No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BARBARA KOWAL,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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INDEX OF APPENDICES

107 F.4th 1018
United States Court of Appeals,
District of Columbia Circuit.

Barbara KOWAL, Appellant
v.
UNITED STATES DEPARTMENT
OF JUSTICE, et al., Appellees
Barbara Kowal, Appellant
v.
United States Department of Justice and Drug
Enforcement Administration, Freedom of
Information Request/PA Unit, Appelleess

No. 22-5231, No. 22-5287
|
Argued January 23, 2024
|
Decided July 16, 2024

Synopsis

Background: Requester, a paralegal for federal public defender representing criminal defendant, filed two suits against Department of Justice and its components, with one suit primarily against FBI and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and other against Drug Enforcement Administration (DEA), to which she had submitted Freedom of Information Act (FOIA) requests, alleging agencies failed to make adequate searches and wrongfully withheld records. The United States District Court for the District of Columbia, Timothy J. Kelly, J., 2022 WL 2315535 and 2022 WL 4016582, granted summary judgment for agencies. Requester appealed.

Holdings: The Court of Appeals, Rao, Circuit Judge, held that:

agencies' document searches in response to FOIA request were reasonable in light of particular requests;

FBI and ATF accurately construed search requests;

it was reasonable for agencies not to search for defendant's alias;

public domain doctrine did not defeat FBI's withholding of summary of wiretap conversation pursuant to exemption applicable to records specifically exempted from disclosure by statute;

agencies' explanations for decision to redact names and other identifying information, pursuant to exemption protecting from disclosure records or information compiled for law enforcement purposes that could reasonably be expected to constitute unwarranted invasion of personal privacy, were sufficient to demonstrate disclosure would threaten privacy interests;

FOIA exemption that protected from disclosure information that could reasonably be expected to disclose identity of confidential source or information furnished by confidential source applied; and

FOIA exemption that allowed agencies to withhold records when release would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines if such disclosure could reasonably be expected to risk circumvention of law applied.

Affirmed.

Procedural Posture(s): On Appeal; Review of Administrative Decision; Motion for Summary Judgment.

***1025** Appeal from the United States District Court for the District of Columbia (Nos. 1:18-cv-02798, 1:18-cv-00938)

Attorneys and Law Firms

Matthew E. Kelley argued the cause for appellant. On the briefs was D. Todd Doss, Assistant Federal Defender, for 22-5231 and 22-5287.

Jeremy S. Simon, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were Brian P. Hudak and Jane M. Lyons, Assistant U.S. Attorneys.

Jeremy S. Simon, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief were Brian P. Hudak and Jane M. Lyons, Assistant U.S. Attorneys. Douglas C. Dreier, Assistant U.S. Attorney, entered an appearance.

Before: Henderson, Pillard, and Rao, Circuit Judges.

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Opinion

Rao, Circuit Judge:

***1026** Barbara Kowal filed Freedom of Information Act ("FOIA") requests with several law enforcement agencies. Unsatisfied by the agencies' disclosures, Kowal brought two suits claiming that the agencies failed to make adequate searches and that they wrongfully withheld records. The district court granted summary judgment for the agencies in both cases. We affirm because the searches were adequate and the records were exempted from disclosure under FOIA.

I.

Kowal is a paralegal for a federal public defender representing Daniel Troya. Troya was sentenced to death for the "gangland-style" murder of a family of four on a highway roadside. *See United States v. Troya*, 733 F.3d 1125, 1136–37 (11th Cir. 2013). The murder was committed "to protect a large-scale drug trafficking ring involving drugs, guns and extensive violence." *Id.* at 1129. In his habeas proceedings, Troya asserted the government failed to disclose exculpatory material at his trial.

Seeking evidence to support Troya's claim, Kowal submitted identical FOIA requests to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), the Federal Bureau of Investigation ("FBI"), and the Drug Enforcement Administration ("DEA"), asking for "all documents, files, records, etc. pertaining to any investigation, arrest, indictment, conviction, sentencing, incarceration, and/or parole of ... Daniel Troya (a/k/a 'Homer')." Kowal's requests included Troya's date of birth and information identifying his federal charges and criminal proceedings.

In response to Kowal's request, the agencies searched for responsive records. The DEA searched its centralized records system using Troya's name and date of birth and identified 418 responsive pages. The DEA produced 14 pages in full, 133 in part, and withheld 271. The ATF searched two of its internal records systems, using the keyword "Daniel Troya," and identified 480 responsive pages. The ATF produced 63 pages in full, 223 in part, and withheld 194. The FBI searched its Central Records System using the terms "Daniel Anthony Troya" and "Homer Troya." The FBI identified 275 responsive pages, produced 134 pages (with some redactions), and withheld 141. In their *Vaughn* indices, [1] the agencies explained that they withheld information pursuant to FOIA Exemptions 3, 6, 7(C), 7(D), 7(E), and 7(F). *See* 5 U.S.C. § 552(b)(3), (6), (7)(C)–(F).

1 When relying on a FOIA exemption to withhold records, an agency must "provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977); *see also Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973).

Dissatisfied with the responses, Kowal challenged the adequacy of the agencies' searches and alleged the agencies impermissibly withheld documents. After she exhausted her administrative remedies, Kowal filed two suits in federal court against components of the Department of Justice: one primarily against the FBI and the ATF, and another against the DEA. The district court granted summary judgment to the agencies. *See Kowal v. Dep't of Justice*, 2022 WL 2315535 (D.D.C. June 27, 2022); *Kowal v. Dep't of Justice*, 2022 WL 4016582 (D.D.C. Sept. 2, 2022). Kowal timely appealed. Because the legal and factual issues substantially overlap, we decide both appeals in a single opinion.

II.

FOIA requires federal agencies, when requested, to disclose certain agency ***1027** records unless an exemption applies. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. §§ 552–59). Kowal challenges both the adequacy of the agencies' searches and their withholding of some records. We review the district court's grants of summary judgment *de novo*.

A.

Kowal first challenges the adequacy of the searches made by the FBI, ATF, and DEA. An agency must demonstrate it "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Watkins Law & Advoc., PLLC v. Dep't of Justice*, 78 F.4th 436, 442 (D.C. Cir. 2023) (cleaned up). The adequacy of a search is "determined not by the fruits of the search, but by the appropriateness of

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the methods used to carry out the search." *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (cleaned up). We consider whether the agency's search was reasonable based on the specific information requested and the agency's efforts to produce that information.

To facilitate judicial review, an agency usually provides an "affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials ... were searched." *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). "Agency affidavits are accorded a presumption of good faith," and we will not credit "[m]ere speculation that ... uncovered documents may exist" as a basis for finding an agency's search inadequate. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200–01 (D.C. Cir. 1991).

1.

Kowal first argues she presented evidence the FBI, ATF, and DEA overlooked responsive records. Kowal possesses over 200 multimedia items from Troya's trial, some of which, for instance, explicitly mention the DEA in the file name. The agencies did not disclose these records in response to her FOIA request. Kowal maintains these omissions are sufficient evidence to preclude summary judgment because she has raised a factual dispute about the adequacy of the agencies' searches.

We disagree. At best, Kowal has established the agencies may have missed some records in their searches. But a "reasonable and thorough search" may still miss records. *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *see also Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995) ("[T]here is no requirement that an agency produce *all* responsive documents."). Agencies are not required "to examine virtually every document in [their] files" or "follow[ ] an interminable trail of cross-referenced documents." *Steinberg v. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994). We focus on the process, not the results, when determining the adequacy of a FOIA search. *See, e.g.*, *Safecard*, 926 F.2d at 1201.

We hold the agencies' searches were reasonable in light of Kowal's particular requests. In identical requests to the FBI, ATF, and DEA, Kowal asked for "all ... records ... pertaining to any investigation, arrest, indictment, conviction, sentencing, incarceration, and/or parole" of Troya. Kowal specified Troya's criminal proceeding and federal charges and represented that she was requesting the information for Troya's habeas proceedings. The framing of Kowal's requests directed the agencies toward their criminal investigation ***1028** databases. The FBI searched its Central Records System, which "spans the entire FBI organization and encompasses the records of FBI Headquarters ... , FBI Field Offices, and FBI Legal Attaché Offices ... worldwide." The ATF similarly searched its N-Force database and Treasury Enforcement Communications System, which are "the two systems of records where ATF records of criminal investigations are housed." The DEA searched its Investigative Reporting and Filing System, which included a "worldwide search for DEA records, including records maintained at field offices."

Troya was a criminal defendant, and Kowal sought materials about his criminal investigation. The FBI, ATF, and DEA each searched their criminal investigation databases based on Kowal's specific records request. They were not required to do more. "The agency is not required to speculate about potential leads." *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996) (cleaned up).

Moreover, Kowal contends the agencies' searches were inadequate because they failed to uncover additional trial records in her possession that she surmises the agencies should have produced. But given that entities not subject to these FOIA requests—including local law enforcement and the U.S. Attorney's office in Florida—were involved in investigating and trying Troya, Kowal has not supported her inference. Our review of the record and the omitted materials does not "raise[ ] substantial doubt" about the reasonableness of the searches. *Valencia–Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (cleaned up). If Kowal believes the agencies failed to turn over specific records from Troya's trial and wants the agencies to pursue records related to her trial exhibits, she can submit a second, more specific FOIA request. *See Kowalczyk*, 73 F.3d at 389. But she fails to demonstrate the agencies' searches were inadequate.

2.

Second, Kowal challenges the scope of the agencies' searches, asserting that the agencies narrowly construed her requests, failed to use all relevant keywords, and failed to search all appropriate databases.

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Kowal first contends the FBI and ATF failed to construe her search requests accurately, both by not searching for all records mentioning Troya and by improperly limiting searches to only certain records systems.[2] Yet Kowal specifically requested records pertaining to the federal criminal investigation and prosecution of Troya and detailed his federal charges and criminal proceedings in the subject line of her request.

2 Kowal does not appeal the district court's conclusion that the DEA properly searched its databases.

As explained in the previous section, the FBI and ATF properly explained that they searched all relevant databases for investigation files related to the criminal matter Kowal referenced in her FOIA request. The ATF explained it construed Kowal's request as one for "records of ATF's role in the federal criminal investigation of Daniel Troya" and accordingly searched its only two databases with records on criminal investigations. For similar reasons, the FBI clarified it did not need to search beyond its Central Records System because any information related to Troya's criminal prosecution would be indexed there.

Agencies have the discretion to construe requests reasonably and conduct flexible and targeted searches within their internal records systems. Agencies do not ***1029** need to honor unreasonably burdensome requests, boiling the ocean in search of responsive records. *See, e.g.*, *Nation Magazine*, 71 F.3d at 891–92.

Kowal does not rebut the agency affidavits or provide any "evidence of agency bad faith." *See Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980). Rather, she only speculates that the FBI and ATF possess other records about Troya. But "[m]ere speculation" is insufficient to demonstrate the agencies' searches were inadequate. *See Safecard*, 926 F.2d at 1201.

Second, Kowal maintains the FBI, ATF, and DEA did not conduct adequate searches because they failed to search for records mentioning Troya's alias or to search using phonetic variations of Troya's name. Agencies have flexibility when searching for responsive records and so may conduct phonetic or alias searches when these searches are likely to produce additional, responsive records. Such variant searches, however, are not always required. *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993). We review only whether the methods used "can be reasonably expected to produce the information requested," *Oglesby*, 920 F.2d at 68, and whether the agency's search was "tailored to the nature" of the FOIA request, *Campbell v. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998).

Given the parameters of Kowal's request and because the agencies located Troya's criminal investigation files, it was reasonable for them not to search using Troya's alias. Kowal only requested records "pertaining to any investigation, arrest, indictment, conviction, sentencing, incarceration, and/or parole of Daniel Troya." The DEA explained that it maintains records related to criminal investigations in its Investigative Reporting and Filing System, which is indexed by name and date of birth. The DEA searched the system and found five criminal investigative files for Troya. Because the DEA located the files mentioned in Kowal's request, there was no need to separately search for additional records indexed under Troya's alias. Similarly, the ATF and FBI also detailed how they maintain criminal and investigatory files indexed by name, social security number, or date of birth, and found responsive investigative files concerning Troya's prosecution with searches tailored for their databases. Any mention of the alias "Homer" that Kowal believes could be found through an alternative search is not responsive to her request for records related to the investigation and trial "of Daniel Troya." Nor is it "obvious" that Troya would be referenced only by his alias in any agency database. *See Am. Oversight v. Dep't of Health & Hum. Servs.*, 101 F.4th 909, 923–24 (D.C. Cir. 2024). Once the agencies found their criminal investigative files pertaining to Troya's capital case, it was reasonable not to search further.

