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PRELIMINARY STATEMENT

The New York Times (the “Times”) seeks records at the core of a pending criminal prosecution of two former Federal Bureau of Prisons (“BOP”) employees on duty the night Jeffrey Epstein died. Some of the same records could also affect the penalty phase of a pending death penalty case against Epstein’s former cellmate. Congress did not intend the Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, to interfere with pending criminal prosecutions. To make sure this would not happen, Congress expressly exempted records that could reasonably be expected to interfere with law enforcement proceedings from public disclosure under FOIA. *See* 5 U.S.C. § 552(b)(7)(A). Many of the records sought by the Times fall at the heart of this exemption.

Other FOIA exemptions also justify BOP’s withholding of records in response to the FOIA request. BOP properly withheld information reflecting its predecisional deliberations about how to respond to Epstein’s apparent suicide attempt on July 23, 2019, his later suicide on August 10, 2019, and related matters. *See* 5 U.S.C. § 552(b)(5). BOP also properly withheld information where disclosure clearly would, and/or could reasonably be expected to, result in an unwarranted invasion of privacy of Epstein’s surviving family members, such as photographs of Epstein’s body following his suicide, or third parties other than Epstein, such as BOP employees or other inmates. *See* 5 U.S.C. § 552(b)(6), (7)(C). The personal information of BOP employees is also protected because its disclosure could place those employees at risk of harm. *See* 5 U.S.C. § 552(b)(7)(F). Some of the withheld records are protected by an additional FOIA exemption because their disclosure would reveal sensitive law enforcement techniques or procedures, including those relating to investigating and preventing inmate suicides. *See* 5 U.S.C. § 552(b)(7)(E).

BOP has logically and plausibly established that its search was adequate and its withholdings under each of these FOIA exemptions were proper. Accordingly, the Court should grant summary judgment in BOP's favor.

BACKGROUND

I. Criminal Proceedings Against Jeffrey Epstein

On July 2, 2019, the United States Attorney's Office for the Southern District of New York ("USAO-SDNY") charged Jeffrey Epstein with one count of conspiracy to commit sex trafficking and one count of sex trafficking. *See* Indictment, Dkt. No. 2, *United States v. Epstein*, No. 19-cr-490 (RMB) (S.D.N.Y.). Epstein was arrested on July 6, 2019, and thereafter incarcerated at the Metropolitan Correctional Center ("MCC") until his death. Declaration of Russell Capone, Counsel to the Acting United States Attorney for the Southern District of New York ("Capone Declaration") ¶ 4; *see* Docket Entry dated July 8, 2019, *United States v. Epstein*, No. 19-cr-490 (RMB) (S.D.N.Y.). On July 23, 2019, Epstein apparently attempted suicide in his cell at the MCC. Capone Decl. ¶ 6. On August 10, 2019, Epstein committed suicide in his cell at the MCC. *Id.* ¶ 7.

II. Criminal Proceedings Against Tova Noel and Michael Thomas

On August 9-10, 2019, the night of Epstein's death, Tova Noel and Michael Thomas were correctional officers on duty at the MCC's Special Housing Unit, where Epstein was then housed. Capone Decl. ¶ 9. As alleged in the November 19, 2019, indictment against Noel and Thomas, they repeatedly failed to perform mandated counts of prisoners under their watch, including Epstein, and to conceal this failure, they repeatedly signed false certifications attesting to having conducted multiple counts of inmates. *Id.*; *see* Indictment, Dkt. No. 1, *United States v. Noel*, No. 19-cr-830 (AT) (S.D.N.Y.) (the "Noel Indictment"). As a result of their actions that

night, Noel and Thomas have been charged with one count of conspiring to defraud the United States and to make or use a false writing or document, and five counts of making or using a false writing or document. *See* Capone Decl. ¶ 9; *Noel* Indictment. The *Noel* prosecution is pending before the Honorable Analisa Torres, U.S.D.J., with trial scheduled to begin on January 4, 2021. Capone Decl. ¶ 9.

III. Criminal Proceedings Against Nicholas Tartaglione

Nicholas Tartaglione has been charged with fifteen criminal violations arising from the murders of Hector Gutierrez, Martin Luna, Urbano Santiago, and Miguel Luna. *Id.* ¶ 10; *see* Superseding Indictment, Dkt. No. 120, *United States of America v. Tartaglione*, No. 16-CR-832 (KMK) (S.D.N.Y.). On April 19, 2019, the USAO-SDNY filed a Notice of Intent to Seek the Death Penalty against Tartaglione. Capone Decl. ¶ 10; Notice of Intent to Seek Death Penalty, Dkt. No. 121, *United States of America v. Tartaglione*, No. 16-CR-832 (KMK) (S.D.N.Y.). Tartaglione has been detained since he was arrested on December 19, 2016. Capone Decl. ¶ 11. For certain periods in July 2019—including on July 23, 2019, the night of Epstein’s apparent suicide attempt—Tartaglione was housed at the MCC with Epstein as his cellmate. *Id.*

IV. The Times’s FOIA Requests and This Action

On August 13, 2019, the Times submitted two FOIA requests to BOP collectively seeking twenty different categories of documents relating to Epstein. *See* Declaration of Kara Christenson (“Christenson Decl.”) ¶¶ 5-6. On September 23, 2019, BOP denied the Times’s requests in full based on its determination that any responsive records were exempt from disclosure, in full or in part, under FOIA Exemptions 5, 6, 7(A), 7(C), 7(E), and/or 7(F). Christenson Decl. ¶ 7.

