UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION, Defendant.	Civil Action No. 16-10613-ADB

DEFENDANT'S REPLY TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

As can be gleaned from the Parties' Rule 56.1 Statement of Undisputed Facts, there are no genuine issues of material fact which are in dispute in this Freedom of Information Act ("FOIA") action. That being said, despite Plaintiffs inclusion of immaterial facts to this FOIA dispute which focus primarily on their belief that the Department of Education's ("DOE") failure to monitor properly its Private Collection Agencies ("PCA") has disproportionately impacted minority students, *see* Declaration of Persis Yu ("Yu Decl."), ¶¶ 40-64, the only issue before this Court is a simple one; namely, was the DOE's response to Plaintiffs' FOIA request proper as a matter of law. *See, e.g., Stalcup v. CIA*, 2013 WL 4784249 * 3 (D. Mass. Sept 5, 2013) (court's only role is to decide FOIA isssues not plaintiff's conspiratorial theory concerning the crash of TWA Flight 800 and its alleged cover-up by the government), *aff'd* 768 F.3d 65 (1st Cir. 2014).

II. ARGUMENT

1. DOE has Properly Withheld Documents Under Exemption 3

Plaintiffs do not challenge the fact that the Procurement Integrity Act ("PIA") is an Exemption 3 statute, nor could they, in light of the established legal precedent on this issue. *See* Defendant's Brief, p. 19. Rather, Plaintiffs maintain that the DOE, through the Pedersen Decl. and *Vaughn* Index, has failed to provide, with specificity, an explanation on how the 131 pages of documents dealing with PCA's submissions to the DOE for contract extensions fall within the PIA's umbrella as "source selection information." *See* Plaintiff's Brief, pp. 29-30. The PIA's "source selection information" provision covers information prepared by private entities for use by a Federal agency to evaluate a bid or proposal for a federal procurement contract, listing 10 examples of information which would qualify thereunder. *See* 41 U.S.C. § 2017(7); *see also U.S. v. Bowling*, 108 F. Supp. 3d 343, 348 n.2 (C.D. N.C. 2015).

In her initial declaration, Ann Marie Pedersen notes that the DOE has withheld in full "source selection" materials it used to review various PCA proposals in connection with contract extensions to their existing procurement contracts with the DOE, including materials that relate to PCA's performance maintained in the Contract Performance Assessment Reports System ("CPARS"). *See* Pedersen Decl., ¶ 45. Information reported to CPARS is specifically not authorized for public release or under the PIA. *Id*., ¶¶ 45-46. In fact, disclosure of "source selection information" can result in criminal and civil penalties. *See Modern Technologies Corp. v. U.S.*, 44 Fed Cl. 319, 323 (1998). The DOE maintains that the description of the 131 pages provided above clearly indicates that they relate to PCA's information submitted to the DOE for purposes of procuring an extension in its contract with the DOE, thereby falling under the PIA's "source related information" provisions and exempt from disclosure under Exemption 3.

Nonetheless, Ms. Pedersen files herewith a Supplemental Declaration further detailing which categories of the 10 enumerated under the PIA within which these documents fall. *See* Supplemental Declaration of Ann Marie Pederson ("Supp. Pederson Decl."), *Exhibit A*, attached hereto. Indeed, the information withheld in full, conducted by the FSA in 2015, relates to the DOE's ongoing review and reevaluation of PCA's contract performance for purposes of determining whether to renew their respective procurement contracts. *See* Suppl. Pederson Decl., ¶ 3. The withheld information includes FSA notations generated in the course of discussions between student loan borrowers and PCAs under contract with the DOE, along with other contract performance data, in reaching those decisions. *Id.* Thus, the Contracting Officer determined that the withheld information is "source selection" materials under Subsection J of the PIA, which protects "other material marked as "source selection information" based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the federal agency procurement to which the information relates." *Id*., *citing* 41 U.S.C. § 423 (f)(1)(A). Without undue repetition, the information protected from disclosure relates to each individual PCA and if disclosed, would cause harm both to the commercial interests of the Government and to the competitive position of contractors being evaluated, as well as, impede the efficiency of Government operations. *Id.* At bottom, the information at heart of this issue at least arguably falls within the PIA and FOIA *de novo* review should end. *See Maynard v. CIA*, 986 F.2d 547, 554 (1st Cir. 1993).