Kowal merely speculates the agencies possess additional records in which Troya was identified only by his street name. But that is insufficient to demonstrate the agencies' searches were unreasonable or performed in bad faith.

* * *

In sum, the FBI, ATF, and DEA followed Kowal's specific requests to locate records relevant to Troya's criminal case and demonstrated that their search methods were reasonable.

B.

Kowal also challenges the agencies' reliance on FOIA Exemptions 3, 6, 7(C), 7(D), and 7(E) to withhold records.[3] Agencies may demonstrate the applicability ***1030** of an

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exemption by affidavit. And "an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.' " *Judicial Watch, Inc. v. Dep't of Defense*, 715 F.3d 937, 941 (D.C. Cir. 2013) (per curiam) (cleaned up). We hold the agencies were justified in withholding certain records under these exemptions.

[3] The FBI and DEA also withheld records pursuant to FOIA Exemption 7(F), 5 U.S.C. § 552(b)(7)(F). The district court did not rule on the applicability of this exemption because all records withheld under 7(F) were also withheld under 7(C). We agree the records are exempt under Exemption 7(C), so it is unnecessary to determine whether Exemption 7(F) also justifies withholding these records.

1.

Exemption 3 protects records "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3). The FBI invoked this exemption to withhold a narrative summary of a wiretap conversation, as required by the Wiretap Act, 18 U.S.C. §§ 2510–12. Kowal does not dispute the record is subject to Exemption 3's protections. She claims instead that the record should be released under the public domain doctrine because it summarizes wiretaps introduced at Troya's trial.

The public domain doctrine provides that "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999). But this exception is "narrow" and entitles "the requester [to] receive no more than what is publicly available." *See id.* at 553–55. Courts are forbidden "from prying loose from the government even the smallest bit of information that is properly" withheld. *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983).

Kowal alleges only that the wiretapped conversations were made public at Troya's trial, not that the FBI's narrative summary of those conversations was made public. An agency's summary is not the same as the conversation itself. Kowal has not shown "there is a permanent public record of the exact" record she seeks. *Davis v. Dep't of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992). The public domain doctrine does not defeat the FBI's withholding under Exemption 3.

2.

The FBI, ATF, and DEA invoked FOIA Exemptions 6 and 7(C) to withhold the names and other identifying information, including addresses and phone numbers, of witnesses and law enforcement personnel involved in Troya's investigation. FOIA Exemption 6 protects "personnel ... and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). FOIA Exemption 7(C) protects "records or information compiled for law enforcement purposes ... [that] could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(C). When, as here, the request is for records compiled for law enforcement purposes, the information protected by Exemption 6 is a subset of that protected by Exemption 7(C), so we need only analyze the latter. *Roth v. Dep't of Justice*, 642 F.3d 1161, 1173 (D.C. Cir. 2011).

When reviewing an agency's reliance on Exemption 7(C), we "must balance the privacy interests involved against the public interest in disclosure." *SafeCard*, 926 F.2d at 1205. There must be "substantial probability that the disclosure [of information] will lead to the threatened invasion [of privacy]." *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989). We "apply a more deferential attitude toward the claims of ***1031** 'law enforcement purpose' made by a criminal law enforcement agency" because "inadvertent disclosure of criminal investigations, information sources, or enforcement techniques might cause serious harm to the legitimate interests of law enforcement agencies." *Pratt v. Webster*, 673 F.2d 408, 418 (D.C. Cir. 1982).

Kowal argues that the agencies failed to justify their withholdings. We disagree. The FBI, ATF, and DEA explained that they redacted names and other personal information, such as telephone numbers, addresses, and confidential source numbers, to prevent "possible harassment" or "derogatory inferences and suspicion" against the personnel and witnesses for their involvement in a gang murder investigation. These explanations are sufficient to demonstrate that the disclosure of the withheld information would threaten privacy interests. *Schrecker v. Dep't of Justice*, 349 F.3d 657, 666 (D.C. Cir. 2003).

Moreover, Kowal fails to establish any cognizable public interest in disclosure. There is no public interest in disclosure

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"unless there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity, and access to the [requested information] ... is necessary in order to confirm or refute that evidence." *Safecard*, 926 F.2d at 1205–06. Kowal provides no evidence of agency misconduct. Instead, she merely speculates that the government may have exculpatory evidence in Troya's capital case and that this implicates the public interest. Our caselaw is clear that "the requester must establish more than a bare suspicion in order to obtain disclosure." *CREW v. Dep't of Justice*, 746 F.3d 1082, 1094 (D.C. Cir. 2014) (cleaned up); *see also Roth*, 642 F.3d at 1178 (same). Where there is no identifiable public interest, the privacy interest protected by Exemption 7(C) prevails because "something, even a modest privacy interest, outweighs nothing every time." *Horner*, 879 F.2d at 879.

Kowal also argues the public domain doctrine should overcome the agencies' reliance on Exemption 7(C) for some withheld trial records and witness names. Although she provided the district court with a list of testifying witnesses and transcripts of their testimony, these trial records demonstrate only that those specific witnesses testified at trial. The records do not link witnesses to particular documents or to the information provided by that source. Because the specific information Kowal seeks has not been publicly disclosed, she cannot benefit from the public domain doctrine. *See Afshar*, 702 F.2d at 1130.

Kowal also specifically challenges the FBI's withholding of a testifying witness's plea agreement because the agreement was admitted into evidence at trial and discussed in open court. Trial records are generally considered public; however, to satisfy the public domain doctrine, they must be "preserved in a permanent public record." *Cottone*, 193 F.3d at 554. Records are no longer public when "destroyed, placed under seal, or otherwise removed from the public domain." *Id.* at 556. And our circuit has cast doubt on the proposition that "practically obscure" material remains public. *Davis*, 968 F.2d at 1279 (cleaned up). Here, the FBI has provided evidence that Troya's trial records, including the specified plea agreement, were not filed with the court and preserved. Because these records are not accessible on the public or electronic docket, the plea agreement does not fit within the public domain doctrine.

We hold that the FBI, ATF, and DEA properly justified their withholding of records under Exemption 7(C).

***1032** 3.

The FBI and DEA also relied on Exemption 7(D) to withhold information that "could reasonably be expected to disclose the identity of a confidential source ... [or] information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). Kowal argues this exemption is inapplicable because the agencies failed to demonstrate that each source testified with an assurance of confidentiality and provided no "particularized findings for each source."

A source is "confidential" if he "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Dep't of Justice v. Landano*, 508 U.S. 165, 172, 113 S.Ct. 2014, 124 L.Ed.2d 84 (1993). For example, in the context of a serious or violent crime we may infer an assurance of confidentiality because of the risks of exposing a "criminal enterprise ... inclined toward violent retaliation." *Mays v. DEA*, 234 F.3d 1324, 1330 (D.C. Cir. 2000). Of course, we cannot "cloak in confidentiality anything anyone ever tells a law enforcement officer about any ... crime." *Id.* Nonetheless, the government may invoke Exemption 7(D) if the circumstances, such as the nature of the crime investigated and the informant's relation to it, support an inference of confidentiality. *Id.* at 1329.

The circumstances here easily support an inference of confidentiality for each source in Troya's murder investigation. [4] The FBI plausibly asserted it was "especially important" to withhold information about sources in this context "given the subject matter ... involves [the] murder of a family on a roadside, [and Troya] was convicted for such murder." Similarly, the DEA explained the sources provided information about an extensive drug trafficking operation and therefore faced a threat of violent reprisal. We have recognized implied assurances of confidentiality in similar circumstances. *See id.* (informants to a conspiracy to distribute crack cocaine); *Hodge v. FBI*, 703 F.3d 575, 578, 581–82 (D.C. Cir. 2013) (informants in a triple murder investigation). The grisly nature of Troya's crime, committed to further a drug trafficking operation, permits a fair inference of confidentiality for the sources in Troya's investigation.

4 Because the information was provided by sources with an implied assurance of confidentiality, we need not address whether some information was

> also provided pursuant to an express assurance of confidentiality.

Kowal also maintains that any source who expected to testify at trial cannot be considered confidential and is not protected by Exemption 7(D). But our circuit has long rejected this argument. "It would defeat the purpose of FOIA [E]xemption 7(D) to hold that the possibility of trial testimony to some or all of the substance of an FBI interview establishes that the source had no expectation that his identity would remain undisclosed." *Schmerler v. FBI*, 900 F.2d 333, 339 (D.C. Cir. 1990).

We note that Exemption 7(D) has no balancing test. If "production of criminal investigative records could reasonably be expected to disclose the identity of a confidential source or information furnished by such a source, that ends the matter." *Roth*, 642 F.3d at 1184–85 (cleaned up). The FBI and DEA demonstrated the sources here were confidential and reasonably justified withholding the information they provided in Troya's investigation.

4.

Kowal also challenges the FBI's and DEA's Exemption 7(E) withholdings. Exemption ***1033** 7(E) allows agencies to withhold records when release would "disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The FBI and DEA invoked Exemption 7(E) to withhold records detailing investigative techniques, including technical information about computer databases and internal systems.

To justify withholding under Exemption 7(E), an agency must clear only a "low bar" by "demonstrat[ing] logically how the release of the requested information might create a risk of circumvention of the law." *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (cleaned up).

This low bar is easily cleared here. The agencies provided well-supported affidavits explaining how the information withheld could aid criminal elements. For example, the DEA's declarant explained the withheld information could provide drug traffickers information on how the agency prioritized its investigations, permitting would-be criminals to change their behaviors to avoid detection. Similarly, the FBI's affidavit explained that providing information on internal databases and file paths could aid in the commission of cyberattacks against the agency. The agencies logically connected withholding with preventing circumvention of the law.

Kowal also claims this withheld information is publicly available, but her evidence fails to support this contention. For example, she asserts that a requested DEA manual is public, providing an Amazon.com link. But this link is for an outdated manual, and Kowal does not allege the DEA officially released this manual. *See, e.g.*, *Medina-Hincapie v. Dep't of State*, 700 F.2d 737, 742 n.20 (D.C. Cir. 1983) (observing an unauthorized disclosure does not waive a FOIA exemption). Nor does Kowal demonstrate the agencies merely withheld information on ordinary law enforcement tactics already known to the public. Instead, the agencies' affidavits detail how the agencies were protecting "methods ... [the agency] considers meaningful ... [which] can reveal law enforcement techniques and procedures." *Shapiro v. Dep't of Justice*, 893 F.3d 796, 800 (D.C. Cir. 2018).

The FBI and DEA met their burden to explain how disclosure of the information could reasonably be expected to risk circumvention of the law under Exemption 7(E). [5]

5 Kowal also challenges the adequacy of the agencies' *Vaughn* indices and the appropriateness of redactions. Her arguments largely mirror those made against the FOIA exemptions, and they similarly fail.

* * *

For the foregoing reasons, the agencies properly responded to Kowal's FOIA requests. We therefore affirm the grants of summary judgment to the FBI, ATF, and DEA.

So ordered.

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 Appendix 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARBARA KOWAL

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE et al.,

Defendants.

Civil Action No. 18-2798 (TJK)

MEMORANDUM OPINION

Barbara Kowal, a paralegal at the Federal Defender for the Middle District of Florida, filed this Freedom of Information Act suit against the Department of Justice and three of its components, the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Federal Bureau of Investigation, and the Drug Enforcement Agency. Kowal requested all records from the ATF and FBI pertaining to Daniel Troya, a capital defendant represented by the Federal Defender in his post-conviction hearings. The ATF and FBI produced documents from their records systems but withheld others in whole or in part under several FOIA and Privacy Act exemptions. The FBI also sent a subset of documents to the DEA for review, which were released in part to Kowal. After cross-motions for summary judgment, the Court granted summary judgment for Defendants as to the ATF and the adequacy of the FBI's search, but concluded that the FBI's *Vaughn* indices were inadequate. Since then, the FBI has updated its *Vaughn* indices and the parties have cross-moved again for summary judgment.