The Times subsequently sent BOP two additional FOIA requests. On December 12, 2019, the Times requested six categories of documents relating to Epstein, *id.* ¶ 9, and on January 2, 2020, the Times requested recordings of Epstein’s last three phone calls, *id.* ¶ 10.

The Times commenced the present action on January 30, 2020, seeking production of records responsive to its four FOIA requests. *See* Complaint, Dkt. No. 1. Over the course of three productions on June 22, July 7 and July 10, 2020, respectively, BOP produced approximately 584 pages of responsive records with appropriate redactions. Christenson Decl. ¶ 47. Through an agreement between the parties, BOP will continue to produce certain responsive records after the filing of this submission, with the basis for any partial withholdings explained herein. *See id.* ¶ 47.

ARGUMENT

I. FOIA and the Summary Judgment Standard

FOIA generally requires federal agencies to make documents and other material “available to the public,” *see* 5 U.S.C. § 552(a), but specifically exempts nine categories of information from that requirement, *see id.* § 552(b). Congress adopted this structure “to reach a workable balance between the right of the public to know and the need of the [g]overnment to keep information in confidence.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-147 at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2423)). The nine FOIA exemptions reflect Congress’s determination that “public disclosure is not always in the public interest.” *CIA v. Sims*, 471 U.S. 159, 166–67 (1985).

Summary judgment is warranted in a FOIA case if the agency submits declarations that (1) supply “facts indicating that the agency has conducted a thorough search” and (2) give “reasonably detailed explanations why any withheld documents fall within an exemption.”

Carney v. DOJ, 19 F.3d 807, 812 (2d Cir. 1994).¹ The agency’s declaration is “accorded a presumption of good faith,” and discovery is “unnecessary if the agency’s submissions are adequate on their face.” *Id.* (internal quotation marks omitted); *accord Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009). An agency’s justification for asserting an exemption “is sufficient if it appears logical and plausible.” *Am. Civil Liberties Union v. United States Dep’t of Def.*, 901 F.3d 125, 133 (2d Cir. 2018), *as amended* (Aug. 22, 2018).

II. BOP Conducted an Adequate Search for Responsive Records

“If an agency demonstrates that it has conducted a reasonable search for relevant documents, it has fulfilled its obligations under FOIA and is entitled to summary judgment on this issue.” *Garcia v. U.S. Dep’t of Justice*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002). The agency must demonstrate that its search was “reasonably calculated to discover the requested documents.” *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 328 (D.C. Cir. 1991). An agency’s search may be reasonable even if it does not return every responsive document. *See Adamowicz v. I.R.S.*, 552 F. Supp. 2d 355, 361 (S.D.N.Y. 2008). An agency must only search those “files likely to contain responsive materials (if such records exist).” *Oglesby v. U.S. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Where an agency’s declaration demonstrates that it has conducted a reasonable search, “the FOIA requester can rebut the agency’s affidavit only by showing that the agency’s search was not made in good faith.” *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993).

BOP’s declarations demonstrate that its search was reasonable and adequate. Multiple offices at BOP undertook searches for documents responsive to the Times’s requests. First, as

¹ Because an agency declaration can satisfy the government’s burden on a motion for summary judgment, “Local Civil Rule 56.1 statements are not required.” *N.Y. Times v. Dep’t of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012); *Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff’d*, 83 F.3d 41 (2d Cir. 1996).

detailed in the Christenson Declaration, BOP's Central Office searched five electronic systems for records responsive to the Times's requests: SENTRY, TRUVIEW, TRULINCS, GROUPWISE, and TRUINTEL. *See, e.g.*, Christenson Decl. ¶¶ 14, 22, 34, 37, 44-46. For the search of each electronic system, the Christenson Declaration explains what the system is, what information it contains, the search methods, and the search parameters that BOP used. *See, e.g., id.* ¶¶ 14, 22, 34, 37, 44-46. Each search of an electronic system returned responsive records, *see id.*, except for the search of the TRULINCS system, as Epstein apparently did not send or receive emails on that system, *see id.* ¶ 37.

In addition to these searches conducted by the Central Office, individual staff at the MCC conducted searches for records responsive to the Times's request. As detailed in the Declaration of Nicole McFarland, BOP staff conferred to determine which MCC staff members would be likely to have records responsive to the Times's request and identified eight such individuals. *See* Declaration of Nicole McFarland ("McFarland Decl.") ¶ 5. Each individual searched his or her electronic and non-electronic files for records responsive to the FOIA requests. *Id.* ¶ 6. These searches located memoranda, reports, photographs, and other material responsive to the Times's request, including forms and reports created following Epstein's July 23, 2019, apparent suicide attempt and his August 10, 2019, suicide. *See* Christenson Decl. ¶ 32; McFarland Decl. ¶¶ 24, 25.

