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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 MICROSOFT CORPORATION,

10 Plaintiff,

11 v.

12 INTERNAL REVENUE SERVICE,

13 Defendant.
14

Case No. C15-369 RSM

Case No. C15-850 RSM

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

15 **I. INTRODUCTION**

16 This Freedom of Information Act (“FOIA”) matter comes before the Court on
17 Defendant Internal Revenue Service (“IRS”)’s Motion for Summary Judgment. Dkt. #63.
18 Plaintiff Microsoft Corporation has filed an opposition. Dkt. #68. The Motion was fully
19 briefed on September 6, 2022. Neither party has requested oral argument. For the following
20 reasons, the Court GRANTS Defendant’s Motion and dismisses this case.
21

22 **II. BACKGROUND**

23 Microsoft filed this case in 2015. Dkt. #1. The six FOIA requests at issue here were
24 made in 2014 and 2015. They concern an IRS audit that began in 2007 for the tax years of
25 2004 through 2006. The Court has already expressed its critical remarks regarding the length
26 of time this litigation has lingered in a related case and won’t repeat them here.
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1 The IRS's audit of Microsoft at issue here is "one of the largest in the Service's
2 history." Dkt. #63 at 2. Perhaps because of that, the IRS created special regulations to hire
3 attorneys from outside law firms (Boies Schiller and Quinn Emanuel, or "QE") as contractors.

4 *Id.*

5 Microsoft's six FOIA requests in this case were for records relating to these outside
6 contractors. Dkt. #1 (Complaint) Exs. A, C, F & H; Case No. 2:15-cv-850-RSM Dkt. #1
7 (Complaint) Exs. A & D. The requests sought records relating to the IRS's contracts with
8 Boies Schiller (requests one and six) and Quinn Emanuel (request five); the temporary and
9 proposed regulations on involving contractors in certain aspects of summons enforcement
10 (requests two and three); and the designated summons issued to Microsoft (request four).
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12 **A. Search for the First FOIA Request**

13 The first FOIA request was originally assigned to Information Specialist Corrina Smith.
14 Dkt. #63-7 ("Valvardi 2d Decl."), ¶ 5. Later, Chief Counsel attorney Daniel Lavassar from the
15 office of the Large Business and International Division Counsel ("LB&I"), along with other
16 LB&I attorneys assisting in Plaintiff's audit, began to search for records responsive to this
17 request. *Id.* at ¶ 7 and ¶ 16. Mr. Lavassar contacted IRS Procedure and Administration
18 ("P&A") Branch 8 to search for electronically stored records. *Id.* at ¶ 28.
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20 He also advised Ms. Smith to send the request to Cheryl Richardson, a contracting
21 officer in the Procurement office which had worked on the Boies contract. Valvardi 2d Decl. at
22 ¶ 7. Ms. Richardson stated that no work was performed under the contract with Boies, that the
23 contract was cancelled, and that she did not have any responsive documents.
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25 In early March 2015, the first request was reassigned to Senior Disclosure Specialist
26 Jean Pelzl. *Id.* at ¶ 11. Ms. Pelzl discussed the first request with Plaintiff's counsel, who
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1 provided several names of other IRS and Counsel employees who might have responsive
2 records, all of whom she asked to search for records. *Id.* at ¶¶ 11–12. Two weeks after
3 Plaintiff filed suit in March 2015, Ms. Pelzl forwarded the documents collected to the Office of
4 Chief Counsel. *Id.*

5 **B. Search for the Second FOIA Request**

6 The IRS Disclosure office sent the second FOIA request to LB&I attorneys assisting in
7 Plaintiff's audit, who began to search for records and contacted P&A Branch 8 to search for
8 electronically stored records. *Id.* at ¶ 16. The Disclosure office also contacted P&A Senior
9 Counsel A.M. Gulas was the lead attorney tasked with drafting the temporary regulations at
10 issue in the request. *Id.* at ¶ 17. In early March 2015, Ms. Gulas provided Ms. Smith with a
11 copy of the official agency file created and maintained by Ms. Gulas during the drafting of the
12 Temporary Regulations, which she determined were all records responsive to this second
13 request. *Id.* at ¶¶ 15, 20–21.

14 **C. Search for the Third FOIA Request**

15 This request, seeking in part communications between the IRS and outside experts, was
16 also assigned to Ms. Smith, who determined that the records were maintained by various IRS
17 and Chief Counsel offices. *Id.* at ¶ 23. The Disclosure office and LB&I attorneys searched for
18 records and contacted P&A Branch 8 to search for electronically stored records. *Id.* at ¶ 24 and
19 ¶ 28. Ms. Smith coordinated with LB&I attorney Mr. Lavassar, and Eli Hoory, then Senior
20 International Advisor in LB&I's Washington, DC office. *Id.* at ¶ 27. They did not find any
21 records responsive to the first category of records. *Id.* at ¶¶ 28–29.

22 The Disclosure office also contacted Ms. Gulas, the lead attorney tasked with drafting
23 the temporary regulations. *Id.* at ¶¶ 17, 25–26. The official agency file for the Temporary
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1 Regulations was provided to Ms. Smith, and she determined that the file was responsive to the
2 second and third categories of records sought by Plaintiff's third FOIA request. *Id.*

3 After this litigation commenced, Chief Counsel attorney James Hartford, then Special
4 Counsel in P&A, instructed the attorney assigned to help defend the FOIA litigation, Scott
5 Hovey, to email specific custodians to say they needed to search for and provide copies of any
6 paper documents for review. Dkt. #63-1 ("Hartford Decl."), ¶ 22. Mr. Hovey instructed the
7 custodians to let him know if they did not have any paper files and that their electronically
8 stored information ("ESI") would be collected through the Service's electronic discovery
9 request ("EDR") process. *Id.*

11 **D. Search for the Fourth FOIA Request**

12 This request was assigned to Senior Disclosure Specialist Jean Pelzl. Valvardi 2d Decl.
13 at ¶¶ 31–32. Ms. Pelzl forwarded a copy of the request to LB&I attorney Shawn Barrett and
14 emailed Revenue Agent ("RA") Douglas Odell, the international examiner in LB&I who issued
15 several of the summons in Plaintiff's audit. Mr. Odell suggested that IRS employee Woo Jung
16 Choi and Chief Counsel attorneys Roy Wulf and Cathy Goodson might also know the
17 whereabouts of responsive records. P&A Branch 8 searched for electronic records. After
18 contacting Mr. Hoory to discuss whether employees outside LB&I might have responsive
19 records, LB&I attorney Lavassar determined that all responsive records would be found within
20 LB&I. *Id.* at ¶ 35. In February 2015, Mr. Odell informed Ms. Pelzl that the search for
21 potentially responsive records was being coordinated by Chief Counsel attorney Cathy
22 Goodson. *Id.* at ¶ 37.

