

No. _____

In the
Supreme Court of the United States

RICHARD BEHAR,
Petitioner,

v.

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY,
Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether documents obtained and used by a federal agency in the legitimate conduct of its official duties are not “agency records” and thus never subject to disclosure under the Freedom of Information Act if they were provided to the agency with an expectation of confidentiality.

2. Whether an appellate court violates the party presentation principle by deciding an appeal primarily on the novel resolution of an issue not presented, briefed, or argued by the parties at any stage of the litigation.

3. Whether the balancing of personal privacy interests against the public interest in disclosure required by FOIA Exemption 7(C) permits an agency’s interest in obtaining information, among other factors, to outweigh the public’s interest in understanding the policies and priorities of a presidential administration.

PARTIES TO THE PROCEEDING

Petitioner Richard Behar was the plaintiff in the district court and the appellee in the court of appeals.

Respondent United States Department of Homeland Security was the defendant in the district court and the appellant in the court of appeals.

RELATED PROCEEDINGS

This proceeding arises from two cases that were consolidated in the district court and court of appeals:

District Court for the Southern District of New York:

Behar v. DHS, No. 1:17-cv-08153, Dkt. 49 (Aug. 15, 2019) (memorandum opinion granting in part and denying in part Respondent's motion for summary judgment without prejudice, and denying Petitioner's cross-motion for summary judgment without prejudice);

Behar v. DHS, No. 1:18-cv-07516, Dkt. 23 (Aug. 15, 2019) (same);

Behar v. DHS, No. 1:17-cv-08153, Dkt. 80 (Aug. 5, 2020) (order denying Respondent's motion for summary judgment and granting Petitioner's motion for summary judgment);

Behar v. DHS, No. 1:18-cv-07516, Dkt. 48 (Aug. 5, 2020) (same).

Court of Appeals for the Second Circuit:

Behar v. DHS, Nos. 20-3253(L), 20-3256(Con), Dkt. 120-1 (July 8, 2022) (opinion reversing district

court's order denying Respondent's motion for summary judgment and granting Petitioner's motion for summary judgment).

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INTRODUCTION

The decision of Second Circuit in this appeal dramatically restricts the scope of the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), in ways that directly contradict controlling decisions of this Court, longstanding interpretations of the Courts of Appeal, and the text of the statute. It effects through judicial fiat a major contraction of the FOIA transparency mandate imposed by Congress nearly fifty years ago.

The Second Circuit reversed on two alternate grounds a decision of the district court that required disclosure of Secret Service records identifying individuals who met with Donald Trump while he was receiving Secret Service protection as a presidential candidate and President-elect. The primary ground for reversal holds that the Secret Service records at issue are not “agency records” subject to FOIA because they were provided to the agency with an expectation they would remain confidential. This holding, the Second Circuit made clear, applies broadly to any records that an entity not subject to FOIA provides to a government agency with an expectation of confidentiality. Under the Second Circuit’s unprecedented holding, all such records are beyond the reach of FOIA’s disclosure obligations by virtue of their confidential designation alone.

Adopted *sua sponte*, without briefing or argument by the parties at any stage of the litigation, this holding directly conflicts with this Court’s ruling in *DOJ v. Tax Analysts* that all documents coming into an agency’s possession in the legitimate conduct of its

official duties are “agency records” subject to FOIA. 492 U.S. 136, 144-45 (1989). The records at issue squarely fit this definition. But, without even discussing *Tax Analysts*, the Second Circuit held they are not “agency records” simply because they were stamped “confidential” when provided to the agency and then treated as such by the agency.

This holding renders superfluous specific exemptions Congress wrote into FOIA to permit agencies to withhold certain confidential information, departs from every circuit’s long understanding of the records subject to FOIA, and effectively lets private parties unilaterally preclude Americans from knowing about the government’s interactions with them. If permitted to stand, this holding will render government more opaque, make mismanagement and corruption harder to detect, and undermine democratic accountability.

The Second Circuit’s drastic departure from statutory text and judicial precedent without even addressing a contrary, controlling ruling from this Court illustrates why, “[i]n our adversarial system of adjudication, we follow the principle of party presentation.” *U.S. v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). Because the Second Circuit announced its holding *sua sponte*, there was no adversarial process that would have developed a proper factual record on the issue and identified errors in the court’s legal analysis. Indeed, the Second Circuit’s “transformation of this case” was far more “radical” than what this Court unanimously condemned in *Sineneng-Smith*, where the appeals

panel at least afforded the parties a meaningful opportunity to be heard. *Id.* at 1581-82.

Worse, the Secret Service here had knowingly waived any argument that the documents at issue are not “agency records” in its opening district court brief. The Second Circuit thus necessarily “abused its discretion” in deciding this case on grounds of which a party was “well aware” but “chose” not to raise. *Wood v. Milyard*, 566 U.S. 463, 474 (2012). *Certiorari* should be granted on this issue to reinforce that this Court does not tolerate such egregious violations of a bedrock principle of our adversarial system.

Certiorari is likewise warranted to address the Second Circuit’s alternative ground for reversal that also shrinks the scope of FOIA and contravenes longstanding precedent. This alternative holding rejected the district court’s identification of the public and private interests to be weighed in determining whether disclosure could constitute an “unwarranted invasion of personal privacy” under FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C).

The Second Circuit *contracted* the disclosure side of the balance by holding that the *only* relevant interest is the extent to which disclosure will shed light on activities of the specific agency whose records were requested. This holding rendered irrelevant the district court’s determination, after *in camera* review, that the Secret Service records would indeed shed light on the policies and priorities of the Trump administration. It also conflicts with this Court’s precedent that the “relevant public interest in the

FOIA balancing analysis” includes the extent to which disclosure would generally “let citizens know ‘what their government is up to.’” *Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

At the same time, the Second Circuit *expanded* the non-disclosure side of the balance by weighing the impact of disclosure on an agency’s future ability to obtain information, even though this interest has nothing to do with the “personal privacy” protected by Exemption 7(C). This aspect of the Second Circuit decision is inconsistent with this Court’s holding that Exemption 7(C), by its terms, protects only an “individual’s right of privacy.” *FCC v. AT&T, Inc.* 562 U.S. 397, 408 (2011), and conflicts directly with the D.C. Circuit’s application of Exemption 7(C) in *Washington Post Company v. HHS*, 690 F.2d 252 (D.C. Cir. 1982).

Certiorari should be granted on all three questions presented to restore “the basic policy that disclosure, not secrecy, is the dominant objective” of FOIA, *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976), and to preserve the principle that “[c]ourts are essentially passive instruments of government” that “normally decide only questions presented by the parties,” *Sineneng-Smith*, 140 S. Ct. at 1579.

OPINIONS AND ORDERS BELOW

The court of appeals’ opinion sought to be reviewed is published at 39 F.4th 81 and reproduced starting at Pet.App.32a. The district court’s order reversed by the

court of appeals is unpublished and reproduced starting at Pet.App.30a. The district court's memorandum opinion on which its order was based is published at 403 F.Supp.3d 240 and reproduced starting at Pet.App.1a.

JURISDICTION

The judgment sought to be reviewed was entered on July 8, 2022. Pet.App.32a. The Second Circuit denied Petitioner's timely petition for rehearing on September 22, 2022. Pet.App.55a.

This Court has statutory jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act provides in relevant part:

5 U.S.C. § 552(a)(4)(B): On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be

withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

5 U.S.C. § 552(b)(7)(C): This section does not apply to matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.

STATEMENT OF THE CASE

This case concerns two FOIA requests to the United States Secret Service (“Secret Service” or “the Agency”), a subcomponent of Respondent United States Department of Homeland Security. The requests seek records that disclose visitors who met with Donald Trump while he received Secret Service protection as a presidential candidate and President-elect.

A. The Public Interest in Donald Trump’s Pre-inauguration Meetings

The Secret Service protects “the President-elect” and “[m]ajor Presidential . . . candidates.” 18 U.S.C. § 3056(a). Mr. Trump and several of his associates began receiving Secret Service protection in November 2015, fourteen months before he entered office.

During this time, news reporting often addressed Mr. Trump's meetings with lobbyists for major corporations and special interest groups. For instance, as a candidate, Mr. Trump reportedly met privately in April 2016 with representatives of approximately twelve special interest groups, including the chief executive of a major airline trade organization.

After Mr. Trump won the presidential election, public interest in his meetings intensified, as this information would shed light on his administration's policies and priorities. During the transition between the election and his inauguration, President-elect Trump selected and announced future members of his cabinet and floated policy priorities while meeting with lobbyists, businessmen, and representatives of foreign governments.

B. Procedural History

1. Mr. Behar's two FOIA requests.

Petitioner Richard Behar is an award-winning investigative journalist and Contributing Editor at Forbes who reported extensively on the 2016 Trump campaign and subsequent administration. Amid great controversy over meetings and conduct of the Trump campaign, on September 22, 2017, Mr. Behar submitted a FOIA request to the Agency seeking certain Secret Service records related to visitors to Donald Trump and his affiliates during the time when they were under Secret Service protection prior to President Trump's inauguration. Pet.App.2a-3a. Though Mr. Trump's inauguration took place on

January 20, 2017, the request specified a January 21, 2017 end date. Pet.App.2a.

After the Agency failed to produce any records within FOIA's deadline, Mr. Behar filed a complaint in the U.S. District Court for the Southern District of New York, invoking its jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. Pet.App.3a. Mr. Behar and the Agency then agreed to a plan for identifying and providing responsive records. Pet.App.3a. Five email chains that were located through this process remain at issue. Pet.App.39a. These contain the names of individuals meeting with Mr. Trump and of individuals needing access to certain parts of Trump Tower. Pet.App.39a.

In reviewing its records, the Secret Service identified "schedules reflecting potential meetings with Mr. Trump while he was a candidate and president-elect." Pet.App.5a. It did not produce them, however, because it viewed the request as more narrowly seeking visitor logs. Pet.App.5a. In response, on May 14, 2018, Mr. Behar filed a second FOIA request to make clear his interest in obtaining schedules disclosing individuals meeting with Mr. Trump. This request also stated that it sought only pre-inauguration documents, but again specified an end-date of January 21, 2017.

The Agency denied this second request and Mr. Behar's subsequent administrative appeal. In August 2018, Mr. Behar filed a second complaint seeking the release of the schedules. Pet.App.6a. The

district court consolidated the cases, and the parties cross-moved for summary judgment.

2. *The Agency's judicial defense of its refusal to disclose.*

The Agency defended its withholdings on two grounds relevant here.

First, the Agency initially argued that some responsive records are not agency records, but only “to the extent they reflect the President’s schedule after his inauguration on January 20, 2017”—one day’s worth of post-inauguration records included in Petitioner’s requests. Memorandum of Law in Support of Defendant’s Motion for Summary Judgment at 18, *Behar v. DHS*, No. 1:17-cv-08513, Dkt. 29 (S.D.N.Y. Oct. 3, 2018). The Agency relied exclusively on lower-court cases construing FOIA not to require disclosure of presidential records in order to avoid separation-of-powers concerns. *See id.* at 16-18 (citing *Doyle v. DHS*, 331 F. Supp. 3d 27 (S.D.N.Y. 2018), *aff’d.*, 959 F.3d 72 (2d Cir. 2020)); *Judicial Watch, Inc. v. Secret Serv.*, 726 F.3d 208 (D.C. Cir. 2013)). Mr. Behar promptly clarified that he sought only records of pre-inauguration meetings. Pet.App.11a n.43. The Agency did not dispute that its pre-inauguration records are “agency records” under FOIA. Because the issue was not disputed, neither party sought to develop a factual record on the point.

Second, the Agency defended its withholding of pre-inauguration records under FOIA Exemption 7(C), the privacy exemption covering law enforcement

records.¹ A declaration by Secret Service officer Kim Campbell contended that disclosure would invade the privacy of Mr. Trump and his visitors. Seeking to demonstrate the existence of privacy concerns, Ms. Campbell asserted that “many,” but not all, of the schedules contained confidentiality markings. She further averred that the Secret Service had treated the documents as confidential but made no claim that any express agreement to do so had been made. Mr. Behar responded that the public’s strong interest in understanding the policies and priorities of the Trump administration outweighed the marginal privacy interest the Agency had articulated. Pet.App.13a-20a.

3. *The district court ultimately orders disclosure after in camera review.*

In August 2019, the district court issued an opinion granting the agency’s motion in part and denying Mr. Behar’s cross-motion without prejudice. Pet.App.28a-29a. It concluded that Mr. Trump and his visitors had cognizable privacy interests, but also found that Mr. Behar had articulated a cognizable public interest in disclosure of the emails and schedules. As the court explained, “the mere occurrence of a meeting or series of meetings,” depending on the identity of the visitors, could shed light on the Trump administration’s post-

¹ Respondent also withheld certain records under FOIA Exemption 7(E). The district court upheld these withholdings, a decision that Petitioner did not appeal. Pet.App.11a n.43.

inauguration policies and priorities. Pet.App.26a. The court found the Agency's declaration insufficiently detailed to perform the balancing of public and private interests required under Exemption 7(C) and gave the agency a second chance to demonstrate that the exemption applied. Pet.App.25a-28a.

The Secret Service then introduced declarations from Kevin Tyrrell and Leonza Newsome. These declarations echoed Ms. Campbell's explanation that "many" schedules were marked confidential and that the Secret Service treated all records as such, but likewise made no claim of any confidentiality agreement. Mr. Tyrrell averred that the agency was unable to provide the additional information sought by the court, such as whether specific meetings concerned Mr. Trump's candidacy or personal business. Mr. Newsome urged that nondisclosure was justified by the Secret Service's interest in voluntarily obtaining information from those it protects that can assist its protective functions. Pet.App.38a.

Following oral argument, the district court ordered the Agency to submit the records for inspection *in camera*. Pet.App.30a. Upon reviewing the records, the court ordered their immediate disclosure "largely for the reasons identified in its prior opinion." Pet.App.30a-31a.

