UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KING & SPALDING, LLP **Plaintiff,** **v.** **UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.** **Defendants.**	)	**Case No. 16-cv-01616 (APM)**

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, King & Spalding, brought this action against the United States Department of Health and Human Services ("HHS") and the Department of Justice ("DOJ"), under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, challenging the responses it received to a FOIA request issued to HHS, the Executive Office for United States Attorneys ("EOUSA") and DOJ's Civil Division. As of the date of this filing, Defendants have satisfied all of their obligations with respect to Plaintiff's FOIA requests. As there are no material facts in dispute, Defendants respectfully move this Court pursuant to Federal Rule of Civil Procedure 56 for summary judgment as to all claims asserted in this action. Defendants respectfully submit that the attached memorandum of points and authorities, supporting declarations and exhibits thereto establish that they are entitled to the relief they seek.

Respectfully submitted,

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United States Attorney

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DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Civil Rule 7(h), Defendants respectfully submits this Statement of Material Facts Not in Genuine Dispute in support of Defendants' Motion for Summary Judgment.

1. This lawsuit, which was filed on August 9, 2016, involves FOIA requests submitted to HHS and two DOJ components, the Civil Division and the Executive Office for United States Attorneys ("EOUSA"), seeking certain documents provided during the period from January 1, 2012 to October 31, 2012 regarding Abiomed, Inc., as described more fully in the requests. (ECF No. 18, Joint Status Report ¶ 2)

Request to HHS

2. On or around April 14, 2016, the Office of the Assistant Secretary for Public Affairs ("ASPA") within HHS received a FOIA request from John Richter of the law firm King & Spalding (hereinafter, "Plaintiff"), which was assigned control number 2016-00514-FOIA-OS, and sought the following:

- All documents between January 1, 2012 and October 31, 2012, provided to any agency of the Federal Government from any individual, corporation, partnership, or other private party other than Abiomed, Inc. ("Abiomed") that concern, discuss, or refer to Abiomed.
- All documents between January 1, 2012 and October 31, 2012, provided by the Department of Health and Human Services ("HHS"), including (i) the HHS Office of Inspector General, (ii) the Food & Drug Administration ("FDA"), or (iii) any HHS or FDA employee affiliated with the HEAT Task Force or DOJ-HHS Medicare Fraud Strike Force, to the U.S. Attorney's Office for the District of Columbia, the Civil Division of the Department of Justice, or any other component or office within the U.S. Department of Justice, that were initially obtained or received from any individual, corporation, partnership, or other private party that concern, discuss, or refer to Abiomed.
- All documents between January 1, 2012 and October 31, 2012, provided to any agency of the Federal Government from any individual, corporation, partnership, or other private party, other than Abiomed, related in whole or in part to the issuance of a Health Insurance Portability and Accountability Act subpoena issued by the U.S. Attorney's Office for the District of Columbia to Abiomed.

(Bell Decl. ¶¶ 6-7)

3. ASPA referred the request to the HHS Office of Inspector General ("OIG"), the U.S. Food and Drug Administration ("FDA"), and the HHS Centers for Medicare & Medicaid Services ("CMS") to conduct searches and respond directly to the Plaintiff. (Bell Decl. ¶ 8)

4. ASPA also asked HHS Office of Civil Rights ("OCR"), which falls under the purview of the Office of the Secretary, to search for any records of investigations regarding Abiomed and to respond to ASPA with any responsive records, and also asked the Immediate Office of the Secretary ("IOS") to conduct a search for records regarding the HEAT Task Force. (Bell Decl. ¶¶ 9, 12)
5. Neither OCR nor IOS located records responsive to the FOIA request. (Bell Decl. ¶¶ 11-12)
6. FDA provided records in response to Plaintiff's FOIA request and Plaintiff does not challenge in this lawsuit the response it received from FDA. (Compl. ¶ 18; ECF No. 18 ¶ 3)
7. OIG did not locate any records responsive to the FOIA request and, on May 4, 2016, provided a final response to Plaintiff, which advised that OIG located no responsive records and provided appeal rights. (Brooks Decl. ¶ 11 and Ex. 3 thereto)
8. Plaintiff did not administratively appeal the response it received from OIG. (Brooks Decl. ¶ 11)
9. CMS conducted a search for responsive records and provided an interim release to Plaintiff by letter dated December 5, 2016 and a final release by letter dated December 8, 2016. (Gilmore Decl. ¶¶ 8-11) The releases made by CMS did not include any withholdings made in connection with the FOIA request at issue. (Gilmore Decl. ¶¶ 10-11)

