

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JUSTIN H. PHILLIPS,

Plaintiff,

v.

U.S. CENSUS BUREAU,

Defendant.

**PARTIES' JOINT RULE
26(f) REPORT**

No. 22-CV-09304

Pursuant to Federal Rule of Civil Procedure 26(f) and the Notice of Court Conference dated December 7, 2022, the parties met and conferred by videoconference on December 12, 2022. However, the parties were not able to agree on a proposed case schedule and therefore set forth each party's proposal separately.

I. Plaintiff's Proposed Case Schedule

Plaintiff proposes that the Court set deadlines for discovery and dispositive motions as set out in Appendix A. Limited discovery is appropriate to resolve complex factual issues at the heart of this Freedom of Information Act ("FOIA") case.

Plaintiff requested two data files under FOIA: the 2020 Redistricting Data Summary Noisy Measurement Persons File (the "2020 NMF"), and the 2010 Census Production Settings Demonstration Data Product Noisy Measurement Persons File (the "2010 NMF"). Defendant denied access to the 2020 NMF under FOIA Exemption 3, 5 U.S.C. § 552(b)(3), relying on a separate statutory protection for census respondents' privacy. *See* Appendix B (citing 13 U.S.C. § 9(a)(2)). Defendant also denied access to the 2010 NMF, stating that it was destroyed in March 2022. *Id.* Discovery would help the Court efficiently determine (1) whether releasing the 2020

NMF would enable outsiders to reconstruct “the data furnished by any particular establishment or individual” in the census, 13 U.S.C. § 9(a)(2), such that FOIA Exemption 3 applies; and (2) whether Defendant destroyed the 2010 NMF lawfully and in good faith.

“The Court has authority to order discovery to determine whether withheld information falls within a FOIA exemption.” *Associated Press v. U.S. Dep’t of Defense*, 395 F. Supp. 2d 17, 19 (S.D.N.Y. 2005) (Rakoff, J.) (citing *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)). Here, discovery is needed to test Defendant’s fact-intensive defenses that releasing the 2020 NMF would compromise census respondents’ privacy and that the 2010 NMF was properly destroyed. Discovery is especially appropriate because Defendant has previously claimed—contrary to its litigation position—that the 2020 NMF is privacy protected. *See, e.g.*, Statement of Michael B. Hawes, Census Bureau Senior Advisor for Data Access and Privacy, U.S. Census Bureau, Transcript, Differential Privacy 201 and the TopDown Algorithm (May 13, 2021) (“the noisy measurement step is what protects privacy in the algorithm”).¹ Plaintiff therefore respectfully requests that the Court enter the proposed Civil Case Management Plan enclosed as Appendix A.

II. Defendant’s Proposed Case Schedule

As Plaintiff acknowledges, the agency has made a final determination with respect to the two electronic files sought by the FOIA request: it has determined that one of the electronic files was deleted months prior to the submission of Plaintiff’s July 2022 FOIA request, and it has withheld the second file pursuant to Exemption 3. Accordingly, the Government requests that the Court enter a briefing schedule for cross-motions for summary judgment. The Government is prepared to file its motion for summary judgment by February 17, 2023.

¹ Available at <https://www2.census.gov/about/training-workshops/2021/2021-05-13-das-transcript.pdf>.

Rather than agreeing to a prompt resolution of this matter through cross-motions for summary judgment, as is the standard in FOIA litigation, Plaintiff instead asks this Court to enter a schedule permitting the full panoply of discovery, including requests for production, interrogatories, depositions, requests for admission, and expert discovery. But “as a general rule, discovery in a FOIA case is ‘rare,’” and even “rarer” in the case where discovery is sought prior to summary judgment. *In re Clinton*, 973 F.3d 106, 113 (D.C. Cir. 2020), *cert. denied sub nom. Jud. Watch, Inc. v. Clinton*, 141 S. Ct. 1740 (2021) (citation omitted). Instead, FOIA cases are generally resolved on the basis of agency declarations submitted in support of summary judgment, without the need for discovery. *Ramaci v. FBI*, 568 F. Supp. 3d 378, 386 (S.D.N.Y. 2021). Because agency affidavits are “accorded a presumption of good faith,” discovery relating to the agency’s search and the exemptions it claims for withholding records is generally not permitted if the agency affidavits are sufficient. *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). As the need for discovery cannot be determined until the Court can assess the sufficiency of the Government’s affidavits, discovery prior to the filing of the Government’s summary judgment motion is not appropriate. *See, e.g., Taylor v. Babbitt*, 673 F. Supp. 2d 20, 23 (D.D.C. 2009) (“In the exceptional case in which a court permits discovery in a FOIA action, such discovery should only occur after the government has moved for summary judgment.”).