4. *The Second Circuit reverses on an "agency record" theory never asserted by the Agency and, in the alternative, on Exemption 7(C).*

The Agency appealed the district court's holding that the records at issue are not exempt under

Exemption 7(C). This was the only issue litigated before Judge Kaplan and the only issue briefed on appeal.² Judge Park acknowledged as much at oral argument by asking Agency counsel why the Secret Service “didn’t make” any claim that the documents are not agency records. Argument Audio at 1:38-1:41.³

Members of the panel then questioned Agency counsel about the argument the Agency “didn’t make.” *Id.* Judge Menashi suggested that, under the Second Circuit’s recent decision in *Doyle v. DHS*, 959 F.3d 72 (2d Cir. 2020), documents provided by any entity not subject to FOIA do not become “agency records” if the entity providing them “evinces an intent to control the records and doesn’t allow the FOIA-able agency to dispose of them.” Argument Audio at 2:18-2:29. Agency counsel respectfully disagreed, responding: “I wouldn’t state the rule as broadly as the court has because I think [*Doyle*] was limited to the context of the President’s records and presidential records.” *Id.* at 2:29-2:46.

² In a footnote, the Second Circuit suggested that the Agency had preserved an argument that the records were subject to executive privilege. Pet.App.45a n.9. It did not. The district court found the Agency had waived any claim to executive privilege and the Agency expressly did not appeal that determination. Reply Brief for Defendant-Appellant at 14 n.3, *Behar v. DHS*, No. 20-3253, Dkt. 84 (2d Cir. May 7, 2021).

³ An audio recording of the November 30, 2021 oral argument is available on the Second Circuit’s website at <https://www.ca2.uscourts.gov/decisions/isysquery/a3eb2b50-c374-4fc6-8f2e-9c97aa2784b1/51-60/list/>.

The court of appeals reversed on two independent grounds.

First, it adopted the theory the Agency never advanced and affirmatively disavowed at argument. It declared that documents received from any entity not subject to FOIA do not become “agency records” subject to disclosure if “the ‘non-covered entity . . . has manifested a clear intent to control the documents, such that the agency is not free to use and dispose of the documents as it sees fit.’” Pet.App.41a (quoting *Doyle*, 959 F.3d at 77-78) (ellipses in original). In adopting this theory, the court did not directly cite *DOJ v. Tax Analysts*, 492 U.S. 136 (1989), this Court’s controlling decision on what constitutes “agency records” subject to FOIA. Instead, it relied on two circuit cases, *Doyle* and *Judicial Watch, Inc. v. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013).

Each of those cases held, on constitutional avoidance grounds, that *presidential* records are not agency records under FOIA so long as the White House manifests its intent to control them. This limitation was required, those courts concluded, because holding otherwise would raise “substantial separation-of-powers questions”: whether Congress could “authorize FOIA requesters to obtain indirectly from the Secret Service information that it had expressly barred requesters from obtaining directly from the President.” *Judicial Watch*, 726 F.3d at 231; accord *Doyle*, 959 F.3d at 78 (stressing that “application of the avoidance canon is limited to the very narrow circumstances” presented).

While relying on these two narrow precedents, the Second Circuit disclaimed the rationale for their holding. The court stated expressly that its decision “does not depend on constitutional avoidance” and applies to records provided to a government agency from any entity not directly subject to FOIA. Pet.App.45a & n.9.

In adopting its limited definition of “agency records,” the Second Circuit made no reference to an agency’s burden to show that requested records are not “agency records.” See *Tax Analysts*, 492 U.S. at 142 n.3. Nor did it note that the Secret Service never attempted to bear this burden and, to the contrary, accepted that the records at issue are agency records under FOIA. It nevertheless held that confidentiality designations on some of the responsive records manifested an intent by the Trump campaign and transition to control the records. Without explaining how intermittent confidentiality designations prevented the Secret Service from using or disposing of the documents, the court held that they are not agency records subject to FOIA based on the documents’ confidential status alone. Pet.App.45a.

Second, having decided an issue never raised or briefed by the parties, the court of appeals held in the alternative that the Agency met its burden under Exemption 7(C). Pet.App.47a. The Second Circuit concluded that the balancing of interests should have ended once the district court found that disclosure “would not advance the public’s understanding of the [Secret Service’s] performance of its statutory duties,” and faulted the district court for taking into account

the ability of the documents to promote public understanding of the policies and priorities of the Trump administration. Pet.App.53a; *see also* Pet.App.52a. The Second Circuit also found error in the district court’s failure to weigh whether disclosure would undermine the Secret Service’s interest in receiving information from those subject to its protection. Pet.App.53a.

Petitioner filed a timely petition for rehearing, which the court denied on September 22, 2022. Pet.App.55a.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit’s Definition of “Agency Records” Subject to FOIA Disclosure Contradicts Holdings of this Court, the Uniform Understanding of the Courts of Appeal, and FOIA’s Plain Text

A. The Second Circuit Disregarded this Court’s Precedent Defining the “Agency Records” Subject to FOIA

In *DOJ v. Tax Analysts*, this Court broadly construed the term “agency records” to effectuate FOIA’s goal of “giving the public access to all nonexempted information received by an agency as it carries out its mandate.” 492 U.S. 136, 147 (1989). The Court held that a document is an “agency record” under FOIA if it is (1) “create[d] or obtain[ed]” by an agency in carrying out its duties and (2) remains in the agency’s “control” when a FOIA request is made. *Id.* at 144-45. Documents are under an agency’s

“control,” the Court made clear, so long as they “have come into the agency’s possession in the legitimate conduct of its official duties.” *Id.* at 145.

In adopting this expansive definition, the Court rejected an argument that the DOJ did not “control” certain tax court decisions in its possession because they remained subject to modification by the tax courts. This Court underscored that the “control inquiry” focuses only on “an agency’s possession of the requested materials.” *Id.* at 147.

The Court also rejected the DOJ’s contention that “materials originating outside the agency” are not “agency records” unless they are “prepared substantially to be relied upon in agency decisionmaking.” *Id.* As the Court explained, the determination of “agency records” does *not* “turn on the intent of the creator of a document relied upon by an agency. Such a *mens rea* requirement is nowhere to be found in the Act.” *Id.*

In short, this Court squarely held that agency possession is both necessary and sufficient to bring a document within FOIA’s scope, so long as the document was obtained and used to carry out the agency’s official duties. This broad definition of “agency records” serves FOIA’s goal of ensuring public access “to *all* nonexempted information *received by* an agency as it carries out its mandate.” *Id.* (emphasis added).

Without even a single direct citation to *Tax Analysts*, the Second Circuit declined to apply this definition. The Second Circuit accepted that the

Secret Service had “obtained” the records in the conduct of its official duties and possessed them at the time of the FOIA request. Pet.App.54a. It also acknowledged that Secret Service officials used the records to “perform their protective functions.” Pet.App.45a. Under *Tax Analysts*, that should end the issue.

Nonetheless, the court declared the documents not to be “agency records” based only on the fact that some documents bore “confidential” markings and the Agency considered them all to have been conveyed with an unexplained “expectation” they “would not be disseminated beyond the Secret Service.” Pet.App.45a. According to the Second Circuit, this expectation of confidentiality *alone* established that “the Secret Service did not take control of the documents” and they are thus not “agency records.” Pet.App.45a.

This holding defies *Tax Analysts*, which rejected the very limitation on the scope of FOIA adopted by the Second Circuit. *Tax Analysts* specifically noted that documents in an agency’s possession are sometimes “subject to certain disclosure restrictions,” and instructed that this “*does not bear on whether the materials are in the agency’s control*, but rather on the subsequent question whether they are exempted from disclosure.” 492 U.S. at 147 n.8 (emphasis added). The “control inquiry,” the Court stressed, focuses only on “an agency’s possession of the requested materials.” *Id.* at 147. The Second Circuit holding repudiates *Tax Analysts*.

B. The Second Circuit’s “Agency Records” Holding Contradicts the Consistent Understanding of Other Circuit Courts

The Second Circuit’s holding is fundamentally at odds with the holdings of every federal court of appeals since *Tax Analysts* to consider the definition of “agency records” under FOIA. It is a complete outlier in two important respects.

1. No court of appeals has previously held that an agency lacks control of a record simply because it was provided to the agency with a “confidential” stamp. To the contrary, every previous circuit court has readily concluded that the creator’s confidentiality intent is irrelevant or, at most, a non-dispositive factor bearing on the question of control. *See Rojas v. Fed. Aviation Admin.*, 941 F.3d 392, 408-09 (9th Cir. 2019) (irrelevant); *Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996) (non-dispositive) *Missouri ex rel. Garstang v. Dep’t of Interior*, 297 F.3d 745, 751 (8th Cir. 2002) (non-dispositive). These decisions follow directly from *Tax Analysts*’s holding that disclosure restrictions are immaterial to a document’s “agency records” status.

The D.C. Circuit made this point vividly in a case that is irreconcilable with the Second Circuit’s. In *Judicial Watch, Inc. v. Secret Service*, an organization requested logs of White House visitors from the Secret Service. 726 F.3d 208, 214 (D.C. Cir. 2013). In denying the request, the Secret Service cited a memorandum of understanding (“MOU”) it executed with the White House providing that the visitor logs “are under the exclusive legal custody and control of the White House,” *id.* at 215, and argued that the logs were not

agency records. The D.C. Circuit concluded that it was “not . . . bound by the MOU’s legal assertions,” *id.*, and held that logs of visitors to parts of the White House complex subject to FOIA *are* agency records, *id.* at 232-33. Though the court considered the White House’s intent relevant, this intent was outweighed by the Secret Service’s use of the documents to “perform background checks and verify admissibility at the time of a visitor’s entrance”—exactly what the Secret Service did here. *See id.* at 219-20, 232; *see also* Pet.App.45a.⁴

2. Unlike other courts of appeals, the Second Circuit placed no burden on the Agency to demonstrate “that the materials sought are not ‘agency records.’” *Tax Analysts*, 492 U.S. at 142 n.3. The Secret Service never advanced this position and waived it in the district court. Other courts have consistently recognized that FOIA “places the burden on the agency to justify the withholding of any requested documents.” *Fed. Labor Relations Auth. v. Dep’t of Navy*, 966 F.2d 747, 758 (3d Cir. 1992) (quoting *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991); *see also, e.g., Rocky Mountain Wild, Inc. v.*

⁴ The D.C. Circuit separately applied the canon of constitutional avoidance to find that logs of visitors to the Office of the President in the Secret Service’s possession are not “agency records” due to the “separation-of-powers concerns” that would otherwise arise. *Judicial Watch*, 726 F.3d at 224. That aspect of *Judicial Watch* is irrelevant here, for, as the Second Circuit recognized, the Trump campaign and transition are not government entities. Pet.App.43a.

Forest Serv., 878 F.3d 1258, 1261 (10th Cir. 2018) (citing *Tax Analysts*, 492 U.S. at 142 n.3, for this proposition); *Judicial Watch*, 726 F.3d at 220-21 (same); *Garstang*, 297 F.3d at 749 (same); *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994) (same). The Second Circuit explicitly articulated the Agency’s burden to prove the applicability of an *exemption*, Pet.App.41a, but said nothing about the Agency’s burden to disprove the “agency records” status of responsive documents in its possession.

Nor could the Agency have met that burden if it had sought to. The record evidence on which the court relied—confidentiality markings on some of the records and an implicit understanding of a desire for confidentiality—was far weaker than the evidence that was found insufficient in *Judicial Watch*. There a MOU expressly provided that the records “are under the exclusive legal custody and control of the White House.” 726 F.3d at 215.

C. The Second Circuit’s “Agency Records” Holding Contradicts FOIA’s Plain Text and Renders Provisions Superfluous

The Second Circuit’s holding warrants review for yet another reason: Changing the “control” inquiry to require the absence of confidentiality restrictions contradicts FOIA’s text and makes two of its statutory exemptions superfluous. It also makes meaningless myriad opinions of this Court and the courts of appeal interpreting those exemptions and other provisions of FOIA.

1. FOIA Exemption 4 permits an agency to withhold in certain circumstances “commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). As this Court has explained, “confidential” information can be withheld under Exemption 4 if it “is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy.” *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019). The Second Circuit’s novel definition of “agency record” renders *Argus Leader*, and indeed all of Exemption 4, meaningless. Under the Second Circuit’s approach, no Exemption 4 analysis of the grocery store data at issue in *Argus Leader* was warranted because the data was not an “agency record” subject to FOIA.