26 **E. Search for the Fifth and Sixth FOIA Request**

1 These requests were assigned to Senior Disclosure Specialist Jean Pelzl. *Id.* at ¶ 40.
2 She emailed all the custodians listed in the requests, except for two employees, Michael
3 Danilack and Robert Ratchford, who had both retired. *Id.* at ¶ 42. The emails included copies
4 of the fifth and sixth request and asked the recipients to begin searching for responsive hard
5 copy and electronic records. *Id.*

6
7 In April 2015, Senior Level Special Trial Attorney Cathy Goodson, who was then an
8 Associate Area Counsel in Chief Counsel LB&I, emailed the employees named in, or otherwise
9 likely to have records responsive to, these FOIA requests. *Id.* at ¶ 43. Ms. Goodson asked if
10 they maintained any potentially responsive hard copy records. She also said they should
11 provide information about where and how their potentially responsive ESI was maintained
12 because this information would be needed for IRS IT to collect their ESI through the EDR
13 process. *Id.* Ms. Goodson also advised the custodians that a self-search for potentially
14 responsive electronic records was unnecessary, as all of their ESI would be collected by IRS IT
15 and moved to a database where it could be searched using specific parameters. *Id.* at ¶ 44.
16 Some custodians found potentially responsive hard-copy documents, which were scanned and
17 added to the database containing ESI collect by IRS IT to be reviewed. *Id.* ¶ 47.

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20 Some responsive documents were found in the Chief Counsel's Concordance document
21 review and processing system. *Id.* at ¶ 50.

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23 After the filing of this suit, Mr. Hartford asked John Gordon, a partner at Quinn
24 Emanuel, requesting that he provide all of the material that the agency had provided to QE
25 under and in connection with the contract. Hartford Decl. at ¶ 51. Mr. Hartford also emailed
26 Carroll O'Connor, a QE paralegal working on the contract, directing her to send him the CDs
27 and thumb drives that the Service had provided to her firm so that the Service could copy that
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1 data to be searched in connection with this litigation. *Id.* at ¶ 52. In October 2015, Mr. Harford
2 received the CDs and thumb drives and the data was copied by P&A in November 2015. *Id.* ¶¶
3 54–55.

4 **F. Search for ESI Responsive to all Six Requests**

5 The IRS details in its Motion the general process by which IRS IT and others conducted
6 its search and review of ESI. Dkt. #63 at 9–12. This does not appear to be at issue in this
7 Motion.
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9 The laptop computers of custodians who had left the IRS before the collection of their
10 information had to be located for the ESI from their hard drives to be copied. Valvardi 2d Decl.
11 at ¶ 64. However, IRS IT discovered that the ESI on the laptop computers of some separated
12 custodians had been erased before the EDR, under IRS equipment retention practice at the time,
13 so that the computer could be re-used by another employee without disclosing sensitive
14 information stored on the laptop by the prior user. *Id.* The hard drives of laptop computers that
15 could be located, and whose ESI still had not been erased, were copied just like the other ESI
16 storage locations. *Id.* at ¶ 65. For the separated custodians whose laptops had been erased, ESI
17 from their laptop hard drives was copied from preserved ESI collected under previous EDRs.
18 *Id.* at ¶ 66. ESI of those separated custodians was also copied from the Microsoft Exchange
19 enterprise email server and from each custodian’s assigned network file storage location. *Id.*
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22 For every custodian, including those who had separated from the Service or Chief
23 Counsel, ESI was collected from their Microsoft Exchange email accounts and from the
24 network data file servers used by each custodian. *Id.* at ¶ 67. Some amount of email ESI,
25 ranging from 65 megabytes to 31.7 gigabytes, was collected for every custodian, including
26 those whose laptop hard drives had been erased. *Id.* ¶¶ 67–68.
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1 The IRS states that it decided not to search “disaster recovery backup magnetic media”
2 for records responsive to FOIA requests due to the cost involved and the low chance of finding
3 new information. Dkt. #63 at 11.

4 The IRS details cost-savings approaches to applying different search terms to different
5 custodians it believed were most likely to have relevant documents to the three distinct subject
6 matters in these FOIAs—the regulations and communications about them; the designated
7 summons; and the contracting with Boies and Quinn Emanuel. *Id.* at 11–12.

9 **G. Sam Maruca’s Hard Drive**

10 The IRS spends a couple pages detailing the unusual circumstances of recovering the
11 hard drive for Samuel Maruca, former director of the Service’s Transfer Pricing Office, who
12 left the IRS on August 1, 2014. *Id.* at 12–13. His hard drive should have been erased when he
13 retired. The IRS so informed the Court. Later, the IRS found his hard drive. The IRS also
14 searched the magnetic backup tapes, which was apparently an “extremely time-consuming,
15 burdensome, and labor-intensive process.” *Id.* at 13.

18 **H. This Action**

19 Ultimately, the IRS released more than 337,000 pages in full. It withheld about 7,200
20 pages in part and 38,200 pages in full. Dkt. #63-5 (“Valvardi Decl.”), ¶ 5. Over the last seven
21 years, the parties have apparently engaged in good faith back and forth efforts to review and
22 release these documents, as evidenced by countless joint status reports and unopposed motions
23 to extend deadlines. *See* Docket. The IRS now moves for summary judgment dismissal.