Request to DOJ Civil Division

10. By letter dated April 14, 2016 to the DOJ Civil Division, Plaintiff made the following request for records from the Civil Division under FOIA:

- All documents between January 1, 2012 and October 31, 2012, provided to any Agency of the Federal Government from any individua4 corporation, partnership, or other private paiiy other than Abiomed, Inc. ("Abiomed") that concern, discuss, or refer to Abiomed.
- All documents between January **1,** 2012 and October 31, 2012, provided to the Civil Division of the U.S. Department of Justice by any other agency of the Federal Government or other component or office within the U.S. Department of Justice that were initially obtained or received from any individual, corporation, partnership, or other private party that concern, discuss, or refer to Abiomed.
- All documents between January **1,** 2012 and October 31, 2012, provided to any agency of the Federal Government from any individua4 corporation, partnership, or other private party, other than Abiomed, related in whole or in part to the issuance ofa Health Insurance Portability and Accountability Act subpoena issued by the U.S. Attorney's Office for the District of Columbia to Abiomed.

(Ex. A to Oshodi Decl.)

11. By letter dated June 17, 2016, the Civil Division responded to the FOIA request by advising Plaintiff that the Civil Division had located 49 pages of responsive documents and that those documents had been referred to EOUSA for direct response, and that "a portion of the records maintained by the Civil Division are protected from disclosure by a court seal." (Ex. B to Oshodi Decl.)
12. The June 17, 2016 letter from the Civil Division advised Plaintiff that "[i]f you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department

of Justice . . ., or you may submit an appeal through OIP's online portal," and also advised that "[y]our appeal must be postmarked or electronically transmitted within 60 days of the date of my response to your request." (Ex. B to Oshodi Decl.)

13. Plaintiff did not appeal the June 17, 2016 response letter that it received from the DOJ Civil Division. (Oshodi Decl. ¶ 5)

Request to EOUSA

14. Plaintiff submitted a FOIA requester to the Executive Office for United States Attorneys ("EOUSA") seeking the following:

- All documents between January 1, 2012 and October 31, 2012, provided to any agency of the Federal Government from any individual, corporation, partnership, or other private party other than Abiomed, Inc. ("Abiomed") that concern, discuss, or refer to Abiomed.
- All documents between January 1, 2012 and October 31, 2012, provided to the U.S. Attorney's Office for the District of Columbia by any other agency of the Federal Government or other component or office within the U.S. Department of Justice that were initially obtained or received from any individual, corporation, partnership, or other private party that concern, discuss, or refer to Abiomed.
- All documents between January 1, 2012 and October 31, 2012, provided to any agency of the Federal Government from any individual, corporation, partnership, or other private party, other than Abiomed, related in whole or in part to the issuance of a Health Insurance Portability and Accountability Act subpoena issued by the U.S. Attorney's Office for the District of Columbia to Abiomed.

(Ex. A to Francis Decl.; Jones Decl. ¶ 3)

15. By letter dated December 23, 2016, EOUSA provided its final response to Plaintiff, in which 344 pages were released in full, 51 pages were withheld in full, and eight pages were duplicates of materials that were either released in full or withheld in full

pursuant to Exemptions (b)(5),[1] (b)(6), (b)(7)(C) and (b)(7)(D) of the FOIA. (Francis Decl. ¶ 10)

16. In a separate release also dated December 23, 2016, EOUSA released records to the Plaintiff, pursuant to a referral it received from the FOIA Office for the Civil Division of DOJ, in which 27 documents were released without redaction and 16 documents were withheld in full. (Francis Decl. ¶ 11). The documents that were withheld in full are duplicates of documents on EOUSA's Vaughn Index. (Francis Decl. ¶ 11)

17. All reasonably segregable, non-exempt responsive documents subject to FOIA have been produced to the Plaintiff. (Francis Decl. ¶ 20).

