No. 16-2359

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PHILIP EIL,

Plaintiff-Appellee,

v.

U.S. Drug Enforcement Administration,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Rhode Island

BRIEF FOR APPELLANT

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

The Government respectfully requests that the Court hear oral argument in this case. The case involves a pure question of law regarding the proper interpretation of Exemption 7(C) of the Freedom of Information Act and the statute's public interest and privacy interest analysis more generally. Moreover, the question is important.

INTRODUCTION

In this Freedom of Information Act (FOIA) case, plaintiff seeks medical records as well as autopsy, toxicology and related reports, and death-scene photographs of former patients of Dr. Paul Volkman, who was convicted of charges related to unlawful disbursement of pain medication. That information contains intimate details concerning the lives of private individuals, including their medical histories and (for some individuals) details concerning substance abuse and addiction.

FOIA Exemption 7(C) protects these records from disclosure. Under that exemption, an agency may withhold records containing personal information when the disclosure of those records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Under well-settled precedents of the Supreme Court and this Court, the application of this exemption requires a court to balance the privacy interest at stake against the relevant public interest in the release of those materials. *See U.S. Dep't. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989); *Carpenter v. U.S. Dep't of Justice,* 470 F.3d 434, 438 (1st Cir. 2006). Once some privacy interest is implicated in a potential disclosure, this Court requires a "significant" showing of public interest in the requested disclosure. *Stalcup v. CIA*, 768 F.3d 65, 74 (1st Cir. 2014).

In ordering disclosure of those records with only limited redactions, the district court applied the wrong standard. Instead of adhering to the well-established balancing framework of Exemption 7(C) (which applies to requests for "agency records"), the district court applied the First Amendment standard that a court uses to determine whether its *own* records should be disclosed. By applying the standard governing judicial records, the district court incorrectly held that plaintiff has a "presumptively paramount right" to the medical records that can be overcome only by a "compelling showing" justifying nondisclosure. That holding finds no basis in FOIA law.

Compounding its error, the district court analyzed the public interest in disclosure by relying upon the asserted public interest in monitoring the judicial system and maintaining public scrutiny of judicial proceedings. But the only public interests recognized by FOIA are those related to an Executive Branch agency's execution of its statutory functions. And even if the court's analysis of executive functions could be separated from its erroneous reliance on scrutiny of the judiciary, there is little basis to conclude that, after considering the extensive information available to plaintiff, release of the medical records would shed light on the government's conduct.

In addition, the court erred in minimizing the significant privacy interests at stake in medical and death-related records of third parties. The government's

introduction of these records at Dr. Volkman's trial neither waived nor otherwise reduced the significant privacy interests. Moreover, the limited redactions ordered by the district court protect the privacy interests of the patients in only the most superficial way. As the government explained, an interested person could connect the medical records to specific individuals named in the publicly-available transcript of Dr. Volkman's trial because of the amount of information in the transcript. The judgment of the district court should be reversed.

STATEMENT OF JURISDICTION

Plaintiff invoked the jurisdiction of the district court under FOIA, 5 U.S.C. § 552(a)(4)(B). JA 6 (Compl. 1). On September 16, 2016, the district court ordered the Drug Enforcement Administration (DEA) to release documents requested by plaintiff. *See* A16 (Op. 16). The government filed a notice of appeal on November 9, 2016. *See* JA 55 (Notice of Appeal). This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred in applying the standard governing the disclosure of judicial records to Executive Branch agency records in this Freedom of Information Act (FOIA) case, and in holding that medical records containing intimate details of third parties, which were admitted as exhibits in a criminal trial,

do not fall within the personal privacy protections of FOIA Exemption 7(C), 5 U.S.C. § 552(b)(7)(C).

2. Whether Exemption 7(C) protects from mandatory disclosure death-related records of third parties, after those records were admitted as exhibits in a criminal trial.

STATEMENT OF THE CASE

A. Statutory Background

The Freedom of Information Act, 5 U.S.C. § 552, *et seq*., generally provides that any person has a right, enforceable in court, of access to federal agency records, except to the extent such records are protected from disclosure by one of the enumerated exemptions. The Act provides for a cause of action when an agency wrongfully withholds "agency records." *Id*. § 552(4)(B). The Act excludes judicial records from its reach. *Id*. § 551(1)(B) (excluding courts from the definition of "agency").

The Act was designed "to expose the operations of federal agencies 'to the light of public scrutiny.'" *Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434, 437 (1st Cir. 2006) (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)). At the same time, the statutory scheme reflects that the interest in an open government may conflict with other important interests of the general public, such as preserving from disclosure national security information concerning the national

defense and foreign policy of the United States, and the preservation of personal, commercial, and law enforcement information. Therefore, in order to protect those interests, Congress provided for certain exemptions from disclosure under FOIA. *See* 5 U.S.C. § 552(b). "These exemptions represent 'the congressional determination of the types of information that the Executive Branch must have the option to keep confidential.'" *New England Apple Council v. Donovan*, 725 F.2d 139, 142 (1st Cir. 1984) (citation omitted).

In particular, Congress enacted two exemptions designed to temper FOIA's policy of public disclosure by protecting "equally important" rights of personal privacy. *See* S. Rep. No. 89-813, at 3 (1965). Exemption 7(C) excludes from the FOIA's disclosure mandate "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). The application of Exemption 7(C) requires a court to balance the privacy interest at stake in revealing the materials with the public interest in their release. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989); *Carpenter*, 470 F.3d at 438.

Exemption 6, which is not limited to law enforcement records, permits the government to withhold all information about individuals in "personnel and

medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Because Exemption 7(C) provides broader privacy protection, *Reporters Comm*., 489 U.S. at 756, the district court limited its analysis to that provision.

B. Factual Background and Prior Proceedings

This case arises from a FOIA request for medical and death-related records introduced at a criminal trial. JA 6 (Compl. 1). In the course of prosecuting Dr. Paul Volkman in the U.S. District Court for the Southern District of Ohio on charges relating to the unlawful disbursement of pain medication resulting in the deaths of 14 people, the United States introduced medical records of former patients of Dr. Volkman with limited redactions. Def's Mot. for Summ. J. 7. The trial transcript indicates that many of the medical records were admitted *en masse* without discussion of the bulk of their contents. *See e.g*., Dkt. No. 410, 48, *United States v*. *Volkman*, No. 1:07-cr-60-SSB, (S.D. Ohio, filed May 16, 2007) (introducing Exhibits 60a & 60b); Dkt. No. 451, 2-16 (testimony of patient discussing only 3 pages of the medical records). Dr. Volkman was subsequently convicted of several counts of unlawful distribution that led to death, unlawful distribution that did not lead to death, maintaining a drug-involved premises, as well as other charges. JA 9, 12 (Compl. 4, 7). His conviction was subsequently

upheld by the United States Court of Appeals for the Sixth Circuit. JA 9, 12 (Compl. 4, 7); *see United States v. Volkman*, 797 F.3d 377, 383 (6th Cir.), *cert denied*, 136 S.Ct. 348 (2015).[1]

The entire criminal trial transcript, including extensive witness and expert testimony, and the criminal exhibit list with a description of each exhibit are available to plaintiff through the district court's PACER system. *See* Docket, *United States v. Volkman*, No. 1:07-cr-60-SSB, (S.D. Ohio, filed May 16, 2007); JA 20-35 (Compl. Exh. A (trial exhibit list)). The briefing and decision in the appeal of Dr. Volkman's criminal conviction are available, as are portions of several trial exhibits, including portions of certain medical records that were part of the record of the appeal of Dr. Volkman's criminal conviction. A6 (Op. 6).