25 **III. DISCUSSION**

26 **A. Legal Standard**

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1 In FOIA cases, the usual summary judgment standards apply and “if there are genuine
2 issues of material fact in a FOIA case, the district court should proceed to a bench trial or
3 adversary hearing” and issue findings of fact and conclusions of law. *Animal Legal Def. Fund*,
4 836 F.3d at 990 (citing Fed. R. Civ. P. 52(a)(1)); *see also Cameranesi v. United States DOD*,
5 856 F.3d 626, 636 (9th Cir. 2017) (“We have now overruled this FOIA-specific summary
6 judgment standard, and instead apply our usual summary judgment standard.”).

8 Accordingly, summary judgment is appropriate where “the movant shows that there is
9 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
10 law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).
11 Material facts are those which might affect the outcome of the suit under governing law.
12 *Anderson*, 477 U.S. at 248. In ruling on summary judgment, a court does not weigh evidence
13 to determine the truth of the matter, but “only determine[s] whether there is a genuine issue for
14 trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins.*
15 *Corp. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

18 On a motion for summary judgment, the court views the evidence and draws inferences
19 in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v.*
20 *U.S. Dep’t of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable
21 inferences in favor of the non-moving party. *See O’Melveny & Meyers*, 969 F.2d at 747, *rev’d*
22 *on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a “sufficient
23 showing on an essential element of her case with respect to which she has the burden of proof”
24 to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

26 FOIA establishes “a judicially enforceable right to secure [government] information
27 from possibly unwilling official hands.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361, 96 S.
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1 Ct. 1592, 48 L. Ed. 2d 11 (1976) (citing S. Rep. No. 813, 89th Cong. (1st Sess. 1965)); *see also*
2 *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009). The aim of these disclosure requirements is
3 to “ensure an informed citizenry, vital to the functioning of democratic society, needed to check
4 against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins*
5 *Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978); *see also*
6 *Hamdan v. United States DOJ*, 797 F.3d 759, 770 (9th Cir. 2015); *Shannahan v. I.R.S.*, 672
7 F.3d 1142, 1148 (9th Cir. 2012).

9 Federal agencies have a duty to construe FOIA requests liberally. *Yagman v. Pompeo*,
10 868 F.3d 1075, 1080 (9th Cir. 2017). Upon receipt of a FOIA request, a federal agency “shall
11 make the records promptly available,” 5 U.S.C. § 552(a)(3)(A), and “shall make reasonable
12 efforts to search for the records” responsive to a request. *Id.* § 552(a)(3)(C)–(D). The agency
13 must establish that it conducted a search “reasonably calculated to uncover all relevant
14 documents.” *Silbaugh v. Pizzella*, No. C18- 1182-JCC, 2019 WL 4392502, at *3 (W.D. Wash.
15 Sept. 13, 2019) (citing *Zemansky v. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985)). Agencies must
16 respond to FOIA requests within twenty business days of receipt, *id.* § 552(a)(6)(A)(i), and
17 disclose responsive documents unless one or more of FOIA’s exemptions apply. These
18 exemptions are “narrowly construed.” *Shannahan*, 672 F.3d at 1149. An agency bears the
19 burden of establishing that an exemption applies. *Lahr*, 569 F.3d at 973. “Any reasonably
20 segregable portion of a record shall be provided” to the FOIA requester. 5 U.S.C. § 552(b).

24 B. Analysis

25 1. Adequacy of the Search

26 FOIA requires the responding agency to demonstrate that it has conducted a search
27 reasonably calculated to uncover all relevant documents. This showing may be made by
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1 “reasonably detailed, nonconclusory affidavits submitted in good faith.” *Lahr*, 569 F.3d at 986
2 (9th Cir. 2009) (quoting *Zemansky*, 767 F.2d at 571 (9th Cir. 1985)). Affidavits submitted by
3 an agency to demonstrate the adequacy of its response are presumed to be in good faith. *Grand*
4 *Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771, 224 U.S. App. D.C. 1 (D.C.C. 1981). However,
5 FOIA places the burden “expressly . . . ‘on the agency to sustain its action.’” *U.S. Dep’t of*
6 *Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 755 (1989). In evaluating the
7 adequacy of the search, the issue “is not whether there might exist any other documents
8 possibly responsive to the request, but rather whether the search for those documents was
9 adequate.” *Lahr*, 569 F.3d at 987. “[T]he failure to produce or identify a few isolated
10 documents cannot by itself prove the searches inadequate.” *Id.* at 988.

13 *Lahr* makes clear that a search is not inadequate for failure to turn up a single
14 document, *see id.* at 987 (citing *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315, 354
15 U.S. App. D.C. 230 (D.C. Cir. 2003)). However, “it may be the case that ‘if a review of the
16 record raises substantial doubt, particularly in view of well-defined requests and positive
17 indications of overlooked materials, summary judgment is inappropriate.” *Hamdan v. United*
18 *States DOJ*, 797 F.3d 759, 771, 2015 (quoting *Iturralde*, 315 F.3d at 314).

20 The IRS maintains that its search efforts were reasonable and adequate under law. Dkt.
21 #63 at 14–18. The IRS argues that the reasonableness of the search “is judged by the process,
22 and not the fruits of the search,” citing *Zaldivar v. United States Dep’t of Veterans Affairs*, No.
23 CV1401493PHXDGCDFM, 2016 WL 4429657, at *3 (D. Ariz. Aug. 22, 2016), *aff’d*, 695 F.
24 App’x 319 (9th Cir. 2017). *Id.* at 14. Anticipating Microsoft’s arguments, the IRS cites
25 *SafeCard Servs., Inc. v S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) for the proposition that a
26 requester cannot challenge the adequacy of a search by “purely speculative claims about the
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1 existence and discoverability of other documents.” *Id.* at 14–15. The IRS relies on its attached
2 declarations and contends that “once the agency submits declarations in support of its search,
3 the burden shifts to the requester to introduce evidence of bad faith to rebut the presumption.”
4 *Id.* at 15 (citing *SafeCard*, 926 F.2d at 1200).