2. The Second Circuit decision also renders superfluous FOIA Exemption 7(D), which allows an agency to withhold law enforcement information supplied by a source “on a confidential basis.” 5 U.S.C. § 552(b)(7)(D). Under the Second Circuit’s definition of “agency records,” this exemption is unnecessary because information “marked” or “treated” by an agency “as confidential” would not be subject to FOIA in the first place. Pet.App.45a. Worthless, too, are all past decisions construing Exemption 7(D), including this Court’s decision in *DOJ v. Landano*, 508 U.S. 165, 173-74 (1993).⁵

⁵ See also, e.g., *Roth v. DOJ*, 642 F.3d 1161, 1184-86 (D.C. Cir. 2011) (assessing burden of proof to establish

3. Also rendered meaningless under the Second Circuit definition of “agency records” are myriad rulings grappling with the application of other FOIA exemptions to information submitted with an expectation of confidentiality. *See, e.g., Ray*, 502 U.S. at 177 (applying Exemption 6 to notes of interviews “conducted pursuant to an assurance of confidentiality”); *Wash. Post Co. v. HHS*, 690 F.2d 252, 263-65 (D.C. Cir. 1982) (rejecting application of Exemption 6 despite agency’s “pledge of confidentiality”); *Peltier v. FBI*, 218 F. App’x 30, 32 (2d Cir. 2007) (applying Exemption 1 where disclosure “would breach express promises of confidentiality made to a foreign government”); *Krikorian v. Dep’t of State*, 984 F.2d 461, 464-65 (D.C. Cir. 1993) (same); *Nat’l Inst. of Mil. Just. v. Dep’t of Def.*, 512 F.3d 677,

confidentiality within Exemption 7(D)); *Halpern v. FBI*, 181 F.3d 279, 298 (2d Cir. 1999) (same); *Radowich v. U.S. Atty.*, 658 F.2d 957, 964 (4th Cir. 1981) (construing Exemption 7(D) to protect all information provided in confidence, even if information becomes known through other sources); *Kimberlin v. Dep’t of Treasury*, 774 F.2d 204, 209 (7th Cir. 1985) (same); *Lame v. DOJ*, 654 F.2d 917, 923 (3d Cir. 1981) (finding no public interest balancing test in Exemption 7(D)); *Jones v. FBI*, 41 F.3d 238, 249 (6th Cir. 1994) (holding that Exemption 7(D) protects the identity of a source who provided information with an understanding of confidentiality, even if she later becomes known); *Hulstein v. DEA*, 671 F.3d 690, 695 (8th Cir. 2012) (finding implied grant of confidentiality under Exemption 7(D) due to risk of retaliation against drug trafficking source); *Broward Bulldog, Inc. v. DOJ*, 939 F.3d 1164, 1189 (11th Cir. 2019) (refusing to extend public-domain doctrine to Exemption 7(D)).

678-79 (D.C. Cir. 2008) (applying Exemption 5 to material provided with “an understanding” its contents “would not be released publicly”). In each case, a record’s confidential status affected the analysis of whether it was exempt under FOIA, but this analysis is rendered entirely unnecessary under the Second Circuit’s stunning limitation on the scope of “agency records.”

In sum, *certiorari* should issue on the first question presented because the Second Circuit decision is so jarringly contrary to text and precedent, and so substantially restricts the scope of FOIA.

II. The Second Circuit’s Defiance of the Party Presentation Principle Independently Warrants Review

In deciding the “agency records” issue, the Second Circuit bulldozed through not only this Court’s substantive FOIA precedents, but its procedural ones too. It violated the “party presentation principle” requiring a court to “decide only questions presented by the parties.” *U.S. v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). The Second Circuit’s violation of the principle here was far more egregious than the Ninth Circuit decision this Court unanimously reversed in *Sineneng-Smith*. Allowing it to stand would undermine our adversarial system that “follow[s] the principle of party presentation.” *N.Y. Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130 n.6 (2022).

The party presentation principle is premised on the notion that “courts are essentially passive

instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. They wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties.” *Sineneng-Smith*, 140 S. Ct. at 1579 (cleaned up). A court should thus “rely on the parties to frame the issues for decision” and then act as a “neutral arbiter of matters the parties present.” *DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1975 (2020).

Courts rarely tolerate exceptions to the party presentation principle, and usually only “to protect a *pro se* litigant’s rights.” *Greenlaw v. U.S.*, 554 U.S. 237, 244 (2008). Even in these rare situations, courts may depart from the principle only “where the petitioner is accorded a fair opportunity to present his position.” *Wood v. Milyard*, 566 U.S. 463, 472 (2012). Apart from questions of subject matter jurisdiction, a court necessarily “abuse[s] its discretion” by deciding a case on grounds of which a party was “well aware” but “chose” not to raise. *Id.* at 474.

The Court recently applied this principle in *Sineneng-Smith* to unanimously reverse a decision by the Ninth Circuit. There, a criminal defendant had been convicted for violating a law that prohibited encouraging or inducing a non-citizen to enter the country while knowing that such entry was unlawful. 140 S. Ct. at 1577. In the district court, she challenged that conviction for insufficient evidence and argued that the statute was unconstitutional as applied to her. *Id.* at 1577, 1580. After the district court upheld the convictions, the Ninth Circuit received briefing

and held oral argument on the issues as the defendant had presented them. *Id.* at 1580.

After argument it appointed *amici* to brief a novel issue: whether the statute was overbroad under the First Amendment. *Id.* at 1580-81. It permitted the parties to submit briefs in response to the *amici* and held oral argument, allotting 30 minutes to each side (including time allotted to the defendant's *amici*). *Id.* at 1581. *See also* Order, *U.S. v. Sineneng-Smith*, No. 15-10614, Dkt. No. 92 (9th Cir. Dec. 15, 2017). In her supplemental brief, the defendant adopted her *amici*'s position on overbreadth, which ultimately formed the basis of the Ninth Circuit's holding. *Sineneng-Smith*, 140 S. Ct. at 1581. This Court reversed because "[n]o extraordinary circumstances justified the panel's takeover of the appeal." *Id.*

As the Ninth Circuit did in *Sineneng-Smith*, the Second Circuit decided this case on an issue never raised or briefed by the parties at any stage of the litigation but instead raised *sua sponte* by the court—whether the records at issue are “agency records.” And the Second Circuit’s “takeover of the appeal” was far more egregious than the Ninth Circuit’s in *Sineneng-Smith* in three respects:

1. In *Sineneng-Smith* the Ninth Circuit held full briefing and argument on the grounds it used to decide the case; the Second Circuit decided the agency records issue here without according either party “a fair opportunity to present his position.” *Wood*, 566 U.S. at 472. The Secret Service never disputed that the documents at issue were “agency records,” and

neither party had reason to develop a factual record relevant to that question or to explore it through the adversarial process. Absent input from the parties, the Second Circuit’s decision does not engage with this Court’s controlling decision in *Tax Analysts*, and overlooks the ways in which its new definition of “agency records” renders several FOIA exemptions superfluous and a great deal of FOIA case law meaningless.

2. In *Sineneng-Smith* the defendant had forfeited her overbreadth argument by not raising it in the district court, but did endorse the argument after the Ninth Circuit’s intervention. 140 S. Ct. at 1581. Here, the Secret Service affirmatively waived the agency records argument. It was well aware of the issue and asserted at the outset that *post*-inauguration records were not agency records, yet “chose, in no uncertain terms, to refrain from” extending that argument to the *pre*-inauguration records. *Wood*, 566 U.S. at 474. Indeed, when the issue was raised at oral argument, Agency counsel rejected the “agency records” theory the court ultimately adopted. Argument Audio at 2:29-2:46. The Second Circuit necessarily abused its discretion by reaching an issue waived by the Agency. *Wood*, 566 U.S. at 474.

3. In *Sineneng-Smith* the Ninth Circuit inserted the overbreadth issue because it found the defendant’s own arguments for reversal lacking in merit. *See U.S. v. Sineneng-Smith*, 982 F.3d 766 (9th Cir. 2020) (affirming conviction after remand), *cert. denied*, 142 S. Ct. 117 (2021). Here, the Second Circuit had no reason to inject its “agency records” issue into the

decision after concluding that the Secret Service should prevail on the Exemption 7(C) grounds it had advanced. Raising and deciding the “agency records” issue *sua sponte* was completely gratuitous.

Simply put, the Second Circuit decided this appeal based on facts never developed and a legal theory that had been waived and rejected by the party it favored. The court offered no justification for its extraordinary departure from the party presentation principle, and there is none. This Court should grant *certiorari* on the second question presented in its supervisory role to remind the federal courts of their limited role as “passive instruments of government.” *Sineneng-Smith*, 140 S. Ct. at 1579.

III. The Second Circuit’s Balance of Interests Under Exemption 7(C) Contradicts Multiple Decisions of this Court

FOIA Exemption 7(C) allows agencies to withhold law enforcement records whose disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Under this Court’s precedents, a FOIA disclosure is “unwarranted” only when a privacy interest in the records outweighs the public interest in disclosure. *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762, 779 (1989) (Exemption 7(C)); *see also Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495, 502 (1994) (same under Exemption 6). The Second Circuit’s decision should also be reviewed because the approach to both sides of this balance in its alternate holding contradict FOIA precedent and text. Its decision significantly narrows the interests

in disclosure that may be considered and expands the interests in withholding beyond anything having to do with personal privacy.

A. The Second Circuit’s Decision Contradicts this Court’s Precedent by Limiting the Interest in Disclosure to be Weighed under Exemption 7(C)

This Court repeatedly has held 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.*” *Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. at 497 (quoting *Reporters Comm.*, 489 U.S. at 773) (cleaned up) (emphasis added). Applying this standard, the district court weighed the extent to which disclosing the Secret Service records would shed light on the Trump administration’s policies and priorities. The district court expressly found that this interest would be advanced after reviewing the records *in camera*. Pet.App.30a-31a.

The Second Circuit reversed because, in its view, the *only* relevant public interest for a FOIA request directed to the Secret Service is in “shed[ding] light on the operations or decision-making of the Secret Service” itself. Pet.App.52a. The Second Circuit faulted the district court for construing the public interest to also include “contributing significantly to public understanding of the operations or activities of the government.” Pet.App.52a. This holding rejects

what this Court has twice instructed the FOIA public interest *does* include.⁶ See *Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. at 495; *Reporters Comm.*, 489 U.S. at 775.

The Second Circuit cited no precedent for this holding, and its narrow conception of the public interest is impossible to square with numerous decisions finding relevant the public interest in understanding government activities beyond those of the specific agency responding to a FOIA request. In *Lardner v. DOJ*, for example, the D.C. Circuit rejected an invocation of Exemption 7(C) by the Office of the Pardon Attorney (“OPA”) and required disclosure of the names of those denied pardons by President George W. Bush. 398 F. App'x 609, 610 (D.C. Cir. 2010) (affirming “for the reasons given in the district court’s opinion”). The court reached this conclusion even assuming that the requested information would “provide[] no insight into OPA’s role in the clemency process.” *Lardner v. DOJ*, 638 F. Supp. 2d 14, 30 (D.D.C. 2009). It required disclosure nonetheless due to the public interest in “laying open the executive’s

⁶ The Second Circuit sought to justify its restrictive approach by noting that neither the Trump campaign or transition were agencies subject to FOIA, Pet.App.53a, but the district court never held, and Mr. Behar never argued, that the records would advance the public interest in understanding the Trump campaign or transition. Rather, after *in camera* review, the district court held that the records would advance the public’s in understanding the Trump *administration*. Pet.App.26a; Pet.App.30a-31a.

exercise of his clemency power to public scrutiny.” *Id.* at 28.

As *Tax Analysts* makes clear, the public is entitled to receive through FOIA documents shedding light on branches of government not directly subject to FOIA—in that case, judicial opinions created by Article III courts that would shed light on the judiciary. This, the Court held, is necessary to effect “FOIA’s goal of giving the public access to all nonexempted information received by an agency as it carries out its mandate.” *DOJ v. Tax Analysts*, 492 U.S. 136, 147 (1989). The D.C. Circuit has similarly found a FOIA public interest in understanding “the integrity of the judicial system,” *Bast v. DOJ*, 665 F.2d 1251, 1255 (D.C. Cir. 1981), and the Ninth Circuit has found a FOIA interest in understanding how lobbyists engage in “political activity and contributions to either the President or key members of Congress.” *Electronic Frontier Found. v. Office of the Director for National Intelligence*, 639 F.3d 876, 888 (9th Cir. 2010).

The Second Circuit’s decision excluding from the public interest balance information generally informing the public about the actions of government contradicts precedent, narrows FOIA’s scope, and undermines the statute’s fundamental purpose.

B. The Second Circuit’s Decision Contradicts this Court’s Precedent by Expanding the Interest in Withholding to be Weighed under Exemption 7(C)

The Second Circuit found that the interests in withholding outweigh the interests in disclosure by relying on an interest in withholding having nothing to do with protecting personal privacy: encouraging those who receive Secret Service protection to share information useful for the Agency. Pet.App.53a. This expands Exemption 7(C) beyond what its plain terms permit.

Exemption 7(C) seeks to protect only an “individual’s right of privacy.” *FCC v. AT&T, Inc.*, 562 U.S. 397, 408 (quoting *Dep’t of State v. Ray*, 502 U.S. 164, 175 (1991)). Thus, this Court has unanimously rejected the application of Exemption 7(C) to protect the interests of a corporation, even though “‘person’ is defined for purposes of FOIA to include a corporation.” *Id.* at 409. Yet the Second Circuit has now held that Exemption 7(C) can be applied to protect the interests of an agency even though FOIA’s definition of “person” specifically *excludes* an “agency.” 5 U.S.C. § 551(2). There is simply no way to square with *FCC v. AT&T, Inc.* with the Second Circuit’s conclusion that encouraging information flow to the Agency furthers any individual’s “personal privacy.”

The D.C. Circuit held as much in a decision that directly conflicts with the Second Circuit’s here. *Washington Post Company v. HHS* found that the government’s ability to collect information “carries no

weight under” the privacy exemptions. 690 F.2d 252, 259 (D.C. Cir. 1982). Indeed, Congress specifically addressed information collection in a separate FOIA exemption that protects confidential sources who provide information to the government, Exemption 7(D). *See* 5 U.S.C. § 552(b)(7)(D). Interpreting Exemption 7(C) as a catchall protecting generally against public harm, the Second Circuit has effectively rewritten the exemption.

Certiorari should be granted on the third question presented because the Second Circuit’s application of Exemption 7(C) is contrary to precedent establishing the interests to be weighed on both sides of the balance.

IV. The Second Circuit’s Dramatic Limitations of FOIA Will Have Enormous Adverse Consequences Beyond This Case

This Court has long instructed that FOIA makes disclosure the rule, not the exception. *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Disclosure advances FOIA’s purpose to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). For this reason, this Court has repeatedly “insisted that the exemptions be ‘given a narrow compass,’” *Milner v. Dep’t of the Navy*, 562 U.S. 562, 571 (2011) (quoting *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989)), and stressed courts’ “obligation to construe FOIA exemptions narrowly in favor of

disclosure,” *DOJ v. Landano*, 508 U.S. 165, 181 (1993).

