

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.)	
)	
Plaintiff,)	Civil Action No. 07-0506 (RJL)
)	
v.)	
)	
U.S. DEPARTMENT OF HOMELAND)	
SECURITY, <i>et al.</i> ,)	
Defendants.)	
_____)	

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT U.S.
DEPARTMENT OF JUSTICE’S RENEWED MOTION FOR SUMMARY
JUDGMENT AND IN SUPPORT OF PLAINTIFF’S CROSS-
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel, respectfully submits this memorandum of law in opposition to the renewed motion for summary judgment filed by Defendant U.S. Department of Justice and in support of Plaintiff’s cross-motion for summary judgment. As grounds therefor, Plaintiff states as follows:

MEMORANDUM OF LAW

I. Introduction.

In February 2006, U.S. Border Patrol Agents Ignacio Ramos and Jose Alonso Compean were convicted in the U.S. District Court for the Western District of Texas for shooting Mexican drug smuggler Osbaldo Aldrete-Davila as Aldrete-Davila was retreating across the U.S. border near El Paso, Texas. Nearly 750 pounds of marijuana were discovered in Aldrete-Davila’s van near the border. Aldrete-Davila was granted immunity for the drugs found in his van in exchange for testifying against the agents. Ultimately, Ramos and Compean were sentenced to

11 and 12 years imprisonment, respectively. Their appeals were substantially denied in July 2008. President George W. Bush commuted the agents' sentences on or about January 19, 2009.

Aldrete-Davila survived the shooting after receiving medical treatment in the United States. However, he subsequently was indicted and arrested on unrelated drug charges after reportedly re-entering the United States with another 750 pounds of illegal drugs, using his U.S. government-issued credentials and in violation of his immunity deal. In August 2008, Aldrete-Davila was sentenced to 9 ½ years in prison.

Whatever the merits of the agents' convictions or the subsequent drug charges against Aldrete-Davila, substantial questions have arisen regarding the actions of U.S. government officials in prosecuting these agents, including questions about the involvement of Mexican government officials, and the decision to grant immunity to Aldrete-Davila and to allow him to re-enter the United States lawfully. To shed light on some of these questions, Plaintiff served FOIA requests on the U.S. Department of Justice ("DOJ"), the U.S. Department of Homeland Security ("DHS"), and the U.S. Department of State ("DOS") seeking records of communications between these agencies and with the Mexican Government, as well as records about participation of U.S. government personnel in coordinating, facilitating, and approving Aldrete-Davila's re-entry to the United States. Plaintiff also seeks records concerning the grant of immunity to Aldrete-Davila and records detailing the terms and conditions permitting Aldrete-Davila to lawfully enter the United States. While some of these records may touch on privacy concerns, if, in fact, Aldrete-Davila is entitled to the protection of U.S. laws, Aldrete-Davila himself simply is not the focus of Plaintiff's request. Rather, the focus of the request is on the actions and activities of U.S. government officials.

II. Factual Background.

On January 24, 2007, Plaintiff sent a FOIA request to Defendant seeking access to the following records:

- a. Communications between DOJ and any/all officers, agencies and/or representatives of the Government of Mexico concerning Osbaldo Aldrete-Davila, a Mexican national who testified in the prosecution of U.S. Border Patrol Agents Ignacio ‘Nacho’ Ramos and Jose Alonso Compean over a shooting incident in Texas on February 17, 2005.
- b. Communications between DOJ and the U.S. Department of State and/or the Department of Homeland Security (and its subordinate agencies) concerning Osbaldo Aldrete-Davila, a Mexican national who testified in the prosecution of U.S. Border Patrol Agents Ignacio ‘Nacho’ Ramos and Jose Alonso Compean over a shooting incident in Texas on February 17, 2005.
- c. The participation of DOJ personnel in coordinating, facilitating and/or approving the lawful entry(ies) of Osbaldo Aldrete-Davila into the United States (reportedly for the last time in February 2006). Mr. Aldrete-Davila reportedly entered the United States lawfully (with the approval of the U.S. Government) to obtain medical treatment, meet with federal investigators and to testify in court in El Paso, Texas.
- d. Any/all agreements, deals, promises, settlements, grants, understandings, memoranda and/or letters granting any form of immunity to Osbaldo Aldrete-Davila.
- e. Records detailing the terms and conditions permitting Osbaldo Aldrete-Davila to lawfully enter the United States.

