UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., AMERICAN CIVIL LIBERTIES UNION AND NATIONAL CONSUMER LAW CENTER Plaintiffs, v. UNITED STATES DEPARTMENT OF EDUCATION Defendant.	Civil Action No.: 16-10613-ADB ORAL ARGUMENT REQUESTED

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

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INTRODUCTION

The key issue in this case is whether the Department of Education ("ED") properly invokes the law enforcement exemption, 5 U.S.C. § 552(b)(7), to shield important aspects of its massive student debt collection operation from public scrutiny. But contract enforcement is not law enforcement, and debt collection is not a sanction. Interpreting the law enforcement exemption broadly enough to include them would do real damage to FOIA's core purpose of promoting open government. Moreover, Plaintiffs continue to believe that ED's submission fails to meet the specific standards for assertion of the deliberative process and work product exemptions. § 552(b)(5). However, in recognition that ED's 2015 procurement process has been formally re-opened since Plaintiffs filed their opening brief, Plaintiffs withdraw their objections to ED's assertion of Exemption 3. § 552(b)(3).

ARGUMENT

I. ED Has Not Demonstrated that Exemption 7(E) Applies to Any of the Withheld Material.

In order to properly invoke Exemption 7, ED must demonstrate that the material it withholds was "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). To do so, ED must identify a specific law enforcement duty to which the withheld material relates, and ED's attempts to collect monies owed as a result of contractual obligations do not qualify. Moreover, ED has not shown that any of the withheld material would, if disclosed, "reasonably be expected to risk circumvention of the law," and thus it fails to justify the invocation of Exemption 7(E) in particular. 5 U.S.C. § 552(b)(7)(E).

A. Contract Enforcement is Not Law Enforcement.

Exemption 7 cannot properly apply unless ED identifies a specific law enforcement duty to which the withheld material relates. *See infra* Section I.B. Such a duty must involve an

agency's enforcement of a criminal or civil law under which the agency has the authority to subject an individual to criminal or civil sanctions, as the cases cited in Plaintiffs' opening brief make clear. *See* Pls.' Memo. of Law in Support of Pls.' Cross-Motion for Summary Judgment and Opp. to Def.'s Motion for Summary Judgment, ECF No. 51, ("Pls.' Br.") 8–9.[1] ED does not address these cases, and it cannot meet their standard.[2] The material ED withholds does not concern law enforcement; instead, it concerns ED's enforcement of contracts to which the federal government is party. ED has provided no case supporting the proposition that contractual obligations can provide the basis for law enforcement, and none exists. *Cf. Milner v. Dep't of Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring) ("The ordinary understanding of law enforcement includes not just the investigation and prosecution of offenses that have already been committed, but also proactive steps designed to prevent criminal activity and to maintain security.").

ED contends that the fact that federal student loan obligations originate with the execution of a master promissory note is irrelevant and should be stricken from the record entirely, *see* Joint Rule 56.1 Statement, ECF No. 58 ("56.1 Statement") ¶ 44, but that fact is central to the dispute concerning Exemption 7. Although ED seeks to shift the focus by proffering additional statutes that allow it to collect defaulted debt using various means, *see* Supplemental Declaration of Ann Marie Pedersen ("Supp. Pedersen Dec.") ¶¶ 9–11, the attempt

[1] Although ED styles its brief a "Reply to Plaintiffs' Cross-Motion for Summary Judgment," Plaintiffs understand it to be both ED's reply to Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment and ED's response to Plaintiffs' Cross-Motion for Summary Judgment.