Moreover, plaintiff has not come close to establishing the type of extraordinary circumstances required to permit discovery in a FOIA case. The Second Circuit has made clear that, for discovery to be authorized in a FOIA case, “the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency’s affidavits or declarations . . . or provide some tangible evidence that an exemption claimed by the agency should not apply or summary judgment is otherwise inappropriate.” *Carney*, 19 F.3d at 812; *see also Pietrangelo v. U.S. Army*,

334 F. App'x 358, 360 (2d Cir. 2009) (“Once the agency has produced adequate affidavits, ‘the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency’s affidavits or declarations,’ in order to justify discovery.”); *Junk v. Bd. of Governors of Fed. Rsrv. Sys.*, No. 19 CIV. 385 (DLC), 2020 WL 6782214, at *3 (S.D.N.Y. Nov. 18, 2020), *aff’d*, No. 19-3125-CV (L), 2022 WL 363776 (2d Cir. Feb. 8, 2022) (“To justify discovery, Junk ‘must make a showing of bad faith on the part of the agency sufficient to impugn the agency’s affidavits or declarations’”). Plaintiff has not even attempted to meet his burden of demonstrating bad faith on the part of the Government. Instead, Plaintiff cites this Court’s decision in *Associated Press v. U.S. Dep’t of Defense*, 395 F. Supp. 2d 17 (S.D.N.Y. 2005), as support for the proposition that the Court enjoys unfettered discretion to order discovery in a FOIA case. That decision provides no support for Plaintiff’s request for discovery in this case. The Court in *Associated Press*, relying upon the aforementioned *Carney* standard, ordered discovery only after the Government filed its summary judgment papers, and after it had determined that the Government’s papers did not (and could not) address whether the third parties whose privacy interests were at issue had or were willing to waive those interests. 395 F. Supp. 2d at 19-20. Nothing in the *Associated Press* case stands for the proposition that district courts have discretion to order discovery prior to the filing of summary judgment papers, or when the standard set forth in *Carney* has not been met.

Contrary to Plaintiff’s assertion that discovery will allow the Court to efficiently determine whether the asserted exemption applies to the withheld file, the most efficient case management would be to proceed directly to summary judgment. To the extent Plaintiff seeks further clarification as to the basis for the Government’s assertion of Exemption 3, such information will be provided in the Government’s moving declarations, which are afforded a presumption of good

faith.² If, upon consideration of the Government's motion for summary judgment, the Court determines that the Government's declarations are insufficient to establish the propriety of its claimed exemption, it can then consider whether Plaintiff has met his burden of establishing that properly tailored discovery would be appropriate under the *Carney* standard.

Dated: December 13, 2022

Respectfully submitted,

DAMIAM WILLIAMS
United States Attorney
Attorney for Defendant

/s/ Jeannette A. Vargas
JEANNETTE A. VARGAS
Assistant United States Attorney
for the Southern District of New York
86 Chambers Street, Third Floor
New York, New York 10003
(212) 637-2678
Jeannette.vargas@usdoj.gov

/s/ Theresa J. Lee
Theresa J. Lee
Ruth Greenwood*
ELECTION LAW CLINIC
HARVARD LAW SCHOOL
6 Everett Street, Ste. 4105
Cambridge, MA 02138
(617) 496-0370
thlee@law.harvard.edu
rgreenwood@law.harvard.edu

*Motion for admission *pro hac vice* pending

Jordan A. Goldstein
Jeffrey Zalesin
SELENDY GAY ELSBERG PLLC
1290 Avenue of the Americas
New York, NY 10104
(212) 390-9000
jgoldstein@selendygay.com
jzalesin@selendygay.com

Attorneys for Plaintiff

² Moreover, although the reasons for the Government's deletion of the 2010 Census Production Settings Demonstration Data Product Noisy Measurement Persons File months prior to the submission of the instant FOIA request is not relevant to resolving this action, *see In re Clinton*, 973 F.3d at 112-13 (granting writ of mandamus with respect to district court's discovery order permitting inquiry into whether a motive for Secretary Clinton to maintain emails on a private server was to evade the requirements of FOIA, as the only relevant inquiry pertained to the actions taken by the agency following the submission of the FOIA request), Census will address the circumstances of this deletion in its moving papers as well.

EXHIBIT A

Revised Form D—For cases assigned to Judge Rakoff
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Effective September 10, 2010

----- x
Phillips

Plaintiff(s),

CIVIL CASE MANAGEMENT PLAN
(JUDGE RAKOFF)

-v-

22-9304 (JSR)

US Bureau of the Census

Defendant(s).
----- x

**This Court requires that this case shall be ready for trial on
5-20-2023.**

After consultation with counsel for the parties, the following Case Management Plan is adopted. This plan is also a scheduling order pursuant to Rules 16 and 26(f) of the Federal Rules of Civil Procedure.

