UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY, Plaintiff, -v- FEDERAL BUREAU OF PRISONS, Defendant.	:	20 Civ. 833 (PAE)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE FEDERAL BUREAU OF PRISONS'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This case involves records at the core of FOIA Exemption 7(A)—records that could reasonably be expected to interfere with two pending federal criminal prosecutions, one a death penalty case. The Bureau of Prisons ("BOP") properly withheld these records, and plaintiff's arguments to the contrary ignore or mischaracterize the weighty law enforcement interests at issue here. The Government has more than met its burden to articulate a rational link between public disclosure of the records and anticipated interference with the pending criminal cases through the declarations of a supervising prosecutor within the United States Attorney's Office for the Southern District of New York. Plaintiff's opposition fails to meaningfully engage with the substance of these declarations, and instead relies on speculation about how the criminal cases might proceed. The Court should uphold BOP's logical and plausible reliance on Exemption 7(A).

BOP's reliance on Exemptions 6 and 7(C) to protect images of Epstein's body and the names of his associates was also proper. Epstein's surviving family member retains a privacy interest in the details of Epstein's suicide and images of his remains, and Epstein's associates retain a privacy interest in the Government not disclosing or officially confirming their association with Epstein. On the other side of the Exemption 6 and 7(C) balance, plaintiff fails to identify a significant public interest that is likely to be advanced by release of this information, which would not shed substantial light on how BOP works.

BOP also properly invoked Exemption 5 and the deliberative process privilege. The portions of the documents withheld as privileged contain predecisional recommendations and discussion about where and how to house Epstein following his apparent suicide attempt in July

2019 and suicide prevention at the MCC more generally. Other documents withheld under Exemption 5 are drafts, which are quintessentially predecisional and deliberative documents.

BOP's reliance on Exemption 7(E) was also appropriate. The limited portions of documents withheld by BOP on this basis reflect specific aspects of BOP's investigations into Epstein's apparent suicide attempt and suicide. Disclosure of this information could reduce the effectiveness of BOP's investigatory techniques—a point which plaintiff's arguments about the effectiveness of suicide prevention techniques do not meaningfully address.

For all these reasons, the Court should grant the Government's motion for summary judgment and deny plaintiff's cross-motion.

BACKGROUND

I. BOP's Productions Since August 5, 2020

The Government respectfully refers the Court to the factual and procedural background provided in the Government's opening brief. *See* Memorandum of Law in Support of the Federal Bureau of Prisons's Motion for Summary Judgment ("BOP MOL"), at 2-4, ECF No. 25.[1] The Government provides additional background here to inform the Court of developments since the filing of the Government's opening brief on August 5, 2020.

Pursuant to an agreement between the parties, BOP continued to produce certain responsive documents after the filing of the Government's opening brief. On August 11, BOP produced 77 additional pages of records to plaintiff, consisting of 5 pages released in full and 72 pages released in part, and on August 31, 2020, BOP produced 351 additional pages of records to plaintiff, consisting of 12 pages released in full and 339 pages released in part. Supplemental Declaration of [redacted] ("Supp. [redacted] Decl.") ¶¶ 5, 7. The bases for withholdings

[1] Unless otherwise noted, the abbreviations used in this submission have the meaning defined in the Government's August 5, 2020, submission.

in connection with these productions were set out in the government's opening papers, with the exception of certain redactions plaintiff agreed not to challenge.[2]

In October 2020, the parties reached an agreement to resolve plaintiff's challenge to the adequacy of BOP's search for records, pursuant to which the Department of Justice Office of the Inspector General ("OIG") returned to BOP electronic copies of records BOP had provided to OIG in connection with the investigation into the circumstances of Epstein's death, after which BOP reviewed these records in response to plaintiff's FOIA requests.[3] On January 8, 2021, BOP produced 190 pages of records to plaintiff, consisting of 14 pages released in full and 176 pages released in part. BOP withheld in full 387 pages of records among those returned to BOP by OIG (the "Returned Records"), as reflected at Entries 55-60 of the updated index submitted with the Supplemental [redacted] Declaration (the "Updated Index").

II. BOP's Withholdings of Returned Records

The bases for BOP's withholdings in full or in part of certain Returned Records are set out in the Supplemental Declaration of Counsel to the Acting United States Attorney [redacted] and the Supplemental Declaration of [redacted]. The bases for these withholdings are substantially the same as the bases for BOP's prior withholdings, except for certain new bases for withholdings under Exemptions 7(E) and 7(F), related to the security of the MCC, that plaintiff has agreed not to challenge. Accordingly, the review, production, and withholding of the Returned Records have not substantially changed the legal issues to be resolved by the Court.

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[2] The Supplemental Declaration of [redacted] and the Supplemental Declaration of Kara [redacted] also correct and clarify certain information discovered or determined since the Government's August 5, 2020, submission.

[3] The parties agreed that BOP would not review emails provided to OIG, except for emails to or from Epstein himself while he was at MCC. BOP determined that Epstein did not send or receive emails while he was at MCC, and so did not review emails in its final round of review and production. See Supp. [redacted] Decl. ¶ 8.

A. Withholding of Some Returned Records in Full or in Part Pursuant to Exemption 7(A)

The Returned Records withheld in full or in part pursuant to Exemption 7(A) were withheld for substantially the same reasons as BOP's prior withholdings under Exemption 7(A), namely that their release could reasonably be expected to interfere with at least one—and for some portions of the withheld records, two—pending criminal cases, as explained in the Government's opening brief. *See* BOP MOL at 7-12. Specifically, the withheld records include possible exhibits at the *Noel* trial, information about which witnesses are expected to testify, and information and documents prepared by potential trial witnesses. *See* Supplemental Declaration of [redacted] ("Supp. [redacted] Decl.") ¶¶ 6-14. In addition, information contained in two of the withheld Returned Records relates to the circumstances of Epstein's apparent suicide attempt and could reasonably be expected to interfere with the *Tartaglione* prosecution. *See id.* ¶¶ 15-16.

B. Withholding of Some Returned Records in Full or in Part Pursuant to Exemption 6 and 7(C)

Each of the Returned Records withheld in full or in part pursuant to Exemptions 6 and 7(C) were withheld for substantially the same reasons as BOP's prior withholdings under Exemptions 6 and 7(C), namely that their release would constitute a clearly unwarranted invasion under Exemption 6, and, at a minimum, could reasonably be expected to constitute an unwarranted invasion under Exemption 7(C), of the personal privacy of BOP employees, BOP inmates other than Epstein, visitors or senders of funds to BOP inmates, or legal counsel for BOP inmates. *See* Supp. [redacted] Decl. ¶¶ 30-40; BOP MOL at 19-20.

C. Withholding of Some Returned Records in Part Pursuant to Exemptions 7(E) and 7(F)

BOP redacted portions of Returned Records pursuant to Exemptions 7(E) and 7(F), but plaintiff has agreed not to challenge the application of these exemptions to the Returned Records.

These exemptions apply to two categories of information in the Returned Records. First, the personal information of certain BOP employees is protected by Exemption 7(F) because release of this information would put BOP employees at risk. *See* Supp. [redacted] Decl. ¶ 48; BOP MOL at 21-22. Plaintiff expressly waived any challenge to this application of Exemption 7(F) in its cross-motion for summary judgment. *See* Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment ("P. MOL"), at 6 n.2, ECF No. 27. Second, some of the Returned Records contain information that, if released, would jeopardize the security of the MCC. *See* Supp. [redacted] Decl. ¶¶ 42-45, 49-50. Through counsel, plaintiff has agreed not to challenge the applications of Exemptions 7(E) and 7(F) to such information.[4]

Accordingly, the legal issues now ripe for resolution by the Court are essentially the same as those addressed in the Government's and plaintiff's opening briefs, except the issue of the adequacy of the Government's search has been resolved by agreement of the parties.

ARGUMENT

I. BOP's Withholdings Were Proper

A. BOP Properly Withheld Records Under Exemption 7(A)

BOP properly withheld records in full under Exemption 7(A). The Times's arguments to the contrary mischaracterize the weighty criminal law enforcement concerns at stake as irrational or irrelevant. They are neither. The Government's burden under Exemption 7(A) is not high: the Government need only demonstrate a "rational link" between the requested public disclosure and interference with ongoing or prospective investigations or proceedings. *See Crooker v. Bureau of*

[4] Through counsel, plaintiff has also agreed not to challenge the application of Exemptions 7(E) and 7(F) to such information in records withheld in full pursuant to Exemption 7(A), namely the records noted at Entries 32 and 49 of the Updated Index.

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*"); *Radcliffe v. IRS*, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008); *see also N.L.R.B v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978) (requiring government to establish that "disclosure of particular kinds of investigatory records . . . would generally 'interfere with enforcement proceedings'"). The Government has gone well beyond this requirement here by submitting two declarations of [redacted], a supervising prosecutor and Counsel to the Acting United States Attorney, that logically and plausibly explain how disclosure of the records or portions of records withheld under Exemption 7(A) would interfere with two ongoing prosecutions, one of them a death penalty prosecution. Such records are at the core of what Exemption 7(A) protects. The Times has failed to rebut the Government's showing.

i. The Records Were Compiled for Law Enforcement Purposes

The Government has logically and plausibly established that the records withheld by BOP under Exemption 7 were compiled for law enforcement purposes, thereby satisfying the first prong of the Exemption 7(A) test. *See Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 525 (S.D.N.Y. 2010); BOP MOL at 8-10. The Times criticizes the Government for arguing that BOP documents—or at least the sort of BOP documents at issue here—should categorically be deemed compiled law enforcement documents because of BOP's institutional role. *See* P. MOL at 9 n.4. But the Times's fails to engage with the Government's substantive arguments on this point, which are based directly on the decision of the Tenth Circuit in *Jordan v. U.S. Dep't of Justice. See* 668 F.3d 1188, 1193-97 (10th Cir 2011). Instead, the Times points out (as the Government did) that other Circuits and courts in this Circuit have applied a different, more practical approach. *See* P. MOL at 9 n.4. But as the Government explained, even if this Court

does not follow the Tenth Circuit's *per se* rule and instead applies a more practical approach, the documents at issue were still compiled for law enforcement purposes. *See* BOP MOL at 8-10. Specifically, the [redacted] and Supplemental [redacted] declarations explain how the records were compiled to help BOP take "proactive steps designed to prevent criminal activity and maintain security" within the MCC. BOP MOL at 10 (quoting *Human Rights Watch v. BOP*, No. 13-CV-7360 (JPO), 2015 WL 5459713, at *5 (S.D.N.Y. Sept. 16, 2015)); *see* BOP MOL at 10 (listing specific purposes of the compilation of the records); *see* Christensen Decl. ¶ 53; Supp. Christensen Decl. ¶ 29. Plaintiff fails to explain why these purposes would not satisfy the "rational nexus" or "practical" approach plaintiff urges, and so has effectively conceded that, even under its proposed approach, the records at issue here were compiled for law enforcement purposes. *See* P. MOL at 9. In addition, many of the records at issue were gathered and provided to OIG in connection with a law enforcement investigation into Epstein's death, and thus were compiled for law enforcement purposes. *See* Supp. [redacted] Decl. ¶ 29.

ii. Disclosure of the Records Would Interfere with Pending Criminal Proceedings

BOP properly withheld the Tartaglione Records[5] under Exemption 7(A). The [redacted] and Supplemental [redacted] Declarations explain why release of the Tartaglione Records would interfere with the *Tartaglione* prosecution, wherein the Government is seeking the death penalty. *See* [redacted] Decl. ¶¶ 27-33, Supp. [redacted] Decl. ¶¶ 15-16. Mr. [redacted] explained that "information contained in the Tartaglione Records may be relevant evidence in any possible penalty phase of the case against Tartaglione, and as a result, premature public disclosure of the Tartaglione Records could reasonably be expected to influence witness testimony and/or

[5] The Tartaglione Records now include those portions of the two Returned Records withheld pursuant to Exemption 7(A).

potential jurors' perceptions of witness testimony or evidence." [redacted] Decl. ¶ 29; *see* Supp. [redacted] Decl. ¶¶ 15-16; *see also* [redacted] Decl. ¶ 30 ("Moreover, the nature of the charges against Epstein and the circumstances of his apparent suicide attempt and death create a risk that premature public disclosure of the Tartaglione Records could reasonably be expected to impair the government's (and the defendants') ability to seat a fair and impartial jury in *Tartaglione* . . . ."). This is more than sufficient "to trace a rational link between the nature of the document[s] and the alleged likely interference." *NY Times*, 2016 WL 5946711, at *7.

Plaintiff's arguments to the contrary downplay the impact of release of the Tartaglione Records on a federal death penalty prosecution, without any factual basis or evidentiary support. The Court should not credit plaintiff's counsel's speculation about how death penalty prosecutions work over the sworn declaration of a senior prosecutor who supervised the case. Beyond that, plaintiff's arguments miss the point of the Government's position, are wrong, or both. First, plaintiff points out that "[t]he charges against Tartaglione have nothing to do with Epstein," which is correct but irrelevant. P. MOL at 10. As the [redacted] Declarations explain, release of the Tartaglione Records could reasonably be expected to interfere with any potential penalty-phase hearing required by 18 U.S.C. § 3593 in *Tartaglione*. Second, plaintiff mischaracterizes the Government's legitimate and reasonable concern about interference with any potential penalty phase of *Tartaglione* as "convoluted" and "speculation about a possibility" that plaintiff claims would allow BOP to withhold information about conditions of confinement in every case. P. MOL at 11-12. This overlooks that Tartaglione's defense counsel has already put his conditions of confinement, and, specifically, the events of the night of Epstein's apparent suicide attempt, at issue in *Tartaglione*. *See* Letter dated January 13, 2020, Dkt. No. 186, *United States v. Tartaglione*, No. 16 Cr. 832 (KMK); Letter dated January 21, 2020, Dkt. No. 193,

United States v. Tartaglione, No. 16 Cr. 832 (KMK). Thus, what plaintiff describes as the Government's "theory" here is not convoluted, speculative, nor even a theory: the conditions of Tartaglione's confinement and his interactions with Epstein have already been placed at issue in his criminal case.[6] Accordingly, the government has met its burden to show that public release of the *Tartaglione* records could reasonably be expected to interfere with a pending law enforcement proceeding.

BOP also properly withheld records under Exemption 7(A) that could reasonably be expected to interfere with the prosecutions of Michael Thomas and Tova Noel. The [redacted] Declarations logically and plausibly explain why these records could reasonably be expected to interfere with *Noel*, including because they "include information about which numerous witnesses are expected to testify at trial, include details that are not publicly known or known to other witnesses, and include information and documents authored by potential trial witnesses." [redacted] Decl. ¶ 14; *see id.* ¶ 15 (explaining how premature disclosure of the records could reasonably be expected to impair the parties ability to seat an impartial jury); *id.* ¶ 16 ("The risks of interference with the Noel proceedings are heightened by the media coverage of speculation and theories about Epstein's death."); Supp. [redacted] Decl. ¶¶ 6-14. As with the Tartaglione Records, the explanations in the [redacted] Declarations are more than sufficient "to trace a rational

[6] Plaintiff also argues in a footnote that the Court should disregard the reasonable expectation of interference with a death penalty prosecution because of the voir dire process. *See* P. MOL at 12 n.7. But the premise of this argument is that release of the Tartaglione Records *may in fact* interfere with *Tartaglione*—plaintiff just asks that the Court to rely on the voir dire process to mitigate the harm. Exemption 7(A) precludes disclosure so long as the Government shows (as it has here) a "rational link" between release of records and likely interference; it is irrelevant whether future measures could potentially be taken to mitigate the interference. And it is preferable to avoid potential prejudice altogether than to rely on potential future mitigation measures. In any event, plaintiff's counsel's speculation about how effective the voir dire process might be does not undermine the logic and plausibility of the sworn declaration of one of the senior prosecutors overseeing the case.

link between the nature of the document[s] and the alleged likely interference." *NY Times*, 2016 WL 5946711, at *7.

Plaintiff's arguments concerning the *Noel* prosecution are conclusory and without evidentiary basis. Plaintiff speculates that the documents withheld under Exemption 7(A) "bear little relationship to the prosecutions of Noel and Thomas." But this argument simply ignores the [redacted] Declaration, which logically and plausibly explains the relationship between the documents and those pending criminal cases. Plaintiff also relies on a decision by Judge Torres in *Noel*, but this decision and subsequent proceedings in that case cut against plaintiff's position. The Government has already disclosed to the *Noel* defendants, pursuant to a protective order, many of the materials withheld by BOP in this case, including materials that BOP gathered in response to plaintiff's FOIA requests and then turned over to the Government. *See* Protective Order, *United States v. Noel*, No. 19-cr-830 (AT) (S.D.N.Y.), Dkt. No. 16; Letter dated January 28, 2020, at 1, *United States v. Noel*, No. 19-cr-830 (AT) (S.D.N.Y.), Dkt. No. 22; Memorandum of Law of the United States of America in Opposition to Defendant Michael Thomas's Motion to Compel, *United States v. Noel*, at 8-9, No. 19-cr-830 (AT) (S.D.N.Y.), Dkt. No. 35. The fact that materials at issue have been disclosed to defendants as part of discovery in a criminal proceeding underscores that such materials are indeed potentially relevant to the prosecution and their premature disclosure would interfere with ongoing criminal proceedings.

Plaintiff's argument that disclosure pursuant to a protective order would foreclose any possible interference with *Noel*, *see* P. MOL at 13, incorrectly conflates disclosure to criminal defendants pursuant to a protective order with *public* disclosure under FOIA. The [redacted] Declarations explain that public disclosure of the records could reasonably be expected to interfere with *Noel*, including by "influenc[ing] witnesses' potential testimony at trial,"

"allow[ing] witnesses to alter their testimony to conform to other evidence," and "impair[ing] the government's (and the defendants') ability to seat a fair and impartial jury." [redacted] Decl. ¶¶ 14, 15; Supp. [redacted] Decl. ¶¶ 6-7. Disclosure to defendants pursuant to a protective order does not undercut these reasonable expectations of interference. Accordingly, plaintiff fails to rebut the Government's showing of a "rational link" between disclosure of the records and alleged likely interference. The Court should uphold BOP's reliance on Exemption 7(A).[7]

B. BOP Properly Withheld Records and Information Under Exemptions 6 and 7(C)[8]

BOP properly withheld two categories of personal information under FOIA Exemptions 6 and 7(C): details of Epstein's death and images of his body, and the personal information of third-party individuals other than Epstein. For each of these categories, the balancing test under Exemptions 6 and 7(C) weighs in favor of withholding the information at issue.

With respect to the details of Epstein's death and images of his body, plaintiff dismisses as *de minimis* the privacy interest of Epstein's brother in not having details and images of his brother's corpse publicly released. This position is contrary to *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 165-71 (2004), and lower court decisions that expressly recognize surviving family members' interests in avoiding the public release of details of a family member's death. *See Eil v. U.S. Drug Enf't Admin.*, 878 F.3d 392, 400 (1st Cir. 2017) (protecting

[7] For the records withheld in full by BOP pursuant to Exemption 7(A), as noted on the Updated Index, the Court need not reach the applicability of other exemptions if it concludes that BOP's withholdings under Exemption 7(A) were proper. For each issue discussed below, the Government notes where the Court need not reach an issue if it concludes that BOP's withholdings under Exemption 7(A) were proper.

[8] If the Court concludes that BOP's withholdings under Exemption 7(A) were proper, it need not reach the issue of whether Exemptions 6 and 7(C) apply to details of Epstein's death and images of his body, but would need to reach the issue of whether Exemptions 6 and 7(C) apply to the personal information of third-party individuals other than Epstein.

under Exemption 7(C) medical and death-related records that had been admitted as 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). Plaintiff attempts to distinguish *Favish* by arguing that surviving family members in that case submitted a declaration. But a declaration is not necessary to establish a privacy interest expressly recognized by the Supreme Court and other courts. *See Eil*, 878 F.3d at 400 (no discussion of declaration); *New York Times Co.*, 782 F. Supp. At 631-32 (same). Indeed, requiring family members to submit public declarations could itself infringe on their privacy.

An additional flaw in plaintiff's argument regarding the details and images of Epstein's death is the lack of any cognizable public interest in their disclosure. Under Exemptions 6 and 7(C), 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) (quotation marks omitted); *see also Associated Press v. U.S. Dep't of Defense*, 554 F.3d 274, 285 (2d Cir. 2009) ("[T]here is only one relevant interest, namely, to open agency action to the light of public scrutiny." (quotation marks omitted)). The records or information themselves must reveal information about government operations or activities. *Assoc. Press v. DOD*, 554 F.3d 274, 291 (2d Cir. 2009) ("[D]isclosure of information affecting privacy interests is permissible only if the information reveals something *directly* about the character of a government agency or official" (quoting *Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991))). Plaintiff advances no reason why releasing details of Epstein's death and photos of his body would reveal direct information about BOP's conduct or contribute significantly to an understanding of BOP's operations. The public knows that Epstein committed suicide by hanging himself in his cell at the MCC. Disclosure of

images of his body and further details of the mechanics of his death would not provide meaningful insight into how BOP works. *Cf. Favish*, 541 U.S. at 173-74 (requiring requester to "establish more than a bare suspicion in order to obtain disclosure" of information that requester believes would show Government impropriety). Accordingly, FOIA Exemptions 6 and & 7(C) protect such information from disclosure.

Similarly unavailing are plaintiff's arguments that the personal information of third-party individuals that appear on logs and other BOP documents should be disclosed. First, plaintiff's argument that no third parties have privacy interests in nondisclosure of their identities or connection to a high-profile matter, or that release of the records would not cause harm because some individuals have been publicly associated with Epstein in media reports, overlooks the well-established difference between reporting and official Government confirmation of facts.[9] Even if an individual's name has been associated with Epstein in media reports, they still maintain a privacy interest in the government not confirming or further publicizing any association. *See Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998); *Bast v. U.S Dep't of Justice*, 665 F.2d 1252, 1255 (D.C. Cir. 1981); *see also DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) (finding that individuals retain substantial privacy interests in criminal rap sheet information, even though the criminal convictions reflected in the rap sheets are already public). Moreover, contrary to plaintiff's assertion, without citing any authority, that the "privacy interest in nondisclosure is fixed," P. MOL at 17 n.11, the high-profile nature and substantial media coverage of Epstein's death heightens the third-party individuals' privacy interests in avoiding public disclosure of their names under Exemptions 6 and 7(C). *See*

[9] Defendants' argument appears to concede that individuals whose association with Epstein is not publicly known have a substantial privacy interest in such an association not being publicized.

Summers v. DOJ, No. CV 98-1837(RWR), 2004 WL 7333532, at *4 (D.D.C. Apr. 14, 2004). The potential intrusion on privacy interests is particularly acute in these circumstances. *See Judicial Watch v. U.S. Dep't of State*, 875 F. Supp. 2d 37, 47 (D.D.C. 2012) (finding a substantial privacy interest where there was an articulable risk of media scrutiny and harassment) (citing *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 118 (D.D.C. 2005)).

Second, plaintiff again fails to explain how the specific information at issue—the names and contact information of third-party individuals who called, visited, or transferred funds to Epstein or were approved to do so—would shed any direct or significant light on "*the operations or activities of the government*." *DOD v. FLRA*, 510 U.S. at 495; *see Associated Press*, 554 F.3d at 285. The names and contact information of the third-party individuals who interacted with Epstein while he was incarcerated do not bear on BOP operations. While plaintiff lists various aspects of BOP operations that information about Epstein's incarceration might shed light upon—such as whether Epstein was afforded special treatment, *see* P. MOL at 17—plaintiff does not connect these aspects of BOP's operations with third-party *names and identifying information*, which is the information actually at issue here. For example, it is not clear how the names of Epstein's visitors or transferors of funds could show whether or not he was afforded special treatment. To take another example, plaintiff argues that release of the names would show "whether BOP were effectively screening visitors who might represent a threat or assist in further criminal acts by Epstein or on behalf of him." P. MOL at 17. A premise of this argument—for which plaintiff does not provide any evidentiary basis—is that a visit to Epstein implies criminality, or that criminality could somehow be inferred from the release of a third-party name. This is too speculative and attenuated theory on which to rest an actual public interest in this case. *See Favish*, 541 U.S. at 159 ("[W]here there is a privacy interest protected

by Exemption 7(C) and the public interest asserted is to show that responsible officials acted negligently or otherwise improperly in performing their duties, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred."). The identities of Epstein's associates may be newsworthy, but, if so, it is not because they shed any light on government operations, the only relevant public interest in the analysis under Exemptions 6 and 7(A). And to the extent plaintiff suggests that disclosure would suggest or imply some sort of impropriety or criminality on the part of the visitor, that would only heighten that individual's privacy interest in avoiding public disclosure of his or her name and contact information. *See Halpern v. F.B.I.*, 181 F.3d 279, 297 (2d Cir. 1999) (describing privacy interests of third parties "insofar as the material in question demonstrates or suggests they had at one time been subject to criminal investigation"); *Garcia v. U.S. Dept. of Justice, Office of Information and Privacy*, 181 F. Supp. 2d 356, 371 (S.D.N.Y. 2002) (collecting cases) ("Case law has identified a number of potential adverse results related to the disclosure of the identities of individuals who appear in documents compiled for law enforcement purposes, concluding that the privacy interests of such individuals must weigh heavily against disclosure.").

Contrary to plaintiff's arguments, there are substantial privacy interests in the records and information BOP has withheld under Exemptions 6 and 7(C), and the information sheds little if any light on how the BOP works. Accordingly, the balancing test weighs in favor of non-disclosure, and BOP properly applied Exemptions 6 and 7(C).

C. BOP Properly Withheld Records and Information Under Exemption 5[10]

[10] If the Court concludes that BOP's withholdings under Exemption 7(A) were proper, then the Court need not reach the issue of BOP's withholdings pursuant to Exemption 5, except for two pages of draft letters withheld in full, noted at Entry 11 of the Updated Index, and a relatively small number of redactions pursuant to Exemption 5 on records released by BOP in part. In light of this, the parties respectfully request that, in the event the Court concludes that BOP's

BOP has properly withheld some records and information under Exemption 5. The government's opening brief identified four sets of decisions and related predecisional documents falling within the scope of Exemption 5. *See* BOP MOL at 14-16. Plaintiff does not meaningfully challenge the withholding of draft letters or records pertaining to press inquiries under Exemption 5. *See generally* P. MOL; BOP MOL at 15-16 (setting out the third (draft letters) and fourth (press inquiries) categories of Exemption 5 materials).[11] Plaintiff only challenges the withholding under Exemption 5 of "documents pertaining to where and how Epstein was housed and how Epstein died." P. MOL at 18.

Portions of the psychological reconstruction prepared following Epstein's death (withheld in full under Exemption 7(A)), as well as the portions of other documents BOP withheld in part under Exemption 5, contain material protected by the deliberative process privilege.[12] These documents contain predecisional recommendations and discussion of suicide prevention measures at MCC, as well as (in the case of certain emails) deliberations about where

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withholdings under Exemption 7(A) were proper, the parties meet and confer and then inform the Court whether it will be necessary for the Court to adjudicate any withholdings pursuant to Exemption 5 and propose a schedule for any additional submissions, if necessary.

[11] Plaintiff's submission briefly mentions the press inquiries, but only the context of its broader arguments challenging BOP's assertion of the deliberative process privilege in connection with decisionmaking about where and how Epstein was housed and how he died. *See* Opp. MOL at 19. But this does not address BOP's decisionmaking about whether and how to respond to press inquiries concerning Epstein and his death. *See* BOP MOL at 15-16.

[12] BOP has re-reviewed certain records it previously withheld in full under Exemption 5. As a result of this re-review, BOP has withdrawn its assertion of Exemption 5 as to the (1) incident report from Epstein's apparent suicide attempt, (2) the final version of the response to the psychological reconstruction prepared following Epstein's death, and (3) five pages consisting of a timeline of events that were included within the responses to the psychological reconstruction prepared following Epstein's death. These records are still withheld in full under Exemption 7(A).

and how to house Epstein following his apparent suicide attempt in July 2019. *See* [redacted] Decl. ¶¶ 49(b), (d), (f). Such predecisional recommendations and deliberations are protected by the deliberative process privilege. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) ("[D]eliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." (quotation marks and citation omitted)). In addition, many of the pages reflecting responses to the psychological reconstruction prepared following Epstein's death are essentially drafts: they contain comments from various authors and offices within BOP in versions of the document before it was finalized. *See* Supp. [redacted] Decl. ¶ 16. These prior versions of the ultimate response document were properly withheld under Exemption 5 as drafts. *See American Civil Liberties Union v. Dep't of Justice*, 844 F.3d 126, 133 (2d Cir. 2016); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 518 (S.D.N.Y. 2010) ("It is well-settled that draft document, by their very nature, are typically predecisional and deliberative." (quotation marks and alteration omitted)).

BOP has also reasonably explained how release of deliberative materials would harm its operations and decisionmaking. The [redacted] Declaration explains that disclosure would harm interests protected by Exemption 5 primarily by hampering the ability of BOP employees to frankly discuss and assess conditions and incidents at BOP facilities, as well as related BOP policies. *See* [redacted] Decl. ¶ 49. Plaintiff dismisses BOP's explanations out of hand as boilerplate, *see* P. MOL at 20, but this anticipated harm is entirely logical and plausible, and it relates directly to the purpose of the deliberative process privilege to "protect[] agencies from being 'forced to operate in a fishbowl.'" *Elect. Frontier Found. v. U.S. Dept. of Justice*, 739 F.3d 1, 7 (D.C. Cir. 2014) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)). Accordingly, BOP's

reasonable explanations are closely tethered to the purpose of Exemption 5 and indeed are similar in kind and specificity to anticipated harms the D.C. Circuit has held support withholdings under Exemption 5. *See Elec. Frontier Found.*, 739 F.3d at 6, 13.

D. BOP Properly Withheld Information Pursuant to FOIA Exemption 7(E)[13]

Plaintiff's arguments challenging BOP's withholdings under Exemption 7(E) fail to engage with the reasons BOP has withheld certain portions of documents, and instead focus on publicly available methods of preventing suicides. The withheld information involves techniques and procedures for how BOP investigates suicides and suicide attempts, including particular observations and investigative steps taken by BOP in response to Epstein's apparent suicide attempt and suicide.

BOP properly withheld portions of eight documents[14] (all separately withheld in full pursuant to Exemption 7(A)) because they would disclose particular investigative steps, actions, and observations BOP staff made in investigating Epstein's apparent suicide attempt and suicide. Such documents include forms used by BOP as part of its investigation (such as a Form 583 and a chain of custody form) and memoranda and reports prepared by BOP employees following

[13] If the Court concludes that BOP's withholdings under Exemption 7(A) were proper, then the Court need not reach the issue of BOP's withholdings pursuant to Exemption 7(E), except for a relatively small number of redactions pursuant to Exemption 7(E) on records released by BOP in part. In light of this, the parties respectfully request that, in the event the Court concludes that BOP's withholdings under Exemption 7(A) were proper, the parties meet and confer and then inform the Court whether it will be necessary for the Court to adjudicate any redactions pursuant to Exemption 7(E) on records released in part and propose a schedule for any additional submissions, if necessary.

[14] BOP has re-reviewed certain documents it previously withheld in full under Exemption 7(E), and now asserts Exemption 7(E) only as to discrete portions of some of those documents. Specifically, BOP has withdrawn its assertion of Exemption 7(E) as to the MCC New York Updates document or photo sheets. BOP continues to assert Exemption 7(E) in part as to the records reflected at Entries 1, 2, 9, 12, 13, 15, 17, and 18 of the Updated Index.

Epstein's suicide attempt that discuss steps taken immediately following Epstein's apparent suicide attempt and results of steps taken during the subsequent investigation. Exemption 7(E) applies to portions of these records because they contain non-public information that would reveal specific details about the application of law enforcement techniques and procedures protected by Exemption 7(E). Supp. [redacted] Decl. ¶¶ 17-25.

"[A] 'technique' is 'a technical method of accomplishing a desired aim' and a 'procedure' is 'a particular way of doing or going about the accomplishment of something.'" *ACLU v. DHS*, 243 F. Supp. 3d 393, 402 (S.D.N.Y. 2017) (quoting *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 682 (2d Cir. 2010)); *see NYCLU v. DHS*, 771 F. Supp. 2d 289, 292 (S.D.N.Y. 2011) (upholding application of 7(E) over specific details of use of cameras and license plate readers, even though such use of such items was generally known). Here, for example, certain of the reports prepared during the course of BOP's investigation include Security Threat Group ("STG") designations, which are an enhanced monitoring technique used by BOP. *See* Supp. [redacted] Decl. ¶¶ 20, 23. As another example, the August 14, 2019 letter withheld by BOP contains details of the After Action Review Team formed to investigate Epstein's suicide, which would disclose non-public law enforcement techniques and procedures employed by BOP.[15] *See id.* ¶ 22.

[15] The cases plaintiff cites to the contrary are not on point. *ACLU* and *Knight First Amendment Institute at Columbia Univ. v. U. S. Dep't of Homeland Security*, 407 F. Supp. 3d 334 (S.D.N.Y. 2019), *appeal filed*, No. 20-3837, rejected questions (or questions or answers) asked of groups of individuals in the immigration context as techniques. *Albuquerque Pub. Co. v. U.S. Dep't of Justice*, 726 F. Supp. 851 (D.D.C. 1989), rejected general descriptions of wiretapping and related surveillance methods as too publicly known. *Kubik v. U.S. Fed. Bureau of Prisons*, No. 10-6078-TC, 2011 WL 2619538 (D. Or. July 1, 2011), rejected the withholding of a video of a prison riot and discussions of prison guards' tactics in a report prepared following the riot essentially because the contents of the video and the tactics used during the riot were already public. None of these cases involves the disclosure of specific investigatory steps taken in response to a specific incident, the details of which are not publicly known.

Plaintiff's arguments about the public availability of documents pertaining to suicide prevention and the techniques described therein miss the point of BOP's Exemption 7(E) withholdings. The techniques and procedures embodied in the records at issue here are not suicide prevention techniques, but investigatory techniques deployed in response to a specific suicide attempt and suicide that exemplify how BOP investigates such incidents in federal prisons. *See, e.g.*, Supp. [redacted] Decl. ¶¶ 18-25. Plaintiff fails to establish that the *investigatory* techniques at issue and their specific application here are publicly known, even if the suicide prevention techniques it describes are publicly known. *See* P. MOL at 21-22.

Second, even if plaintiff had established that the techniques and procedures at issue were publicly known as a general matter, BOP has shown that the withheld information regarding their application in this particular context could reduce or nullify their effectiveness. 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). Although an agency need not show a risk of circumvention of the law in order to justify withholding of law enforcement techniques or procedures under Exemption 7(E), *see Allard K. Lowenstein Int'l Human Rights Project*, 626 F.3d at 681-82, BOP has explained that releasing the information contained in the Exemption 7(E) records at issue here would in fact make it easier for inmates to circumvent BOP's investigatory techniques and procedures. *See* Supp. [redacted] Decl. ¶¶ 18-25. The disclosure of these investigatory techniques and their use in the context of specific incidents at BOP facilities is simply not the same as disclosure of the general suicide prevention techniques

identified by plaintiff, such as double-celling. *See* P. MOL at 22. In particular, BOP has withheld information regarding STG designations, steps taken in response to an inmate emergency in the Special Housing Unit, sources typically relied upon and information-gathering steps taken in investigating incidents at the MCC, details about how BOP After Action Review teams conduct their work, and information about where evidence is stored. *See* Supp. [redacted] Decl. ¶¶ 18-25; *see also, e.g.*, *Human Rights Watch*, 2015 WL 5459713, at *6 (concluding that "the conduct giving rise to STG status is 'investigative in nature'" although not reaching Exemption 7(E) as a basis for its decision to uphold the withholding of STG information). Accordingly, the government has carried its burden here to properly invoke Exemption 7(E).

CONCLUSION

For the foregoing reasons, the Court should grant the government's motion for summary judgment and deny plaintiff's cross-motion for summary judgment.

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Respectfully submitted,

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