[2] ED cites language from *Rural Housing* stating that Exemption 7 "covers investigatory files related to enforcement of all kinds of laws," Reply to Plaintiffs' Cross-Motion for Summary Judgment, ECF No. 57 ("Def.'s Br.") 10 (citing *Rural Hous. All. v. U.S. Dep't of Agric.*, 498 F.2d 73, 81 n.46 (D.C. Cir. 1974), but it omits the remainder of the sentence: "labor and securities laws as well as criminal laws." The fact that civil enforcement can qualify as law enforcement is not in dispute here, and the *Rural Housing* court actually shared Plaintiffs' concerns that a "broad interpretation" of law enforcement "swallows up" FOIA. *Id.* at 18. Plaintiffs also note that, writing more than forty years ago, the *Rural Housing* court expounded upon the earlier version of Exemption 7 limited to investigatory files. *See* Def.'s Br. 12.

fails. Enforcement mechanisms like garnishment of wages or tax returns, *see* Def.'s Br. 10–11, are not sanctions or penalties deployed in response to violations of law; these are, instead, means by which ED can collect monies owed to it under contract.[3]

Across the board, FOIA exemptions are "construed *narrowly*," *Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 557 (1st Cir. 1992), in keeping with FOIA's "overall policy of broad disclosure," *Irons v. F.B.I.*, 811 F.2d 681, 685 (1st Cir. 1987) (citation and internal marks omitted). Exemption 7 is no exception. Plaintiffs' opening brief cited language in *Birch v. U.S. Postal Service* noting that Exemption 7, if not properly cabined, could "swallow up FOIA." 803 F.2d 1206, 1209 (D.C. Cir. 1986) (citation and internal alterations omitted). ED responds that Exemption 7 has been amended since the decision in *Birch* to eliminate the requirement that covered materials be "investigatory," Def.'s Br. 12, which is indisputably true but misses the point: Plaintiffs have not claimed the materials need be investigatory. Regardless, allowing the law enforcement exemption to apply to contractual enforcement would significantly broaden its scope, and such a definition cannot be reconciled with the requirement to resolve any doubts about the scope of FOIA exemptions "in favor of openness." *Providence Journal*, 981 F.2d at 557 (internal citations omitted); *see also Church of Scientology Int'l v. U.S. Dep't of Justice*, 30 F.3d 224, 229 (1st Cir. 1994) ("FOIA's general philosophy remains, however, one of full agency disclosure, and courts have the obligation to interpret its reach generously, in order to achieve the FOIA's basic aim: sunlight.") (citations and internal marks omitted).

[3] Moreover, a significant portion of the withheld material has nothing to do with these collection methods. *See, e.g.*, ED 3244–45 (Ex. 10 to Dec. of Rachel E. Goodman, ECF No. 54-10 ("Goodman Dec. Ex. 10")).

B. Because ED is Not a Law Enforcement Agency, This Court Must Apply an Exacting Standard to Identify the Relevant Law Enforcement Purpose.

An agency like ED that performs many non-law-enforcement functions is "subject to an exacting standard when it comes to the threshold requirement of Exemption 7." *Tax Analysts v. I.R.S.*, 294 F.3d 71, 77 (D.C. Cir. 2002). "[I]f the primary function of an agency is not law enforcement, then the agency must demonstrate that it had a purpose falling within its sphere of enforcement authority in compiling the particular document." *Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1194 (10th Cir. 2011) (citation and internal marks omitted). ED suggests that this instruction has been abandoned by the D.C. Circuit and other courts, Def.'s Br. 9–10, but the very D.C. Circuit case it claims represents this abandonment states that "if the agency has mixed law enforcement and administrative functions, [courts] will 'scrutinize with some skepticism the particular purpose claimed.'" *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) (quoting *Pratt v. Webster*, 673 F.2d 408, 418 (D.C. Cir. 1982)).[4] Courts continue to apply this analysis. *See, e.g.*, *Codrea v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 15-0988, 2017 WL 908182, at *3 (D.D.C. Mar. 7, 2017); *Schwartz v. Dep't of Def.*, No. 15-CV-7077, 2017 WL 78482, at *12 (E.D.N.Y. Jan. 6, 2017).