2. The DOE Properly Invoked the Protections Under Exemption 5

Plaintiffs maintain that the three categories of documents redacted, in part, namely, (1) certain portions of the Correction Action Plan (CAP); (2) certain emails responding to inquiries

about agency policy; and (3) internal communications analyzing the DOE's collection methods as applied to PCA's and developing Frequently Asked Questions response, were neither pre-decisional nor deliberative. *See* Plaintiffs' Brief, pp. 20-24. A brief discussion of each follows.

(i) CAP

In particular, Plaintiffs maintain that the CAP is not pre-decisional because parts of the redacted material is explicitly marked with the notation "Actual Completion Date" 2014, despite the CAP being dated August 25, 2015. *Id*., p. 21. According to Plaintiffs, withheld material deemed as complete before the completion date of the final document cannot be pre-decisional under Exception 5, *citing generally Providence Journal Co. v. United States Department of the Army*, 981 F.2d 552, 557 (1st Cir. 1992). *Id*. However, Plaintiffs argument emanates from a misunderstanding of the CAP document and notations cited as "Actual Completion Date," and the FOIA law in general. *See* Supp. Pederson Decl., ¶ 5. Indeed, the comments, and their respective completion date noted within the CAP (including July 2014), are proposed evidence of completed tasks that the Office of Federal Student Aid (FSA) could provide to the OIG to support their argument that FSA had completed the corrective actions. *Id*. In other words, the redacted portions noted "complete" were not committed to conduct actions but merely completed advisory opinions of lower-level FSA staff provided to FSA and OIG decision makers to formulate FSA's eventual final position to the OIG and, thus, were pre-decisional and deliberative. *Id*. *See also Dalitzky v. U.S. Small Business Administration*, 144 F.R.D. 8, 13 (D. Mass. 1992) (documents written to supervisor recommending a particular course of action is pre-decisional by nature and protected under Exemption 5).

In fact, the CAP version at issue in the complaint was not the final version approved by the OIG, nor was the August 29, 2015 version of the CAP memorialized in any decisional

document. *See* Supp. Pedersen Decl., ¶ 5. Needless to say, Plaintiffs' understanding (and their argument against Exemption 5 in this context) is factually misplaced, so too is their blanket position that post decisional documents cannot find protection under Exemption 5. *See, e.g., Stalcup*, 768 F.3d at 71-72 (1st Cir. 2014) (fact that CIA issued final decision as to cause of TWA Flight 800 crash in 1997, the two documents prepared thereafter in 1998 were still protected under Exemption 5 because after CIA's 1997 initial conclusion new information was provided which caused it to continue its review of the TWA Flight 800 crash). *Performance Coal Co. v. U.S. Dept. of Labor*, 847 F. Supp. 2d 6, 15-16 (D.D.C. 2012)(documents discussing how agency to respond to allegations against it are protected under Exemption 5); *North Dartmouth Properties v. U.S. Dept. of Housing*, 948 F. Supp. 65, 68 (D. Mass. 1997)(document created after final agency decision but reiterated agency's pre-decisional deliberations protected under Exemption 5).

