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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

David Yanofsky,	)
	) Civil Action
Plaintiff,	) No. 19-cv-2290
	)
vs.	) MOTIONS HEARING
	)
United States Department of	) Washington, DC
Commerce,	) May 24, 2022
	) Time: 2:00 p.m.
Defendant.	)

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TRANSCRIPT OF MOTIONS HEARING  
HELD BEFORE  
THE HONORABLE JUDGE FLORENCE Y. PAN  
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S

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Court Reporter:	Janice E. Dickman, RMR, CRR, CRC Official Court Reporter United States Courthouse, Room 6523 333 Constitution Avenue, NW Washington, DC 20001 202-354-3267
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1 THE COURT: All right. Good afternoon.

2 THE COURTROOM DEPUTY: Good afternoon, Your Honor.  
3 This is civil action 19-2290, *David Yanofsky versus*  
4 *United States Department of Commerce.*

5 Counsel, please identify yourselves for the record,  
6 beginning with the plaintiff.

7 MR. MARSHALL: Good afternoon, Your Honor. This is  
8 Adam Marshall for plaintiff David Yanofsky. I have my  
9 co-counsel Katie Townsend with me, as well.

10 THE COURT: Good afternoon, Mr. Marshall and  
11 Ms. Townsend.

12 MS. SEABROOK: Good afternoon, Your Honor. April  
13 Seabrook on behalf of the government. And with me I have  
14 agency counsel Michael Bogomolny.

15 THE COURT: Good afternoon, Ms. Seabrook. And I'm  
16 not going to try --

17 MS. SEABROOK: Just call him Bogo.

18 THE COURT: So we are here for a hearing on the  
19 motions for summary judgment. The defendant has filed a second  
20 motion for summary judgement and plaintiff has filed a cross  
21 motion for summary judgment. And I want to thank the parties  
22 for very interesting briefing in this case. I thought it was  
23 very well done.

24 So, let me just clarify with the parties, is the only  
25 count that's now at issue Count 1? It seems like the other

1 counts were all about fees. And I want to make sure that  
2 procedurally I'm handling all the right counts, because Count 1  
3 is violation of FOIA, unlawful withholding of agency records,  
4 and then all the other counts seem to deal with fees and I  
5 think that already was litigated.

6 MR. MARSHALL: That's correct, Your Honor. In the  
7 Yanofsky II, which I'll call this case, the only count is for  
8 violation of withholding of records. Following Yanofsky I,  
9 there was a meet-and-confer between counsel for the parties and  
10 the Department of Commerce said that there would be no fees  
11 charged for the request.

12 So, the withholding is the only thing that was at  
13 issue, from our perspective at least.

14 THE COURT: Thank you. Do agree with that,  
15 Ms. Seabrook?

16 MS. SEABROOK: (Nods head.)

17 THE COURT: All right. So, there's a lot of ground  
18 to cover here, so I thought I could start with Ms. Seabrook and  
19 her motion for summary judgment. And, Ms. Seabrook, your  
20 motion for summary judgment really only makes two points. The  
21 first is sort of a request that I reconsider what Judge Jackson  
22 did with respect to her finding about what the request was by  
23 plaintiff Yanofsky and her finding that you had not responded  
24 to that request. And I feel like a large part of your motion  
25 for summary judgment was trying to revisit that ruling. And

1 then the second part of your motion was they're only looking  
2 for anonymized, I guess -- I'm sorry, non-anonymized,  
3 non-aggregated data and we don't have that. Or, I guess you  
4 defined that data and said we don't have that.

5 I will tell you on the outset, I'm not inclined to  
6 revisit what Judge Jackson determined about what the request  
7 was. And so I don't think that just providing standardized  
8 reports was sufficient. So, I'd rather you not argue that  
9 because I'm pretty convinced I'm not going there. I don't  
10 think you meet the standards for motion for reconsideration on  
11 that. So I'm more interested in the second argument, which is  
12 what databases you have and what you don't have.

13 So if you could address that second part of your  
14 argument, I would appreciate it. And I will note to you that  
15 there is a waiver issue because I know that later on, in an  
16 opposition/reply brief you do talk about things are not agency  
17 records, there are FOIA exceptions. I think for purposes of  
18 your motion for summary judgment, those are waived because  
19 that's in a reply brief. I think you can raise them in  
20 opposition to their motion for summary judgment, but I don't  
21 think you can rely on those arguments for summary judgment  
22 yourself. So, with all that, I'll let you go.

23 MS. SEABROOK: Okay. Well, first, I do want to  
24 address, with respect to whether arguments are waived, any  
25 arguments that we, sort of, asserted in our reply brief were in

1 direct response to the opposition. So, to the extent that we  
2 were asserting -- we were filing for summary judgment on  
3 certain issues, we wouldn't have had to broach the issues that  
4 we brought up in the reply, had plaintiff not asserted them in  
5 the opposition.

6 THE COURT: Can we talk about that, Ms. Seabrook?  
7 Because your arguments were they're not agency records and  
8 there are FOIA exemptions. Why is that not something  
9 appropriate to raise in your summary judgment? Those are  
10 alternative arguments that you should have raised in your  
11 motion for summary judgment, if you wanted to rely on them.

12 MS. SEABROOK: Because the motion for summary  
13 judgment and reply brief. As we note, are talking about two  
14 different sets of records. So our motion for summary judgment  
15 argued based on the -- we'll call it the initial interpretation  
16 of the FOIA request, and argued that even if we -- under Judge  
17 Jackson's interpretation of the FOIA request, we've already  
18 produced what we have because under Judge Jackson's  
19 interpretation of the FOIA request and what plaintiff said was  
20 that they wanted, I believe, anonymized, non-aggregated data.

21 What we argued in our opposition is, well, we don't  
22 have that data. Plaintiff -- I'm sorry, we argue in our motion  
23 that we don't have that data. Plaintiff then argued in his  
24 opposition, well, no, no, no, we're not looking for anonymized,  
25 non-aggregated, we're looking for a different type of data.

1 THE COURT: What are they looking for?

2 MS. SEABROOK: I believe it was -- in their  
3 opposition they said non-anonymized, non-aggregated data. And  
4 so in our reply, well, if that's what you're saying you're now  
5 looking for, then these arguments would apply to that data.  
6 But that's --

7 THE COURT: I do understand that that is your  
8 argument, but I'm not quite convinced that that's, sort of, an  
9 accurate framing because Judge Jackson said anonymized,  
10 non-aggregated, right? That's what you're assuming. Why is  
11 not the I-92 data anonymized and non-aggregated?