Defendants’ Statement of Material Facts (“Def’s Statement”) at 1-2.

Plaintiff’s FOIA request was received by Defendant on January 24, 2007. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), Defendant was required to respond to Plaintiff’s request by February 21, 2007. In a letter dated April 3, 2007, Defendant acknowledged receipt of Plaintiff’s request and advised that it had been assigned Request No. 07-964. *Id.* at 2.

In its April 3, 2007 letter, Defendant requested that Plaintiff identify specific United States Attorney's Offices where Plaintiff believed records responsive to its request would be located. On April 8, 2009, Plaintiff administratively appealed Defendant's letter on the grounds that Plaintiff had identified the United States Attorney's Office in the Western District of Texas ("USAO WDTX") in its original FOIA request. Plaintiff's appeal was granted, and, on May 11, 2007, Defendant advised Plaintiff that it had begun to process the request. *Id.* at 2-3.

On June 15, 2007, Defendant sent a letter to Plaintiff asserting that the USAO WDTX need not even search for records responsive to Plaintiff's request because any such records would be exempt from disclosure pursuant to FOIA Exemptions 6 and 7(c) and Privacy Act Exemption (j)(2). Defendant advised Plaintiff that any responsive material could not be released absent an express authorization and consent by Agents Ramos and Compean and Mr. Aldrete-Davila. *Id.*

On February 25, 2009, the Court ordered that a search must be conducted in the USAO WDTX. On August 24, 2009, Defendant released only 4 pages of records responsive to Plaintiff's request. On November 4, 2009, Defendant filed a motion for summary judgment along with a revised *Vaughn* Index. *Id.* at 4.

III. Argument.

A. Summary Judgment Standard.

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed.R.Civ.P. 56(c). In FOIA cases, the agency decisions to "withhold or disclose information under FOIA are reviewed *de novo* by this court." *Judicial Watch, Inc. v.*

U.S. Postal Service, 297 F. Supp.2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, a court must view the facts in the light most favorable to the requestor. *Weisberg v. United States Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). For an agency to prevail, it must “prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act’s inspection requirements.” *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978).

B. Defendant Has Failed to Satisfy its Burden of Demonstrating the Applicability of FOIA Exemption 5 As a Matter of Law.

Exemption 5 protects “inter-agency or intra-agency memorandums or letters which 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). This exemption encompasses several privileges, three of which are asserted by Defendant. They include the deliberative process privilege, the attorney work product privilege, and the attorney-client privilege.

1. Deliberative Process Privilege.

Defendant asserts that thirty-eight of the fifty-two records at issue are entirely or partially exempt from disclosure pursuant to the deliberative process privilege. The deliberative process privilege “protects from disclosure ‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *Wilderness Soc’y v. U.S. Dep’t of the Interior*, 344 F. Supp.2d 1, 10 (D.D.C. 2004) (citing *Dep’t of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001)). The fundamental purpose of the privilege is to “prevent injury to the quality of agency decisions.” *National Labor Relations Board v. Sears Roebuck & Co.*, 421 U.S.

132, 151 (1975). To ensure that an injury does not occur, courts must determine whether “disclosure of materials would expose an agency’s decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.” *Formaldehyde Inst. v. Dep’t of Health & Human Serv.*, 889 F.2d 1118, 1123 (D.C. Cir. 1989) (citing *Dudman Communication Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)).