- A. The case (is) (is not) to be tried to a jury. [Circle as appropriate]
- B. Joinder of additional parties must be accomplished by December 30, 2022.
- C. Amended pleadings may be filed without leave of Court until December 30, 2022.
- D. Discovery (in addition to the disclosures required by Fed. R. Civ. P. 26(a)):
 - 1. Documents. First request for production of documents, if any, must be served by January 6, 2023. Further document requests may be served as required, but no document request may be served later than 30 days prior to the date of the close of discovery as set forth in item 6 below.
 - 2. Interrogatories. Interrogatories pursuant to Rule 33.3(a) of the Local Civil Rules of the Southern District of New York must be served by January 6, 2023. No other interrogatories are permitted except upon prior express permission of Judge Rakoff. No Rule 33.3(a) interrogatories need be served with respect to disclosures automatically required by Fed. R. Civ. P. 26(a).
 - 3. Experts. Every party-proponent of a claim (including any counterclaim, cross-claim, or third-party claim) that intends to offer expert testimony in respect of such claim must make the disclosures required by Fed. R. Civ. P. 26(a)(2) by February 17, 2023. Every party-opponent of such claim that intends to offer expert testimony in opposition to such claim must make the disclosures required by Fed. R. Civ. P. 26(a)(2) by March 13, 2023. No expert testimony (whether designated as “rebuttal” or otherwise) will be permitted by other experts or beyond the scope of the opinions covered by the aforesaid disclosures except upon prior express permission of the Court, application for which must be made no later than 10 days after the date specified in the immediately preceding sentence. All experts may be deposed, but such depositions must occur within the time limit for all depositions set forth below.

4. Depositions. All depositions (including any expert depositions, see item 3 above) must be completed by March 17, 2023. Unless counsel agree otherwise or the Court so orders, depositions shall not commence until all parties have completed the initial disclosures required by Fed. R. Civ. P. 26(a)(1) or until four weeks from the date of this Order, whichever is earlier. Depositions shall proceed concurrently, with no party having priority, and no deposition shall extend beyond one business day without prior leave of the Court.

5. Requests to Admit. Requests to Admit, if any, must be served by March 1, 2023 [insert date that is no later than 30 days prior to date of close of discovery as set forth in item 6 below].

6. All discovery is to be completed by March 31, 2023. Interim deadlines for items 1–5 above may be extended by the parties on consent without application to the Court, provided the parties are certain they can still meet the discovery completion date set forth in this paragraph. The discovery completion date may be adjourned only upon a showing to the Court of extraordinary circumstances, and may not be extended on consent.

E. Post-discovery summary judgment motions in the form prescribed by the Court’s Individual Rules of Practice may be brought on without further consultation with the Court provided that a Notice of any such motion, in the form specified in the Court’s Individual Rules of Practice, is filed no later than one week following the close-of-discovery date (item D-6 above) and provided that the moving papers are served by April 21, 2023, answering papers by May 5, 2023, and reply papers by May 12, 2023 [the last of these days being no later than six weeks following the close of discovery]. Each party must file its respective papers with the Clerk of the Court on the same date that such papers are served. Additionally, on the same date that any papers are served and filed, counsel filing and serving the papers must arrange to deliver courtesy non-electronic hard copies to the Courthouse for delivery to Chambers.

F. A final pre-trial conference, as well as oral argument on any post-discovery summary judgment motions, shall be held on _____ [date to be inserted by the Court], at which time the Court shall set a firm trial date. The timing and other requirements for the Joint Pretrial Order and/or other pre-trial submissions shall be governed by the Court’s Individual Rules of Practice.

G. All motions and applications shall be governed by Judge Rakoff’s Individual Rules of Practice. Counsel shall promptly familiarize themselves with all of the Court’s Individual Rules, as well as with the Local Rules for the United States District Court for the Southern District of New York.

SO ORDERED.

JED S. RAKOFF
U.S.D.J.