5 The IRS points out that it searched for only its own “agency records,” *i.e.* searching
6 only for “records in the agency’s possession at the time of the requests or materials originating
7 from the agency.” *Id.* at 17. Put another way, the IRS is asserting that it was not required to
8 search for records outside its possession that were originated by the contractors at Boies
9 Schiller or Quinn Emanuel.
10

11 Microsoft argues that “Defendant, QE, and Boies, however, contractually expanded the
12 scope of Defendant’s agency records, defining Defendant’s property as including all records
13 provided by Defendant to QE and Boies, and all records QE and Boies created or assembled as
14 part of their respective engagements.” Dkt. #68 at 6 (citing Rosen Decl., Ex. 10 (QE Contract
15 at 10-11), Ex. 9 (Boies Contract at 9)). Microsoft contends that the IRS “constructively”
16 obtained and controlled certain unproduced records created by QE and Boies. *Id.* at 8 (citing
17 *Burka v. United States HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996)).
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19 The remainder of Microsoft’s Response on this issue leans heavily on vague,
20 conclusory accusations of an inadequate search without supporting detail. Microsoft states that
21 the IRS “applied inconsistent search conventions” and implemented “disparate search standards
22 for similarly situated custodians without reasonable explanation.” Dkt. #68 at 6. Microsoft
23 points to any and all irregularities in this search process, including the issues with Sam
24 Maruca’s hard drive and that the IRS failed to review any ESI from Gary Gray, an Office of
25 Chief Counsel executive. *Id.* at 14–16.
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1 On Reply, the IRS points out that “this Court has never adopted the *Burka* test” and it
2 argues that it “should decline to do so here because *Burka* conflicts with the possession
3 prerequisite for an agency record set forth in the Supreme Court (*Tax Analysts, Forsham*) and
4 Ninth Circuit (*Rojas*) precedent cited above.” Dkt. #78 at 4. The IRS adequately explains that
5 Gary Gray’s records were searched and argues that its efforts related to Sam Maruca’s hard
6 drives were “reasonably calculated to uncover all responsive records.” *Id.* at 7–8.

8 The Court has thoroughly reviewed the steps taken by the IRS to conduct the FOIA
9 searches at issue here. The Court agrees with the IRS that they were reasonable and adequate
10 under the circumstances of this case and the above controlling law. Microsoft has failed to
11 introduce evidence of bad faith or to otherwise demonstrate that the IRS’s actions were
12 unreasonable. The search efforts, as described above, meet the standard of being “reasonably
13 calculated to uncover all relevant records” and were made in good faith. The Court has no
14 reason to conclude otherwise. Any irregularities are adequately explained, and might be
15 expected given the size and scope of the requests.

17 The IRS was not required to search records outside its possession or those originating
18 from Boies Schiller or Quinn Emanuel under controlling case law. Those records are not
19 “agency records” for purposes of the FOIA. An agency’s contractual “right of access” to
20 materials held by a private party is not dispositive as to whether such materials are “agency
21 records.” *See Forsham v. Harris*, 445 U.S. 169, 171, 177-78 (1980). The FOIA excludes
22 “government contractor” from the definition of “agency.” *See* 5 U.S.C. § 552(f)(1); *see also*
23 *Forsham v. Harris*, 445 U.S. at 179 (“Congress excluded private grantees from FOIA
24 disclosure obligations by excluding them from the definition of ‘agency.’”). For contractor-
25 created materials to be transformed into “agency records,” they must have been received by the
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1 agency. *Id.* at 183-86; *Rojas v. Fed. Aviation Admin.*, 989 F.3d 666, 677 (9th Cir. 2021) (en
2 banc) (“Documents that are not in an agency’s possession do not constitute ‘agency records’
3 even if the agency could have obtained them by asking a third party to produce them”), *cert.*
4 *denied*, 142 S. Ct. 753, 211 (2022); *see also Am. Small Bus. League v. U.S. Small Bus. Admin.*,
5 623 F.3d 1052, 1053 (9th Cir. 2010). The Court declines to apply the test from *Burka, supra* to
6 find that the IRS constructively controlled these records.
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8 This is not a basis to deny summary judgment.

9 **2. Adequacy of the *Vaughn* Index**

10 Anticipating this issue, the instant Motion argues, in a footnote:

11 “The adequacy of a *Vaughn* Index is not defined by its form, but
12 rather its substance.” *People for the Am. Way Found. v. Nat’l Park*
13 *Serv.*, 503 F. Supp. 2d 284, 294–95 (D.D.C. 2007) (citation
14 omitted). A *Vaughn* Index is not expected to be “a work of
15 literature,” and “agencies are not graded on the richness or
16 evocativeness of their vocabularies,” *Landmark Legal Found. v.*
17 *IRS*, 267 F.3d 1132, 1138 (D.C. Cir. 2001), nor on the length of
18 their document descriptions, *Judicial Watch, Inc. v. FDA*, 449 F.3d
19 141, 146 (D.C. Cir. 2006). The relevant inquiry in analyzing the
20 adequacy of a *Vaughn* Index is “whether the index provide[s] a
21 relatively detailed justification, specifically identif [ies] the reasons
22 why a particular exemption is relevant and correlat[es] those
23 claims with the particular part of a withheld document to which
24 they apply.” *People for the Am. Way Found.*, 503 F. Supp. 2d at
25 295 (internal quotation marks and quotation omitted).