The burden is on Defendant to show that the thirty-eight records at issue should be withheld in whole or in part pursuant to the deliberative process privilege. *Wilderness*, 344 F. Supp 2d at 9. To overcome its burden, Defendant must show that the records are both pre-decisional and deliberative. *Id.* at 10. The U.S. Supreme Court has defined pre-decisional documents as those “prepared in order to assist an agency decisionmaker in arriving at his decision.” *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1978). Moreover, pre-decisional documents “must precede, in temporal sequence, the ‘decision’ to which it relates.” *General Electric Co. v. Steven Johnson*, 2006 U.S. Dist. LEXIS 64907, *13 (D.D.C. Sept. 12, 2006). If the document succeeds an agency’s decision, in temporal sequence, it must reflect an agency’s continuing process of examining its policies. *Wilderness*, 344 F. Supp.2d. at 13-14. “Post-decision draft documents which examine and make recommendations to an agency’s policies can be withheld. Such later created documents are not necessarily rationalizing or supporting the agency decision, as they may be evaluating it and making recommendations on it.” *Id.* In other words, an agency may withhold records pursuant to the deliberative process privilege only if it relates to future policy decisions, not solely the prior decision. Whereas pre-decisional records are privileged, “communications made after the

decision and designed to explain it [] are not” privileged. *Sears*, 421 U.S. at 151-152. The reason for excluding post-decisional documents from the (b)(5) exemption is simple: documents created after the decision do not cause injury to the deliberative process. *Id.* (“It is difficult to see how the quality of a decision will be affected by communications ... occurring after the decision is finally reached.”).

Defendant’s assertion of the deliberative process privilege must fail because the records in question are post-decisional, not pre-decisional, records. First, the *Vaughn* Index asserts that Documents 1, 6, 13-16, 22, and 23 are exempt from disclosure under the deliberative process privilege because they contain “content of [the] internal discussion regarding the grant [of] immunity to Mr. Aldrete-Davila.” Aldrete-Davila was granted immunity in 2005. The records at issue were created in September 2006 or later. Consequently, the records are post-decisional, not pre-decisional. While they may explain an agency decision, explanatory records are not subject to the deliberative process privilege. *Sears*, 421 U.S. at 151-152. Moreover, Defendant does not describe these records with any degree of specificity beyond asserting that they concern the “grant of immunity” to Aldrete-Davila. While this is not a sufficiently specific description to sustain an agency’s burden under Exemption 5 (*see Judicial Watch*, 297 F. Supp.2d at 260), Defendant’s description also fails to identify any decision that the agency was making to which the records relate. Defendant cannot demonstrate as a matter of law that the deliberative process privilege applies to these particular records because the records are post-decisional.

Second, Defendant asserts that Documents 4, 5, 7-12, 17-21, 44, and 51 fall under Exemption 5 because they contain “content of [the] internal discussion regarding the way in which Aldrete-Davila gained legal entry into the U.S. on specific dates.” Defendant does not

even attempt to identify any particular decision to which these records relate. The fact that Aldrete-Davila entered the United States legally on certain specific dates was not a decision made by Defendant.¹ As stated above, Defendant has the burden of providing specific descriptions demonstrating why responsive records fall under the deliberative process privilege. It failed to do so here. Even if Defendant had identified a specific decision to which the records relate, this particular set of records once again relate to past events. Aldrete-Davila has been incarcerated since February 2006. All of these records are from 2007. Obviously, Aldrete-Davila could not have gained entry into the United States, legally or illegally, after he already had been incarcerated in a U.S. prison. Because the records are post-decisional, the deliberative process privilege does not apply.

Defendant completely fails to identify any decision to which Documents 24-28 relate. Rather, Defendant's *Vaughn* Index indicates that these records are simply e-mail messages "concerning Mr. Aldrete-Davila." Because Defendant has not even attempted to identify a agency decision to which these records relate, its assertion of the deliberative process privilege must fail.

2. Attorney Work Product Doctrine.

Defendant asserts the attorney work product doctrine over Documents 1, 3-9, 11-28, 30, 32, 44-49, and 51-54. As Defendant acknowledges, the attorney work product doctrine applies only to documents "created by or at the direction of an attorney in anticipation of litigation." *See* Defendant's Memorandum of Points and Authorities in Support of Motion for Summary

¹ Regardless, Aldrete-Davila was provided border crossing credentials by the U.S. Department of Homeland Security, not by Defendant.