DATED: New York, New York

EXHIBIT B



UNITED STATES DEPARTMENT OF COMMERCE
U.S. Census Bureau
Washington, DC 20233-0001

December 1, 2022

Ms. Theresa J. Lee
Election Law Clinic
Harvard Law School
6 Everett Street, Suite 4105
Cambridge, MA 02138
thlee@law.harvard.edu

Dear Ms. Lee:

This letter is in response to your Freedom of Information Act (FOIA), Title 5, United States Code, Section 552, request submitted July 7, 2022, to the U.S. Census Bureau's FOIA Office. We received your request in this office on July 7, 2022. We have assigned to it tracking number DOC-CEN-2023-000130 and are responding under the FOIA to your clarification dated November 18, 2022, for:

1. 2010 Census Production Settings Demonstration Data Product Noisy Measurement Persons File (this file comprises the noisy measurements used to produce tables P1-P5 in the 2010 Census Production Settings Demonstration Data Product released on June 8, 2021)
2. 2020 Redistricting Data (P.L. 94-171) Summary Noisy Measurement Persons File (this file comprises noisy measurements used to produce tables P1-P5 in the official 2020 Census Redistricting [P.L. 94-171] Redistricting Data Summary File released on August 12, 2021)

After conducting a reasonable search, we have determined that we have no records responsive to item 1 of your request. This information was destroyed on March 26, 2022, because it was not operationally efficient to maintain them. As part of the Disclosure Avoidance System development, the Census Bureau generated approximately 700 redistricting Noisy Measurement Files from the 2010 Census, each containing approximately 16.6 billion statistics and each requiring approximately 950 gigabytes of storage. As these were intermediate, experimental files, responsible fiscal management prompted their deletion. Please note that the 2010 Noisy Measurement Files are temporary records not subject to any approved record retention schedule with NARA, and these temporary files were deleted before you submitted your FOIA request.

December 1, 2022

Page 2

We are withholding item 2, the 2020 Redistricting Data (P.L. 94-171) Summary Noisy Measurement Persons File, in full pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3), in conjunction with 13 U.S.C. § 9(a)(2). FOIA Exemption 3 exempts from disclosure records or portions of records that are made confidential by statute, and Title 13 strictly prohibits publication whereby the data furnished by any particular establishment or individual can be identified. *See Fair Lines American Foundation Inc. v. U.S. Department of Commerce and U.S. Census Bureau*, Memorandum Opinion at No. 21-cv-1361 (D.D.C. August 02, 2022) (holding that 13 U.S.C. § 9(a)(2) permits some level of attenuation in the chain of causation, and thus supports the withholding of information that could plausibly allow data furnished by a particular establishment or individual to be more easily reconstructed).

Although the data you are seeking must be withheld under FOIA, we note that we have a well-defined procedure to provide secure access to data protected under Title 13 through the Federal Statistical Research Data Centers (FSRDCs) for approved research projects. (Columbia University and Harvard University are institutional partners of the New York and Boston FSRDCs, respectively.) If Professor Phillips were to submit a qualifying project proposal through an FSRDC, upon review and acceptance of the project we would be able to approve authorized access to the confidential 2020 Redistricting Data (P.L. 94-171) Summary Noisy Measurement File for his research.

Based on the above information, this constitutes a denial of your request under FOIA. Although we are aware that this matter is already in litigation, we must inform you that you have the right to appeal this denial of the FOIA request. An appeal must be received within 90 calendar days of the date of this response letter. Any appeal should be addressed to the following office:

Assistant General Counsel for Employment, Litigation, and Information
Room 5896
U.S. Department of Commerce,
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

An appeal may also be sent by e-mail to FOIAAppeals@doc.gov, or by FOIAonline, if you have an account in FOIAonline, at <https://foiaonline.gov/foiaonline/action/public/home>. The appeal should include a copy of the original request and initial denial, if any. All appeals should include a statement of the reasons why the records requested should be made available and why the adverse determination was in error. The appeal letter, the envelope and the e-mail subject line should be clearly marked "Freedom of Information Act Appeal."

The e-mail, FOIAonline, and Office are monitored only on working days during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday). FOIA appeals posted to the e-mail box, FOIAonline, or Office after normal business hours will be deemed received on the next normal business day. If the 90th calendar day for submitting an appeal falls on a Saturday, Sunday or legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely.

December 1, 2022

Page 3

In addition, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
e-mail at ogis@nara.gov
telephone at 202-741-5770; toll free at 1 877-684-6448
facsimile at 202-741-5769

Because this request is in litigation as *Phillips v. Census*, No. 22-cv-9304 (S.D.N.Y.), if you have any questions concerning this letter or wish to discuss the matter please contact Jeannette Vargas, the Assistant United States Attorney representing the Census Bureau in the lawsuit, at Jeannette.Vargas@usdoj.gov or 212-637-2678.

Sincerely,

Jean M. McKenzie, Esq., CISM
Acting Freedom of Information Act/Privacy Act Officer
Acting Chief, Freedom of Information Act Office

Cc: Ruth M. Greenwood rgreenwood@law.harvard.edu
Jordan Ari Goldstein jgoldstein@selendygay.com
Jeffrey Colin Zalesin zalesin@selendygay.com
Jeannette Anne Vargas jeannette.vargas@usdoj.gov
Michael Bogomolny mbogomolny@doc.gov