26 Dkt. #63 at 19 n.2.

27 Microsoft argues that the *Vaughn* index is inadequate, “repeatedly reciting as the bases
28 for exemptions claimed the same generalized, substance-free entries, failing to include requisite
29 data for each document withheld, and improperly identifying document families.” Dkt. #68 at
30 16. The specific data that is withheld for some documents includes the “date, author,
31 recipient(s) and subject.” *Id.* at 17. Microsoft criticizes the IRS for relying on the documents

1 themselves to provide justification for redacted data, which it calls a “two-source convention.”
2 *Id.* at 18. Microsoft states that the IRS has separated attachments from emails and thus
3 destroyed “document family data.” *Id.*

4 The IRS replies that “categorization and repetition provide efficient vehicles by which a
5 court can review withholdings that implicate the same exemption for similar reasons,”
6 “[e]specially where the agency has disclosed and withheld a large number of documents,”
7 citing *Jud. Watch, Inc. v. FDA*, 449 F.3d 141, 147 (D.C. Cir. 2006) (“No rule of law precludes
8 [an agency] from treating common documents commonly.”). Dkt. #78 at 10. The IRS also
9 cites to *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1138 (D.C. Cir. 2001) for the
10 proposition that “[i]t is not the agency's fault that thousands of documents belonged in the same
11 category, thus leading to exhaustive repetition.” *Id.* The IRS asserts that when not otherwise
12 apparent on the face of a document, the *Vaughn* index includes date, author, recipient, and
13 subject, and argues that Microsoft fails to identify a specific list of offending entries. *Id.* at 11.
14 The IRS calls the alleged destruction of document family data “cursory and context-free.” *Id.*
15 The IRS asserts that it is entitled to treat emails and attachments as separate records, and
16 explains its process for when it concluded that an attachment was not responsive to the FOIA
17 requests. *Id.* at 11–12.

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21 Considering the *Vaughn* index and the declarations filed in this case together, the Court
22 finds that the information provided in that index was not inadequate for the general reasons
23 argued by Microsoft. The use of repetitive entries does not reflect a lack of substantive
24 information but rather the large number of documents at issue and, perhaps, the repetitive
25 nature of work at the IRS. While the IRS’s *Vaughn* index might be monotonous, or even less-
26 than-helpful from the perspective of Microsoft, courts have found that repetitive entries are
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1 efficient for the Court and certainly the producing agency. Microsoft’s “cursory and context-
2 free” criticism of the *Vaughn* index is adequately rebuffed by the IRS’s explanation of its
3 procedure, perhaps more complicated than it needed to be, for reporting date, author, recipient,
4 and subject information and document family data. Cutting out nonresponsive records appears
5 to be an appropriate use of agency discretion. Microsoft’s frustrations with the *Vaughn* index
6 do not preclude summary judgment dismissal of this case.
7

8 **3. Exemptions**

9 The IRS has withheld or redacted documents based on FOIA exemptions 552(b)(2),
10 (b)(3), (b)(4), (b)(5), (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E) (Exemptions 2, 3, 4, 5, 6, 7A,
11 7C, and 7E). Microsoft does not challenge the IRS’s use of exemptions 7(C) and 7(E). Dkt.
12 #68 at 29 n.25. The remaining exemptions are addressed individually below.
13

14 **i. Exemption 2**

15 Exemption 2 protects from disclosure matters “related solely to the internal personnel
16 rules and practices of an agency.” 5 U.S.C. § 552(b)(2). Exemption 2 thus “applies to internal
17 rules and practices exclusively connected with ‘the selection, placement, and training of
18 employees,’ including ‘hiring and firing.’” *Rojas v. Fed. Aviation Admin.*, 941 F.3d 392, 402
19 (9th Cir. 2019 (citing *Milner v. Dep’t of Navy*, 562 U.S. 562, 569–70 (2011))).
20

21 The IRS points to the declaration of Christopher Valvardi to support the use of this
22 exemption for withholding “information relates solely to agency personnel matters, such as the
23 placement of employees for certain assignments.” Dkt. #63 at 19–20 (citing Valvardi Decl. ¶
24 11).
25

26 Microsoft disagrees with the use of this exemption for four documents, but cites in
27 briefing to no examples, stating only “certain withheld documents address decisions regarding
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1 Plaintiff's audit and the assignment of Defendant's personnel to the examination." Dkt. #68 at
2 31. Microsoft compares these to a document where the exemption 2 claim was rejected *in*
3 *Schwaner v. Dep't of the Air Force*, 898 F.2d 793 (D.C. Cir. 1990), a "roster including the
4 names and military duty addresses of Air Force personnel." *Id.*

5 Microsoft provides no evidence or argument to support the assertion that these
6 documents relate to *decisions* regarding Plaintiff's audit. They are not comparable to a roster
7 including names and addresses. These documents appear to be exclusively "connected with"
8 the placement of employees and with personnel practices. The IRS has met its burden of
9 establishing that this exemption applies.
10

11 **ii. Exemption 3**

12 FOIA exemption 3 permits an agency to withhold information that is specifically
13 exempted from disclosure by statute. 5 U.S.C. § 552(b)(3). At issue in this Motion are
14 documents withheld under Sections 6103 of Title 26.
15

16 Section 6103(a) provides that tax "returns" and "return information" are to be kept
17 confidential, unless disclosure is permitted by Title 26. *Church of Scientology of California v.*
18 *IRS*, 484 U.S. 9 (1987). "Return information" is defined and construed broadly, and includes
19 practically any data "received by, recorded by, prepared by, furnished to, or collected by the
20 Secretary with respect to a return or with respect to the determination of the existence of, or
21 possible existence of liability (or the amount thereof) of any person[.]" 26 U.S.C. §
22 6103(b)(2)(A). Third parties may not obtain such "return information" of another person
23 without that person's written authorization. *See* 26 U.S.C. § 6103(c), 26 C.F.R. §
24 601.702(c)(4)(i)(E) & (c)(5)(iii).
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1 Section 6103(e)(7) provides that “[r]eturn information with respect to any taxpayer may
2 be open to inspection or by disclosure . . . if the Secretary [of the Treasury] determines that
3 such disclosure would not seriously impair Federal tax administration.”