Judgment at 14. For Defendant to meet this burden, it “must establish that the documents ‘must at least have been prepared with a specific claim supported by concrete facts which would likely lead to litigation in mind’ and provide some indication whether the documents have been shared with third parties, which would amount to a waiver of the privilege.” *Wilderness*, 344 F. Supp.2d at 17 (citing *Judicial Watch*, 297 F. Supp.2d at 268).

Defendant cannot and does not satisfy its burden. Defendant fails to state why the withheld information is exempt from disclosure. Defendant does not name the attorneys involved, the subject matter of the e-mails, or any pending litigation or a specific claim supported by concrete facts that would likely lead to litigation. Such information is essential if Defendant is going to sustain its burden. In *Wilderness*, the Court held that, because the agency failed to provide the names of the authors or recipients, it

ha[s] no context in which to assess whether the attorney work-product privilege protects the documents from disclosure. Furthermore, [the agency failed] to indicate that the documents were created in anticipation of litigation or that they have not been shared with third parties. For these reasons, the [agency has] failed to satisfy [its] burden of proving that these documents need not be released pursuant to the work-product privilege.

Wilderness, 344 F. Supp.2d at 18. Under the standard set forth in *Wilderness*, Defendant has failed to meet its burden of demonstrating that the attorney work product doctrine applies to this particular set of records.

3. Attorney-Client Privilege.

Defendant asserts attorney-client privilege with respect to Document 32. To satisfy its burden, Defendant must show that the withheld document “(1) involves confidential communications between an attorney and his client and (2) relates to a legal matter for which the client has sought professional advice.” *Wilderness*, 344 F. Supp.2d at 16. Moreover, the

attorney-client privilege cannot be invoked in every instance in which an agency communicates with its lawyers. *Id.* Rather, the agency must demonstrate that the information was “intended to be confidential and was not disclosed to any third party.” *Id.*

Defendant does not explain how the two e-mail messages listed as Document 32 constitute an attorney-client communication. Defendant only describes the records as “[t]wo e-mail messages dated March 21, 2007, concerning Aldrete-Davila. DHS OIG Consult-Referral,” and asserts that the withheld information is protected by “attorney-client privilege.” This extremely cursory description does not come close to satisfying the requirements of the privilege, as set forth in *Wilderness*, 344 F. Supp.2d at 16. Moreover, Defendant uses the exact same description for Document 33, but does not claim that Document 33 is subject to the attorney-client privilege. Because Defendant has failed to meet its burden of showing that Document 32 is protected from disclosure by the attorney-client privilege, it must be released to Plaintiff.

C. The Privacy Exemptions Are Inapplicable As a Matter of Law.

Defendant also misapplies the Privacy Act and privacy exemptions (b)(6) and (b)(7)(C) of FOIA. As an initial matter, the Privacy Act applies *only* to citizens of the United States or to aliens lawfully admitted for permanent residence. 5 U.S.C. § 552a(a)(2).² Osbaldo Aldrete-Davila is a Mexican national and has not been lawfully admitted to the U.S. for permanent residence. Therefore, the Privacy Act does not apply to him.

In addition, FOIA’s privacy exemptions do not apply to these records for at least three reasons: (1) any privacy intrusion implicated by the release of the records is *de minimis*; (2)

² Section § 552a(a)(2) of the Privacy Act defines “individual” as a “citizen of the United States or an alien lawfully admitted for permanent residence.”

