UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES UNION, *et al.* Plaintiffs, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	No. 08-cv-1157 (JR)

PLAINTIFFS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

This lawsuit arises out of plaintiffs' request under the Freedom of Information Act for records regarding the government's warrantless tracking of individuals' cell phones. Plaintiffs briefly respond to the arguments in defendant's opposition memorandum.

ARGUMENT

I. DEFENDANT CANNOT WITHHOLD THE CASE NAMES AND DOCKET NUMBERS OF PUBLIC, CRIMINAL PROSECUTIONS.

Plaintiffs seek "[t]he case name, docket number, and court of all criminal prosecutions, current or past, of individuals who were tracked using mobile location data, where the government did not first secure a warrant based on probable cause for such data." Plaintiffs' FOIA Request, Dkt. No. 26-5 at 2.

A. Publicly Prosecuted Criminal Defendants Have Virtually No Privacy Interest In The Fact That They Were Prosecuted.

In their prior briefing, plaintiffs explained why the privacy interest of a publicly prosecuted criminal defendant is minimal, at best, and should not weigh heavily in the balancing

of interests under FOIA's exemptions. Pls.' Br., Dkt. No. 30 at 13-17.[1] In response, defendant cites three district court cases for the assertion that criminal defendants have a "significant" privacy interest in the fact that they were prosecuted. Def.'s Op. at 4. None of these cases stands for this proposition. Plaintiffs discussed *Harrison* in their opening brief. Pls.' Br. at 17. The best interpretation of that case is that even a minimal privacy interest justifies withholding where a requester fails to demonstrate that there is any public interest in disclosure. *Id*. *Long v. U.S. Dep't of Justice* likewise holds that where there is no meaningful public interest at stake, even a marginal privacy interest can prevail. 450 F. Supp. 2d 42, 69-70 (D.D.C. 2006) (privacy interest prevailed relative to overbroad rationales that failed to demonstrate *how* disclosure would advance the public interest). *See also Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989) ("[S]omething . . . outweighs nothing every time.").

Defendant's final case, *LCCR v. Gonzales*, deals not with the case names and docket numbers of criminal prosecutions, but with "local police arrest reports, bail bond information and affidavits by and concerning private individuals that were filed in court." 404 F. Supp. 2d 246, 257 (D.D.C. 2005). It is unclear whether the private individuals whose information was at stake were criminal defendants, witnesses or uncharged subjects of criminal investigations. *Id.* at 258. In his discussion, Judge Lamberth recognized a privacy interest and then asserted, without explanation, that the public interest did not outweigh the privacy interest. *Id.*

[1] Defendant mischaracterizes plaintiffs' argument regarding the privacy interest of publicly prosecuted federal criminal defendants. Plaintiffs contend that an individual's privacy interest is at its lowest ebb once he is publicly named as a criminal defendant, not that it is entirely non-existent. *See, e.g.*, Pls.' Br. at 13 n.1 ("Plaintiffs acknowledge that individuals have, as a categorical matter, some privacy interest when their names are mentioned in law enforcement records. *U.S. Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 780 (1989). When the proffered privacy interest is that of a criminal defendant in the case name and docket number of his prosecution, however, that interest is at its nadir.").

Defendant also attempts to reframe *U.S. Dep't of Justice v. Reporters Committee*, 489 U.S. 749, 773 (1989), as a case about withholding information regarding individuals who had actually been prosecuted. Def.'s Op., Dkt. No. 32 at 4. Defendant's hook for this argument is that the case involved the disclosure of rap sheets, which contain a wide range of personal identifiers and criminal history information, including convictions. *Reporters Committee*, 489 U.S. at 752. However, the Court was clear that its decision in the case hinged on the uniquely invasive effects of compilation of information about individuals, not any particular piece of information contained on the rap sheet. . It wrote:

> [T]he issue here is whether the *compilation* of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

