unavailing.

III. BOP CANNOT JUSTIFY ITS WITHHOLDINGS UNDER THE EXEMPTION FOR LAW ENFORCEMENT TECHNIQUES AND PROCEDURES.

BOP has withdrawn its arguments that inmate identities and information in the CMC column of the CMU spreadsheets can be withheld under Exemption 7(E). Gov't Reply 17 n.12.

And it has admitted that none of the information it has withheld constitutes a "guideline[]" under Exemption 7(E). *Id.* BOP's remaining 7(E) claim must likewise fail: the STG information found in the CMU spreadsheets does not reveal any non-public law enforcement techniques.

BOP defends its redaction of the STG assignments and information supposedly linked to them by claiming that they are used to "track and monitor inmates . . . identified as posing unique security threats." *Id*. But a tracking designation alone cannot reveal "law enforcement techniques" because it reveals nothing about how BOP applied that designation or how it is being used. The designation simply labels an inmate as part of a class and reveals far less about investigative techniques than do law enforcement codes that courts have previously allowed to be released. HRW Br. 19. Allowing BOP to withhold STG statuses under Exemption 7(E) would expand its scope to the detriment of FOIA's aim of transparency.

Moreover, STG designations cannot be withheld under Exemption 7(E) because the exemption protects only *non-public* law enforcement techniques. *Campbell v. DOJ*, No. 89-3016, 1996 WL 554511, at *34 (D.D.C. Sep. 19, 1996) (declaring that Exemption 7(E) applies to "obscure or secret techniques"), *rev'd & remanded on other grounds*, 164 F.3d 20 (D.C. Cir. 1998); *Rugiero v. DOJ*, 257 F.3d 534, 551 (6th Cir. 2001) (stating that first clause of Exemption 7(E) "protects [only] techniques and procedures not already well-known"). Various sources have already made STG designations publicly available. For instance, the website Public Intelligence has published two BOP reports analyzing the interception of CMU inmate communications that include their STG designations and details of their affiliations. HRW Br. 19. Any investigative techniques the withholdings would reveal could already be deduced from these reports.

Contrary to BOP's assertion, Exemption 7(E) does not require disclosure only if the information has been "officially acknowledged." Gov't Reply 19. The purpose of Exemption

7(E) is to prevent secret investigative techniques from becoming publicly known. Once those techniques are known, the logic underlying Exemption 7(E) no longer applies, regardless of whether the information at issue was "officially acknowledged." Moreover, the cases upon which BOP relies were concerned with whether the government had previously *waived* a right to withhold national security information. *Id* . (citing *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)). But the issue here is not whether BOP has *waived* its right to assert Exemption 7(E), it is whether that exemption applies in the first place.[8]

Finally, BOP argues that "inmates armed with information about their STG assignments could reasonably be expected to take steps to conceal their associations or change their patterns and methods of communication." Gov't Reply 18. But because HRW is only seeking de-identified information, the possibility of an inmate obtaining information about his own STG assignments is highly unlikely. Moreover inmates housed within the CMU and subject to SAMs are severely restricted as to their communications and are aware of these restrictions. In any event, information about how BOP manages STG populations is already in the public domain and BOP offers no reason to believe this has led to the kinds of circumvention that BOP describes. This Court should order BOP to disclose the redacted STG information.

IV. BOP'S WITHHOLDINGS UNDER THE LIFE AND SAFETY EXEMPTION ARE IMPROPER.

BOP's new argument that the redactions in the CMU spreadsheets are also exempt under Exemption 7(F) fails for a number of reasons. As an initial matter, courts do not usually consider new arguments raised on reply. *See, e.g.*, *Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993). As BOP acknowledges, the rule in FOIA cases is that the Government "must assert all exemptions

[8] Moreover, BOP cites no case where the official acknowledgement requirement was applied to Exemption 7(E). And, unlike in *Wolf*, the information here issue does not raise national security concerns. Even if the "official acknowledgment" doctrine were applicable, the Second Circuit cast doubt on its strict application in *N.Y. Times Co. v DOJ*, 752 F.3d 123, 141 & n.19 (2d Cir. 2014).

at the same time, in the original district court proceedings." *Maydak v. DOJ*, 218 F. 3d 760, 764 (D.C. Cir. 2000) (emphasis added); Gov't Reply 21. Late additions are allowed in "extraordinary circumstances" where, "from pure human error, the government failed to invoke the correct exemption." *Maydak*, 218 F.3d at 767. BOP has not shown that this is an extraordinary circumstance nor that its belated assertion the exemption is due to "pure human error." Indeed, it has not offered any explanation why it failed to assert Exemption 7(F) sooner. *See* Second Stroble Decl. ¶¶ 12-16; Schiavone Decl.; Decl. of K. Schwinn, ECF No. 52 ("Shwinn Decl.").