Respectfully submitted,

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[1] After further consideration, EOUSA no longer is relying for its withholdings under FOIA Exemption (b)(5). The same information withheld under Exemption (b)(5), however, is being withheld under FOIA Exemptions (b)(6), (b)(7)(C) and (b)(7)(D).

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MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

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Table of Authorities

Cases

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FACTUAL BACKGROUND

The accompanying Statement of Material Facts addresses the processing of these requests and that statement is incorporated herein by reference.

LEGAL STANDARD

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 248. A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

The "vast majority" of FOIA cases are decided on motions for summary judgment. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) ("FOIA cases typically and appropriately are decided on motions for summary judgment."); *Citizens for Responsibility &*

Ethics in Washington v. U.S. Dep't of Labor, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) ("*CREW*"). An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records and each responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *See Weisberg v. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See McGehee v. C.I.A.*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert denied*, 415 U.S. 977 (1974); *Media Research Ctr.*, 818 F. Supp. 2d at 137. "[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *CREW*, 478 F. Supp. 2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Media Research Ctr.*, 818 F. Supp. 2d at 137 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

ARGUMENT

I. Plaintiff Failed To Exhaust Administrative Remedies With Respect To Its Request To The DOJ Civil Division And With Respect To The Aspect Of The HHS Request That Was Referred To The Office Of Inspector General For Direct Response.

"The statutory scheme in the FOIA specifically provides for an administrative appeal process following an agency's denial of a FOIA request," and "courts have consistently confirmed that the FOIA requires exhaustion of this appeal process before an individual may

seek relief in the courts." *Oglesby v. Dep't of Army*, 920 F.2d 57, 61-62 (D.C. Cir. 1990) (citing 5 U.S.C. § 552(a)(6)(A)(i), (ii) and cases). Although exhaustion under FOIA is not jurisdictional, it has been characterized "as a jurisprudential doctrine" because the requester's failure to exhaust precludes judicial review "if a merits determination would undermine the purpose of permitting an agency to review its determinations in the first instance." *Bloomgarden v. DOJ,* 2014 U.S. Dist. LEXIS 7610, at *8 (D.D.C. Jan. 22, 2014) (quoting *Hidalgo v. FBI*, 344 F.3d 1256, 1258-59, 358 U.S. App. D.C. 104 (D.C. Cir. 2003)).

Exhaustion is required both for a FOIA request as a whole as well as for each aspect of the agency's processing of a request. Thus, a plaintiff may have exhausted administrative remedies with regard to one aspect of the agency's processing of a FOIA request, and yet not have exhausted all remedies with respect to another aspect. *Id*. In such cases, "[i]t is appropriate for the Court to consider only those aspects of plaintiff's request which he properly exhausted." *Kenney v. DOJ,* 603 F. Supp. 2d 184, 190 (D.D.C. 2009). Likewise, a lawsuit can present exhausted and unexhausted claims, with the latter properly subject to dismissal. *Hall & Assoc. v. EPA,* 2014 U.S. Dist. LEXIS 178571, at *17, *18 n.7 (D.D.C. Dec. 31, 2014) (limiting lawsuit only to claims that were administratively exhausted and dismissing claims that were not exhausted).

Although the exhaustion of administrative remedies is not jurisdictional, exhaustion is a "condition precedent" to filing a lawsuit and the failure to exhaust "precludes judicial review." *Hidalgo v. Federal Bureau of Investigation,* 344 F.3d 1256, 1259 (D.C. Cir. 2003); *Bonner v. SSA,* 574 F. Supp. 2d 136, 138-39 (D.D.C. 2008) (observing that administrative exhaustion is a "condition precedent" to filing suit and dismissing prematurely filed lawsuit); *Judicial Watch v. FBI,* 2002 U.S. Dist. LEXIS 28168, at *14 (D.D.C. July 26, 2002) (dismissal appropriate for

prematurely filed lawsuit even if "the defendant subsequently failed to timely respond to the plaintiff's substantive request for the documents" because "the Court will only consider those facts and circumstances that existed at the time of the filing of the complaint, and not subsequent events, in deciding whether this case must be dismissed").