12 MS. SEABROOK: We --

13 THE COURT: The database for I-92 is anonymized and  
14 it's not aggregated.

15 MS. SEABROOK: Correct. But our argument with  
16 respect to that -- I mean, we -- our --

17 THE COURT: The reason I'm asking you this, just so  
18 you know, is because if that's the case, then your arguments  
19 should have been in your motion for summary judgment. This is  
20 not something that came up later. This was squarely at issue  
21 when you filed your motion for summary judgment.

22 MS. SEABROOK: When the argument that the -- that the  
23 I-92 non-aggregated, non-anonymized data wouldn't have -- in  
24 our position, wouldn't have come up if the original -- when the  
25 original request, as we interpreted it and as Judge Jackson

1 interpreted it was anonymized, non-aggregate. So we have --

2 THE COURT: Correct. It is anonymized and  
3 non-aggregated right?

4 MS. SEABROOK: No. It is non-anonymized,  
5 non-aggregated.

6 THE COURT: There are, in the record, declarations  
7 that say there is not identifiable to any person, the I-92  
8 data. I can find the cite for you, but it's throughout the  
9 briefs. It's anonymized and non-aggregated, the I-92.

10 MS. SEABROOK: The I-92 doesn't contain PII, personal  
11 identifiable information. But it's still not anonymized data.

12 THE COURT: What's the difference?

13 MS. SEABROOK: The difference is that there are, for  
14 example, business proprietary information. And so I-92  
15 contains business information, whereas the I-94 contains the  
16 personal identifiable information.

17 THE COURT: And if I don't agree with you that  
18 there's business confidential information, you'd agree that  
19 that can be turned over, the I-92 data?

20 MS. SEABROOK: No, because those are not agency  
21 records.

22 THE COURT: Okay. So why is that not waived by the  
23 fact that after Judge Jackson ruled, you knew that the  
24 landscape was anonymized, non-aggregated data. The I-92 data  
25 is anonymized and not aggregated. So if you were going to file

1 a motion for summary judgment about I-92 data, why would you  
2 not have had to include, in your motion for summary judgment,  
3 that these are not agency records and they're subject to the  
4 exemption for business records, which is what you just said?  
5 Why are not those arguments waived?

6 MS. SEABROOK: That's actually not accurate in terms  
7 of what the information -- so, Judge Jackson said plaintiff was  
8 looking for anonymized, non-aggregated data. The I-92 data is  
9 non-anonymized, non-aggregate data. So it's --

10 THE COURT: We're talking in circles, Ms. Seabrook.  
11 Let's just be clear. The I-92 data, according to you, is  
12 not -- does not have personal identifying information, but the  
13 reason you say it's not anonymized is because it has business  
14 confidential information, right? So why did you not have to  
15 assert Exemption 4 in your motion for summary judgment?

16 MS. SEABROOK: Because we weren't talking about --  
17 they were asking for information that we -- that was different  
18 than what the database contains. So, for example, if they  
19 were -- they're asking for anonymized, non-aggregated data.

20 THE COURT: Yes.

21 MS. SEABROOK: So, it didn't seem as though we had to  
22 assert exemptions related to non-aggregated -- I mean, sorry,  
23 non-anonymized because the non-anonymized doesn't simply mean  
24 just personal identifiable information. We had interpreted --  
25 and plaintiff has never disputed -- that anonymized means any



1 identifiable information, not just the individual. And so when  
2 we interpreted -- and this is, I believe, consistent with Judge  
3 Jackson's order, that they were looking for anonymized,  
4 non-aggregated information. And we looked at the I-92 data and  
5 the I-92 data is non-anonymized, non-aggregate. So there are  
6 two different types --

7 THE COURT: Non-anonymized in what way?  
8 Confidential, which is Exemption 4? That's what you just said,  
9 unless I'm missing something. The only way in which it's not  
10 anonymized is that it has business confidential information?  
11 Is what you just said?

12 MS. SEABROOK: I believe that's accurate.

13 THE COURT: Then why is that not Exception 4? Why  
14 don't you have to assert Exception 4?

15 MS. SEABROOK: Because that wasn't the data they were  
16 looking for. So, it would be --

17 THE COURT: That's what you thought they were looking  
18 for. You thought they were looking for non-anonymized,  
19 non-aggregated data.

20 MS. SEABROOK: No. And we outline this, for example,  
21 in our reply brief. So, Judge Jackson and plaintiff both said  
22 they're looking for anonymized, non-aggregated data. So our  
23 motion for summary judgment discussed do we have anonymized,  
24 non-aggregated data? And plaintiff's opposition, they said,  
25 oh, no, we're not looking for anonymized, non-aggregated data

1 and we only said that because Judge Jackson used those terms.  
2 Instead, we're looking for non-anonymized, non-aggregated data.  
3 But once they switched to --

4 THE COURT: Ms. Seabrook, I completely understand  
5 your argument, I'm just not convinced by it because what you  
6 have just told me is that the reason it was non-anonymized, in  
7 your view, is because it had business confidential information.  
8 And so I don't see why, if you're relying on business  
9 confidential information, you don't have to assert Exemption 4  
10 in your motion for summary judgment. And since you didn't,  
11 it's waived.

12 MS. SEABROOK: And I -- but I don't believe -- to say  
13 that we had to assert Exemption 4 --

14 THE COURT: If you want to rely on that.

15 MS. SEABROOK: Well, to say that we had to  
16 proactively assert it says that we have to anticipate that  
17 they're now going to shift what kind of data they're looking  
18 for. And so we can't make an argument based on, you know,  
19 information that changes, if they're continually changing the  
20 ball, that's my -- my question for the Court is -- maybe this  
21 is where the disconnect is -- does the Court not believe that  
22 anonymized data also applies to -- or, excuse me, that  
23 non-anonymized also applies to information that is identifying  
24 for businesses, in addition to personal identifying  
25 information?

1           THE COURT: I don't have a belief on that one way or  
2 the other. I do have an opinion that there's no evidence that  
3 there's business confidential information here. We'll get to  
4 that later.

5           But here's what I think Ms. Seabrook: Generally  
6 speaking, you are required to make all your arguments for  
7 summary judgment in your motion for summary judgment, because  
8 that's an orderly way for the Court and opposing counsel to  
9 understand what issues are on the table. And if you have  
10 arguments in a FOIA case that the records sought are not agency  
11 records, if that's an argument that you have, that's an  
12 alternative argument that would have been appropriate to make  
13 regardless of this other stuff that you're talking about now,  
14 which I don't find convincing anyway.