Although some courts do cite the "rational nexus" language in addressing non-law-enforcement agencies, *see* Def.'s Br. 9–10, there is no dispute that such agencies must, at the very least, carefully identify a particular law enforcement duty to which withheld material has a rational nexus. The cases cited by ED make the point clear. *See* Def.'s Br. 9–10; *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 186 (3d Cir. 2007) (rejecting claim of law

[4] ED's citation to the unreported decision in *Kubik v. BOP*, No. 10-6078, 2011 WL 2619538, at *10 (D. Or. July 1, 2011), provides it with no more support, as the *Kubik* court treated the Bureau of Prisons as a law enforcement agency. *See* Def.'s Br. 9; *Kubik*, 2011 WL 2619538, at *10.

enforcement purpose where DHS had "not identified any connection between its law enforcement authority and the information contained in the withheld material"); *Levinthal v. Fed. Election Comm'n*, 219 F. Supp. 3d 1, 6 (D.D.C. 2016) (because agency "is responsible for investigating violations of the Federal Election Campaign Act," Exemption 7 applies); *McCann v. U.S. Dep't of Health & Human Servs.*, 828 F. Supp. 2d 317, 324 (D.D.C. 2011) ("As this case involved the investigation of a health care provider for HIPAA violations, the threshold law enforcement requirement is met."); *Carter, Fullerton & Hayes, LLC v. F.T.C.*, 601 F. Supp. 2d 728, 740 (E.D. Va. 2009) (given "FTC's authority to enforce other antitrust and consumer protection laws, the Court holds that the FTC has produced sufficient evidence to conclude that the records were compiled in relation to the enforcement of federal law"). ED has failed to make such a showing here.

Bagwell is not to the contrary.[5] *Bagwell v. U.S. Dep't of Educ.*, 183 F. Supp. 3d 109 (D.D.C. 2016). In *Bagwell*, the requester sought "records pertaining to the Department's review of compliance by the Pennsylvania State University . . . with the Clery Act, 20 U.S.C. § 1092(f), which imposes requirements regarding the tracking and disclosure of certain campus crime statistics." *Id.* at 115. The Clery Act requires that, if an institution is found to have misrepresented this information, ED "shall impose a civil penalty upon the institution." 20 U.S.C. § 1092(f)(13). Because ED was engaged in enforcement of a federal statute, ED's investigation of Clery Act compliance had a law enforcement purpose. Here, ED has identified

[5] Plaintiffs note that paragraph 15 of the Supplemental Declaration of Ann Marie Pedersen consists almost entirely of improper legal argumentation on this point, which this Court should ignore. *See Doolittle v. U.S. Dep't of Justice, Drug Enf't Agency*, 142 F. Supp. 2d 281, 285 n.5 (N.D.N.Y. 2001) (noting that submitting legal documents through a factual declaration in a FOIA action "is *improper*, and such arguments will *not* be considered.").

no parallel law violation entailing a civil or criminal penalty to which the withheld material is relevant.

C. ED Does Not Demonstrate a Logical Connection Between Disclosure of the Withheld Material and a Risk of Circumvention of the Law.

Because ED has failed to meet the Exemption 7 threshold requirement that the withheld material relates to law enforcement activity, the Court need not reach questions specific to Exemption 7(E), including whether disclosure of any of the material could reasonably be expected to risk circumvention of law. Should the Court opt nonetheless to consider these questions, it will find ED's arguments unavailing. Plaintiffs focus here on the absence of a risk of circumvention of the law, although they continue to believe that, even with its supplemental declaration, ED has failed to demonstrate that it has withheld techniques, procedures, or guidelines. *See* Pls.' Br. 13–15.