Defendants argue that their updated *Vaughn* indices are sufficient, they properly invoked certain FOIA exemptions to justify their withholdings, and they met their duty to disclose all reasonably segregable portions of the records at issue. In response, Kowal argues that the FBI's

Vaughn indices are still inadequate, that the FBI failed to adequately justify the claimed FOIA exemptions, improperly withheld information in the public domain, and failed to disclose all reasonably segregable information. The Court finds that the FBI's *Vaughn* indices are sufficient and that it properly invoked Exemptions 3, 6, 7(C), 7(D), 7(E), and 7(F). The Court also finds that the FBI met its duty to disclose all reasonably segregable portions of the records at issue. The Court will therefore grant Defendants' motion and deny Kowal's.

I. Background

The Court granted Defendants' previous motion for summary judgment as to the ATF and as to the adequacy of the FBI's search. *Kowal v. DOJ,* 490 F. Supp. 3d 53, 72 (D.D.C. 2020). The Court assumes familiarity with the facts and the contents of its prior Opinion and Order. Since that time, Defendants have filed updated *Vaughn* indices and additional declarations. *See* ECF 31-2. Pending before the Court are their renewed cross-motions for summary judgment. ECF No. 31; ECF No. 36.

II. Legal Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Summary judgment is appropriate when, "viewing the evidence in the light most favorable to the non-movants and drawing all reasonable inferences accordingly, no reasonable jury could reach a verdict in their favor." *Lopez v. Council on Am.-Islamic Rels. Action Network, Inc.*, 826 F.3d 492, 496 (D.C. Cir. 2016).

FOIA "requires federal agencies to disclose information to the public upon reasonable request unless the records at issue fall within specifically delineated exemptions." *Judicial Watch, Inc. v. FBI*, 522 F.3d 364, 366 (D.C. Cir. 2008). It creates a "strong presumption in favor

of disclosure," and "places the burden on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). If information is already in the public domain, an agency cannot invoke an otherwise valid exemption to withhold it. *See Students Against Genocide v. U.S. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001). When an agency withholds portions of a record, it must still disclose "[a]ny reasonably segregable portion . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b).

A court reviewing a FOIA action may grant summary judgment based on the agency's declarations "[i]f an agency's affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith." *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). But the agency may not rely on "conclusory and generalized allegations of exemptions" in its affidavits. *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973).

III. Analysis

A. Sufficiency of FBI's *Vaughn* Indices

Kowal again challenges the sufficiency of the *Vaughn* indices provided by the FBI. Because FOIA requesters face information asymmetry that favors the agency, courts evaluating claimed FOIA exemptions must rely on the agency's representation of the materials it withholds. *See King v. DOJ*, 830 F.2d 210, 218 (D.C. Cir. 1987). A sufficiently detailed *Vaughn* index enables that evaluation. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006). An agency must use a *Vaughn* index to explain withheld information by "specify[ing] in detail which portions of the document are disclosable and which are allegedly exempt." *Vaughn*, 484 F.2d at 827.

A court evaluates a *Vaughn* index on its function, not its form. *See Keys v. DOJ*, 830 F.2d 337, 349 (D.C. Cir. 1987). An adequate *Vaughn* index functions in part to enable the reviewing court to determine whether the agency properly invoked FOIA exemptions. *See Lykins v. DOJ*, 725 F.2d 1455, 1463 (D.C. Cir. 1984). It does so if it "provide[s] a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). Thus, an index must "state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant." *Founding Church of Scientology of Wash., D.C. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

Kowal argues that the FBI has not cured the deficiencies in its *Vaughn* indices and fails to "provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Cent., Inc.*, 566 F.2d at 251. Kowal also argues that "[f]requently the level of detail in the document descriptions is insufficient to allow a requestor to reasonably determine whether the claimed exemptions have been properly invoked." ECF No. 35 at 15. In ruling on the previous cross-motions for summary judgment, the Court noted that the lack of document descriptions or submission of redacted documents made it difficult to "understand with particularity which portions the FBI seeks to withhold under the exemptions claimed." *Kowal v. DOJ*, 490 F. Supp. 3d 53, 68 (D.D.C. 2020).

But the FBI's revised indices resolve these issues. The *Vaughn* indices now include descriptions as to the types of documents to which the exemptions are being applied. These descriptions work in combination with coded designations and Defendants' declarations to give

further context as to why each exemption is relevant. In combination, these tools provide enough information for the Court to understand the nature of the redacted material. *See Judicial Watch*, 449 F.3d at 145. And ultimately, the FBI's revised *Vaughn* indices adequately enable the Court to review the agency's withholdings under these exemptions. *See Lykins*, 725 F.2d at 1463.

B. The FBI's Withholdings

1. Exemption 3

Defendants invoke Exemption 3 to withhold documents "relating to wire and electronic communications interception and interception of oral communications." ECF No 31-2 at 38 ("Second Hertel Decl.") ¶ 9. FOIA's Exemption 3 exempts records that are "specifically exempted from disclosure by statute" if the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. § 552(b)(3)(A)(i). And the D.C. Circuit has held that "intercepted communications" obtained under a Title III wiretap fall "squarely within the scope" of Exemption 3. *Chong v. DEA*, 929 F.2d 729, 733 (D.C. Cir. 1991).

Defendants invoked this exemption for two pages of a "narrative summary of the initiation of an investigation of a targeted drug trafficking organization." *See* ECF No. 31-2 at 12. The FBI's declaration explains that it invoked the exemption because portions of the records are based on wire and electronic communication interceptions and are thus protected under 18 U.S.C. § 3510. Second Hertel Decl. ¶ 9. But Kowal argues that Defendants have not met their burden to withhold these pages due to the potential applicability of the public domain doctrine. *See* ECF No. 35 at 17. She reasons that the recorded wiretaps were played at trial and are therefore part of the public domain. She invokes *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir.

1999), to suggest that these recordings "los[t] their protective cloak once disclosed" and that without more information, the Court cannot evaluate whether the FBI improperly withheld materials already in the public domain.

But Kowal's argument misses a critical point—the *Vaughn* index makes clear that the records at issue are part of a "narrative summary" document, not a transcript or tapes of a wiretap. *See* ECF No. 31-2 at 12. Even assuming the wiretaps referenced in the narrative summary were played at trial, Kowal has not shown that the document at issue is part of the public domain. "For the public domain doctrine to apply, the specific information sought must have already been 'disclosed and preserved in a permanent public record.'" *Students Against Genocide*, 257 F.3d at 836 (quoting *Cottone*, 193 F.3d at 554). Thus, Defendants have properly invoked Exemption 3.

2. Exemptions 6 and 7(C)

Under Exemptions 6 and 7(C), Defendants withheld the identities of, and personal information about, individuals involved or associated with law enforcement investigations. Second Hertel Decl. ¶ 16. All information that "applies to a particular individual" qualifies for consideration under Exemption 6. *See U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *see also Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. DOJ*, 503 F. Supp. 2d 373, 381 (D.D.C. 2007) ("Congress'[s] primary purpose in drafting Exemption 6 was to provide for confidentiality of personal matters."). And under Exemption 7(C), "the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files" under Exemption 6. *DOJ v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989). Thus, because "Exemption 7(C) is more protective of privacy than

Exemption 6," *U.S. Dep't of Def. v FLRA*, 510 U.S. 487, 496 n.6 (1994), and the records at issue were compiled for law enforcement purposes, the Court need only consider whether the FBI properly invoked Exemption 7(C). *See Roth v. DOJ*, 642 F.3d 1161, 1173 (D.C. Cir. 2011) ("[A]ll information that would fall within the scope of Exemption 6 would also be immune from disclosure under Exemption 7(C)."). Narrowing the analysis further, because Kowal does not dispute that the requested records about Troya's criminal prosecution are law enforcement files for purposes of Exemption 7(C), the Court need only evaluate the FBI's redactions by balancing "the privacy interests involved against the public interest in disclosure." *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1205 (D.C. Cir. 1991).

"Exemption 7(C) 'affords broad[] privacy rights to suspects, witnesses, and investigators.'" *SafeCard Servs.*, 926 F.2d at 1205 (quoting *Bast v. DOJ*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)). And the public interest in personally identifiable information is "not just less substantial, it is insubstantial," *id.*, unless there is "compelling evidence that the agency denying the FOIA request is engaged in illegal activity" and "access to the names of private individuals appearing in the agency's law enforcement files is necessary to confirm or refute that evidence." *Id.* at 1205–06. Otherwise, "there is no reason to believe that the incremental public interest in such information would ever be significant," and the information is exempt from disclosure. *Id.* at 1206. Since Kowal does not point to any illegal activity implicating the FBI or its redactions under Exemptions 6 and 7(C), the Court cannot find fault with the balance that the FBI struck.

Kowal argues that Defendants have provided no facts to suggest that disclosure would work a clearly unwarranted invasion of personal privacy so as to outweigh public interest in disclosure. *See* ECF No. 35 at 21. In part, this argument presumes that these individuals' identities were revealed at trial. While perhaps some of them were, Kowal does not meet her

burden to show that the identical documents and information that FBI seeks to withhold here were made public then. *See Bartko v. DOJ*, 167 F. Supp.3d 55, 72 (D.D.C. 2016) ("Aside from the trial testimony she references, the plaintiff has not even tried to explain how the balance of the materials she seeks is public.") (cleaned up); *Black v. DOJ*, 69 F. Supp. 3d 26, 35 (D.D.C. 2014) (determining burden unmet where plaintiff provided court transcripts but failed "to point to specific information identical to that being withheld that has been placed in the permanent public record").[1] Further, "[e]ven if [Kowal] already knows the identities of trial witnesses, the [FBI's] decision to withhold their names and other identifying information under Exemption 7(C) is justified" because "[a] witness does not waive his or her interest in personal privacy by testifying at a public trial." *Sellers v. DOJ*, 684 F. Supp. 2d 149, 159–60 (D.D.C. 2010); *see also Lardner v. DOJ*, No. 03-cv-0180 (JDB), 2005 WL 758267, at *19 (D.D.C. Mar. 31, 2005) (finding that the name of a witness who testified at a public trial was properly withheld under Exemption 7(C)). Ultimately, Kowal has not shown that the withheld material is in the public domain, or that the balance of interests tips towards release of the information withheld by Defendants under Exemptions 6 and 7(C).

3. Exemption 7(D)

Exemption 7(D) allows the withholding of records that could disclose the identity of confidential sources as well as any information those sources provide. 5 U.S.C. § 552(b)(7)(D).

[1] Kowal also argues that an October 31, 2007, third-party plea agreement, Exhibit BB (TT 5953), is within the public domain because it was admitted into evidence at Troya's trial. ECF No. 44-3. But the FBI attests that the plea agreement is not available on the public docket and thus is not in the public domain. In *Cottone*, the court held that the government can rebut a plaintiff's suggestion that trial records are in public domain by showing that the evidence has since been "destroyed, placed under seal, or otherwise removed from the public domain." 193 F.3d 550, 556 (D.C. Cir. 1999). Thus, because the plea agreement is not available on the public docket, it is not in the public domain, and may be withheld under Exemption 7(C).

In determining the applicability of the exemption, "the question is . . . whether the particular source spoke with an understanding that the communication would remain confidential." *DOJ v. Landano*, 508 U.S. 165, 172 (1993). Defendants invoked Exemption 7(D) to "withhold portions of the report that contained information that would disclose the identity of and the information provided by a confidential source." Second Hertel Decl. ¶ 27. Defendants claim that sometimes they gave an express assurance of confidentiality to their sources and, at other times, an assurance of confidentiality was implied, given the subject matter of the investigation. *Id.* ¶ 28; ECF No. 31 at 14.