15           But it seems to me that you should not be allowed to  
16 argue in a piecemeal fashion, where in your motion for summary  
17 judgment you're not raising that things are not agency records,  
18 you're not raising that FOIA exemptions apply. Like, that  
19 belongs in your motion for summary judgment, if you think FOIA  
20 exceptions apply. And even as alternative arguments, like  
21 even -- let's assume that they didn't change what you perceived  
22 to be, like, what they were looking for, it's still appropriate  
23 to say that these are not agency records. That applies whether  
24 these are anonymized or non-anonymized because your arguments  
25 about whether these are agency records or not are applicable

1 even if we were talking about anonymized, aggregated data --  
2 or, non-aggregated data. But you didn't raise that argument,  
3 which would have been appropriate to raise. And your excuse  
4 for not raising it is, well, they changed their argument, so  
5 now I'm going to raise something that I could have raised  
6 before that was also applicable to their first argument, but  
7 now I'm going to raise this now. And I don't think that it is  
8 applicable.

9 But, I will tell you that it doesn't make that much  
10 of a difference because, in my view, I don't think you can rely  
11 on those arguments to argue for your motion for summary  
12 judgment because you should have raised them in your motion.  
13 But I would allow you to oppose their motion for summary  
14 judgment relying on those arguments. So it's not like I'm  
15 going to ignore your arguments about agency records or about  
16 FOIA exemptions; I'm going to reach the merits of that.

17 But I just think, when I'm looking at your motion for  
18 summary judgment, the issues are very simple. There are only  
19 two issues in your motion for summary judgment. One, you're  
20 asking me to revisit what Judge Jackson ruled with respect to  
21 what the request was. And I'm not going to do that because I  
22 don't see any reason to do so. I don't think that the standard  
23 that justice requires it is met here. So I'm not going to  
24 revisit that. And then the second part of your motion is,  
25 well, we just don't have the records. And it seems that that's

1 not the case and so I think I can just deny your motion for  
2 summary judgment.

3 MS. SEABROOK: So, Your Honor, I think that the one  
4 thing that's missing is that when plaintiff asks for  
5 anonymized, non-aggregated data, that means that the I-92 data  
6 is nonresponsive to the request. It's not as though we have  
7 a -- I mean, it doesn't make sense for us to assert exemptions  
8 if our position is, well, this is not actually responsive to  
9 the request. So, if plaintiff comes back and says, oh, instead  
10 of that, I want this, well then we have to defend, well, now  
11 you say you want this. Then if the Court is going to accept  
12 now you want this, then these are the exemptions that apply to  
13 that.

14 But our motion fully asserts the arguments based on  
15 the records that were responsive to the request and that  
16 plaintiff -- and I'm not talking about our argument regarding  
17 Judge Jackson's interpretation. I'm talking about plaintiff's  
18 accepted interpretation of anonymized, non-aggregated data  
19 being what they were looking for.

20 THE COURT: Could we talk about that? Let's talk  
21 about the I-92 database.

22 MS. SEABROOK: Okay.

23 THE COURT: If I don't think there's business  
24 confidential information in there -- which we can talk about --  
25 then are they entitled to the whole data file for I-92?

1 MS. SEABROOK: No.

2 THE COURT: Why not?

3 MS. SEABROOK: Because they are records that are  
4 owned by CBP and we referred that to CBP for their processing.  
5 We can't make determinations about data that another agency  
6 owns.

7 THE COURT: So let's talk about that, owned by CBP.  
8 Why do you say that? Because I read the MOU, it doesn't say  
9 that. So, for example, there's this case I'm sure you've all  
10 read that the D.C. Circuit case -- I think it was *Department of*  
11 *Justice versus* -- or was it *Judicial Watch*? There was a case  
12 where there was a request for -- *Judicial Watch versus* -- it  
13 was for the White House records, there was an MOU. Yeah,  
14 *Judicial Watch versus U. S. Secret Service*. In that case there  
15 was an MOU in which the MOU said this information, which was,  
16 like, White House visitor logs, belongs to the White House. It  
17 is in the control of the White House. It explicitly said that.  
18 And, by the way, that's not dispositive, just because it's in  
19 an MOU. But that MOU said it explicitly. And when I read the  
20 MOU in this case, it doesn't say that at all. It said it's  
21 collected by CBP and it's used by DOC and it doesn't say that  
22 CBP owns it.

23 MS. SEABROOK: Well, the MOU states that CBP provides  
24 the data to Commerce for a specific purpose. There is  
25 information in the MOU that we pointed out in our briefing that

1 we believe supports that the data -- sorry.

2 THE COURT: Okay. I've got the MOU up in front of  
3 me. I've just read it. I read through the whole thing and I  
4 don't see anywhere that this indicates that the data belongs to  
5 CBP. It's really about how DOC can use the data. Doesn't say  
6 that CBP owns the data.

7 MS. SEABROOK: One moment, Your Honor.

8 THE COURT: So it says, "This agreement addresses the  
9 sharing of form I-94 data and the form I-92 data, each of which  
10 is collected by the INS and used by the DOC for the express  
11 purposes as set forth herein." So, I think that there is an  
12 attempt to limit what DOC can do with the data, but I don't  
13 think it's at all clear that this data belongs to CBP and,  
14 therefore, I don't know that it's clearly correct that you can  
15 just refer this over to CBP.

16 MS. SEABROOK: Your Honor, I think the agency records  
17 and ownership analysis includes, for example, does the  
18 originating agency intend to control how the data is used? And  
19 I think that's really what the MOU is evidence of, is that CBP  
20 has stated how the data is supposed to be used. And,  
21 additionally, even if CBP didn't own the data and they had  
22 equities in the data, then we would still have to refer to them  
23 because we don't -- we still don't have the right to release  
24 data that is not an agency record.

25 THE COURT: So it's kind of a circular argument. I

1 mean, we can talk about whether there is an agency or not, but  
2 I thought we were just talking about first whether this is  
3 owned by CBP. And based on the MOU itself, I don't think it  
4 is. But in terms of referral or consultation, what is the  
5 status of that? If you were going to consult or refer, what is  
6 the status of that? You can't just refer and then just wash  
7 your hands of it.

8 MS. SEABROOK: Right. And we haven't. We've  
9 repeatedly followed up upon our saying what we've been told is  
10 that the referral is actually on a priority list to be  
11 processed. And the issue that they're having is that when they  
12 try to process the request and the data, it crashes their  
13 system. They also had an issue where they can only process it  
14 in the office. And so during COVID, we weren't allowed to go  
15 in, and now they're going in one day a week. And so, they --  
16 and this was the update that we received -- I believe it was  
17 yesterday.

18 THE COURT: So they're processing the request?

19 MS. SEABROOK: Yes.

20 THE COURT: And so, CBP does not object to releasing  
21 the data then?

22 MS. SEABROOK: We don't know how CBP will rule on the  
23 data. They may review it and decide, you know, to release them  
24 or withhold, but it's their decision to --

25 THE COURT: But you're not obligated to consult with



1           them and find out what their position is before you come into  
2           court and make representations about this?

