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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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STAR PUBLISHING COMPANY;
TONY DAVIS,

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Plaintiffs,

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vs.

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UNITED STATES FISH AND
WILDLIFE SERVICE; UNITED
STATES DEPARTMENT OF
THE INTERIOR,

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Defendants.

No. CIV 13-080-TUC-CKJ

ORDER

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I. Report and Recommendation

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The magistrate judge recommended Defendants' Motion for Summary Judgment should be granted as to the Memo contained in Document Three and as to Documents Four and Six on the Vaughn Index, finding these documents were properly exempted from disclosure under Freedom of Information Act ("FOIA") Exemptions 6 and 7(C). See 5 U.S.C. §§ 552(b)(6) and (7)(C). The magistrate judge further recommended Defendants'

1 Motion for Summary Judgment should be granted as to the Interview Transcript contained
2 in Document Three and as to Document Five to the extent that personal information should
3 not be disclosed. The magistrate judge also recommended Defendants' Motion for Summary
4 Judgment should be denied as to the Interview Transcript contained in Document Three and
5 as to Document Five, finding these documents had been overly redacted under Exemptions
6 6 and 7(C).

7 The magistrate judge recommended Plaintiffs' Cross-Motion for Summary Judgment
8 should be granted as to the Interview Transcript contained in Document Three and as to
9 Document Five to the extent that Defendants should disclose less redacted versions of these
10 documents. The magistrate judge further recommended Plaintiffs' Cross-Motion for
11 Summary Judgment should be denied (1) as to the Interview Transcript contained in
12 Document Three and as to Document Five to the extent that personal information should not
13 be disclosed, (2) as to the Memo contained in Document Three, and (3) as to Documents
14 Four and Six.

15 Lastly, the magistrate judge recommended the parties' Motions for Summary
16 Judgment should be denied as moot as to Documents One and Two on the Vaughn Index.

17 This Court "may accept, reject, or modify, in whole or in part, the findings or
18 recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). Further, under 28 U.S.C.
19 § 636(b)(1), if a party makes a timely objection to a magistrate judge's recommendation, then
20 this Court is required to "make a de novo determination of those portions of the [report and
21 recommendation] to which objection is made." The statute does not "require [] some lesser
22 review by [this Court] when no objections are filed." *Thomas v. Arn*, 474 U.S. 140, 149-50,
23 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). Rather, this Court is not required to conduct "any
24 review at all . . . of any issue that is not the subject of an objection." *Id.* at 149.

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26 *II. In Camera Review*

27 The Court has reviewed the documents that are the subject of this litigation. These
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1 documents were provided to the magistrate judge by Defendants; the magistrate judge has
2 provided them to this Court. This Court will return the documents to the magistrate judge
3 at this time. Upon conclusion of this case, the Court will issue an order regarding the return
4 or the retention of these documents.

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6 III. *Privacy Interests – Names of Public Officials and Other Private Individuals*

7 Plaintiffs argue the names of administrative employees of the United States Fish and
8 Wildlife Service ("Service") involved in the Macho B case, including Erin Fernandez
9 ("Fernandez") and her supervisors, should be disclosed in all of the investigative records
10 produced to date by the Service, including Documents Three, Five and Six on the
11 Government's Vaughn Index. Plaintiffs also argue that redaction of the names of Janay Brun
12 ("Brun") and Emil McCain ("McCain") in the records advances no cognizable privacy
13 interest and serves only to obfuscate the public's ability to interpret the Macho B records and
14 evaluate the Service's handling of the case.

15 Plaintiffs point out that Exemptions 6 and 7(C) of FOIA require a court "to balance
16 the privacy interests of the individuals protected against the public interest at stake."
17 *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 808 (9th Cir. 1995). Like all of FOIA's
18 statutory exceptions, Exemptions 6 and 7(C) "must be narrowly construed[.]" and "the
19 burden is on the agency to sustain its action." *Lion Raisins Inc. v. U.S. Dep't of Agriculture*,
20 354 F.3d 1072, 1079 (9th Cir. 2004); 5 U.S.C. § 552(a)(4)(B). Records that shed light on
21 government negligence, failure to perform duties, malfeasance in office or other official
22 misconduct satisfy the "public interest" standard. *Lahr v. National Transp. Safety Bd.*, 569
23 F.3d 964 (9th Cir. 2009); *Rosenfeld*, 57 F.3d at 811. "Where the public interest advanced is
24 that officials were negligent or that they otherwise improperly performed their duties, the
25 requester must establish 'more than a bare suspicion' of wrongdoing, by 'produc[ing]
26 evidence that would warrant a belief by a reasonable person that the alleged Government
27 impropriety might have occurred.'" *Lahr*, 569 F.3d at 974, *citation omitted*.