Kowal argues that Defendants improperly presumed that any individuals who provided information to the FBI did so under an implied assurance of confidentiality. *See* ECF No. 35 at 25. Kowal is right that it would be improper to apply a blanket presumption. *See Landano*, 508 U.S. at 175–76. But an assurance of confidentiality can still be implied based on the nature of the criminal investigation and the informant's relationship to the target. *Id.* at 179. This is one of those situations. The FBI explains that the sources provided information about a "drug organization" and the related murder of a family on a roadside. ECF No. 40-2 at 11.[2] And Courts often find that confidentiality is implied in illicit drug trade investigations because violent reprisal is so common. *See, e.g.*, *Wilson v. DEA*, 414 F. Supp. 2d 5, 15 (D.D.C. 2006); *Mays v. DEA*, 234 F.3d 1324, 1329–30 (D.C. Cir. 2000); *Love v. DOJ*, No. 13-cv-1303,

[2] To the extent Kowal argues that the "particularized approach" laid out in *Landano* requires information about the specific circumstances of each informant, ECF No. 35 at 24, she overstates the holding of that case. *Landano* rejects a categorical presumption of confidentiality for all investigations and instead requires the government to distinguish those investigations for which they assert Exemption 7(D) from the run-of-the-mill variety. *See also Quiñon v. FBI*, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (discussing the "case-specific factor" cited to justify invocation of Exemption 7(D)). But *Landano* does not require that each distinguishing factor be provided to the Court as to each individual source, and Kowal cites no case law to support such a requirement.

2015 WL 5063166 at *6 (D.D.C. 2015). Because of the nature of the investigation, the Court can infer an assurance of confidentiality. And this inferred assurance of confidentiality allows the Court to conclude that Defendants properly invoked Exemption 7(D).

4. Exemption 7(E)

Exemption 7(E) allows the withholding of documents complied for law enforcement purposes if disclosing such records "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Agencies face a "relatively low bar" when trying to withhold information under Exemption 7(E). *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). The agency need only "demonstrate logically how the release of the requested information might create risk of circumvention of the law." *Id.* (quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009)).

Both the FBI and DEA's *Vaughn* indices reflect withholdings based on this exemption. The FBI withheld four categories of information: "Sensitive Information within FBI FD-515 Forms," "Internal Secure File Paths and E-mail Web Addresses," "Investigative Techniques and Procedures Relevant to the FBI's Informant Program," and "Database Identifier[s]." *See* ECF No. 19-6 at 30–35. The Hardy Declaration describes each of these categories and presents the logic for how release of the requested information might create risk of circumvention of the law. *See* ECF No. 19-6 at 30–35. And the DEA invoked this exemption to withhold several pages of a "Organized Crime Drug Enforcement Task Force (OCDETF) Investigation Initiation Form Narrative Summary of the Case Investigation." ECF No. 31-2 at 52–57. The Hertel Declaration

also explains that the exempt portions "deal with manpower requirements, tools to be used in the investigation, strategy for pursuing the targeted information, and more." ECF No. 31-2 at 46–47.

Kowal contests Defendants' reliance on Exemption 7(E) on several grounds. First, she argues that the "FBI has failed to demonstrate that the information it has withheld concerns techniques that are not otherwise already in the public domain." ECF No. 35 at 28. And second, she argues that Defendants have not shown that they have met their segregability responsibilities about material withheld under Exemption 7(E). She specifically flags a document appearing at bates-stamped page 141, which Defendants withheld in full, despite their invocation of 7(E) to redact "Internal Secure File Paths and E-mail Web Addresses." ECF No. 35 at 28–29. And finally, she challenges Defendants' establishment of a logical connection between the withheld information and circumvention of the law, specifically pointing to information withheld under the "database identifiers" and "internal secure file paths" categories. ECF No. 44 at 19–20.

Defendants face only a relatively low bar to invoke Exemption 7(E), and they have cleared it. As for Kowal's public domain argument, the Hardy Declaration makes clear that information related to publicly known law enforcement techniques was withheld because it *also* included non-public information. For example, Defendants acknowledge that the surveillance techniques discussed on pages with redactions for "Sensitive Information within FBI FD-515 Forms" are publicly known. But the information redacted there is a rating scale assessing the effectiveness of each technique in the context of the investigation, as well as information about law enforcement partnerships used to carry out the techniques. Kowal does not argue that this kind of specific contextual and analytical information is publicly known. And as Defendants suggest, this sort of information could alert potential criminals to the techniques that the FBI

finds useful in a certain type or stage of investigation, as well as their law enforcement partners that might be involved in these investigative methods.

Kowal's arguments related to "Internal Secure File Paths and E-mail Web Addresses" also come up short. First, as to bates-stamped page 141, Defendants explain that a sensitive file path was withheld under Exemption 7(E), but that other information on that page was withheld under *other* exemptions, which ultimately caused Defendants to withhold the entire page. ECF 40-1 at 5. And second, Defendants have met their burden to "demonstrate logically how the release of the requested information might create risk of circumvention of the law." *Blackwell*, 646 F.3d at 42. The FBI explains that "internal secure file paths" "if released, could allow hackers with technical skills an opportunity to exploit the FBI by disrupting the FBI's internal communications. By releasing this information publicly, the FBI could jeopardize its own secure technological infrastructure thereby assisting criminals in circumventing the law." ECF 40-1 at 5. And as for "database identifiers," the FBI explains that "[r]eleasing the identity of this database would give criminals insight into the available tools and resources the FBI and its partners use to conduct criminal and national security investigations." ECF 19-6 at 35. This kind of technical information is regularly withheld under Exemption 7(E), and the FBI has sufficiently explained the logic that justifies withholding it here. *See Price v. DOJ*, No. 18-cv-1339 (CRC), 2020 WL 3972273, at *13 (D.D.C. July 14, 2020); *Dutton v. DOJ*, 302 F. Supp. 3d 109, 125 (D.D.C. 2018).

5. Exemption 7(F)

Exemption 7(F) allows the withholding of documents compiled for law enforcement purposes if disclosure "could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. § 552(b)(7)(F). Defendants only invoke Exemption 7(F) in

conjunction with Exemption 7(C). ECF No. 31-2 at 7–31. Given that Exemption 7(F) is "an absolute ban against certain information and, arguably, an even broader protection than 7(C)," *Raulerson v. Ashcroft*, 271 F. Supp. 2d 17, 29 (D.D.C. 2002), and as the Court has determined that Defendants properly invoked Exemption 7(C), the Court need not reach the applicability of Exemption 7(F). *See Wilson v. DEA*, 414 F. Supp. 2d 5, 14 n.8 (D.D.C. 2006).

C. Segregability of the Documents FBI Withheld in Full

Finally, Kowal argues that the FBI failed to show how portions of documents it withheld in full were not segregable. Segregability is analyzed using a burden-shifting framework. Agencies must provide a "detailed justification" for the non-segregability of the withheld information, although not "so much detail that the exempt material would be effectively disclosed." *Johnson v. Exec. Off. for U.S. Att'ys*, 310 F.3d 771, 776 (D.C. Cir. 2002). Agencies typically meet their initial burden by providing a *Vaughn* index and "a declaration attesting that the agency released all segregable material." *Judicial Watch, Inc. v. DOJ*, 20 F. Supp. 3d 260, 277 (D.D.C. 2014). Once that happens, "[a]gencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). The plaintiff must then produce a "quantum of evidence" rebutting this presumption, at which point "the burden lies with the government to demonstrate that no segregable, nonexempt portions were withheld." *Id.*

Kowal argues that Defendants' justifications for withholding the documents in full were too conclusory and circular to prove that the agency properly determined that there were no segregable portions. ECF No. 40 at 30. But the FBI has met its initial burden here and the plaintiff has not produced a "quantum of evidence" to rebut it. The FBI has provided a *Vaughn* index detailing which documents have been withheld in full and which exemptions were applied.

And, as its declaration explains, "any non-exempt information on [pages withheld in full] was so intertwined with exempt material, no information could be reasonably segregated for release." ECF 19-6 at 38. Upon review of the relevant *Vaughn* indices and Defendants' declarations, the Court is satisfied that Defendants have shown that no portion of the documents withheld in full is reasonably segregable and therefore must be disclosed.[3]

IV. Conclusion

For all the above reasons, the Court will grant Defendants' Motion for Summary Judgment and deny Kowal's Motion for Summary Judgment. A separate order will issue.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: September 30, 2021

[3] Upon consideration of the Plaintiff's Proposed Amended Counterstatement of Material Facts, ECF No. 43-1, the Court does not find that the Proposed Counterstatement materially impacts its opinion or the reasoning underlying it. Therefore, the Court will deny the Plaintiff's Motion to Amend as moot.

 Appendix 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARBARA KOWAL,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE et al.,

Defendants.

Civil Action No. 18-2798 (TJK)

MEMORANDUM OPINION

Barbara Kowal, a paralegal assisting a federal criminal defendant in his post-conviction proceedings, submitted requests under the Freedom of Information Act for records about that defendant from several federal agencies, including the Federal Bureau of Investigation, or FBI, and the Bureau of Alcohol, Tobacco, Firearms and Explosives, or ATF. Kowal later sued these agencies over their responses to her requests. As relevant here, the Court granted the ATF summary judgment as to the adequacy of its search for records, granted the FBI summary judgment on its decision to withhold a plea agreement under a FOIA exemption, and entered final judgment in their favor. Kowal now moves to alter or amend the judgment, challenging these two aspects of the Court's summary judgment rulings. There is no clear error for the Court to correct, so it will deny the motion.

I. Background

The Court assumes familiarity with the background of this case. *See* ECF No. 29; ECF No. 49. Briefly, Kowal is a paralegal for the Federal Defender for the Middle District of Florida, which represents federal criminal defendant Daniel Troya in post-conviction proceedings. ECF No. 29 at 1–2. She submitted FOIA requests for records related to Troya from the ATF and the

FBI. *Id.* at 2. These agencies searched for responsive records, reviewed the results of their searches, and produced some records but withheld others under FOIA exemptions. *Id.* at 2–7.

Kowal later sued. She alleged that these agencies violated FOIA in several ways, including by failing to conduct adequate searches and wrongly withholding responsive records. ECF No. 1 ¶¶ 32–43. After one round of summary judgment briefing, the Court granted both agencies summary judgment as to the adequacy of their searches and granted the ATF summary judgment on whether it had wrongfully withheld any records. But it denied summary judgment for both Kowal and the FBI as to whether the FBI had improperly withheld records. *See* ECF No. 29 at 8–24. After another round of briefing, the Court granted the FBI summary judgment and entered final judgment. *See* ECF No. 48; ECF No. 49.

Kowal now moves to alter or amend the judgment. *See* Fed. R. Civ. P. 59(e). She argues that the Court clearly erred in granting summary judgment for the ATF about the adequacy of its search and for the FBI about its withholding of a third-party plea agreement. ECF No. 50. The agencies oppose. ECF No. 53.

II. Legal Standard

Rule 59(e) allows a district court to correct its own mistakes in the period immediately following the entry of judgment. *White v. N.H. Dep't of Emp. Sec.*, 455 U.S. 445, 450 (1982). But "[a]ltering or amending a judgment under Rule 59(e) 'is an extraordinary remedy which should be used sparingly.'" *Ecological Rts. Found. v. U.S. EPA*, 541 F. Supp. 3d 34, 45 (D.D.C. 2021) (quoting *Mohammadi v. Islamic Republic of Iran*, 782 F.3d 9, 17 (D.C. Cir. 2015)). A Rule 59(e) motion "need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Pigford v. Perdue*, 950 F.3d 886, 891 (D.C. Cir. 2020) (internal quotation

marks omitted). To be clearly erroneous, a "final judgment must be dead wrong"—it must "strike the court as wrong with the force of a five-week-old, unrefrigerated dead fish." *Slate v. Am. Broad. Cos.*, 12 F. Supp. 3d 30, 35 (D.D.C. 2013) (cleaned up); *see also New York v. United States*, 880 F. Supp. 37, 39 (D.D.C. 1995) (per curiam) ("Only if the moving party presents . . . a clear error . . . which compel[s] a change in the court's ruling will the motion to reconsider be granted." (internal quotation marks omitted)). A Rule 59(e) motion is not a vehicle for "new arguments or evidence that the moving party could have raised before the decision issued." *Ecological Rts. Found.*, 541 F. Supp. 3d at 46 (cleaned up). The party seeking Rule 59(e) relief has the burden to prove that it is warranted. *See Bowser v. Smith*, 401 F. Supp. 3d 122, 124 (D.D.C. 2019).