The Second Circuit’s decision goes in the opposite direction. Its new definition of “agency records” fundamentally limits the scope of FOIA. Under the Second Circuit’s holding, any private entity can shield its communications with a government agency from potential FOIA disclosure by labeling them “confidential,” and agencies can effectively opt out of FOIA’s disclosure mandate by promising confidential treatment when receiving a document.

The Second Circuit’s novel construction of Exemption 7(C) also undercuts FOIA’s mandate for open government. It narrows FOIA from broadly illuminating “the operations or activities of government,” to revealing only a sliver of the government. Pet.App.51a-53a. And it holds that interests in secrecy not accepted by Congress can nevertheless overcome FOIA’s disclosure mandate.

If left to stand, these holdings will corrode the public’s right to know “what their government is up to,” *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762, 772 (1989), and thwart the transparency this Court has called a “structural necessity in a real democracy,” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). The FOIA limitations adopted in the Second Circuit’s overreaching decision will restrict public access to government information, make mismanagement and corruption harder to detect, and produce a less informed electorate.

The Court should review this extraordinary contraction of the long-settled scope of FOIA because the transparency that FOIA seeks to protect is particularly important today. Public trust in the government is a third of what it was when FOIA took effect in 1967,⁷ and most Americans “believe[] that U.S. democracy is in crisis and is at risk of failing.”⁸ Transparency is necessary if we are effectively to combat these existential problems.

⁷ See Pew Research Center, *Public Trust in Government: 1958-2022* (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/>.

⁸ G.R. Sanchez, et al, *Misinformation is eroding the public’s confidence in democracy*, Brookings (July 26, 2022), <https://www.brookings.edu/blog/fixgov/2022/07/26/misinformation-is-eroding-the-publics-confidence-in-democracy/>.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant *certiorari*.

Respectfully submitted,

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⁹ This Petition does not purport to represent the institutional views of Yale Law School, if any.

APPENDIX

1a

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17-cv-8153 (LAK)

18-cv-7516 (LAK)

RICHARD BEHAR,

Plaintiff,

-against-

U.S. DEPARTMENT OF HOMELAND SECURITY,

Defendant.

MEMORANDUM OPINION

Appearances:

John Langford

David Schulz

Charles Crain

MEDIA FREEDOM & INFORMATION ACCESS CLINIC

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LEWIS A. KAPLAN, *District Judge*.

This case involves Freedom of Information Act (“FOIA”) requests of Richard Behar—an investigative reporter and contributing editor at *Forbes* magazine—to obtain records from the United States Secret Service (“USSS”) identifying visitors to Donald Trump during the periods in which Mr. Trump was a presidential candidate receiving USSS protection and while he was president-elect. For the reasons explained below, defendant’s motions for summary judgment are granted in part and denied in part and plaintiff’s cross-motion is denied.

Background

I. Factual History

In September 2017, plaintiff submitted a FOIA request to the Department of Homeland Security (“DHS”) seeking records and communications identifying individuals who were screened and/or noted by the USSS because they either (a) sought to visit Donald Trump or certain of his family members or campaign officials, and/or (b) sought access to any secured area where those individuals were present.² The request was “limited to records of individuals screened or noted by the USSS between November 1, 2015, and January 21, 2017,” which is understood to be the time during which Mr. Trump received USSS protection until the date of

² DI 1-1 at ECF 3-4. Unless stated otherwise, “DI” numbers reference documents filed in case 17-cv-8153.

The campaign officials and family members named in the request were: Eric Trump, Donald Trump, Jr., Ivanka Trump, Jared Kushner, Paul Manafort, Michael Flynn, Corey Lewandowski, Michael Cohen, Stephen Bannon and Kelleyanne Conway. *Id.* at ECF 3.

his inauguration.³ Plaintiff requested expedited processing of the request.⁴

In early October 2017, DHS advised Mr. Behar that his request was being transferred to the FOIA officer for the USSS.⁵ By late October, plaintiff had not yet received the requested documents and filed suit to challenge defendant's failure to disclose them.⁶

In February 2018, the Court entered a Joint Stipulation and Order pursuant to which defendant reviewed a narrowed email set collected from the USSS detail leaders, assistant detail leaders and operations supervisors assigned to protectee Donald Trump.⁷ Defendant identified nine emails responsive to the FOIA request, and two of those emails were produced with redactions.⁸ The redactions on those emails are not being challenged in this action. Of the remaining seven emails, five are from the campaign period and two are from the transition period.⁹ As described in a declaration submitted by the FOIA and privacy acts officer for the USSS,¹⁰ these documents include:

³ *Id.* at ECF 4.

⁴ *Id.*

⁵ DI 1-4 at ECF 2.

The USSS is a component of defendant DHS. DI 7 at 2; DI 29 at ECF 7.

⁶ DI I.

⁷ DI 23.

⁸ DI 28 at 5.

⁹ The transition period refers to the time after Mr. Trump was elected President, but before his inauguration.

¹⁰ DI 28.

From the campaign period:

- an April 2016 email chain referring to a future meeting between Mr. Trump and a specific individual assisting with preparation for a speech;
- a July 2016 email referring to a meeting between Mr. Trump and a specific individual and staff at Trump Tower;
- an August 2016 email containing references to three individuals who might accompany or meet with Mr. Trump during a then upcoming trip: Scott Walker, Rudolph Giuliani and Sheriff David Clarke.¹¹ *The email contains specific information concerning security planning for the trip, including an intelligence and threat assessment and details regarding staffing of security personnel, including local law enforcement assistance. The email attached site diagrams and photographs;*
- a September 2016 email chain referring to a then future meeting between Mr. Trump and a specific individual; and
- a July 2016 email referring to a meeting that day with a specific individual. *The email contains also specific information concerning USSS staffing and screening responsibilities.*

¹¹ The USSS determined that these individuals appeared in public with Mr. Trump during the trip in question and therefore provided plaintiff with a redacted version of the email releasing their names.

From the transition period:

- a November 2016 email providing a list of individuals who would need access to certain areas within Trump Tower *and describing related security arrangements for access to secure areas of Trump Tower*; and
- a January 2017 email referring to a meeting that day with Martin Luther King III¹² and other unidentified individuals. *The email contains also information regarding USSS staffing and responsibilities of specific USSS personnel with regard to screening and other protective activities.*¹³

In May 2018, defendant's counsel notified plaintiff of schedules reflecting potential meetings with Mr. Trump while he was a candidate and president-elect and that defendant did not consider them to be responsive to the FOIA request because they did not "reflect[] any screening or notation of individuals by the USSS."¹⁴ These documents reflect, to some extent, the evolution of Mr. Trump's schedules over time.¹⁵ Shortly thereafter, plaintiff filed a second FOIA request seeking production of the schedules and any additional documents that the USSS located in connection with the search and review conducted pursuant to the Joint Stipulation and Order that

¹² The USSS determined that this individual appeared in public with Mr. Trump at Trump Tower on that date and therefore provided plaintiff with a redacted version of the email releasing his name.

¹³ DI 28 at 6-7.

¹⁴ 18-cv-7516 DI 7-2 at ECF 10.

¹⁵ DI 28 at 8.

“reference any individuals attending or expecting to attend meetings with Mr. Trump and/or the Trump family members and/or campaign officials described in [the first FOIA request].”¹⁶

The USSS did not identify any additional documents responsive to plaintiffs second request apart from the schedules.¹⁷ In June 2018, defendant informed plaintiff that it was withholding the schedules in full.¹⁸ Plaintiff submitted an administrative appeal,¹⁹ and the USSS upheld its decision to withhold the schedules.²⁰ In August 2018, plaintiff filed the second of these actions to compel disclosure of the schedules.²¹ In October 2018, defendant filed motions for summary judgment dismissing both actions, and plaintiff cross-moved for summary judgment.²²

II. FOIA Exemptions Claimed

Defendant has withheld from production or redacted certain information from the responsive documents described above pursuant to three FOIA exemptions. Exemption (6) applies to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”²³ Exemption (7)(C) applies to “records or information compiled for law enforcement purposes” the

¹⁶ 18-cv-7516 DI 7-2 at ECF 4.

¹⁷ DI 28 at 8.

¹⁸ 18-cv-7516 DI 7-3.

¹⁹ 18-cv-7516 DI 7-4.

²⁰ 18-cv-7516 DI 7-5.

²¹ 18-cv-7516 DI 1.

²² DI 30.

²³ 5 U.S.C. § 552 (b)(6).

disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”²⁴ Exemption 7(E) applies to “records or information compiled for law enforcement purposes” the disclosure of which “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”²⁵

With regard to the responsive emails described above, the USSS invoked exemptions (6) and (7)(C) to “withhold the names of the visitors and information concerning the nature and/or circumstances of the visits, and the names, certain email addresses, and phone numbers of law enforcement personnel and non-visitor third parties whose names and contact information appear on these documents.”²⁶ The USSS withheld all of the schedules pursuant to exemptions (6) and (7)(C). It determined that the privacy rights of the law enforcement personnel, Mr. Trump, and the third parties identified in the documents outweighed any public interest in disclosure.²⁷

The USSS withheld the italicized portions of certain emails described above pursuant to exemption (7)(E), on the grounds that they “contain specific information concerning law enforcement techniques and procedures, including: (1) staffing of protective details, including numbers of security personnel assigned to particular details; (2) responsibilities of individual USSS agents;

²⁴ 5 U.S.C. § 552 (b)(7)(C).

²⁵ 5 U.S.C. § 552 (b)(7)(E).

²⁶ DI 28 at ¶ 30.

²⁷ *Id.* at ¶ 31.

(3) specific security arrangements for an upcoming trip by candidate Trump; and (4) security arrangements for access by certain individuals to secure areas of Trump Tower.”²⁸

Discussion

I. FOIA Summary Judgment Standard

FOIA confers upon federal courts “jurisdiction to enjoin [a federal] agency from withholding agency records and to order the production of any agency records improperly withheld[.]”²⁹ Disclosure of “agency records” is mandated unless they fall within one of FOIA’s enumerated exemptions.³⁰

“Summary judgment is the usual mechanism for resolving disputes under FOIA.”³¹ “In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA.”³² Furthermore,

“[s]ummary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls

²⁸ *Id.* at 1137.

²⁹ U.S.C. § 552(a)(4)(B).

³⁰ *See Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999).

³¹ *Brennan Ctr. for Justice at New York Univ. Sch. of Law v. Dep’t of Homeland Sec.*, 331 F.Supp.3d 74, 83 (S.D.N.Y. 2018).

³² *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).

within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith. Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.”³³

However, “[s]ummary judgment in favor of [a] FOIA plaintiff is appropriate when an agency seeks to protect material which, even on the agency's version of the facts, falls outside the proffered exemption.”³⁴

II. Applicability of Exemption 7

As explained above, defendant withheld all of the schedules and certain information from the responsive emails pursuant to exemptions 6 and 7(C). Plaintiff does not contest that these records constitute “similar files” that meet the threshold requirement of exemption 6. Plaintiff, however, argues that the records cannot be withheld under exemption 7(C) because defendant has failed adequately to demonstrate that they were “compiled for law enforcement purposes.”³⁵

“To show that particular documents qualify as ‘records or information compiled for law enforcement

³³ *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

³⁴ *Nat. Res. Del Council, Inc. v. US. Dep't of Interior*, 36 F.Supp.3d 384, 398 (S.D.N.Y. 2014) (quoting *NY. Times Co. v. U.S. Dep't of Def.*, 499 F.Supp.2d 501, 509 (S.D.N.Y. 2007)).

³⁵ This distinction is potentially significant because the differing levels of protection afforded by exemption 6 and exemption 7(C) “result from an explicit compromise between the executive and legislative branches making Exemption 7(C) broader and more easily satisfied so that disclosure under it is more difficult to obtain.” *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 509 (2d Cir. 1992).

purposes,’ an agency must establish a rational nexus between the agency’s activity in compiling the documents and ‘its law enforcement duties.’”³⁶

The USSS submitted a declaration stating:

“The Secret Service is a criminal law enforcement and security agency created under Title 18, United States Code, Section 3056. All of the records identified as responsive to Plaintiff’s FOIA requests were compiled in connection with the Secret Service’s investigation and protective mission. As such, these Secret Service records meet the threshold requirement of exemption (b)(7) of having been compiled for law enforcement purposes.”³⁷

Plaintiff argues that the declaration is insufficient to trigger Exemption 7 because “[c]onspicuously absent from the government’s papers is any demonstration that the Secret Service used the Emails and Schedules to conduct background checks, plan security arrangements, or otherwise facilitate any specific law enforcement activity.”³⁸ Plaintiff acknowledges that numerous courts have held that other types of records compiled in the course of the USSS’s protective and investigative duties are protected by Exemption 7, but argues that “the government submitted non-conclusory evidence demonstrating the existence of a rational nexus between the withheld records at issue and the specific law enforcement activities carried out by the USSS”

³⁶ *Brennan Ctr. for Justice*, 331 F. Supp. 3d at 97 (quoting *Keys v. U.S. Dep’t of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987)).

³⁷ DI 28 at 1129.

³⁸ DI 43 at 2.

in each of those cases.³⁹ Defendant argues that its declaration here is sufficient to satisfy the threshold requirement of exemption 7 because the explanation it provides is “entirely logical and plausible, as the Withheld Emails and Schedules were either received or created (and therefore ‘compiled’) by the [USSS] in the course of protecting Mr. Trump, and the [USSS]’s actions in safeguarding protectees are indisputably undertaken for a law enforcement purpose.”⁴⁰

“The ordinary understanding of law enforcement includes . . . proactive steps designed to prevent criminal activity and *to maintain security*.”⁴¹ And “[t]here can be no doubt . . . that the Secret Service acts with a law enforcement purpose when it protects federal officials [and presidential candidates] from attack, even though no investigation may be ongoing.”⁴² There is no evidence in the record suggesting that the USSS compiled the records for reasons other than those offered in the USSS declaration. Nor is there any evidence suggestive of agency bad faith. The threshold requirement of exemption 7 therefore is satisfied. We accordingly evaluate the documents withheld on privacy grounds under exemption 7(C), and not under exemption 6.⁴³

³⁹ *Id.* at 2-3.