Id. at 764 (emphasis added). The Court never disaggregated and considered individually the various types of data on the rap sheets, and there is no reason to think it would have assigned a high privacy value to public criminal prosecution data of the kind at issue here.[2]

In fact, there is good reason to believe the Court would have assigned a low privacy value to such data. In deciding whether rap sheets should be released, the Court looked to how Congress and the Executive had treated rap sheets in contexts beyond FOIA. *Id.* at 764-66. The Court found that the "web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information" bolstered the conclusion that a strong privacy interest inheres in rap

[2] As Judge Friedman pointed out in *Long*, "the extent to which . . . information is publicly available is relevant in determining the magnitude of the privacy interest at stake. In this regard, the Court finds that information . . . disseminated over the internet through PACER is decidedly less obscure than 'public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country.' Accordingly . . . [the Court finds that the interests at stake are significantly less substantial than those at issue in *Reporters Committee*." 450 F.Supp.2d at 68-70 (D.D.C., 2006) (quoting *Reporters Committee*, 489 U.S. at 764).

sheets. *Id.* at 764-65. In contrast, as plaintiffs described in their opening brief, it is the policy of the Executive to publicize the names of those it prosecutes. Pls.' Br. at 14 n.15 and accompanying text. For the Department of Justice to be arguing that, for example, Najibullah and Mohammed Zazi and Ahmad Wais Afzali are entitled to privacy with respect to their criminal prosecutions does not pass the laugh test.[3]

With respect to *Reporters Committee's* holding that there can be a privacy interest in information that is publicly available, defendant creates a dispute where there is none. Plaintiffs have never contended that there can never be a privacy interest in publicly available information. Pls.' Br. at 14. Plaintiffs advance the more modest argument that public disclosure can diminish privacy expectations. *See, e.g., Detroit Free Press, Inc. v. U.S. Dep't of Justice* 73 F.3d 93, 97 (6th Cir. 1996) ("[T]he need or desire to suppress the fact that the individual depicted in a mug shot has been booked on criminal charges is drastically lessened in an ongoing criminal proceeding such as the one precipitating the dispute presently before us.").

Finally, defendant, citing Fed. R. Crim. P. 16(a)(1)(E), contends that "individuals who are prosecuted are presumably informed of the fact that they were the subject of cell phone tracking." Def.'s Op. at 7. This is false. This rule provides for the release of records in three circumstances: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant. Fed. R. Crim. P. 16(a)(1)(E). Because cell phone tracking records were never in defendant's possession, sub-section (iii) does not apply. *United States v. Cardenas-Mendoza*,

[3] *See* U.S. Department of Justice Press Release, "Three Arrested in Ongoing Terror Investigation," September 20, 2009, *available at* http://www.usdoj.gov/opa/pr/2009/September/09-nsd-1002.html (publicizing that each of the named individuals "has been charged by criminal complaint with knowingly and willfully making false statements to the FBI"); *see also* William K. Rashbaum and David Johnston, *U.S. Agents Arrest Father and Son in Terror Inquiry*, N.Y. Times, Sept. 19, 2009.

2009 WL 2605379 at * 4 (9th Cir. Aug. 26, 2009) (ruling out disclosure under (iii) where document was "never in [defendant's] possession"). Subsections (i) and (ii) will not apply if defendants plead guilty prior to Rule 16 disclosure. Further, there is no guarantee that the government will trigger subsection (ii) by using the cell phone tracking records in its case-in-chief, or that the records will be deemed "material to preparing the defense" as the Supreme Court has narrowly interpreted that term—as "preparation of their defense against the Government's *case-in-chief . . .*" *United States v. Armstrong*, 517 U.S. 456, 463 (1996) (emphasis added). If the Department of Justice, which prosecutes these cases, knew that this information were *actually* released to defendants, it could have said so in plain words, instead of "presum[ing]." Def.'s Op. at 7. The defendant's need to "presum[e]" strongly suggests that it does not actually know that this information is provided to criminal defendants. In any event, as discussed below, the public – and not just the criminal defendant in a particular case – has a substantial interest in knowing about the surveillance methods their government employs.