3                   MS. SEABROOK: Well, as I just said, they are having  
4           trouble processing it. So there's no way for them to tell  
5           us -- and we specifically asked multiple times what their  
6           position is on the data and whether it's releasable. And what  
7           they've said to us is that they still have to review it and  
8           make a determination. Also what they said to us, is even if  
9           the data is releasable, that they don't authorize Commerce to  
10          release the data that they've compiled and created.

11                   THE COURT: Okay. So I think all of this assumes  
12          they have control over it and have ownership of it, which I  
13          don't really think is true. I mean, I just look at the MOU and  
14          I just don't see that. And the MOU does not indicate that they  
15          own it or control it. But there are some limits on what DOC  
16          can do with it. But, I don't think so.

17                   MS. SEABROOK: I mean, I think that if we're  
18          talking -- if CBP didn't retain some ownership of the data,  
19          then it doesn't seem as though they would be able to enforce,  
20          under the MOU, the limitations of what Commerce can do with the  
21          data. So in that respect, I think that indicates that there  
22          is -- CBP still intended and does have some ownership rights,  
23          because Commerce cannot decide to disclose the information in a  
24          way that is inconsistent with what CBP has allowed.

25                   THE COURT: So, can we talk about that, Ms. Seabrook?

1 Because it seems to me that we have a statute here, which is  
2 FOIA, and it has all these requirements and there's a whole  
3 reason behind FOIA, that it's about transparency in government  
4 and allows people to make these requests, agencies are required  
5 to fulfil the requests. And then you have this MOU. The MOU  
6 cannot supersede the requirements of FOIA. And as I read this  
7 MOU, it doesn't address FOIA at all.

8 As I read this MOU, it seems to put some limits on  
9 what DOC, the Department of Commerce -- and I'm going to use  
10 "DOC," even though I know there are all these components within  
11 DOC. It's just easier for me to say DOC. It seems to me the  
12 Department of Commerce is limited, but the purpose of this MOU  
13 is about, sort of, the reason why this data is shared, which is  
14 we create statistics with it, we creates reports with it. And  
15 in the context of doing those things there are som Limits on  
16 what you can do. I don't think this MOU addresses what you can  
17 do in the context of FOIA. Okay? And the reason I think this  
18 is important is because the case that I just referenced  
19 earlier, which is *Judicial Watch versus U.S. Secret Service*,  
20 that's a case in which there was an MOU which tried to directly  
21 address the implications of FOIA in the context of the records  
22 there. And the D.C. Circuit said, you know, we will look at  
23 this MOU for certain purposes, but not, not to tell us what's  
24 disclosable under FOIA.

25 The D.C. Circuit said -- I think I can tell you. I

1 read it in some detail. The Court said that it would rely on  
2 the MOU's description of the purpose, generation, and use of  
3 the records, as well as the government's intentions,  
4 understandings, and practice regarding the records. But, it  
5 declined to be bound by the MOU's legal assertions that the  
6 records were presidential records, that they were not the  
7 records of an agency subject to FOIA, or that they were under  
8 the exclusive legal custody and control of the White House.

9 Those legal conclusions are not to be determined in a  
10 MOU. That's applying FOIA. Okay? And so I don't think that  
11 two agencies, such as CBP and DOC, Department of Commerce, can  
12 decide among themselves we're never going to disclose this  
13 information, and then somebody comes along and makes a FOIA  
14 request and they can say, Too bad, we can't give this to you  
15 because we agreed among ourselves that we're never disclosing  
16 this information. You can't do that. FOIA would not allow  
17 that. And in this case that I just told you about, there was  
18 an alternative statutory framework, the Presidential Records  
19 Act, you know, so that was something that they had to take into  
20 account. But in our case all we have is the requirements of  
21 FOIA and an MOU, which in my view cannot constrain an agency's  
22 obligations under FOIA.

23 You can't just -- the Department of Commerce can't  
24 say, I have now agreed with CBP that I'm never going to  
25 disclose this and now FOIA doesn't apply to these records.

1 That can't be the way it works.

2 MS. SEABROOK: Your Honor, and I agree. And that's  
3 not the way that it works. The MOU doesn't try to carve out  
4 any documents from FOIA. The MOU is simply one piece of  
5 evidence with respect to the ownership of the records and how  
6 the records are supposed to be -- allowed to be used by the  
7 Department of Commerce. In any FOIA case, even if you take out  
8 the MOU, if there are entities from other agencies in the  
9 records, there is a referral. And there's nothing improper  
10 about a referral to another agency, if we're continuing to  
11 follow up.

12 We have tried and we have been pushing the CBP to  
13 process the data. But at the same time, I don't -- and to  
14 research this, I don't know that FOIA permits the agency to  
15 release data that the agency believes is owned by another  
16 agency. And so --

17 THE COURT: If it's not owned by the other agency,  
18 then the referral -- I don't have to wait for the referral to  
19 happen, right?

20 MS. SEABROOK: I'm sorry. I missed the first part of  
21 your question.

22 THE COURT: If the Court does not agree that this  
23 data is owned by the other agency and the other agency has  
24 exclusive rights to determine what happens with this, then we  
25 don't have to wait for the referral to happen, right?

1 MS. SEABROOK: If the Court determines that the --  
2 that's accurate, yes. I just wanted to make sure.

3 THE COURT: Okay. Absolutely. Absolutely. I'm  
4 sorry, I just read all this information, so I have a lot of  
5 questions about it. Okay.

6 MS. SEABROOK: One thing that I do want to point out  
7 on the same issue, the MOU, on pages 1 to 2 it says Commerce is  
8 prohibited from releasing the data.

9 THE COURT: Well, it says not to be released in any  
10 form identifiable to any individuals. So let's talk about what  
11 they're actually asking for here. My understanding is they are  
12 asking for an anonymized, non-aggregated data. So they're not  
13 asking for anything that would be identifiable to any  
14 individuals, so that would not violate the MOU.

15 MS. SEABROOK: We don't have anonymized data -- I'm  
16 sorry anonymized, non-aggregated --

17 MR. BOGOMOLNY: I-94

18 THE COURT: Is a --

19 MS. SEABROOK: -- I-94 data.

20 THE COURT: Right. But I-92, though, it sounds like  
21 is anonymized, non-aggregated.

22 MS. SEABROOK: I don't believe that's accurate  
23 because I -- and I think where the issue is, is that we believe  
24 that the information -- so the I-92 information contains a lot  
25 of information about travel and business information. But not

1 just proprietary information, because it's identifying  
2 information as well. That makes the information  
3 non-anonymized. And so --

4 THE COURT: Should we move to that? Because I --  
5 where is the evidence in the record that there's business  
6 confidential information in the I-92 data? So this kind of  
7 shows up in your reply brief and you don't cite anything in the  
8 record, you just say that it is. But then in the plaintiff's  
9 reply brief they cited all these publicly available sources to  
10 get a lot of this information. So do you actually have  
11 evidence that there's business confidential information here?