1. Plaintiff's FOIA Request and DEA's Disclosures

Plaintiff Philip Eil, a journalist writing a book about Dr. Volkman's criminal case, sought access to the exhibits introduced at trial from the U.S. District Court for the Southern District of Ohio, the U.S. Court of Appeals for the Sixth Circuit, the U.S. Attorney's Office, and the district judge. A3 (Op. 3). Both the U.S. Attorney's Office and the district court judge advised Eil that he should file a

[1] The court of appeals initially affirmed Dr. Volkman's conviction and sentence, *see United States v. Volkman*, 736 F.3d 1013 (6th Cir. 2013), but the Supreme Court vacated the judgment and remanded for consideration in light of *Burrage v. United States*, 134 S. Ct. 881 (2014). On remand, the court of appeals affirmed the conviction and sentence. 797 F.3d at 383.

FOIA request, and the court of appeals explained that it would respond after the Department of Justice completed its review. JA 7-9 (Compl. 2-4). On February 1, 2012, Eil filed a FOIA request with the Executive Office for the United States Attorneys of the United States Department of Justice, seeking all 220 exhibits introduced by the government at the trial. JA 7 (Compl. 2). The request was subsequently referred to DEA.

To date, DEA has disclosed over 19,500 pages of responsive records. These disclosures include a video of DEA's raid of Dr. Volkman's medical clinic, a presentation comparing the prescribing patterns of Dr. Volkman to other doctors in the relevant area, inspection reports, correspondence between Dr. Volkman and the government, patient logs (including dates of treatment, amounts prescribed, but redacting names), several thousand prescriptions issued by Dr. Volkman, medical records where it was possible to redact identifying information, and death certificates for deceased patients. DEA's Mot. for Summ. J. 4-6; JA 20-35 (Compl. Exh. A (Exhibit List); JA 51 (DEA's Mot. for Summ. J Ex. B (Letter of Aug. 31, 2015 (accompanying death certificates))). After the notice of appeal in this case was filed, 25 exhibits containing medical records of former patients who are now deceased were released along with a tax record belonging to Dr. Volkman, an employee's timesheet, and photographs of deceased victims when they were alive.

2. The Withheld Records

As relevant here, the government withheld two types of records in their entirety to protect the privacy of the individuals mentioned in those records, pursuant to Exemptions 6 and 7(C): (1) medical records describing medical information of patients named in the transcript of the trial; and (2) death-related records describing the circumstances of death, including autopsy, post-mortem and toxicology reports and photographs of deceased patients. The government also redacted certain identifying information and personally sensitive information pursuant to Exemptions 6 and 7(C).

The trial exhibits withheld include medical records of approximately 27 former patients of Dr. Volkman. JA 20-35 (Compl. Exh. A (Exhibit List)). Another 22 exhibits are death-related records or photographs. These records contain approximately 10 postmortem exam/autopsy records; 11 toxicology/laboratory reports; and 3 photos of deceased bodies. JA 20-35 (Compl. Exh. A (Exhibit List). In addition, the government has redacted a postmortem exam, toxicology report, and evidence collection record related to finding the dead body of the deceased in medical records of deceased patients that have been produced.

These records contain intimate details concerning private individuals who were patients of Dr. Volkman. As the records that have been disclosed reveal,

these records include almost the entire medical histories of these patients. Much of these records come from other medical providers and were created years, if not decades, before the patients sought treatment from Dr. Volkman. They include information ranging from basic but personal medical details, such as height and weight, to more sensitive medical history and other information such as mental illness and learning disabilities, birth defects, illicit drug use, the termination of past pregnancies, history of domestic violence, impairment of bodily functions, sexual activity as well as information about a patient's family members.

2. District Court Proceedings

In March 2015, plaintiff filed this complaint in the U.S. District Court for the District of Rhode Island. After considering the parties' cross-motions for summary judgment, the district court granted summary judgment to plaintiff and ordered the government to disclose the remaining responsive documents with only limited redactions. A11 (Op. 11).

At the outset, the district court acknowledged the medical records are those of "innocent, uninvolved third parties to the criminal prosecution of Dr. Volkman" and that the records "contain intimate details of private individuals." A14 (Op. 14). The court noted that that Exemption 7(C)[2] applies where disclosure "'could

[2] Although the government raised both Exemptions 6 and 7(C) as grounds for withholding, the district court only considered the application of Exemption

reasonably be expected to constitute an unwarranted invasion of [personal] privacy,'" A6 (Op. 6) (quoting 5 U.S.C. § 552(b)(7)(C)), and that courts therefore "balance the[] privacy interests against the public interest in disclosure" under that Exemption, A7 (Op. 7). In conducting the FOIA balancing, the district court, however, applied a different standard—one for determining whether a court should grant public access to its own judicial records. *See* A14-15 (Op. 14-15). Citing *FTC v. Standard Financial Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987), the court weighed the "presumptively paramount right . . . to know" against the competing privacy interest at stake. A14-15 (Op. 14-15).

Highlighting the need for "[p]ublic scrutiny of judicial proceedings," the district court's analysis of the public interest in disclosure of DEA's records centered on the public's interest in "judicial records" and the related common-law right of access to judicial documents. A7-8 (Op. 7-8) (citing the First Amendment right of access to court records in *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989)). And the court explained that the specific public interest in these records related to how the government presented evidence at trial and how the jury reached its verdict. A11 (Op. 11). The court reasoned that the "public has a strong interest in staying apprised of the government's investigation and the

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7(C) because the law-enforcement exemption provides "broader" protections for personal privacy. A6 (Op. 6).

judicial proceedings that led to the conviction of Dr. Volkman." A 12 (Op. 12). And, again applying the standard governing the disclosure of judicial records, the court stated that "[o]nly the most compelling reasons can justify the non-disclosure of judicial records." A12 (Op. 12) (alteration in original) (quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993)) (analyzing whether protective order entered as part of civil discovery protected information later introduced at trial from subsequent disclosure).

Turning to the individual privacy interests at stake, the district court first questioned whether "further public dissemination of third parties' medical records that have already been introduced into a public trial present a 'compelling showing' sufficient to justify their non-disclosure now." A12 (Op. 12). While the court acknowledged this Court's holding that "[p]rior revelations of exempt information do not destroy an individual's privacy interest" and that "[t]he privacy interests the government seeks to uphold remain as strong now as they were before," A13 (Op. 13) (first alternation in original) (quoting *Moffat v. U.S. Dep't of Justice*, 716 F.3d 244, 251 (1st Cir. 2013), the court admitted that it did not take these privacy interests "too seriously." A12 (Op. 12).

Having minimized the privacy interests at stake and focused on the public interest in judicial proceedings, the district court addressed the balance between the two. In doing so, the court balanced "'the presumptively paramount right of the

public to know against the competing private interests at stake.'" A14-15 (Op. 14-15) (quoting *FTC*, 830 F.2d at 410).

The court then held that it could achieve the appropriate balance of these interests by "ordering the DEA to redact highly personal information of no consequence to the trial or conviction of Dr. Volkman." A15 (Op. 15). The court thus ordered release of the records with redactions of "names, social security numbers, addresses, telephone numbers, dates of birth, medical and tax record numbers, and insurance numbers of the third parties," as well as the trial exhibit numbers, over the government's objection that an interested member of the public could connect the records to specific, individual patients using information in the criminal trial transcript. A16 (Op. 16). These redactions, in the court's view, would not "completely protect the privacy interests of the third parties" because of the personal information available in the trial transcript and certain exhibits released in the criminal appeal. A15 (Op. 15). Excluding trial exhibit numbers, the court reasoned, would prevent someone from "easily matching up the exhibits with the transcript" to identify victims. A15 (Op. 15). "As redacted, the identities of the third parties either cannot be discerned or cannot be easily discerned from the court exhibits, thereby offering protection of the third parties' privacy interests." A15 (Op. 15).

SUMMARY OF ARGUMENT

1. In mandating disclosure of sensitive medical records, the district court failed to follow the well-established standard set forth in FOIA Exemption 7(C). Instead, the court erroneously applied the standard governing a court's decision to release its own *judicial* records. But FOIA, which applies only to "agency" records, operates under a different standard. Under Exemption 7(C), once a privacy interest is identified (and there is no question there is such an interest here), the court must balance that interest against the public interest in knowing what the agency is up to. But the district court did not apply that standard.