B. There Is A Strong Public Interest In Learning To What Ends The Government Uses A Controversial Form Of Surveillance.

Defendant erroneously asserts that plaintiffs must show that the records at issue are "'necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity.'" Def.'s Op. at 8 (quoting *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991)). Defendant's view must be rejected because *SafeCard* was effectively overruled on this point by *NARA v. Favish*, 541 U.S. 157 (2003). In *Favish*, the Supreme Court ruled that to establish a public interest, "First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest." *Id.* at 172. To the extent that "the public interest being asserted is to show that

responsible officials acted negligently or otherwise improperly in the performance of their duties," the requester must produce evidence that would "warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 173-74. The court expressly rejected the suggestion that "clear evidence" of impropriety was required, reasoning that "[g]iven FOIA's prodisclosure purpose . . . the less stringent standard we adopt today is more faithful to the statutory scheme." *Id.* 174. Because *SafeCard's* "compelling evidence" standard is even more stringent than the rejected "clear evidence" standard, *Favish* overruled *SafeCard*. Although the D.C. Circuit has not expressly acknowledged that *SafeCard* is no longer good law, its subsequent rulings on Exemptions 7(C) cite *Favish* rather than *SafeCard*. *See, e.g.*, *Boyd v. U.S. Dep't of Justice*, 475 F.3d 381, 386-87 (D.C. Cir. 2007); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1115 (D.C. Cir. 2007); *Ogaju v. United States*, 378 F.3d 1115, 1116-17 (D.C. Cir. 2004).[4]

Plaintiffs easily satisfy the *Favish* test. First, "the public interest sought to be advanced is a significant one." *Id.* at 172. Hundreds of millions of people in the United States carry cell phones. Pls.' Br. at 2. The government claims the power to track those cell phones without a prior judicial determination of probable cause, *see* Pls.' Br. at 4, and asserts that "to suggest that the government is acting unlawfully by obtaining judicial authorization to engage in cell phone tracking on less than probable cause -- which is permitted in numerous jurisdictions -- is patently absurd." Def.'s Op. at 10. But United States Magistrate Judges in at least 12 districts, including the District of Columbia, have adopted precisely this "patently absurd" position, and have required the government to show probable cause. *See* Pls.' Br. at 6. It is not "patently absurd"

[4] *See also Long*, 450 F.Supp.2d at 69 ("[T]he categorical rule announced in *SafeCard Services* . . . does not apply where plaintiffs are seeking information solely about individuals who have been publicly charged in a criminal case . . . .") (citing *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995)).

but entirely fair to describe warrantless cell phone tracking as a controversial, and perhaps unconstitutional, surveillance method.

The specific information plaintiffs seek here—the case names and docket numbers (including court) of criminal prosecutions of subjects of warrantless cell phone tracking—will advance the public interest by revealing to what ends warrantless cell phone tracking is put. This is the classic rationale for FOIA, knowing what the government is "up to." *Reporters Committee*, 489 U.S. at 773. Knowing the case names and docket numbers will allow the public to learn what crimes people subjected to warrantless cell phone tracking are alleged to have committed. Generally speaking, people are more tolerant of privacy-invasive surveillance targeted at more serious crimes than they are when such techniques are targeted at relatively minor crimes. This intuition led Congress to limit wiretapping to an enumerated list of the most serious crimes. 18 U.S.C. § 2516. Knowing what crimes are being prosecuted as a result of cell phone tracking will help the public evaluate whether the loss of privacy is worth the cost in personal privacy.