12 MS. SEABROOK: The -- I'm sorry, you're talking about  
13 the I-92 data? The I-92 data is actually -- each record  
14 pertains to a single flight, and so each flight there's  
15 information -- that's what the I-92 data is, is information  
16 reported by commercial airlines regarding transportation. And  
17 so within that information is flight information. I mean,  
18 that's the whole basis of the collection of I-92 data. What we  
19 didn't -- and I don't believe that -- and, I'm sorry, maybe I'm  
20 misremembering this. But I actually don't believe that  
21 plaintiff has claimed that the I-92 does not have business  
22 proprietary data.

23 THE COURT: They do. They do, and they're  
24 proprietary. So you say, in your brief, it is valuable data  
25 that is used in the business of the provider of the

1 information, the air carriers. But you cite nothing to support  
2 that. And then you say the confidentiality standard is met  
3 because the owners of the information, private and commercial  
4 airlines, customarily do not disclose the information or make  
5 it publically available in any way, but you cite nothing. But  
6 then in the plaintiff's reply brief they cite publicly  
7 available sources for almost all of the information you're  
8 saying is confidential. It's in pages 15 to 17 in their reply  
9 brief.

10 MS. SEABROOK: I think the difference, Your Honor, is  
11 we didn't -- one thing that we contemplated but could not do,  
12 for example, was go to the airlines and get declarations to  
13 support that. So what we've done is we've talked about the  
14 different kinds of information and the fact that this kind of  
15 information, when it's compiled together and produced in a  
16 single document, it's very useful. What plaintiff has shown is  
17 that, okay, he can go to a number of different sources and get  
18 some of this information, but not all of the specific  
19 information that would be in the I-92 data.

20 THE COURT: So, it's in the argument, Ms. Seabrook,  
21 but since you're not citing any evidence, I don't know that I  
22 can really rely on it. You have the burden of showing that  
23 this exemption applies, and you're just making general  
24 statements with no evidence. It's not clear to me, on its  
25 face, that this is valuable to airline carriers. I don't know.

1 And you have no evidence of it, and it's your burden.

2 MS. SEABROOK: I believe -- I thought that we had  
3 discussed it in one of our declarations, but I'm also not --

4 THE COURT: If you can point that out, I would be  
5 interested. Because you don't cite a thing in your papers.

6 MS. SEABROOK: No, it's not. It was a declaration  
7 that we provided.

8 THE COURT: It is in a declaration?

9 MS. SEABROOK: It's not. It was a declaration that  
10 we had discussed, but then we didn't have the time to, for  
11 example, like I said, you know, contact airlines and get  
12 declarations.

13 THE COURT: I see. So I just can't, sort of, rely on  
14 a representation that this is business confidential when you  
15 have no evidence to support it. So now that we don't have  
16 that, does the I-92 data -- does that all have to be released?

17 MS. SEABROOK: I don't believe so, Your Honor.

18 The I-92 data is the raw data from CBP that contains  
19 the flight information. Even if it's only -- it still -- I  
20 think the issue that we're sort of talking about, I think, the  
21 thing that's getting missed is that the I-92 data is not  
22 responsive to the FOIA request. So what you're asking us is --

23 THE COURT: Wait a minute. Wait a minute. Let's  
24 step back. Let's step back. I think the FOIA request is they  
25 want the data that underlies the I-92 report. How is the I-92



1 data not responsive to that data request, that FOIA request?

2 MS. SEABROOK: What they asked for was the  
3 anonymized, non-aggregated data. And so, whether the business  
4 information in the records is identifying information I think  
5 is a different question than whether it's covered by Exemption  
6 4. So, Your Honor I can say, for example, what you can  
7 withhold, you know, part of this or this information because  
8 it's subject to Exemption 4, but that also doesn't change the  
9 fact that it's still not non-anonymized data. It's still --  
10 it's still not anonymized data, it's still data --

11 THE COURT: Let me ask you something else,  
12 Ms. Seabrook. It was very curious to me -- and I'm very  
13 interested in the answer to this question -- that there's an  
14 allegation by the plaintiff that DOC sells the whole data file.  
15 There's a brochure that says you can buy this whole data  
16 file -- and it's also in the complaint, paragraphs 14 and 18 --  
17 that the whole data file is for sale. Why can't you just turn  
18 over the whole data file? If you're selling it to other  
19 people, why can't this FOIA requester have it?

20 MS. SEABROOK: Partly because what we did --

21 (Off-the-record discussion between Ms. Seabrook and  
22 Mr. Bogomolny.)

23 MS. SEABROOK: Oh, that's right. I'm sorry. We  
24 don't sell the entire database. What we sell are the  
25 standardized reports, which is what we turned over.

1 THE COURT: No, I think there's a separate thing,  
2 because there's a different price for it, the whole data file.  
3 It's in paragraphs 14 and 18 of the complaint, and there's a  
4 brochure that says you sell the data file, according to the  
5 plaintiff. That sounds like it's something different from the  
6 standardized reports.

7 MS. SEABROOK: No, the data file, as referenced on  
8 the website, which is what plaintiff is referencing, refers to  
9 the standardized reports.

10 THE COURT: Oh, I see.

11 MS. SEABROOK: We sell --

12 THE COURT: When you say "data file," you just mean  
13 the standardized reports?

14 MS. SEABROOK: Right.

15 THE COURT: Okay. Okay. So, the FOIA request itself  
16 just says "data files" and "technical paperwork underlying the  
17 I-92 report." So, given that it's not -- there's no PII, so it  
18 didn't run afoul of the MOU, and given the general statement  
19 within the FOIA request, why can't you just turn over the I-92  
20 database? I'm interested, too, in why is Department of  
21 Commerce fighting this so hard? Is it because they charge  
22 money for this in other context, so they don't want to give it  
23 away for free? Why is this just not something you just turn  
24 over?

25 MS. SEABROOK: I think there are a number of issues,

1 is that one being that the Department of Commerce has a real  
2 concern that if they start, you know, releasing the data that  
3 CBP has said, you know, we are placing these limits on, that  
4 CBP will no longer provide the data. Because they don't  
5 necessarily -- they're not necessarily required to supply the  
6 data.

7 THE COURT: Then why would CBP care? If it's not --  
8 the MOU only says it can't be individually identifiable. If  
9 it's not, why would they care?

10 MS. SEABROOK: Well, the -- I believe what plaintiff  
11 is asking for is -- I'm sorry, no. The way that the MOU is  
12 worded, I believe it's not that it's -- can't be individually  
13 identifiable, I believe it's that the -- the data can't be --  
14 that is -- I apologize, let me just -- I want to make sure I  
15 get the language right.