BOP's late assertion of Exemption 7(F) is particularly inexcusable for several reasons. BOP had at least four prior opportunities to determine that Exemption 7(F) applied: (1) when it originally produced the CMU spreadsheet in January 2014, (2) when it substituted a more-redacted version for the original production in March 2014, (3) when it produced the draft *Vaughn* index this Court ordered it to provide prior to summary judgment, ECF No. 19 at ¶ 10.E, and (4) when it submitted its formal *Vaughn* index with its summary judgment motion. Moreover, BOP has had a very long time to contemplate its position: the CMU spreadsheets were first produced in January 2014, and BOP had more than three months to prepare its summary judgment filing after the entry of a briefing schedule. *See* ECF Nos. 27, 29.

Not only has BOP offered no explanation for its default, but there are in fact no changed circumstances that might account for it. BOP has long possessed all the evidence it now invokes to assert Exemption 7(F). Indeed, the author of one of the declarations BOP offers on reply acknowledges that he compiled the CMU spreadsheets at issue. Schiavone Decl. ¶ 3. Moreover, BOP's belated claim is especially suspect because it comes at the same time that BOP has stopped invoking Exemption 7(E) to justify most of the redactions in the CMU spreadsheets. Requesters should not have to wait until the Government's reply to learn its true position, and

this Court should not endorse this approach to FOIA litigation.

The supposed concerns about life and safety that BOP invokes do not excuse its default. Gov't Reply 20-21. BOP relies on *ACLU v. DOD*, but the Court only allowed the belated Exemption 7(F) claim there because "physical safety . . . ha[d] been of paramount concern throughout th[e] case." 389 F. Supp. 2d at 575. Here, the inmates' physical safety was only raised in regards to a single redaction to the "Key Indicators" document. *Compare* Stroble Decl. with Second Stroble Decl.; Schiavone Decl.; Schwinn Decl.[9] Moreover, BOP, as the institution charged with protecting the life and safety of the inmates in its care, was surely aware of any such concerns at the outset, and could have raised them at the appropriate time but did not.

Even if BOP's new argument is entertained, BOP fails to show that Exemption 7(F) applies. To qualify for Exemption 7(F), an agency must demonstrate that "there is some nexus between disclosure and possible harm and [that] the deletions were narrowly made to avert the possibility of such harm." *Brestle v. Lappin*, 950 F. Supp. 2d 174, 185 (D.D.C. 2013); *see also* HRW Br. 22 n.19. BOP argues that disclosure of details from the CMU spreadsheets such as sex offender and CMC designations, associations, and STG codes would allow CMU inmates (and others) to identify specific inmates, which could "reasonably be expected to endanger the life or physical safety" of identifiable inmates. § 552(b)(7)(F); Gov't Reply 20; Schiavone Decl. ¶¶ 7-8.

BOP's argument fails because, as explained already, HRW seeks de-identified information that would not threaten any identifiable inmate. Courts have allowed the Government to withhold the *names* of inmates under Exemption 7(F), but HRW is not seeking names, register numbers or any other information that would directly identify inmates. *See, e.g.*,

[9] In *August v. FBI*, also cited by BOP, the Government argued (as BOP has not) that it had failed to identify a new exemption due to pure human error. 328 F.3d 697, 701 (D.C. Cir. 2003). And as *Maydak* was yet to be decided when litigation began, the Court held that the Government could have reasonably believed that it would be able to raise new exemptions later. *Id.* at 701.

Kalwasinski v. BOP, No. 08-9593, 2010 WL 2541363 (S.D.N.Y. 2010); *see also supra*, at 4-6. Even if CMU inmates could re-identify other inmates, BOP's claim that they are likely to acquire the withheld information is purely speculative, and is especially implausible given the severe restrictions that BOP places on CMU and SAMs inmates' ability to communicate with the outside world. *See* Prasow Decl. ¶ 13-14. Ex. A. 138-141; Manes Decl. Ex. F.