Based on the foregoing and as described in the Christenson and McFarland Declarations, BOP conducted reasonable and adequate searches, and BOP's motion for summary judgment as to the sufficiency of its search should be granted.

III. BOP's Withholdings Were Proper

A. BOP Properly Withheld Records and Information Pursuant to FOIA Exemption 7(A)

i. Exemption 7(A)

As indicated in the index submitted by BOP, *see* Christenson Decl. Attachment 8, all of the records BOP withheld in full fall within the scope of FOIA Exemption 7(A), except two pages of draft letters and one set of emails discussed below that were properly withheld in full under Exemption 5.²

Exemption 7(A), 5 U.S.C. § 552 (b)(7)(A), exempts from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.” “To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm.” *Amnesty Int’l USA v. CIA*, 728 F. Supp. 2d 479, 525 (S.D.N.Y. 2010) (internal quotation marks omitted). The term “enforcement proceedings” as used Exemption 7(A) encompasses criminal and civil proceedings, and proceedings must be either pending or reasonably foreseeable at the time of the withholding. *See, e.g., Kay v. F.C.C.*, 976 F. Supp. 23, 37-38 (D.D.C. 1997) (citing *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978)).

The government’s burden to establish the applicability of Exemption 7(A) is not high; the government need only show that “disclosure of particular kinds of investigatory records . . . would generally interfere with enforcement proceedings.” *Robbins Tire*, 437 U.S. at 236 (quotation marks omitted); *Radcliffe v. IRS*, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008). The

² For the records withheld in full by BOP, the Court need not reach the applicability of other exemptions if it concludes that BOP’s withholdings under Exemption 7(A) were proper, except for the following documents identified on the BOP index: 2 pages of draft letters withheld under Exemption 5’s deliberative process privilege and 56 pages of emails withheld under Exemption 5’s attorney-client privilege.

government need only demonstrate a “rational link” between the requested public disclosure and interference with the government’s ongoing or prospective investigations or proceedings. *See Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986); *New York Times Co. v. Dep’t of Justice*, No. 14 Civ. 03776 (AT) (SN), 2016 WL 5946711, at *7 (S.D.N.Y. Aug. 18, 2016) (“*NY Times*”). Moreover, Exemption 7(A) permits the categorical withholding of records. *See Robbins Tire*, 437 U.S. at 236. In contrast to some other exemptions,

the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding. Rather, federal courts may make generic determinations that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.

Radcliffe, 536 F. Supp. 2d at 437 (quoting *Barney v. I.R.S.*, 618 F.2d 1268, 1273 (8th Cir.1980)). “Exemption 7(A) . . . is designed to block the disclosure of information that will genuinely harm the government’s case in an enforcement proceeding or impede an investigation.” *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989) (R.B. Ginsburg, J.).³

ii. The Records Were Compiled for Law Enforcement Purposes

As a threshold matter, all of the documents withheld by BOP were “compiled for law enforcement purposes,” and thus satisfy the threshold requirement of Exemption 7. 5 U.S.C. § 552(b)(7).

The government has the burden of proving that records were compiled for law enforcement purposes, *see Ferguson v. FBI*, 957 F.2d 1059, 1070 (2d Cir. 1992), but “[b]ecause the DOJ is an agency specializing in law enforcement, its claim of a law enforcement purpose is entitled to deference,” *Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 926

³ Exemption 7(A) also protects records that, if released, could interfere with post-trial criminal proceedings, such as an appeal. *See, e.g., Kidder v. FBI*, 517 F. Supp. 2d 17, 27-28 (D.D.C. 2007); *Kansi v. U.S. Dep’t of Justice*, 11 F. Supp. 2d 42, 44 (D.D.C. 1998).