Knowing the case names and docket numbers will also reveal whether the prosecutions are successful. It belabors the obvious to spell out that a surveillance technique that leads to convictions is more valuable for law enforcement purposes than one that does not. Finally, the case names and docket numbers will reveal whether warrantless cell phone tracking is being challenged via motions to suppress and, if so, with what success. Again, a law enforcement tool that survives defense motions to suppress is more useful than one that is thwarted by adverse rulings on its constitutionality and exclusion of evidence.

For these reasons, plaintiffs easily satisfy the second *Favish* requirement, that the requestor show the information is "likely to advance" the stated public interest. 541 U.S. at 172.

Entering the case names into PACER will pull up the case dockets, which will reveal the crimes charged, the motions filed, and the ultimate disposition of the cases.

The government argues that the Court cannot consider "derivative uses" in evaluating the public interest favoring disclosure. Def.'s Op. at 12. In other words, defendant suggests that because the docket number of a case must be entered into PACER in order to generate information of public interest, the public interest is one this Court cannot consider.[5] Neither the Supreme Court nor the D.C. Circuit has taken the position that derivative uses may not be considered. *See Consumers' Checkbook Center For The Study Of Services v. U.S. Dep't of Health & Human Serv.*, 554 F.3d 1046, 1062 n.3 (D.C. Cir. 2009). Although not categorically deeming derivative uses permissible grounds for finding a public interest, in *Getman v. NLRB*, 450 F.2d 670, 677 (D.C. Cir. 1971), the court held that names and addresses must be disclosed for use in a study of labor representation elections because the use of the data may implicate the public interest. The cases that defendant cites do not bar derivative uses, and are best read as rejecting speculative public interests that may or may not be furthered by disclosure. *Associated Press v. U.S. Dep't of Defense*, 554 F.3d 274, 290 (2d Cir. 2009) ("Although under this rationale the public interest might be further served, the speculative nature of the result is insufficient to outweigh the detainees' privacy interest in nondisclosure."); *Herzberg v. Veneman*, 273 F. Supp. 2d 67, 87 (D.D.C. 2003) ("[T]he link between the request and the potential illumination of agency action is too attenuated.").[6]

[5] Although defendant only makes this argument with regard to the success of prosecution, Def.'s Op. at 12, logically it applies to all of the information plaintiffs hope to obtain.

[6] Application of the defendant's purported ban on consideration of derivative uses would be particularly nonsensical in this case, because plaintiffs could just as well have asked the defendant to disclose the full docket sheet, the complaint, and any decision in each such case, and thereby obtained the desired information without any "derivative use." Plaintiffs' limitation

II. DEFENDANT CANNOT WITHHOLD THE CASE NAMES AND DOCKET NUMBERS IN APPLICATIONS FOR CELL TRACKING AUTHORITY

Plaintiffs seek case names and docket numbers (including court) of applications the government has filed to engage in cell phone tracking.[7] To the best of plaintiffs' knowledge, these applications were filed under seal. Plaintiffs cannot of course verify this fact, but defendant's *Vaughn* demonstrates that this is defendant's routine practice, and defendant's opposition memorandum does not dispute that these applications are under seal.

Plaintiffs' primary interest is in obtaining the docket numbers (including court) of these applications. With the docket numbers, plaintiffs and other members of the public will have the option of filing motions to unseal the orders granting or denying the applications. Unsealing would have the beneficial effect of making the applicable legal standard for cell phone tracking public. Plaintiffs seek the case names in addition to the docket numbers, because they may facilitate plaintiffs' ability to locate the cases in the court's files.

Docket numbers of sealed applications do not even meet the basic threshold for withholding under Exemptions 6 or 7(C) because they will reveal no information specific to a person. Clearly, knowing the docket number of a sealed application for surveillance authority will reveal no personally identifying information. The docket number itself is just a series of

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of their request to case names and docket numbers served only to reduce the administrative burden on the defendant.

