IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PROJECT ON PREDATORY STUDENT LENDING OF THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL, *Plaintiff*, v. UNITED STATES DEPARTMENT OF JUSTICE, *Defendant*.	Civil Action No. 2:17-cv-00210-NBF Hon. Nora Barry Fischer Electronically Filed Document

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

INTRODUCTION

The Project on Predatory Student Lending submitted its FOIA request over a year and a half ago. In that time, the Department of Justice has offered a series of shifting—and seemingly conflicting—excuses; it has made false representations about its reasons for withholding responsive documents; and it has consistently delayed, stonewalled, and fought the Project's efforts to challenge its withholding. What it has not done is produce a single document.

This Court should not permit the agency to continue to evade its obligations under FOIA. The Government has failed to demonstrate any legitimate basis for refusing to comply with the Project's FOIA request. This Court, therefore, should order the Government to search for and produce all non-exempt records responsive to the Project's request.

FACTUAL BACKGROUND

I. The Underlying Litigation

In 2011, the United States Government—along with multiple states and individual whistleblowers—sued Education Management Corporation (EDMC), a large for-profit education company, for violating the False Claims Act. SMF ¶ 1.[1] According to the Government, EDMC's "relentless and exclusive focus" was on "the number of new students" its recruiters could enroll—students who, by enrolling, brought the company income through government-funded student loans. *Id.* ¶ 2. EDMC, the Government alleged, created a "boiler room style sales culture" and taught its recruiters to prey on prospective students' vulnerabilities to maximize enrollment numbers. *Id.* Ultimately, the Government claimed, the company violated the False Claims Act by illegally paying its recruiters based on the number of students they could enroll

[1]SMF refers to the Project's Concise Statement of Material Facts. The Project's appendix is cited as App. Throughout the brief, internal quotation marks and citations are omitted unless otherwise specified.

and then lying to the Government about it in order to receive $11 billion dollars in federal funding. *Id*.

Following discovery, the parties settled the case for $95.5 million—a tenth of the value of the claims the Government initially alleged. SMF ¶ 7. The settlement did not provide for the cancellation of any federal student loans. *Id.*

II. The Blanket Protective Order and FERPA Protective Order

At the outset of discovery in the EDMC litigation, the district court entered a blanket protective order, which permitted any party to mark information it produced "confidential." SMF ¶ 8. The order made clear that the Court had not determined that there was good cause to keep any particular document confidential: To the contrary, it explicitly stated that "[n]othing in [its] provisions . . . shall be construed in any way" as a judicial "finding that information designated" by a party as confidential was actually confidential. *Id.*

The parties extensively briefed and negotiated a provision in the protective order governing public access to the documents pursuant to FOIA. SMF ¶ 8. As enacted, this provision required that any party that wished to prevent the disclosure of documents produced in the EDMC litigation to third parties under FOIA must move for a protective order within ten days of being notified of a FOIA request. *Id.* As explained by the Government, "this approach" permitted EDMC "to make an effort to protect their confidential material, but [did] not inhibit a third party's judicially enforceable right to access" records held by the Government. *Id.*

The Court also entered a separate protective order governing personally identifiable information from education records subject to the Family Educational Rights and Privacy Act. SMF ¶ 10. That order also made clear that the Court had not determined that there was good cause to keep any particular document confidential: It stated that "[n]othing in this Protective

Order shall be construed in any way as a finding that information designated 'FERPA Confidential' actually constitutes personally identifiable information from students' education records." *Id.*

III. The Project's FOIA Request and Subsequent FOIA Litigation

In June 2016, the Project sent a FOIA request to the Department of Justice seeking certain records EDMC produced to the Government in discovery during the EDMC litigation. SMF ¶ 12.The agency summarily denied the Project's request in its entirety. *Id.* ¶ 13. It cited several FOIA exemptions as grounds for its denial, but it did not identify the documents it believed were responsive to the Project's request, let alone explain which of the cited exemptions it believed applied to which document and why. *See id.* The agency gave only a single-sentence explanation for its decision: "In making our determination," the agency wrote, "we have taken the following into account: the protective orders in place, protection of personal privacy, protection of confidential business information, and the Family Educational Rights and Privacy Act." *Id.*

Because DOJ's denial relied, in part, on the blanket protective order entered in the EDMC litigation, the Project moved to intervene in that case. SMF ¶ 14. The sole purpose of the Project's intervention was to seek an order clarifying that, because no party has demonstrated good cause to keep any documents produced in the EDMC litigation secret, the blanket protective order does not, in and of itself, require their withholding. *Id.* Pursuant to the terms of the protective order, the Project asked this Court to require that if EDMC wanted to prevent disclosure under FOIA of any documents it had produced to the Government in discovery, it must move for a further protective order within ten days and demonstrate good cause. *Id.*

The Project also timely filed an administrative appeal of DOJ's denial of its FOIA

request. SMF ¶ 15. Because the agency's denial letter did not provide sufficient information for the Project to determine whether its refusal to produce responsive documents was lawful, the Project requested that the agency provide a *Vaughn* index listing the documents it identified as responsive to the Project's request, indicating what material was being withheld, and explaining what exemptions it claimed with respect to that material. *Id.* After DOJ failed to respond to the Project's appeal within the time limit prescribed by FOIA, the Project filed this lawsuit challenging the agency's refusal to produce the requested records. *Id.* ¶ 16.

Only after the Project filed a lawsuit, did DOJ respond to its administrative appeal. SMF ¶ 17. The agency affirmed its denial of the Project's request, but it did so on different—and conflicting—grounds. *Id.* ¶ 18. Having initially claimed that the documents were subject to specific FOIA exemptions—suggesting that the agency had reviewed the records and identified exemptions it believed applied—on appeal, DOJ made clear that it had not, in fact, reviewed the responsive records at all. Instead, the agency claimed that it would be too burdensome to search for and review responsive records. *Id.* And, in any case, it contended it need not do so because, in its view, the records the Project sought were not agency records at all. *Id.* The agency did not explain what basis it had for claiming, in its initial denial letter, that the records responsive to the Project's FOIA request were subject to specific statutory exemptions, if the agency had not even reviewed the records.