(D.C. Cir. 2003) (quotation marks and brackets omitted). Records qualify as “compiled for law enforcement purposes” if they “relate to anything that can fairly be characterized as an enforcement proceeding.” *Shapiro v. U.S. Dep’t of Justice*, 37 F. Supp. 3d 7, 29 (D.D.C. 2014) (quotation marks omitted). The Tenth Circuit has adopted a “per se rule” that “for an agency like the BOP, whose primary function is law enforcement, all records and information it compiles are in furtherance of its law enforcement function” *Jordan v. U.S. Dep’t of Justice*, 668 F.3d 1188, 1193-97 (10th Cir. 2011) (characterizing case law from the First, Second, Sixth, and Eighth Circuits as adopting a “per se rule” that all records of law enforcement agencies are compiled for law enforcement purposes) (citing, *inter alia*, *Williams v. F.B.I.*, 730 F.2d 882, 883-86 (2d Cir. 1984) (noting that “[t]hroughout the debate on the 1974 amendments, Congress assumed that all investigatory records of the FBI were compiled for a law enforcement purpose”)); *but see Jordan*, 668 F.3d at 1193-94 (noting that an alternative approach, a “rational nexus test” has been adopted by the Third, Ninth, and D.C. Circuits). In *Human Rights Watch v. BOP*, No. 13-CV-7360 (JPO), 2015 WL 5459713 (S.D.N.Y. Sept. 16, 2015), Judge Oetken concluded that *Williams* did not require the per se rule, did not adopt the Tenth Circuit’s per se rule for BOP records, and followed a “practical approach,” observing that “[t]he ordinary understanding of the term [law enforcement] includes proactive steps designed to prevent criminal activity and maintain security.” *Id.* at *5 (quotation marks and ellipses omitted); *see also* Opinion and Order, Dkt. No. 59, *Gonzalez v. ICE*, No. 19-cv-2911 (JGK) (S.D.N.Y. July 29, 2020), slip op. at 27-28 (requiring a “rational nexus” between withheld records and an agency’s law enforcement duties).

As the Tenth Circuit recognized in *Jordan*, documents created by BOP are compiled for law enforcement purposes because “[t]he BOP is an integral component of a comprehensive

federal law enforcement system” and because statutory amendments to FOIA have preserved the broad scope of Exemption 7’s language. *Jordan*, 668 F.3d at 1195; *see id.* at 1196-97 (discussing amendments to Exemption 7); *see also Williams*, 730 F.2d at 884-85 (discussing amendments to Exemption 7). But even applying a “practical approach” or “rational nexus” standard, the withheld records readily qualify as “compiled for law enforcement purposes.” As explained in the Christenson Declaration, the withheld records were compiled to help BOP take “proactive steps designed to prevent criminal activity and maintain security” within the MCC. *Human Rights Watch v. BOP*, 2015 WL 5459713 at *5; *see* Christenson Decl. ¶ 53. They were compiled, *inter alia*, to prevent suicides by inmates awaiting trial or sentencing at BOP facilities; to protect the safety, security, and orderly operation of BOP facilities, particularly the MCC, a pretrial detention facility; and to facilitate investigation of the incidents addressed in the records, including Epstein’s suicide, which gave rise to a criminal investigation and prosecution. *See id.* Even if the Court does not apply a per se rule, BOP’s declarations show that the records at issue were compiled for law enforcement purposes.

iii. Disclosure of the Records Would Interfere with Multiple Pending Criminal Proceedings

Disclosure of the records withheld under Exemption 7(A) would interfere with the pending prosecutions against Noel, Thomas, and Tartaglione, as logically and plausibly explained in the declaration of Russell Capone, who serves as Counsel to the Acting United States Attorney for the Southern District of New York and has a supervisory role with regard to the prosecutions. Capone Decl. ¶¶ 1, 9-10, 13-32. The withheld records include possible exhibits at the *Noel* trial, information about which numerous witnesses are expected to testify, and information and documents authored by potential trial witnesses. *See id.* ¶¶ 14-25. Premature disclosure of these records or the information contained therein could reasonably be expected to

influence witnesses' potential testimony at trial, allow witnesses to alter their testimony to conform to other evidence, and/or influence potential juror's perceptions of witness testimony or evidence. *See id.*; *W. Journalism Ctr. v. Office of Indep. Counsel*, 926 F. Supp. 189, 192 (D.D.C. 1996) (Exemption 7(A) applies where "[w]itnesses with access to such information could easily alter, conform or construct their testimony depending upon the information disclosed"). This is more than sufficient "to trace a rational link between the nature of the document and the alleged likely interference." *NY Times*, 2016 WL 5946711, at *7.

In addition to interfering with *Noel*, release of a subset of the withheld records that discuss or refer to Tartaglione (the "Tartaglione Records") would also interfere with the prosecution of Tartaglione. The Tartaglione Records contain information about Tartaglione's conditions of confinement and his interactions with Epstein, which have been put directly at issue by Tartaglione's defense counsel, specifically in connection with the potential penalty phase of the case against Tartaglione. Capone Decl. ¶ 29. The Capone Declaration explains how premature release of the Tartaglione Records could reasonably be expected to influence witness testimony and potential juror perceptions of any interactions between Epstein and Tartaglione. *See* Capone Decl. ¶¶ 29-31. These explanations similarly "allow the court to trace a rational link between the nature of the document and the alleged likely interference," *NY Times*, 2016 WL 5946711, at *7 (brackets omitted), and provide independent basis for BOP's withholding of the Tartaglione Records under Exemption 7(A), independent of the likely interference with *Noel*.