[7] Defendant has indicated that the only applications that contain docket numbers are documents 22, 27, and 67. Plaintiffs withdraw their request for the case names and docket numbers of the other applications. Document 67 is an Application, a fact acknowledge by defendant in its *Vaughn*. Def.'s Second Revised *Vaughn* Index, Dkt. No. 32, Exh. 2 (the "*Vaughn* Index.") Although Defendant's *Vaughn* Index states that Document 29 is a "template application," review of the document demonstrates that it is in fact an application that was filed in the Northern District of Georgia. *See* Declaration of Benjamin Sahl, dated July 24, 2009, Exh. 11. Defendant's *Vaughn* states that Document 22 is a draft application, which plaintiffs have been unable to verify as the document was withheld in full. *Vaughn* Index. Defendant concedes, however, that the document has a case number.

numbers. The application and resulting order are presumably sealed. It would make no sense to file an application to engage in covert surveillance of a particular individual and then publicly reveal that individuals name in an unsealed filing.

Plaintiffs acknowledge that the case names may contain personally identifiable information of surveillance targets who have yet to be prosecuted. To the extent the case names contain such information, plaintiffs seek only the other portions of the case names.

III. THIS COURT SHOULD ORDER THE RELEASE OF THE TEMPLATE APPLICATIONS

A. *In Camera* Review Of The Partially Withheld Template Applications Is Necessary For The Court To Conduct A Meaningful Review Of The Government's Exemption Claims.

Plaintiffs seek the release of withheld portions of 12 template applications that defendant asserts are covered by Exemption 7(E) and in some cases also Exemption 2.[8] Given the small number of documents at issue, plaintiffs ask this Court to review the 12 documents *in camera* to see if the redacted portions are appropriate for release.

In response to plaintiffs' argument that defendant's *Vaughn* and accompanying declaration were too conclusory to justify withholding, Pls.' Br. at 23-25, defendant has now proffered a second declaration, Def.'s Op. Exh. 1. The justifications for withholding are different but no less conclusory. When the conclusory nature of the affidavits is combined with the inherent difficulty of arguing about the propriety of release of information that plaintiffs cannot see, plaintiffs are in an essentially impossible situation.

In reviewing the validity of an agency's exemption claim, the Court "may examine the contents of such agency records in camera to determine whether such records or any part thereof

[8] Defendant withheld the following documents pursuant to Exemption 7(E): Documents. 2, 3, 27-29, 32-34, and 68-71. *Vaughn* Index. Defendant additionally asserts Exemption 2 for documents 2, 69 and 71. *Id.*

shall be withheld." 5 U.S.C. § 552(a)(4)(B). Summary judgment based on affidavits without in camera review is appropriate only where the government's affidavits "provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith . . . ." *Ctr. for Auto Safety* v. *EPA*, 731 F.2d 16, 22 (D.C. Cir. 1984) (quoting *Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)). Thorough judicial review of the government's exemption claims is particularly appropriate in light of the requester's information disadvantage, peculiar to the context of FOIA litigation:

> [I]t is anomalous but obviously inevitable that the party with the greatest interest in obtaining disclosure is at a loss to argue with desirable legal precision for the revelation of the concealed information. Obviously, the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure. . . .
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> In a very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to name statements categorizing information . . . .

Vaughn v. Rosen, 484 F.2d 820, 823-24 (D.C. Cir. 1973). "In an effort to compensate" for this disadvantage on the part of FOIA requesters, "the trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt." *Id.* at 825. *See also, Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998) ("A judge has discretion to order *in camera* inspection on the basis of an uneasiness, on a doubt that he wants satisfied before he takes responsibility for a de novo determination." (quoting *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978)) (internal quotation marks omitted)).