(ii) DOE Internal Communications

Plaintiffs briefly state their objection to the DOE's use of Exemption 5 concurring internal communications withheld by the DOE which deal with existing future collection policies, and the creation of Frequently Asked Questions (FAQ), asserting that the *Vaughn* Index is devoid of any description that would permit an individual review of the use of Exemption 5. *See* Plaintiffs' Brief, pp. 21, 22. Needless to say, not only is the *Vaughn* Index description appropriate, but the Pedersen Decl. and Supp. Pedersen Decl. discuss in sufficient detail the documents themselves and their entitlement to deliberative process privilege under Exemption 5. Indeed, as noted by Pedersen, the internal communications analyzing DOE's collections practices by PCA's and developing a FAQ related to collection fees are the result of deliberations by DOE staff to create future collection practices. *See* Pedersen Decl., ¶ 49. The

internal communications were of operations managers developing and negotiating answers for FAQs as part of the deliberate process of policy development. *See* Pedersen Decl., ¶ 6. These documents are thereby protected from disclosure under Exemption 5. *See Missouri ex rel. Shorr v. U.S. Army Engineers*, 147 F. 3d 705, 510 (8th Cir. 1998) (purpose of deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny).

(iii) DOE Internal Emails And Discussions With Outside Loan Servicers

Despite Pederson's Declaration discussing the reasons for DOE's use of Exemption 5 as it relates to internal emails between DOE employees and others with outside loan servicers, Plaintiffs' chief complaint focuses on the *Vaughn* Index, asserting that it must pinpoint a specific decision to which it attaches, identify whether it was prepared to assist in official discussion meeting, and that it temporally precedes the specified decision. *Id*. Defendant maintains that such specificity is not what is required for Exemption 5 protection, especially, where, as here, the Pedersen Decl. and Supp. Pedersen Decl. describes in detail the nature of these documents. *See, e.g., Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 373 (4th Cir. 2009) (agencies not required to identify specific policy judgment at issue in each document); *Maynard*, 986 F.2d at 558 (1st Cir. 1992) (where declaration provided a reasoned justification for its withholdings, submission of a *Vaughn* index not required by agency).

Indeed, as the Pedersen Decl. stated from the outset, the DOE emails concern the appropriate response to borrower's request for assistance in the processing of her loan. *See* Pedersen Decl., ¶ 50. These emails contain proposed draft language on how to respond to borrowers' specific circumstances concerning default, or constitute internal discussions by operations managers developing and negotiating draft answers as part of the deliberative process

of policy development. *See* Supp. Pedersen Decl., ¶ 6. These emails consist of preliminary thoughts and opinions of staff reflecting the give and take between the DOE and the PCAs discussing various approaches, views and recommendations and are not final policy determinations of FSA decision makers. *Id.* Accordingly, these documents are clearly covered under the deliberative process privilege. *See Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 867 (D.C. Cir. 1980) (deliberative process privilege covers "recommendations, draft documents, processes, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency"); *Nat'l Wildlife Federation v. U.S. Forest Service*, 861 F. 2d 1114, 1121 (9th Cir. 1988) (recommendations on how to deal with a specific issue are themselves the essence of the deliberative process); *Judicial Watch, Inc. v. U.S. Dept of Commerce*, 337 F. Supp. 2d 146, 147 (D.D.C. 2004) (Exemption 5 protects "talking points" and recommendation on how to answer questions).

(iv) Work-Product Privilege

Plaintiffs seemingly object to the DOE's use of the work product privilege because DOE does not identify whether the redacted portions of the 2016 PCA Manual on "litigation" strategy was either written by or for an attorney or, even assuming it was, nowhere does DOE state that the material contains legal analysis. *See* Plaintiffs' Brief, pp. 25-26. Plaintiffs provide no support for their position that cabins the work product privilege in Exemption 5 to such limited circumstances. Rather, where a document may have been created for more than one purpose, the work product privilege applies if the document was created at least in part of the prospect of litigation. *See Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 67 (1st Cir. 2002) (overturning district court decision that litigation had to be "primary motivating factor" behind document's creation for privilege to apply). In fact, the document at issue does not even have to be created

by an attorney for the privilege to attach under Exemption 5. *See, e.g.*, *Shacket v. United States*, 339 F. Supp. 2d 1092, 1096 (S.D. Cal. 2004) (irrelevant that report withheld under work product privilege was prepared by IRS agent, not attorney, as said privilege protects documents created by "other representative of a party").