III. Analysis

Kowal argues that the Court's summary judgment decisions about the adequacy of the ATF's search and the FBI's withholding of a third-party plea agreement were clearly erroneous. *See* ECF No. 50 at 5, 8. But she has not met the "very exacting standard" to show clear error in either ruling. *See Slate*, 12 F. Supp. 3d at 35.

First, the Court did not clearly err in granting summary judgment in favor of the ATF about the adequacy of its search. This issue came up in the first round of summary judgment briefing. The ATF moved for summary judgment, arguing that its search for records in response to Kowal's FOIA requests was adequate. ECF No. 19 at 4–5. As pertinent here, Kowal opposed summary judgment because there were "'positive indications of overlooked materials,'" explaining that she possessed more than two hundred "DVDs, CDs, audio recordings, and photos of evidence" that were responsive to her FOIA requests but that the agencies did not identify or produce in responding to those requests. ECF No. 21 at 27–28 (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180

F.3d 321, 327 (D.C. Cir. 1999)). The Court rejected Kowal's challenge and granted the ATF summary judgment as to the adequacy of its search. *See* ECF No. 29 at 8–10, 12–15, 25.

Kowal now argues that the Court clearly erred by misapplying the summary judgment standard in rejecting her "overlooked materials" argument and then granting the ATF summary judgment. ECF No. 50 at 8–15. Not so.

When an agency seeks summary judgment in a FOIA case because its search was adequate, the agency "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). If the agency makes that prima facie showing, the burden shifts to the requester to come forward with "countervailing evidence," such as "positive indication[s] of overlooked materials," that "raises substantial doubt" about the search's adequacy. *See Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314–15 (D.C. Cir. 2003) (cleaned up); *Schoenman v, FBI*, 764 F. Supp. 2d 40, 46 (D.D.C. 2011). If the requester's "countervailing evidence" fails to "raise a 'substantial doubt' as to the adequacy of the [agency's] search," summary judgment for the agency on this issue is appropriate. *See Schoenman v. FBI*, 764 F. Supp. 2d at 51–52 (quoting *Iturralde*, 315 F.3d at 314); *Wright v. Admin. for Children & Families*, No. 15-cv-218 (BAH), 2016 WL 5922293, at *8–9 (D.D.C. Oct. 11, 2016).

Previously, the Court found that the ATF carried its initial burden to show that its search was adequate. *See* ECF No. 29 at 8–10, 12–15. Thus, to stave off summary judgment for the ATF on this issue, Kowal had to show that the "overlooked materials" she referenced raised "substantial doubt" about the adequacy of the ATF's search. *See Schoenman*, 764 F. Supp. 2d at 46. She didn't. All that she argued on this point was that

> [h]ere, there are records which could have been located and produced had a proper search been conducted. These include, but are not limited to DVDs, CDs, audio

> recordings, and photos of evidence. Plaintiff is in possession of over two hundred such items obtained in the course of post conviction representation of Mr. Troya that would be responsive to the FOIA requests, however, not one DVD, CD, audio recording, or photo has been produced by the Defendants. It appears the agency has completely overlooked or without documenting completely withheld all but written records.

ECF No. 21 at 27–28. She supported her argument with one paragraph in her declaration, in which she stated that she was "in possession of over two hundred items comprising DVDs, CDs, audio recordings, and photos that would be responsive to [her] various requests" but that "Defendants[]" had not "acknowledged or produced." ECF No. 21-1 ¶ 23. The Court rejected Kowal's argument mainly because she did not "explain[] why, just because *she* has" these records, "the *ATF* must also have them such that it could produce them in response to a FOIA request." ECF No. 29 at 15. That is, Kowal's vague and conclusory assertions failed to raise a substantial doubt about the adequacy of the ATF's search in the face of its prima facie showing that its search was adequate. The Court sees no error, let alone clear error, in this conclusion. *See Lopez v. Exec. Off. for U.S. Attys.*, 598 F. Supp. 2d 83, 87 (D.D.C. 2009).

In her motion, Kowal now raises new points to support her "overlooked materials" argument. For instance, she explains that "Defendants" produced some of the allegedly overlooked records to Troya "in the context of his criminal proceeding," purportedly showing that these "agency records exist." ECF No. 50 at 8. She also observes that, in the second round of summary judgment briefing, she "submitted the exhibit list from . . . Troya's capital trial," showing that "the government" introduced "a number of photographs and recordings into evidence." ECF No. 50 at 10 n.5 (citing ECF No. 44-2). Kowal's representations remain vague about precisely what the overlooked records are and where (for the most part) she got them. And she still does not explain why the *ATF*'s failure to identify or produce them in response to her request is a "positive indication of overlooked materials" raising a "substantial doubt" about the adequacy of the *ATF*'s search,

particularly given the various law enforcement agencies involved in Troya's case. But in any event, she does not explain why she failed to make these arguments before the Court granted summary judgment for the ATF. These arguments could have been raised then and so provide no basis for Rule 59(e) relief now.

Second, the Court did not clearly err in granting the FBI summary judgment over its withholding of a third-party plea agreement. This issue came up in the second round of summary judgment briefing. Kowal argued that the FBI improperly invoked FOIA Exemptions 6 and 7(C) to withhold the plea agreement of one of Troya's co-defendants because of the public-domain doctrine, *see* ECF No. 35 at 20, under which "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record," *see Cottone v. Reno*, 193 F.3d 550, 553–54 (D.C. Cir. 1999). Kowal argued that the public-domain doctrine applied because the plea agreement was admitted into evidence at Troya's trial and discussed in open court. ECF No. 35 at 20; *see also* ECF No. 44 at 14. In granting the FBI summary judgment on this issue, the Court found that the plea agreement "is not available on the public [*i.e.*, electronic] docket" of Troya's criminal case and thus "is not in the public domain," making the public-domain doctrine inapplicable. *See* ECF No. 49 at 8 n.1.

Kowal argues that the Court clearly erred in so concluding because the plea agreement, as a trial exhibit, became a judicial record subject to the "common-law right of access to judicial records," meaning that it is in the public domain despite its inaccessibility on the "public docket." *See* ECF No. 50 at 5–7. Even assuming the plea agreement is somehow publicly accessible in the trial court's records despite not being on the public docket, the Court sees no clear error in its previous ruling. Under the public-domain doctrine, information previously placed in the public domain that "has since become practically obscure . . . should not . . . necessarily be considered

permanently part of the public domain" to trigger the doctrine. *See Albert v. DOJ*, No. 04-5111, 2005 WL 79028, at *1 (D.C. Cir. Jan. 11, 2005) (cleaned up) (following *Davis v. U.S. DOJ*, 968 F.2d 1276, 1279 (D.C. Cir. 1992)). In other words, the public-domain doctrine does not require the disclosure of otherwise exempt materials—particularly materials exempt from disclosure under Exemption 7(C)—that are "technically public but practically obscure." *See Kolbusz v. FBI*, No. 17-cv-319 (EGS/GMH), 2021 WL 1845352, at *19 (D.D.C. Feb. 17, 2021) (cleaned up); *see also DOJ v. Reporters Comm, for Freedom of Press*, 489 U.S. 749, 762–64 (1989); *Bartko v. U.S. DOJ*, 167 F. Supp. 3d 55, 71 (D.D.C. 2016). Because the plea agreement, at the very least, "is not available on the [trial court's] public docket," it is practically obscure, even if it is technically public. *See* ECF No. 49 at 8 n.1. Thus, the Court did not clearly err in concluding that the FBI's withholding was proper.

IV. Conclusion

For these reasons, the Court will deny Kowal's motion to alter or amend. A separate order will issue.

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: June 27, 2022

Appendix 4

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5231 **September Term, 2024**

1:18-cv-02798-TJK

Filed On: September 17, 2024

Barbara Kowal,

Appellant

v.

United States Department of Justice, et al.,

Appellees

BEFORE: Srinivasan, Chief Judge, and Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5231 **September Term, 2024**

1:18-cv-02798-TJK

Filed On: September 17, 2024

Barbara Kowal,

Appellant

v.

United States Department of Justice, et al.,

Appellees

BEFORE: Henderson, Pillard, and Rao, Circuit Judges

O R D E R

Upon consideration of appellant's petition for panel rehearing filed on August 30, 2024, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

The Freedom of Information Act, 5 U.S.C. § 552(b) (2012), provides in pertinent part:

Public information; agency rules, opinions, orders, records, and proceedings

* * * * *

(a)(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) 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, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

No. 22-5231

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BARBARA KOWAL,
Petitioner-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:18-cv-02798 (Kelly, J.)

COMBINED PETITION BY PETITIONER-APPELLANT FOR PANEL REHEARING & REHEARING *EN BANC*

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August 30, 2024

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GLOSSARY

ATF	Bureau of Alcohol, Tobacco, Firearms, and Explosives
DEA	Drug Enforcement Agency
DOJ	United States Department of Justice
FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act

RULE 35(b) STATEMENT

This case concerns FOIA requests to the FBI, ATF, and DEA (collectively, "the government" or "Appellees") for investigative records.[1] Appellant Barbara Kowal respectfully requests this Court grant a Petition for Rehearing and Rehearing *En Banc* of the panel decision issued on July 16, 2024, affirming the district court's grant of summary judgment for Appellees. *Kowal v. DOJ*, 107 F.4th 1018 (D.C. Cir. 2024). This case should be reheard because it conflicts with Supreme Court and Circuit caselaw. Consideration by the full court is necessary to secure and maintain uniformity of the following decisions:

1. There is a well-developed body of law articulating the public domain doctrine in FOIA cases. Specifically, under Circuit precedent a trial exhibit enters the permanent public record when admitted into evidence. *Cottone v. Reno*, 193 F.3d 550, 554-55 (D.C. Cir. 1999). Unless destroyed or placed under seal, it remains a public record. *Id.* at 554. The panel created a new exception to the doctrine: if an exhibit is "not accessible on the public or electronic docket, [it] does not fit within the public domain doctrine." *Kowal*, 107 F.4th at 1031. This is a drastic departure from Circuit precedent and plainly invalid way to define the

[1] This case originated as two suits, one against FBI and ATF, the other against DEA. This Court consolidated the cases for oral argument and decided them in a single Opinion. Since the appeals retain separate dockets, this Petition is filed in both.

public domain. It is well settled what transpires in open court is public record. *Craig v. Harney*, 331 U.S. 367, 374 (1947); *In re Leopold*, 964 F.3d 1121, 1127 (D.C. Cir. 2020).

2. The decision conflicts with another aspect of the public domain doctrine by requiring a showing that the "exact record" is already in the public domain. The relevant inquiry, however, is whether the *information* is in the public domain, not whether it is also in precisely the same *form*. *Cottone*, at 555; *Niagra Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16, 19-20 (D.C. Cir. 1999).

3. The panel misapplied Circuit law regarding disclosure of third-party names in law enforcement records. Citing *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), it concluded third-party information is presumptively protected absent evidence of illegal agency activity. But here, the individuals' identities were already divulged during their voluntary testimony in open court about their involvement in the crime. Under Circuit law, *SafeCard* "does not apply" here and the names should not have been redacted. *Citizens for Resp. & Ethics in Washington v. DOJ* (*CREW II*), 854 F.3d 675, 682 (D.C. Cir. 2017); *Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995).

4. In *DOJ v. Landano*, 508 U.S. 165 (1993), the Supreme Court rejected a position adopted by many Circuits—including this one—that courts should

presume sources supplying information to law enforcement in the course of an investigation are inherently confidential. Instead, courts must conduct a fact-specific inquiry to determine whether each "particular source" furnished information with an expectation of confidentiality. *Id.* at 172. The district court expressly declined to conduct a source-by-source analysis. The panel not only erroneously affirmed the lower court, it substituted one irrebuttable presumption ("promises of confidentiality are inherently implicit when an agency solicits information about crimes") for another ("promises of confidentiality are inherently implicit when an agency solicits information about violent drug crimes"). Moreover, it mistakenly relied on caselaw directly abrogated by *Landano*.

5. The opinion got the summary judgment standard backwards: It weighed evidence and drew inferences in the light most favorable to the moving party (Appellees), then placed the burden on the non-moving party (Kowal) to refute those inferences. *Tolan v. Cotton*, 572 U.S. 650, 659 (2014). Consequently, it erroneously found no genuine issue of material fact regarding the adequacy of the agencies' searches.