⁴⁰ DI 40 at 5.

⁴¹ *Milner v. Dept of the Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring) (emphasis added).

⁴² *Id.* at 583.

⁴³ Plaintiff does not challenge the assertion that the material withheld pursuant to exemption 7(E) “would disclose techniques and procedures for law enforcement investigations or prosecutions.” He contests only whether the information was compiled for law enforcement purposes. Having concluded that the requested

III. Exemption 7(C) Balancing Test

“Exemption 7(C) requires a court to balance the public interest in disclosure against the privacy interest Congress intended the Exemption to protect. The first question to ask in determining whether Exemption 7(C) applies is whether there is any privacy interest in the information sought.”⁴⁴

A. Privacy Interests

“FOIA requires only a measurable interest in privacy to trigger the application of the disclosure balancing tests. Thus, once a more than *de minimis* privacy interest is implicated the competing interests at stake must be balanced in order to decide whether disclosure is permitted under FOIA.”⁴⁵

Plaintiff first argues that any privacy interest that Mr. Trump or third parties have in the withheld information is *de minimis* and that disclosure therefore is warranted without consideration of the public interests in disclosure.

“The privacy interest for purposes of Exemption 7(C) is broad and encompasses the individual’s control of

information was compiled for law enforcement purposes, it follows that plaintiff effectively has waived any challenge to plaintiffs 7(E) exemption claims.

Defendant argues that any information reflecting the meetings of Mr. Trump post-dating his inauguration are not “agency records” subject to FOIA. Plaintiff has confirmed that he “does not seek information about visits to Mr. Trump after his inauguration.” DI 43 at 1, fn. 1.

⁴⁴ *Associated Press v. U.S. Dept. of Defense*, 554 F.3d 274, 284 (2d Cir. 2009) (internal quotations and citations omitted).

⁴⁵ *Id.* at 285.

information concerning his or her person.”⁴⁶ Furthermore, “[i]t is well established that identifying information such as names, addresses, and other personal information falls within the ambit of privacy concerns under FOIA.”⁴⁷ Moreover, third parties to proceedings have a cognizable privacy interest protected by the FOIA privacy exemptions.⁴⁸ A measurable privacy interest exists if “the information that would be revealed by disclosure is the type of information that a person would ordinarily not wish to make known about himself or herself.”⁴⁹

The requested documents contain personal and confidential schedules of Mr. Trump and the names of individuals scheduled to meet with him in confidence. In one instance, the documents reveal the purpose of the meeting.

This satisfies the “more than *de minimis*” threshold of exemption 7(C). Private schedules and meetings involve information concerning one’s person. The fact that these meetings were not disclosed publicly indicates that this information was of a kind that the visitors to Mr. Trump, and Mr. Trump himself, did not wish to make generally known. We therefore are obliged to balance the privacy interests of Mr. Trump and other third parties against the public interest in disclosure.

i. Mr. Trump’s Privacy Interests

Defendant argues that Mr. Trump, as a candidate and then president-elect, had a substantial privacy

⁴⁶ *Id.* at 287.

⁴⁷ *Id.* at 285.

⁴⁸ *Id.* at 292.

⁴⁹ *Id.* at 287.

interest in his personal meetings and calendars reflecting meetings with advisors and others.⁵⁰ Many of the schedules were marked confidential and bear other indicia of confidentiality, including reminders “not [to] distribute this calendar as it is highly confidential.”⁵¹ Furthermore, the withheld schedules “show Mr. Trump’s entire calendar for days or weeks, as well as the evolution of his calendar over time.”⁵² The emails reveal “with whom [Mr. Trump] conferred at a particular time and place, and in one case the subject matter of the meeting [].”⁵³ The USSS “understood that *all* of the Withheld Schedules and visitor information in the Withheld Emails was provided to the USSS with the expectation that the information would be maintained as confidential and used for purposes of carrying out the [USSS’ s] investigative and protective mission.”⁵⁴ Furthermore, defendant argues that “[c]andidates and presidents-elect ought to be able to meet with advisors and others on a confidential basis, without fear that their private interactions will be opened to public scrutiny” and that “even once in office,” presidents retain a significant privacy interest in holding confidential meetings.⁵⁵

Plaintiff argues that Mr. Trump, as a prominent businessman and candidate for federal office, had a significantly reduced privacy interest over the with-

⁵⁰ DI 40 at 9; DI 29 at 9.

⁵¹ DI 28 at 34.

⁵² DI 40 at 11, fn. 4.

⁵³ DI 29 at 10.

⁵⁴ DI 40 at 11 (emphasis in original).

⁵⁵ DI 29 at 10; DI 40 at 9.

held information.⁵⁶ He claims that any privacy interest relating to Mr. Trump’s “political strategy” and “struggle for advantage in the 2016 election lapsed with the election itself.”⁵⁷ He states also that the expectation of privacy that Mr. Trump had over these documents, as evidenced through the indicia of confidentiality contained within certain documents, does not give rise to a cognizable privacy interest standing alone. Finally, plaintiff argues that “[s]ince Mr. Trump was not president during any time period targeted by the records, privacy interests surrounding presidential conduct are not at issue.”⁵⁸

There is merit to each of the opposing arguments. While the privacy interest of Mr. Trump is significantly reduced by his circumstances, that is a matter of its weight rather than removing it from consideration entirely. We deal below with what weight to assign to Mr. Trump’s privacy interest in the balancing analysis.

ii. The Privacy Interests of Third Parties

According to defendant, the schedules and four of the withheld emails “identify specific individuals who met, or were scheduled to meet, with Mr. Trump at a particular point in time, and in some cases provide information about the nature and/or circumstances of those meetings . . . [a]nother email identifies several individuals who needed regular access to certain secure areas within Trump Tower.”⁵⁹ The emails contain also “the names and contact information of non-visitor

⁵⁶ DI 43 at 4.

⁵⁷ *Id.*

⁵⁸ DI 31 at 32-33.

⁵⁹ DI 29 at 11.

third parties, including campaign or transition staff members who transmitted them to the [USSS].”⁶⁰

Defendant argues that the individuals referenced within these documents have privacy interests in avoiding public dissemination of their names and private information because the “identity of individuals who assist with preparation for speeches and other campaign-related events, as well as the nature of the assistance provided, is the kind of campaign-related information that both presidential candidates and those who assist them would ordinarily keep confidential and not wish to be made public.”⁶¹

Plaintiff cites *Department of State v. Ray*⁶² for the proposition that “whether 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.”⁶³ He claims that while the government “may well be correct that some [third parties] would prefer not to be associated with Mr. Trump . . . it neither presents any evidence to that effect nor explains why those who are [sic] already been publicly associated with Mr. Trump have any remaining privacy interest in that fact.”⁶⁴

B. Public Interests in Disclosure

“[T]he only relevant public interest in disclosure to be weighed [] is the extent to which disclosure would serve the core purpose of the FOIA, which is contrib-

⁶⁰ *Id.*

⁶¹ DI 40 at 14.

⁶² 502 U.S. 164 (1991).

⁶³ *Id.* at 176, fn. 12 (internal quotation omitted).

⁶⁴ DI 43 at 7.

uting significantly to public understanding *of the operations or activities of the government.*⁶⁵ In other words, the relevant inquiry 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.”⁶⁶

Plaintiff first argues that disclosure of the requested information would shed light on the USSS’s performance of its statutory duties in several ways. He relies on a statement from the USSS’s website that “protection of a candidate/nominee is designed to maintain the integrity of the democratic process and continuity of government.” This statement, he contends, shows that disclosure of the information sought would be helpful in evaluating whether the USSS was accomplishing those statutory goals because it would shed light on: (i) “the extent to which the [USSS] was made aware of improper contacts, if any, between Mr. Trump’s campaign and agents of foreign governments,”⁶⁷ (ii) the purported decision by the USSS not to conduct background checks on individuals meeting with presidential candidates,⁶⁸ (iii) the USSS’s ability to protect the continuity of government by vetting visitors of the president-elect throughout the transi-

⁶⁵ *U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 495 (1994) (emphasis in original) (internal quotations omitted).

⁶⁶ *Id.* at 497.

⁶⁷ D131 at 37.

⁶⁸ *Id.* at 38.

tion period,⁶⁹ and (iv) “how the [USSS] uses taxpayer funds to carry out its mandates.”⁷⁰

Plaintiff claims also that disclosure would aid in letting citizens know what their government is up to “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.”⁷¹ Similarly, plaintiff argues that “knowledge of meetings with Mr. Trump during the campaign and transition would help to 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.”⁷²

Defendant counters that disclosure of the requested information would not shed any light on the USSS’s performance of its statutory duty to protect presidential candidates and presidents elect. It argues, contrary to plaintiff’s assertion, that it is not the job of the USSS to assess the propriety of candidates’ meetings with agents of foreign governments or to prevent protectees and their associates from affiliating with people and engaging in activities that might undermine the transition of power. Rather, its sole statutory duty is to provide protection. The website statement on which plaintiff relies “simply describes the purpose of [USSS] protection, but does not create an independent mandate “to maintain the integrity of the electoral

⁶⁹ *Id.*

⁷⁰ *Id.* at 39.

⁷¹ *Id.* at 40.

⁷² *Id.* at 41.

process and the continuity of government,” as plaintiff suggests.⁷³

Defendant states also that the requested information would shed no light on the background check policy or the vetting procedures utilized by the USSS. It would disclose only who met or was scheduled to meet with Mr. Trump. Nor would the information requested illuminate how the USSS spends taxpayer funds. In any case, as defendant argues, “[i]f plaintiff wanted to obtain information from the [USSS] about the costs of providing protection for Mr. Trump or his family, he would have asked for it.”⁷⁴ The request, however, seeks only visitor records and schedules, “which shed no light on the costs incurred . . . or how the agency expends taxpayer funds.”⁷⁵

Defendant contends also that the requested information would shed no light into Mr. Trump’s conduct as president. At most, argues defendant, the information revealed about scheduled meetings “would provide fuel for speculation as to Mr. Trump’s advisors and priorities, but such ‘indirect and speculative’ public interests do not ‘serve[] the purposes of FOIA.’”⁷⁶ Similarly, defendant argues that there is no reasonable basis to draw an inference that the occurrence of a meeting with a particular individual would reveal any information about any conflicts of interest Mr. Trump may have as president.

⁷³ DI 40 at 18.

⁷⁴ *Id.* at 20.

⁷⁵ *Id.*

⁷⁶ *Id.* at 21 (quoting *Long v. Office of Personnel Management*, 692 F.3d 185, 194 (2d Cir. 2012)).

Defendant argues as well that there is a substantial public interest in maintaining the confidentiality of schedules and visitor information that candidates, presidents-elect, and other protectees who are private citizens provide to the USSS in confidence. The USSS declaration states that:

“In order to fulfill its protective mission, the Secret Service needs to obtain information from its protectees, including information about their schedules and future meetings. This information allows the Secret Service to staff its protective details appropriately, advance and secure locations as needed, and provide for its agents to be physically located where needed at any given time. Protectees will be reluctant to provide this information to the Secret Service if they believe that by doing so the information will become subject to public disclosure under FOIA. Thus, compelled disclosure under FOIA of the names of individuals who meet with Presidential candidates and Presidents-elect would harm the public interest, by jeopardizing the flow of information from protectees to the Secret Service and thereby making it more difficult for the Secret Service to protect candidates and Presidents-elect.”⁷⁷

C. Balancing the Public and Privacy Interests

Having laid out the relevant interests, “Exemption 7(C) requires a court to balance the public interest in

⁷⁷ DI 28 at ¶ 35.

disclosure against the privacy interest Congress intended the Exemption to protect.”⁷⁸

As the Supreme Court has stated:

“Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. 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. Second, the citizen must show the information is likely to advance that interest. Otherwise the invasion of privacy is unwarranted.”⁷⁹

Furthermore, the Second Circuit has stated that “disclosure of information affecting privacy interests is permissible only if the information reveals something *directly* about the character of a government agency or official.”⁸⁰

“The privacy interest protected by Exemption 7(C) is an interest in avoiding disclosure of personal matters and keeping personal facts away from the public eye.”⁸¹ As previously stated, Mr. Trump’s visitors, and to some degree Mr. Trump himself, have cognizable privacy interests in the emails and schedules that reveal the names of who met with Mr. Trump during

⁷⁸ *Associated Press*, 554 F.3d at 284 (internal quotation omitted).

⁷⁹ *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

⁸⁰ *Associated Press*, 554 F.3d at 289 (emphasis in original) (internal citation and quotation omitted).

⁸¹ *Id.*

the time that he was a presidential candidate and president elect.

It would be wrong to overstate the privacy interests of the third party visitors in question, as there has been no showing that disclosure of their names would lead to embarrassment, retaliation or other unwelcome consequences.⁸² The only information in the USSS declaration relating to potential negative consequences to third parties resulting from disclosure concerns the law enforcement personnel identified in the documents.⁸³ Thus, while we are persuaded that participation in these meetings with candidates and presidents-elect is the type of information that a person often would not wish to make known about himself or herself, we should not give that generalization too much weight in the balance.⁸⁴

⁸² See *Ray*, 502 U.S. at 176-77.

⁸³ DI 28 at ¶ 33 (“the public interest is best served by the non-disclosure of such information, since disclosure could result in the personal harassment of law enforcement personnel and consequent diminishment of the ability of law enforcement personnel to perform their duties.”)