Here, the portions of the PCA Manual redacted under Exemption 5 work product privilege was prepared at the direction of attorneys within the DOE's Office of General Counsel to assist in the collection and/or defense of anticipated litigation in collection actions of defaulted borrowers. *See* Supp. Pedersen Decl., ¶ 4. For example, a redacted portion encompasses directions to PCAs on how to draft Certificate of Indebtedness to avoid common challenges made in litigation. *Id.* Release of these redacted materials would deprive the DOE of its ability to fully and adequately prepare for actual or anticipated litigation and is protected under the work product privilege in Exemption 5. *Id. See also Schiller v. NLRB*, 964 F. 2d 1205, 1208 (D.C. Cir. 1992).

3. DOE Properly Exercised Its Rights Under Exemption 7

A. The Requested Records Satisfy Exemption 7's Threshold

The parties agree that DOE "must meet the threshold requirements of Exemption 7 before they may withhold requested documents on the basis of any of its subparts." *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982); *see* Plaintiffs' Brief, p. 8. Regarding this rudimentary principle, Plaintiffs' analysis of Exemption 7's threshold relies heavily on *Pratt's* reasoning that "agencies with both administrative and law enforcement functions are subject to an *exacting standard* when it comes to the threshold requirement of Exemption 7," in contrast to more traditional law enforcement agencies, "such as the FBI, who need only establish a *rational nexus* between enforcement of a federal law and the document for which an exemption is claimed." *Id.*

at 420 (emphasis added). However, Plaintiffs reliance on *Pratt* is misplaced.

Indeed, in the thirty years since *Pratt*, courts have struggled with, and in fact rejected, this supposed dichotomy. Recently, the D.C. Circuit has concluded that "it is not evident that the *Pratt* formulation adds all that much to the statutory text." *Pub. Employees for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 203 (D.C. Cir. 2014). In fact, a number of other courts have eschewed the *Pratt* dichotomy's treatment of mixed-function agencies, like the DOE. *See Kubic v. BOP*, No. 10-6078, 2011 U.S. Dist. LEXIS 71300 at * 28-29 (D. Or. 2011); *Abdelfattha v. DHS*, 488 F.3d 178, 184-85 (3d Cir. 2007); *Van Mechelen v. Dept' of Interior*, No. C05-5393, 2005 WL 3007121, at *4 (W.D. Wash. Nov. 9, 2005). *See also Carter, Fullerton & Hayes, LLC v. F.T.C.*, 601 F. Supp. 2d 728, 742 (E.D. Va. 2009) ("The Fourth circuit has . . . only cited *Pratt* twice in dicta").

Not surprisingly, Plaintiffs argue that the recently decided D.C. Circuit case of *Bagwell v. U.S. Dep't of Educ.*, 183 F. Supp. 3d 109, 125 (D.D.C. 2016) "mistakenly imported" the "rational nexus" standard to DOE. *See* Plaintiffs' Brief, p. 10. Nonetheless, Plaintiffs cannot escape the fact that a number of more recent FOIA decisions dealing with Exemption 7 are wholly consistent with *Bagwell*. For example, as mentioned previously, *Pub. Employees* makes it clear that many courts see little value in *Pratt's* "exacting standard" distinction as advocated by Plaintiffs. *See* Plaintiffs' Brief, p. 10; *see also McCann v. U.S. Dep't of Health & Human Servs.*, 828 F. Supp. 2d 317, 323 (D.D.C. 2011) ("*an agency* need only establish a rational nexus between the investigation and one of the agency's law enforcement duties and a connection between an individual or incident and a possible security risk or violation of federal law.") (emphasis added and internal quotation marks omitted); *Levinthal v. Fed. Election Comm'n*, 219 F. Supp. 3d 1, 6 (D.D.C. 2016) (adopting the rational nexus standard without any mention of a

countervailing "exacting" standard). In short, *Bagwell* should be viewed as controlling law.