Instead, the district court's erroneous application of the standard governing judicial records infected all parts of its decision. For instance, the district court applied a standard in which the "presumptively paramount right" to the medical records can be overcome only by a "compelling showing" justifying nondisclosure. The use of that incorrect standard alone requires reversal.

The district court's analysis of the public interest also was seriously flawed. As this Court has recognized, the only public interest relevant to Exemption 7(C) in FOIA is the interest in revealing an Executive Branch agency's performance of its statutory mandates. But the court's analysis of the public interest relied heavily on the notion that disclosure of the medical records would foster public scrutiny of the judiciary. And the outcome of any individual criminal prosecution says little

about DEA's enforcement and policy decisions. FOIA expressly excludes the judiciary from its scheme, and, thus, it was improper to credit any public interest in revealing the workings of the courts. Moreover, plaintiff provided no compelling explanation to show how the release of individual medical records would advance the public's understanding of DEA's activities in general, or even in this specific case, in light of the voluminous information available about the trial.

The district court also failed to properly weigh the privacy interests of Dr. Volkman's patients in their medical records. Where the individuals whose privacy interest is at stake are witnesses to or victims of criminal activity, the reasons for protection from disclosure embodied in Exemption 7(C) are strongest. Medical information is particularly sensitive and that sensitivity is compounded when, as here, it can be linked to particular individuals through the use of other available information. The government's introduction of these records during the criminal trial of Dr. Volkman does little to alter this calculus. The privacy interest of third parties is not waived by the government's conduct. The district court's failure to appreciate the inherent nature of the privacy interests conflicts with this Court's case law.

2. The district court also failed to consider the privacy interests in death-related images and reports, such as the autopsy and toxicology reports and death-scene images and reports. The interest in avoiding publication of information and

images concerning the circumstances of a family member's death is significant, and none of plaintiff's asserted public interests can overcome those interests.

STANDARD OF REVIEW

This Court reviews de novo a district court's determination that materials are not exempt from disclosure. *See Union Leader Corp. v. U.S. Dep't of Homeland Sec.*, 749 F.3d 45, 49 (1st Cir. 2014).

ARGUMENT

I. The Government Properly Withheld Personal Medical Records of Dr. Volkman's Patients from Public Disclosure.

As the Supreme Court has explained, "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774 (1989) (emphases in original). The purpose of FOIA "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id.* at 773.

A. The District Court Incorrectly Applied the Standard Governing Access to Judicial Records Instead of the Applicable FOIA Standard.

In considering the applicability of Exemption 7(C), a court must balance the privacy interest at stake against the relevant public interest in disclosure.

Reporters Comm., 489 U.S. at 780. Where the subject of a record "is a private citizen and when the information is in the Government's control as a compilation," the privacy interest is at its "apex" while the FOIA public interest in disclosure is at its "nadir." *Id*. Once a privacy interest is implicated in a potential disclosure, this Court requires a "significant" showing of public interest in the requested disclosure. *Stalcup v*. *CIA*, 768 F.3d 65, 74 (1st Cir. 2014).

1. Although the district court correctly noted that Exemption 7(C) requires a balancing of the privacy interest with the public interest in disclosure (*see* A7 (Op. 7)), it applied a balancing approach untethered from FOIA. Instead of applying the settled Exemption 7(C) standard governing access to "agency records," the district court erroneously applied a different standard: one that governs a court's decision whether to grant public access to its own "judicial records." A 7, 14-15 (Op. 7, 14-15) (quoting *FTC v*. *Standard Fin*. *Mgmt*. *Corp*., 830 F.2d 404, 410 (1st Cir. 1987)).

The "judicial records" standard applied by the district court is not a part of FOIA. Rather, that standard is based on cases construing constitutional and common-law rights of access to judicial proceedings and records that have no bearing on FOIA's statutory scheme for disclosing executive branch records. *See* A7-8 (Op. 7-8) (citing First Amendment and common law cases relating to the "public monitoring of the judicial system"). The public's First Amendment right

of access to court records in order to "understan[d]" those proceedings and the need for "public monitoring of the judicial system," *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989); *In re Providence Journal Co.*, 293 F.3d 1, 9-10 (1st Cir. 2002), are not reflected in the FOIA statutory scheme. Similarly, limitations on a court's ability to close trials or restrict access to their own records, *see Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993); *FTC*, 830 F.2d at 410, account for different rights and interests than those Congress incorporated into FOIA.

But the records here, while filed in court, are not "judicial records." Indeed, if they were, FOIA would not apply to them. Congress's definition of "agency" for the Administrative Procedure Act, including FOIA, expressly excludes "the courts of the United States." 5 U.S.C. § 551(1)(B). FOIA, by contrast, permits individuals to request records only from an "agency," *id.* § 552(a)(3), and it authorizes courts to order disclosure only of "agency records" that have been improperly withheld, *id.* § 552(a)(4)(B). Any right of access to records under FOIA stems solely from the fact that they are agency, not court, records.

If plaintiff truly seeks judicial records, he is in the wrong forum. Should he renew his requests to the district court for the Southern District of Ohio and the Sixth Circuit for trial exhibits, those courts can apply the standard governing judicial records to decide the proper disposition of their records. But *this* Court's

jurisdiction arises under FOIA, which limits its application to agency records and sets forth clear standards for analyzing the privacy interests protected by Exemption 7(C).

2. The district court's incorrect standard fundamentally altered its analysis of the case. Under Exemption 7(C), when a privacy interest is implicated, the requestor must show both that (1) the public interest sought to be advanced is significant, and (2) the information is likely to advance that interest. *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004); *Stalcup*, 768 F.3d at 74. But the court here reversed the analysis and imposed a burden on the government that exists nowhere in FOIA. Relying on cases involving judicial records, the court declared a "'presumptively paramount right of the public to know.'" A14-15 (Op. 14-15); *see also* A7 (Op. 7) (referring to the "common law presumption that the public ought to have access to judicial records") (quoting *FTC*, 830 F.2d at 408). The court then held—again based on non-FOIA cases involving the right of access to judicial records—that its presumption of disclosure can only be overcome with a "compelling showing." A12 (Op. 12) (quoting *Poliquin*, 989 F.2d at 533) ("Only the most compelling reasons can justify the non-disclosure of judicial records."); *see FTC*, 830 F.2d at 410 (accord).

Exemption 7(C) does not support a presumption of disclosure that can be overcome by "compelling showing." Exemption 7(C) authorizes withholding if

release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (emphasis added). Moreover, as this Court has explained, when "some privacy interest is at stake," a FOIA requestor must show a "significant public interest" to warrant disclosure. *Stalcup*, 768 F.3d at 74; *see also Union Leader Corp. v. Dep't of Homeland Sec.*, 749 F.3d 45, 54 (1st Cir. 2014) ("[W]here Exemption 7(C) privacy concerns are implicated, the requesting party must show [f]irst, . . . 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 [s]econd . . . [that] the information is likely to advance that interest. Otherwise the invasion of privacy is unwarranted.") (citation omitted). A "non-zero privacy interest," moreover, cannot be outweighed by a public interest "whatever its weight or significance—that falls outside of the FOIA-cognizable public interest." *Federal Lab. Relations Auth. v. U.S. Dep't of the Navy*, 941 F.2d 49, 57 (1st Cir. 1991) (*FLRA*).

Given the significance of the district court's failure to apply the correct standard governing Exemption 7(C), the district court's judgment should be reversed for that reason alone.

B. The District Court Erred in Assessing the Public Interest.

The district court further erred in crediting a public interest not recognized by FOIA and giving it undue weight. Properly understood, plaintiff's assertions of

public interest relate solely to an interest in the outcome of a particular criminal trial. Such an interest is, at most, a *de minimis* interest that cannot outweigh the privacy concerns raised here.