BACKGROUND

Appellant is a paralegal in a Federal Defender Office that represents Daniel Troya in his federal post-conviction proceedings. Troya was sentenced to death after a trial in the Southern District of Florida. Various DOJ components

participated in the investigation and prosecution of Troya, including FBI, DEA, and ATF.

These agencies generated hundreds of records, including photographs and audio/video recordings. Many were introduced as trial exhibits. During post-conviction proceedings, Kowal obtained these exhibits and numerous other records Appellees had produced to the defense at trial.

Kowal submitted identical FOIA requests to Appellees seeking "all documents, files, records, etc. pertaining to any investigation, arrest, indictment, conviction, sentencing, incarceration, and/or parole of ... Daniel Troya (a/k/a 'Homer')." The requests covered multimedia items, like photographs and audio/video recordings.

No agency produced multimedia items in response or noted the existence of such records in their *Vaughn* indices. They also invoked various exemptions to withhold records Kowal contended were already in the public domain.

Kowal challenged the adequacy of the agencies' searches and various withholdings. After exhausting administrative remedies, she filed two suits: one primarily against FBI and ATF, and another against DEA. Both resulted in summary judgment favoring Appellees.[2]

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[2] *Kowal v. DOJ*, 2022 WL 2315535 (D.D.C. June 27, 2022); *Kowal v. DOJ*, 2022 WL 4016582 (D.D.C. Sept. 2, 2022).

On appeal, the cases were consolidated for argument and decided in one Opinion, which is the subject of this Petition.

ARGUMENT

I. The Opinion Contravenes Circuit Precedent Regarding The Public Domain Doctrine

Under the public domain doctrine, "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone*, 193 F.3d at 554. Here, Kowal argued these materials included: (1) a trial exhibit; (2) summaries of wiretapped conversations played at trial; and (3) third-party names.

A. Exhibits

A third-party plea agreement was admitted as a government exhibit at trial. This document thus entered the public record and is in the public domain.

The panel disagreed. Despite acknowledging trial records "are generally considered public," *Kowal*, at 1031, it ruled that the public domain doctrine did not apply "[b]ecause these records are not accessible on the public or electronic docket[.]" *Id.* No authority was cited for this proposition. Indeed, the creation of a "docket accessibility" exception is a significant departure from Circuit precedent.

In *Cottone*, *supra*, plaintiff sought wiretap recordings played at trial. This Court granted his request because "audio tapes enter the public domain once played and received into evidence." *Id.* at 554. Notably, the Court did not require

proof the recordings were accessible on the docket. The burden of demonstrating a "permanent public record" was met by proffering transcripts establishing which recordings were "played in open court and received into evidence." *Id.* at 554-55. "With such a specific showing, [the Court is] not left to guess which tapes have entered the public domain and which have not." *Id.* at 555.

Cottone distinguished *Davis v. DOJ*, 968 F.2d 1276 (D.C. Cir. 1992). There, a similar request was denied—but only because the court reporter failed to create a "permanent public record" of which recordings were actually played. Because of that extraordinary lapse, plaintiff could not identify which specific tapes entered the public domain. *Id.* at 1278-80.

Cottone and *Davis* hold that information enters and remains in the public domain when it is admitted into evidence in open court. Moreover, "until destroyed or placed under seal," such records "remain a part of the public domain." *Cottone*, 193 F.3d at 554.

Kowal met this burden. She proffered transcripts demonstrating the plea agreement was entered into evidence. She also proffered a copy of the relevant exhibit.

The government did not dispute the plea agreement was entered into evidence, nor contend it was destroyed or under seal. Yet the panel ruled it was not in the permanent public record. Its conclusion rested on a newly created exception

to the public domain doctrine for trial records that are not "accessible on the public or electronic docket." *Kowal*, at 1031.[3]

This exception is a significant departure from Circuit precedent and conflicts with the "well-established principle of American jurisprudence that the release of information in open trial is a publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party has to restrict its further use." *Nat'l Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 421 (6th Cir. 1981). As the Supreme Court observed:

> A trial is a public event. What transpires in a courtroom is public property. … There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Craig, 331 U.S. at 374.

A longstanding common-law right of access to court records exists which predates the Constitution and has been recognized by this Court since "at least 1894." *In re Leopold*, 964 F.3d at 1127. That right includes plea agreements. *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991) ("Plea

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[3] Citing *Davis*, the panel suggests trial records become "practically obscure" if not accessible on the docket. *Kowal*, at 1031. Not so. In *Davis*, the recordings were practically obscure for a distinct reason: nobody memorialized which tapes were played. *Davis*, 968 F.2d at 1278. That defect is curable by proffering a transcript establishing what information was admitted into evidence. *Cottone*, 193 F.3d at 554-55.

agreements have traditionally been open to the public and public access to them enhances both the basic fairness of the proceeding and the appearance of fairness so essential to public confidence in the system.") (cleaned up).

The public right to inspect court records has never been limited by whether they are accessible via the public or electronic docket. The panel's anomalous ruling disturbs decades of precedent and threatens the uniformity of this Court's decisions. Rehearing is necessary.

B. Summaries

Kowal sought a narrative summary of a wiretapped conversation played at trial. Citing *Davis*, the panel held the public domain doctrine requires a showing the record sought is the exact record in the public domain. *Kowal*, at 1030. Since the "summary is not the same as the conversation itself," it denied Kowal's claim. *Id.* This was incorrect.

The public domain doctrine does not require courts to favor form over substance. The relevant inquiry is whether the *information* is in the public domain, not whether it is in identical *form*.

In *Davis*, this Court did not deny the wiretap request because plaintiff failed to produce an "exact record" but because plaintiff "ha[d] not satisfied his burden to point to specific *information* in the public domain." 968 F.2d at 1280 (emphasis added). That burden did not require producing the recordings themselves, but only

proffering transcripts "demonstrate[ing] precisely which recorded conversations were played in open court." *Cottone*, at 555. *Davis* did not "establish a uniform, inflexible rule requiring every public-domain claim to be substantiated with a hard copy simulacrum of the sought-after material." *Id.*

This Court re-affirmed that holding in *Niagra Mohawk*, where the plaintiff sought information power plants were required to submit to the government on specific forms. Plaintiff argued the information was public because the facilities already included it on another publicly available form—*i.e.*, "the information on the two forms is identical in scope." 169 F.3d at 20. The district court disagreed, but this Court reversed, noting "if identical *information* is truly public, then enforcement of an exemption cannot fulfill its purpose." *Id.* at 19 (emphasis added).

As one court has observed:

> The lesson of these cases is that courts should scrutinize whether the plaintiff has proven that the information sought is in the public domain. They do not require a plaintiff to produce an exact copy of the redacted information, in the same form, to meet that burden of production.

Judicial Watch, Inc. v. HHS, 525 F.Supp.3d 90, 104 (D.D.C. 2021).

Here, the relevant "information" is the wiretap recordings played at trial. Documents that merely *summarize* these recordings would not disclose "more than what is publicly available," *Cottone*, at 555, or reveal information greater in scope

than that published in open court. Enforcing the exemption therefore serves no purpose.

The panel contravened Circuit law by requiring a showing of "a permanent public record of the exact record she seeks." *Kowal*, at 1030 (cleaned up). Rehearing is necessary.

C. Names

The government improperly redacted names made public during trial. Kowal proffered a list of testifying witnesses, with testimony transcripts, demonstrating their identities and involvement were a matter of public record. Indeed, some were cooperating witnesses implicated in the investigation and hoping to benefit by testifying. Notably, they voluntarily divulged their identities and connection to the case.

Citing *SafeCard*, the panel held third-party information in criminal files is presumptively protected from disclosure absent evidence of illegal agency activity. With no such evidence before it, the panel denied Kowal's claim. *Kowal*, at 1031. This was mistaken.

Under subsequent Circuit law, *SafeCard* "does not apply" to "individuals who have already been publicly identified" through "testimony in open court [] as having been charged, convicted or otherwise implicated in connection with" a crime. *CREW II*, 854 F.3d at 682. Such individuals "have a diminished privacy

interest in certain information that may be contained in the records," including names. *Id.*; *see also Nation Magazine*, 71 F.3d at 896 (distinguishing privacy interests of witnesses who knowingly and publicly connect themselves to criminal investigations "from the interest of unnamed *SafeCard* witnesses who did not voluntarily divulge their identities").

Moreover, the assertion that Kowal "fail[ed] to establish any cognizable public interest," *Kowal*, at 1031, is incorrect. Kowal consistently argued there is "a public interest in the manner in which the DOJ carries out substantive law enforcement policy," *Citizens for Resp. & Ethics in Washington v. DOJ* (*CREW I*), 746 F.3d 1082, 1093 (D.C. Cir. 2014). This interest is "weighty." *CREW II*, 854 F.3d at 682 (public interest in discovering "how the FBI and DOJ…investigate and prosecute criminal conduct.") (cleaned up). Imposition of a federal death sentence heightens that interest. *Prison Legal News v. Exec. Off. for U.S. Att'ys*, No. 08CV01055MSKKL, 2009 WL 2982841, at *3 (D. Colo. Sept. 16, 2009); *United States v. Sampson*, 275 F.Supp.2d 49, 84 n.16 (D. Mass. 2003). Kowal is not seeking unrelated private information about third parties, but rather their connection to *the government's actions* in the criminal case. Disclosure serves the public interest.[4]

[4] *See Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) (public interest "in knowing that a government investigation itself is comprehensive").

Moreover, showing "illegal agency activity" is only necessary "when the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties[.]" *NARA v. Favish*, 541 U.S. 157, 174 (2004). The interest asserted here is different. Whether agency impropriety might be exposed is irrelevant: "[M]atters of substantive law enforcement are properly the subject of public concern, whether or not the policy in question is lawful." *ACLU v. DOJ*, 655 F.3d 1, 14 (D.C. Cir. 2011) (cleaned up).

II. The Panel Misapplied Exemption 7(D)

Kowal argued Exemption 7(D) was improperly used because the agencies applied a blanket presumption that cooperating sources provide information solely under an implied assurance of confidentiality. Supreme Court law, however, requires a particularized showing that *each source* expected confidentiality. *Landano*, 508 U.S. at 172 ("Under Exemption 7(D), the question is not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential.") (emphasis in original).

The district court held a source-by-source analysis was unnecessary because in all cases involving violent drug crime, confidentiality was necessarily implied.[5]

[5] *Kowal v. DOJ*, No. 18-2798, 2021 WL 4476746, at *5 & n.2 (D.D.C. Sept. 30, 2021); *Kowal v. DOJ*, No. 18-938, 2021 WL 3363445, at *5 & n.4 (D.D.C. Aug. 3, 2021).

The panel erroneously affirmed. *Kowal*, at 1032.

First, *Landano* requires establishing *each particular source's* expectation of confidentiality. 508 U.S. at 172. Accordingly, courts in this Circuit and others have understood a source-by-source evaluation is necessary to invoke Exemption 7(D).[6] No such inquiry was performed here.

Second, *Landano* does not countenance the ruling here—that the crime alone is dispositive. That would simply substitute one irrebuttable presumption ("promises of confidentiality are inherently implicit when an agency solicits information about crimes") for another ("promises of confidentiality are inherently implicit when an agency solicits information about violent drug crimes"). Given FOIA's overarching goal of "access to official information long shielded unnecessarily from public view," *EPA v. Mink*, 410 U.S. 73, 80 (1973), it cannot be maintained Congress intended the government be able to prevail on an Exemption 7(D) claim by merely asserting categorical exceptions for certain crimes.