ED wrongly claims that courts do not require the risk of circumvention of the law to relate to any particular statute. The cases it cites underscore that ED must identify the violation of statute risked by the disclosure in order to claim Exemption 7(E). *See* Def.'s Br. 11; *Mayer Brown LLP v. I.R.S.*, 562 F.3d 1190, 1192 (D.C. Cir. 2009) (noting that "'the law' encompasses both prohibitions against certain behaviors as well as the legally prescribed consequences for violations" and finding risk of circumvention for records that could help law-breakers avoid punishment for tax evasion); *Isiwele v. United States Dep't of Health & Human Servs.*, 85 F. Supp. 3d 337, 358, 360 (D.D.C. 2015) (noting that "courts regularly find [E]xemption 7 applicable to USCIS documents that concern the enforcement of a statute or regulation within USCIS's authority and . . . were compiled for adjudicative or enforcement purposes," and in that context, finding records relating to the prevention and investigation of immigration fraud were properly withheld) (internal marks and citations omitted). Because ED here cannot point to a

statute or law defining either a violation or its punishment that could be circumvented if the records were disclosed, it cannot demonstrate the applicability of Exemption 7(E).

There is currently a circuit split concerning whether the risk of circumvention requirement applies only to "guidelines for law enforcement investigations or prosecutions," or whether it applies equally to "techniques and procedures" for such investigations or prosecutions.[6] Although the weight of authority suggests that the circumvention requirement applies to all three categories, the First Circuit has not yet weighed in. But this Court need not resolve the issue, as ED argues that the documents at issue are "guidelines" meeting the circumvention requirement. *See* Def.'s Br. 13 ("The DOE's declarations plainly meet the second prong's 'guidelines' requirement"); Supp. Pedersen Dec. ¶ 13.[7] ED discusses at length why its withholding meets the circumvention requirement without suggesting that the requirement should not apply to any of the withheld material. *See id.* at 11–14.

Moreover, courts reject agencies' attempts to demonstrate the risk of circumvention in a conclusory or illogical fashion. *See* Pls.' Br. 15–17 (citing cases); *Strunk v. U.S. Dep't of State*, 845 F. Supp. 2d 38, 47 (D.D.C. 2012) (statement in agency declaration that disclosure of documents "would permit potential violators . . . to develop countermeasures to evade detection, inspection and examination methods," was insufficient to justify withholding under Exemption 7(E)). ED's submission does not meet the standard.

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[6] *Compare Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011); *Catledge v. Mueller*, 323 F. App'x 464, 466–67 (7th Cir. 2009); *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1064 (3d Cir. 1995); *Benavides v. U.S. Marshals Serv.*, 990 F.2d 625 (5th Cir. 1993) (unpublished) *with Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 778 (9th Cir. 2015); *Allard K. Lowenstein Int'l. Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 681–82 (2d Cir. 2010).

[7] Ms. Pedersen's supplemental declaration does assert that the PCA's "Standard of Conduct and Complaint Procedure," ED 3244–3253, "fall squarely within the definition of a technique or a procedure." *Id.* ¶ 16. This court should reject this unsupported conclusion. *See* Pls.' Br. 14–15; *Det. Watch Network v. U.S. Immigration & Customs Enf't*, 215 F. Supp. 3d 256, 267 (S.D.N.Y. 2016). Plaintiffs remain confused as to the argument made by the footnote in ED's brief discussing this paragraph of the declaration. *See* Def.'s Br. 13 n.2. In any event, though, ED nowhere argues that the circumvention requirement does not apply to these records.

ED contends that disclosure of some withheld information would allow defaulted borrowers to "illegally evade collection of their student loans," Def.'s Br. 12, but its submission is insufficient and illogical on this point. ED never defines the nature of the underlying illegality, and it could not; failing to pay a contractual debt in full does not violate any civil or criminal law. The declaration, instead, states that a risk of circumvention exists because disclosure would allow borrowers to "improperly" avoid or delay repayment. Supp. Pedersen Dec. ¶¶ 16, 18, 19, 21, 22.[8] Impropriety, however, is not illegality. And, in any event, these assertions are alternately conclusory, *id.* ¶¶ 21, 22, or illogical, ¶¶ 16, 18, 19.[9]