BOP has also failed to explain why all or even most of the redacted information would pose a threat to life or safety if released. Its declarations focus solely on the risk of violence to sex offenders and gang members if their status as such is disclosed. *See* Schwinn Decl. ¶ 7; Schiavone Decl. ¶¶ 7, 8.A-.B; Second Stroble Decl. ¶ 15. The declarations simply assert these risks in a conclusory fashion, and should not be credited for that reason. But even if the Court finds the declarations persuasive with respect to sex offenders and gang members, BOP offers no evidence that there would be a risk to other categories of inmates, including those charged with terrorism and terrorism-related offenses, which are the principal focus of HRW's request. Clearly, the redactions were not "narrowly made." *Brestle*, 950 F. Supp.2d at 185.

This Court should reject BOP's belated and inadequate effort to invoke Exemption 7(F) and order disclosure of the information redacted from the CMU spreadsheets on that basis.

V. BOP'S RELIANCE ON AN *EX PARTE* DECLARATION IS INAPPROPRIATE.

BOP has not provided the most thorough public explanation possible for the withholdings in the Key Indicators documents. Citing only *Simmons v. DOJ*, BOP argues that it need not identify even the withholding statute(s) it invokes under Exemption 3. 796 F.2d 709, 711 (4th Cir. 1986). *Simmons*, however, was a national security case—the FBI raised both Exemptions 1 and 3—and it is well established that *in camera* review of *ex parte* declarations is far more easily accepted in cases implicating national security interests. *See, e.g.*, *Lykins v. DOJ*, 725 F.2d 1455,

1465 (D.C. Cir. 1984) ("[W]e have expressed reservations about [the use of *in camera* affidavits] in cases which do not involve national security."). Indeed, the *Simmons* court only chose not to reveal the identity of the Exemption 3 statute for "[national] security reasons." *Simmons*, 796 F.2d at 711. BOP, on the other hand, has not argued that the withheld information implicates any national security concerns. Because BOP's complete reliance on the *ex parte* declaration prevents HRW from meaningfully challenging BOP's redaction of the Key Indicators document, *see* HRW Br. 20-22, plaintiff respectfully asks the Court to order BOP to produce a more detailed public justification, or else to conduct its own *in camera* review of the document.

VI. BOP HAS IMPROPERLY REDACTED DOCUMENTS AS "NON-RESPONSIVE."

BOP has redacted specific words and phrases on the grounds they are "non-responsive" even though the pages in question are concededly responsive to HRW's request. *See* HRW Br. 22-23. FOIA specifies that responsive "records" may only be redacted where "segregable" material falls within an exemption. *See id.* at 23 (citing § 552(b), (d)). If a request seeks information that appears only on specific pages of a lengthy document, agencies may be entitled to treat only the responsive pages as the "record" subject to disclosure. But once those pages have been identified, FOIA does not allow agencies to selectively redact phrases they unilaterally deem "non-responsive." BOP fails to address this straightforward implication of the statute.[10]

BOP's redactions of specific words and phrases are particularly troubling because it

[10] BOP also misstates relevant law. Contrary to its suggestion, Gov't Reply. 23, the Court in *ACLU of Northern California v. DOJ* did order the Government to produce "non-exempt portions of responsive records" withheld by DOJ. 2014 WL 4954277, at *15 (N.D. Cal. Sep. 30, 2014) (noting that ACLU challenged such redactions in certain documents and ordering DOJ to produce those documents "in full, as they have not established that they are work product, or that redactions pursuant to Exemption 7(E) are warranted."). In *American Immigration Council v. DHS*, the court considered documents that BOP identified only as "non-responsive duplicates," and held that "[u]nless Defendants indicate the applicable exemption(s) . . . this Court will have no choice but to compel disclosure." 950 F. Supp. 2d 221, 248 (D.D.C. 2013). BOP is also incorrect in stating that the author of *American Immigration Council* later affirmed that agencies may redact for non-responsiveness. *See* Gov't Reply 23. In *Am. Immigration Council v. DHS*, Judge Boasberg first reviewed the contested pages *in camera*, which HRW has repeatedly requested, and then decided the withheld sections were irrelevant. 30 F. Supp. 3d 67, 73 (D.D.C. 2014).

concedes that the pages in question are otherwise responsive and has adopted an aggressively narrow (and incorrect) view of HRW's Requests so as to leave these particular phrases outside their scope. BOP has made "non-responsive" redactions to two kinds of records: those concerning CMU capacity, and records reflecting requests for religious accommodation and their disposition. In both instances, BOP's claim of "non-responsiveness" is unjustified.