Defendant has already made Aldrete-Davila a nationally-known figure; and (3) the public interest outweighs any privacy concerns of Aldrete-Davila.³

In order for an agency to withhold information under FOIA Exemption 6 properly, the agency must demonstrate that the information is both a personnel, medical, or similar file, and that the disclosure of the information would constitute a clearly unwarranted invasion of privacy. *See U.S. Dep't of Justice v. Reporters' Committee For Freedom of the Press*, 489 U.S. 749, 755 (1989); 5 U.S.C. § 552(b)(6). It is undeniably the agency's burden to make these demonstrations. *Id.* In addition, "similar files" are defined to include any "Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 601 (1982). These are the only types of records to which Exemption 6 applies. Finally, if the privacy interests in the information at issue is *de minimis*, the disclosure does not amount to a "clearly unwarranted invasion of personal privacy." *Ripskis v. Dep't of Housing and Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984). Once it has been established that the information at issue comes from a personnel, medical, or similar file, the Court must balance the privacy interests of an individual against the public's interest in disclosure. *See Judicial Watch v. Food & Drug Administration*, 449 F.3d 141 (D.C. Cir. 2006).

In order to withhold responsive information pursuant to Exemption (b)(7)(C), the agency must meet a similar standard, namely, that the disclosure of the information "could reasonably be

³ It is not a foregone conclusion that FOIA's privacy exemptions inherently apply to non-citizens. In *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004), the U.S. Supreme Court held that "in the case of Exemption 7(c), the [FOIA] statute requires us to protect, in the proper degree, the personal privacy of *citizens* against the uncontrolled release of information compiled through the power of the state." (Emphasis added). The opinion uses the term "citizen" or "citizens" no less than nine times.

expected to constitute an unwarranted invasion of personal privacy.” While this exemption is regarded as providing a somewhat higher level of protection than Exemption 6, the burden remains squarely on the agency to prove that disclosure would result in an unwarranted invasion of privacy. *See Akin, Gump, Strauss, Hauer & Feld, LLP v. U.S. Dep’t of Justice*, 503 F. Supp.2d 373, 383 (D.D.C. 2007). As with Exemption 6, Exemption 7(C) requires a Court to “balance the public interest in disclosure against the privacy interests Congress intended the Exemption to protect.” *Associated Press v. U.S. Dep’t of Defense*, 554 F.3d 274, 284 (2d Cir. 2009) (quoting *Reporters’ Committee*, 489 U.S. at 776).

1. The Privacy Interests in This Case Are De Minimis.

FOIA’s privacy exemptions require a balancing of competing considerations. Asserting that information is private is not enough to withhold the information from a requestor. Rather, the exemptions permit withholding information contained in certain types of files when disclosure would “constitute a clearly unwarranted invasion of personal privacy,” or an “unwarranted invasion of personal privacy.” 5 U.S.C. §§ 552(b)(6); (b)(7)(C). Therefore, it is not enough for Defendant to simply assert generic privacy interests.

The first step in determining whether FOIA privacy exemptions apply is to ask “whether their disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest. If no significant privacy interest is implicated, FOIA demands disclosure.” *National Ass’n of Ret. Federal Employees v. Horner*, 978 F.2d 873, 874 (D.C. Cir. 1989). In this case, the information sought for release, other than Aldrete-Davila’s name, which is obviously already available to the public, is not the type of information that typically is withheld as private. Plaintiff is not seeking information such as Aldrete-Davila’s “place of birth, date of birth, date of marriage, employment

history, [or] comparable data.” *Id.* at 875. Rather, the information sought by Plaintiff revolves around the actions and communications of U.S. government officials regarding Aldrete-Davila’s entry(ies) into the United States.⁴ Any privacy interest Aldrete-Davila has in such information is *de minimis* at best.