16 I believe the issue is, Your Honor, so the MOU says  
17 the information can't be released in a way that is identify --  
18 individually identifiable.

19 THE COURT: Yes.

20 MS. SEABROOK: But, again, plaintiff has stated --  
21 one moment.

22 So, the MOU states that DOC cannot release the  
23 information in any form identifiable to any individuals.

24 So what we've interpreted that to mean is that it  
25 can't release the data to -- the non-anonymized, non-aggregated

1 data. And that's the data that Commerce has, non-aggregated,  
2 non-anonymized.

3 THE COURT: That doesn't speak to aggregation, it  
4 just says non-identifiable. So, anonymized. But it doesn't  
5 speak to aggregation.

6 MS. SEABROOK: What I mean is that Commerce -- the  
7 data that Commerce has is -- so, for example, there's no  
8 database that is non-anonymized -- I'm sorry.

9 THE COURT: Anonymized.

10 MS. SEABROOK: Anonymized and non-aggregate. So, I  
11 mean --

12 THE COURT: Let's just talk about the I-92 database.  
13 Okay? Why is it that the release of the I-92 database would  
14 not be -- it's in your possession, you don't have to cut the  
15 data or do anything to it, you just release it, and it's not  
16 identifiable to any individuals so it doesn't run afoul of the  
17 MOU. So why isn't that just not disclosable? Let's start with  
18 I-92.

19 MS. SEABROOK: So the I-92, it's not releasable  
20 because -- the only information that we have for the I-92 is  
21 the information received from Commerce -- I'm sorry, received  
22 from CBP. When we create, for example, the standardized  
23 reports or, you know, when someone buys a customized report,  
24 that doesn't create a new database. So the information that we  
25 have is just the non-anonymized, non --

1           THE COURT:  It's anonymized.  The record says that  
2           there's no personally identifiable information in the I-92  
3           database.

4           MS. SEABROOK:  There's no personally identifiable  
5           information, but each entry in the I-92 database relates to a  
6           specific flight and that the flight information relates to  
7           businesses, and that's clear.  So even though --

8           THE COURT:  I don't find that an important privacy  
9           interest.  Like, why is that an important privacy interest?

10          MS. SEABROOK:  Because the agency -- I'm sorry, the  
11          airlines, I think even if we say, okay, while some of this  
12          information is available in other sources, we still have the  
13          issue of this discloses, for example, the flight patterns and  
14          information about the airline and its business.

15          THE COURT:  Okay.  And what's your source for why we  
16          should not do that?

17          MS. SEABROOK:  I'm sorry.  The source for why we  
18          should not --

19          THE COURT:  We should not release information that  
20          you just described.  Because it's not personally identifying,  
21          there's no personal privacy interest involved, it doesn't run  
22          afoul of the MOU, it's anonymized because there's no personal  
23          identifying information in this, and you have it.  So why is  
24          that not just disclosable?  You say, well, it does disclose  
25          some information about who the businesses are, what the

1 flights -- but why can't that be disclosed?

2 MS. SEABROOK: Well, I think, Your Honor, I think the  
3 issue is that we've been -- when we interpreted anonymized, we  
4 didn't interpret it and believe it to be limited to PII. So  
5 when we're saying that we don't have anonymized --  
6 non-anonymized data, it's because we are -- I mean, that was  
7 our position. And --

8 THE COURT: The only barrier -- your interpretation  
9 is the only barrier. I don't see that as an important barrier.

10 MS. SEABROOK: Well, I believe that, you know, as we  
11 interpret, we -- so, as we interpret the information  
12 requested -- excuse me, the I-92 was not responsive to the FOIA  
13 request. Once we, sort of, we got into this position of  
14 plaintiff saying that they want the data that's in the I-92, I  
15 think it's an issue that we honestly -- I don't know that we  
16 have even been, sort of, tasked with or considered the, sort  
17 of, the position of -- well, data is only considered  
18 non-anonymized if it has PII.

19 And so I think that's sort of where there's a  
20 disconnect, is that we, in making our assessment of whether the  
21 data was considered anonymized, we sort of define information  
22 that relates to specific flights and disclosing specific  
23 airlines. So that is not something that we have -- honestly, I  
24 don't believe it's something that we entertain or --

25 THE COURT: Right. So if I just tell you that that's

1 a distinction that makes no difference, then the I-92 gets  
2 turned over?

3 MS. SEABROOK: I don't believe so, Your Honor. I  
4 think -- because I think we would have to have a lot of  
5 different things happen for us to just turn the I-92 over. So,  
6 for example, we still, you know, maintain that the data belongs  
7 to Commerce. But even if it doesn't belong to Commerce,  
8 there -- I'm sorry, the data still belongs to CBP. But even if  
9 it doesn't belong to CBP, CBP doesn't own it. CBP still has a  
10 right under the FOIA to process and review the data and decide  
11 what can be released. And then we --

12 THE COURT: What would be their basis for having that  
13 right, if they don't own the data?

14 MS. SEABROOK: Because it is -- under the FOIA -- and  
15 this is, you know, throughout the case law -- that an agency  
16 that has equities in another -- excuse me, an agency who has a  
17 responsive document to a FOIA request and identifies that there  
18 is another agency that has equities, can refer the document to  
19 that agency, the originating agency, before they even consult  
20 with the originating agency.

21 THE COURT: But there would have to be some basis for  
22 thinking they do have equities in this, and it's not clear to  
23 me that they do. I mean, can you tell me, what would be their  
24 interest in withholding information or stopping the entire  
25 data-sharing program because you've released anonymized but not

1 aggregated data?

2 MS. SEABROOK: Your Honor --

3 THE COURT: It only identifies personally identifying  
4 information as something they care about.

5 MS. SEABROOK: We can't answer that question because  
6 we're not CBP, it's not our data. Or, it's not something that,  
7 for example -- I think it's also -- it's one of those things  
8 where while -- even if the Court were to say, "Okay, you have  
9 to produce the I-92 data," we would still have to consult with  
10 CBP. And because --

11 THE COURT: Really? If you had a court order? If  
12 you had a court order to turn it over you could stop because  
13 CBP objected? I don't think so.