In their prior brief, plaintiffs explained why the *Vaughn* and declarations submitted were inadequately specific to serve as the basis for withholding. Pls.' Br. at 23-27. Defendant has now submitted a revised declaration. Second Finnegan Decl. at ¶¶ 11, 12, 14 & 15, Dkt. No. 32

at 6-9,. Defendant's rationales for withholding are too general in nature for plaintiffs to be able to tell whether they are valid. For example, defendant states it is withholding Document 71 in part because it shows "the conditions under which a subject's cell phone activity will be captured." Second Finnegan Decl. at ¶ 11. If defendant is merely referring to the well-known fact that a cell phone's geographic location will not be captured when it is turned off—a fact the government concedes is "obvious", Pls.' Br. Exh. 1 at 6—withholding is not appropriate. Likewise, defendant states that it is withholding Documents 2, 59 and 71 in part because they will identify "the ways in which co-conspirators can be identified by using information related to a target's cell phone activity." Second Finnegan Decl. at ¶ 11. If defendant is withholding the fact that investigators can monitor where a target goes and then use property records to determine who lives there, or can use tracking data from other cell phones to determine whether the owners of those other phones go there, then withholding is not appropriate because this is also a matter of simple deduction. Plaintiffs could engage in the same speculative exercise for each proffered rationale.

The conclusory nature of the declaration and *Vaughn* leave plaintiffs at a serious disadvantage. Plaintiffs are "at a loss to argue with desirable legal precision for the revelation of the concealed information" because they "cannot know the precise contents of the documents sought." *Vaughn*, 484 F.2d at 823. Under the circumstances, plaintiffs ask the Court to review the 12 disputed records *in camera*. This task will not be overly burdensome, in large part because defendants have only partially withheld the 12 records, so the court will only have to address the excision of specific passages.

B. Exemption 7(E) Requires Defendant To Show A Risk of Circumvention.

Defendant erroneously contends that it does not need to show a risk of circumvention in order to withhold documents pursuant to Exemption 7(E). Defendant attempts to dismiss plaintiffs' citation to a contrary D.C. Circuit case, *PHE, Inc. v. DOJ*, 983 F.2d 248 (D.C. Cir. 1993), by stating that it "deals with information concerning guidelines rather than techniques or procedures." Def.'s Op. at 21-22. But this is not the case. Some of the information withheld information withheld in *PHE* pertained to techniques, and the circuit applied the circumvention requirement across the board. *PHE*, 983 F.2d at 251 ("The affidavit also indicates that additional withheld information *related to an investigative technique . . . .*") (emphasis added). The circuit's language—"under both the (b)(2) and the (b)(7)(E) exemptions, the agency must establish that releasing the withheld materials would risk circumvention of the law"—is inescapably broad. *Id.* Furthermore, the D.C. Circuit is not alone in holding that the government must always demonstrate a risk of circumvention under 7(E). *See Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1064 (3d Cir. 1995) (holding, in a case involving law enforcement techniques, that the government must demonstrate a risk of circumvention); *Feshbach v. S.E.C.*, 5 F. Supp. 2d 774, 786 (N.D. Cal. 1997) (citing *Davin*, 60 F.3d at 1064) ("To qualify for Exemption 7(E), the non-disclosing agency must demonstrate that the records, if disclosed, would risk circumvention of the law.").

IV. THE COURT SHOULD ORDER DEFENDANT TO CONDUCT AN ADEQUATE SEARCH.

Plaintiffs seek the identification and release of the "Hodor" and "Kischer" Declarations and of any existing final versions of thirteen draft applications and proposed orders identified on defendant's *Vaughn* index. *Vaughn* Index Entries at 19-24, 30, 31, 35, 36, 48, 65 and 66.