2. The Government Has Already Made Aldrete-Davila a Nationally Known Figure.

It is extraordinary that any agency of the U.S. Government, let alone Defendant, is asserting the privacy rights of Aldrete-Davila, as it is the U.S. Government itself that has made Aldrete-Davila a nationally known figure. Unlike other cases in which an agency refused to confirm or deny the existence of records, Defendant has not only disclosed Aldrete-Davila’s identity and the fact that it possesses records about Aldrete-Davila, but the government has disclosed substantial information about Aldrete-Davila in the past.⁵

The U.S. Court of Appeals for the District of Columbia Circuit has addressed this issue and held that “the government may not rely on a FOIA exemption to withhold information that has been ‘officially acknowledged’ or is in the ‘public domain.’” *Davis v. U.S. Dep’t of Justice*,

⁴ Accordingly, Plaintiff does not seek the release of certain categories of information withheld by Defendant. Specifically, Plaintiff does not seek release of names and/or identifying information pertaining to third parties merely mentioned or the names and/or identifying information pertaining to third parties of investigative interest to the government. See 2d Finnegan Dec. at ¶¶ 47-49.

⁵ See e.g., *Judicial Watch v. U.S. Dep’t of Homeland Security*, 514 F. Supp.2d 7, 11 (D.D.C. 2007); *Mays v. Drug Enforcement Admin.*, 234 F.3d 1324, 1327-28 (D.C. Cir. 2000) (agency never publicly acknowledged whose identity it was protecting); *Santos v. Drug Enforcement Admin.*, 357 F. Supp.2d 33, 35 (D.D.C. 2004) (agency would neither confirm nor deny the existence of third-party records); *Romero-Cicle v. U.S. Dep’t of Justice*, 2006 U.S. Dist. LEXIS 84077, *13-14 (D.D.C. Nov. 20, 2006) (agency never publicly acknowledged whose identity it was protecting, just the types of information being redacted).

968 F.2d 1276, 1279 (D.C. Cir. 1992) (quoting *Afshar v. Dep't of State*, 702 F.2d 1125, 1130-34 (D.C. Cir. 1983)). An extraordinary amount of information has already been released about Aldrete-Davila. Plaintiff respectfully refers the court to Plaintiff's Motion for Partial Summary Judgment filed November 19, 2007 (Docket No. 24), Plaintiff's Opposition to DOJ's Cross Motion for Summary Judgment, filed April 11, 2008 (Docket No. 32), and Plaintiff's Reply to DOJ's Opposition to Plaintiff's Motion for Partial Summary Judgment, filed May 5, 2008 (Docket No. 37) in *Judicial Watch v. Department of Homeland Security*, C.A. No. 07-0506 (RJL) ("JW v. DHS"), which currently is pending before this court.

Among other things, the above documents demonstrate that the U.S. Government has already publicly acknowledged that Aldrete-Davila entered the United States illegally with a van full of illegal drugs, that he was shot by Border Patrol agents while attempting to flee back to Mexico, that he was offered immunity to testify against Border Patrol Agents Ramos and Compean, and that Aldrete-Davila broke his immunity agreement by smuggling another load of illegal drugs into the United States. *See* Plaintiff's Motion for Partial Summary Judgment at 9-10 in JW v. DHS. The U.S. Government subsequently released detailed information about medical procedures performed on Aldrete-Davila, as well as information about his urology and orthopedics appointments. *See* Plaintiff's Reply to DOJ's Opposition to Plaintiff's Motion for Partial Summary Judgment at 4-5 in JW v. DHS. Indeed, Defendant does not even attempt to identify what alleged privacy interests Aldrete-Davila has left or why, under these circumstances, it should be allowed to continue to withhold the particular information at issue. Defendant should not be allowed to claim a privacy exemption for an individual about whom so much has already been made public by the U.S. Government.

3. The Public Interest Clearly Outweighs Any Privacy Concerns.

Even if Aldrete-Davila's privacy interests have not already been rendered *de minimis* by prior government action, the public interest in this case clearly outweighs any privacy concerns. In addition to demonstrating that the FOIA exemptions apply, Defendant must also demonstrate that the release of the withheld information would constitute a "clearly unwarranted invasion of privacy." The U.S. Supreme Court has held that the question of whether an invasion of privacy is warranted goes directly to "the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Reporters' Committee*, 489 U.S. at 772 (internal quotations omitted). In other words, the public interest in the withheld information is directly linked to the determination of whether the privacy invasion is warranted. *See Horowitz v. Peace Corps.*, 428 F.3d 271, 278 (D.C. Cir. 2005).