For other material, ED relies on its concern that malicious actors may use the disclosed information "to defraud borrowers and taxpayers for their own commercial benefit." Supp. Pedersen Dec. ¶ 13, *see also id.* ¶ 20. While Plaintiffs do not dispute the existence or perniciousness of debt relief scams—and, indeed, Plaintiff NCLC released a widely cited report on the student loan debt relief industry and its violations of law, *see* Supplemental Declaration of Persis Yu ("Supp. Yu Dec.") ¶ 2, 3—ED has still failed to "demonstrate logically" how the release of the material at issue risks circumvention. *Blackwell v. F.B.I.*, 646 F.3d 37, 42 (D.C.

[8] The Supplemental Declaration contains various internal inconsistencies. For example, it asserts both that ED "has only withheld guidelines for determining whether and how to enforce collection of or compromise an amount due," Supp. Pedersen Dec. ¶ 14, and also that it has withheld "internal processing details regarding forced income-driven repayment consolidations and the process for Fast-Track consolidation," *id.* ¶ 18, and the "process for preparing and submitting an account for rehabilitation funding," *id.* ¶ 21. The latter two categories, concerning repayment options to which borrowers are entitled by statute and regulation, *see* 56.1 Statement ¶¶ 51–53, are clearly not a subset of the former.

[9] The Supplemental Declaration states that ED is withdrawing its assertion of 7(E) with respect to ED 152–227 (Analysis of PCA Collection Methods), ¶ 17, seemingly recognizing that evaluation of the performance of PCAs could not facilitate circumvention of the law. It then says in a footnote to that sentence that ED continues to assert Exemption 5 with respect to both this material and ED 3244–3253 (Goodman Dec. Ex. 10), the chapter on "Complaints Against the PCA." Plaintiffs contest that, among other things, ED's instructions about what PCAs "must NOT" do to comply with their Standards of Conduct, ED 3244–45, are properly covered by Exemption 7(E). If ED means to withdraw its assertion of 7(E) for Complaints Against the PCA, it must disclose this material to Plaintiffs—contrary to its claim, ED never asserted Exemption 5 with respect to this material. *See* Vaughn Index, ECF No. 45-3, at 12. Additionally, ED's assertion in that footnote that Plaintiffs do not challenge the applicability of Exemption 5 to this material is incorrect. Plaintiffs' opening brief makes clear that Plaintiffs challenge each assertion of the deliberative process privilege. Pls.' Br. 24 n.17 ("[T]he agency's filing is deficient with respect to its explanation of each and every deliberative process withholding. . .").

Cir. 2011). Information about how the government and the private collection agencies ("PCAs") determine which borrowers might be subject to offset of their federal wages, benefits, or tax would not help bad actors "trick borrowers into disclosing financial information by pretending to be an official PCA." Supp. Pedersen Dec. ¶ 20; *see* ED 3165–3169 (Goodman Dec. Ex. 10). In fact, debt relief scams exist and proliferate, in part, because the student loan servicing and collection system is too complicated for borrowers to navigate on their own, and making this material publicly available would make it easier for borrowers to navigate that system without turning to scammers. Supp. Yu Dec. ¶ 4. Moreover, while it is possible to imagine how disclosure of *any* information—even the most banal—could assist a wrongdoer in a "phishing" expedition,[10] circumvention cannot be premised on such an attenuated argument, lest the exemption swallow the rule. *See Birch*, 803 F.2d at 1209–10 (D.C. Cir. 1986).