Defendant accuses plaintiffs of engaging in "blind guesses," Def.'s Op. at 23 n.10, dismissing as mere "speculation" plaintiffs' suggestions both that the Hodor and Kischer declarations may be responsive to plaintiffs' request and that a final version may exist for one or more of the thirteen draft applications identified by defendant. Def.'s Op. at 26. An agency need not pursue a record based upon a plaintiff's mere speculation, but for FOIA purposes, at least, "speculation" is not as broad a category as defendant implies. In *SafeCard*, to which defendant cites, the D.C. Circuit rejected a plaintiff's argument that certain documents existed as "[m]ere speculation" where further efforts would be "hopeless and wasteful" because the documents the plaintiff speculated existed "would never have been created in the normal course . . ." *SafeCard*, 926 F.2d at 1201.[9]

Plaintiffs' request for the "Hodor" and "Kischer" declarations is hardly speculative. Those declarations are specifically described in defendant's documents as components of the application package the government submits when it seeks cell tracking authority. *See Vaughn* Index at Entries 26-28. It is plaintiffs' understanding that other than the "Hodor" and "Kischer" declarations, each of the components of defendant's application package was identified by defendant as responsive.[10] While it is perhaps conceivable that all of the components of the

[9] Defendant also cites *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548 (D.C. Cir. 1994), perhaps because that decision quotes language from *SafeCard*. Def.'s Op. at 26. Whatever defendant believes the message of *Steinberg* to be, in that decision, far from being dismissed as irrelevant, the effect of plaintiff's "speculation" was to leave the D.C. Circuit "with considerable doubt as to the adequacy of the [agency's] search," and led the Circuit to remand on that issue. *Steinberg*, 23 F.3d at 549.

[10] Records released by defendant indicate that in seeking an order permitting defendant to collect cell phone records for the purpose of identifying the physical location of a cell phone user, several documents are utilized. These include: an application (*see, e.g.*, July 24, 2009 Sahl. Decl., Ex. 8 (P197-P199)); a memorandum of points and authorities (*see, e.g., id.* (P200-P212)); a proposed order, (*see, e.g., id.* (P216-P220); an agent's declaration, (*see, e.g., id.* (P213-P215); and, at least in come instances, a form warrant. In addition, depending upon the type of cell

government's application would be responsive to plaintiffs' FOIA request *except for* the Hodor and Kischer declarations, the possibility that the declarations are indeed responsive can hardly be dismissed as mere "speculation."

Similarly, while it is conceivable that there exist no final versions of any of the thirteen draft applications, that would mean that in the course of its search defendant identified *only one* application that had actually been filed with a court, a remarkable coincidence if true. *Vaughn* Index at Entry 67. In any case, in suggesting there are likely one or more final versions of these documents, plaintiffs are doing no more than pointing out the obvious, a far cry from seeking documents, such as were at issue in *SafeCard*, "that would never have been created in the normal course." 926 F.2d at 1201.

The legal question before this Court, ignored by defendant in its brief, is whether the search for the records at issue would be so unduly burdensome as to absolve defendant of its duty under the FOIA to engage in that search. *See* Pls. Br. at 29; Def.'s Op. at 22-25. "In order to prevail on an FOIA motion for summary judgment, the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (internal quotation omitted). "When an agency 'has not previously segregated the requested class of records[,] production may be required only 'where the agency (can) identify that material with reasonable effort.'" *Founding Church of Scientology v. NSA*, 610 F.2d 824, 836 (D.C. Cir. 1979) (quoting *Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 192 (D.C. Cir. 1973)). Where the reasonableness of a search is questioned, the burden is on the agency to explain why further search would be unreasonably burdensome. *See Nation Magazine*

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phone data sought, Defendant evidently files either the "Hoder" declaration or the "Kischer" declaration, or both. *See, e.g.*, Sahl Decl., Exh. 8-11, P197, P216, P221, P249.

v. United States Customs Serv., 71 F.3d 885, 892 (D.C. Cir. 1995) (ordering district court on remand to order agency to search for the document sought by plaintiffs "if [the agency] cannot provide sufficient explanation as to why such a search would be unreasonably burdensome"); *See also People for Am. Way Found. v. U.S. Dep't of Justice*, 451 F.Supp. 2d 6, 12 (D.D.C. 2006) (discussed in Pls.' Br. at 29).