This case clearly presents a situation in which the public interest outweighs the alleged privacy rights being asserted. The information Plaintiff seeks in this case goes to the heart of opening up government action to the light of public scrutiny. The records sought by Plaintiff will help answer questions surrounding Defendant's decision to grant immunity to Aldrete-Davila, as well as activities by the U.S. Government, including whether and/or how Defendant, DOS, and DHS cooperated in prosecuting U.S. Border Patrol Agents Ramos and Compean, and whether and/or how Defendant, DOS, and DHS cooperated with the Government of Mexico in the prosecution of the two agents. These questions primarily involve information about Defendant and other agencies of the U.S. Government, not information about Aldrete-Davila or third

parties. In fact, as demonstrated above, the activities of the individual involved here – Aldrete-Davila – are already largely public. The remaining withheld information focuses on official actions of Defendant. “Official information that sheds light on an agency’s performance of its statutory duties falls squarely within [the] statutory purpose [of FOIA].” *Reporters Committee*, 489 U.S. at 773.

IV. Conclusion.

Plaintiff respectfully requests that the Court deny Defendant’s renewed motion for summary judgment and grant Plaintiff’s cross-motion by requiring it to produce all non-exempt responsive records by a date certain.

Dated: December 7, 2009

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Paul J. Orfanedes
D.C. Bar No. 429716

/s/ Jason B. Aldrich
D.C. Bar No. 495488
501 School Street, S.W., Suite 700
Washington, DC 20024
(202) 646-5172

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JUDICIAL WATCH, INC.,)	
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Plaintiff,)	Civil Action No. 07-0506 (RJL)
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U.S. DEPARTMENT OF HOMELAND)	
SECURITY, <i>et al.</i> ,)	
Defendants.)	
_____)	

**PLAINTIFF’S RESPONSE TO DEFENDANT U.S. DEPARTMENT OF JUSTICE’S
STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE AND
PLAINTIFF’S STATEMENT OF MATERIAL FACTS IN SUPPORT
OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this response to Defendant U.S. Department of Justice’s Statement of Material Facts Not in Genuine Dispute and Plaintiff’s Statement of Material Facts in Support of Cross-Motion for Summary Judgment:

I. Plaintiff’s Response to Defendant U.S. Department of Justice’s Statement of Material Facts Not in Genuine Dispute.

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.
6. Undisputed.
7. Undisputed.

8. Undisputed.

9. Undisputed.

10. Plaintiff does not dispute the contents of Defendant's letter. Plaintiff disputes that responsive records are being properly withheld pursuant to FOIA Exemption 5, 6, or 7, or Privacy Act Exemption (j)(2) as a matter of law. Plaintiff also disputes that, as a matter of law, Defendant has satisfied its burden of demonstrating that its claims of exemption apply to the specific, responsive records at issue in this litigation.

11. Undisputed.

12. Plaintiff does not dispute the contents of Defendant's letter. Plaintiff disputes that responsive records are being properly withheld pursuant to FOIA Exemption 5, 6, or 7 as a matter of law. Plaintiff also disputes that, as a matter of law, Defendant has satisfied its burden of demonstrating that its claims of exemption apply to the specific, responsive records at issue in this litigation.

13. Undisputed.

14. Undisputed.

15. Undisputed.

II. Plaintiff's Statement of Material Facts in Support of Cross-Motion for Summary Judgment.

For its own LCv.R. 7.1(h) statement of material facts not in genuine dispute, Plaintiff respectfully refers the Court to Defendant's statement and Plaintiff's response thereto, set forth above.

Dated: December 7, 2009

Respectfully submitted,

JUDICIAL WATCH, INC.

/s/ Paul J. Orfanedes

D.C. Bar No. 429716

/s/ Jason B. Aldrich

D.C. Bar No. 495488

Suite 700

501 School Street, S.W.

Washington, DC 20024

(202) 646-5172

Attorneys for Plaintiff