The Capone Declaration's categorical descriptions of the withheld records, and how their premature disclosure under FOIA is reasonably likely to interfere with pending criminal prosecutions, satisfies BOP's burden to justify its withholdings under Exemption 7(A). The Supreme Court has instructed that federal courts may make "generic determinations" "that, with

respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.” *Robbins Tire*, 437 U.S. at 236 (quotation marks omitted). The particular “kinds of enforcement proceedings” at issue here are among the most sensitive—pending federal criminal prosecutions, including one where the government is seeking the death penalty. And the Capone Declaration logically and plausibly explains how the particular kinds of records at issue—MCC staffing records, BOP records relating to Epstein’s apparent suicide attempt and suicide, certain medical and psychological records, documents related to counts of inmates, an August 8, 2019 review of SHU inmates, and emails relating to Epstein—could “generally” be expected to interfere with enforcement proceedings. *See* Capone Decl. ¶¶ 18-23. The Capone Declaration further explains how subcategories of withheld emails—emails pertaining to Epstein’s apparent suicide attempt, his incarceration, and his mental health and emails pertaining to Epstein’s death—would generally be expected to interfere with enforcement proceedings. *See* Capone Decl. ¶¶ 24-25. It is entirely rational, logical and plausible that, as articulated by a senior prosecutor overseeing the prosecutions at issue, each of these categories and subcategories of documents could improperly influence witnesses and jurors. Under the approach ratified by the Supreme Court in *Robbins Tire*, BOP properly withheld these records under Exemption 7(A).

B. BOP Properly Withheld Records and Information Pursuant to FOIA Exemption 5

i. Exemption 5 and Applicable Privileges

Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5), exempts from disclosure “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). Exemption 5 encompasses the “‘deliberative process’ or ‘executive’ privilege, which protects the decisionmaking processes of the executive

branch in order to safeguard the quality and integrity of governmental decisions.” *Hopkins v. U.S. Dep’t of Housing and Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991). Information in an agency record must satisfy two criteria to qualify for the deliberative process privilege: it “must be both ‘predecisional’ and ‘deliberative.’” *Grand Cent. P’ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (quoting *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975)).

A document is “predecisional” when it is “prepared in order to assist an agency decisionmaker in arriving at his decision.” *Grumman*, 421 U.S. at 184. While a document is predecisional if it “precedes, in temporal sequence, the ‘decision’ to which it relates,” *Grand Cent. P’ship*, 166 F.3d at 482, the government need not “identify a specific decision” made by the agency to establish the predecisional nature of a particular record. *NLRB v. Sears, Roebuck*, 421 U.S. 132, 151 n.18 (1975); accord *Tigue v. U.S. Dep’t of Justice*, 312 F.3d 70, 80 (2d Cir. 2002). Rather, so long as the document “was prepared to assist [agency] decisionmaking on a specific issue,” it is predecisional. *Id.*

“A document is “deliberative’ when it is actually . . . related to the process by which policies are formulated.” *Grand Cent. P’ship*, 166 F.3d at 482 (internal quotation marks omitted; alteration in original). In determining whether a document is deliberative, courts inquire as to whether it “formed an important, if not essential, link in [the agency’s] consultative process,” *Grand Cent. P’ship*, *id.* at 483, reflects the opinions of the author rather than the policy of the agency, *id.* at 483; see *Hopkins*, 929 F.2d at 84-85, or might “reflect inaccurately upon or prematurely disclose the views of [the agency],” *Grand Cent. P’ship*, 166 F.3d at 483.

Separate from the deliberative process privilege, the attorney-client privilege requires “[t]he relationship of attorney and client, a communication by the client relating to the subject matter upon which professional advice is sought, and the confidentiality of the expression for

which the protection is claimed.” *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). “[T]he traditional rationale for the [attorney-client] privilege applies with special force in the government context.” *In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007).

ii. BOP Properly Withheld Records Pursuant to Exemption 5

Some of the withheld records are protected in full or in part by Exemption 5 and the deliberative process privilege. As logically and plausibly explained in the Christenson Declaration, BOP withheld records or information pertaining to four sets of decisions made by BOP. *See* Christenson Decl. ¶¶ 49. Each set of records satisfies the two-prong test to fall within the scope of the deliberative process privilege.

First, prior to Epstein’s suicide, BOP made decisions concerning how to house Epstein and whether or not to house him with a cellmate. *See* Christenson Decl. ¶¶ 49a, 49d. The incident report of Epstein’s July 23, 2019, apparent suicide attempt, as well as information contained in emails and related documents about Epstein’s incarceration prior to his death, are predecisional because they were prepared to assist BOP in making such decisions about Epstein’s incarceration. *Id.* ¶¶ 49a, 49d. The documents and withheld information are deliberative because they were part of the process by which BOP made these decisions and “bear on the formulation or exercise of policy-oriented judgment,” namely, how to appropriately house Epstein during his incarceration, including following his apparent suicide attempt. *Grand Cent. P’ship*, 166 F.3d at 482; *see* Christenson Decl. ¶¶ 49a, 49d.