II. ED Has Not Demonstrated that Exemption 5 Applies to All of the Withheld Material.

A. Deliberative Process.

In contending that its submission is sufficient to justify withholding material under the deliberative process privilege, ED's brief reflects two significant legal errors. First, it wrongly suggests that an agency is not required to identify a specific policy decision to which each deliberative process redaction relates, citing an out-of-circuit case. *See* Def.'s Br. 6 (citing *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 373 (4th Cir. 2009)). In the First Circuit, the deliberative process standard is not satisfied unless the agency can, among other things, "pinpoint the specific agency decision to which the document correlates." *New Hampshire Right*

[10] ED asserts that "[t]he risk of circumvention of the law exists even with the regulations and guidance already publically available," *id.* ¶ 13, suggesting that ED's standard for determining what risks circumvention of the law is not correctly calibrated. Disclosure of the law itself cannot be said to risk circumvention of the law.

to Life v. U.S. Dep't of Health & Human Servs., 778 F.3d 43, 52 (1st Cir. 2015), *cert. denied sub nom. New Hampshire Right to Life v. Dep't of Health & Human Servs.*, 136 S. Ct. 383 (2015) (citation omitted); Pls.' Br. 20–21 (detailing full standard). Because ED acknowledges that it has not attempted to meet that standard for any record here, its assertion of deliberative process must fail across the board. *See especially* ED 152–227 (Goodman Dec. Ex. 3). The First Circuit also requires that the agency verify "that the document precedes, in temporal sequence, the decision to which it relates." *Providence Journal*, 981 F.2d at 557 (citation and internal marks omitted). As a result, it is particularly egregious that ED withholds material reflecting existing policies, rather than solely those discussing the creation of new policies. *See* ED 2852–2853, 2892 (Goodman Dec. Ex. 6); 2877, 2906, 2931, 2942 (Supp. Yu Dec. Ex. 4).

Second, ED misunderstands the doctrine detailing ways in which predecisional material "can lose that status." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); Pls.' Br. 22; *but see* Def.'s Br. 5. Deliberative process does not apply if material is subsequently adopted as the agency position on an issue or used by the agency in its dealings with the public, *Coastal States*, 617 F. 2d at 866, or if it constitutes "the reasons which did supply the basis for an agency policy actually adopted," that is, the agency's "working law," *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152–53 (1975); *see also ACLU v. U.S. Dep't of Justice*, 210 F. Supp. 3d 467, 477 (S.D.N.Y. 2016) (describing "adoption" and "working law" exceptions). These exceptions operate to remove much of the material at issue here from coverage under the deliberative process exemption. This is especially clear with the Corrective Action Plan, ED 1–5 (Goodman Dec. Ex. 1) which ED itself describes as containing "specific recommendations by FSA [Federal Student Aid] personnel to FSA and OIG [Office of the Inspector General] decision-makers selected from a broader universe of completed FSA actions

to support FSA's eventual final position." Supp. Pedersen Dec. ¶ 5 (emphasis added); *see also id.* ¶ 6 (asserting that material is covered because it does "not consist of the final policy determinations made by FSA decision-makers" and that it therefore is not "working law").

These twin misunderstandings of the law prevent ED's submission from carrying its burden with respect to the deliberative process exemption.

B. Attorney Work Product.

ED continues to contend that the work product exemption covers its instructions to PCAs as to how to prepare documents used to initiate litigation against defaulted borrowers, but the attorney work product exemption simply does not extend broadly enough to cover these kinds of administrative instructions. The D.C. Circuit has held, for example, that material in a prosecution manual that is "administrative, concerning such matters as . . . papering procedures, sample forms, office organization, and the like" cannot be withheld under the work product exemption because it does "not include factual information, mental impressions, conclusions, opinions, legal theories or legal strategies relevant to any on-going or prospective trial." *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 757, 776 (D.C. Cir. 1978) (en banc); *see also ACLU of N. Cal. v. Dep't of Justice*, 70 F. Supp. 3d 1018, 1033 (N.D. Cal. 2014) (finding withheld pages qualified for work-product exemption because they do not merely "convey general agency policy regarding the use of location tracking devices, nor do they provide instructions for how the DOJ desires its attorneys to apply for orders authorizing their use"); Pls.' Br. 25–27.