14 MS. SEABROOK: It's not that we could stop CBP  
15 objecting. But, honestly, Your Honor, say the Court orders us  
16 to turn over the I-92, we do have the right to confer with an  
17 agency that we believe has entities and information. So we  
18 would still have to confer -- and I would think, you know, Your  
19 Honor, that the Court would welcome that because that would  
20 answer your question. So the question you just asked me was  
21 whether, you know, what would CBP's interest be? But we don't  
22 know that because --

23 THE COURT: Wasn't it your business to find out?  
24 Because we're here on summary judgment and if you want to  
25 assert CBP's interests, weren't you supposed to go talk to



1       them, get an affidavit or a declaration and put it in the  
2       record? Because I don't think it's appropriate, for a case  
3       that's been kicking around this long, for you just to be, like,  
4       oop, we referred it to CBP, we're waiting. It just seems to me  
5       that you have the burden. You have to defend this -- your  
6       actions under this FOIA case and you can't just point to the  
7       empty chair and say here's somebody, because you have the  
8       burden, you should have gotten that information, if that's what  
9       you want to rely on, right?

10               MS. SEABROOK: Well, Your Honor, as I said before, we  
11       can't -- CBP can't give us information that they don't have.  
12       If they can't --

13               THE COURT: You could file a declaration as to what  
14       their position is, and you could have gotten a declaration as  
15       to where they stand in that referral process. You could have  
16       gotten a declaration that says, oh, we think we own this.

17               MS. SEABROOK: Well, we did, Your Honor. And Your  
18       Honor granted plaintiff's motion to strike the declaration  
19       because it wasn't signed and also --

20               THE COURT: That's the whole other thing. Why do you  
21       keep submitting unsigned things?

22               MS. SEABROOK: That's the thing, Your Honor. I do  
23       want to note that in your opinion you noted that, you know,  
24       this was the second unsigned and that it was a careless  
25       mistake. That's actually not accurate. The first declaration

1 was unsigned and we noted that in our file because it was  
2 completed years ago and there's no way to locate a signed one  
3 and the individual has retired. And we noted that in our brief  
4 when we submitted the unsigned. When we submitted this, it was  
5 when the document was converted, the electronic signature  
6 disappeared. And so in the copy that we filed with our reply,  
7 showed that it was signed before we submitted it. And that  
8 declaration speaks exactly to the issue that you're asking  
9 about, which is CBP's on ownership on the MOU and the  
10 information.

11 THE COURT: And what about the MOU, why is that not  
12 signed? Because you're relying, also, on an unsigned MOU that  
13 says this becomes effective once it's signed, but it's not  
14 signed.

15 MS. SEABROOK: The original MOU was signed when the  
16 agency was still the INS. So I believe it was around 2002,  
17 2003. So we haven't been able to -- in Commerce's records,  
18 been able to locate the signed copy. In our conversations with  
19 CBP -- and I believe this may also be in the declaration -- is  
20 that the parties consider and have been working under the MOU  
21 for almost two decades now.

22 THE COURT: So, maybe I should talk to Mr. Marshall  
23 about this. Because it just seems to me that you submitting a  
24 declaration from somebody at DOC that says we fear that if we  
25 turn this over, CBP will stop sharing any information with us

1 at all. It's hard for me to understand that because I can't  
2 see what the interest is that's being violated. If it's  
3 anonymized data, the MOU doesn't seem to indicate that CBP  
4 would otherwise care. And so it's just for me to rely on your  
5 representations about what CBP thinks of this.

6 And then, also, when I look at this MOU, I don't see  
7 them as asserting any kind of proprietary interest over this  
8 data. It said we collect it, DOC uses it, that's what it says,  
9 and here's our understanding of what they're going to do with  
10 it in the context of why we collect it. Doesn't speak to FOIA  
11 at all.

12 MS. SEABROOK: Your Honor, the declaration that I'm  
13 referring to that we submitted, I'm referring to a declaration  
14 from CBP talking about the data and MOU. And that's the  
15 declaration that I was referring to when I said that they  
16 provided some information about what they expected with the  
17 data and their ownership interest.

18 THE COURT: Well, I struck that, so I didn't read it.  
19 But, do they have an interest in data that's anonymized and  
20 then released? Would they object to anonymized data being  
21 released?

22 MS. SEABROOK: I don't know, Your Honor.

23 THE COURT: Um-hum.

24 MS. SEABROOK: I mean, that's an issue that we  
25 have --

1 THE COURT: So that declaration didn't speak to that?

2 MS. SEABROOK: I don't recall. Because the issue at  
3 the time was the -- was ownership. And, also, we didn't  
4 believe that we had anonymized data. So because, sort of, our  
5 definition of anonymized is --

6 THE COURT: Let's just put that aside. I don't want  
7 to get into that again.

8 MS. SEABROOK: I just think that's why we didn't  
9 address, sort of, whether they would release anonymized,  
10 because we didn't think of it as anonymized data to release.

11 THE COURT: The MOU doesn't talk about your  
12 definition of anonymized, it said individually identifiable.  
13 It's the PII kind. And so if it's not individually  
14 identifiable -- it says identifiable to any individuals.  
15 That's what the MOU says. So if you're releasing data that's  
16 not identifiable to any individuals, you're not violating the  
17 MOU.

18 MS. SEABROOK: Well, the agency understands that to  
19 mean we're -- an airline as a business is an individual, and  
20 businesses -- that's where that interpretation came from.

21 THE COURT: It's hard for me to understand, and maybe  
22 you can explain why anybody would care about that? I  
23 understand people, like individuals, don't want their  
24 information floating around because they're people. But in an  
25 airline industry -- and we're looking at statistical analysis

1 of airline industry trends and travel -- why does an individual  
2 travel care if it's identifiable to them in this context?

3 MS. SEABROOK: Your Honor, I honestly don't have the  
4 answer to that question. But I also urge the Court to remember  
5 that this is information compiled by CBP as part of gathering  
6 information about visitors to the United States. So there may  
7 be issues that Commerce is not concerned with that CBP is, in  
8 terms of foreign travel and airlines. And until CBP evaluates  
9 the data, they can't give us specifically, you know, that they  
10 want to assert certain exemptions.

11 And so, I mean, we're at this juncture where we are  
12 pushing CBP to -- and we have been pushing CBP to give a final  
13 response. And we can't force them to do anything, but we've  
14 been trying. And so we can't -- we also can't assume that we  
15 know what interests a component of the Department of Homeland  
16 Security has in this data.

17 THE COURT: So, Ms. Seabrook, just to sort of cut to  
18 the chase here, my inclination would be to deny your motion for  
19 summary judgment because it only asserts these two grounds,  
20 which I think are clearly not adequate. Like, one is to  
21 revisit Judge Jackson's ruling, which I'm not going to do, and  
22 the second to say we just don't have this data, which I don't  
23 think is true.