In *Roth v. DOJ*, 642 F.3d 1161, 1184 (D.C. Cir. 2011), this Court observed the nature of the crime is but one among "a number of factors" courts must

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[6] *See, e.g.*, *Hale v. DOJ*, 2 F.3d 1055, 1057 (10th Cir. 1993); *Matthews v. FBI*, No. 15-569, 2019 WL 1440161, *10 (D.D.C. Mar. 31, 2019); *Boyd v. ATF*, No. CIV A 05-1096 RMU, 2006 WL 2844912, at *8 (D.D.C. Sept. 29, 2006); *Steinberg v. DOJ*, Civ. No. 91-2740-LFO, 1993 WL 385820, *4 (D.D.C. Sep. 14, 1993); *Al-Turki v. DOJ*, 175 F.Supp.3d 1153, 1196 (D. Colo. 2016).

consider. An agency cannot generalize from one source to all; it must demonstrate fear of retaliation for each source. *Raulerson v. Ashcroft*, 271 F.Supp.2d 17, 27 (D.D.C. 2002). The "dispositive issue must therefore be more than simply whether the crime is violent." *Id.*

Indeed, to determine a source's expectations regarding confidentiality, courts must look at the facts "from the perspective of an informant, not the law enforcement agency." *Billington v. DOJ*, 233 F.3d 581, 585 (D.C. Cir. 2000). Here, some sources were cooperating witnesses who testified in exchange for some perceived benefit. Cooperating witnesses are unique because they have *no* expectation the information they furnish will be confidential. As DOJ concedes:

> Cooperating witnesses [CWs] differ from CIs [confidential informants] in that CWs agree to testify in legal proceedings and typically have written agreements with the Department of Justice (DOJ)… that spell out their obligations and their expectations of future judicial or prosecutive consideration.[7]

The panel found this argument foreclosed by *Schmerler v. FBI*, 900 F.2d 333 (D.C. Cir. 1990). That is doubtful—*Landano* abrogated *Schmerler*. *See* 508 U.S. at 170 (citing and rejecting *Schmerler* and other circuit opinions). Indeed, *Schmerler* was premised on the very presumption forbidden by *Landano:* that "promises of

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[7] DOJ Office of the Inspector General, The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines, Special Report (Sept. 2005), https://oig.justice.gov/sites/default/files/archive/special/0509/chapter3.htm.

confidentiality are inherently implicit when the FBI solicits information." 900 F.2d at 337 (cleaned up). This flawed premise led the *Schmerler* court to conclude that a source's expectation of testifying was "not sufficient to rebut the presumption of confidentiality." *Id.* at 339. Such reasoning does not survive *Landano*. Once that invalid presumption is discarded, *Landano* requires the court to conduct a fact-specific inquiry that considers a source's expectations of confidentiality at the time they gave information. The panel's refusal to consider such individualized factors was error.

III. The Opinion Misapplied Summary Judgment Law

Rule 56 requires summary judgment only when "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The court must interpret all facts and plausible inferences in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "[T]he nonmoving party's version of any disputed issue is presumed correct." *Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 456 (1992).

In the FOIA context, summary judgment should issue only if the government has "demonstrate[d] beyond material doubt that the search was reasonable." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (cleaned up). The "burden of persuasion on this matter is properly imposed on the agency."

McGehee v. CIA, 697 F.2d 1095, 1101 (D.C. Cir. 1983).

The government may not meet that burden if there are "positive indications of overlooked materials." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999). If the search fails to locate records known to exist, it raises "substantial doubt" regarding the search's adequacy, and "summary judgment is inappropriate." *Id.*

That happened here. Kowal's request included multimedia items. The government located none, but Kowal knew such records existed: she possessed over 200 items comprising DVDs, CDs, audio recordings, and photos which had been produced at trial. She proffered a sworn declaration; an itemized list; and trial transcripts confirming the government introduced recordings and photographs as exhibits. Kowal was not merely speculating that additional responsive records existed, or that these were agency records. (The panel itself acknowledged some of the records "explicitly mention the DEA in the file name." *Kowal*, at 1027). Given these clear positive indications of overlooked materials, the government failed to demonstrate an adequate search "beyond material doubt."

But the panel affirmed, reasoning that since "entities not subject to these FOIA requests—including local law enforcement and the U.S. Attorney's office in Florida—were involved in investigating and trying Troya, Kowal has not supported her inference [that Appellees possess these records]." *Kowal*, at 1028.

This misapplied the summary judgment standard.

"By weighing the evidence and reaching factual inferences contrary to [nonmovant's] competent evidence, the [panel] neglected to adhere to the fundamental principle that at the summary stage, reasonable inferences should be drawn in favor of the nonmoving party." *Tolan*, 572 U.S. at 660. Here, the panel should have credited Kowal's evidence that the government overlooked hundreds of agency records. Instead, it interpreted all facts and plausible inferences in favor of Appellees and concluded the records may be in possession of other entities. It then placed the burden on Kowal to refute this conclusion.

There was no basis for the panel's conjecture that the agencies no longer possessed the items. No agency denied possession. Nor did they confirm they searched for multimedia files. Thus, their declarations did not "negate[] any inference that other requested documents still remained in the files." *Weisberg v. DOJ*, 627 F.2d 365, 370 (D.C. Cir. 1980) (reversing summary judgment where agency claimed lack of possession). Indeed, the panel's suggestion that Kowal "submit a second, more specific FOIA request" for these items to the same agencies implicitly concedes the government failed to negate the inference it still possessed these records. *Kowal*, at 1028.

The panel's improper weighing of the evidence left unanswered whether the agencies still possessed the missing items. "A factual question thus persists, and it

was inappropriate for the [court] to undertake to resolve it at the stage of summary judgment." *Weisberg*, 627 F.2d at 369.

The panel alternately cited *Iturralde v. Comptroller of Currency*, 315 F.3d 311 (D.C. Cir. 2003) to suggest a reasonable search may overlook records. But *Iturralde* is distinguishable because it held the "failure of an agency to turn up *one specific document* in its search does not alone render a search inadequate." *Id.* at 315 (emphasis added). Fair enough. Here, the agencies failed to turn up *over 200 items* known to exist. Moreover, the absence of whole categories of documents—photographs and audio/video recordings—calls into question the reasonableness and thoroughness of the searches.

CONCLUSION

For the foregoing reasons, this case should be reheard *en banc* or by the panel.

Dated: August 30, 2024

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 35 because this brief contains 3,898 words, excluding the parts of the brief exempted by D.C. Cir. Rule 32(e)(1). Microsoft Word computed the word count.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Times New Roman) in 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I electronically filed the foregoing Petition for Panel Rehearing & Rehearing *En Banc* with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit via the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARBARA KOWAL,

Plaintiff,

v. Civil Action No. 1:18-cv-2798-TJK

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Defendants.
_____/

MOTION TO ALTER OR AMEND

Pursuant to Federal Rule of Civil Procedure 59(e) ("Rule 59(e)"), Plaintiff Barbara Kowal respectfully moves this Court to alter or amend its Memorandum Opinion and Order partially granting Defendants' first motion for summary judgment, *see* ECF No. 29 (issued Sep. 24, 2020), and its Memorandum Opinion granting Defendants' renewed motion for summary judgment. *See* ECF No. 49 (issued Sep. 30, 2021). In support of this Motion, Plaintiff states the following:

I. Relevant Procedural History

Plaintiff, a paralegal at the Federal Defender for the Middle District of Florida, filed a FOIA suit against the Defendants—the United States Department of Justice and three of its components (ATF, FBI, and DEA)—after requesting all records from the ATF and FBI pertaining to Daniel Troya, a

capital defendant represented by the Federal Defender in his post-conviction hearings. The ATF and FBI produced some documents from their records systems but withheld other documents in whole or in part under several FOIA exemptions.

First Round of Summary Judgment

Defendants moved for summary judgment, arguing the ATF and FBI adequately searched for records and properly withheld documents pursuant to certain FOIA exemptions. ECF No. 19. Plaintiff cross-moved for summary judgment. ECF No. 21. As relevant here, Plaintiff argued the ATF's search was inadequate because there was evidence showing the existence of overlooked records. ECF No. 21 at 27-28.[1] Specifically, Plaintiff pointed to investigative records—over two hundred DVDs, CDs, audio recordings, and photos—that were produced by DOJ counsel at the time of Mr. Troya's trial, but which Defendants failed to locate in response to Plaintiff's FOIA request. *Id*. Plaintiff also argued that the FBI failed to justify its withholdings and improperly withheld information in the public domain. *Id*. at 28-31.

On September 24, 2020, this Court issued a Memorandum Opinion and Order granting, in part, Defendants' motion for summary judgment. ECF No. 29. As to the issue of the adequacy of the search, this Court ruled:

[1] The citations in this motion adopt the pagination in the ECF-generated headers of the parties' filings.

> [A]s for the absence of items allegedly in Kowal's possession, she has not explained why, just because *she* has them, the *ATF* must also have them such that it could produce them in response to a FOIA request. While positive indications of overlooked materials may show that a search was inadequate, the standard typically applies when the requester can show that the agency itself ignored those indications when it conducted its search. Since the adequacy of a FOIA search is not judged on results, but rather on the good faith search itself, the missing items do not show that the search was inadequate. The ATF may simply not have them, and even if it does, a reasonable and thorough search may have missed them for whatever reason.

ECF No. 29 at 15 (cleaned up).

As to the propriety of the FBI's withholdings, the Court agreed with Plaintiff that the agency failed to provide sufficient information in its *Vaughn* index to allow the Court to "determine whether the FBI has properly invoked its asserted FOIA exemptions[.]" ECF No. 29 at 18. The Court held that "[b]ecause of the FBI's inadequate *Vaughn* index, the Court need not decide whether the FBI improperly withheld any information already in the public domain[.]" *Id*. at 18 n.13. The Court noted, however, that the FBI would be given an opportunity to submit a revised *Vaughn* index, *id*. at 18, and further ordered that the parties submit a joint schedule for briefing renewed motions for summary judgment to resolve the outstanding issues as to the FBI. *Id*. at 26.

Second Round of Summary Judgment

Defendants filed a renewed motion for summary judgment, accompanied by updated *Vaughn* indices and additional declarations. ECF No. 31. Plaintiff filed a renewed cross-motion for summary judgment. ECF No. 35. As relevant here, Plaintiff argued the FBI failed to justify its withholding of an October 31, 2007 third-party plea agreement. *See* ECF No. 35 at 20. Specifically, Plaintiff argued this record is within the public domain because it was admitted into evidence at Mr. Troya's public trial. *Id*. *See also* ECF No. 44 at 14-15; ECF No. 44-3 (Exhibit BB).

On September 30, 2021, the Court granted Defendants' renewed motion for summary judgment. ECF No. 49. As to the "public domain" issue, this Court ruled:

> [T]he FBI attests that the plea agreement is not available on the public docket and thus is not in the public domain. In *Cottone*, the court held that the government can rebut a plaintiff's suggestion that trial records are in public domain by showing that the evidence has since been "destroyed, placed under seal, or otherwise removed from the public domain." 193 F.3d 550, 556 (D.C. Cir. 1999). Thus, because the plea agreement is not available on the public docket, it is not in the public domain, and may be withheld under Exemption 7(C).

ECF No. 49 at 8 n.1.

The Court entered final judgment on that same day. ECF No. 48.

II. Standard of Review

Rule 59(e) was adopted "to make clear that the district court possesses the power to rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dep't of Emp't. Sec.*, 455 U.S. 445, 450 (1982) (internal quotations omitted). District courts have "substantial discretion in ruling on motions for reconsideration" pursuant to Rule 59(e). *Black v. Tomlinson*, 235 F.R.D. 532, 533 (D.D.C.2006). Such a motion is appropriate in cases where there is a need to correct a clear error, or to prevent manifest injustice. *Firestone v. Firestone*, 76 F.3d 1205, 1280 (D.C. Cir. 1996).

III. The Court erred in holding the third-party plea agreement is not within the public domain.

As this Court correctly noted, if information is already in the public domain, an agency cannot invoke an otherwise valid exemption to withhold it. *See* ECF No. 49 at 3 (citing *Students Against Genocide v. U.S. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001)). Here, Plaintiff relied on the public domain doctrine to challenge Defendants' withholding of an October 31, 2007 third-party plea agreement. Specifically, Plaintiff repeatedly noted that the plea agreement was entered into evidence as an exhibit by the government at Mr. Troya's trial and addressed at length in open court. *See* ECF No. 35 at 20; ECF No. 35-1 (Exhibit K); ECF No. 44 at 14. Plaintiff even produced that trial exhibit, ECF No. 44-3 at 1-5, as well as the relevant trial transcript page

showing that the government was the party that entered it into evidence. ECF No. 44-3 at 6. Thus, this record is clearly in the public domain.[2] This Court's ruling however adopted Defendant's spurious argument, *see* ECF No. 41 at 9; ECF No. 41-1 at ¶ 4, that the underlying record was not in the public domain because it was unavailable on the public docket and held Defendants' withholding of the document was therefore proper. ECF. No. 49 at 8 n.1. That ruling was clearly erroneous given the record before this Court.