DOJ also opposed the Project's motion to intervene in the EDMC litigation for the purpose of clarifying or modifying the blanket protective order. SMF ¶ 21. The agency stated that it had "independent reasons *other than* the protective orders" entered in the EDMC litigation to withhold *every* document sought by the Project—that is, it represented that *none* of the documents the Project seeks were being withheld solely because of the protective orders. *Id*.

Therefore, the agency argued, the Project's challenge to the blanket protective order was not ripe, because "all" of the documents the Project seeks were being withheld for "threshold reasons that require resolution in the FOIA action." *Id.* Based on the Government's representations that it was not withholding any of the requested documents solely because of protective orders—and that the FOIA litigation, therefore, might be dispositive of the Project's entire request—the Project agreed to wait to determine whether any clarification or modification of the protective order was necessary until after the FOIA litigation was completed. SMF ¶ 22.

In seeking summary judgment here, the Department of Justice has identified three sets of records responsive to the Project's request: (1) documents produced to it by EDMC on hard drives, CDs, and DVDs—which the Government refers to all together as "hard drives"; (2) documents pertaining to one EDMC subsidiary, the Art Institute of Dallas, which were produced to the Government on a CD and then uploaded to Deputy Chief Christy Wiegand's network directory; and (3) eleven documents found in the agency's EDMC litigation case file or in the agency's email archives. Comber Decl. ¶¶ 11, 15-17. The Government continues to withhold all of these documents in their entirety.

Contrary to the Government's previous representations that no documents were being withheld solely based on the protective orders in the EDMC litigation, the *Vaughn* index submitted with the Department's motion for summary judgment makes clear that *the majority* of the Art Institute documents are being withheld solely because of the protective orders. SMF ¶ 23.

STANDARD OF REVIEW

Because FOIA creates a broad right of access to Government information, there is "a strong presumption in favor of disclosure." *Davin v. DOJ*, 60 F.3d 1043, 1049 (3d Cir. 1995). If an agency seeks to withhold records, the statute "expressly places the burden on the agency" to

demonstrate its withholding is proper. *Sheet Metal Workers Int'l Ass'n v. U.S. Dep't of Veterans Affairs*, 135 F.3d 891, 897 (3d Cir. 1998).

Summary judgment is proper when the moving party shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Because the Government bears the burden of proof at trial, the Project can prevail on summary judgment simply by "pointing out . . . that there is an absence of evidence to support the" Government's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

ARGUMENT

The Government has failed to demonstrate any legitimate basis for withholding any of the records responsive to the Project's FOIA request. First, it argues that it may withhold the Art Institute documents because of the blanket protective orders entered in the EDMC litigation. But, by their terms, these orders do not constitute a finding of good cause to withhold documents. Next, it contends that the documents produced to it on hard drives are not agency records—despite the fact that they indisputably satisfy the Supreme Court's definition of that term. And it argues that searching the hard drives would be unduly burdensome, despite substantial evidence to the contrary. Finally, the Government argues that it may withhold copies of documents the Project seeks, simply because they are copies. These arguments are all meritless.

So too is the Government's contention that it demonstrated that its search for responsive records was adequate. Among other things, the Government fails to explain how it searched its email archives; it excluded from its search several attorneys who worked on the EDMC litigation; and it limited the date range of its search for no apparent reason. That is not adequate.

The burden is on the agency to prove that it has complied with its obligations under FOIA. The Government has not come close to satisfying its burden here.

I. THE GOVERNMENT HAS FAILED TO DEMONSTRATE THAT THE ART INSTITUTE DOCUMENTS MAY BE WITHHELD.

Despite having expressly—and repeatedly—represented that none of the documents responsive to the Project's FOIA request were being withheld solely because of the protective orders entered in the EDMC litigation, the Government now seeks to withhold the vast majority of the Art Institute documents—thousands of pages of responsive documents—solely because of those protective orders. *See* Gov't MSJ 25.[2]

But "the mere existence" of a protective order is "insufficient" to absolve an agency of its disclosure obligations under FOIA. *Morgan v. U.S. Dep't of Justice*, 923 F.2d 195, 199 (D.C. Cir. 1991). Only orders "intended to operate as the functional equivalent of an injunction prohibiting disclosure can justify an agency's decision to withhold records." *Id.*

The protective orders here do not satisfy this requirement. The orders were blanket protective orders, entered without any finding of good cause. *See* SMF ¶¶ 8, 10. They expressly state that they should *not* be construed as a judicial finding that nondisclosure is warranted. *See id*. To the contrary, the confidentiality protective order provides that if a party wishes to prevent disclosure of the documents under FOIA, it must move for a further protective order and demonstrate good cause—the protective order alone is, by its terms, insufficient. *See id.* ¶ 8.

That's precisely why, when the Project received the Government's initial FOIA denial citing the blanket protective orders, it moved to intervene in the EDMC litigation—to ask for a

[2] The Government states that some of the documents contain "the personally identifiable information of EDMC's applicants and students," and contends that such information is exempt from disclosure under FOIA Exemption 6—which protects information the disclosure of which would "constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6). Gov't MSJ 24. But, as the Government itself acknowledges, this information may be redacted. *Id.* at 25. It does not, therefore, prevent the disclosure of the records. *See* 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.").

court order requiring EDMC to demonstrate good cause for any document it wished to prevent the Government from disclosing. That was over a year ago. Had the parties begun then to litigate whether there is good cause to keep the Art Institute of Dallas documents secret, that issue would likely be long-settled by now—and the documents produced to the Project.

Instead, the Government falsely represented that it had "independent reasons other than the Protective Orders" to withhold *all* of the documents the Project seeks—reasons that the Government stated could be fully resolved in the FOIA litigation, rendering any dispute over the protective orders moot. SMF ¶ 21. And, relying on these false representations, the Project agreed to delay the protective order litigation. *Id.* ¶ 22. Now, nine months later, we are back where we started: The Government seeks to rely on blanket protective orders to withhold documents those protective orders, by their terms, do not justify withholding. The Government doesn't even acknowledge its previous false representations—let alone attempt to explain them.