A FOIA requester must file a FOIA request "in accordance with the agency's published rules for making such a request." *Reed v. Lynch,* 2016 U.S. App. LEXIS 70773 (D.C. Cir. May 31, 2016). DOJ has a decentralized system for processing requests, "with each component handling requests for its records." 28 C.F.R. § 16.1(c). Under the DOJ FOIA regulations, requests must be sent "directly to the FOIA office of the component that maintains the records being sought." 28 C.F.R. § 16.3(a)(1). Here, Plaintiff directed one FOIA request to the DOJ Civil Division, a distinct DOJ component, and a separate FOIA request to a different component of the DOJ, the Executive Office for United States Attorneys ("EOUSA").

EOUSA did not provide a final response to Plaintiff prior to the filing of this lawsuit and, therefore, exhaustion is not an issue pertaining to that distinct request. However, the DOJ Civil Division did provide a final response to Plaintiff prior to the filing of this lawsuit. Specifically, by letter dated June 17, 2016, the DOJ Civil Division responded to the FOIA request that it received from Plaintiff by notifying Plaintiff that it was referring certain records that it had located to EOUSA and otherwise notifying Plaintiff that other documents within its possession were subject to a sealing order. Pursuant to 28 C.F.R. § 16.6(e), the June 17, 2016 letter advised Plaintiff of its appeal rights. (Ex. B to Oshodi Decl.; *see also* 28 C.F.R. § 16.6(e)).

Plaintiff, however, failed to file an administrative appeal in response to the June 17, 2016 letter and, therefore, failed to exhaust its administrative remedies with respect to the DOJ Civil Division request. The FOIA request to the DOJ Civil Division, therefore, is not properly before

this Court and any purported claim in the Complaint based on that request should be dismissed. *See, e.g.*, *Debrew v. Atwood*, 792 F.3d 118, 124 (D.C. Cir. 2015) ("Because DeBrew did not exhaust the administrative remedies available to him before filing suit, we affirm the judgment of the district court with respect to his claim that the BoP did not conduct an adequate search in response to his request for records about the 'DNA Act.'").

HHS also has a decentralized FOIA system. (Bell Decl. ¶ 8). Under its procedures, the HHS Office of Inspector General ("OIG") "is responsible for processing requests for the records it maintains." *See* 45 C.F.R. § 5.3. Plaintiff's FOIA request to HHS was referred to OIG for direct response to Plaintiff to the extent that Plaintiff sought records maintained by OIG. (Bell Decl. ¶ 8) By letter dated May 4, 2016, OIG notified Plaintiff that no records responsive to Plaintiff's request had been located. (Ex. 3 to Brooks Decl.) OIG provided appeal rights in that letter and has no record of Plaintiff filing an administrative appeal in response to the May 4, 2016 letter. (*Id.*; *see also* Brooks Decl. ¶ 11) Accordingly, any purported claim in the Complaint based on OIG's response to the FOIA request should be dismissed for failure to exhaust administrative remedies. *See, e.g.*, *Debrew*, 792 F.3d at 124.

II. Summary Judgment Should Be Granted As To The Remainder Of The Request Directed To HHS.

The FOIA requires that an agency release all records responsive to a properly submitted request unless such records are protected from disclosure by one or more of the Act's nine exemptions. 5 U.S.C. § 552(b); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). Once the court determines that an agency has released all non-exempt material, it has no further judicial function to perform under the FOIA and the FOIA claim is moot. *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982); *Muhammad v. U.S. Customs & Border Prot.*, 559 F. Supp.

2d 5, 7-8 (D.D.C. 2008). Because no responsive information was withheld by HHS, the Court's analysis is limited to assessing the reasonableness of HHS's search. As demonstrated below, HHS satisfied its obligation to conduct adequate searches for records responsive to Plaintiff's FOIA request.