The materials at issue here are administrative, and ED does not demonstrate otherwise. ED asserts that the redacted portions "describe, in part, how the Certificate of Indebtedness should be drafted to avoid common arguments and challenges made in litigation." Supp. Pedersen Dec. ¶ 4. First, this statement is very careful not to assert that the Manual actually

contains any information about arguments and challenges made in litigation; rather, it says only that the Manual contains drafting instructions, which were motivated by a desire to avoid such challenges. Second, ED concedes that this logic applies only "in part" to the redacted material, but ED is obligated to segregate material that contains legal analysis—if any does—from that which does not. *Tax Analysts*, 391 F. Supp. at 127 (work product exemption "requires the responding agency to disclose any reasonably segregable non-exempt portions of a record unless they are inextricably intertwined with the exempt portions") (citations and internal marks omitted); *Widi v. McNeil*, No. 2:12-CV-00188, 2017 WL 1906602, at *5 n.4 (D. Me. May 8, 2017) ("In the First Circuit, a segregability analysis must be performed even when the document is covered by the work product privilege."). ED's redactions, however, do not indicate that any such segregation has occurred. *See, e.g.*, ED 3172–3173; 3179–3180 (Goodman Dec. Ex. 10). Accordingly, ED has not carried its burden with respect to the work product exemption.

III. In Light of Changed Circumstances, Plaintiffs Withdraw Their Objection to the Withholding of Source Selection Information Pursuant to Exemption 3.

Plaintiffs' opening brief argued that ED's submission was deficient with respect to Exemption 3, 5 U.S.C. § 552(b)(3) because it had both failed to identify how the material constituted "source selection information" under the Procurement Integrity Act's definition, 41 U.S.C. § 2101(7), and because it had not affirmatively identified any ongoing contracting process to which the withheld material relates. *See* Pls.' Br. 28–29. Ms. Pedersen's responsive declaration states that records meet the requirements of subsection (J) of the statutory definition: designated by a contracting officer as source selection information the disclosure of which would jeopardize completion of a federal procurement process. Supp. Pedersen Dec. ¶ 3. On May 19, 2017, after Plaintiffs filed their opening brief in this matter, ED formally reopened the 2015 procurement process to which it asserts the records at issue here relate. *See* Supp. Yu Dec. ¶ 4.

Given this change in circumstances, and mindful of conserving this Court's resources, Plaintiffs no longer contest the withholding of these records pursuant to Exemption 3.

IV. Plaintiffs' Undisputed Facts are Material to This Dispute and This Court Should Not Strike Them.

ED objects, in identical language, that the first two dozen of Plaintiffs' 56.1 facts are so immaterial as to warrant that they be "stricken from review." 56.1 Statement ¶¶ 40–64. In support of this objection, ED cites *Stalcup v. CIA*, No. 11-11250, 2013 WL 4784249 at *3 (D. Mass. Sept. 5, 2013), which it contends holds that a court's "only role is to decide issues under FOIA, not facts outside the request and responses thereto." In fact, the cited portion of the opinion merely notes that the court will not, in the course of resolving the FOIA dispute, "determine whether plaintiff is correct in his belief that a pervasive and protracted government conspiracy resulted in the public being provided with a false explanation of the crash." *Id.*; Def.'s Br. 1. The facts which Plaintiffs have submitted here, by contrast, provide important factual context for the claims at issue in the case, including the size and scope of ED's debt collection program and its impact. Moreover, ED objects to Plaintiffs' statements even when they are indisputably relevant, as with statements describing the statutory and regulatory framework governing ED's collection of defaulted student debt. 56.1 Statement ¶¶ 42–44; 50–53.

CONCLUSION

For the foregoing reasons, and those in their opening brief, Plaintiffs respectfully request that ED's motion be denied and that Plaintiffs' cross-motion be granted, or, in the alternative, that ED be ordered to supplement its submission or to submit the withheld records for in camera review.

Dated: July 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

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Dated: July 5, 2017