⁸⁴ In arguing that third parties have a negligible privacy interest in information revealing meetings with presidential candidates, plaintiff draws an analogy to federal laws mandating the disclosure of political contributions. He claims that the “Supreme Court has repeatedly upheld the constitutionality of these sorts of disclosure provisions” and that “[o]nly 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.” *Id.* (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 367 (2010)). Defendant rightly points out that the language from *Citizen’s United* relied upon by plaintiff involved the standard for bringing an as-applied challenge to disclosure laws and argues that the Supreme Court’s

With regard to Mr. Trump’s privacy interest, for the reasons stated above and as articulated in the USSS affidavit, we are persuaded also that candidates and presidents-elect have some cognizable privacy interest in “maintaining the confidentiality of their personal schedules and the identity of individuals with whom they meet.”⁸⁵ But that does not decide this case because the weight to be given that interest is limited substantially by the fact that candidates for federal office are not merely private citizens. They are “public figures with less privacy interest than others in information relating to their candidacies.”⁸⁶ Mindful that Mr. Trump’s privacy interest is tempered by the

campaign contribution jurisprudence if relevant at all—only “underscore[s] the importance of the [third-party] privacy interests at stake” in this case. DI 40 at 16.

Plaintiff’s analogy to federal laws mandating the disclosure of campaign contributions is unavailing. First, the information revealed in knowing who contributed to a political campaign is fundamentally different than knowing who met in person with a candidate or president-elect at a particular point in time. Plaintiff suggests that this information would “at most, suggest an individual’s political affiliation or donor status,” but it would show far more than that. It would reveal that a person had a personal relationship or connection with Mr. Trump sufficient to gain an in-person meeting. Second, the Supreme Court’s jurisprudence surrounding campaign contribution laws does not diminish the privacy interests of third parties for purposes of this FOIA analysis. As the Supreme Court has stated, disclosure can “seriously infringe on privacy of association and belief guaranteed by the First Amendment” notwithstanding the ultimate legality of disclosure laws. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). This line of authority only fortifies the existence of a measurable privacy interest of the third parties in this case.

⁸⁵ DI 28 at ¶ 34.

⁸⁶ *Common Cause v. Nat’l Archives and Records Serv.*, 628 F.2d 179, 184 (D.C. Cir. 1980).

fact that he was an aspiring and then successful candidate for federal office during the relevant period and that there has been no showing of potential unwelcome consequences on the part of the third party visitors resulting from disclosure, we consider the public interest in the information requested.

To begin, we agree with defendant that disclosure of the emails and schedules would not advance the public's understanding of the USSS's performance of its statutory duties. The USSS is statutorily vested with a mandate to provide protection to major presidential candidates and presidents-elect, and understanding how the USSS performs that duty would be a cognizable public interest for FOIA purposes. But contrary to plaintiff's assertion, disclosure would not advance public understanding of how the USSS spends taxpayer funds, vets visitors, conducts background checks or any other USSS function. Rather, the information would reveal only who met with Mr. Trump at a given time. Had plaintiff been interested in information concerning how the USSS performs its protective mandate, he would have tailored his FOIA request accordingly. At bottom, however, all that would be revealed pursuant to these requests is who met or was scheduled to meet with Mr. Trump. Such information would shed no light on the actions or operations of the USSS itself.

Plaintiff's reliance on the comment from the USSS's website that "protection of a candidate/nominee is designed to maintain the integrity of the democratic process and continuity of government" is misplaced. Plaintiff asserts that this statement is an official agency interpretation of its statutory role "entitled to

[*Chevron*] deference” for purposes of a FOIA analysis.⁸⁷ The statement itself appears in the “frequently asked questions” section of the USSS’s public website as an answer to the question “[w]hat is the history of candidate/nominee protection?”⁸⁸ Without belaboring the obvious, we simply note that this statement merely describes the genesis of the USSS’s protective mandate. Accordingly, we do not consider the website statement to confer a free-floating grant of statutory authority requiring a public interest analysis of whether every action taken or not taken by the USSS conforms with the amorphous goal of maintaining the continuity of government.

There remains plaintiff’s contention that the documents would shed light on whom Mr. Trump relied upon in selecting his initial cabinet and perhaps other presidential appointees and determining the priorities of his administration, and that the public interest in disclosure outweighs the relevant privacy interests. That may be so. But the Court is unable to make that determination on the basis of the current USSS declaration. As previously stated, during the period in question Mr. Trump was not a member of the government. But it certainly was not merely a private citizen. The documents likely reflect meetings that occurred in the days and weeks before Mr. Trump assumed the highest office in the land. We lack information sufficient to determine whether disclosure of the identities of those with whom he met in that time period could shed light on the operations of the government once

⁸⁷ DI 43 at 9.

⁸⁸ *Id.* at fn. 4; <https://www.seeretservice.gov/about/faqs/> (Last visited July 26, 2019).

Mr. Trump became president and other matters of legitimate public interest.

The emails and schedules do not reveal the reasons for the meetings.⁸⁹ However, in certain circumstances, the mere occurrence of a meeting or series of meetings with particular individuals could reveal information advancing public knowledge of whom Mr. Trump relied upon in making cabinet and other presidential appointments in or determining his presidential priorities. It may be that these particular documents do not reveal information shedding light on these activities, but defendant paints with too broad a brush in asserting that any meeting with any individual during the time in question categorically would not shed light on Mr. Trump's post-inauguration priorities and conduct. For example, if Mr. Trump's schedules indicated that he had multiple meetings with representatives of particular interest groups shortly before publicly announcing appointments of members or proponents of one or more of those groups or their policy preferences, some reasonably might draw conclusions, rightly or wrongly, about Mr. Trump's post-inaugural priorities from the occurrence of those meetings.

The USSS declaration is similarly lacking with respect to information needed for the Court to consider properly the privacy interests of the individuals meeting with Mr. Trump, and Mr. Trump himself. For example, the declaration provides no information from which the Court can assess whether the meetings

⁸⁹ The single email revealing the purpose of the meeting indicates that it was for the preparation of a speech while Mr. Trump was a candidate. Knowing the identity of who assisted with the preparation of a campaign speech does not reveal information about the operations of government.

related to Mr. Trump’s candidacy or instead regarded personal matters. Furthermore, there is no mention of whether disclosure of the documents has the potential to result in unwelcome consequences on the part of the visitors. Absent this information, the declaration lacks “reasonable specificity of detail as to demonstrate that the withheld information logically falls within [exemption 7(C)].”⁹⁰

IV. Revised Agency Submissions

Plaintiff asserts that “*in camera* review would be warranted to assess the validity of the government’s asserted privacy interests” if we do not grant summary judgment in his favor.⁹¹ “If the agency fails to provide a sufficiently detailed explanation to enable the district court to make a *de novo* determination of the agency’s claims of exemption, the district court then has several options, including inspecting the documents *in camera*, requesting further affidavits, or allowing the plaintiff discovery.”⁹² But “[a] court should only consider information *ex parte* and *in camera* that the agency is unable to make public if questions remain after the relevant issues have been identified by the agency’s public affidavits and have been tested

⁹⁰ *Wilner*, 592 F.3d at 76 (internal quotation omitted).

Because we cannot properly evaluate the privacy interests of Mr. Trump and the third-party visitors or the public interest in disclosure on the basis of the current USSS declaration, we do not take up defendant’s arguments relating to the public interest in non-disclosure at this time. We will consider those arguments if defendant chooses to assert them in a renewed motion for partial summary judgment, as described below.

⁹¹ DI 31 at 44.

⁹² *ACLU v. US. Dep’t of Justice*, 210 F.Supp.3d 467, 485-86 (S.D.N.Y. 2016) (quoting *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 997 (D.C. Cir.1998)).

by plaintiffs.”⁹³ At this stage, the Court finds it appropriate to allow the USSS to provide additional declarations or other submissions in support of its exemption 7(C) withholdings, taking into account the deficiencies discussed above.⁹⁴ After the filing of additional agency submissions, the parties will be free to renew their arguments with respect to the applicability of exemption 7(C) to the visitors identified in the emails and schedules, in accordance with the schedule set forth below.

Conclusion

For the foregoing reasons, defendant’s motions for summary judgment [17-cv-8153, DI 27 and 18-cv-7516, DI 12] are granted to the extent that plaintiffs claims for disclosure of records reflecting names and other information pertaining to law enforcement personnel are dismissed and denied in all other respects. Plaintiff’s cross motion [17-cv-8153, DI 30] is denied in all respects.

This ruling is without prejudice to defendant renewing its motion, on or before October 15, 2019, on the basis of revised *Vaughn* submissions taking into account the deficiencies identified above and without prejudice also to a renewed cross-motion by plaintiff

⁹³ *Wilner*, 592 F.3d at 75-76.

⁹⁴ *Cf. ACLU*, 210 F.Supp.3d at 486 (“The Court finds it appropriate, at this juncture, to provide DOJ with the opportunity to provide further substantiation of its work product claims with respect to these documents.”); *Electronic Frontier Foundation v. U.S. Dep’t of Justice*, 826 F.Supp.2d 157, 174-75 (D.D.C. 2011) (“Having found the DOJ’s *Vaughn* submissions inadequate, the Court has several options regarding how to proceed in this case . . . [t]he Court finds that the best approach is to direct the agency to revise their *Vaughn* submissions, taking into account the deficiencies identified by the Court.”).

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taking into account defendant's revised submissions. Any such cross motion shall be filed on or before November 15, 2019.

The Clerk shall terminate the pending motions.

SO ORDERED.

Dated: August 15, 2019

/s/ Lewis A. Kaplan
Lewis A. Kaplan,
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17-cv-8153 (LAK)

18-cv-7516 (LAK)

RICHARD BEHAR,

Plaintiff,

-against-

U.S. DEPARTMENT OF HOMELAND SECURITY,

Defendant.

ORDER

LEWIS A. KAPLAN, District Judge.

In a prior opinion [Dkt. 49], the Court concluded that the government had failed to meet its burden of establishing that the Freedom of Information Act (“FOIA”) justifies the withholding of the materials responsive to the plaintiff’s FOIA request, with the exception of names and other information pertaining to law enforcement personnel. The Court provided the government an opportunity to address with additional agency submissions the several deficiencies identified in its opinion. After receiving these submissions and holding oral argument on the parties’ renewed motions for summary judgment, the Court ordered *in camera* review of the responsive materials

Having reviewed the responsive materials, and largely for the reasons identified in its prior opinion,

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the Court concludes that the government has failed to meet its burden of establishing that the materials are exempt from withholding.

The government's motion for summary judgment [Dkt. 54] is denied, and the plaintiff's cross-motion for summary judgment [Dkt. 58] is granted. The government shall produce the responsive materials to the plaintiff on or before August 18, 2020. The Clerk of the Court is directed to terminate the pending motions and close these cases.

SO ORDERED.

Dated: August 4, 2020

/s/ Lewis A. Kaplan
Lewis A. Kaplan,
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM 2021
Nos. 20-3253(L), 20-3256(Con)

RICHARD BEHAR,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of New York

ARGUED: NOVEMBER 30, 2021
DECIDED: JULY 8, 2022

Before: PARK, NARDINI, and MENASHI, *Circuit Judges.*

Defendant-Appellant U.S. Department of Homeland Security appeals the order of the U.S. District Court for the Southern District of New York to release certain records pursuant to a Freedom of Information Act (“FOIA”) request submitted by Plaintiff-Appellee Richard Behar. The Secret Service received the records from a presidential campaign and transition to facilitate the agency’s protection of the presidential candidate and President-elect. We hold that the records are not

“agency records” under the FOIA because the records are not subject to the agency’s control. Even if the records were subject to the agency’s control, the district court erred in holding that 5 U.S.C. § 552(b)(7)(C) would not provide protection from disclosure. Accordingly, we REVERSE the judgment of the district court to the extent that it required the Secret Service to disclose the requested documents.

JACKSON BUSCH (David A. Schulz, Charles Crain, *on the brief*), Media Freedom & Information Access Clinic, Abrams Institute, Yale Law School, New Haven, CT, *for Plaintiff-Appellee*.

SARAH S. NORMAND, Assistant United States Attorney (Christopher Connolly, Assistant United States Attorney, *on the brief*), *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY, *for Defendant-Appellant*.

MENASHI, *Circuit Judge*:

Defendant-Appellant U.S. Department of Homeland Security (“DHS”) appeals the judgment of the district court ordering the U.S. Secret Service, a component of DHS, to release certain records that Plaintiff-Appellee Richard Behar requested under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. We reverse the judgment of the district court on two grounds. First, the records are not “agency records” subject to the FOIA. Second, even if the records were eligible for disclosure under the FOIA, Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), would shield the records from disclosure.

BACKGROUND

The FOIA requires a federal agency to disclose an “agency record” when a member of the public requests such disclosure, subject to enumerated exemptions. 5 U.S.C. § 552(f)(2)(A), (b)(1)-(9). This dispute arises from a FOIA request for schedules and visitor information from the presidential campaign and transition of Donald J. Trump covering the period in which Trump received Secret Service protection before his inauguration as President of the United States on January 20, 2017.

I

Behar, a journalist, submitted two FOIA requests to the Secret Service seeking visitor and scheduling documents from the campaign and transition of candidate and President-elect Trump that had been shared with the Secret Service. Behar first requested “[r]ecords identifying every individual who was screened and/or noted by the Secret Service” in connection with the agency’s protection of Trump from November 1, 2015, to January 21, 2017, as well as “[a]ll records concerning any communication between the Secret Service and any individual employed by and/or affiliated with either the Trump Campaign and/or the Trump Organization regarding any individual” who had been so screened or noted. J. App’x 30-31.