4 The IRS claims exemption 3 protection for 2,512 records. The records withheld under §
5 6103(a) contain “the tax information of third parties, including: names, taxpayer identification
6 numbers, or other identifying information; the fact of whether a particular taxpayer’s return is
7 being examined; and descriptions of examination or collection activity.” Dkt. #63 at 21 (citing
8 Valvardi Decl. ¶ 15). The records withheld under § 6103(e)(7) contain “communications and
9 activities involved in the Service’s examination of Plaintiff, or, communications and activities
10 related to its examinations or other enforcement activities pertaining to other taxpayers.” *Id.* at
11 22 (citing Dkt. #63-9 (“Choi Decl.”), ¶¶ 10-13; Dkt. #63-3 (“Hartford 2d Decl.”), ¶¶ 7-11).
12 The Second Declaration of James Hartford states that releasing these records to Microsoft now
13 could provide it “with much earlier and greater access to information about the Service’s
14 examination than plaintiff would otherwise be entitled to receive in administrative or litigation
15 proceedings, whereas the Government is not entitled to a corresponding degree of discovery in
16 these proceedings’ current posture.” Hartford 2d Decl. at ¶ 11.

17 Microsoft criticizes the *Vaughn* index for only providing general descriptions of these
18 documents but fails to talk about any specifics. Microsoft say the IRS’s declarations “simply
19 parrot the 26 U.S.C. § 6103(e)(7) standard” without proving that the disclosure of the
20 information would prematurely aid Microsoft’s legal strategy in subsequent administrative or
21 litigation proceedings. Dkt. #68 at 28.

22 Given the limited argument above, the Court will not deny summary judgment based on
23 this exemption or order the production of any documents. The IRS’s cited declarations provide
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1 adequate detail justifying the IRS’s withholdings under § 6103(e)(7) and the IRS’s *Vaughn*
2 index details the tax return information records withheld under these exemptions. Given the
3 length and nature of these proceedings, it is clear to the Court without further argument from
4 the IRS that Microsoft would very likely benefit from the withheld information in future
5 administrative or litigation proceedings. The IRS has met its burden of establishing that this
6 exemption applies.
7

8 **iii. Exemption 4**

9 Exemption 4 protects “trade secrets and commercial or financial information obtained
10 from a person” that is “privileged or confidential.” 5 U.S.C. § 552(b)(4). The redacted
11 information here includes information provided by various contractors before, during, or after
12 the contract such as contractors’ proposed, prospective, or actual billing schedules, as well as
13 information on invoice documents reflecting amounts billed, hours worked, and bank account
14 numbers. Valvardi Decl. at ¶¶ 18–19.
15

16 Microsoft takes issue with 34 documents withheld under this exemption. The Court
17 finds that the withheld information is “commercial or financial information” under the ordinary
18 meaning of that phrase. *See Pub. Citizen Health Res. Group v. FDA*, 704 F.2d 1280, 1290
19 (D.C. Cir. 1983) (“Records that actually reveal basic commercial operations, . . . or relate to the
20 income-producing aspects of a business,” fall within the scope of “commercial” information).
21 This is the type of information that would typically be confidential. *See Rocky Mountain Wild,*
22 *Inc. v. United States Forest Serv.*, No. 18-CV-03065-MEH, 2021 WL 825985, at *19 (D. Colo.
23 Mar. 4, 2021) (regarding “corporate bank account numbers, estimated insurance premiums, and
24 information provided in connection with billing statements from Plaintiff’s counsel”); *Calderon*
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1 v. *U.S. Dep't of Agriculture*, 236 F. Supp. 3d 96, 119 (D.D.C. 2017). The IRS has met its
2 burden.

3 iv. Exemption 5

4 FOIA exemption 5 protects from disclosure “inter-agency or intra-agency
5 memorandums or letters which would not be available by law to a party other than an agency in
6 litigation with the agency.” 5 U.S.C. § 552(b)(5). As the language suggests, exemption 5
7 incorporates those privileges which the government enjoys in pretrial discovery under relevant
8 statutes and case law. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984).
9 This exemption incorporates the governmental deliberative process privilege, the attorney-
10 client privilege and the work-product doctrine. *See Tax Analysts v. IRS*, 294 F.3d 71, 76 (D.C.
11 Cir. 2002).

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14 The Vaughn index cites exemption 5 as the basis for withholding approximately 6,242
15 documents or parts thereof.

16 Deliberative process privilege

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18 Defendant bears the burden of establishing the deliberative process involved and the
19 role played by the documents at issue in that process. *See Senate of Puerto Rico v. DOJ*, 823
20 F.2d 574, 585 (D.C. Cir. 1987). Documents qualify as predecisional and deliberative only if
21 they “reflect[] advisory opinions, recommendations, and deliberations comprising part of a
22 process by which governmental decisions and policies are formulated.” *Tax'n With*
23 *Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981). Microsoft cites to *Safeway,*
24 *Inc. v. IRS*, No. C 05-3182 SBA, 2006 U.S. Dist. LEXIS 81078, at *26 (N.D. Cal. Oct. 24,
25 2006) as a case on point. In *Safeway*, the court found that “the IRS’[s] decisionmaking about
26 the extent of [p]laintiff’s tax liability is not the sort of deliberative process meant to be
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1 addressed by the privilege.” 2006 U.S. Dist. LEXIS 81078, at *26. The court found that
2 characterizing documents as “predecisional simply because they play into an ongoing audit
3 process would be a serious warping of the meaning of the word.” *Id.*, at *26 (quoting *Coastal*
4 *States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980)).

5 The IRS distinguishes *Safeway* by arguing that court “assumed that the documents at
6 issue lacked the subjective, personal thoughts of IRS employees in the absence of a sufficient
7 description of the documents’ contents, which is not the situation here.” Dkt. #78 at 14 n.16.
8 The IRS counters by citing to some cases of its own where the deliberative process privilege
9 was upheld for workpapers and other audit documents. *Id.* (citing *Highland Cap. Mgmt., LP v.*
10 *Internal Revenue Serv.*, 408 F. Supp. 3d 789, 815 (N.D. Tex. 2019) (finding documents to be
11 clearly “pre-decisional, since they were generated prior to the IRS’s final decision to adjust
12 Plaintiff’s tax liability”) and *Moye, O’Brien, O’Rourke, Hogan, & Pickert v. Nat’l R.R.*
13 *Passenger Corp.*, 376 F.3d 1270, 1280 (11th Cir. 2004)).