i. FOIA Exemption 7(E) Allows the DOE to Withhold the Requested Documents

Against this legal backdrop, DOE has met the "rational nexus" requirements of Exemption 7's standard, and that the withheld documents are properly categorized under 7(E) which "sets a relatively low bar for the agency to justify withholding" materials. *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). More specifically, for purposes of Exemption 7(E) "an agency must demonstrate only that release of a document might increase the risk that a law will be violated or that past violators will escape legal consequences." *Pub. Employees*, 740 F.3d at 205 (internal quotations omitted). Furthermore, the materials in question were properly withheld by the DOE because their release would detail its "specific methods of law enforcement." *ACLU Found. Of Mass. v. FBI*, No. 14-CV-11759, 2016 WL 4411492, at *5 (D. Mass. Aug. 17, 2016) (Burroughs, J.) (quoting *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 287, 299 (S.D.N.Y. 2011)). Simply put, the DOE would be abdicating its law enforcement responsibilities if it disclosed the documents at issue.

a. DOE is Statutorily Required to Enforce the Law

Exemption 7 was intended to "'cover[] investigatory files related to enforcement of all kinds of laws.'" *Rural Hous. All. v. U.S. Dep't of Agric.*, 498 F.2d 73, 81 (D.C. Cir. 1973). Despite this latitude, Plaintiffs argue that 31 U.S.C. § 3711(g)(9), which requires agencies to take steps to collect debts owed to the government, provides DOE with "no authority to level either civil or criminal sanctions against borrowers who have defaulted on student debt", thereby denying any use of Exemption 7(E) in this context. *See* Plaintiffs' Brief, p. 10. This is incorrect.

Undoubtedly, DOE has been granted broad authority to level sanctions against borrowers in default. The Federal Claims and Collections Act, 31 U.S.C. § 3711, requires DOE "to 'collect

a claim on the United States Government for money or property arising out of the activities of, or referred to, the agency.'" *See* Supp. Pedersen Decl., ¶ 10 (quoting 31 U.S.C. § 3711(a)(1)). DOE is therefore authorized to use a number of "enforcement mechanisms, including administrative offset, tax refund offset, Federal salary offset, referral to private collection contractors, referral to agencies operating a debt collection center, reporting delinquencies to credit reporting bureaus, garnishing the wags of delinquent debtors, and litigation or foreclosure. 31 U.S.C. § 3711(g)(9)(A)-(H)." *Id.*, ¶ 11. Furthermore, DOE is tasked with minimizing the risk of encouraging false claims and must establish controls and guidelines to scrutinize possible false claims. *Id.*, ¶ 12.

B. Disclosure of These Documents Risk Circumvention of the Law

Exemption 7(E) is "written in broad and general terms" due to the "importance of deterrence" and "does not simply apply when information will definitely lead to circumvention of the law . . . [but] exempts information that would '*risk* circumvention of the law.'" *Mayer Brown LLP v. I.R.S.*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (quoting 5 U.S.C. § 552(b)(7)(E)).

In cases similar to this, administrative agencies have been found to have properly withheld 7(E) materials without pointing to any particular statute, but instead focusing exclusively on the risk of circumvention of the law in general. *See Isiwele v. United States Dep't of Health & Human Servs.*, 85 F. Supp. 3d 337, 360 (D.D.C. 2015) (quoting USCIS *Vaughn* Index) (withholding documents "concerning 'possible interactions with applicants, and information gathering techniques' for preventing and investigating immigration fraud . . . [t]he release of such information could 'allow applicants to circumvent immigration laws, alter behaviors, or tailor actions.'").[1]

[1] In keeping with the rest of the D.C. Circuit, the court in *Isiwele* relied on *Blackwell* to guide the analysis of 7(E), despite USCIS being a largely administrative agency, unlike the agency in question in *Blackwell, supra,* the FBI.