When the Secret Service did not provide notice of a determination on his request within twenty days, Behar filed suit in the U.S. District Court for the Southern District of New York. *See* 5 U.S.C. § 552(a)(6)(A), (a)(6)(C)(i). The parties entered a joint stipulation, which the district court adopted on February 21, 2018, that required the agency to conduct searches of potentially responsive records and to review those records

on a rolling basis, with a plan to produce tranches monthly. During this process, the Secret Service disclosed in an email that it had identified Trump's schedules but deemed those records non-responsive to Behar's request.¹ As a result, on May 14, 2018, Behar filed a second FOIA request for "[a]ll schedules identified by the USSS" in that email. J. App'x 71.² The second request further broadened the category of records sought to "includ[e] all references to future meetings with Mr. Trump" and "[a]ny additional documents the USSS locates in conducting the searches described in the Joint Stipulation and Order that reference any individuals attending or expecting to attend meetings with Mr. Trump and/or the Trump family members and/or campaign officials described" in Behar's initial request. J. App'x 71 (citation omitted).

After processing Behar's second request, the Secret Service responded that it did not consider "the responsive documents" to be "agency records" because "[t]he schedules of candidate Trump and President-elect Trump provided to the Secret Service by the campaign and/or transition team are the property of a private entity which is not subject to FOIA" and "[t]he Secret Service does not exercise the requisite control over these records to satisfy the definition of an 'agency record.'" J. App'x 87 (citing *Jud. Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 231 (D.C. Cir. 2013)).

¹ See J. App'x 77 ("[I]n the course of its review ... the USSS identified some schedules that included references to future meetings with Mr. Trump. However, none of those schedules reflected any screening or notation of individuals by the USSS, and thus they were not identified as responsive to plaintiff's FOIA request.").

² Behar amended his complaint on August 21, 2018, to account for the May 14, 2018, request. J. App'x 55.

The Secret Service also determined that “even if the schedules were agency records, they would be withheld in full” under Exemption 7(C) as “information compiled for law enforcement purposes the disclosure of which could lea[d] to an unwarranted invasion of personal privacy,” among other exemptions. J. App’x 87.³

The government moved for summary judgment on October 3, 2018, and Behar cross-moved for summary judgment on October 31, 2018. On August 15, 2019, the district court denied Behar’s motion for summary judgment and denied in part and granted in part the government’s motion.⁴ The district court considered whether Trump and third parties identified in the records—those who appeared on Trump’s itineraries or gained access to facilities in Trump Tower—had privacy interests protected by Exemption 7(C). The district court explained that any privacy interests were “tempered by the fact that [Trump] was an aspiring and then successful candidate for federal office during the relevant period and that there has been no showing of potential unwelcome consequences on the part of the third party visitors resulting from disclosure.” *Behar v. DHS*, 403 F. Supp. 3d 240, 254

³ The Secret Service upheld these determinations in an administrative appeal. *See* J. App’x 99 (“Having reviewed your argument and the facts of this matter, it has been determined that the Secret Service does not exercise the requisite control over the records that were located to satisfy the definition of an ‘agency record.’”); *id.* (“Upon review of this matter, it has been determined that these exemptions are still applicable to the records. Therefore, your appeal is denied.”).

⁴ The district court granted the government’s motion for summary judgment with respect to the identities of law enforcement personnel and other security information captured in the requested documents. Behar has not appealed that decision.

(S.D.N.Y. 2019). The district court thought it possible that “the public interest in disclosure outweighs the relevant privacy interests” because the documents “could reveal information advancing public knowledge of whom Mr. Trump relied upon in making cabinet and other presidential appointments [or in] determining his presidential priorities.” *Id.* at 255.

The district court allowed the Secret Service “to provide additional declarations or other submissions in support of its exemption 7(C) withholdings,” specifically to explain “whether the meetings related to Mr. Trump’s candidacy or instead regarded personal matters” and “whether disclosure of the documents has the potential to result in unwelcome consequences on the part of the visitors.” *Id.* at 255-56.

The Secret Service responded with declarations explaining that “protectees’ schedules do not reveal anything about the manner in which the Secret Service conducts its activities.” J. App’x 805. The Secret Service “assessed that the documents do not shed light on the workings of the Secret Service” and, because the documents covered only the campaign and transition, “the documents do not directly reflect the activities or operations of the Trump administration.” J. App’x 818. Because the Secret Service was not involved in the activities of the campaign or transition, it was unable to evaluate “whether a given meeting was in furtherance of Mr. Trump’s candidacy, presidency, business or personal interests” or “to make an informed judgment as to whether disclosure of the occurrence of a particular meeting or series of meetings would shed light on ‘whom Mr. Trump relied upon in making cabinet and other presidential appointments [or in] determining his presidential priorities.’” J. App’x 819 (quoting *Behar*, 403 F. Supp. 3d at 255). To evaluate

who the visitors were and what the significance of their meetings might have been “would require the Secret Service to engage in speculation.” J. App’x 819.

The Secret Service emphasized that it had access to the schedules and visitor information only to facilitate its provision of security services to the candidate and President-elect and that it had agreed to keep the documents confidential. Deputy Director Leonza Newsome III, for example, declared that

[a]ll of the itineraries, schedules, and calendars at issue in this case, and the information regarding meetings contained in the remaining emails at issue, were provided to the Secret Service with the expectation of privacy and the expectation that they would not be disseminated beyond the Secret Service personnel who had the need of the information contained in the documents to perform their protective functions.

J. App’x 805. He explained that “the Secret Service understood that all schedules and visitor information provided by candidate and/or President-elect Trump were provided on a confidential basis, and the Secret Service treated the schedules and visitor information as confidential.” J. App’x 805. “Compelled disclosure under FOIA of these schedules and emails,” he said, “would harm the public interest, by jeopardizing the flow of information from protectees to the Secret Service, thereby increasing the difficulty of protecting Presidential candidates and Presidents-elect.” J. App’x 806.

In addition to the declarations, the Secret Service provided the records for *in camera* review by the district court, and the agency renewed its motion for summary judgment. On August 4, 2020, the district

court issued a one-page order granting Behar’s motion for summary judgment “largely for the reasons identified in its prior opinion.” S. App’x 29. The government timely appealed.

II

The records that remain at issue in this appeal are private schedules and visitor information provided by the Trump presidential campaign and transition to the Secret Service, at the agency’s request, to facilitate the provision of security services to candidate and President-elect Trump. The records include (1) email chains forwarded from the Trump campaign and transition to the Secret Service and (2) scheduling documents and attachments sent from the Trump campaign and transition to the Secret Service.

The first category of documents consists of five email chains between Trump campaign officials and the Secret Service.⁵ Four of the five emails refer to meetings that Trump planned to hold in the future.⁶

⁵ The district court upheld the withholding of portions of the email chains that reflected “law enforcement investigative and protective information,” J. App’x 108, and Behar does not challenge that aspect of the judgment on appeal. Only the portions of the records not already deemed exempt for that reason are before us.

⁶ Specifically, the four “future-meeting” emails include an April 2016 email chain referring to a future meeting between Trump and an individual assisting with the preparation of a speech; a July 2016 email referring to an “ongoing” meeting between Trump, his staff, and another individual at Trump Tower; a July 2016 email referring to a meeting to occur that day; and a September 2016 email chain referring to a future meeting between Trump and an individual, in which the non-public nature of the meeting is emphasized in the text of the email.

The fifth email identifies individuals who needed access to certain areas within Trump Tower.

The second category of records consists of over 600 scheduling records, including Trump's calendars, itineraries, line schedules, and detailed schedules. These records range in detail. The calendars, itineraries, and line schedules include only general information such as the time and place of each scheduled meeting. The detailed schedules reveal the substantive matters at issue in the meetings as well as the names of attendees.

Most of the scheduling records were provided to the Secret Service during the transition period in which Trump was President-elect and bear a seal denoting the office of the President-elect. All the detailed schedules are marked as "confidential" and "[n]ot to be copied or shared." J. App'x 816. Emails attaching itineraries and calendars likewise note a "reminder to please not distribute this calendar as it is highly confidential." J. App'x 817.

STANDARD OF REVIEW

The FOIA authorizes judicial review when "an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records'" so that the district court may "force an agency to comply with the FOIA's disclosure requirements." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999) (quoting *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989)). We review a district court's summary judgment decision de novo, *Ctr. for Const. Rts. v. CIA*, 765 F.3d 161, 166 (2d Cir. 2014), including the threshold determination of whether the requested records are "agency records" eligible for disclosure under the statute, *Doyle v. DHS*, 959 F.3d 72, 76 (2d Cir. 2020).

For those documents properly considered “agency records,” once the agency has identified an applicable exemption and justified its application, our review is generally deferential to the agency’s analysis. While “[t]he defending agency has the burden of showing that any withheld documents fall within an exemption to the FOIA,” we “accord a presumption of good faith to an agency’s affidavits or declarations,” *NRDC v. EPA*, 19 F.4th 177, 183 (2d Cir. 2021) (internal quotation marks and alterations omitted), such that “when an agency provides ‘reasonably detailed explanations’ to support its decision to withhold a document, its ‘justification is sufficient if it appears logical and plausible,’” *id.* (quoting *ACLU v. DOD*, 901 F.3d 125, 133 (2d Cir. 2018)).

DISCUSSION

The district court’s order granting summary judgment rested on the assumption that the documents at issue are “agency records” eligible for disclosure under the FOIA. That assumption was erroneous. We hold that the records do not qualify as “agency records” disclosable under the FOIA. Moreover, even if the records were properly considered “agency records” eligible for disclosure, the district court erred in weighing the relevant privacy interests and concluding that Exemption 7(C) did not apply.

I

The district court erred in granting summary judgment to Behar because the requested records are not “agency records” within the meaning of the FOIA. That conclusion follows from our recent decision in *Doyle v. DHS*, in which we explained that “agency records” did not include “information provided by[] a governmental entity not covered by FOIA” when the

“non-covered entity . . . has manifested a clear intent to control the documents, such that the agency is not free to use and dispose of the documents as it sees fit.” 959 F.3d at 77-78 (internal quotation marks omitted). That principle applies with equal force in this case, in which the entity not covered by the FOIA is not even a governmental entity.⁷

To decide this case, we start as we did in *Doyle* by examining the scope of the term “agency record” under the FOIA. The FOIA defines “agency” as “each authority of the Government of the United States” except “the Congress,” “the courts of the United States,” and other bodies including “courts martial and military commissions.” 5 U.S.C. § 551(1). Additionally, “the term ‘agency’ under the FOIA” does not include “the Office of the President,” “the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.” *Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); see also *Main St. Legal Servs., Inc. v. NSC*, 811 F.3d 542, 549 (2d Cir. 2016) (holding that the National Security Council is not an agency subject to the FOIA because it lacks authority other than to advise and assist the President).

Though the FOIA does not provide a definition of “agency records,” “the Supreme Court [has] instructed” that “the term ‘agency records’ extends only to those documents that an agency both (1) ‘creates or obtains,’ and (2) ‘controls at the time the FOIA request was

⁷ In *Doyle*, we decided that “visitor logs for the White House Complex and the President’s Mar-a-Lago home in Florida” requested from the Secret Service were not “agency records” subject to the Freedom of Information Act.” 959 F.3d at 73.

made.” *Jud. Watch*, 726 F.3d at 216 (alterations and emphasis omitted) (quoting *Tax Analysts*, 492 U.S. at 144-45). “Control” by an agency requires more than mere possession. “[N]ot all documents in the possession of a FOIA-covered agency are ‘agency records’ for the purpose” of the FOIA, and “not all records physically located at an agency are ‘agency records.’” *Id.* “We have explained that agency ‘control’ is key to determining whether materials qualify as ‘agency records’ under FOIA.” *Doyle*, 959 F.3d at 77.

Certain prior cases have involved records obtained from governmental entities that are not subject to the FOIA, such as Congress, *see Jud. Watch*, 726 F.3d at 221, and the Office of the President, *see Doyle*, 959 F.3d at 77-78. But the same analysis applies when, as in this case, the agency obtained the documents from a non-governmental entity similarly not subject to the FOIA. Neither a presidential campaign nor a transition qualifies as an “agency” of the federal government under the FOIA. 5 U.S.C. § 551(1). A transition receives government funding,⁸ but funding “short of Government control” leaves “grantees free from the direct obligations imposed by the FOIA.” *Forsham v. Harris*, 445 U.S. 169, 182 (1980). A transition “is clearly not in the control of the incumbent President” but “answers only to the President-elect.” *Ill. Inst. for Continuing Legal Educ. v. DOL*, 545 F. Supp. 1229, 1232 (N.D. Ill. 1982). Accordingly, the transition “is not within the executive branch of government and hence not an ‘agency’ within the meaning of § 552(e) of the FOIA.” *Id.* at 1232-33.

⁸ Presidential Transition Act of 1963, Pub. L. 88-277, § 3, 78 Stat. 153, 154-55 (1964), 3 U.S.C. § 102 note.

Thus, it is “undisputed that a requester could not use FOIA to compel” the disclosure of records directly from a campaign or transition, just as a requester could not compel such disclosure from other non-agencies such as Congress or the Office of the President. *Jud. Watch*, 726 F.3d at 216. When an entity “is not an agency for FOIA purposes, documents generated” by that entity “are not agency records when they are made,” *id.* (internal quotation marks and alteration omitted), so we inquire into “control” to determine whether such documents have become “agency records” after an agency obtains them.