14 Further, the IRS points to the Valvardi declaration as containing “much of the
15 information that Plaintiff complains is lacking, including the function and role of the
16 documents, many of which are drafts...” *Id.* at 15 (citing Valvardi Decl. at ¶¶28–43).

17 The Court’s decision here does not seem to be bound to controlling law. Each party
18 cites to district court cases coming to different conclusions. The Court finds that, given the
19 scope and unusual nature of this case, the documents at issue are not related to a run-of-the-mill
20 assessment of a company’s tax liability, but closer to a process by which governmental
21 decisions and policies are formulated. The explanation for the use of this privilege is sufficient
22 and seems better than what was available to the court in *Safeway*. Microsoft’s other criticisms
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1 about vagueness in *Vaughn* index entries have been dealt with above. The IRS has met its
2 burden.

3 **Attorney client privilege**

4 The attorney-client privilege, as incorporated into exemption 5, protects from disclosure
5 “confidential communications between an attorney and his client relating to a legal matter for
6 which the client has sought professional advice.” *Mead Data Central, Inc. v. Dep’t of the Air*
7 *Force*, 566 F.2d 242, 252 (D.C. Cir. 1977).
8

9 Based on the information in the Valvardi declaration and the *Vaughn* index, the IRS
10 argues that the documents withheld under this privilege were communications “(1) among
11 government attorneys reflecting the facts provided by the Service in order to obtain advice, or
12 reflect the advice being developed by government attorneys to benefit the agency; (2) among
13 Chief Counsel attorneys relating to legal advice requested on behalf of the Service; and (3)
14 among Service employees and examiners and Chief Counsel for legal advice on Plaintiff’s
15 examination. Dkt. #63 at 27–36 (citing Valvardi Decl. at ¶¶ 21–26).
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18 The IRS claims attorney-client privilege for 4,821 records or parts thereof. Microsoft’s
19 first states that “in many cases” this privilege is invoked for documents “with purely factual
20 information.... including audit workpapers.” Dkt. #68 at 20–21. Again, Microsoft does not
21 provide any specifics or further detail. Microsoft then argues that this privilege cannot apply to
22 documents created by QE and Boies contractors because the record shows that these attorneys
23 “provided audit support, not legal counsel.” *Id.* at 21 (citing several sources in the record).
24 Finally, Microsoft maintains that “[t]he attorney-client privilege also does not apply to
25 communications regarding the proposed and temporary regulations.” *Id.* (citing *Coastal States*
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1 *Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862-63 (D.C. Cir. 1980)). Microsoft points to no
2 specific documents.

3 On Reply, the IRS states:

4 Contrary to Plaintiff's unfounded contentions based on its warped
5 reading of the agency's representations in the prior summons
6 enforcement action, the IRS's evidence, testimony, and briefing
7 has been consistent: QE was to provide the services of an expert in
8 commercial litigation and assist the IRS in "preparing, organizing
9 and presenting the factual record and *legal analysis* of the case."
10 (Dkt. No. 15-cv-00102-PSM [sic] doc. 36-4 (Contract) at 7, 10
11 (emphasis added).) Eli Hoory further testified that QE was hired to
12 provide the "kind of legal consultation and advice . . . that a
13 complex commercial litigator would have." (Rosen Decl. Ex. 7
14 (Tr.) at 52-53); *see also* Dkt. No. 15-cv-00102-PSM [sic] doc. 92
15 at pdf [sic] 15-16 ("The goal was to obtain an independent
16 evaluation of the Microsoft audit and also to obtain assistance with
17 development of facts and legal theories"). Indeed, government
18 counsel even raised an objection, consistent with the above, based
19 on attorney client privilege regarding IRS discussions with QE,
20 and that objection was sustained. (Tr. at 119-20.) Despite
21 Plaintiff's cherry picking, the IRS thus properly asserts attorney
22 client privilege with respect to records exchanged with QE. *See*
23 *United States v. Chen*, 99 F.3d 1495 (9th Cir. 1996) (rebuttable
24 presumption that a lawyer is hired to give legal advice) *cert.*
25 *denied*, 520 U.S. 1167 (1998).

18 Dkt. #78 at 13-14 (emphasis in original).

19 While facts alone are not protected by this privilege, communications between an
20 attorney and a client are, even if those communications contain facts, if the purpose of the
21 communication is to enable the attorney to provide legal advice. The documents Microsoft
22 objects to for being just facts are apparently workpapers provided to IRS Chief Counsel
23 attorneys as part of a request for advice on a particular issue, while others are workpapers
24 containing handwritten notes or analysis that were sent to an attorney to solicit or inform legal
25 advice. Microsoft's problem with attorney client documents related to the temporary
26 regulations fail to point to specific documents or deal with the evidence submitted by the IRS in
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1 declarations related to the use of attorneys to craft those regulations. Microsoft's first and third
2 points are insufficiently argued and will not serve as a basis for denying summary judgment.

3 Microsoft's second argument certainly gives the Court pause. At times the IRS has
4 portrayed its use of QE and Boies contractors differently. However, the Court is convinced that
5 a careful, close reading of the record demonstrates that these attorney contractors were hired in
6 part for legal analysis and that a rebuttable presumption applies here. This was not a routine
7 examination where contractors could be assumed to be doing routine auditing work rather than
8 providing legal advice. Microsoft has not successfully rebutted that presumption.
9