This Court should not permit the Government to delay any longer. It should order the Government to (1) immediately notify EDMC that it intends to release these documents under FOIA and (2) if EDMC does not file for a further protective order within 10 days, release the documents to the Project.[3]

II. THE GOVERNMENT HAS NOT DEMONSTRATED THAT IT MAY WITHHOLD THE DOCUMENTS PRODUCED ON "THE HARD DRIVES."

A. The Documents Are Agency Records.

Consistent with FOIA's "goal of broad disclosure," documents requested from an agency are presumed to be agency records. *See U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142

[3] The Project does not object to the redaction from these documents of the "personally identifiable information of EDMC's applicants and students" pursuant to FOIA Exemption 6 and the Family Educational Rights and Privacy Act (FERPA). It reserves the right, however, to challenge any withholdings on this basis, if it appears that the Government has withheld information beyond that which is justified by Exemption 6 or FERPA.

n.3, 151 (1989). The burden, therefore, "is on the agency to demonstrate, not the requester to disprove, that the materials sought are not agency records." *Id.* at 142 n.3. The Government here has not—and cannot—meet this burden.

1. The records meet the Supreme Court's definition of "agency records."

The Government suggests that the definition of agency records is an open question. It is not. Although FOIA itself does not define the term, the Supreme Court has done so. In *Tax Analysts*, the Court established a definitive two-factor test to determine whether documents sought under FOIA are agency records. *See Tax Analysts*, 492 U.S. at 144-45. That two-factor test is controlling here. The Government's assertions to the contrary are meritless.

The FOIA requester in *Tax Analysts* was a weekly magazine that reported on developments in federal taxation. *Tax Analysts*, 492 U.S. at 139. Unable to reliably obtain district court decisions in tax cases from the courts themselves, the magazine submitted a FOIA request to the Department of Justice, which represents the Government in "nearly all civil tax cases" and therefore receives all decisions in those cases. *Id.* The agency argued that although it possessed copies of the decisions due to its role as counsel for the Government, the decisions remained court records—not agency records—and, therefore, the Government argued, they were not subject to FOIA. *See id.* at 146. The Supreme Court disagreed. *See id.*

After surveying its previous case law on agency records, the Court identified two—and only two—requirements "which must be satisfied for requested materials to qualified as agency records." *Tax Analysts*, 492 U.S. at 144. First, "an agency must either create or obtain the requested materials." *Id.* And, second, "the agency must be in control of the requested materials at the time the FOIA request is made." *Id.* at 145. The Court defined "control" to mean that the records came "into the agency's possession in the legitimate conduct of its official duties." *Id.*

Applying these criteria to the documents requested in *Tax Analysts*, the Court held that both requirements were met. First, it was "undisputed" that the Justice Department had "obtained" the documents. *Tax Analysts*, 492 U.S. at 146. And, second, the Court held that the Department controlled the documents because they had come into its possession in the legitimate course of its duties—litigating tax cases on behalf of the Government. *See id.* at 146-47.

As it does here, the Government in *Tax Analysts* argued that the Supreme Court should impose additional requirements—beyond simply "possession in the legitimate course" of an agency's duties—to hold that an agency has sufficient control over a record to render it subject to FOIA. *See Tax Analysts*, 492 U.S. at 147. The Supreme Court refused. *See id.* Doing so, the Court explained, would be "incompatible with the FOIA's goal of giving the public access to all nonexempted information received by an agency as it carries out its mandate." *Id.* The Court thus made clear that it would not permit agencies to thwart disclosure by grafting additional requirements onto its definition of agency records.

The documents the Project seeks here satisfy both prongs of the *Tax Analysts* test. It's undisputed that (1) they were "obtained" by the Department of Justice and (2) they came "into the agency's possession in the legitimate conduct of its official duties." Under *Tax Analysts*, therefore, they are agency records. The Government doesn't even attempt to argue otherwise.

Instead, it contends that this Court should adopt additional requirements beyond those established by the Supreme Court in *Tax Analysts*—precisely the contention the Supreme Court rejected in that case. The Department fails to mention that most of the additional requirements it proposes were considered—and rejected—by the Court in *Tax Analysts*. In fact, four of them come directly from the lower court opinion in *Tax Analysts* itself—an opinion the Supreme Court decided not to follow. Thus, the Government asks this Court to eschew the two-factor test the

Supreme Court did establish and instead rely on an array of factors the Supreme Court itself chose not to adopt.

The Department of Justice relies heavily on the fact that the D.C. Circuit has intermittently considered various combinations of the factors the agency seeks to impose here. But, as the Government admits, even courts within the D.C. Circuit itself doubt the validity of this approach. *See* Gov't MSJ 10. And the Third Circuit has never adopted it. To the contrary, courts within this Circuit adhere to the two-factor *Tax Analysts* test, as required by the Supreme Court. *See, e.g.*, *Pohl v. EPA*, No. CIV.A.09-1480, 2010 WL 4388071, at *4 (W.D. Pa. Oct. 29, 2010); *Bartlett v. DOJ*, 867 F. Supp. 314, 316 (E.D. Pa. 1994). The fact that courts in another circuit, in cases that are not binding on this Court, have sometimes taken an approach that conflicts with Supreme Court precedent does not mean that this Court should follow suit.

The Supreme Court has established two requirements for documents to qualify as agency records under FOIA. The records sought here indisputably meet both requirements. That should end the inquiry.

2. None of the seven additional factors the Government impermissibly seeks to impose demonstrates that the records are not agency records.

Rather than adhere to the definitive two-factor test established by the Supreme Court, the Government argues that this Court should instead consider *seven* additional factors—factors that are much more vague and difficult to apply than the two provided by the Supreme Court. The Government doesn't explain how this Court should balance these factors or even how the agency decided upon the factors it chose—besides that it apparently believes they weigh in its favor.

The vague additional requirements the agency asks this Court to adopt conflict with Supreme Court precedent, with Third Circuit case law, and with FOIA itself. Moreover, the Government cannot even demonstrate that it satisfies these factors—even if this Court could

permissibly apply them. This Court should decline the Government's invitation to ignore controlling Supreme Court precedent in favor of new factors the Government can't even meet.

The first four factors the Government asks this Court to consider come from the lower court's approach in *Tax Analysts* that the Supreme Court itself chose not to adopt.