Still, Plaintiffs argue that "[i]t cannot be that Exemption 7 applies whenever an agency acts pursuant to a statutory mandate or nearly every action taken by a federal agency would qualify." Plaintiffs' Brief, pp. 10-11. In support, Plaintiffs cite to the D.C. Circuit's concerns in *Birch v. U.S. Postal Service* about Exemption 7 "swallow[ing] up FOIA," in the context of a "mixed-function agency." 803 F.2d 1206, 1209-10 (D.C. Cir. 1986). *Birch* goes on to quote from FOIA statutory language that Exemption 7 only applies to "investigations which focus directly on specifically alleged illegal acts, illegal acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions." *Id.* at 1210.

After *Birch* was decided, however, Congress amended FOIA, "deleting any requirement that the information be 'investigatory.'" *Tax Analysts v. I.R.S.*, 294 F.3d 71, 79 (D.C. Cir. 2002). In amending FOIA, "the legislative history makes it clear that Congress intended the amended exemption to protect both investigatory and non-investigatory materials, including law enforcement manuals *and the like*." *Id.* (emphasis added). DOE's unwillingness to disclose "information [that] would provide insight to a borrower—or entities seeking to defraud borrowers—as to how to avoid repayment of a loan" fits squarely within the language and spirit of 7(E), especially considering its current judicial interpretation and its amended language.

That being said, what the DOE must do to clear 7(E)'s "relatively low bar," is "demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Stephens v. Dep't of Justice*, 26 F. Supp. 3d 59, 72 (D.D.C. 2014). Here, DOE has met this rather low burden by noting that there are both "defaulted borrowers who may seek to illegally evade collection of their student loans, [and] there are entities seeking to defraud borrowers and taxpayers for their own commercial benefit." *See* Supp. Pedersen Decl., ¶ 14. In contemplation of these threats, DOE is only withholding "guidelines for

determining whether and how to enforce collection of or compromise an amount due." *Id.*

Furthermore, while Plaintiffs claim in their brief that 7(E) requires DOE to "establish *both* that [a withheld document] is a law enforcement technique, procedure or guideline *and* that its disclosure can reasonably be expected to risk circumvention of the law," *see* Plaintiffs' Brief, p. 13, no such dual requirement exists. To the contrary, "an agency may withhold law enforcement records that disclose *either* (1) techniques and procedures for law enforcement investigations or prosecutions *or* (2) guidelines for law enforcement investigations or prosecutions that could reasonably be expected to risk circumvention of the law." *ACLU Found. of Mass.*, 2016 WL 4411492 at *4. (Burroughs, J.) (emphasis added). The DOE's declarations plainly meet the second prong's "guidelines" requirement, as they represent agency policy on applying sanctions to enforce federal law. *See, e.g., Families for Freedom v. U.S. Customs & Border Patrol*, 2011 WL 6780896, at * 4 (S.D.N.Y. Dec 27, 2011).[2]

Given the well-documented history of debt relief schemes, disclosing guidelines detailing "how to enforce collection of or compromise an amount due" poses a serious risk of circumvention of the law. This risk not only envelopes defaulted borrowers who may seek to illegally evade collection of their student loans, *see* Supp. Pedersen Decl., ¶¶ 13, 14, 18, 19, 21, 22, but also entities seeking to defraud borrowers and taxpayers. *Id.*, ¶ 13. By way of example, information redacted from the PCA Manual's Treasury Offset Program, if released, would allow bad actors to use information to engage in "phishing" expeditions to trick borrowers into disclosing financial information by pretending to be an official PCA, illegally extracting student