10 **Work product privilege**

11 Work product protection under exemption 5 protects materials prepared by an attorney
12 or others in anticipation of litigation. The IRS initially claimed work product privilege for 635
13 documents. Microsoft points out that, although this audit process has been lengthy, it was not
14 clear when these documents were created that there would be litigation, and that the IRS has
15 said as much previously. Dkt. #68 at 22–24. In its Reply brief, the IRS concedes that point and
16 withdraws its work-product claims for any materials pertaining solely to Microsoft's audit.
17 Dkt. #78 at 16. The IRS has amended its *Vaughn* index (Dkt. #78-2) and submitted a
18 supplemental declaration (Dkt. #78-1) to support the continued withholding of documents that
19 relate to: “(1) tax cases involving taxpayers other than Plaintiff which were anticipated or
20 currently being litigated; or (2) the enforcement/anticipated litigation of a summons
21 enforcement matter involving Plaintiff.” *Id.* The record demonstrates that these remaining
22 documents were prepared by attorneys or by an IRS employee at the supervision of an attorney.
23 The Court is satisfied that this issue has been resolved and does not serve as a basis for
24 precluding summary judgment.
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1 FOIA exemption 7 exempts from disclosure “records or information compiled for law
2 enforcement purposes.” 5 U.S.C. § 552(b)(7). The threshold determination under exemption 7
3 is whether the documents at issue were (a) compiled by a law enforcement agency; and (b)
4 compiled for a law enforcement purpose(s). *Abramson v. FBI*, 456 U.S. 615, 622 (1982). The
5 IRS is a law enforcement agency for purposes of exemption 7. *Church of Scientology v. IRS*,
6 995 F.2d 916, 919 (9th Cir. 1993); *Keys v. DOJ*, 830 F.2d 337, 340 (D.C. Cir. 1987). Courts
7 have consistently held that records compiled for civil or criminal investigations by the IRS are
8 “records or information compiled for law enforcement purposes.” *Tax Analysts*, 294 F.3d at 77.
9

10 FOIA exemption 7(A) applies to information whose disclosure “could reasonably be
11 expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). It is properly
12 invoked when release of a document would hinder an agency’s ability to control or shape an
13 investigation. *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996).
14

15 The IRS claims exemption 7(A) protection for 2,365 records. Given the nature of the
16 audit against Microsoft and the obvious intent of Microsoft to inquire about that audit via these
17 FOIA requests, it would appear that some use of this exemption is to be expected. The IRS
18 cites several cases to support this exemption under these circumstances:
19

20 Under exemption 7(A), the Service must show that records could
21 reasonably be expected to interfere with enforcement proceedings
22 by showing that (1) law enforcement proceeding is pending or
23 prospective, and (2) release of information about it could
24 reasonably be expected to cause articulable harm. *See, e.g., NLRB*
25 *v. Robins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (holding
26 that government must show how records “would interfere with a
27 pending enforcement proceeding”); *Sussman v. U.S. Marshals*
28 *Serv.*, 494 F.3d 1106, 1113–14 (D.C. Cir. 2007) (discussing dual
elements necessary to invoke exemption 7(A): reasonably
anticipated law enforcement proceeding and harm if information
released).

1 A court may make generic determinations that disclosure of certain
2 types of investigatory records would generally interfere with
3 certain kinds of enforcement proceedings. *Robbins Tire & Rubber*,
4 437 U.S. at 223–24; *see also Spannaus v. DOJ*, 813 F.2d 1285,
5 1288 (4th Cir. 1987). Records may be withheld categorically or
6 individually from disclosure under FOIA exemption 7(A). *DOJ v.*
7 *Reporters’ Comm. for Freedom of the Press*, 489 U.S. 749 (1989)
8 (where the Court found that records could be categorically
9 withheld under FOIA exemption 7(C), it relied in part on cases in
10 which records were categorically withheld under 7(A)).

11 In determining whether disclosure of a category of records would
12 “interfere” with enforcement proceedings, Courts have also
13 interpreted “interference” broadly. For example, in *Robbins Tire*,
14 the Supreme Court found that permitting a plaintiff earlier and
15 greater access to documents or other information collected by the
16 agency than it would normally be entitled, constitutes the type of
17 interference exemption 7(A) was enacted to prevent. *Robbins Tire*
18 *& Rubber*, 437 U.S. at 236. Other courts have found that
19 interference with enforcement proceedings occurs by revealing the
20 identities of potential witnesses, the nature, scope, direction, and
21 limits of the investigation, the transactions being investigated,
22 information on third-party contacts, the evidence obtained to date,
23 the reliance the agency places on the evidence, and the
24 Government’s strategies and theories. *Curran v. DOJ*, 813 F.2d
25 473, 474 (1st Cir. 1987); *Barney v. IRS*, 618 F.2d 1268, 1273 (8th
26 Cir. 1980). In upholding this exemption, the cases add that FOIA
27 was not intended to be used as a discovery tool. *See United States*
28 *v. Murdock*, 548 F.2d 599, 602 (5th Cir. 1977).

19 Dkt. #63 at 30–31. This case law supports the IRS’s use of boilerplate language applying this
20 exemption to categories of documents. Microsoft fails to argue, in a nonconclusory way, how
21 the so-called boilerplate language fails to satisfy the above standards. The Court gives
22 credence to the IRS that the material withheld here includes “information on the agency’s focus
23 or interest in specific facts, transactions, individuals, evidence, or claims which would
24 prematurely disclose the nature, scope, direction, and strategy of the audit” and that this would
25 naturally harm the IRS’s enforcement activities. *See id.* at 31 (citing Valvardi Decl. at ¶ 56).
26 The use of this exemption does not preclude summary judgment.
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1 **C. Microsoft's Surreply**

2 Microsoft has filed a Surreply arguing that the IRS improperly added new arguments
3 and facts on Reply, and that newly attached declarations are made by a declarant without
4 personal knowledge. Dkt. #80. The Court finds that any new arguments or facts are responsive
5 to Microsoft's brief and that Microsoft has no legitimate claim of prejudice. The Court
6 declines to strike anything in the declarations for lack of personal knowledge given the nature
7 of the declarant's work on this complex case and the Court's own ability to parse the weight of
8 any evidence in resolving this Motion.
9

10 **IV. CONCLUSION**

11 Having reviewed the relevant briefing and the remainder of the record, the Court hereby
12 finds and ORDERS that the IRS's Motion for Summary Judgment. Dkt. #63, is GRANTED.
13 Plaintiff's remaining claims are DISMISSED. This case is CLOSED.
14

15 DATED this 18th day of January, 2023.

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18 RICARDO S. MARTINEZ
19 UNITED STATES DISTRICT JUDGE
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