The touchstone for determining whether a trial record is public is not whether it can be downloaded from the electronic case file. There is a long-standing common-law right of access to judicial records which predates the Constitution and has been recognized by the Circuit Court of Appeals for the District of Columbia since "at least 1894." *In re Leopold*, 964 F.3d 1121, 1127 (D.C. Cir. 2020). Any documents filed with the Court which play a role in the adjudicatory process are considered "judicial records." *Id.* at 1128. This includes exhibits. *See, e.g., United States v. Jackson,* 2021 WL 1026127, at *4-5 (D.D.C. March 17, 2021) (finding video exhibits in criminal case to be judicial records).

[2] As this Court noted, there are three ways in which the government can rebut this claim: by showing that the relevant record has since been "destroyed, placed under seal, or otherwise removed from the public domain." *Cottone*, 193 F.3d at 556. None of those circumstances apply here.

This right is also reflected in Rule 5.4(a) of the Local Rules of the Southern District of Florida which explicitly states that "[u]nless otherwise provided by law, Court rule, or Court order…court filings are matters of public record." Here there is no law, Court rule, or Court order excepting the trial exhibit from this rule. Defendant has *never* sought to seal the exhibit or otherwise restrict it from public access. The fact that it cannot be downloaded on ECF simply has no bearing on whether it should be considered public.

Moreover, this Court's reliance on the inability to electronically access the exhibit as proof it is not in the public domain ignores the very ECF rules which controlled the filings at the time of Plaintiff's trial. Section 5 of the version of the Case Management Electronic Case Filing CM/ECF Administrative Procedures for the Southern District of Florida which was in effect during Plaintiff's trial specifically covered "Documents That Cannot Be Filed Electronically." *See* attached exhibit at 17. This section included Procedure 5I which clearly stated, "Exhibits offered or admitted at trial will not be filed electronically or conventionally unless so ordered by the Court." *Id*. at 19. The lack of electronic access to exhibits in this case is thus merely a vestige of a prior filing system not a rejection of the fundamental historical right to access judicial records. This Court's holding that the plea agreement was not in the public domain was clearly erroneous.

IV. The Court erred in holding that there were no positive indications of overlooked records.

In the course of its investigation of Mr. Troya's capital case, the government collected and generated numerous records. But not all of them were written materials. Many were photographs and audio/video recordings. Yet no such multi-media records were produced in response to Plaintiff's FOIA request, which clearly encompassed such items.[3]

Plaintiff knows such agency records exist because Defendants produced some of them to Mr. Troya in the context of his criminal proceeding. As Plaintiff stated in her declaration:

> I am in possession of over two hundred items comprising DVDs, CDs, audio recordings, and photos that would be responsive to my various requests of the Defendants. Not one of these items has been acknowledged or produced in Defendants' declarations or Vaughn Indices.

ECF No. 21-1 ("Declaration of Barbara Kowal") at ¶ 23.

Plaintiff's declaration constitutes "countervailing evidence" as to the adequacy of the agency's FOIA search. *Founding Church of Scientology of Washington D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979). Specifically, the existence of these numerous photographs and audio/video

[3] *See* ECF No. 21-2 at 4-5 ("For purposes of this request the terms 'records,' 'documents,' and 'files' are intended to include … photographs, recordings (including videotapes, audiotapes, CD's, CD-Rom's, or DVD's or any other form of electronic recordation)[.]").

recordings—which Defendants produced in a different proceeding—is a "positive indication" that the agency overlooked responsive records in conducting its search. *See Oglesby v. United States Dep't of the Army*, 79 F.3d 1172, 1185 (D.C. Cir. 1996) (finding positive indications of overlooked records based on the fact that agency had produced responsive records to a different individual in a different proceeding); *Founding Church of Scientology*, 610 F.2d at 834 (D.C. Cir. 1979) (distribution of responsive documents by the agency to other agencies gave "rise to substantial doubts about the caliber of [the agency's] search endeavors").

In their reply, Defendants offered the following terse answer:

> Plaintiff's speculation that other documents should exist—such as DVDs, CD-Roms or audio recordings (Opp. at 21)—is insufficient to raise a material question of fact with respect to the adequacy of an agency's search. *Wilbur v. CIA*, 355 F.2d 675, 678 (D.C. Cir. 2004) ("mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records").

ECF No. 26 at 8.[4]

The premise of Defendants' response, however, is mistaken. Plaintiff is not engaged in "mere speculation" about "as yet uncovered documents." These

[4] Defendants' citation to *Wilbur v. CIA* contained a typographical error. The correct cite is 355 F.3d 675.

photographs and recordings do, in fact, exist.[5] Notably, the agency never actually refuted this point. Moreover,

> in any FOIA request, the existence of responsive documents is somewhat "speculative" until the agency has finished looking for them. As the relevance of some records may be more speculative than others, the proper inquiry is whether the requesting party has established a sufficient predicate to justify searching for a particular type of record. Here, the [agency] does not deny that such a predicate exists, rendering its "speculation" claim irrelevant.

Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 29 (D.C. Cir. 1998).

Nevertheless, this Court granted Defendant's summary judgment motion, reasoning the missing records were not necessarily indicative of an inadequate FOIA search, but rather that the agency "may simply not have them." ECF No. 29 at 15. But on this record, that ruling was clearly erroneous.

None of the pleadings or declarations submitted by Defendants affirmatively represent that which this Court's ruling presumed—*i.e.*, that the agency is not in possession of photographs and audio/video recordings. In fact, Plaintiff's FOIA request stated that if the requested records "have been purged, destroyed or lost, please send an official written response with your agency's record retention policy and procedures noting the date the records were purged, destroyed or lost." ECF No. 21-2 at 5. But the agency never sent such

[5] In addition to her sworn declaration, Plaintiff also submitted the exhibit list from Mr. Troya's capital trial, which indicates the government itself introduced a number of photographs and recordings into evidence. *See* ECF No. 44-2.

a response. Nor did it ever make such a statement in any of the subsequent litigation.[6]

It is well settled that summary judgment "may be granted only if the moving party proves that no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law." *Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1978) (footnotes omitted). Here, Defendants plainly failed to carry that burden, and it was error for this Court to grant summary judgment based on a material fact that is unsupported by the record.

It is equally settled in federal procedural law that

> [t]he party seeking summary judgment has the burden of showing there is no genuine issue of material fact, even on issues where the other party would have the burden of proof at trial, and even if the opponent presents no conflicting evidentiary matter. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

[6] It should be noted that an agency's generalized claims of destruction or non-preservation cannot sustain summary judgment. *See Campbell*, 164 F.3d at 28; *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 369 (D.C. Cir. 1980). *See also Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 328 (D.C. Cir. 1999) (rejecting agency's contention that summary judgment is appropriate since records such as the one plaintiff requested are routinely destroyed after two years because the agency's manual contains exceptions to the routine destruction of documents, and "[f]rom the bare record, we are unable to determine whether the requested [records] might fall within these exceptions.") Moreover, in the absence of such a representation, it should ordinarily be presumed in the context of FOIA cases that an agency has complied with its duties under federal law to properly maintain records. *See Judicial Watch, Inc. v. U.S. Dep't of Justice*, 319 F.Supp.3d 431, 437-38 (D. D.C. 2018).

United States v. General Motors Corp., 518 F.2d 420, 441 (D.C. Cir. 1975) (cleaned up). *See also United States v. Diebold*, 369 U.S. 654, 655 (1962). Yet here, the Court's ruling failed to follow these well-settled principles. Specifically, the Court reasoned it was *Plaintiff's* burden to "explain why, just because *she* has [the missing records], the *ATF* must also have them such that it could produce them in response to a FOIA request." ECF No. 29 at 15 (emphasis in original). But that's an erroneous application of the law, especially on this record.

Plaintiff proffered a sworn declaration, as well as a corroborative exhibit (ECF No. 44-2), demonstrating that the relevant photographs and recordings exist, and that Defendants previously produced some of these items. Conversely, Defendants neither disputed the existence of the records or that the agency previously produced them in a different proceeding. Nor did Defendants affirmatively represent that the agency is no longer in possession of these records.

Viewed in the light most favorable to the party opposing the motion for summary judgment, the inference to be drawn from these facts is that the agency is in possession of the records such that it could produce them in response to a FOIA request. At the very least, "[a] factual question thus persists, and it was inappropriate for the District Court to undertake to resolve it at the stage of summary judgment." *Weisberg v. U.S. Dep't of Justice*, 627

F.2d 365, 369 (D.C. Cir. 1980) (rejecting agency's claim that requested record was no longer in FBI's possession).

In short, although this Court's "deduction was hardly illogical," it "was not inexorably required," and Plaintiff "should have been the beneficiary of the inference more favorable to [her] that … the [requested records are] somewhere in [agency] files." *Weisberg*, 627 F.2d at 369-70. Moreover, "[s]ince the Department did not show positively that the primary facts are not susceptible to this interpretation, it was not entitled to summary judgment." *Id*. at 370.

Respectfully, the cases upon which the Court relied to resolve this issue, *see* ECF No. 29 at 15, are inapposite. In *Concepcion v. FBI*, 606 F. Supp. 2d 14, 30 (D. D.C. 2009), the court found the plaintiff was engaged in "speculation as to the existence of additional records" and made "[unsupported] allegations of agency bad faith." Here, Plaintiff is not speculating; she has proffered both a declaration and an exhibit list from the original trial that corroborates the existence of additional records. Similarly, in *Baker & Hostetler LLP v. U.S. Dep't of Com.*, 473 F.3d 312, 318 (D.C. Cir. 2006),[7] the plaintiff asserted that the agency's "failure to identify any responsive documents from certain high-level officials" showed the inadequacy of the agency's search. But, unlike Ms. Kowal, the plaintiff there never proffered any evidence to demonstrate that

[7] The Court's Memorandum Opinion contains a typographical error and misstates this citation as 472 F.3d 312.

such documents actually existed. As the *Baker* court noted, that "assertion" was "mere speculation." *Id.*

In *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003), the plaintiff challenged the adequacy of the agency's search based on its failure to disclose a single report. But as the court noted, "it is long settled that the failure of an agency to turn up *one specific document* in its search does not alone render a search inadequate." *Id.* (emphasis added). Here, the dispute is not over a lone record; the agency failed to turn up *hundreds* of items. Additionally, Defendants offer no plausible explanation about how so many records might have been "accidentally lost or destroyed." *Id.*

Finally, Plaintiff respectfully disagrees with this Court's interpretation of *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999). The Court concluded that case is distinguishable because Plaintiff "has not shown that the ATF overlooked records here in the way that the Coast Guard did in that case. … The issue was not that the Coast Guard's search missed certain documents, but that the design of the search ignored a location likely to contain them." ECF No. 29 at 15 n.12. But *Valencia-Lucena* does not stand for the narrow proposition that the only way to establish positive indications of overlooked records is to identify additional locations to be searched. In fact, that opinion reaffirmed the broader holding articulated in *Oglesby* and *Founding Church of Scientology* that "if a review of the record raises

substantial doubt, particularly in view of well-defined requests and positive indication of overlooked materials, summary judgment is inappropriate." 180 F.3d at 326 (internal citations and quotation marks omitted). Indeed, the dispositive fact in each of those cases that was a positive sign of overlooked records is also present here: the agency produced the requested records to others on a separate occasion. Moreover, the sheer volume of records that are known to exist, and which the agency failed to turn up, gives "rise to substantial doubts about the caliber of [its] search endeavors." *Founding Church of Scientology*, 610 F.2d at 834.

Defendants were not entitled to summary judgment on this record. Accordingly, Plaintiff respectfully requests the judgment be altered or amended, and that Defendants be ordered to conduct a proper search for photographic and audio/video recordings responsive to Plaintiff's FOIA request.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the *Motion to Alter or Amend* be granted.

Dated: October 27, 2021

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I CERTIFY the foregoing was electronically filed with the Clerk of Court using the CM/ECF system that will automatically send a notice of electronic filing to counsel of record this 27th day of October 2021.

/s/ *D. Todd Doss*
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