[2] Given the 1986 FOIA amendments, Plaintiff's definition of "techniques and procedures" as referring to "how law enforcement officials go about investigating a crime," plainly contradicts the documented legislative intent of the amendments. *See Tax Analysts*, 294 F.3d at 79 (Congress eliminated any "requirement that the information be investigatory."). DOE therefore maintains that the withheld documents meet both of the aforementioned prongs of 7(E). *See* Supp. Pedersen Decl., ¶ 16. Indeed, DOE is statutorily obligated to recover funds owed to the federal government.

loan payments from borrowers. *See* Supp. Pedersen Decl., ¶ 20. Such forms of malfeasance is not hypothetical. Both the Federal Trade Commission and the Consumer Financial Protection Bureau have taken actions against these student loan scammers. *See* Supp. Pedersen Decl., ¶ 13 n. 1. In one recent complaint, a fraudulent company "pretend[ed] to evaluate [borrowers] for [loan forgiveness] eligibility," and then falsely claimed they were in fact eligible. FEDERAL TRADE COMMISSION, *FTC Cracks Down on Debt Relief Schemes Targeting Student Loan and Mortgage Borrowers, available at* https://www.ftc.gov/ne ws-events/press-releases/2016/05/ftc-cracks-down-debt-relief-schemes-targeting-student-loan.

At bottom, DOE's "relationship between its authority to enforce a statute or regulation and the activity giving rise to the requested documents . . . support[s] at least a colorable claim of the relationship's rationality," meeting the "rational nexus" standard. *Abdelfattah*, 488 F.3d at 186. DOE has provided ample justification for its withholdings and has not simply "recited statutes, orders and public laws," to justify its use of 7(E). *Id.* Such a deficient showing, at least in *Abdelfattah*, constitutes merely asserting that the documents were "compiled for law enforcement purposes." *Id.* (quoting from the Vaughn Index). In contrast, here, the DOE has disclosed more than enough information to have cleared 7(E)'s "low bar." *Bloomer v. U.S. Dep't of Homeland Sec.*, 870 F. Supp. 2d 358, 369 (D. Vt. 2012). As such, this Court should follow *Bagwell, supra* and its progeny, finding that the DOE is an Exemption 7 entity and that the redactions it has made to the PCA Manual is protected under Exemption 7(E).[3]

[3] Plaintiffs recommend that *in camera* review occur in connection with the redactions made by DOE under Exemptions (b)(5) and (7). Courts limit such review to extraordinary rather routine cases since such review circumvents the adversarial process and can be burdensome to conduct. *Larson v. Dep't of State*, 565 F.3d 857, 870 (D.C. Cir. 2009) (noting that "[i]f the agency's affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted by the record, and there is no evidence in the record of agency bad faith, then summary judgment is appropriate without in camera review of the documents") (internal quotation and citation omitted); *Mo. Coal. v. U.S. Army Corp. of Eng'rs*, 542 F.3d 1204, 1210 (8th Cir. 2008) (stating that "in camera inspection should be limited as it is contrary to the traditional role of deciding issues in an adversarial context upon evidence produced in court" (internal quotations and citation

Respectfully submitted,

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CERTIFICATE OF SERVICE

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/s/ Michael Sady
Michael Sady
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Dated: June 21, 2017

omitted). *In camera* review is also unnecessary when agencies meet their burden of proof through a reasonably detailed declaration. *Hull v. IRS*, 656 F.3d 1174, 1196 (10th Cir. 2011); *Assoc. Press v. DOJ*, 549 F.3d 62, 67 (2d Cir. 2008) (concluding that, "in light of relatively detailed nature of the [agency's] declarations," district court's decision not to conduct in camera review was not an abuse of discretion). However, with the addition of the Supp. Pedersen Decl. this request should be denied. In short, it will be difficult for Plaintiffs to rebut the presumption of good faith owed to Defendant's declarations, explain what makes this case extraordinary, or acknowledge the Defendant's reasonably detailed declaration.