1. Instead of a legitimate public interest recognized by FOIA, the district court erroneously relied on an unrelated interest in judicial records. Under this Court's precedents, a court considering Exemption 7(C) must disregard public interests other than the interest in examining the operations of Executive Branch agencies. *See FLRA*, 941 F.2d at 57 (a court must examine the balance under Exemption 7(C) "without regard to public interests other" than the examining agency operations). As noted, the judiciary is excluded from FOIA's disclosure mandate. *See* 5 U.S.C. § 551(1)(B) (excluding courts from the definition of "agency"); *see also Smith v. U.S. Dist. Court for S. Dist. of Illinois*, 956 F.2d 647, 649 n.1 (7th Cir. 1992) (request for judicial records is not available through FOIA). Accordingly, interests, albeit important ones, relating to access to judicial proceedings and records must be excluded from the FOIA balancing.

Nor is it appropriate to import the common-law interest in access to judicial proceedings and records into FOIA. The Supreme Court has rejected precisely this type of bootstrapping of a non-FOIA public interest. In *U.S. Dep't of Def. v. Federal Labor Relations Auth.*, 510 U.S. 487, 498 (1994), the FOIA requestor asked the Court to consider the public interests in favor of collective bargaining

embodied in the Federal Labor Relations Act as part of the FOIA balancing analysis. The Court declined to do so, acknowledging that "importing the policy considerations" from one legal framework into FOIA would effectively "rewrite" it. *Id*. Here, the fact that court records are presumptively open "is irrelevant to the FOIA analysis." *Id*. at 499.

The district court's borrowing of a public interest from outside of FOIA is particularly inappropriate because (as noted above) FOIA expressly excludes the judiciary. FOIA's definition of "agency" to mean each "authority of the Government of the United States" excluding the courts and Congress, 5 U.S.C. § 551(1), underscores that FOIA's focus on shedding light on the actions of the "government" is simply a focus on shedding light on "the agency's own conduct." *See DoD*, 510 U.S. at 496 (quoting *Reporters Comm*., 489 U.S. at 773). And because FOIA's "basic purpose . . . [is] to open agency action to the light of public scrutiny," *id*. (quoting *Department of Air Force v*. *Rose*, 425 U.S. 352, 372 (1976)) — not to open judicial action to such scrutiny — the district court's analysis clashes with the express terms of the statute.

Where a plaintiff has "failed to point out how the withheld information would reveal anything significant about" the agency's performance of its statutory duties, the balance under Exemption 7(C) must tip in favor of the asserted privacy interest. *Maynard v*. *CIA*, 986 F.2d, 547, 567 (1st Cir. 1993); *cf*. *Marzen v*. *Dep't*

of Health and Human Servs., 825 F.2d 1148, 1154 (7th Cir. 1987) (even where there was a substantial public interest in an individual's death, the medical records were properly withheld).

2. The "only relevant 'public interest in disclosure' to be weighed [under the 7(C)] balance is the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding *of the operations or activities of the government*." *Federal Labor Relations Auth*., 510 U.S. at 495 (quoting *Reporters Comm*., 489 U.S. at 775). Thus, "[w]here the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information" to "show [both] that the public interest sought to be advanced is a significant one" and that "the information is likely to advance that interest." *Favish*, 541 U.S. at 172. Plaintiff has done little more than articulate a vague, high level public interest and has shown no compelling connection between any cognizable public interest and the specific records at issue.

Information about a particular criminal defendant in a routine case or the conduct of an individual trial is not a public interest for FOIA purposes. "[T]he innocence or guilt of a particular defendant tells the Court nothing about matters of substantive law enforcement policy that are properly the subject of public concern." *Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434, 441 (1st Cir. 2006). While a criminal defendant's interest in a challenge to his conviction is "deeply

personal," it does not implicate a larger governmental function, and thus has little bearing on the public interest recognized by FOIA. *Moffat v. U.S. Dep't of Justice*, 716 F.3d 244, 252 (1st Cir. 2013). Similarly, plaintiff's journalistic interest in this particular criminal case cannot serve as a public interest that would upend the significant privacy interests at issue here. *See, e.g.*, *Reporters Comm.*, 489 U.S. at 771 ("The requesting party and the use that party plans to make of the requested information has no bearing on the assessment of the public interest served by disclosure.").

Plaintiff has attempted to reframe the interest in Dr. Volkman's guilt as something else. But, his assertions of a public interest in identifying where DEA draws the line of illegal conduct in prescribing pain medication, *see* A11 (Op. 11), boil down to nothing more than the ultimate issue of guilt or innocence in Dr. Volkman's case. And the district court's own characterization of the public interest at stake focused on the judicial proceedings. The court suggested that disclosure would shed light on "what evidence the government had that caused it to tout the indictment of Dr. Volkman" as a warning to medical professionals, and "how the DEA carried out its statutory obligations as a government agency with respect to Dr. Volkman and how the judiciary handled his trial." A10 (Op. 10).

Moreover, the information requested must reveal "something *directly* about the character of a government agency." *Hopkins v. U.S. Dep't of Hous. & Urban*

Dev., 929 F.2d 81, 88 (2d Cir. 1991); *id*. ("Were we to compel disclosure of personal information with so attenuated a relationship to governmental activity, however, we would open the door to disclosure of virtually all personal information, thereby eviscerating the FOIA privacy exemptions."). Medical records introduced in a single trial have a limited, indirect relationship to the government's execution of its statutory functions. The district court's conclusion that the records would illustrate what evidence formed the basis of its decision to prosecute Dr. Volkman, A10 (Op. 10), such reasoning proves far too much. If that were all FOIA requires to show a public interest under Exemption 7(C), virtually any criminal case would give rise to FOIA disclosure.

3. Plaintiff has not shown that disclosure of this information in this particular trial would shed light on DEA activities. *Stalcup*, 768 F.3d at 74 (A court must consider whether providing a requestor with private information "would yield any new information."). There is little basis for concluding that the medical records of the patients at issue here or their identities would shed any additional light on how DEA enforces its statutory mandates. Records about an individual criminal trial can shed only limited light on the asserted public interest in knowing how DEA "delineate[s] between legitimate and illegal prescriptions" in the wake of a "public controversy within the field of pain management about the proper prescribing of opiates." A11 (Op. 11).

The district court failed to consider the wealth of information in the public record and whether release of the information "shed any additional light on the Government's conduct." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991). The entire criminal trial transcript is available, and the government has released, among other documents, inspection reports, inventory and dispensing logs, correspondence between the criminal defendant and the government, and video of a physical search of the criminal defendant's clinic. In addition, there is significant information about DEA's general policies regarding what is a legitimate medical purpose for issuing prescriptions. Plaintiff has made no showing that extensive medical histories unrelated to Dr. Volkman's crimes would shed light on DEA's conduct of his criminal trial specifically, or DEA's conduct of its statutory duties generally. "That gap" between the asserted public interest and the information sought prevents the court "from concluding that release would further his purported public interest." *Stalcup*, 768 F.3d at 74.

C. The District Court Erroneously Evaluated the Privacy Interests Involved.

The district court's order fails to protect the privacy of Dr. Volkman's former patients from disclosure of medical records containing virtually their entire medical histories. These individuals can be identified when other publicly available information is consulted.

1. FOIA gives special solicitude to personal information contained in law enforcement files. Congress sensibly protected "intimate personal data, to which the public does not have a general right of access in the ordinary course" from disclosure. *Favish*, 541 U.S. at 166; *id*. ("[W]here the subject of documents is a private citizen, the privacy interest is at its apex.") (quotation marks omitted). Privacy interests are significant when the records at issue contain personal medical information because those records are "highly personal" and "intimate in nature." *Kurzon v. Department of Health & Human Servs.*, 649 F.2d 65, 68 (1st Cir. 1981).