Second, following Epstein’s suicide, BOP undertook an investigation into his death and made decisions about how to conduct that investigation and what conclusions—including concerning possible changes to BOP’s policies at MCC—should be drawn from it. *See id.* ¶¶ 49b, 43f. The psychological reconstruction of Epstein’s suicide and internal BOP responses

thereto, as well as information contained in emails and related documents discussing Epstein's suicide and BOP's response to it, are predecisional because they were prepared to assist BOP in making decisions following Epstein's suicide, including possible changes to BOP's suicide prevention policy at MCC. They are deliberative because they bear on BOP's policies relating to preventing inmate suicides at facilities like MCC, investigating suicides when they occur, and reviewing BOP's policies at MCC. *See id.* ¶¶ 49b, 49f. For example, the psychological reconstruction of Epstein's suicide contains multiple recommendations—and responses to certain recommendations—for how MCC should change its suicide prevention policies and measures, such as recommendations about double-celling and direct observation of inmates. *See id.* ¶ 49b.

Third, the draft letters withheld by BOP are predecisional and deliberative because they precede final versions of those letters, and represent iterative versions as BOP determined how best to present the information in question. *See Christenson Decl.* ¶ 49c. “It is well-settled that draft documents, by their very nature, are typically predecisional and deliberative. They reflect only the tentative view of their authors; views that might be altered or rejected upon further deliberation by their authors or by their superiors.” *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 518 (S.D.N.Y. 2010) (quotation marks and brackets omitted); *see ACLU v. DOJ*, 844 F.3d 126, 133 (2d Cir. 2016); *NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at *11 (S.D.N.Y. Nov. 30, 2007) (“Draft documents, by their very nature, are typically predecisional and deliberative.”)

Fourth, BOP properly withheld information in emails pertaining to press inquiries concerning Epstein and his death and how BOP would respond to them. “Governmental decisions and policies can include the formulation of an agency's statements to the public and other outside entities.” *Leopold v. Office of Director of National Intelligence*, No. 16-2517

(CKK), 2020 WL 805380, at *5 (D.D.C. Feb. 18, 2020); *see id.* at *6 (collecting cases, including from this district, on both sides of the question whether agency communications about how to interact with the public may be subject to the deliberative process privilege and concluding, including by relying on the Second Circuit's decision in *ACLU*, 844 F.3d at 133, that "[a]s long as communications are pre-decisional and deliberative, internal agency communications about public statements can be protected by the deliberative process privilege"). The withheld information in the emails in this case is predecisional and deliberative because it was prepared to assist BOP in its determination of, and were part of the process by which BOP decided, whether and how to change its policies at MCC and whether and how to respond to press inquiries concerning Epstein and his death. *See* Christenson Decl. ¶ 43e. In addition, some of the emails also contain predecisional and deliberative material because they include draft responses to press inquiries. *See id.*; *Amnesty Int'l*, 728 F.Supp.2d at 518.

Separate from the deliberative process privilege, one set of emails withheld in full under Exemption 5 is protected by the attorney-client privilege, as indicated on the BOP index. This group of emails consists of communications between BOP employees and Assistant United States Attorneys in the Civil Division of the USAO-SDNY, which represented BOP in connection with litigation requests for documents related to Epstein, and how to respond to these requests pursuant to Department of Justice regulations (known as *Touhy* regulations). *See* Christenson Decl. ¶ 50; *see also United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); 28 C.F.R. § 16.21 *et seq.* As confidential communications between attorneys and a client for the purpose of obtaining and providing legal advice, *see* Christenson Decl. ¶ 50, these emails are privileged and were properly withheld under Exemption 5.

Under the FOIA Improvement Act of 2016, “[a]n agency shall . . . withhold information under [FOIA] only if . . . (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or (II) disclosure is prohibited by law.” 5 U.S.C. § 552(a)(8)(A)(i). The legislative history of this amendment expressly acknowledges that it “does not alter the scope of information that is covered under an exemption.” H.R. Rep. No. 114-391, at 10 (2016). The Christenson Declaration explains how disclosure of the materials withheld under Exemption 5 would harm interests protected by Exemption 5, primarily by hampering the ability of BOP employees to frankly discuss and assess and conditions and incidents at BOP facilities, as well as related BOP policies. *See* Christenson Decl. ¶ 49. In addition, disclosure of the emails protected by the attorney-client privilege would impair BOP’s ability to seek out and receive frank and complete advice from legal counsel, which is particularly important for a government agency. *See* Christenson Decl. ¶ 50; *Erie*, 473 F.3d at 419.

C. BOP Properly Withheld Information Pursuant to FOIA Exemptions 6 and 7(C)

FOIA Exemption 6, 5 U.S.C. § 552(b)(6), protects from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The statutory language concerning files “similar” to personnel or medical files encompasses any “information which applies to a particular individual . . . sought from government records.” *U.S. Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). Under Exemption 6, a court considers whether the “public interest in disclosure outweighs the individual privacy concerns.” *Nat’l Assoc. of Homebuilders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002) (internal quotation marks omitted). But the “only relevant public interest in disclosure to be weighed in this balance is the extent to which

disclosure would . . . contribut[e] significantly to public understanding *of the operations or activities of the government.*” *DOD v. FLRA*, 510 U.S. 487, 495 (1994).