To determine whether an agency exercises control over documents obtained from an entity not covered by the FOIA, we ask whether “the non-covered entity ... has manifested a clear intent to control the documents,’ such that ‘the agency is not free to use and dispose of the documents as it sees fit.’” *Doyle*, 959 F.3d at 77-78 (quoting *Jud. Watch*, 726 F.3d at 223). If the document “remains under the control of and continues to be the property of” the non-covered entity and the agency “holds the document, as it were, as a ‘trustee,’” the document is not an agency record subject to the FOIA. *Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978). A document generated by a non-covered entity “has become an agency record” only if “the document has passed from the control of [the entity] and become property subject to the free disposition of the agency with which the document resides.” *Id.*

We have applied this analysis to information that the Secret Service obtains from a protected entity in order to facilitate its provision of security services to that entity. We recognized in *Doyle* that the Office of the President “cannot retain effective physical control” of documents that must be shared with the Secret

Service to facilitate the protection of the President, but because the Office of the President “manifested a clear intent to control the documents,” those documents do not qualify as agency records. 959 F.3d at 77-78 (quoting *Jud. Watch*, 726 F.3d at 223, 225). We reached that conclusion in part “because it is hard for us to ‘believe Congress intended that FOIA requesters be able to obtain from the gatekeepers of the White House what they are unable to obtain from its occupants.’” *Id.* (quoting *Jud. Watch*, 726 F.3d at 233).

The same logic applies here. In this case, the campaign and transition manifested a clear intent to control the documents. As the Secret Service explained via Deputy Director Newsome, “[a]ll” of the records “at issue in this case . . . were provided to the Secret Service with the expectation of privacy and the expectation that they would not be disseminated beyond the Secret Service personnel who had the need of the information . . . to perform their protective functions.” J. App’x 805. The records were regularly marked as “confidential” and “[n]ot to be copied or shared,” with “[r]eminder[s] to please not distribute” the records due to their “high[] confidential[ity].” J. App’x 816-17. “Regardless of their markings, however,” the agency “treated” the information “as confidential.” J. App’x 805. Under these circumstances, the Secret Service did not take control of the documents such that the documents were subject to the free disposition of the Secret Service.⁹

⁹ *Doyle* emphasized that its holding was necessary to avoid deciding the “difficult constitutional question” that would arise if the FOIA were interpreted to require the disclosure via the Secret Service of presidential records. 959 F.3d at 77. Our decision in this case follows from the control test and does not depend on constitutional avoidance. But we note that similarly difficult

This conclusion is consistent with how presidential transition records have been treated in other cases. In *Democracy Forward Found. v. GSA*, the court held that records of a presidential transition were not “agency records” of the General Services Administration (“GSA”). 393 F. Supp. 3d 45 (D.D.C. 2019). In that case, as in this one, the agency had access to the records only because of its statutory obligation to provide services to the presidential transition. The GSA “functioned mainly as a ‘warehouse’ for the transition team’s electronic communications” because “[i]t supplied a network to host and store records.” *Id.* at 53. The “GSA might have been exposed to the content of communications but only incident to its monitoring of the transition team’s networks to ensure their operation and security.” *Id.* (internal quotation marks omitted). In those circumstances, the “GSA did not sufficiently ‘control’ the emails to qualify as ‘agency records.’” *Id.* at 54.

The court also explained that the “FOIA’s central purpose is to ensure that the *Government’s* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed.” *Id.* at 53 (quoting *DOJ v. Repts. Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989)). The transition’s emails would not “shed any light about [the] GSA’s

constitutional questions regarding executive privilege or other confidentiality interests would arise if the FOIA required the disclosure of records belonging to a presidential transition, which deliberates and conducts business in anticipation of assuming the presidency on inauguration day. The government in this case said that if it did not prevail on its statutory arguments, “we would argue, and in fact we did reserve the . . . right to assert . . . that in fact privilege could be asserted” over the contested records. Oral Argument Audio Recording at 3:28.

operations or decision-making” and “are not ‘agency records’ subject to disclosure under FOIA.” *Id.*

Similarly, in this case the Secret Service had access to the documents only incident to its provision of security services to the campaign and the transition, and those documents do not reveal information about the Secret Service’s operations or decision-making as distinct from those of the campaign and the transition. In short, the records at issue here are not “agency records” subject to disclosure under the FOIA.

II

Even if the records in this case were properly considered “agency records,” we still would reverse the judgment of the district court because Exemption 7(C) would shield the records from disclosure. The district court erred in holding that Exemption 7(C) did not apply.

Exemption 7(C) provides that “records or information compiled for law enforcement purposes” are exempt from disclosure under the FOIA “to the extent that the production of such . . . records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). The district court concluded that the records in this case were compiled for law enforcement purposes, and neither party disputes that conclusion on appeal. The question is therefore whether disclosure might reasonably be expected to invade personal privacy unjustifiably.

If the agency identifies a privacy interest in the requested documents, “disclosure is unwarranted under Exemption 7(C) unless the requester can show a sufficient reason for the disclosure.” *Associated Press v. DOD*, 554 F.3d 274, 288 (2d Cir. 2009) (internal

quotation marks omitted). To overcome the privacy interest, the requester “must show that the public interest sought to be advanced is a significant one,” with “an interest more specific than having the information for its own sake,” and that “the information is likely to advance that interest.” *NARA v. Favish*, 541 U.S. 157, 172 (2004). Thus, “whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny,” *Reps. Comm.*, 489 U.S. at 772 (internal quotation marks omitted), while “[g]oals other than opening agency action to public scrutiny are deemed unfit to be accommodated under FOIA when they clash with privacy rights,” *Associated Press*, 554 F.3d at 293 (quoting *FLRA v. U.S. Dep’t of Veterans Affs.*, 958 F.2d 503, 510-11 (2d Cir. 1992)).

In this case, the district court recognized that the government successfully established that Trump and other third parties had cognizable privacy interests in the records. 403 F. Supp. 3d at 253. But the district court proceeded to make two errors. First, the district court unjustifiably discounted those privacy interests. Second, the district court overlooked the purpose of the FOIA “to open *agency action* to the light of public scrutiny,” *Reporters Comm.*, 489 U.S. at 772 (emphasis added) (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)), by including in the purported public interest in disclosure access to information about the activities of non-agencies.

A

The Secret Service filed declarations that established a basis for withholding the records. The agency explained that the campaign and transition provided

the records with a clear understanding of confidentiality such that, in the agency's view, "the privacy rights of . . . Mr. Trump[] and the third parties identified in the documents outweighed any public interest in disclosure." *Behar*, 403 F. Supp. 3d at 246. The understanding between the Secret Service and the campaign and transition that the records would be treated confidentially establishes a privacy interest under the FOIA. *See U.S. Dep't of State v. Ray*, 502 U.S. 164, 177 (1991) (holding that the appellate court gave "insufficient weight to the fact that" witness interviews taken as part of an investigation "had been conducted pursuant to an assurance of confidentiality").

The district court discounted Trump's privacy interest as "limited substantially" by his candidacy for public office. 403 F. Supp. 3d at 254. This conclusion relied on an overreading of extra-circuit precedent.¹⁰ We do not agree that "public figures" who are protected by the Secret Service have a lesser privacy interest "in information relating to their candidacies" that the Secret Service might obtain. 403 F. Supp. 3d at 254 (quoting *Common Cause*, 628 F.2d at 184). Many people who receive Secret Service protection are public figures, *see* 18 U.S.C. § 3056(a), and we do not think that status limits their privacy interests in information exchanged with the Secret Service to facilitate that protection. *Cf. Favish*, 541 U.S. at 170

¹⁰ In *Common Cause v. Nat'l Archives & Recs. Serv.*, the court emphasized that it was not "suggesting that the presence of these circumstances will always or even usually tip the balance in favor of disclosure under 7(C)" and then noted as relevant that the "information sought about" "candidates for federal office" regarded "campaign contributions" that were independently "required by law to be reported publicly." 628 F.2d 179, 184 (D.C. Cir. 1980). The court did not reach any conclusion about whether disclosure was required. *See id.* at 186.

(“We have observed that the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution.”).

During a presidential campaign or transition in particular, a candidate or President-elect may receive advice on which he or she will rely after assuming the presidency. “[T]he public interest is best served by holding that communications made by presidential advisers in the course of preparing advice for the President come under the presidential communications privilege,” *In re Sealed Case*, 121 F.3d 729, 751-52 (D.C. Cir. 1997), and Congress has recognized that the “national interest” in “continuity” requires presidential transition activities, Presidential Transition Act § 2, 3 U.S.C. § 102 note. Accordingly, we agree with DHS that the privacy interest here would not be “tempered,” 403 F. Supp. 3d at 254, but heightened “to the extent any particular record did reveal information that directly or significantly illuminated President Trump’s post-inaugural priorities or conduct . . . given the well-established confidentiality of presidential meetings and advisors,” Appellant’s Br. 49.

The district court also erred in discounting the privacy interests of third-party visitors because the Secret Service did not show “that disclosure of their names would lead to embarrassment, retaliation or other unwelcome consequences.” 403 F. Supp. 3d at 253. Such consequences could make a privacy interest “particularly pronounced,” *Associated Press*, 554 F.3d at 286, but that showing is not necessary and its absence did not justify discounting the privacy interests here.¹¹ Exemption 7(C) requires only that the

¹¹ As made clear in the Secret Service’s supplemental filings, the agency could describe the privacy interests only generally because it was unfamiliar with the individuals named in the

agency establish that “[t]he privacy interest protected by [the exemption] is an interest in ‘avoiding disclosure of personal matters’ and ‘keeping personal facts away from the public eye.’” *Associated Press*, 554 F.3d at 286 (quoting *Reps. Comm.*, 489 U.S. at 762, 769). The Secret Service showed that the disclosed information “is the type of information that a person would ordinarily not wish to make known about himself or herself.” *Id.* at 292; see *Behar*, 403 F. Supp. 3d at 253 (noting that the district court was “persuaded that participation in these meetings with candidates and presidents-elect is the type of information that a person often would not wish to make known about himself or herself”). But the district court nonetheless determined that it “should not give that generalization too much weight in the balance.” *Id.*

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The district court further erred in its evaluation of the public interest in disclosure regarding the Secret Service’s “performance of its statutory duties.” 403 F. Supp. 3d at 251. The FOIA limits the public interest in disclosure to “public scrutiny” of “agency action.” *Rose*, 425 U.S. at 372; see also 5 U.S.C. § 552(a). Here, the Secret Service explained that the requested records “do not reveal anything about the manner in which the Secret Service conducts its activities,” J. App’x 805, and the district court even agreed that the documents would not “advance the public’s understanding of the USSS’s performance of its statutory duties,” 403 F. Supp. 3d at 254. Nevertheless, the

documents and the substance of the meetings between those individuals and the candidate or President-elect. See J. App’x 816-18. The FOIA does not require the Secret Service to gather information about its protectees beyond that required to provide security services.

district court proceeded to hold that because the documents would reveal information about the inner workings of the campaign and nascent administration, there was a public interest in disclosure under the FOIA. That is incorrect.

There is no cognizable public interest to be vindicated through the FOIA in “advancing public knowledge of whom Mr. Trump relied upon in making cabinet and other presidential appointments” or in “determining his presidential priorities.” *Id.* at 255. To the contrary, disclosing records that reveal this pre-presidential information would shed no light on the operations or decision-making of the Secret Service—as the FOIA requires it must to vindicate a public interest in disclosure. The district court relied on a loose description of the FOIA as aiming to disclose “the operations or activities of the government”—even those parts of the government not subject to the FOIA—rather than focusing on the statutory purpose to reveal information about agency action. *Id.* at 251 (emphasis omitted) (quoting *DOD v. FLRA*, 510 U.S. 487, 495 (1994)).

Even the case on which the district court relied does not describe the purpose of the FOIA so broadly. In *DOD v. FLRA*, the Supreme Court “elaborated” on the statement that “the core purpose of the FOIA ... is contributing significantly to public understanding of the operations or activities of the government.” 510 U.S. at 495 (internal quotation marks, emphasis, and alteration omitted). The Court explained that the “statutory purpose” of the FOIA was “full agency disclosure” of “[o]fficial information that sheds light on an agency’s performance of its statutory duties.” *Id.* at 495-96 (quoting *Reps. Comm.*, 489 U.S. at 773). The Court expressly stated that the statutory purpose “is not fostered by disclosure of information about private

citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.* at 496 (quoting *Reps. Comm.*, 489 U.S. at 773). For that reason, the public interest is not served when "the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records." *Reps. Comm.*, 489 U.S. at 773.

Given these instructions from the Supreme Court, the district court's "public interest" analysis should have ended when it concluded that disclosure of the records in this case "would not advance the public's understanding of the USSS's performance of its statutory duties." 403 F. Supp. 3d at 254. Neither a campaign nor a transition is an agency the records of which the FOIA aims to disclose. The FOIA does not establish a public interest in revealing information about such entities.

At the same time, we have said that the FOIA, through Exemptions 6 and 7(C), recognizes a "strong public interest in encouraging witnesses to participate in future government investigations" that would be undermined if investigators could not assure witnesses that private information would remain confidential. *Perlman v. DOJ*, 312 F.3d 100, 106 (2d Cir. 2002), *vacated*, 541 U.S. 970 (2004), *reinstated after remand*, 380 F.3d 110 (2d Cir. 2004). In the same way, Exemption 7(C) recognizes a public interest in encouraging those officials who receive Secret Service protection to share information necessary for the Secret Service to perform its protective function.

Given these considerations, even if the records here were properly considered agency records, the privacy interests would outweigh any public interest in disclo-

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sure and thereby shield the records from disclosure under Exemption 7(C).

CONCLUSION

The Secret Service obtained records from the campaign and transition subject to an understanding of confidentiality in order to provide security services to the presidential candidate and President-elect. Under these circumstances, the agency did not exercise control sufficient to convert the records into agency records subject to disclosure under the FOIA. Even if the records had been so converted, 5 U.S.C. § 552(b)(7)(C) would protect the records from disclosure. For these reasons, we REVERSE the judgment of the district court to the extent that it required the Secret Service to disclose the requested documents.

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos: 20-3253 (L)
20-3256 (Con)

RICHARD BEHAR,
Plaintiff - Appellee,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY,
Defendant - Appellant.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of September, two thousand twenty-two.

ORDER

Appellee, Richard Behar, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk
[SEAL Catherine O'Hagan Wolfe]