1 The evidence of wrongdoing, as set forth by Plaintiffs, is as follows: information
2 already known to the public suggests that permits held by Arizona Game and Fish that would
3 have allowed it to capture an endangered jaguar under the ESA had expired; there is
4 significant evidence that the Service knew of the plan to capture Macho B and did nothing
5 to stop it based on alleged email correspondence; an Arizona Congressman criticized the
6 Service for attempts to manipulate and cover up actions; Service agents accuse an individual
7 of concealing or destroying records and making false statement; an Interior Department
8 Inspector General's report exonerated all federal employees regarding the Macho B incident
9 and only two State of Arizona employees were prosecuted; the U.S. Attorney's Office
10 allegedly declined to prosecute an individual for criminal prosecution, and; and a witness has
11 admitted that he or she was negligent in failing to protect Macho B.

12 Plaintiffs argue that the public deserves to know why Service officials were not held
13 accountable for their actions (i.e., why the Service's 'Jaguar Lead' was not prosecuted).
14 Plaintiffs also assert the "[d]isclosure of the redacted names of public officials and witnesses
15 involved in the investigation would allow [Plaintiffs] to fully evaluate the Service's
16 involvement in the Macho B investigation, from its oversight duties under the [Endangered
17 Species Act] to its decision not to prosecute employees for obstructing justice." (Pls.' MSJ
18 at 12). Plaintiffs argue this evaluation would allow them to determine whether employees
19 accused of wrongdoing still oversee the endangered species program, determine whether
20 employees received preferential treatment, and review what steps the Service has taken to
21 avoid similar problems in the future.

22 Defendants, however, determined that the privacy interests of third parties, the
23 witnesses, and investigators were strong. These individuals have the right to be free from
24 unwarranted invasions of privacy and revealing names and identifying information could
25 expose them to unwanted harassment, annoyance, harm and derogatory publicity because of
26 their connection to the Macho B jaguar investigation. *See e.g., Forest Serv. Employees for*
27 *Env. Ethics v. United States Forest Service*, 524 F.3d 1021 (9th Cir. 2008). Additionally,
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1 Defendants considered that disclosure of the names and identifying information would shed
2 very little light on government operations.

3 The Court recognizes that "the fact that 'an event is not wholly "private" does not
4 mean that an individual has no interest in limiting disclosure or dissemination of the
5 information.'" *Favish v. Office of Independent Counsel*, 217 F.3d 1168, 1184 (9th Cir.
6 2000), *citations omitted*; *see also Forest Serv. Employees*, 524 F.3d at 1025 n. 3. Therefore,
7 simply because some information is already in the public realm, does not obviate the need
8 for balancing the privacy concerns against the public interest. Moreover, simply because
9 some individuals have provided public information does not mean that any formal waivers
10 of privacy concerns have been submitted to the Court. *See e.g. Forest Serv. Employees*, 524
11 F.3d at 1023 (where an individual waived any right to confidentiality, agency provided
12 disclosure with all references to that individual unredacted). Lastly, the Court considers that,
13 although privacy concerns may be somewhat diminished where the information sought would
14 likely disclose official misconduct, *id.* at 1025, it does not appear that any Service employees
15 have been accused of official misconduct based on the Interior Department Inspector
16 General's report exonerating all federal employees regarding the Macho B incident. *Id.* at
17 1026 (disciplinary decisions did not strip employees of privacy interests).