Defendant has not met its burden to explain why the search would be unduly burdensome, and obviously cannot, given that defendant has already located the Hodor and Kischer declarations and that the search for the thirteen final versions would require only the search of thirteen, known, files. The Second Finnegan Declaration attempts to put a straw argument before this Court, asserting, specifically in response to plaintiffs' argument regarding "the final versions of 13 draft documents," that "to search for final applications for orders to obtain mobile phone location information would require a search of potentially every criminal case file maintained in each USAO as well as the Federal Records Center," which "would be administratively over burdensome." Second Finnegan Decl. at 34. Plaintiffs seek no such Herculean efforts. The task before defendant is to search merely thirteen files, the identities and locations of which are obviously known to defendant.

Defendant argues that to search the thirteen relevant files for final applications would amount to an "iterative" search process, against which defendant must take a principled stand, and thus that the final applications should properly be addressed through a second FOIA request. Def's Op. at 26. Whatever the merits of this argument might be in a matter in which an "iterative" request was at issue, this is not such a matter. Plaintiffs are not, as defendant suggests, asking defendant to "broaden its search," *Id*., but rather merely to retrieve documents from among a small subset of the universe of records that defendant did not search in the first

instance only because they were too numerous to search, making it unduly burdensome to do so. Again, defendant's burden to search thirteen case files will presumably be minimal; defendant does not even suggest that these files are large.

Finally, defendant suggests that plaintiffs have waived any argument that defendant's search was inadequate. Def's Op. at 27-28. Defendant cites no authority for this proposition. When the parties initially identified for the Court the issues they believed remained to be litigated, the inadequacy of defendant's search had yet to come to light. The issue could be identified only upon review of defendant's *Vaughn* index, which defendant chose not to provide to plaintiffs until defendant filed its motion for summary judgment. Defendant has not been prejudiced, as it fully briefed the issue of adequacy in its opposition brief. Plaintiffs in this matter have consistently sought to narrow the legal issues and documents at issue between the parties and before this Court. Such good faith efforts to be a responsible litigating party cannot reasonably be treated as a waiver of subsequently-revealed deficiencies in defendant's response to the FOIA request at issue.

V. THE PARTIES' SUMMARY JUDGMENT MOTIONS SHOULD BE HELD PARTLY IN ABEYANCE UNTIL ISSUES SURROUNDING DOCUMENT 67 AND THE HODOR AND KISCHER DECLARATIONS ARE RESOLVED.

Defendant has agreed to take certain voluntary steps with regard to some documents. Summary judgment should be held at least party in abeyance until these steps are taken.

Defendant has elected to make a voluntary disclosure of portions of Document 67. Def.'s Op. at 1. According to defendant's *Vaughn*, Document 67 is an "Application (Sealed) (5 pages), and Order (2 pages) (Sealed)." *Vaughn* Index. Defendant "is filing a motion to lift the seal under which Document 67 was filed and will release those portions of that documents which do not identify specific individuals once that motion is granted." Def.'s Opp. at 1 n.1. Defendant

also represented that it is analyzing the Hodor and Kirscher declarations to determine "which, if any, portions of these two documents it has a duty or interest in withholding in preparation for their release through a discretionary disclosure." Def.'s Op. at 27.

Defendant has yet to disclose any portion of Document 67 or the Hodor or Kischer declarations. Until defendant discloses these records or takes the position that it will not disclose them, this Court should defer ruling on the parties' motions for summary judgment. These records are responsive to plaintiffs' request and plaintiffs contend they are entitled to their disclosure. This Court may need to intervene if defendant does not produce Document 67 and the Hodor and Kischer declarations. Summary judgment is therefore inappropriate.

September 25, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2009, I filed a true and correct copy of the foregoing Plaintiffs' Reply In Support Of Their Cross-Motion For Summary Judgment with the Court's Electronic Filing System, which will send an electronic notice to the attorney of record for each party.

/s/ Benjamin Sahl
Benjamin Sahl