Under the FOIA, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."). A search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *see Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (noting that "[p]erfection is not the standard by which the reasonableness of a FOIA search is measured"). Rather, a search is inadequate only if the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby*, 920 F.2d at 68. An agency, moreover, is not required to examine "virtually every document in its files" to locate responsive records." *Steinberg v. Dept. of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994; *see also Hall v. U.S. Dep't of Justice*, 63 F. Supp. 2d 14, 17-18 (D.D.C. 1999) (finding that agency need not search for records concerning subject's husband even though such records may have also included references to subject). Rather, as here, it is appropriate for an agency to search for responsive records in accordance with the manner in which its records are maintained. *Greenberg v. Department of Treasury*, 10 F. Supp. 2d 3, 13 (D.D.C. 1998).

Once an agency demonstrates the adequacy of its search, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith." *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993). Hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of an agency's search. *Oglesby*, 920 F.2d at 67 n.13. "Agency affidavits enjoy a presumption of good faith that withstands purely speculative claims about the existence and discoverability of other documents." *Chamberlain v. U.S. Dep't of Justice*, 957 F. Supp. 292, 294 (D.D.C. 1997), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997).

As discussed in the accompanying declarations, HHS conducted a reasonable search in response to the FOIA request. HHS conducted a search for responsive records within the Office of the Secretary, specifically, in two areas of that office (the Office of Civil Rights and the Immediate Office of the Secretary) that were likely to have responsive records based on the language of the FOIA request. (Bell Decl. ¶¶ 9, 12). The Office of Civil Rights ("OCR") searched its Program Information Management System, the system that houses all OCR records related to its investigations, using the term "Abiomed." (Bell Decl. ¶ 10). OCR identified potentially responsive records and, upon review, those records were determined not to be responsive because they fell outside of the timeframe of the request. (Bell Decl. ¶¶ 10-11). The Immediate Office of the Secretary searched their electronic records database as well as a hard drive that may have contained responsive records using several search terms, including "Abiomed." (Bell Decl. ¶ 12). No responsive records were located as a result of that search. (*Id.*)

HHS also referred the request to three components, OIG, the U.S. Food and Drug Administration ("FDA"), and the Centers for Medicare & Medicaid Services ("CMS"). For

reasons discussed above, the referral to OIG is not before the Court and therefore is not addressed further in this motion. Similarly, Plaintiff has acknowledged that it is not challenging the response to the FOIA request that it received from FDA. (Compl. ¶ 18; ECF No. 18 ¶ 3). With respect to CMS, a search was conducted of the correspondence component of CMS, the Office of the Strategic Operations and Regulatory Affairs Office, which is the central point of contact for all incoming correspondence to the CMS administrator. (Gilmore Decl. ¶ 8) CMS searched its tracking database for the term "Abiomed" but no responsive documents were located. (*Id.*) CMS also referred the request to the Center for Clinical Standards and Quality ("CCSQ"), which is a CMS program office that serves as the focal point for all quality, clinical, medical science issues, survey and certification, and policies for CMS programs. (Gilmore Decl. ¶ 9) CCSQ located no responsive records. (*Id.*) Finally, the CMS FOIA officer engaged in searches of its own records of similar subject matter in other requests and found an earlier control number 0218 2014 7034 from another FOIA request filed in February 2014 regarding Abiomed records. (Gilmore Decl. ¶ 10) CMS identified records responsive from those files, which were produced in the form in which they had been located, and a further search by CMS located additional responsive documents, which also were produced to Plaintiff. (Gilmore Decl. ¶¶ 10-11)

Accordingly, in light of the above, a reasonable search was conducted in response to the FOIA request to HHS. Thus, for all of the reasons stated above, summary judgment should be granted to HHS.

III. EOUSA Conducted A Reasonable Search And Properly Applied Exemptions to Withhold Information

A. EOUSA's Search

In order to locate records responsive to the FOIA request directed to EOUSA, the FOIA coordinator for the United States Attorneys Office for the District of Columbia ("USAO-DC") searched a Master Index using the term "Abiomed" and the applicable date range to locate potentially responsive records and also sent a global e-mail to all USAO-DC civil employees. As a result of those efforts, Mr. Bryan located two sets of potentially responsive files. (Jones Decl. ¶¶ 7-9). One set of files post-dated the date range of the request and was determined not to be responsive on that basis. (Jones Decl. ¶ 9) The other file was maintained by the USAO-DC's Criminal Division, Fraud and Public Corruption Section ("FPS"), and was determined to have some documents responsive to the request. (Jones Decl. ¶ 10).

In addition to reviewing these files, the USAO-DC FOIA coordinator searched electronic files maintained by FPS and also requested AUSAs who had done work related to Abiomed to provide any emails pertaining to Abiomed during the relevant date-range that they maintained. (Jones Decl. ¶ 12) Finally, the USAO-DC FOIA coordinator contacted the USAO-DC's Information Technology Unit for access to electronic files of former AUSAs who previously did work related to Abiomed. (Jones Decl. ¶ 13) A search was conducted of such files to the extent still accessible using various search terms, including the term "Abiomed." (Jones Decl. ¶14). Accordingly, EOUSA conducted a reasonable search for records responsive to the FOIA request.

B. EOUSA's Withholdings

EOUSA properly withheld information in full under Exemption (b)(6), (b)(7)(C) and

(b)(7)(D). Defendant EOUSA addresses below the basis for these withholdings and its basis for withholding the exempt information in full from the documents at issue.

1. **FOIA Exemption (b)(6), (b)(7)(C), and (b)(7)(D)**

Exemption (b)(6) and Exemption 7(C) both protect information that, if disclosed, would invade the privacy of third parties. Exemption 7(C), however, provides a lesser standard in that it requires simply a showing of an "unwarranted" invasion of personal privacy, as opposed to Exemption 6's required showing of a "clearly unwarranted" invasion of personal privacy. *Braga v. FBI,* 910 F. Supp. 2d 258, 267 (D.D.C. 2012). Accordingly, although case law interpreting Exemption (b)(6) remains relevant, the Court need only focus on the Exemption 7(C) standard because Exemption 7(C)'s requirement that records be compiled for law enforcement purposes is satisfied here. (Francis Decl. ¶ 15)

Exemption 7(C) allows an agency to withhold "investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that production of such records or information would . . . constitute an unwarranted invasion of personal privacy." *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 893 (D.C. Cir. 1995) (quoting 5 U.S.C. § 552(b)(7)(C)). The courts have construed this provision as permitting exemption if the privacy interest at stake outweighs the public's interest in disclosure. *Id.*

Exemption 6 of the FOIA protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). "The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual." *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999) (*quoting Dept. of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982)). The Court

has also emphasized that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989).

In order to determine whether there would be an "unwarranted invasion of personal privacy," the Court must balance the interests of protecting "an individual's private affairs from unnecessary public scrutiny," and "the public's right to governmental information." *Lepelletier*, 164 F.3d at 46 (interior quotation marks omitted) (*citing United States Dept. of Defense v. FLRA*, 964 F.2d 26, 29 (D.C. Cir. 1992)). In determining how to balance the private and public interests involved, the Supreme Court has sharply limited the notion of "public interest" under the FOIA: "[T]he *only* relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier*, 164 F.3d at 46 (emphasis added) (*quoting United States Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994)). Information that does not directly reveal the operation or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Reporters Committee*, 489 U.S. at 775.

Exemption7(C) authorizes the government to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In order to trigger the balancing of public interests against private interests, a FOIA requester must (1) "show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and (2) "show the information is likely to advance that interest." *Boyd v. Criminal*

Division of U.S. Dept. of Justice, 475 F.3d 381, 366 (D.C. Cir. 2007) (*citing Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004)). If the public interest is government wrongdoing, then the requester must "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Favish,* 541 U.S. at 174.

To determine whether disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy" for purposes of Exemption 7(C), the Court "must 'balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information.'" *Roth*, 642 F.3d at 1174. It is well recognized that "'the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.'" *Id.* Thus, not only the targets of law-enforcement investigations, but also witnesses, informants and investigating agents have a 'substantial interest' in ensuring that their relationship to the investigations 'remain secret.'" *Id.*

EOUSA withheld under Exemption 6 and 7(C) the names and other identifying information of Assistant United States Attorneys and third parties mentioned in the email. Those interests were balanced against any public interest in the information as set forth in the accompanying Francis declaration. (Francis Decl. ¶¶ 14-17).

Exemption 7(D) provides that, when records were "compiled by criminal law enforcement author[ies] in the course of a criminal investigation," as were all the records at issue here, the records are exempt from disclosure "if producing the records 'could reasonably be expected to disclose the identity of a confidential source' or 'information furnished' by such a source." *Roth v. U.S. Department of Justice*, 642 F.3d 1161, 1184 (D.C. Cir. 2011). Exemption 7(D) not only protects identifying information of the confidential source, but also information that would permit the "linking" of a source to specific source-provided material. *See, e.g., Birch v. USPS,* 803 F.2d 1206, 1212 (D.C. Cir. 1986) (proper to withhold identity of person who acted as an intermediary for the source in the source's dealings with the agency); *Stone v. Def. Investigative Serv.,* 816 F. Supp. 782, 788 (D.D.C. 1993) (protecting "information so singular that to release it would likely identify the individual").

To establish a basis for withholding under Exemption 7(D), the agency must do more than claim that all sources provided information on a confidential basis, but instead must "'point to more narrowly defined circumstances that . . . support the inference' of confidentiality." *Roth*, 642 F.3d at 1184 (quoting *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 171 (1993)). Here, the source approached the Criminal Division through counsel in order to remain anonymous and communications were made through counsel without disclosing the source's identity. (Francis Decl. ¶ 18) That constitutes "narrowly defined circumstances" establishing that the source provided information with an expectation of maintaining confidentiality.

Exemption 7(D) does not require any balancing of public and private interests. *Id.* Therefore, if the production of criminal investigative records "'could reasonably be expected to disclose the identity of a confidential source' or 'information furnished by' such a source, that ends the matter." *Id.* at 1184-85. Although the agency must submit a declaration that provides

sufficient justification for invoking Exemption 7(D), the agency is not required to be so detailed that it would "'giv[e] away the information it is trying to withhold.'" *Id.* at 1185. EOUSA has satisfied the requirements of Exemption 7(D) and, therefore, has properly withheld information on that basis.

2. Defendant EOUSA Complied With FOIA's Segregability Requirement

Under the FOIA, if a record contains information exempt from disclosure, any "reasonably segregable," non-exempt information subject to FOIA must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with 'reasonable specificity'" that the information it has withheld cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep't of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

Here, where non-exempt information could be segregated from exempt information, USPTO segregated and disclosed the non-exempt information from the records that were withheld. (Francis Decl. ¶ 20) However, because of the nature of the information at issue, it was appropriate for EOUSA to withhold certain pages in full because the release of any portion of those documents would undermine the exemptions being claimed. (Francis Decl. ¶ 20)

In that regard, the situation here is analogous to that in *Judicial Watch v. Export-Import Bank*, 108 F. Supp. 2d 19 (D.D.C. 2000), where the court considered whether the agency complied with its segregability obligations when it withheld in full a resume of an unsuccessful candidate under Exemption (b)(7)(C). In finding that the agency complied with those obligations, the court explained: "This Court and other courts agree that information in the resumes cannot be reasonably segregated. If too little information is be [sic.] disclosed, the bits of disclosed information are meaningless. In contrast, if too much information is disclosed, it could easily be used to identify the individual." *Id.* at 37. The same analysis applies here, where the nature of the information furnished by the confidential source is such that, if disclosed, it could reasonably be expected to reveal the identity of the confidential source. (Francis Decl. ¶ 20)

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court grant summary judgment in favor of Defendants as to all claims in this case.

Respectfully submitted,

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