Even more protective of privacy interests, Exemption 7(C), 5 U.S.C. § 552(b)(7)(C), exempts from disclosure records or information compiled for law enforcement purposes where its production “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Under Exemption 7(C), a court again “balance[s] the public interest in disclosure against the [privacy] interest.” *Associated Press v. U.S. Dep’t of Defense*, 554 F.3d 274, 284 (2d Cir. 2009). In this analysis, “[t]here is only one relevant public interest, that of opening agency action to the light of public scrutiny.” *Id.* at 284 (quotation marks and brackets omitted). “The [FOIA requester] must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake and . . . must also show the information is likely to advance that interest.” *Id.*

Some of the records withheld by BOP contain personal information about third parties that, if publicly disclosed, would constitute a clearly unwarranted invasion of privacy, and at a minimum, could reasonably be expected to constitute an unwarranted invasion of personal privacy. These records contain two general categories of personal information: details of Epstein’s death and images of his body, and the names, contact information, and other personal details of third-party individuals other than Epstein.⁴

One category of records implicates the privacy interests of Epstein’s surviving family members because these records contain highly personal details about his death, including images

⁴ As a threshold matter, each of the records withheld under Exemptions 6 and 7(C) qualifies for the protection of Exemptions 6 and 7 because, with respect to Exemption 6, the records consist of “personnel . . . files,” such as overtime logs for MCC, or “similar files” containing information about particular individuals. *See Christenson Decl.* ¶ 56. These records also qualify for Exemption 7(C) because, as discussed *supra*, they were compiled for law enforcement purposes.

of his body after his suicide. Christenson Decl. ¶ 62. The Supreme Court and lower courts have recognized surviving family members's privacy interests in medical records and details of a relative's death. For example, in *National Archives & Records Administration v. Favish*, 541 U.S. 157, 165–71 (2004), the Supreme Court held that Exemption 7(C) protected death-scene photographs held in law enforcement files because their release could be painful and invasive for surviving family members. *See also Eil v. U.S. Drug Enf't Admin.*, 878 F.3d 392, 400 (1st Cir. 2017) (protecting under Exemption 7(C) medical and death-related records that had been exhibits at criminal trial); *New York Times Co. v. Nat'l Aeronautics & Space Admin.*, 782 F. Supp. 628, 631-32 (D.D.C. 1991) (protecting under Exemption 6 audio recording of Challenger astronauts' final moments). On the other side of the Exemption 6 and 7(C) balance, the Times cannot show that disclosure of the information in these records is likely to offer any significant insight into BOP operations. Particularly in light of the New York City Medical Examiner's public conclusion that Epstein hanged himself, the specific details of his suicide or the appearance of his body shortly thereafter do not shed any substantial light on BOP operations.

The second category of the materials withheld under Exemptions 6 and 7(C) consists of personally identifying information of BOP employees, BOP inmates other than Epstein, visitors or senders of funds to BOP inmates (including but not limited to Epstein), legal counsel for BOP inmates (including but not limited to Epstein), USAO-SDNY employees, and journalists. *See* Christenson Decl. ¶ 61. The Christenson Declaration explains how the balancing test weighs in favor of protecting personally identifying information under Exemptions 6 and 7(C) for each of these categories of individuals. *See id.* Moreover, the publicity and unfounded speculation surrounding Epstein's death make it more likely that disclosure of personally identifying information of an individual who interacted with Epstein or participated in the response to his

death would cause an unwarranted invasion of privacy. *See* Christenson Decl. ¶¶ 58-59.

Accordingly, the personally identifying information of third parties other than Epstein contained in these Records is protected from disclosure by Exemptions 6 & 7(C). *See Human Rights Watch*, 2015 WL 5459713, at*9-10 (upholding application of Exemptions 6 and 7(C) to withhold details about inmates BOP documents); *Billington v. U.S. Dep't of Justice*, 301 F. Supp. 2d 15, 19-21 (D.D.C. 2004) (upholding application of Exemption 6 to withhold identity of journalist).

D. BOP Properly Withheld Records and Information Pursuant to FOIA Exemption 7(E)

Exemption 7(E), 5 U.S.C. § 522 (b)(7)(E), exempts from disclosure law enforcement records where 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.” Exemption 7(E) contains “two alternative clauses,” one covering “techniques and procedures,” and the other addressing “guidelines.” *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 680-81 (2d Cir. 2010). The first clause of Exemption 7(E) provides categorical protection to information that would disclose law enforcement “techniques and procedures,” without requiring any showing of harm as a result of disclosure. *See id.* at 681. While Exemption 7(E) generally covers only “investigatory records that disclose investigative techniques and procedures not generally known to the public,” *Doherty v. U.S. Dep't of Justice*, 775 F.2d 49, 52 n.4 (2d Cir. 1985), “even commonly known procedures may be protected from disclosure if the disclosure could reduce or nullify their effectiveness,” *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004)