But the court's decision fails to protect those important interests in stark contrast to the protection courts typically afford to medical information. *See Yonemoto v. Department of Veterans Affairs*, 686 F.3d 681, 696 (9th Cir. 2012) (amended op.) ("Information regarding illness or health is personal, and falls under" the stricter scope of Exemption 6), *overruled on other grounds by Animal Legal Defense Fund v. U.S. FDA*, 836 F.3d 989 (9th Cir. 2016); *Halloran v. Veterans Admin*, 874 F.2d 315, 320, 324 (5th Cir. 1989) (finding that medical information was properly withheld when the identity of the individual was known); *Marzen*, 825 F.2d at 1154 ("[W[hatever public interest can be gained from disclosure of the intimate details contained in the medical records cannot justify the invasion of the" relevant privacy interests.); *Blast v. U.S. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981) (stating that the privacy interest in "medical

information of a personal nature" is "well recognized, even under the stringent standard of exemption 6"). While the medical information itself is highly sensitive—and much of that is already available in the criminal transcript, the invasion of privacy from release of that information becomes even more "significant" when "highly personal information" is linked to "particular, named individuals." *Ray*, 502 U.S. at 175-76 (reviewing disclosure of information "regarding marital and employment status, children, living conditions and attempts to enter the United States" of former refugees). Here, the information is not only personal—an individual's almost entire medical history—but includes what is essentially a history of substance abuse and addiction. Any invasion of that interest is no less than significant, and the district court erred in failing to recognize the weight of that interest.

Dr. Volkman's former patients have an additional interest in remaining free from harassment associated with the disclosure of their identities. Plaintiff has emphasized his earlier attempts to contact witnesses in this case, *see* Pl's Mot. for Summ. J. 2, and the patients and their families, thus, have a heightened interest in avoiding unwanted and intrusive contacts following from the disclosure of their private medical information. *Cf*. *FLRA*, 941 F.2d at 55-56 (recognizing a more than "modest" privacy interest in "bare names and home addresses" based on the

"ability to retreat to the seclusion of one's home and to avoid enforced disclosure of one's address").

2. The district court discounted the personal privacy interests at stake because of what it asserted were the government's prior "failures to take measures to protect the privacy interests," A13 (Op. 13). While the court recognized that prior disclosure does not "destroy" the privacy interest, it continued to rely on the fact that the medical records were not protected when the exhibits were admitted at the trial. *Id*. The court failed to address controlling precedent which acknowledges that substantial privacy interests can exist in personal information even though the information has been made available to the general public at some place and point in time. *See Reporters Comm*., 489 U.S. at 770-71; *see also Moffat*, 716 F.3d at 251.

In *Moffat*, this Court considered a plaintiff's claim that the privacy interests in the names of third-party informants, FBI personnel, and others mentioned in an FBI report were lessened because he had a less-redacted version of the same report that he alleged was provided by a different government agency. 716 F.3d at 251. Consistent with the decisions of other courts of appeals, the Court explained that "prior revelations of exempt information do not destroy an individual's privacy interest." *Id*. (collecting cases). The Court declared to the contrary that the privacy interests "remain as strong now as they were before." *Id*.

Because Exemption 7(C) protects the interests of those who are incidentally involved in law enforcement activities, an individual's participation in an investigation or prosecution does not diminish his or her privacy. The medical records here are those of witnesses to and/or victims of Dr. Volkman's criminal activities. Exemption 7(C) protects the privacy interests of precisely those categories of individuals. *Carpenter*, 470 F.3d at 438; *see also Fitzgibbon v. CIA*, 911 F.2d 733, 767 (D.C. Cir. 1990) ("[P]ersons involved in FBI investigations-even if they are not the subject of the investigation-have a substantial interest in seeing that their participation remains secret."). Any contrary argument "mistakenly assumes that the mere possibility of being called as a witness is somehow equivalent to an individual voluntarily abdicating his or her privacy. . . . [E]ven assuming that a witness had been required to testify, that does not necessarily diminish his or her privacy." *Stalcup*, 768 F.3d at 73; *see also Moffat*, 716 F.3d at 251 (stating that "prior revelations of exempt information do not destroy an individual's privacy interest"). Indeed, there is no sense in which any of the individuals whose records are at issue have waived or otherwise voluntarily lost their privacy interest. Nor does the alleged failure of the government to protect their privacy interest by not sealing those records during Dr. Volkman's trial, even if that were possible, forfeit the inherent privacy interests at stake. *See*

Stalcup, 768 F.3d at 73 (recognizing an "individual's inherent privacy interest irrespective of any government intervention").

Moreover, the court failed to address the "practical obscurity" doctrine, which acknowledges that substantial privacy interests can exist in personal information even though the information has been made available to the general public at some place and point in time if the information remains practically obscure. *See Reporters Committee*, 489 U.S. at 770-71; *see also Moffat*, 716 F.3d at 251. While the district court noted that the names of the witnesses appear in the publicly available transcript A13 (Op. 13), it never analyzed the extent to which their medical information was publicly available.

3. While the district court attempted to protect the privacy interest of the individuals by ordering limited redactions, the court's efforts are insufficient to protect the personal privacy interest attendant to the former patients' medical records. The court ordered redaction of the patient's names, addresses, dates of birth, and social security numbers, but did not protect other sensitive medical information, including past procedures, medications, and diagnoses. The district court's own recognition that redactions could not "completely protect the privacy interests of the third parties because personally identifiable information has already been released," A15 (Op. 15), should have led the court to deem the records exempt under Exemption 7(C).

These redactions provide little or no protection for the privacy interests at stake. Any interested person could identify which patient each of these records belongs to by connecting the trial testimony with the exhibits, even with the redactions proposed by the court, with only a little effort. The names of these individuals are disclosed in the trial transcript along with substantial amounts of information about their medical histories and interactions with Dr. Volkman, thus redacting the information would not sufficiently protect their privacy. Even as redacted, the medical records would permit an interested member of the public to match the names in the trial transcript with the exhibits redacted under the court's order.

These redactions, therefore, are a far cry from the type of protection the Supreme Court has found sufficient to protect personal privacy. *Cf*. *Rose*, 425 U.S. at 378 (rejecting contention that disclosure is barred "in any case in which the conclusion could not be guaranteed that disclosure would not trigger recollection of identity in any person whatever"). In *Rose*, the Supreme Court explained that "what constitutes identifying information regarding [an individual] must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar . . . with other aspects of [the events at issue]." *Id*. at 380. While redaction may be a useful technique in many cases in which the "risks of identifiability" are "incidental," *id*. at 381, 382, redaction is not

appropriate where the likelihood of identification is non-trivial, or as here, highly likely. No specialized knowledge or skill is required to read the criminal transcript for basic detail and dates and match that to the same information in the medical records.

4. The district court's redactions were based upon its explicit application of a standard recognizing the "paramount" right of the public for information. A4 (Op. 4). As noted in Part I.A. *supra*, that is an incorrect standard. Thus, to the extent the court's redactions were based upon the incorrect standard, at the very least the case must be remanded so the court can engage in a new balancing effort. *See Rose*, 425 U.S. at 381 (remand appropriate to permit a court to reweigh the public and private interests).

For the reasons explained above, the district court's decision to require release of personal medical records rests on an incorrect standard, an incorrect view of the applicable public interest, and an erroneous evaluation of the privacy interest at stake. Its decision must be reversed.

II. The Death-Related Records of Dr. Volkman's Patients Are Exempt from Public Disclosure.

The district court failed to consider the special and significant privacy interests in the death-related records withheld. Those interests are significant and outweigh any possible public interest in disclosure.

The Supreme Court has recognized a significant privacy interest in information related to the circumstances and causes of death as well as depictions of death scenes. *See Favish*, 541 U.S. at 171. FOIA incorporates the privacy interests relating to a family's control over the body of the deceased and death images and thus protects the surviving family members' privacy interests. This interest extends both to actual depictions and the "the disclosure of graphic details surrounding their relative's death." *Id*.; *see also Prison Legal News v. Executive Office for U.S. Attorneys*, 628 F.3d 1243, 1248 (10th Cir. 2011) (affirming withholding of autopsy photographs and images). These interests extend not only to photographs of the death scenes and bodies, but also autopsy reports and other information relating to the depiction of the circumstances of death of the deceased. *See Favish,* 541 U.S. at 169 (quoting *Reid v. Pierce County*, 961 P.2d 333, 342 (Wash. 1998) ("[T]he immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent.")); *see also Accuracy in Media, Inc. v. National Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999) (noting the "the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome details of death by violence").

The district court failed to specifically address the application of Exemption 7(C) to photographs of death scenes and deceased bodies, autopsy reports, death scene evidence reports, and toxicology reports and the significant privacy interests

at stake in disclosure of those records. That failure is reversible error. No remand is necessary, however, because it is well settled that those privacy interests are significant. Any corresponding public interest in those records is clearly outweighed by the privacy concerns. Plaintiff has articulated no reason that the facts and circumstances of death available in the public transcript are insufficient for the asserted public interest in Dr. Volkman's conviction, or DEA's policies more generally. *See Favish*, 541 U.S. at 172.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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April 2017

CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 7,943 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Jaynie Lilley
Jaynie Lilley

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system

s/ Jaynie Lilley
Jaynie Lilley

ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

PHILIP EIL,
Plaintiff,
v.

U.S. DRUG ENFORCEMENT ADMINISTRATION,
Defendant.

C.A. No. 1:15-cv-99-M-LDA

MEMORANDUM AND ORDER

JOHN J. MCCONNELL, JR., United States District Judge.

Philip Eil, an award-winning freelance journalist, filed a Freedom of Information Act (FOIA)[1] request with the U.S. Drug Enforcement Administration seeking copies of all the exhibits the government had introduced in the criminal trial of Dr. Paul H. Volkman. The government initially objected to producing any documents but eventually produced some of the requested documents, most of them heavily redacted. Mr. Eil filed this complaint in order to obtain unredacted copies of the produced exhibits and copies of the remaining non-produced exhibits. Because this Court finds that the public interest in disclosure can be accomplished while safeguarding many of the privacy interests of those involved, the Courts GRANTS Philip Eil's Motion for Summary Judgment (ECF No. 15) and DENIES the DEA's Motion for Summary Judgment. (ECF No. 16).

[1] 5 U.S.C. § 552.

FACTS

The United States government charged Dr. Volkman in a 22-count indictment with a variety of drug related charges.[2] In announcing the indictment, the government alleged that Dr. Volkman "handed out more than 1,500,000 pain pills between October 2001 and February 2006," made $3,087,500 from this scheme, and caused the "the deaths of at least 14 people." The government proclaimed that the "indictment serves as a warning to all medical professionals that if you illegally prescribe medication for personal gain you will be prosecuted to the fullest extent of the law." (ECF No. 15-4).

The U.S. District Court for the Southern District of Ohio held a public jury trial of Dr. Volkman in March 2011. At that trial, the government presented 70 witnesses and introduced more than 220 exhibits. Most of these exhibits were the medical records of former patients of Dr. Volkman. The government never sought to have these records sealed, and it did not redact the names or any other personally identifiable information of Dr. Volkman's former patients from the records. The trial court on its own never sealed the records or required the redaction of personally identifiable information from the exhibits.

After an eight-week trial, the jury convicted Dr. Volkman of 20 of the 22 counts brought against him. The court sentenced him to four consecutive life terms

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[2] The government charged Dr. Volkman with: conspiring to unlawfully distribute a controlled substance in violation of 21 U.S.C. § 841(a); maintaining drug-involved premises in violation of 21 U.S.C. § 856(a)(l); the unlawful distribution of a controlled substance leading to death in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); and possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. §§ 924(c)(1) and (2).

of imprisonment. Dr. Volkman appealed his sentence to the U.S. Court of Appeals for the Sixth Circuit. The Sixth Circuit twice denied his appeal.[3]

Since shortly after the trial,[4] Mr. Eil has sought access to copies of the admitted trial exhibits used to convict Dr. Volkman. Dr. Volkman was a college and medical school classmate of Mr. Eil's father. Mr. Eil was "intrigued" by the question of how Dr. Volkman, "with a MD/PhD from the University of Chicago [could] turn into, according to the government's allegations, a prodigious drug dealer and medical mass-murderer." (ECF No. 15-1 at 2 n. 1). After making this criminal prosecution the subject of his thesis project for the nonfiction-writing program at the Columbia University School of the Arts, Mr. Eil decided to write a book on his investigation of Dr. Volkman's prosecution and conviction.

The uncontroverted evidence in this case reveals that Mr. Eil requested access to the Volkman trial exhibits from the Clerk of the U.S. District Court for the Southern District of Ohio, the Clerk of the U.S. Court of Appeals for the Sixth Circuit, lead prosecutor Assistant United States Attorney Timothy D. Oakley, and trial Judge Sandra S. Beckwith. Each of these people denied Mr. Eil's request for the trial exhibits. Both A.U.S.A. Oakley and Judge Beckwith instructed or assured

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[3] *United States v. Volkman*, 736 F.3d 1013 (6th Cir. 2013), *vacated*, 135 S. Ct. 13 (2014). The U.S. Supreme Court vacated that judgment and remanded the case to the Sixth Circuit for further proceedings. *Volkman v. United States*, 135 S. Ct. 13 (2014). Upon remand, the Sixth Circuit again upheld Dr. Volkman's conviction. *United States v. Volkman*, 797 F.3d 377 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 348 (2015).

[4] Mr. Eil attended some of the trial, but after the government issued a subpoena to him as a potential witness in the trial, he could no longer attend the trial. The government never called Mr. Eil to testify.

Mr. Eil that FOIA was the proper avenue for accessing these materials. Following this advice, Mr. Eil filed a FOIA request on February 1, 2012, with the Executive Office of the United States Attorneys ("EOUSA"). Nine months later, the EOUSA transferred the request to the Defendant, U.S. Drug Enforcement Administration.

Mr. Eil requested copies of the 220 trial exhibits that the government had admitted into evidence, consisting of approximately 15,000 pages. In total, the DEA partially released 3,813 pages of information, and the government largely redacted many of those pages. These productions represent about twenty-five percent of the pages admitted as full exhibits. Withholding the bulk of the materials, the DEA asserts privacy concerns for the individuals whose records the government had admitted at trial.[5]

Specifically, the government redacted from the trial exhibits the following:

- Identifying information of third parties, including names, social security numbers, addresses, telephone numbers, dates of birth or death, medical and tax record numbers, insurance information, employment information, and other particularly unique and sensitive personal and medical information, pursuant to § 552(b)(6) and (b)(7)(C);
- Identifying information of criminal investigators, pursuant to § 552(b)(6), (b)(7)(C) and (b)(7)(f); and
- DEA numbers, pursuant to § 552(b)(7)(e).[6]

Additionally, the DOJ withheld in their entirety:

- Medical records of individuals named in the transcript of the Volkman trial, pursuant to § 552(b)(6) and (b)(7)(C);

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[5] The transcript of the entire trial, including the names of the victims and references to some of their medical records, as well as a listing of trial exhibits with descriptions of each exhibit, including the third parties' names, is publicly available. (ECF No. 15-29).

[6] Mr. Eil does not seek "disclosure of either the identifying information of criminal investigators or DEA numbers." (ECF No. 15-1 at 7 n. 11).

- Detailed autopsy and toxicology reports, reports of post-mortem exams, and photographs of deceased patients, pursuant to § 552(b)(6) and (b)(7)(C); and
- Tax records of an individual, pursuant to § 552(b)(7)(C).

(ECF No. 15-1 at 7-8).

PROCEDURE

Mr. Eil filed this Complaint in March 2015 against the U.S. Drug Enforcement Administration. (ECF No. 1). He seeks a declaration that the DEA wrongfully withheld and redacted documents, an injunction ordering the DEA to provide access to the requested documents, and an award of costs and attorney's fees pursuant to 5 U.S.C. § 552(a)(4)(E). *Id.* at 11. The parties agreed that this matter should be resolved through the filing of cross motions for summary judgment (ECF Nos. 15, 16), to which both parties responded. (ECF Nos. 18, 19). This Court held a hearing on the cross-motions on August 3, 2016.

ANALYSIS

"FOIA is one of the central tools to create transparency in the Federal government. FOIA should be a valuable mechanism protecting against an insulated government operating in the dark, giving the American people the access to the government they deserve." (ECF No. 15-37 at 3).

Public scrutiny of the workings of government—including the judiciary—is vitally important to the proper functioning of our democracy. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Because of this importance, FOIA "presumes public entitlement to agency information." *Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 556 (1st Cir. 1992). "By establishing a

presumption in favor of agency disclosure, Congress aimed to 'expose the operations of federal agencies to public scrutiny.'" *Stalcup v. CIA*, 768 F.3d 65, 69 (1st Cir. 2014) (quoting *Providence Journal*, 981 F.2d at 556). FOIA provides, with exceptions, that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, play, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

The statute sets forth nine exemptions from this production requirement—two of which appear to be applicable here. First, FOIA does not apply to "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). Second, FOIA excludes from production "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).[7] Exemption 7(C) offers the government a broader privacy exemption; therefore, this Court need only consider the application of Exemption 7(C). *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 (1989).

The FOIA exemptions are to be narrowly construed (*Stalcup*, 768 F.3d at 69), and all doubts are to be resolved in favor of disclosure. *U.S. Dep't of Justice v.*

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[7] The DEA also asserted the exemption contained in § 552(b)(7)(E) concerning techniques and procedures of law enforcement investigations or prosecutions, but Mr. Eil is no longer seeking any information that would fall into that exception. (ECF No. 15-1 at 7 n. 11).

Julian, 486 U.S. 1, 8 (1988). It is the government's burden to establish the applicability of any exemption. 5 U.S.C. § 552(a)(4)(B); *Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434, 438 (1st Cir. 2006).

When the government relies on exemptions for withholding documents from public production, the court is required "to balance these privacy interests against the public interest in disclosure." *Moffat v. U.S. Dep't of Justice*, 716 F.3d 244, 251 (1st Cir. 2013) (citing *Maynard v. CIA*, 986 F.2d 547, 566 (1st Cir. 1993)). This balance requires the Court to evaluate the competing societal interests. In doing so, the Court will look at each of these two competing interests.

Public interest in disclosure of judicial records

"[T]he common law presumption that the public ought to have access to judicial records" underscores the import attached to the public's interest in judicial records. *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987). The United States Supreme Court has acknowledged that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978).

> [The First] Circuit, along with other circuits, has established a First Amendment right of access to records submitted in connection with criminal proceedings. The basis for this right is that without access to documents the public often would not have a "full understanding" of the proceeding and therefore would not always be in a position to serve as an effective check on the system.

Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 502 (1st Cir. 1989) (citation omitted) (quoting *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984)).

"Courts long have recognized 'that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system.' This recognition has given rise to a presumption that the public has a common-law right of access to judicial documents." *In re Providence Journal Co., Inc.*, 293 F.3d 1, 9–10 (1st Cir. 2002) (citation omitted) (first quoting *Siedle v. Putnam Inv., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998) and then citing *Nixon*, 435 U.S. at 597).

Public scrutiny of judicial proceedings produces a myriad of societal benefits. Recent examples of tenacious journalists exposing potential flaws in criminal cases illustrate this axiom.[8] For example, in the case of Adnan Syed's murder conviction, memorialized in season one of a popular podcast entitled *Serial* by Sarah Koenig,[9] Ms. Koenig exposed facts from his trial that contributed to Maryland state court Judge Martin P. Welch granting the defendant a new trial.[10] Another recent example flows from "Making a Murderer," Netflix's 10-episode series concerning a murder in Manitowoc, Wisconsin.[11] A Milwaukee state court jury convicted Brendan Dassey of first-degree intentional homicide and sentenced him to life in

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[8] "[T]he specific purpose for which the information is requested" plays no role in determining public interest. *Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434, 440 (1st Cir. 2006) (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 771 (1989).

[9] Sarah Koenig, *Serial: Season One*, https://serialpodcast.org/season-one (last updated February 7, 2016).

[10] *Syed v. State*, No. 199103042-046, (Cir. Ct. Balt. City June 30, 2016) (baltimorecitycourt.org). *See* Jonah Engel Bromwich & Liam Stack, *Adnan Syed, of 'Serial' Podcast, Gets a Retrial in Murder Case*, N.Y. TIMES (June 30, 2016), http://www.nytimes.com/2016/07/01/us/serial-adnan-syed-new-trial.html?_r=0.

[11] Moira Demos & Laura Ricciardi, *Making a Murderer*, NETFLIX, https://www.netflix.com/title/80000770 (last visited Sept. 6, 2016).

prison. In federal post-conviction relief, Magistrate Judge William Duffin[12] recently granted Mr. Dassey's petition for a writ of habeas corpus and ordered his retrial or release in ninety days.[13]

> Public access to trial materials upholds many values of our justice system.[14]
>
> Openness of trials was observed . . . to contribute "assurance that the proceedings were conducted fairly . . . , discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." Another value served was that of "public acceptance of both the process and its results," "awareness that society's responses to criminal conduct are underway," the "prophylactic aspects of . . . community catharsis." These interests seem clearly implicated in this age of investigative reporting and of continuing public concern over the integrity of government and its officials.

Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 503 (1st Cir. 1989) (citations omitted) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 571 (1980)).

The public interest at issue must relate to the underlying purpose of FOIA: "to open agency action to the light of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep't*

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[12] *Dassey v. Dittmann*, No. 14-CV-1310, 2016 WL 4257386 (E.D. Wis. Aug. 12, 2016), ECF No. 23. *See* Daniel Victor, *Conviction Against Brendan Dassey of "Making a Murderer" Is Overturned*, N.Y. TIMES (August 12, 2016), http://www.nytimes.com/2016/08/13/us/brendan-dassey-making-a-murderer.html.

[13] Nothing in this Court's memorandum and order should be taken in any way to imply that the Court has the opinion that Dr. Volkman's conviction is invalid or was the result of any improper procedures. The Court notes these examples simply to highlight the importance of public scrutiny of criminal judicial proceedings.

[14] Importantly, this case does not involve disclosure of matters before or during a trial. A very different analysis by the trial judge would have to take place under those circumstances because the court would have legitimate concerns with a party's right to a fair trial without prejudicial publicity.

of Air Force v. Rose, 425 U.S. 352, 372 (1976)). The relevant inquiry, when evaluating public interest, is whether disclosure will show citizens "what their government is up to." *Bibles v. Or. Nat. Desert Ass'n*, 519 U.S. 355, 355–56 (1997) (per curium) (quoting *U.S. Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 497 (1994)) (internal quotation marks omitted).

In this case, the public has an interest in the court records from Dr. Volkman's trial because it allows the public to know "what their government is up to" in carrying out its investigative and judicial functions. *Id.* Specifically, disclosing the court exhibits allows the public to know what evidence the government had that caused it to tout the indictment of Dr. Volkman as a "warning to all medical professionals that if [they] illegally prescribe medications for personal gain [they] will be prosecuted to the fullest extent of the law." (ECF No. 15-1 at 2). Because the information petitioned for disclosure is the very information used to convict Dr. Volkman, the public interest in this information cannot be served in any way other than by releasing the court exhibits. Indeed, these particular documents are an integral part of a serious investigation and prosecution by the DEA. The government selected each of these requested exhibits to present as full exhibits at trial. These exhibits led to Dr. Volkman's ultimate conviction and sentence to four consecutive life terms in prison. The exhibits Mr. Eil seeks ultimately demonstrate how and why Dr. Volkman was convicted—that is, how the DEA carried out its statutory obligations as a government agency with respect to Dr. Volkman and how the judiciary handled his trial.

The public has a proper interest in the evidence used by the DEA to delineate between legitimate and illegal prescriptions in the conviction of Dr. Volkman. The medical record exhibits shed light on whether patients died because of Dr. Volkman's unlawful prescribing. This question was at the very heart of the trial because expert witnesses disagreed about the implications of these medical records. The records demonstrate what the DEA was up to in carrying out its statutory duties of investigating and prosecuting Dr. Volkman.[15] The government could not prove illegal activity, and the jury could not convict Dr. Volkman for that activity without a review of these records. The details of the government's strategy of proving Dr. Volkman's illegitimacy are also significant, given the public controversy within the field of pain management about the proper prescribing of opiates. The records at issue in this case are not simply records "accumulated in various governmental files"; they are the very records that the government relied upon to prosecute Dr. Volkman and the jury used to convict him.

> "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public." If the press is to fulfill its function of surrogate, it surely cannot be restricted to report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously.

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[15] The importance of the information contained in these records is further highlighted by the fact that the jury did not convict Dr. Volkman on Count IV of the indictment (causing the death of an individual by unlawfully dispensing a medication not for a legitimate purpose) but did convict him on causing the deaths of other patients. Because the jury determined that in one instance Dr. Volkman had not caused the death of his patient but did in other instances, the decision must have been specifically tied to their medical records exhibits.

Pokaski, 868 F.2d. at 504 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980)).

"[O]nly the most compelling showing can justify post-trial restriction on disclosure of testimony or documents actually introduced at trial." *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993). "Open trials protect not only the rights of individuals, but also the confidence of the public that justice is being done by its courts in all matters, civil as well as criminal." *Id.* "As we have said elsewhere, '[o]nly the most compelling reasons can justify the non-disclosure of judicial records.'" *Id.* (quoting *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987)). In this case, the public has a strong interest in staying apprised of the government's investigation and the judicial proceedings that led to the conviction of Dr. Volkman.

Individual privacy interests involved

Does further public dissemination of third parties' medical records that have already been introduced into a public trial present a "compelling showing" sufficient to justify their non-disclosure now? It is hard to take the government's vehement arguments asserting the strong privacy interests of the third parties here too seriously. The government introduced unredacted copies of previously private medical records into a public trial. The government never requested that the trial court seal the documents, and it never sought to have personally identifiable information on the documents redacted. Moreover, when the government filed documents on the Court's public website PACER as part of its opposition to

Dr. Volkman's appeal, it publicly filed medical records of an individual, containing his name and private medical records.[16] The government to this date has not sought an order from the trial court or the Sixth Circuit seeking to seal any of the private medical records that were trial exhibits. Moreover, it has allowed the trial transcript containing all of the names of the third parties and discussion of their medical conditions to remain available to the public.

Nevertheless, regardless of the government's prior failure to take measures to protect the privacy interest of those third parties, it is this Court's obligation to make a determination of the privacy interests involved. "[P]rior revelations of exempt information do not destroy an individual's privacy interest. . . . The privacy interests the government seeks to uphold remain as strong now as they were before." *Moffat v. U.S. Dep't of Justice*, 716 F.3d 244, 251 (1st. Cir. 2013). "[P]atients have a privacy interest under the United States Constitution in their medical records . . . ." *In re Search Warrant (Sealed)*, 810 F.2d 67, 71 (3d Cir. 1987). These types of records are considered "highly personal" and "intimate in nature." *Kurzon v. Dep't of Health & Human Servs.*, 649 F.2d 65, 68 (1st Cir. 1981) (quoting *Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392 ,398 (D.C. Cir. 1980), *abrogated by U.S. Dep't of State v. Wash. Post. Co.*, 456 U.S. 595, 598 (1982)). "[T]he 'privacy rights of participants and third parties' are among those

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[16] During the course of the appeal in Dr. Volkman's case, the government, as part of opposition to the appeal, uploaded sixteen unredacted or partially redacted trial exhibits (a total of 60 pages), including personally identifiable information of some of the victims, to the Court's public access website PACER. The government turned over these unredacted documents to Mr. Eil.

interests which, in appropriate cases, can limit the presumptive right of access to judicial records." *In re Knoxville News-Sentinel Co.,* 723 F.2d 470, 478 (6th Cir. 1983) (quoting *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d 1165, 1179 (6th Cir. 1983)).

The folks whose medical records are involved here are innocent, uninvolved third parties to the criminal prosecution of Dr. Volkman. It is an unfortunate fact that the court exhibits contain intimate details of private individuals. When information about private citizens "is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

The Balance

Mr. Eil "acknowledges the delicate balance at play here: the documents at issue were exhibits at a public trial, but these records also contain information that is normally private." (ECF No. 18 at 2). What makes this matter challenging to analyze is that the privacy interests of the individuals whose medical records the government had admitted at the public trial were not protected at that time.[17]

"When faced with a claim that cause sufficiently cogent to block access has arisen, it falls to the courts to weigh the presumptively paramount right of the

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[17] "At the time that confidential information is offered in evidence, the trial judge has ample power to exclude those portions that have limited relevance but contain trade secrets or other highly sensitive information." *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 534 (1st Cir. 1993) (citing FED. R. EVID. 403).

public to know against the competing private interests at stake." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (citing *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d at 478). The Court must strike this balance "in light of the relevant facts and circumstances of the particular case." *Id.* (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. at 599) (internal quotation marks omitted).

Attempting to balance these potentially competing interests, the Court finds that it can protect most of the privacy interests of the third parties by excluding personally identifiable information in the exhibits. Moreover, in this case, redacting the trial exhibit numbers will prevent an individual from easily matching up the exhibits with the transcript to identify one of the third parties. The Court cannot completely protect the privacy interests of the third parties because personally identifiable information has already been released in the transcript and exhibits attached to the DEA's appellate brief. Instead, the Court minimizes the invasion of privacy by ordering the DEA to redact highly personal information of no consequence to the trial or conviction of Dr. Volkman.

Redacting the exhibits in this fashion minimizes the privacy interests implicated; therefore, in this instance, the balance of interests tips in favor of public interest. Once the DEA redacts the exhibit numbers and personally identifiable information as instructed below, the exhibits should be produced. As redacted, the identities of the third parties either cannot be discerned or cannot be easily discerned from the court exhibits, thereby offering protection of the third parties' privacy interests. *Cf. Charles v. Office of the Armed Forces Med. Exam'r*, 935 F.

Supp. 2d 86, 99 (D.D.C. 2013) ("[W]ithout demonstrating that family members will encounter the disclosed information, and be able to discern that a redacted report relates to their family member, the defendants present no more than a mere possibility of an invasion of personal privacy and that is insufficient to find that Exemption 6 applies."). The records of Dr. Volkman's trial can then be subjected to appropriate public scrutiny with minimal intrusion upon the privacy interests of the third parties. This balance best protects the public's right to know and the individuals' privacy interests as envisioned by FOIA.

CONCLUSION

The Court GRANTS Philip Eil's Motion for Summary Judgment (ECF No. 15) and DENIES the DEA's Motion for Summary Judgment (ECF No. 16) as follows:

1. The DEA shall produce within 60 days, copies all exhibits admitted into evidence at the criminal trial of Paul H. Volkman.

2. The DEA may redact from the exhibits only the following:

   a. the names, social security numbers, addresses, telephone numbers, dates of birth, medical and tax record numbers, and insurance numbers of the third parties;

   b. identifying information of criminal investigators and DEA numbers; and

   c. the trial exhibit number and instead shall substitute an alternative identifying character in each place where a trial exhibit number was located.

3. The parties may address any requests for attorney fees or costs by a subsequent motion.

SO ORDERED:

John J. McConnell, Jr.
United States District Judge

September 16, 2016

5 U.S.C. § 552(b)(7)(C)

This section does not apply to matters that . . . are 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.