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19 *IV. Document Three – Memo*

20 Plaintiffs object to the magistrate judge's recommendation that names and identifying
21 information continue to be redacted from the Memo. However, the magistrate judge
22 recommended that Defendants' Motion for Summary Judgment be granted as to the Memo
23 because it cannot be redacted sufficiently to protect the privacy interests of the individuals
24 named in the Memo. The Court's *in camera* review of the Memo reveals that the redaction
25 of names and identifying information would insufficiently protect the privacy interests of the
26 person identifiable in or by the Memo. Furthermore, the disclosure of the Memo would not
27 significantly advance the public interest. Indeed, its disclosure would not serve FOIA's

1 central purpose of piercing "the veil of administrative secrecy and [opening] agency action
2 to the light of public scrutiny.'" *U.S. Dept. of State v. Ray*, 502 U.S. 164, 173 (1991),
3 *citation omitted*. The Court agrees with the magistrate judge that this document is exempted
4 from disclosure as the disclosure would constitute a clearly unwarranted invasion of privacy
5 under 5 U.S.C. § 552(b)(6) and could reasonably be expected to constitute an unwarranted
6 invasion of personal privacy under 5 U.S.C. § 552(b)(7).

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8 *V. Document Three – Transcript*

9 The Court agrees with the magistrate judge in the balancing of the public interest
10 against the privacy concerns as to the transcript included within Document Three. The public
11 interest in the disclosure of the names and identifying information does not greatly advance
12 the public interest and the disclosure of names and identifying information will not
13 appreciably further the public's right to monitor Defendants' actions. Although Plaintiffs
14 argue the privacy interests are not weighty, the Court finds the interests are measurable,
15 *Forest Serv. Employees*, 524 F.3d at 1026-27, and the disclosure of names and identifying
16 information will not appreciably further the public's right to monitor Defendants' actions. *Id.*
17 at 1027. The disclosure of the names and identifying information would constitute a clearly
18 unwarranted invasion of privacy under 5 U.S.C. § 522(b)(6) and could reasonably be
19 expected to constitute an unwarranted invasion of personal privacy under 5 U.S.C. §
20 552(b)(7).

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22 *VI. Document Five – Interview*

23 The Court agrees with the magistrate judge in the balancing of the public interest
24 against the privacy concerns as to the April 2, 2009 interview conducted by the United States
25 Fish and Wildlife Service's Law Enforcement Office. In weighing the evidence of
26 wrongdoing and public interest against the privacy interest, the Court finds the public interest
27 in the disclosure of the names and identifying information does not greatly advance the
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1 public interest. Additionally, the Court finds the interests are measurable, *Forest Serv.*
2 *Employees*, 524 F.3d at 1026-27, and the disclosure of names and identifying information
3 will not appreciably further the public's right to monitor Defendants' actions. *Id.* at 1027.
4 The disclosure of the names and identifying information would constitute a clearly
5 unwarranted invasion of privacy under 5 U.S.C. § 522(b)(6) and could reasonably be
6 expected to constitute an unwarranted invasion of personal privacy under 5 U.S.C. §
7 552(b)(7).

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9 VII. *Document Six – Affidavits*

10 The Court's *in camera* review of the affidavits and draft affidavits reveals that the
11 redaction of names and identifying information would insufficiently protect the privacy
12 interests of the person identifiable in or by the affidavits. The disclosure of the affidavits
13 would not significantly advance the public interest. The Court agrees with the magistrate
14 judge that these documents are exempted from disclosure as the disclosure would constitute
15 a clearly unwarranted invasion of privacy under 5 U.S.C. § 522(b)(6) and could reasonably
16 be expected to constitute an unwarranted invasion of personal privacy under 5 U.S.C. §
17 552(b)(7).

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19 VIII. *In Camera Review of Less Redacted Interview Transcripts or Further Direction*

20 Defendants do not object to the recommendations of the magistrate judge, but assert:

21 that certain specific information that was redacted from the interview
22 transcripts may, in the abstract, lead a third-party (including a Magistrate
23 Judge) to conclude that it does not implicate any individual's privacy interest;
24 however, that same information to someone familiar with the underlying facts
25 would be significant. Defendants are able to prepare less-redacted versions of
the interview transcripts. However, without further direction or an opportunity
for explanation (in the form of an *ex parte* declaration or otherwise),
Defendants are concerned that revised redacted versions might not meet
judicial expectation and/or simply prolong this litigation.