As indicated on the BOP index, some of the records withheld by BOP fall within the scope of Exemption 7(E) because they contain information or discussion of sensitive law enforcement techniques and procedures.⁵ As explained in the Christenson Declaration, release of these records would disclose BOP's law enforcement techniques and procedures for preventing and investigating suicides, suicide attempts, and other incidents within its facilities. *See* Christenson Decl. ¶¶ 65-68. Release of these records, particularly the Inmate Investigative Report, would reveal how BOP responds to and investigates certain incidents at facilities. And although BOP need not make a specific showing of a risk of circumvention of the law in order to withhold techniques and procedures under Exemption 7(E), BOP has explained that releasing these records would make it easier for inmates to circumvent measures designed to prevent suicides, as well as BOP's investigatory techniques and procedures. *Id.* Accordingly, BOP properly withheld these records under Exemption 7(E). *See Jordan*, 668 F.3d at 1201 (upholding application of Exemption 7(E) to BOP psychological records).

E. BOP Properly Withheld Information Pursuant to FOIA Exemption 7(F)

Exemption 7(F), 5 U.S.C. § 522 (b)(7)(F), exempts from disclosure law enforcement records where release “could reasonably be expected to endanger the life or physical safety of an individual.” “Exemption 7(F) was enacted to protect the safety of individuals involved in law enforcement investigations.” *ACLU v. DOD*, 389 F. Supp. 2d 547, 576 (S.D.N.Y. 2005). Application of Exemption 7(F) “is appropriate . . . where disclosure of identifying information would put the life and physical safety of law enforcement agents and other third parties in danger.” *Gonzalez* No. 19-cv-2911, slip op. at 34. “An agency’s burden to prove that disclosure

⁵ As discussed *supra*, all of these records were compiled for law enforcement purposes.

would result in the endangerment of life or physical safety is a low one.” *Gonzalez*, No. 19-cv-2911, slip op. at 33 (quotation marks omitted).

The personally identifying information of BOP employees described above as protected under Exemptions 6 and 7(C) is also protected by Exemption 7(F). As described in the Christenson Declaration, BOP employees work with inmates who, during or after their incarceration, might target such employees for reprisals. Christenson Decl. ¶ 25. Releasing the personally identifying information of such individuals would increase the risk of such targeting by making it easier for government staff to be identified and located. *See id.* These concerns are heightened because of the media attention and public speculation surrounding Epstein’s death. *See id.* Accordingly, BOP properly withheld the personally identifying information of BOP employees under Exemption 7(F). *See Jordan*, 668 F.3d at 1198 (upholding application of Exemption 7(F) to BOP Supermax roster); *Pinson v. Dep’t of Justice*, 236 F. Supp. 3d 388, 370 (D.D.C. 2017) (upholding application of Exemption 7(F) to BOP assignment rosters).

IV. BOP Has Satisfied Its Duty to Segregate and Release Any Non-Exempt Information

FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Where, as here, an agency asserts Exemption 7(A) by describing the categories of records it has withheld, the government satisfies this obligation by explaining why those categories of records do not contain reasonably segregable non-exempt information. *See, e.g., Robbins, Geller, Rudman & Dowd, LLP v. United States Sec. & Exch. Comm’n*, No. 3:14-CV-2197, 2016 WL 950995, at *9 (M.D. Tenn. Mar. 12, 2016) (citing examples). Moreover, nonexempt portions of documents may “be withheld if they are inextricably intertwined with the exempt portions.” *Conti v. U.S. Dep’t of Homeland Sec.*, No. 12 Civ. 5827

(AT), 2014 WL 1274517, at *25 (S.D.N.Y. Mar. 24, 2014) (quotation marks omitted). “The agency is entitled to a presumption that it complied with its obligation to disclose reasonably segregable material.” *Id.*

In the present case, BOP has already produced 584 pages of records, with appropriate redactions, in response to the Times’s FOIA requests and intends to produce more. Christenson Decl. ¶ 47. The records withheld in full by BOP do not contain any reasonably segregable non-exempt information. *See* Christenson Decl. ¶¶ 47. With regard to the records withheld in full under Exemption 7(A), the Capone Declaration explains that, to the extent there is non-exempt information contained in the records withheld under Exemption 7(A), that information is intertwined with exempt information and cannot reasonably be segregated without risking interference with the *Noel* and *Tartaglione* prosecutions. Capone Decl. ¶ 34. The public speculation and unfounded theories about Epstein’s death make segregation particularly difficult because the provision of information related to Epstein without complete context risks compounding the unfounded speculation about Epstein’s death, and heightening the risk of interference with *Noel* and *Tartaglione*. *Id.* As to the remaining records withheld in full, either the records are privileged in their entirety (*e.g.*, as attorney-client communications or draft documents) or any non-exempt information in the documents is inextricably intertwined with exempt information, such that segregating any non-exempt information would be of little to no informational value. *See* Christenson Decl. ¶ 47. Accordingly, BOP has satisfied its obligation to reasonably segregate any non-exempt portions of the records withheld in full.

CONCLUSION

For the foregoing reasons, the Court should grant the government’s motion for summary judgment.

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By:

