IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NAACP, *et al.*

Plaintiffs,

v.

U.S. DEPARTMENT OF COMMERCE,

Defendant.

Civil Action No. 3:17-cv-01682-WWE

September 17, 2018

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR DISCOVERY

Rachel Brown, Law Student Intern*
Varun Char, Law Student Intern*
Nikita Lalwani, Law Student Intern*
Abigail Olson, Law Student Intern
Joseph Schottenfeld, Law Student Intern*
Charlotte Schwartz, Law Student Intern
Jeffrey Zalesin, Law Student Intern*
Michael J. Wishnie (ct27221)

* Motion for leave to appear as law student interns pending

Rule of Law Clinic
Yale Law School
127 Wall Street
New Haven, CT 06511
Tel: (203) 436-4780
Fax: (203) 432-1426
michael.wishnie@ylsclinics.org
Counsel for Plaintiffs

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This case is about a cornerstone of American democracy. Before congressional seats can be "apportioned . . . according to . . . the whole number of persons in each State," U.S. Const. Am. XIV § 2; before states can divide themselves into legislative districts that honor the Constitution's promise of one person, one vote; and before Congress can equitably distribute hundreds of billions of dollars in program funding, there must be an "actual Enumeration" of the population, or a census. *Id.* Art. I § 2 cl. 3. And before the census can take place every tenth year, the federal government—specifically, Defendant U.S. Department of Commerce, through its sub-agency the U.S. Bureau of the Census—must spend years preparing for this momentous undertaking. The issue in this Freedom of Information Act ("FOIA") case is how transparent the government must be about its preparations for the census.

The need for transparency about the census has never been greater. As the 2020 Census approaches, the Census Bureau has cut back drastically on field testing, struggled with chronic underfunding, and announced unprecedented changes in census-taking methodology—all without adequately answering the criticisms of experts who warn that the Bureau is headed for a woefully inaccurate census. Plaintiffs—the National Association for the Advancement of Colored People ("NAACP"), the NAACP Connecticut State Conference, and the NAACP Boston Branch—have monitored the 2020 Census preparations as best they can, based on the information that Defendant has published. This limited information alone is not enough. To understand the Bureau's preparations for 2020 more thoroughly, Plaintiffs, their constituents, and the public at large need access to internal Bureau records. Plaintiffs therefore filed a request under FOIA, 5 U.S.C. § 552, and after receiving no satisfactory response, filed this lawsuit to compel disclosure as required by law.

In the fourteen months since Plaintiffs filed their FOIA request, cause for concern about the 2020 Census has only escalated, as Defendant has decided to add a citizenship question to the census questionnaire and recalculated the life-cycle cost estimate for the census. Meanwhile, Defendant still has not met its obligations under FOIA. Despite clear evidence that Defendant possesses many responsive internal records, Defendant has produced almost none. Instead, Defendant has insisted that Plaintiffs are entitled to little more than the surface-level documents on the Census Bureau website, defying Congress's choice to grant the public presumptive access to *all* federal agency records under FOIA.

Defendant has now moved for summary judgment, but patently fails to carry its legal burden. Defendant relies on vague affidavits that provide little information about its search methods and even less about the structure of its databases. Similarly, Defendant leaves Plaintiffs and the Court unable to determine whether Defendant unlawfully withheld records.

Because Defendant has not satisfied its burden, its motion for summary judgment should be denied, and Plaintiff should be allowed to take limited discovery to develop a reliable record concerning the searches Defendant conducted. Alternatively, Plaintiffs cross-move under Federal Rule of Civil Procedure 56(d) for the Court to defer ruling on Defendant's motion and permit Plaintiffs to take the limited discovery they need, in the hope that this discovery will allow the parties to agree on additional, targeted searches and thereby resolve this matter without need for further adjudication. *See, e.g.*, *Am. Immigration Council v. DHS*, No. 3:12-cv-00355-WWE, ECF No. 44 (D. Conn. July 31, 2013) (in FOIA action, parties resolved litigation without need for adjudication of Defendant's motion for summary judgment after this Court granted Rule 56(d) motion and allowed limited discovery).

BACKGROUND

The decennial census is used to determine the balance of political power among and within the states and the distribution of hundreds of billions of dollars in federal funds. *See* Decennial Programs, *About the 2020 Census*, U.S. Census Bureau, https://www.census.gov/programs-surveys/decennial-census/2020-census/about.html. It is therefore critical that the census be accurate, and the public has a profound interest in the planning and execution of the census.

Congress has charged the U.S. Bureau of the Census (the "Census Bureau" or "Bureau"), a sub-agency of Defendant U.S. Department of Commerce ("Defendant"), with conducting the census. 13 U.S.C. §§ 2-6. Despite the importance of the census, the Bureau has historically undercounted communities of color, children, home renters, and low-income persons. *See, e.g.*, *2010 Census Missed 1.5 Million Minorities*, CBS News (May 22, 2012), https://www.cbsnews.com/news/2010-census-missed-15-million-minorities/. The 2020 Census is poised to be worse than ever on this front. The Census Bureau has fallen behind on hiring,[1] struggled to secure adequate funding throughout the census cycle,[2] cancelled important field tests,[3] exacerbated public distrust by adding a census question about citizenship status,[4] and

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[1] *2020 Census*: *Continued Management Attention Needed to Address Challenges and Risks with Developing, Testing, and Securing IT Systems*, Gov. Accountability Off. 13 (Aug. 2018), https://www.gao.gov/assets/700/694169.pdf ("the Bureau continues to face staffing challenges that could impact its ability to manage and oversee the technical integration contractor").

[2] *See, e.g.*, Arloc Sherman, *After Budget Deal, Policymakers Should Boost 2018 Funding for the 2020 Census*, Ctr. Budget Pol'y Priorities (Feb. 16, 2018), https://www.cbpp.org/blog/after-budget-deal-policymakers-should-boost-2018-funding-for-the-2020-census ("funding problems over the last several years—due in part to tight annual caps on overall non-defense discretionary funding—have hamstrung census preparations.").

[3] *Census Bureau Announces Changes to 2017 Field Tests*, U.S. Census Bureau (Oct. 18, 2016), https://www.census.gov/newsroom/press-releases/2016/cb16-tps143.html.

[4] *See* Hansi Lo Wang, *Citizenship Question Controversy Complicating Census 2020 Work, Bureau Director Says*, NPR (Jul. 11, 2018),

announced plans to reduce the Bureau's field infrastructure drastically,[5] while relying on an untested digital-first census-taking strategy that experts have described as vulnerable to cyber-attack.[6] Making matters worse, the Bureau's preparations have not been adequately transparent, leaving the public with more questions than answers about important matters such as the Bureau's preparedness for cybersecurity threats and its plans to hire community-based partnership specialists to promote an accurate count of hard-to-count populations.

A census done on the cheap, without sufficient time, planning, or resources to ensure that hard-to-count communities are reached, inevitably harms communities of color. As Defendant's own studies indicate, African Americans have faced "a lengthy history of discrimination and unequal treatment in this country" which leads to "distrust of the government and hence apprehension about responding to federal questionnaires." *See* Pls.' Local Rule 56(a)(2) Statement ¶ 96. When the government fails to address this distrust, it exacerbates the consequences of this history of discrimination. When the government fails to count African Americans, their votes are diluted, their schools go underfunded, and their community needs are ignored. Given the acute harms that accrue to communities of color as a result of inaccurate

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https://www.npr.org/2018/07/11/627350553/citizenship-question-controversy-complicating-census-2020-work-bureau-director-s.

[5] *See, e.g.*, *2020 Census Operational Plan: A New Design for the 21st Century*, Census Bureau 38 (Nov. 2015), https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan.pdf ("Reduced number of Regional Census Centers (RCC) managing a reduced number of Area Census Offices tasked with managing field operations and support activities.").

[6] *See, e.g,*, *Letter to Honorable Wilbur L. Ross* (Jul. 16, 2018), https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/07/Census-Cybersecurity-Letter.pdf ("We urge the leadership of the Bureau and of the Department of Commerce to share publicly their plans for protecting information vital to the future of American voting but also tempting for adversaries that seek to harm our country and its foundational democratic processes.")

census-taking, it is critical—not to mention legally required under FOIA—for Defendant to provide transparency about the Census Bureau's operations.

Plaintiffs, leading civil rights organizations that work to ensure the welfare of communities of color, are mobilizing to promote an accurate census count in their communities in spite of the Census Bureau's deficient preparations. To inform their activism leading up to 2020, Plaintiffs seek to understand exactly where Defendant's plans fall short so they can effectively advocate before Congress and conduct vital community outreach efforts aimed at mitigating the consequences of Defendant's failures.

Accordingly, in June 2017, Plaintiffs filed a FOIA request (the "Request" or "FOIA Request") with Defendant, seeking information about the Census Bureau's preparations for the 2020 Census. ECF No. 1, Ex. A. The Request asked for twelve numbered categories of documents related to, *inter alia*, the Bureau's hiring practices, cancellation/delay of tests, plans to digitize the census, canvassing of addresses, and outreach to hard-to-count groups. *Id*.

Despite its statutory obligation to respond within twenty business days, 5 U.S.C. § 552(a)(6)(A)(i), Defendant failed to send Plaintiffs any documents until October 3, 2017, when Defendant provided incomplete responses to six of Plaintiffs' twelve itemized requests. Def.'s Ex. 1, Attachment E at 36-100. Defendant has since provided further partial responses to the Request on several occasions. *See* Def.'s Ex. 1, Attachment F at 104-222; Def.'s Ex. 1, Attachment H at 228-251. However, Defendant remains far from meeting its statutory obligations. Defendant has repeatedly pointed to publicly available reports, but these documents are incomplete; many of them are self-described "conceptual and high-level" memoranda, Pls.' Local Rule 56(a)(2) Statement ¶ 80, and, as recent litigation over the citizenship question has demonstrated, they may be misleading. *See Kravitz v. U.S. Dep't of Commerce*, No. 18-cv-1041-

GJH, 2018 WL 4005229 at *17 (D. Md. Aug. 22, 2018) (citing evidence that what Defendant described to the public as a "'request' from the Department of Justice [to add the citizenship question] was in fact manufactured by senior Department of Commerce officials as a pre-textual reason for reinstating the citizenship question"). If anything, these public documents confirm that Defendant has more records responsive to Plaintiffs' FOIA request that Defendant has failed to disclose or even search for. *See infra,* Section I(A)(3).

Plaintiffs filed this FOIA lawsuit on October 5, 2017. ECF No. 1. Defendant answered on December 14, 2017. ECF No. 13. On March 21, 2018, upon the joint motion of the parties, this Court entered a scheduling order providing, *inter alia*, that Plaintiffs and Defendant would meet and confer in an attempt to narrow the issues in dispute. ECF No. 16. Plaintiffs and Defendant did meet and confer by telephone, but Plaintiffs' effort to work with Defendant to identify mutually agreeable search methods proved fruitless. Pls.' Local Rule 56(a)(2) Statement ¶¶ 72-75.

Defendant has moved for summary judgment dismissing Plaintiffs' complaint in full. Plaintiffs now ask the Court to deny Defendant's motion and order limited discovery. In the alternative, Plaintiffs ask the Court to defer ruling on the motion for summary judgment and allow limited discovery under Federal Rule of Civil Procedure 56(d).

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, a court may enter summary judgment only if a review of the record shows there is "no genuine issue as to any material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine dispute is one in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255 (citation omitted).

The standard for summary judgment in a FOIA case requires the agency to show that "its search was adequate and that any withheld documents fall within an exemption to FOIA." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment can be granted based on "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption." *Id*. Once submitted by the agency, these affidavits ordinarily "are accorded a presumption of good faith," *id*. (citations omitted), but "this good faith presumption only applies to agency affidavits or declarations that are 'reasonably detailed.'" *Eberg v. Dep't of Def.*, 193 F. Supp. 3d 95, 107 (D. Conn. 2016) (internal quotation omitted).

The moving agency must demonstrate that the search was "reasonably calculated to discover the requested documents," *Grand Cent. Partnership, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) (internal quotation omitted), and it must make this showing "beyond material doubt." *Vietnam Veterans v. DHS*, 8 F. Supp. 3d 188, 205 (D. Conn. 2014) (internal quotation omitted). In the case of a FOIA request that "demands all agency records on a given subject," the agency's search is not adequate unless it "pursue[s] any 'clear and certain' lead it cannot in good faith ignore" in pursuit of the responsive records. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999) (internal quotation omitted).

To prove that withholdings were lawful under FOIA, the agency must give "reasonably detailed explanations why any withheld documents fall within an exemption" to FOIA. *Carney*, 19 F.3d at 812. "In keeping with [FOIA's] policy of full disclosure, the exemptions are 'narrowly

construed with doubts resolved in favor of disclosure.'" *Halpern*, 181 F.3d at 287 (internal quotation omitted).

If the agency submits affidavits that facially meet the standard for summary judgment, "the requester may nonetheless produce countervailing evidence, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order." *El Badrawi v. DHS* (*El Badrawi I*), 583 F. Supp. 2d 285, 299 (D. Conn. 2008) (internal quotation omitted).

Finally, Rule 56(d) (formerly Rule 56(f)) provides that if a nonmoving party "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may" enter any "appropriate order," including an order allowing "time . . . to take discovery" and deferring or denying the motion for summary judgment in the meantime. A party can obtain Rule 56(d) relief if it shows "(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 303 (2d Cir. 2003) (citation omitted).

ARGUMENT

I. Defendant has not met its burden for summary judgment.

To justify summary judgment, Defendant has the burden to make two showings: (1) "that its search was adequate," and (2) "that any withheld documents fall within an exemption to FOIA." *Carney*, 19 F.3d at 812. Defendant has failed to carry its burden on either issue. Summary judgment therefore must be denied.

A. *Defendant has failed to show that it conducted an adequate search.*

An adequate FOIA search is one "reasonably calculated to discover the requested documents." *Grand Cent. Partnership, Inc.*, 166 F.3d at 489 (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991)). Before summary judgment can enter, "the defending agency must show beyond material doubt that it has conducted" such a search. *Vietnam Veterans*, 8 F. Supp. 3d at 205 (quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007)). Rather than make this required showing, Defendant relies on a combination of threadbare descriptions, conclusory statements, and irrelevant deflections. The available evidence shows that Defendant failed to uncover numerous responsive documents in its possession. At a minimum, material disputes of fact regarding the reasonableness of Defendant's searches preclude summary judgment. Defendant's motion should be denied.

1. Defendant has not described its databases and search methods in reasonable detail.

When an agency relies on sworn declarations to establish the adequacy of its search, those declarations "must be 'relatively detailed and non-conclusory.'" *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 231, 240-41 (D. Conn. 2012) (quoting *SafeCard,* 926 F.2d at 1200). The agency's declarations "must detail files searched and the general scheme of the agency file system," *id.* at 245 (quoting *Fisher v. FBI*, 94 F. Supp. 2d 213, 218 n.2 (D. Conn. 2000)), and they must "describe in reasonable detail the scope of the search and the search terms or methods employed," *id.* at 241. Defendant's declarations in this case are insufficient to support summary judgment because they fail to describe the agency file system and fail to provide remotely reasonable detail about the scope and methods of Defendant's searches.

a. Defendant has failed altogether to describe the structure of its file system.

Defendant's declarations do not "describe at least generally the structure of the agency's file system which renders any further search unlikely to disclose additional relevant information." *El Badrawi I*, 583 F. Supp. 2d at 298 (citation omitted). Nor do the declarations, Def.'s Exs. 1 & 2, specify "what database was searched" and "what information the database contains." *Vietnam Veterans*, 8 F. Supp. 3d at 212. As judges in this district have recognized, any declaration that fails to provide this information is "insufficiently detailed to show beyond material doubt that the search conducted . . . was adequate." *Id.* at 212-13; *accord The Few, the Proud, the Forgotten v. U.S. Dep't of Veterans Affairs*, 254 F. Supp. 3d 341, 355 (D. Conn. 2017) (quoting *id.* at 212-13). Summary judgment must be denied on this basis alone.

The closest Defendant comes to describing the structure of its file system is the statement, contained in the Declaration of Vernon E. Curry, that certain components of the Census Bureau "conducted manual and electronic searches for responsive records which included searching personal files, shared drives, and email." Def.'s Ex. 1, Curry Decl. ¶ 9. This passing reference to "personal files, shared drives, and email" does not fulfill Defendant's obligation to explain what databases it maintains, which ones were searched, and what documents the searched databases contain. Several years ago, Judge Thompson rejected as insufficiently detailed a Marine Corps declaration that contained almost precisely the same information as the Curry Declaration regarding the searched databases. *Vietnam Veterans*, 8 F. Supp. 3d at 221 (declaration that "state[d] that computer hard drives, shared drives, and email accounts were searched" did "not adequately describe the branch's filing system" because it left the court "unable to discern whether there are other electronic files which were not searched, and if there are, why they were not searched"). *See also Eberg*, 193 F. Supp. at 109 (agency declaration was inadequate where declarant stated that he "searched electronic databases with

Share Drives on the Non-secure Internet Protocol Router Network (NIPRNET) allocated to" his office but failed to "explain how his office's files are organized into the NIPRNET, identify the names or number of databases he searched, or describe the types of files kept in or fields used by the databases he searched."). Defendant's failure to describe its record-keeping scheme makes it impossible to determine whether Defendant searched the databases likely to contain responsive records. Defendant therefore has not demonstrated that it conducted an adequate search.

b. Defendant has not described in reasonable detail the scope and methods of its searches.

Another fatal deficiency of Defendant's declarations is that they do not "describe in reasonable detail the scope of the search and the search terms or methods employed." *Serv. Women's Action Network*, 888 F. Supp. 2d at 241. Without such a description, Defendant cannot possibly carry its burden to establish the adequacy of its searches.

Defendant attempts to explain its searches by submitting the Curry Declaration. Mr. Curry declares that he identified seven operating units within the Census Bureau as likely to possess responsive records locatable with reasonable effort, Def.'s Ex. 1, Curry Decl. ¶ 8; that he issued to each of these units "search taskers instructing them to search for, identify, and produce responsive documents to [his] office," *id.* at ¶ 9; and that "[t]hose program areas conducted manual and electronic searches for responsive records which included searching personal files, shared drives, and email," *id*. Defendant does not identify the search terms that Census Bureau units used to conduct the "manual and electronic searches," nor does it specify which "personal files, shared drives, and email" archives were searched.[7]

[7] Mr. Curry also declares that during this litigation, "[a]dditional searches were initiated in response to specific requests for well-identified documents, such as Plaintiffs' request for a copy of the integrated communications contract awarded to Young & Rubicam." Def.'s Ex. 1, Curry Decl. ¶ 15. Defendant thus appears to claim that one of its search methods was to run targeted

The documents attached to the Curry Declaration similarly fail to shed light on the scope and methods of Defendant's searches. Defendant represents that the set of documents included in the Curry Declaration as Attachment D is a "copy of the search taskers issued" to the relevant Census Bureau offices. Def.'s Ex. 1, Curry Decl. ¶ 9. However, Attachment D does not actually contain copies of search taskers issued to the seven offices Mr. Curry identified, and therefore fails to clarify what instructions, if any, each office received from Mr. Curry.

Attachment D consists of an email memorandum requesting information from certain offices to help complete a fee estimate, Def.'s Ex. 1, Attachment D at 21-22; a photocopy of the Request, *id.* at 23-26; a blank worksheet for estimating FOIA fees, *id*. at 27; a memorandum from Mr. Curry to Sean Kinn of the Census Acquisition division dated December 12, 2017, *id.* at 32; a blank form for a Census Bureau office to sign when transmitting documents, *id.* at 33; and two email memoranda pertaining to a separate FOIA request not at issue in this lawsuit, *id.* at 28-31.[8] Of these documents, the only one with any relevance to Defendant's search methods is the December 12, 2017, memorandum to Mr. Kinn. In that memorandum, Mr. Curry instructs Mr. Kinn to "search every place that could reasonably be expected to have responsive documents" and advises him that responsive documents "would include, in addition to final documents, drafts, notes, informal records, and electronic records." *Id*. at 32. Beyond the boilerplate

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searches for individual documents that Plaintiffs had requested by name, including the Young & Rubicam contract. However, Plaintiffs dispute that they ever made any such request; Plaintiffs requested a category of records that includes the Young & Rubicam contract, but they did not single out that document alone. *See* Pls.' Local Rule 56(a)(2) Statement ¶ 25. Thus, there is a genuine factual dispute as to Defendant's claim that it used this search method. And even if this part of the Curry Declaration were undisputed, it would provide no basis to conclude that Defendant's overall search was adequate. If Defendant indeed conducted an adequate search, it must have used *some* method to query databases for documents by subject matter. Yet the Curry Declaration fails to specify which databases Defendant queried and which search terms it used.

[8] The separate FOIA request referenced in these email memoranda was filed by Plaintiffs in March 2018, during the pendency of this litigation.

instruction to "search every place that could reasonably be expected to have responsive documents," the memorandum offers no description of *how* Defendant planned to accomplish that search.

Case law from this district confirms that the level of detail Defendant has provided about its searches is grossly insufficient to justify summary judgment. For example, in *The Few, the Proud, the Forgotten*, Judge Bolden found the Veterans Health Administration's declarations inadequate to establish the adequacy of its search because those declarations—like Defendant's declarations in this case—failed to specify the agency's search terms. 254 F. Supp. 3d at 358, 360. In *Vietnam Veterans*, Judge Thompson held an agency declaration that described search methods in significantly *more* detail than the Curry Declaration inadequate to justify summary judgment. 8 F. Supp. 3d at 207-08 (declaration that described an electronic file system divided into folders, identified the folders searched, and listed the search terms used to query each folder failed to "adequately describe [the agency's] search to show that it was reasonably calculated to find all responsive documents" because, *inter alia*, it did not explain why other folders were not searched). *See also The Few, the Proud, the Forgotten*, 254 F. Supp. 3d at 356 (declaration submitted by Veterans Benefits Administration's FOIA officer, listing search terms that certain personnel used to search their emails, was insufficient to establish the adequacy of VBA's search because, *inter alia*, the agency failed to explain why it excluded another search term).

Because Defendant has not submitted a declaration describing its searches in reasonable detail, it has not carried its burden for summary judgment.

2. The public availability of some responsive information does not relieve Defendant of its obligation to search for other, non-public responsive records.

Defendant attempts to justify summary judgment largely by emphasizing its efforts to keep the general public informed about its planning for the 2020 Census. *See* Def.'s Mem. at 12;

id. at 13-17 (stating that "extensive information is publicly available," to which Defendant has referred Plaintiffs); Def.'s Ex. 2, Reist Decl. ¶¶ 5-13. Plaintiffs are familiar with the records that Defendant has made public. However, these disclosures are no substitute for a full FOIA search calculated to uncover all records responsive to the specific request at issue in this case. Because Plaintiffs are seeking—and Congress has directed the disclosure of—records that go beyond what Defendant has voluntarily released, Defendant cannot avoid its burden to show that it adequately searched for *all* responsive records, including those that have never been made public.

Defendant does not even pretend that the public-facing documents posted on the Census Bureau website represent all the information in Defendant's possession on the subjects covered by the Request. Many of these documents are, *by their own description*, "conceptual and high-level" summaries, as opposed to exhaustive catalogues of relevant information. Pls.' Local Rule 56(a)(2) Statement ¶ 80; *see also id.* ¶ 77 (document titled *2020 Census Detailed Operation Plan for: 15. Group Quarters Operation (GQ)* describes itself as presenting "the high-level design for the GQ operation"); *id.* ¶ 78 (document titled *2020 Census Detailed Operational Plan for: 3. Security, Privacy, and Confidentiality Operation (SPC)* describes itself as providing a "high level description of the production support processes for the 2020 Census SPC operation."). Defendant appears to take the position that because it has published these "high-level" materials, it is largely relieved of its obligation to produce, or even search for, other documents. Congress has not, however, excused agencies that publish generalized, "high-level" records online from their statutory obligations under FOIA to search for and disclose non-exempt records in response to particularized requests.

Congress adopted FOIA "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). In keeping with this strong "policy of disclosure," a federal agency must "disclose its records unless its documents fall within one of the specific, enumerated exemptions set forth in the Act." *Nat'l Council of La Raza v. DOJ*, 411 F.3d 350, 355 (2d Cir. 2005). By adopting a presumption in favor of mandatory disclosure, Congress rejected the notion that an agency may pick and choose which documents to release. Therefore, when an agency publishes a document announcing a decision and summarizing (or purporting to summarize) the agency's reasons for making that decision, the public need not simply take the agency's account at face value, but may use FOIA to examine non-exempt internal records that underlie the agency's external communications materials.

This right of access to internal documents is necessary to FOIA's "policy of disclosure," *id.*, because agencies will not necessarily provide a full accounting of their activities and motivations without being legally compelled to do so. Recent events demonstrate that Defendant itself is no paragon of voluntary transparency. Specifically, in March 2018 Defendant published a memorandum from Secretary of Commerce Wilbur Ross, which stated that Secretary Ross decided to add a question about citizenship status to the 2020 Census questionnaire in response to a request from the U.S. Department of Justice. Pls.' Local Rule 56(a)(2) Statement ¶ 81. Only later, in the context of litigation, did Defendant reveal that contrary to its prior representations, Defendant itself had asked DOJ to submit that request. *See State of New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 809 (S.D.N.Y. 2018); *Kravitz*, 2018 WL 4005229 at *17 (citing evidence that the "'request' from DOJ [to add the citizenship question] was in fact manufactured

by senior Department of Commerce officials as a pre-textual reason for reinstating the citizenship question").

Another example of the incompleteness of Defendant's public-facing materials is the Census Bureau's webpage for the 2018 End-to-End Test. Many news reports indicate that this crucial test has been plagued by problems. The Bureau abandoned its planned advertising and outreach campaign in advance of the test due to inadequate funding. Pls.' Local Rule 56(a)(2) Statement ¶ 83. Some residents are so fearful of the government that they have refused to answer the door when enumerators attempted to interview them. *Id.* ¶ 84. Local political leaders even had to call an emergency meeting to try to salvage the test. *Id.* ¶ 85. Yet, none of this is reflected on the 2018 End-to-End Test webpage. *Id.* ¶ 82. If Defendant possesses any documentation of these important problems, that documentation lurks beneath the surface of Defendant's optimistic public-relations materials.

These examples of incomplete or misleading publicity materials illustrate the importance, and the wisdom, of Congress's policy of allowing citizens to go beneath public-facing agency materials and investigate whether there is more to the story than the agency has voluntarily disclosed. That type of investigation is precisely what Plaintiffs seek to do through the Request. As discussed *infra*, Section IV(A)(1)(c), a lawful response to Plaintiffs' request would include documents which appear to be in Defendant's possession, but which have never been disclosed to the public. FOIA requires Defendant to conduct a search reasonably calculated to capture internal records such as these, but Defendant has not met its burden to show that it conducted such a search.

3. Defendant's claim that it conducted an adequate search is contradicted by publicly available evidence.

Extrinsic evidence refutes Defendant's claim that it conducted adequate searches as required by law. Specifically, the same "conceptual and high-level" webpages that Defendant relies on in this case provide evidence that Defendant possesses many responsive records that it has failed to disclose or even search for. The sheer volume of responsive records that Defendant overlooked creates, at the very least, a material dispute of fact as to whether Defendant's searches were "reasonably calculated to uncover all relevant documents." *Vietnam Veterans*, 8 F. Supp. 3d at 205.

For example, Defendant provided a link to the Census Bureau's webpage for the Data Stewardship Executive Policy Committee, which contained the Bureau's "Administrative Data, Access, and Use Policy." *See* Def.'s Ex. 1, Attachment I at 232. According to this internal policy, the Census Bureau's use of data from other federal or state administrative agencies is always governed by interagency agreements between the Census Bureau and data-providing agencies. Pls.' Local Rule 56(a)(2) Statement ¶ 86. This raises the question: where are those interagency agreements? Indeed, documents that Defendant included in the certified administrative record in *State of New York v. Department of Commerce*, a lawsuit challenging the Census Bureau's new citizenship question, but never disclosed to Plaintiffs in the instant case, indicate that Defendant concluded at least 35 such agreements before Plaintiffs filed their FOIA request. *See id.* ¶ 87. To the extent that the Census Bureau has used or plans to use these third-party data in the course of its address-canvassing efforts, these records are responsive to Item 2 of the Request at issue in this case. ECF No. 1, Ex. A, Item 2.

Similarly, many of the public-facing documents to which Defendant has directed Plaintiffs indicate that the Census Bureau made determinations or conducted studies, but do not include the supporting documentation that provided the basis for the Census Bureau's action. In

several cases, it is clear that the absent supporting documentation would be responsive to Plaintiffs' FOIA request.

For example, Plaintiffs specifically asked for records relating to the Census Bureau's plans for hiring field staff. ECF No. 1, Ex. A, Item 7. Versions 2 and 3 of the Census Operational Plan indicate that the Census Bureau plans to *halve* the field infrastructure for the 2020 Census down from the 2010 Census. Pls.' Local Rule 56(a)(2) Statement ¶ 89. Other than general references to the efficiencies of automation, these operational plans do not indicate how the Bureau decided that it could make do with *half* the field infrastructure of the prior census. For the Bureau to have made such a significant decision, there must be some kind of supporting documentation and significant internal discussion. *Id.* Defendant has not disclosed, or stated that it has withheld, any such records, which are responsive to Item 7 of the Request at issue in this case. ECF No. 1, Ex. A, Item 7.

Similarly, in the Integrated Communications Plan from June 2017, the Bureau claims that it should have already begun establishing long-term partnerships with national organizations in order "to extend our outreach efforts and connect with hard-to-count (HTC) populations." Pls.' Local Rule 56(a)(2) Statement ¶ 90. Though the plan provides "examples of potential national partners for several of our key audiences," there is no information about whether the Bureau has actually entered into any formal relationship with any of them. *Id.* The Bureau would not make such representations without any supportive documentation and without significant internal discussion. Such internal documents and communications would be responsive to Item 4 of Plaintiffs' Request. ECF No. 1, Ex. A, Item 4.

Defendant also provided a link to an October 2017 hearing before the House Oversight and Government Reform Committee. Def.'s Ex. 1, Attachment J at 240. In testimony provided

for this hearing, a Government Accountability Office ("GAO") official stated that 35 of the Bureau's 58 federal employee positions remained vacant, significantly undermining the Bureau's ability to oversee planning for the census. Pls.' Local Rule 56(a)(2) Statement ¶ 92. Plaintiffs' FOIA request specifically asked for records indicating how the federal hiring freeze had affected the Census Bureau and for records relating to hiring decisions at the Bureau. ECF No. 1, Ex. A, Items 9-10. Other than this GAO testimony, none of the information Defendant provided to Plaintiffs addresses or explains this vacancy rate. Plaintiffs are entitled to the reasonable inference that Defendant possess more documents related to the serious vacancy problem highlighted by the GAO testimony.

Moreover, in connection with this same hearing, Secretary Ross submitted written testimony stating that the Commerce Department has been having weekly meetings to review the budget, scope, schedule, and risks associated with census planning. *Id.* at ¶ 93. Defendant's search has not identified any documents prepared in connection with these meetings—no agendas, minutes, or related records—all of which would be responsive to many of the items of the Request at issue in this case. ECF No. 1, Ex. A.

Additionally, Defendant provided links to materials from program management review meetings which pointed to the existence of specific reports that are almost certainly responsive to Plaintiffs' request, and which Defendant has not disclosed or stated that it withheld. *See* Pls.' Local Rule 56(a)(2) Statement ¶¶ 94-95. During the April 20 Management Review Meeting, participants discussed a "Should Have Started/Should Have Finished Report," listing "activities that should have started and/or finished and have not"; 30, 60 & 90 Day Look Ahead Reports; an Executive Alert Report, describing "a list of activities which are the gates that must start and finish on time in order to deliver the apportionment and redistricting data"; and a

Critical Path Report, which describes "the status of a set of activities that is the high level main path through the program." *Id.* at ¶ 94. These reports appear to be compiled on a regular basis, but Defendant has not disclosed any of them nor provided any information about them. *Id.* These reports are responsive to at least Items 1 and 12 of the Request. ECF No. 1, Ex. A, Items 1, 12. A program management review from January 2018 also indicated that Defendant began opening regional census centers in January 2017, began address canvassing field staff recruitment in March 2017, and opened area census offices from April 2017 to July 2017. *See* Pls.' Local Rule 56(a)(2) Statement ¶ 95. There must be internal planning memoranda relating to these actions, all of which would be responsive to Item 2 of the Request, and none of which have been identified by Defendant. ECF No. 1, Ex. A, Item 2. Further, Defendant provided links to webpages and documents indicating that the Bureau has long been aware that it is facing significant problems in reaching hard-to-count populations. *See* Pls.' Local Rule 56(a)(2) Statement ¶¶ 96, 101. Given the urgency with which advisors and the Bureau describe these problems, the Bureau must have more internal memoranda that are responsive to Plaintiffs' request. For example, Defendant provided a link to a report from 2016 on how reliance on the internet and use of administrative records would impact hard-to-count communities in the 2020 Census. Def.'s Ex. 1, Attachment J at 236. The report concluded that technological advances will not be particularly helpful in reaching historically undercounted communities of color. *Id.* Defendant fails to identify any records addressing these concerns or documenting the agency's reasons for setting the report's recommendations aside, although such records would be responsive to (at least) Item 4 of the Request. ECF No. 1, Ex. A, Item 4.

Another presentation that Defendant linked to urged that "staffing for the Partnerships Program equal or exceed the staffing levels in 2010," *see* Pls.' Local Rule 56(a)(2)

Statement ¶ 97, yet during a Senate hearing in October 2017, Secretary Ross indicated that the Bureau would be hiring just over one quarter the number of partnership specialists for the 2020 as it did for the 2010 Census. *See id.* at ¶¶ 98-99. Defendant also provided a link to a Census Bureau webpage on its efforts at increasing self-response, but the most recent publication on this page is from June 2014. *See id.* at ¶ 100. Other, more recent Census Bureau publications indicate that the Bureau has observed a significant rise in public distrust in government. One study, conducted *before* the Bureau announced the inclusion of a citizenship question, found that respondents refused to respond to questions or even answer the door—one respondent family was so fearful that they simply moved after an interviewer visited their home. *See id.* at ¶ 101. Given the Bureau's apparent awareness of this problem, Defendant must have materials relating to improving self-response among hard-to-count communities from more recently than 2014. Such records would be responsive to Item 4 of the Request. ECF No. 1, Ex. A, Item 4.

Finally, some of the (relatively few) internal documents that Defendant has disclosed to Plaintiffs provide direct evidence that Defendant possesses additional responsive documents, which Defendant has neither disclosed nor stated that it withheld. Specifically, in certain internal Bureau emails released to Plaintiffs, employees of Defendant describe or refer to specific memoranda and other documents pertaining to President Donald Trump's memorandum imposing a federal hiring freeze. *See, e.g.*, Def.'s Ex. 1, Attachment F at 111 (referencing "the draft HR Bulletin for the Hiring Freeze"); *id.* at 131 (email with an attachment titled "Hiring Freeze Exemption Approval"); *id*. at 132 ("Attached you will find a copy of the approved Hiring Freeze Exemption memo."); *id.* at 138 (email with attachment titled "Updated CORI Hiring Freeze user guidance MZL"); *id.* at 161 (referring to "the anomaly request and a less technical document we prepared for transition"). These documents would be responsive to Item 8 of

Plaintiffs' request, which seeks all records related to the Census Bureau's implementation of the President's hiring freeze. *See* ECF No. 1, Ex. A, Item 8. These records should not have been too difficult to identify if Defendant conducted an adequate search; indeed, simply reviewing the documents Defendant actually produced would have revealed the existence of these undisclosed records.

As this overview demonstrates, Defendant's FOIA searches have ignored numerous categories of important, responsive records. Some records produced by Defendant refer explicitly to other records that have not been disclosed, nor listed as withheld; and in many other instances, Plaintiffs, as non-movants, are entitled to the reasonable inference that additional responsive, non-exempt records exist. Defendant has failed to carry its burden of establishing that it has conducted adequate searches, and summary judgment is improper.

4. Defendant may not avoid searching for records it speculates may be exempt from disclosure.

Defendant's obligation to conduct adequate searches for responsive records applies even though Defendant has expressed a belief that some or all of the documents located through certain searches might later be found exempt from disclosure. *See, e.g.*, Def.'s Ex. 1, Attachment H at 226 ("[W]e will not do a search for drafts and planning documents which will then be withheld"); Pls.' Local Rule 56(a)(2) Statement ¶ 70 (Defendant's counsel stated that documents concerning "plans to hire additional staff to assist with the 2020 Census for 2018-2020 . . . are all part of the deliberative process."). The refusal to search for records that, in the unilateral speculation of the agency, *might* be subject to a statutory exemption, is a violation of FOIA.

Defendant may not preemptively invoke an exemption to avoid conducting a search, because it "cannot know, without searching, whether some of its responsive records may contain segregable, non-exempt information." *James Madison Project v. DOJ*, 208 F. Supp. 3d 265, 287

(D.D.C. 2016); *see also Broward Bulldog, Inc. v. DOJ*, No. 12-61735-CIV, 2014 WL 2999205 at *3 (S.D. Fla. Apr. 4, 2014) (where government refused to conduct certain FOIA searches on belief that responsive documents would be exempt on privacy grounds, government improperly "deprive[d] the Court of its role in examining any relevant documents and independently determining whether any exemptions may apply").

In a letter to Defendant's counsel dated April 9, 2018, Plaintiffs explained that the refusal to conduct searches based on predicted withholdings was unlawful, and that Defendant should conduct the searches required by law without further delay. *See* Pls.' Local Rule 56(a)(2) Statement ¶ 71. However, nothing in the record, including Defendant's affidavits, indicates that Defendant did conduct these legally required searches.[9] Defendant's failure to demonstrate that it searched for all responsive documents—even those it anticipated withholding in full or in part—precludes summary judgment as to the adequacy of Defendant's searches.

5. Defendant has not proven that conducting thorough searches would be unreasonably burdensome.

In addition to providing inadequate descriptions of the searches it has conducted, Defendant offers unpersuasive excuses for the searches it has not conducted. Specifically, Defendant argues that certain searches for responsive documents would be unduly burdensome,

[9] Defendant states that "[t]he level of effort sought by Plaintiffs to seek out, review, and document predecisional drafts that are exempt from disclosure under FOIA is unsustainable." Def.'s Mem. at 19. As discussed *infra*, Section I(A)(5), Defendant has failed to carry its burden of establishing that locating, reviewing, and documenting records responsive to the Request would impose an unreasonable burden. But even assuming that it would be unreasonably burdensome for Defendant to locate and process *every* responsive internal draft, Defendant still must conduct a search calculated to uncover those documents that can be found *without* taking on an unreasonable burden. *See Shapiro v. CIA*, 170 F. Supp. 3d 147, 156 (D.D.C. 2016). Defendant fails to prove that it has done so.

and thus are not required under FOIA.[10] *See* Def.'s Mem. at 17 (discussing refusal to search for emails and certain draft documents); *id*. at 18 (same, as to planning documents); *id.* at 19 (same). Defendant's undue-burden defense is unavailing because it relies on conclusory assertions; offers no justification for Defendant's apparent failure to explore less burdensome search methods; and improperly conflates the burden of complying with the Request with the burdens imposed by separate litigation and separate FOIA requests.

a. Defendant's statements about the time and effort required to comply with the Request are conclusory and unsupported.

Defendant's undue-burden defense cannot serve as a basis for summary judgment because it rests on conclusory statements for which Defendant has provided no explanation or evidence. When an agency claims that performing a search would impose an undue burden, it must "provide [a] sufficient explanation as to why such a search would be unreasonably burdensome." *Nation Magazine v. U.S. Customs Serv.,* 71 F.3d 885, 892 (D.C. Cir. 1995). A declaration or affidavit supporting the agency's assertion of unreasonable burden must describe the basis for that assertion "with reasonably specific detail." *Nat'l Day Laborer Org. Network v. ICE*, No. 16-cv-387 (KBF), 2017 WL 1494513 at *14 (S.D.N.Y. Apr. 19, 2017). An agency's

[10] Defendant's litigation position that it cannot conduct more thorough searches without taking on an unreasonable burden is, at best, difficult to square with representations Defendant has made to Plaintiffs. Through its counsel, Defendant has repeatedly advised Plaintiffs that it could and would do more to locate records responsive to the Request. For example, Defendant represented in a letter dated February 16, 2018, that it would search for additional documents responsive to several items of the Request, including Item 11, which seeks records related to the counting of incarcerated persons and determination of their residences. Def.'s Exhibit 1, Attachment H at 228. In an email dated March 5, 2018, Defendant stated that it did not yet have an update on its response to Item 11, but that it would provide an update by March 6, 2018. Pls.' Local Rule 56(a)(2) Statement ¶ 68. Since then, however, the Census Bureau has not provided any further documents or information in response to Item 11, aside from one publicly available link to related information provided in a July 23, 2018 letter. *Id.* ¶ 69. Insofar as Defendant seeks to defend this failure on undue-burden grounds, that new argument conflicts with Defendant's prior representations.

burden to show that a request is overbroad and unduly burdensome is "substantial." *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 455 (D.D.C. 2014*), aff'd sub nom. Tereshchuk v. Bureau of Prisons, Dir.*, No. 14-5278, 2015 WL 4072055 (D.C. Cir. June 29, 2015).

For example, in *Tereshchuk*, the Bureau of Prisons argued that a request was unduly burdensome because it would require the agency to review and redact 214,456 hardcopy documents that were scattered across multiple facilities, but the court declined to grant summary judgment on this basis, finding that the "severity of the burden [was] … unclear." *Id*. at 455-56; *see also Pub. Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003) (rejecting as insufficiently specific agency's argument that search would be unreasonably costly and time-consuming because it would require searching 25,000 paper files and shipping them from Texas to California). Moreover, even if the burden on the agency is objectively a large one, that finding alone does not establish that the burden is unreasonable. Because the text of FOIA "puts no restrictions on the quantity of records that may be sought" and expressly "anticipates that requests for records may be so voluminous as to require an agency to carry an unusual workload," proving that a request is overly burdensome requires more than showing that the responsive records are voluminous and would be time-consuming to review. *Tereshchuk*, 67 F. Supp. 3d at 455.

In this case, Defendant's declarations fall short because they do not provide information sufficient to show just how severe a burden Defendant estimates the Request would impose, nor do they show that Defendant has a sound basis for that estimate. Defendant attempts to support its undue-burden defense by submitting the Declaration of Burton Reist. Def.'s Ex. 2, Reist Decl. ¶¶ 17, 19. However, Mr. Reist nowhere elaborates the extent of the burden he believes the Request would impose, much less his basis for that belief, beyond averring broadly that a search

could take between "scores" and "hundreds" of years. *Id.* ¶ 17. This statement is too vague to support entry of judgment for Defendant.

Indeed, Mr. Reist's statement about the purported burden on Defendant is even less specific than other agency declarations that courts have found insufficient to demonstrate an undue burden. Unlike the declarations found insufficient in *Tereshchuk*, 67 F. Supp. 3d at 455-56, and *Pub. Citizen*, 292 F. Supp. 2d at 6, the Reist Declaration does not even indicate how many documents the Request implicates or identify particular features of those documents that would make them burdensome to produce. The Court should decline to grant summary judgment based on Defendant's undue-burden defense.[11]

b. Defendant must consider less burdensome ways to comply with the Request.

An additional defect of Defendant's undue-burden defense is that it relies on fallacious all-or-nothing thinking. Assuming for argument's sake (although Plaintiffs do not concede) that it would be unduly burdensome for Defendant to conduct a search that would locate *every* responsive document, it does not follow that Defendant is relieved of its obligation to conduct a search "reasonably calculated to discover the requested documents." *Grand Cent. Partnership*, 166 F.3d at 489 (citation omitted). The Second Circuit has "made clear that an agency's search need not be perfect, but rather need only be reasonable." *Id*. Because FOIA contemplates "reasonable" searches, an agency may not simply throw up its hands and declare

[11] An additional problem with Defendant's undue-burden defense is that Defendant fails to specify *which* of the twelve numbered items of the Request would purportedly require an unreasonable investment of time and effort. Defendant has never provided a non-conclusory explanation of why the language Plaintiffs used in the Request, including as clarified in subsequent communications with the agency, *see* Def.'s Ex. 1, Attachment B at 14; Def.'s Mem. at 11, would not enable "a professional employee of the agency who [is] familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Ruotolo v. Department of Justice, Tax Division,* 53 F.3d 4, 10 (2d Cir. 1995) (citing H.R. Rep. No. 93–876, 93rd Cong., 2d Sess. 6 (1974), 1974 U.S.C.C.A.N. 6271).

that when a perfect search is infeasible, no search is necessary at all. *See Shapiro v. CIA*, 170 F. Supp. 3d 147, 156 (D.D.C. 2016) (rejecting undue-burden excuse for not searching for certain documents because "FOIA does not require perfection," so agency's belief that it "could not with certainty determine that an office, database, or archival file series does not contain a [responsive] record" did not preclude a reasonable search).

In this case, Defendant fails to demonstrate that it made a good-faith effort to come up with manageable methods for searches that it believed would otherwise be unreasonably burdensome. In fact, Plaintiffs have actively encouraged Defendant to develop such middle-ground methodologies, but these efforts on Plaintiffs' part have proved fruitless. On April 16, 2018, Plaintiffs' counsel indicated that they were willing to work collaboratively to identify a mutually agreeable path forward for each of Plaintiffs' requests. Pls.' Local Rule 56(a)(2) Statement ¶ 72. Defendant's counsel, Michael Bogomolny, stated that it would be too burdensome to search for all emails related to cybersecurity and the 2020 Census, but that searching for responsive emails of specific, high-level Census Bureau officials would be significantly less burdensome. *Id.* ¶ 73. Plaintiffs' counsel indicated a willingness to limit the request for email searches so as to focus on senior officials. Mr. Bogomolny represented that he would ascertain which Census Bureau officials would be appropriate to include in this targeted email search, and that he would propose the resulting list of officials to Plaintiffs. *Id*. But he never did. *Id.* ¶ 75.

Also during the telephone call on April 16, 2018, Mr. Bogomolny stated that he believed the Census Bureau could, without unreasonable effort, produce data reflecting how many employees the Census Bureau had hired for certain types of positions at various points in the 2020 Census cycle, and how many employees in those same types of positions had been hired at

the equivalent points in the 2010 Census cycle. *Id.* ¶ 74. Plaintiffs' counsel and Mr. Bogomolny agreed that searching for these historical data might potentially be an appropriate and reasonable search method for certain items of Plaintiffs' FOIA request. *Id*. Mr. Bogomolny represented that he would investigate the feasibility of this search method, and that he intended to follow up with a more specific proposal for Plaintiffs to review. *Id*. But he never did. *Id.* ¶ 75.

In the months since this conversation, Defendant has failed to adhere to the commitments it made through counsel. *Id*. Defendant cannot be heard to claim that complying with the Request is unduly burdensome, when it has failed to fulfill its own promise to explore less burdensome ways of complying.

c. Discovery in litigation involving different parties and FOIA requests of other requesters do not excuse Defendant from its statutory obligations in this case.

To succeed on its undue-burden defense, Defendant must show that *this case* involves an unreasonably burdensome FOIA request. *See Ruotolo*, 53 F.3d at 9 (recognizing that "there is such a thing as a request that calls for an unreasonably burdensome search," but holding that defendant agency had not "demonstrated that this is such a case"). Yet, in the course of defending its failure to conduct more thorough searches, Defendant repeatedly refers to the discovery process in separate litigation, and to separate FOIA requests not at issue in this case. *See, e.g.*, Def.'s Mem. at 17-18 (discussing time the Census Bureau has spent and will spend on discovery in separate litigation in the District of Maryland); *id*. at 18 (stating that information sought through discovery in the District of Maryland "overlaps with the information requested in Plaintiffs' FOIA lawsuit"); *id.* at 18-19 (discussing other FOIA requests).

Defendant cites no authority, and Plaintiffs are aware of none, for the notion that a FOIA request may be deemed unduly burdensome because it occurs at a time when the agency is

handling multiple requests for information that combine to put the agency under stress. Indeed, Defendant's own regulations recognize that when the agency receives FOIA requests about a "matter of widespread and exceptional media interest involving questions about the Government's integrity which affect public confidence," such as the 2020 Census, the correct response under FOIA is to *expedite* processing of those requests, not to use the volume of requests as an excuse to shirk the agency's responsibility to each requester. 15 C.F.R. § 4.6(f)(1)(iii). *See also Tereshchuk*, 67 F. Supp. 3d at 455 (explaining that FOIA contemplates that agencies may sometimes need to "carry an unusual workload" to keep up with their obligations); *see also* Response to Court Order Regarding Defendant's Compliance Plan, *The Few, The Proud, The Forgotten v. U.S. Dep't of Veterans Affairs*, No. 3:16-cv-647-VAB, ECF No. 100 at 3 (D. Conn. May 11, 2018) (in FOIA action, since the VA lacked "the full-time resources to handle a production request of this magnitude internally," it hired outside contractor "in order to fully complete production responsive to the FOIA request," at estimated cost of $2.5 million).

None of these principles change when a particular FOIA requester is also a civil litigant seeking documents from the same agency through discovery. As the Supreme Court has made clear, a requester's rights under FOIA are neither diminished nor enhanced by the fact that the requester is also a litigant in a separate, concurrent lawsuit. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 n.23 (1978); *see also United Technologies Corp. v. FAA*, 102 F.3d 688, 690 (2d Cir. 1996) ("It is a basic principle under FOIA that the individuating circumstances of a requester are not to be considered in deciding whether a particular document should be disclosed. All requesters are considered to have equal rights of access."). Parties do not forfeit their rights under FOIA when some of the same records are subject to discovery. This is because "[t]he

FOIA disclosure regime . . . is distinct from civil discovery," and "[d]ifferent considerations determine the outcome of efforts to obtain disclosure" under each regime. *Stonehill v. IRS*, 558 F.3d 534, 538 (D.C. Cir. 2009). Accordingly, courts have recognized that FOIA requests and civil discovery may be pursued concurrently. *See, e.g.*, *El Badrawi v. DHS*, 258 F.R.D. 198, 205-06 (D. Conn. 2009) (ordering production in civil discovery of certain information that had been properly withheld under a FOIA request by the same plaintiff); *Stonehill*, 558 F.3d at 542 (declining invitation to "link the two information-gathering regimes" by finding waiver of FOIA exemption where agency failed to assert corresponding discovery privilege in separate litigation).

Ignoring these well-settled principles, Defendant makes much of the fact that one of the Plaintiffs, the NAACP, is also a plaintiff in a separate lawsuit against parties including Defendant in the District of Maryland (the "Maryland Litigation").[12] Defendant states that the information sought in the two cases "overlaps," Def.'s Mem. at 18, but does not—and cannot—claim that every document responsive to Plaintiffs' FOIA Request is also covered by discovery demands in the Maryland Litigation, or vice versa. Nor does Defendant advise this Court that the District of Maryland has ordered only *limited* discovery, consisting of certain productions and one deposition. *See* Letter Order, *NAACP v. Bureau of the Census*, No. 18-cv-0891-PWG, ECF No. 42 (D. Md. July 5, 2018).

Despite its tacit acknowledgement that this case and discovery in the Maryland Litigation are not coextensive, Defendant complains of the burden purportedly imposed by the civil discovery process. *See* Def.'s Mem. at 18. Defendant even suggests that its failure to produce

[12] Defendant erroneously refers to the Maryland Litigation as "Plaintiffs' related lawsuit." Def.'s Mem. at 18. Two of the three Plaintiffs in this FOIA action—the NAACP Connecticut State Conference and the NAACP Boston Branch—are not involved in the Maryland litigation. The two cases involve different claims by different plaintiffs against different defendants and seek different relief. Pls.' Local Rule 56(a)(2) Statement ¶ 53.

certain documents under FOIA should be excused based on its assurance that those documents "have been *or will be* produced in a related lawsuit." Def.'s Mem. at 20 (emphasis added). Defendant's prediction that documents responsive to the Request "will be produced" in the Maryland Litigation is conclusory, unsupported, and irrelevant to the question of whether Defendant has carried its burden to prove it has discharged its obligations under FOIA. *See Carney*, 19 F.3d at 812 ("[T]he defending agency has the burden of showing that its search *was* adequate") (emphasis added). Defendant has not demonstrated that the Request at issue in this case "calls for an unreasonably burdensome search," *Ruotolo*, 53 F.3d at 9, and summary judgment is unwarranted on this basis.

B. *Defendant has failed to show that its withholdings were proper.*

Defendant has also failed to carry its burden for summary judgment as to the propriety of its withholdings. Defendant must give "reasonably detailed explanations why any withheld documents fall within an exemption" to FOIA. *Carney*, 19 F.3d at 812. Under a practice developed by the D.C. Circuit in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and adopted in the Second Circuit, an agency typically submits a so-called *Vaughn* index describing the withheld documents and the purported bases for those withholdings, in order "to afford a FOIA plaintiff an opportunity to decide which of the listed documents it wants and to determine whether it believes it has a basis to defeat the Government's claim of a FOIA exemption." *New York Times Co. v. DOJ*, 762 F.3d 233, 237 (2d Cir. 2014).

"In keeping with [FOIA's] policy of full disclosure, the exemptions are 'narrowly construed with doubts resolved in favor of disclosure.'" *Halpern*, 181 F.3d at 287 (quoting *Fed. Labor Relations Auth. v. U.S. Dep't of Veterans Affairs*, 958 F.2d 503, 508 (2d Cir. 1992)). For example, although an agency may withhold "inter-agency or intra-agency memorandums or

letters that would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5) ("Exemption 5"), the Second Circuit has emphasized that a "document loses its predecisional and deliberative character," and thus its protection under Exemption 5, when it is "adopted as agency policy or incorporated therein by reference." *Nat'l Council of La Raza*, 411 F.3d at 356-57 (2d Cir. 2005). Similarly, when documents contain information subject to Exemption 5, the agency must segregate out and release any portions of those documents that consist of "purely factual material . . . in a form that is severable without compromising the private remainder of the documents." *EPA v. Mink*, 410 U.S. 73, 91 (1973) *superseded in part on other grounds by* 1974 amendments to FOIA.

Defendant produced a *Vaughn* index on March 27, 2018, regarding certain partial withholdings of documents responsive to the Request. Def.'s Ex. 1, Attachment G. Defendant represents that this Vaughn index provides "an explanation of the information withheld under" Exemptions 5 and 6. Def.'s Mem. at 13.

Contrary to Defendant's representation, this *Vaughn* index does not provide a full accounting of Defendant's withholdings. Defendant has separately stated that it withheld certain documents in full under Exemption 5. *See* Def.'s Ex. 1, Attachment F at 104 (stating that records responsive to Items 9(a) and 9(b) of the Request "are being withheld in whole" under Exemption 5). These withholdings of entire documents are not reflected in the *Vaughn* index, nor has Defendant elsewhere provided a sufficiently detailed description of the withheld documents to enable Plaintiffs and the Court to determine whether the withholdings were proper. Even if Defendant had adequately identified these documents and established that they contain material subject to Exemption 5, that would not end the matter, because Defendant has not shown that these documents contained no non-exempt factual material that could have been segregated and

released. *See Mink*, 410 U.S. at 91. Thus, there is a genuine dispute as to whether Defendant is using Exemption 5 to withhold entire documents that should be fully or partially released.

Additionally, some of the partial withholdings that Defendant does list in the *Vaughn* index lack sufficiently detailed explanations to establish that these withholdings are proper. The *Vaughn* index lists partial withholdings under 5 U.S.C. § 552(b)(4) ("Exemption 4") , which protects certain trade secrets and business information; Exemption 5; and 5 U.S.C. § 552(b)(6) ("Exemption 6"), which exempts certain "personnel and medical files and similar files" on privacy grounds. *See* Def.'s Ex. 1 Attachment G. Plaintiffs do not contest the listed withholdings under Exemptions 4 and 6.

Defendant's withholdings under Exemption 5, however, are not adequately explained. Defendant states that it withheld information "discussing potential application of a hiring freeze exemption to the American Housing Survey," information "discussing expected future consultation with Director of OPM regarding long-term plan for federal government workforce," information "discussing possible changes to the special censuses," and "discussion of possible hirings/promotions." *Id*. However, like the agency declaration found inadequate to justify withholdings in *Halpern*, Defendant's *Vaughn* index "gives no contextual description either of the documents subject to redaction or of the specific redactions made to the various documents." 181 F.3d at 293. This "lack of specificity is particularly troubling" given that the number of pages redacted under Exemption 5 is relatively small. *Id*.

Because the *Vaughn* index is so vague as to "make it effectively impossible for the court to conduct de novo review of the applicability of FOIA exemptions," it is "necessary" for the Court to conduct *in camera* review of the fully and partially withheld documents. *Associated Press v. DOJ*, 549 F.3d 62, 67 (2d Cir. 2008). The Court should therefore deny summary

judgment on the propriety of Defendant's withholdings, and order Defendant to submit those documents in unredacted form for *in camera* review.

II. The Court should permit limited discovery to resolve outstanding issues of material fact.

Because Defendant has failed to show that it conducted adequate searches, the Court should permit Plaintiffs to take limited discovery, including depositions, to develop a more detailed record of the searches Defendant has conducted. District courts have the power to permit discovery when agency affidavits are inadequate to support summary judgment in a FOIA case. *Halpern*, 181 F.3d at 295. As Judge Thompson elaborated in another FOIA case, "courts have consistently held that a court should not, of course, cut off discovery . . . where the agency's response raises serious doubts as to the completeness of the agency's search, where the agency's response is patently incomplete, or where the agency's response is for some other reason unsatisfactory." *Vietnam Veterans*, 8 F. Supp. 3d at 206 (quoting *Exxon Corp. v. FTC*, 466 F. Supp. 1088, 1094 (D.D.C. 1978)). Judge Hall has similarly explained that in FOIA cases, discovery focused on "the scope of the agency's search" is particularly appropriate in such circumstances. *El Badrawi I*, 583 F. Supp. 2d at 301.

Courts in this district have granted this type of search-focused discovery in analogous circumstances in other FOIA cases. *See Eberg*, 193 F. Supp. 3d. at 115, 119 (permitting depositions where an agency's declarations failed "to describe [its] file systems adequately," provided "no explanation of the databases that the various components use," and provided "no explanation as to why [its] office searched certain available databases and not others"); *El Badrawi I*, 583 F. Supp. 2d at 301 (granting depositions because the agency's search declarations were "patently incomplete"); *Vietnam Veterans*, 8 F. Supp. at 209 (granting discovery when

agencies did "not meet their burden of showing beyond material doubt that the search conducted . . . was adequate."); *Unidad Latina En Accion v. DHS,* No. 3:07-cv-1224-MRK, ECF No. 67 (D. Conn. Jan. 5, 2009) (in FOIA case, permitting depositions of two Department of Homeland Security officials); *see also Lion Raisins, Inc. v. U.S. Dep't of Agriculture*, 636 F. Supp. 2d 1081, 1107 (E.D. Cal. 2009) (granting a deposition "[i]n order to create a sufficient factual record regarding the adequacy of the search").

As described *supra*, Section I(A), the imprecision of Defendant's declarations, the strong evidence that Defendant possesses many undisclosed responsive records, and the dubious grounds on which Defendant stakes its undue-burden defense raise "serious doubts as to the completeness of the agency's search." *Vietnam Veterans*, 8. F. Supp. 3d at 206 (quoting *Exxon Corp.*, 466 F. Supp. at 1094). Defendant has provided no information at all about how it keeps its records, what databases it maintains, which ones it searched, or what search terms and methods it used to search those databases. That publicly available documents point to numerous responsive records that Defendant never uncovered provides further evidence that these under-described searches were also inadequate.

Given these deficiencies, and the reasonable inferences drawn therefrom, it is appropriate for Plaintiffs to depose the two Census Bureau officials: Chief FOIA Officer Vernon Curry and Assistant Director for Decennial Census Programs James B. Treat. Mr. Curry is, according to the declaration he submitted in this case, "personally familiar with the underlying FOIA request at issue in this lawsuit, and further actions taken on appeal and during litigation." Def.'s Exhibit 1, ¶ 3. As the Bureau's Chief FOIA Officer, Mr. Curry also presumably has expertise in the structure of the Bureau's recordkeeping, which he failed to describe in his written declaration.

Mr. Treat is also an appropriate deponent in this case because, as Assistant Director for Decennial Census Programs, he can provide information that will bear on the plausibility of Defendant's claim that it conducted an adequate search for all records responsive to the Request. As Defendant itself has determined, the Census Bureau's Decennial Program Office is among the offices most likely to possess responsive records. Def.'s Exhibit 1, ¶ 8. As a senior official in the Decennial Program Office, Mr. Treat presumably is familiar with the types of documents his office customarily creates, and how those documents are routed, copied, and stored.

The depositions Plaintiffs propose would be tailored to the purpose of determining whether Defendant's FOIA searches were adequate. Outstanding factual questions about "the scope of the agency's search" are a particularly appropriate focus for discovery in a FOIA case. *Vietnam Veterans*, 8 F. Supp. 3d at 206; *see also El Badrawi I*, 583 F. Supp. 2d at 301); *Eberg*, 193 F. Supp. 3d at 115; *Lion Raisins*, 636 F. Supp. 2d at 1107. Plaintiffs respectively request leave to take limited discovery, consisting of depositions of Mr. Curry and Mr. Treat.

III. In the alternative, the Court should defer ruling on Defendant's motion and permit Plaintiffs to take targeted depositions.

Plaintiffs have raised triable issues of material fact, and the Court should therefore deny summary judgment. In the alternative, if the Court finds that Plaintiffs so far have not cited sufficient evidence to support factual contentions that are "essential" to their opposition, Fed. R. Civ. Pro. 56(d), Plaintiffs cross-move for an order holding Defendant's motion for summary judgment in abeyance and allowing limited discovery in the form of depositions of Mr. Curry and Mr. Treat.

As described above, Defendant has failed to carry its burden to establish the adequacy of its searches and withholdings. This Court faced a similarly bare factual record in *American*

Immigration Council v. Department of Homeland Security, a FOIA suit involving records related to ICE's Criminal Alien Program. Presented with a motion for summary judgment based on factual assertions untested in discovery, this Court found that limited discovery under Rule 56(d) was appropriate before ruling on the summary judgment motion. *See* Order, *Am. Immigration Council v. DHS*, No. 3:12-cv-00355-WWE, ECF No. 39 (D. Conn. Dec. 6, 2012) (granting Rule 56(d) cross-motion). Following the Court's order, plaintiffs took a single deposition, which yielded information sufficient to allow the parties to reach a settlement. Stipulation and Order of Settlement and Dismissal, *Am. Immigration Council v. DHS*, No. 3:12-cv-00355-WWE, ECF No. 44 (D. Conn. July 31, 2013). As a result, this Court was not obliged to adjudicate the summary judgment motion, or any other dispositive motion, in that case. As in *AIC,* Defendant here has provided little more than a conclusory assertion that its searches and withholdings were lawful, and Plaintiffs should be afforded the opportunity to develop evidence that may prove otherwise. Such limited discovery may allow the parties to narrow the issues in dispute, or even resolve them completely, as in *AIC* .

Rule 56(d) provides for targeted discovery where the Government has provided an insufficient basis for the assertions it makes in support of its motion for summary judgment. Under Rule 56(d), formerly Rule 56(f), the nonmoving party must have had "the opportunity to discover information that is essential to his opposition." *Anderson*, 477 U.S. at 250 n.5; *see also Pulliam v. EPA*, 292 F. Supp. 3d 255, 261 n.5 (D.D.C. 2018) ("Typically, a Rule 56(d) request is granted 'almost as a matter of course unless the non-moving party has not diligently pursued discovery of the evidence,' and a district court has discretion in determining whether it should permit additional discovery.") (internal quotation omitted). When, as here, Defendant's declarations leave Plaintiffs and the Court in the dark about key fact-bound issues—such as the

reasonableness of an agency search—discovery is necessary. *See Trebor Sportswear Co. v. The Limited Stores, Inc.*, 865 F.2d 506, 511 (2d Cir. 1989) (quoting *Celotex*, 477 U.S. at 326) ("The nonmoving party should not be 'railroaded' into his offer of proof in opposition to summary judgment.").

Plaintiffs should have an opportunity to discover information to help them dispute Defendant's assertions about the adequacy of its searches, and this Court should have the benefit of adversarial briefing based on a meaningful factual record. Targeted discovery is needed to clarify the reasonableness of Defendant's searches and its undue-burden defense.

As discussed *supra*, Section I(A)(5)(a), Defendant argues that its search was adequate in large part because complying more thoroughly with the Request would impose an undue burden, but Defendant has not provided remotely adequate support for this disputed factual claim. Under Second Circuit precedent, the factual basis of Defendant's undue-burden defense is an appropriate subject for Plaintiffs to explore through discovery under Rule 56(d).

In *Ruotolo*, for example, the court reversed an order granting summary judgment in a FOIA case and explained that the requesters should have been granted discovery under former Rule 56(f), the predecessor to current Rule 56(d). 53 F.3d at 11. The agency in that case claimed that the search would create an undue burden because there would be "hundreds" of files to search, *id.* at 7. Rather than accept this claim at face value, the court found that the requesters should be allowed to discover "[i]nformation that could shed light on the scope of that burden." *Id.* at 11. *See also* Order, *Am. Immigration Council v. DHS*, No. 3:12-cv-00355-WWE, ECF No. 39 (D. Conn. Dec. 6, 2012) (in FOIA suit, holding Defendant's summary judgment motion in abeyance and allowing one deposition where Defendant argued that Plaintiffs' request would create an undue burden).

Similarly, as described *supra*, Section I(A)(1), Defendant has failed to carry its burden of establishing the adequacy of its searches, including by providing a meaningful description of its systems of records or the search terms it has used or could deploy. This lack of clarity about "the scope of the agency's search" makes limited discovery appropriate. *Vietnam Veterans*, 8 F. Supp. 3d at 206 (quoting *El Badrawi I*, 583 F. Supp. 2d at 301); *see also Eberg*, 193 F. Supp. 3d at 115; *Lion Raisins*, 636 F. Supp. 2d at 1107.

For these reasons, it would be appropriate for the Court to grant Plaintiffs' Rule 56(d) cross-motion, permit Plaintiffs to take the depositions of Mr. Curry and Mr. Treat, and defer ruling on Defendant's motion for summary judgment pending completion of the depositions.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's motion for summary judgment and permit Plaintiffs two depositions regarding Defendant's FOIA searches. In the alternative, Plaintiffs request that the Court grant their cross-motion for discovery, permit the same two depositions pursuant to Rule 56(d), and defer ruling on Defendant's motion for summary judgment.

Respectfully submitted,

/s/ Michael J. Wishnie

Rachel Brown, Law Student Intern*
Varun Char, Law Student Intern*
Nikita Lalwani, Law Student Intern*
Abigail Olson, Law Student Intern
Joseph Schottenfeld, Law Student Intern*
Charlotte Schwartz, Law Student Intern
Jeffrey Zalesin, Law Student Intern*
Michael J. Wishnie (ct27221)
Rule of Law Clinic

Yale Law School†
127 Wall Street
New Haven, CT 06511
Tel: (203) 436-4780
Fax: (203) 432-1426
michael.wishnie@ylsclinics.org
Counsel for all Plaintiffs

*Motion for leave to appear as law student interns pending

† This brief does not purport to state the opinion of Yale Law School, if any.

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2018, a copy of the foregoing memorandum of law was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Respectfully submitted,

/s/ Michael J. Wishnie
Michael J. Wishnie (ct27221)
Rule of Law Clinic
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 436-4780
michael.wishnie@ylsclinics.org