1. First, the Government argues that in determining whether the documents are agency records, this Court should consider the "intent of the" documents' "creator[s]." Gov't MSJ 10. But the agency made this exact argument to the Supreme Court in *Tax Analysts*, and the Court rejected it. *See Tax Analysts*, 492 U.S. at 147. The determination of whether a document is an "agency record," the Court held, does not "turn on the intent of the creator." *Id.* There is no "*mens rea* requirement" in the statute. *Id.* And the Court refused to add one. *See id.*

Moreover, even if this Court were to consider intent, the Government has not demonstrated that this factor weighs in its favor. The agency suggests that the Project must provide evidence that the documents' creators "knew or intended" that the documents would be obtained by the agency. Gov't MSJ 11. But it is the Government's burden to show that the documents are not agency records—not the Project's burden to prove that they are. *See Tax Analysts*, 492 U.S. at 142 n.3. For this factor to weigh in its favor, therefore, the Government would have to demonstrate that the creator of each document did *not* know or intend that the document might be used by the Government. It cannot possibly do so. The Government admits that it has no evidence whatsoever about the intent of the records' creators. *See* Gov't MSJ 11. And, in fact, earlier in the EDMC litigation, it argued that at least some documents were created with the goal of defrauding the Government—that is, that the whole point of their creation was to be used by the Government. *See* EDMC Dkt. No. 386-16, at 6.

2. Second, the Government contends that the documents are not agency records because, due to the blanket protective orders entered in the EDMC litigation, the Department of Justice lacks "unfettered discretion to use and dispose" of the documents "as it sees fit." Gov't MSJ 11-12. The Government made a similar argument to the Supreme Court in *Tax Analysts*. *See* Pet'r's Br., *Tax Analysts*, 1989 WL 1127763, at *14 (arguing that the Justice Department lacked control over the district court decisions it receives in litigation in part because if the decisions are made public by the court, the agency "has no power to restrict their use or their dissemination," and if "they are sealed" by the court, the agency "has no power to release them to others"). The Supreme Court did not accept it then. And this Court should not accept it now.

Agencies frequently lack "unfettered discretion" over the use and disposal of their records. *See, e.g.*, *De Laurentiis v. Haig*, 686 F.2d 192, 193 (3d Cir. 1982) (describing statute that restricts disclosure of immigration information); 44 U.S.C. § 3314 (establishing "exclusive" procedures for disposal of Government records). The Federal Records Act, for example, requires agencies to preserve "records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency"—in other words, it limits agencies' discretion to dispose of their records as they see fit. 44 U.S.C. § 3101. This limitation on agencies' ability to dispose of some of their most important records cannot possibly mean that these records are not agency records.

To the contrary, the text and structure of FOIA make clear that documents obtained by an agency in the legitimate conduct of its duties are agency records—regardless of limitations on the agency's use or disposal of the documents. FOIA contains a specific exemption (Exemption 3) permitting agencies to withhold documents otherwise subject to the Act if there is another statute that prohibits the documents' disclosure. *See* 5 U.S.C. § 552(b)(3). This exemption would

be unnecessary if, as the Government contends, a document is only subject to FOIA in the first place if an agency has unfettered discretion over its use and disposal. If the Government were correct, whenever a statute limited an agency's ability to disclose a document, that document wouldn't be an agency record subject to FOIA. No exemption would be needed. The inclusion of a specific FOIA exemption for documents an agency is statutorily prohibited from disclosing demonstrates that documents in an agency's possession are agency records, even if there are limitations on the agency's discretion to disclose them. *Cf. Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous."); *De Laurentiis*, 686 F.2d at 197 (describing Exemption 3 as providing for the "withholding *of agency records*" (emphasis added)).

Thus, a protective order cannot possibly transform an agency record into a non-agency record. *See Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1400 (7th Cir. 1984) (holding that a protective order is "irrelevant" to whether a document is an agency record). The Government does not cite a single case holding otherwise. *Cf. GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 387 (1980) (discussing impact of injunction prohibiting disclosure of records, without ever suggesting that the records are not "agency records").

And even if a protective order could somehow transform an agency record into a non-agency record, it would still need to be supported by good cause. *See Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986). To withhold documents on this basis, therefore, the Government—or EDMC—would still need to demonstrate, with respect to each document the Government seeks to withhold, that there is good cause for secrecy that outweighs the public's interest in access. *See id.*; *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994). Neither has done so.

3. The third factor the Government asserts this Court should consider is whether the Department of Justice "read or relied on" the documents EDMC produced. Gov't MSJ 9. Again, there is no basis for this argument in the text of the statute. *Cf. Tax Analysts*, 492 U.S. at 147 (refusing to add requirements not supported by the text of the statute). To the contrary, the Court in *Tax Analysts* emphasized that Congress intended to ensure that the public had access to information *"available to* an agency." *Tax Analysts*, 492 U.S. at 144 (emphasis added); *see also id.* at 147 (describing "FOIA's goal" as "giving the public access to all nonexempted information *received* by an agency as it carries out its mandate" (emphasis added)). Nowhere does it require that the agency have read or relied on that information.

And with good reason. The information made available to an agency in the course of its duties can shed light on the agency's actions, regardless of whether the agency actually read the information. Here, for example, the documents produced to the Government by EDMC will help the public evaluate the evidence against EDMC (or lack thereof) and therefore enable the public to evaluate the agency's settlement with the corporation—regardless of whether the agency relied on the documents to enter that settlement. Even just knowing that an agency had substantial relevant information available to it that it chose to ignore is, in and of itself, useful to the public's ability to understand and oversee the agency's conduct.

Furthermore, even if—contrary to the Supreme Court's decision in *Tax Analysts*—an agency must not only obtain documents in the legitimate course of its duties, but also read or rely on them, the outcome here would remain the same. The Government carefully words its argument to *imply* that it has not read or relied on the documents, but it does not actually say that. Instead, it states that it didn't read or rely on the documents "*directly from the hard drives*" and that the agency was not reading or relying on the documents "*at the time of the FOIA*

request." Gov't MSJ 12-13 (emphasis added). It never states that it did not read or rely on the documents at all.