With respect to CMU capacity, BOP's *Vaughn* index invokes no exemptions, stating that it excised "Total Institution Capacity" and "Special Housing Unit Capacity" because "the Joint Stipulated Settlement only concerns Rated Capacity for the CMU." Stroble Decl. Ex. 2, at 1.[11] But the joint stipulation specified that BOP would search for "records reflecting the inmate capacity of the CMUs," Stroble Decl. Ex. 3, ¶ 8, and nowhere limited HRW's request to "rated capacity," or excluded "total institution" or "special housing unit" capacity, *see id.*; Compl. Exs. B, L. Before producing its draft *Vaughn*, BOP did not notify HRW that it was construing the request so narrowly, and HRW has subsequently objected to these redactions. *See* HRW Br. 23. BOP is simply not entitled to unilaterally narrow HRW's request. [12]

BOP's "non-responsive" redactions to the religious accommodation documents are even more egregious.[13] BOP has redacted sentences and paragraphs because it determined certain "information does not relate to the following: requests for Islamic religious accommodation and for records regarding the disposition of any such requests." *See* Stroble Decl. Ex. 2, at 6, 9, 11-13. A review of the redacted records suggests that BOP has redacted inmate complaints to excise portions that BOP has deemed do not concern "Islamic religious accommodation." But the

[11] The redacted pages in question have been submitted for the Court's convenience. Handler Decl., Ex. B.
[12] *Dettman v. DOJ*, 802 F.2d 1472 (D.C. Cir. 1986), strongly suggests that BOP's unilateral narrowing of HRW's request is improper. The court did not review whether the FBI had improperly narrowed the scope of Dettman's FOIA request because she was notified of its proposed narrowing and did not exhaust administrative remedies. *Id.* at 1476. But the court suggested that had she *not* been notified, it would have "decline[d] to embrace the government's parsimonious reading of Dettman's request." *Id.*
[13] The redacted pages in question have been submitted to the Court. Handler Decl. Ex. C.

parties' joint stipulation and HRW's original FOIA requests sought the entirety of "records" requesting Islamic religious accommodation and the entirety of "records" reflecting the disposition of such requests. *See Joint Stipulation and Proposed Order*, ECF No. 18 at 1. Because HRW's interest is to understand how BOP handles such requests, all information on a document requesting or responding to an accommodation request may be relevant. Just as with the CMU records, BOP may not unilaterally narrow the scope of HRW's FOIA request.

It remains unclear why BOP has taken such an aggressive posture toward "non-responsiveness." BOP should simply produce those details over which it claims no exemption and defend the rest under a FOIA exemption. The Court should not allow the Government to redact supposedly non-responsive information from concededly responsive pages and should require BOP to produce all of the material redacted on this basis.

In addition, BOP has declined to provide a *Vaughn* index for certain documents because it determined, after producing them, that they were entirely non-responsive to HRW's request for records about Islamic religious accommodation. Gov't Reply 25; Stroble Decl., Ex. 2; HRW Br. 24. Upon further review of the documents, HRW withdraws its objection to all of these documents except Bates-numbers BOP000335, 360, and 361. Those three pages are almost entirely redacted, making it impossible for HRW to determine whether they actually fall outside HRW's requests. *See* Handler Decl. Ex. D (attaching the three redacted pages in question).

VII. THE COURT SHOULD CONDUCT *IN CAMERA* REVIEW.

If the Court is not inclined to order immediate disclosure, it should review the withheld material *in camera*. Contrary to BOP's assertion, Gov't Reply 25, *in camera* review is proper, as this case "involve[s] a strong public interest in disclosure" and BOP has not adequately justified its withholdings. HRW Br. 24-25; *supra*, at 4-7.

CONCLUSION

For these reasons, the Court should grant HRW's cross-motion for summary judgment and order BOP to disclose all of the withheld material that HRW has challenged.

Respectfully submitted,

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Dated: June 5, 2015
New Haven, CT

[*] This memorandum has been prepared by the Media Freedom and Information Access Clinic, a program of the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School. Nothing in this memorandum should be construed to represent the official views of the law school. Counsel thanks Laura Crestohl for her assistance in preparing this submission.