26 Def.'s Obj. at 5. Plaintiffs assert, however, that Defendants should not be allowed to
27 "withhold pertinent information from public inspection based on the malleable standard of
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1 what 'someone familiar with the underlying facts' might find significant." Pl.'s Reply at 2.

2 The parties do not present any authority for their positions. However, the Supreme
3 Court has recognized that the courts may have to examine "records themselves and require
4 disclosure of portions to which the purposes of the exemption under which they are withheld
5 does not apply." *Dept. of Air Force v. Rose*, 425 U.S. 352, 374 (1976) (quoting S.Rep. No.
6 93–854, p. 32 (1974)). Additionally, another district court has utilized ongoing *in camera*
7 reviews to ensure compliance with FOIA. *See Islamic Shura Council of Southern California*
8 *v. F.B.I.*, 278 F.R.D. 538 (C.D.Cal. 2011), *rev'd on other grounds*, — F.3d —, 2014 WL
9 1013324 (March 18, 2014). Moreover, the Court's *in camera* review indicates that conduct
10 described in the documents may provide identifying information that may not typically be
11 considered identifying information. Because the conduct described in the documents is
12 limited to a few individuals, disclosure of such conduct may subject such persons to
13 "undeserved embarrassment and attention." *Hunt v. F.B.I.*, 972 F.2d 286, 289 (1992).

14 Because Defendants' interpretation of "identifying information" may not ensure FOIA
15 compliance and in the interests of judicial economy, the Court will direct Defendants to
16 provide the less-redacted transcripts to the magistrate judge for further review. The Court
17 will leave to the discretion of the magistrate judge to determine what procedure to follow to
18 conduct this supplemental review (e.g., submission of less-redacted documents only,
19 submission of supplemental briefs, etc.).

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21 Accordingly, IT IS ORDERED:

22 1. The Report and Recommendation (Doc. 36) is ADOPTED.

23 2. Defendants' Motion for Summary Judgment (Doc. 22) is GRANTED IN PART
24 AND DENIED IN PART. The Motion for Summary Judgment is GRANTED as to the
25 Memo contained in Document Three and as to Documents Four and Six on the Vaughn Index
26 as these documents have been properly exempted from disclosure under Exemptions set forth
27 in 5 U.S.C. §§ 552(b)(6) and (7)(C). Defendants' Motion for Summary Judgment is
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1 GRANTED as to the Interview Transcript contained in Document Three and as to Document
2 Five to the extent that personal information shall not be disclosed. Defendants' Motion for
3 Summary Judgment is DENIED as to the Interview Transcript contained in Document Three
4 and as to Document Five as these documents have been overly redacted under Exemptions
5 set forth in 5 U.S.C. §§ 552(b)(6) and (7)(C) and Defendants shall disclose less redacted
6 versions of these documents.

7 3. Plaintiffs' Cross-Motion for Summary Judgment (Doc. 24) is GRANTED IN
8 PART AND DENIED IN PART. The Cross-Motion for Summary Judgment is GRANTED
9 as to the Interview Transcript contained in Document Three and as to Document Five to the
10 extent that Defendants shall disclose less redacted versions of these documents. Plaintiffs'
11 Cross-Motion for Summary Judgment is DENIED as to the Interview Transcript contained
12 in Document Three and as to Document Five to the extent that personal information shall not
13 be disclosed, as to the Memo contained in Document Three, and as to Documents Four and
14 Six.


15 4. The parties' Motions for Summary Judgment (Docs. 22 and 24) are DENIED
16 AS MOOT as to Documents One and Two on the Vaughn Index.

17 5. This matter case is referred back to Magistrate Judge D. Thomas Ferraro for
18 further pretrial proceedings and report and recommendation in accordance with the
19 provisions of 28 U. S. C. § 636(b)(1) and L.R.Civ.P. 72.1 and 72.2.

20 All future filings in this case shall be designated:

21 **CIV-13-080-TUC-CKJ (DTF)**

22 DATED this 22nd day of April, 2014.

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Cindy K. Jorgenson
26 United States District Judge