Nor could it. A review of the filings in the EDMC litigation reveals that the Government *did* rely on the information produced to it by EDMC on the hard drives. There are multiple documents—including a declaration submitted to the Court under penalty of perjury—in which Christy Wiegand, lead counsel for the Government, makes assertions based on "a review" of discovery produced by EDMC, describes in detail evidence the company produced, or quotes discovery documents. *See* SMF ¶ 11. The Government neglects to mention any of these filings—presumably hoping that neither the Project nor the Court would discover them on its own. These documents make clear that—in court filings, in proceedings before the Special Master, and in correspondence with opposing counsel—the Government repeatedly relied on the documents the Project seeks here. *See id*. Any suggestion to the contrary is meritless.

4. Fourth, the Government asserts that the hard drives were not integrated into the Department of Justice's record systems, and therefore, it contends, they are not agency records. But there is no statutory requirement that an agency that obtains a record in the legitimate conduct of its duties file that record in a particular way before it becomes subject to FOIA. If there were such a requirement, agencies could simply circumvent the statute by not filing their records. That is, of course, not the law. *See Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 131 n.* (D.C. Cir. 2005) (explaining that under *Tax Analysts*, it's "immaterial" if documents created "in the legitimate conduct of" an agency's "official duties" are "never integrated" into the agency's record system—they are agency records, regardless of where they are located).

To the contrary, FOIA requires the disclosure of *all* records obtained or created by an agency in the legitimate course of its duties—not just those contained within a particular filing

system. *See Tax Analysts*, 492 U.S. at 145. Indeed, the statute provides that documents may be agency records even if they are not held by the agency at all, but instead hosted by a government contractor—that is, it expressly recognizes that not all agency records are contained within a specific agency filing system. *See* 5 U.S.C. § 552(f)(2)(B); *see also Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 150 (D.C. Cir. 2016) (holding that emails of an agency head, located on a private, non-governmental account, could be agency records).

Furthermore, the Government has not demonstrated that the documents the Project seeks weren't, in fact, ever integrated into its records system. The Government states only that currently the hard drives are in a room at the agency. *See* Gov't MSJ 13. But, presumably, all materials the Government receives are kept in a room. The agency provides no evidence about its ordinary procedures for handling discovery materials obtained on hard drives, no evidence about its procedures for handling such hard drives when they are produced in qui tam cases that the Government is co-prosecuting with a private law firm, and no evidence about how (if at all) the treatment of the hard drives here was unique. There is simply no basis, therefore, for the Government's assertion that the hard drives were not integrated into its system for storing similar materials.

Moreover, the Project doesn't seek the hard drives themselves. It seeks copies of the documents EDMC produced to the agency, which happened to be produced initially on hard drives. And so the status of the physical hard drives isn't necessarily dispositive. To the extent integration into an agency's filing system matters at all, the question is whether the *documents* at issue were ever integrated into the agency's system—on the hard drives or otherwise. The only evidence in the record about the documents themselves is: (1) The Department of Justice relied on them during the course of the EDMC litigation; and (2) copies of at least some of the

documents were found in the U.S. Attorney's email archives, *see* Comber Decl. ¶ 17(c). If anything, this evidence suggests that the records *were* integrated into the agency's records system. The Government has not demonstrated otherwise.

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In addition to the four factors from the lower court's decision in *Tax Analysts*, the Government also argues that this Court should consider three additional factors—factors the Government seems to have chosen simply because it believed they would weigh in its favor. They do not.

1. First, the Government contends that because it "did not create the Hard Drives," they cannot possibly "provide any additional insight into the activities, functioning, operations, or structure of government"; and because the Government does not believe the documents can shed light on its activities, it contends that it is entitled to withhold them "[o]n this basis alone." Gov't MSJ 14. The Government made a nearly identical argument in *Tax Analysts*. *See* Pet'r's Br., *Tax Analysts*, 1989 WL 1127763, at *8, *18-*20. The Supreme Court rejected the argument then. And this Court should do so now.

For one thing, it's just not true that the documents can't shed light on Government activities, simply because the Government didn't create them. These documents didn't just randomly happen to end up in the hands of the Department of Justice. EDMC received billions of dollars in Government funding; the Government alleged that the corporation violated the law to increase the amount of funding it could get and then submitted false claims to the Department of Education to secure that funding; and, finally, the Department of Justice, in one of the Civil Division's "most significant cases," sued EDMC for defrauding the Government. *See* Comber Decl. ¶ 3. The documents the Project requests here are documents the agency received in

discovery as it was prosecuting that lawsuit.

These documents will enable the public to better understand and evaluate the Government's prosecution and settlement of "one of the most significant cases" the agency has brought—indeed, viewing the evidence produced in discovery is perhaps the only way the public can evaluate the agency's decision to settle the case for one tenth the value of the claims it originally brought. *See Int'l Bhd. of Elec. Workers v. HUD*, 763 F.2d 435, 436 (D.C. Cir. 1985) ("[T]he purpose of FOIA is to permit the public to decide for itself whether government action is proper."). The documents will also help the public evaluate the Department of Education's management of the taxpayer-funded federal student loan program by providing a detailed look at the impact and execution of that program at EDMC.

As the Supreme Court explained in *Tax Analysts*, Congress did not intend to limit disclosure under FOIA to documents created by agencies themselves. *See Tax Analysts*, 492 U.S. at 144, 147. Rather, it intended "to put within public reach" *all* information acquired by the Government in the legitimate conduct of its duties. *Id.* at 144. As evidenced by the documents sought here, documents acquired by an agency can be just as useful in evaluating and overseeing the Government as those created by the Government itself.

Furthermore, as the Third Circuit has made clear, FOIA's broad disclosure requirement means that even records that will add "nothing to the public's knowledge of government workings" must still be disclosed. *Fed. Labor Relations Auth. v. U.S. Dep't of Navy*, 966 F.2d 747, 758 (3d Cir. 1992). The documents at issue in *Tax Analysts* were district court decisions, required by statute to be made publicly available by the courts themselves—documents that were only in the possession of the Department of Justice because the agency served as counsel for the Government in those cases. As the Government repeatedly emphasized in its briefing, disclosure

of those decisions by the Department could not possibly add anything to the public's understanding of the workings of the agency. *See* Pet'r's Br., *Tax Analysts*, 1989 WL 1127763, at *8, *18-*20; *Tax Analysts*, 492 U.S. at 156 (Blackmun, J., dissenting) ("What respondent demands, and what the Court permits, adds nothing whatsoever to public knowledge of Government operations."). Yet, the Supreme Court required that they be disclosed.

As the Supreme Court has repeatedly explained, FOIA was enacted to curb the discretion of agencies to withhold records from the public—discretion that was "often abused." *See, e.g.*, *Tax Analysts*, 492 U.S. at 150. Permitting an agency to withhold records simply because it believes that they won't aid the public in understanding or overseeing the agency would reinstate precisely what Congress intended to prevent—broad discretion for agencies to decide which records the public is entitled to receive. The Third Circuit and the Supreme Court have both made clear that agencies cannot circumvent FOIA in this way. This Court should do the same.

2. Second, the Government contends that "mere possession of a document" by an agency does not transform that document into an agency record. Gov't MSJ 14-15. But the Project does not argue otherwise. The Project is not asking this Court to hold that possession alone is sufficient. It is merely asking that this Court follow the rule established by the Supreme Court in *Tax Analysts*: that "possession *in the legitimate conduct of [an agency's] official duties*" is enough, *Tax Analysts*, 492 U.S. at 145 (emphasis added).

The Government leaps from the undisputed principle that possession alone does not render a document an agency record to a conclusory assertion that the documents sought here are "most appropriately viewed as 'EDMC records' and not 'agency records.'" Gov't MSJ 15. This leap is unfounded. And it is foreclosed by *Tax Analysts*. The court decisions in *Tax Analysts* came into the Justice Department's possession through the legitimate conduct of its duties to

represent the Government. The documents here came into the agency's possession in the same way. Like the decisions in *Tax Analysts*, therefore, the documents obtained by the Government in the EDMC litigation are now agency records.

3. Finally, the Government argues that the documents produced on the hard drives cannot be agency records simply because the U.S. Attorney's Office purportedly "understood its possession of the Hard Drives to be temporary." Gov't MSJ 15. As an initial matter, this assertion is difficult to believe. In negotiating the protective order, the Department of Justice fought to ensure that the order would permit disclosure under FOIA—a fight that would make no sense if the agency did not believe the documents were agency records. *See* SMF ¶ 8. Moreover, contrary to the Government's suggestion, the protective order itself does not actually require the return of all documents produced to the Government. It requires the return of all documents that are *both* marked confidential *and* fall within specified categories of information that are, in fact, confidential. *See id.* ¶ 9. And, because there was never any good cause showing to support secrecy, the blanket protective order was insufficient to justify withholding anyway—indeed, the order explicitly says as much. *See id.* ¶ 8.

Thus, to the extent the Government believed the blanket protective order necessarily rendered its possession of *all* documents produced in discovery temporary, that belief was both wrong and unreasonable. *Cf. San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999) ("[B]lanket orders are inherently subject to challenge and modification, as the party resisting disclosure generally has not made a particularized showing of good cause with respect to any individual document."). The Government has had these documents now for years—there is nothing temporary about it.

The Government argues for a "bright-line rule" that any time a federal agency believes its

possession of a record to be temporary, that record is automatically not an agency record—regardless of the reasonableness of the Government's belief or how long the Government, in fact, ends up possessing the record. The Government provides no authority whatsoever for this contention. And courts have repeatedly rejected similar arguments. *See, e.g.*, *Teich v. FDA*, 751 F. Supp. 243, 247 (D.D.C. 1990) ("If the [agency]'s possession of the document is a result of the conduct of its legitimate duties, it is irrelevant whether the [agency] agrees to return the material after it has been reviewed."); *Gen. Elec. Co.*, 750 F.2d at 1399. An agency may not circumvent FOIA simply by promising to return records—and it certainly may not circumvent FOIA simply because it *believes* it promised to return records, even if it didn't.

The Government suggests that without its novel "bright-line rule," agencies will be overburdened with requests for reference materials they obtain on loan from libraries and research institutes. It raised a similar concern in *Tax Analysts*. *See* Pet'r's Br., *Tax Analysts*, 1989 WL 1127763, at *22 (arguing that if the Court rejected its proffered limitations on the definition of agency records, "all federal agencies" could "be compelled to become taxpayer-subsidized lending libraries"). And the Supreme Court rejected it. *See Tax Analysts*, 492 U.S. at 146 n.5. "We are confident," the Court stated, "that requests for documents of this type will be relatively infrequent." *Id.* "Common sense suggests that a person seeking such documents or materials housed in an agency library typically will find it easier to repair to the Library of Congress, or to the nearest public library, rather than to invoke the FOIA's disclosure mechanisms." *Id.* And, the Court noted, "[t]o the extent such requests are made, the fact that the FOIA allows agencies to recoup the costs of processing requests from the requester may discourage recourse to the FOIA where materials are readily available elsewhere." *Id.*

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FOIA was passed to limit the discretion of agencies to withhold records from the public. That's why its exemptions "are explicitly exclusive"—to prevent agencies from inventing novel reasons for secrecy. *See Tax Analysts*, 492 U.S. at 151. The Government here seeks to circumvent this limitation by manipulating the definition of agency records. This Court should not permit it to do so. *See Consumer Fed'n of Am. v. Dep't of Agric*., 455 F.3d 283, 287 (D.C. Cir. 2006) ("We must nonetheless be careful to ensure that the term agency records not be manipulated to avoid the basic structure of the FOIA.").[4]

The Supreme Court has established that documents obtained in the legitimate conduct of an agency's duties are agency records. The documents the Project seeks here meet this definition. This Court, therefore, should hold that they are agency records as a matter of law.

B. The Government Has Not Shown that it Would Be Unduly Burdensome to Search for and Review Documents Located on the Hard Drives.

The Government argues that even if the hard drive documents are agency records, it need not search them because doing so would be "unduly burdensome." Gov't MSJ 16. But the Government's showing of burden is woefully inadequate. An agency cannot avoid its FOIA obligations simply by claiming that they are too difficult to fulfill. It must "provide a sufficient explanation" of "*why* a search certain to turn up responsive documents would be unduly burdensome." *Pub. Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003) (emphasis added). This "required showing is substantial." *Shapiro v. Cent. Intelligence Agency*, 170 F. Supp. 3d 147, 156 (D.D.C. 2016). The agency's explanation cannot be merely a string of conclusory assertions; it must provide "reasonably specific detail" sufficient to permit a court to

[4] The Government itself doesn't seem to buy its own argument. It doesn't even attempt to argue that the Art Institute documents are not agency records—despite the fact that the only apparent difference between those documents and the documents on the hard drives is that the Government stored the Art Institute documents on a computer rather than on hard drives. There's no justification in the statute to make such an arbitrary distinction.

assess its reasonableness. *Id.* at 156. The Government has failed to do so.

The Government's assertion of burden rests on the assumption that to locate documents responsive to the Project's request, it would have to review each document on the hard drives individually. Gov't MSJ 16. But the Government provides no explanation for this assumption. And the Government's filings in the EDMC litigation strongly suggest that it is incorrect.

The EDMC filings point to at least three ways the Government could identify documents responsive to the Project's FOIA request without having to review every document. First, the filings reference cover letters that EDMC apparently produced to the Government along with each document production. *See* SMF ¶ 25. These letters appear to contain detailed information about the documents such as Bates ranges of records responsive to specific discovery topics; lists of custodians and the types of documents those custodians produced; and estimates of the number of pages produced on specific discovery topics. *See id*. The Government fails to even mention the existence of these letters, let alone provide "reasonably specific detail" about what information they contain and why that information is insufficient to aid the Government in narrowing its search.

Second, during discovery in the EDMC litigation, the Special Master found that EDMC could use search terms and predictive coding to identify and prioritize documents responsive to the Government's discovery requests. *See* SMF ¶ 24. The documents the Project seeks are documents EDMC produced to the Government in discovery. Nevertheless, the Government asserts—without explanation or evidence—that it cannot use "search terms or predictive coding" to identify responsive documents. Kornmeier Decl. ¶ 8. It does not even address the fact that these tools were apparently used to produce these documents in the first place. *Cf. Hall v. CIA*, 881 F. Supp. 2d 38, 53 (D.D.C. 2012) (refusing to find a search unduly burdensome based on

conclusory statements alone).

Third, the filings in the EDMC litigation demonstrate that the documents produced by EDMC contain valuable metadata. *See* SMF ¶ 26. For example, in a discovery dispute with EDMC, the Government used metadata to determine that one-third of a set of documents produced by the company were duplicates. *See id.* Identifying which documents are duplicates that the Government need not review would certainly aid in narrowing its search. Nevertheless, the Government does not address this possibility—or any other way in which metadata might aid it in searching for responsive documents.

The Government's discussion of metadata is limited to an assertion that the hard drives were not "encoded with metadata that would enable any party to identify the precise discovery request to which the specific file corresponded." Comber Decl. ¶ 11(c). While perhaps true, this assertion is misleading. Although the metadata may not link specific files to specific discovery requests, the Government knows that it can be used in other ways that at least appear helpful in narrowing the Government's search. And yet, the Government doesn't even mention these possibilities.

Courts have warned against the "undiscriminating adoption" of an agency's claim of undue burden—unexamined claims of burden could easily be used to circumvent FOIA. *Armstrong v. Bush*, 139 F.R.D. 547, 553 (D.D.C. 1991). Here, the Government contends that it would take it 460 years to produce a subset of what EDMC produced in less than one. *See* Comber Decl. ¶ 11(a).[5] The reason for that, it seems, is that the Government has not considered

[5] Even if it took DOJ approximately the same amount of time to identify the records responsive to the Project's FOIA request as it took EDMC to produce all of its discovery, that would not be an "unusual" burden sufficient to absolve the Government of its responsibilities. *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 455-56 (D.D.C. 2014) ("FOIA requests are frequently time-consuming and indeed it is not unusual for a search pursuant to FOIA to last over a year.").

any of the tools available to it to narrow its search. But the Government cannot avoid its obligation to produce agency records, simply by refusing to consider anything but the most burdensome possible search methodology, and then citing undue burden to justify its refusal to search. *See Pinson v. DOJ*, 80 F. Supp. 3d 211, 217 (D.D.C. 2015) (declining to find unreasonable burden where DOJ "fail[ed] to explain why a more limited search would be unfruitful"); *People for Am. Way Found. v. DOJ*, 451 F. Supp. 2d 6, 15-16 (D.D.C. 2006) (granting summary judgment to FOIA requester and rejecting DOJ's claim of undue burden because the agency's claim was based on having to manually review 44,000 case files, when in fact, it could limit the records it needed to search by using PACER).

Nor does the Government provide any other explanation sufficient to demonstrate that responding to the Project's FOIA request would be unduly burdensome. The agency asserts that even once it has identified documents responsive to the Project's request, it would be "unduly burdensome" to review these documents for privileges and exemptions. But it fails to provide any explanation for this assertion—or any details that would allow the Court to evaluate it. This cursory assertion of burden is insufficient. *See, e.g.*, *Shapiro*, 170 F. Supp. 3d at 156 (explaining that "[c]ourts typically demand a detailed explanation by the agency regarding the time and expense" required to assess an agency's claim of undue burden).

The agency also asserts that it would be prohibitively expensive to host all of the documents on a document review platform. But the Government does not explain why it would require a document review platform to review the documents in the first place.[6] And the only

[6] The Government makes a passing reference to "specifications for production of electronically stored information governing the EDMC Litigation," Comber Decl. ¶ 11(b), but neither provides those specifications nor states what those specifications were. Although the actual specifications do not appear to have been publicly filed in the EDMC litigation, the Government filed proposed "Specifications for Productions and ESI Protocols," which specify that all documents should be

evidence it offers for its assertion that such a platform would be unduly costly is the unsupported hearsay of counsel for EDMC about *its* document review platform—with no explanation of why the Government could not use less costly software. Moreover, as explained above, there is no basis for the Government's assertion that it would need to review every single document—therefore, there is no reason to believe that it would need to upload every document to a document review platform. The Government does not offer any evidence about whether the Department of Justice—which is, after all, the litigation arm of the Government—has a document review platform capable of handling the number of documents it would be required to review given a more limited search.

The Government's assertion of undue burden rests on a series of conclusory assertions that appear to be contradicted by the available evidence. This is a far cry from the "substantial" showing required for an agency to demonstrate that a FOIA request is unduly burdensome. *See Shapiro*, 170 F. Supp. 3d at 156. This Court should, therefore, order the Government to search the hard drives for documents responsive to the Project's request. Or, at the very least, the Court should deny the Government's motion for summary judgment and permit the Project to take discovery on this issue.

III. THE GOVERNMENT HAS NOT DEMONSTRATED THAT IT MAY WITHHOLD THE OTHER DOCUMENTS FOUND IN ITS FILES AND EMAILS.

In addition to the Art Institute of Dallas documents and the documents produced on hard drives, the Government identified eleven other documents that are responsive to the Project's FOIA request. *See* Comber Decl. ¶¶ 15, 17. But the Government contends it need not produce these documents. Its argument on this point is difficult to follow. It seems that the Government

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produced with searchable text. *See* EDMC Dkt. No. 232-2 at 5.

contends that because these documents are not the original documents produced by EDMC, but instead copies of those documents, they are not responsive to the Project's FOIA request. That is not a fair reading of the Project's request. In requesting the documents produced by EDMC to the Government, the Project clearly did not intend to limit its request to the *original* copy of those documents. *Cf. Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985) ("[T]he agency must be careful not to read the request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester. To conclude otherwise would frustrate the central purpose of [FOIA].").

The Government also makes a conclusory assertion that these documents, which it failed to even list on its *Vaughn* index, may be withheld because of work product. *See* Comber Decl. ¶ 15. But it does not provide any evidence to support this contention. It is therefore waived. *See SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 477 (E.D. Pa. 2005) ("[I]f the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected.").

The Government has not demonstrated any permissible justification for withholding these eleven documents. This Court, therefore, should order the Government to immediately produce them to the Project.

IV. THE GOVERNMENT HAS FAILED TO SATISFY ITS BURDEN TO PROVE THAT ITS SEARCH FOR THE REQUESTED RECORDS WAS ADEQUATE.

Government agencies responding to requests for records must conduct a search that is "reasonably calculated to uncover all relevant documents." *Aguiar v. Drug Enf't Admin.*, 865 F.3d 730, 738 (D.C. Cir. 2017). "To demonstrate the adequacy of its search, the agency should provide a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials were searched."

Abdelfattah v. U.S. Dep't of Homeland Sec., 488 F.3d 178, 182 (3d Cir. 2007). The agency is entitled to summary judgment only if it "shows beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents."*Aguiar*, 865 F.3d at 738. The Government here has not met this burden.

As an initial matter, the Government failed to search the hard drives, which indisputably contain records responsive to the Project's request. But that is not the only way in which the Government fails to meet its burden.

For one thing, the Government's description of its email search states only who performed the search and what they found. Comber Decl. ¶ 17. It does not "disclose the search terms" or "the type of search performed." *Aguiar*, 865 F.3d at 738. Without any explanation of *how* its email search was performed, the Government's explanation is "insufficient as a matter of law," for it is impossible to evaluate whether the search was actually reasonably calculated to uncover all relevant documents. *See id.*

Moreover, the Government imposed numerous limitations on its search that it fails to adequately explain. For example, the agency asserts that it "determined from a review of the case file that" responsive documents "would not have been transmitted via email before May 2, 2014." Comber Decl. 17(c). But the Government fails to explain *how* it was able to determine this from its case file review. And there are filings in the EDMC litigation, signed by lead counsel for the Government and dated on and before May 2, 2014, that reference or describe the discovery documents—indicating that these documents might be contained in DOJ's email archive before this date. *See, e.g.*, App. 125, 127, 133, 136.

The Government imposed several other unexplained limitations: It only searched the records of three employees. *See* Comber Decl. ¶ 13 (stating, without explanation, that the

Government "determined that no other individuals could reasonably be expected to possess" responsive records). It did not search the records of all DOJ attorneys who worked on the case. *See* EDMC Dkt. No. 385 (brief submitted by the Government in the EDMC litigation, signed by DOJ attorneys whose records were not searched). It did not search any records held by paralegals or other support staff—nor did it explain why it's reasonable to believe that the agency prosecuted "[o]ne of the most significant cases" that office has ever handled, without sharing documents with support staff. Comber Decl. ¶¶ 3, 13. It searched only emails between DOJ attorneys and attorneys for other parties—it did not search any emails sent amongst DOJ attorneys themselves. Comber Decl. ¶ 17(b). And even then, it did not search emails between DOJ attorneys and *all* attorneys for other parties—omitting, for example, counsel for any of the state plaintiffs. *See* Comber Decl. ¶ 17(b).

These unexplained limitations make clear that the Government's search was inadequate. This Court, therefore, should so hold, and order the Government to (1) undertake a search that is reasonably calculated to uncover all relevant documents and (2) after doing so, provide a declaration with sufficient detail to demonstrate the adequacy of its search. Alternatively, the Court should permit the Project to take discovery on this issue.

CONCLUSION

For the foregoing reasons, the Project respectfully requests that the Court deny the Government's motion for summary judgment and grant its cross-motion for summary judgment.

Dated: December 22, 2017

Respectfully submitted,

/s/ Amanda Savage
Amanda Savage (admitted *pro hac vice*)
MA 690938
Eileen Connor (admitted *pro hac vice*)
MA 569184
Toby Merrill (admitted *pro hac vice*)

MA 601071
Project on Predatory Student Lending
Legal Services Center of Harvard Law School
122 Boylston Street
Jamaica Plain, MA 02130
Tel.: (617) 390-2710
Fax: (617) 522-0715
asavage@law.harvard.edu

Jennifer Bennett (admitted *pro hac vice*)
CA 296726
Public Justice
555 12th Street, Suite 1230
Oakland, CA 94607
Tel.: (510) 622-8213
Fax: (510) 622-8155
jbennett@publicjustice.net

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, I electronically filed the foregoing Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment using the CM/ECF system, which will send notification of such to all counsel of record.

/s/ Amanda Savage
Amanda Savage
Counsel for Plaintiff