24 And then with respect to the plaintiff's motion for  
25 summary judgment, I think there are two choices. Because, to

1 be honest, I'm not finding your arguments particularly  
2 persuasive. But, and so I could say, well, it's your burden,  
3 you're not persuading me, so they win. Or, I could order  
4 discovery to get more information about the things that are  
5 holes, I think, in the presentation. Because I don't think --  
6 on the one hand I think it was kind of your burden to do so and  
7 you haven't, but yet I don't really want to make a ruling that  
8 sort of runs afoul of things that are just not in the record, I  
9 just don't know about, including CBP's interests in this data,  
10 what -- would they actually care about this? Because I don't  
11 see why they would. There's an assertion in a declaration from  
12 a Department of Commerce official that they care, but I  
13 don't really understand why that would be, but they're not  
14 here. So I hesitate to make a ruling that might affect their  
15 interests when I don't know what their interests are.

16 So, those are, kind of, the two choices. And I'll  
17 give you an opportunity to tell me why you think it would be  
18 more appropriate to order discovery than to just grant the  
19 plaintiff's motion.

20 MS. SEABROOK: Your Honor, I actually think that one  
21 way, in order to do this, would be to, rather than grant  
22 plaintiff's motion or grant discovery, is to allow a certain  
23 amount of time for defendant to provide a declaration and other  
24 evidence from CBP regarding the -- I think, the issues the  
25 Court is most concerned about are specifically what's in the

1 I-92 and I-94 data, what evidence there is of ownership, and  
2 what's CBP's position on releasing those. If we could have an  
3 opportunity -- and then, if that's not sufficient, then we  
4 could move on to, for example, discovery. That might at least  
5 narrow the issue that would be open for discovery.

6 THE COURT: But why should I let you do that when  
7 it's your burden and today is the day? Why haven't you done  
8 that before today? If you wanted to rely on CBP's interests,  
9 wasn't it incumbent upon you to figure that out and present it  
10 to the Court? Otherwise, haven't you just not met your burden?

11 MS. SEABROOK: I don't think so, Your Honor. I mean,  
12 I understand it is our burden on summary judgment to establish  
13 that the agency has satisfied its FOIA obligation. But it's  
14 also the agency's responsibility to act reasonably. And all of  
15 our decisions have been reasonable based on our interpretation.  
16 What's happened today is the Court has said, well, you don't  
17 agree with our definition of what anonymized means. So I think  
18 it would be fair to give us an opportunity to say, okay, well,  
19 now that we know that the Court doesn't agree with how we saw  
20 the data, this is additional information that we can provide.

21 And I also think that it would help, you know, to the  
22 extent that, you know, plaintiff is going to want to seek  
23 discovery or has specific issue, I do think that having  
24 information -- additional information from CBP, which we've  
25 tried to obtain, is vital because I don't think -- I think that

1 even if the Court grants the motion for summary judgment for  
2 plaintiff, I'm not really clear to what Commerce could do  
3 immediately to effect any motion for -- excuse me, any order  
4 that the Courts says, you know, because we would still have to  
5 consult with CBP. So I think it might be helpful to have --

6 THE COURT: I'm not sure how that would work,  
7 Ms. Seabrook, so let's think through this together. Because if  
8 I ordered you to just turn it over, I don't know that  
9 consultation with them makes any difference at all, because you  
10 can't not turn it over if they object, if I've ordered you to  
11 turn it over. And if I ordered you to turn it over, it would  
12 be based on a finding that this is in your bailiwick, not  
13 theirs. Because according to the MOU, they gather the data,  
14 you use it. And they have not claimed in that MOU any right  
15 to, you know, keep ownership of the data. And there's not --  
16 none of that is in the MOU.

17 So if I were to order you to turn it over, it would  
18 be based on a finding that this is up to you, not them.

19 MS. SEABROOK: I understand, Your Honor. However --

20 THE COURT: For the record, anyway. Because this  
21 record does not indicate to me what is CBP's interest in not  
22 releasing anonymized, non-aggregated data. I can't think of  
23 why they would care.

24 MS. SEABROOK: I do have some indication -- or, at  
25 least in terms of thinking of different reasons, as I said,



1 they are a Department of Homeland Security component, compiling  
2 information about individuals coming into the United States,  
3 and it's detailed information. So, that's --

4 THE COURT: It's anonymized.

5 MS. SEABROOK: It's anonymized because it doesn't  
6 have PII, that doesn't mean that it doesn't provide information  
7 like, for example, like how many flights are coming in from a  
8 certain country.

9 THE COURT: Which is probably available information.

10 MS. SEABROOK: I don't believe it is all publicly  
11 available, Your Honor. But, again, you know, I --

12 THE COURT: Flights are coming in from another  
13 country, you don't think that's publicly available? I think  
14 that is.

15 MS. SEABROOK: I don't know that it is. I mean, I  
16 think we can assume that you could look up some of the  
17 information, but I don't know the full scope of I-92 data that  
18 they collect because that's not something that, you know, sort  
19 of puts an issue directly re -- or, directly that we had to  
20 brief. But I do think that there could definitely be instances  
21 of -- for example, smaller commercial flights, private flights,  
22 like this is all information that CBP collects and we don't  
23 know what they're doing with it.

24 THE COURT: All right. I'm just looking at  
25 plaintiff's reply brief. Air carrier name, flight number,

1 arrival/departure date, closely guarded competitive data of  
2 passenger buying for various groups. It's not private. It's  
3 routinely made available by airlines to private entities and  
4 the U.S. government itself.

5 Okay. The second Marshall declaration shows Delta  
6 flights from Tokyo area airports to Detroit. Exhibit D,  
7 flights from multiple carriers to JFK and London the week of  
8 March 1st. It's -- I mean, just flight information is public  
9 information. I mean, I don't know why that's private.  
10 Historical databases online with detailed information on  
11 millions of flights since 2004. Exhibit E, Exhibit F,  
12 historical flight data from flight stats.

13 MS. SEABROOK: Your Honor --

14 THE COURT: There are transportation statistics,  
15 makes detailed information available that contains  
16 international nonstop segment data. I just think that general  
17 flight information is public information. So I'm having  
18 trouble understanding what is the big state secret here. Like,  
19 why would CBP cut off the entire data sharing program if you  
20 released anonymized data that relates to flights, flight  
21 volume, you know, where people go? Like, just flight  
22 information. I don't understand what the state secret is.  
23 What is -- and part of it, part of it is I want to be fair and  
24 hear your arguments, but on the other hand, I feel like it was  
25 kind of your obligation to put this information in the record

1 if you want to rely on it. Just vaguely saying CBP might not  
2 like this, it's hard for me to make a ruling based on that.

3 MS. SEABROOK: Well, Your Honor, I felt as though our  
4 argument that CBP owns the records was insufficient argument  
5 and that I also believe that, you know -- and I understand  
6 that, you know, Your Honor feels like there isn't enough  
7 evidence in the record to determine ownership, but at this  
8 point, given that we really don't know all of the reasons that  
9 CBP may want to keep this information, and we don't know  
10 exactly everything that's saying the I-92, to the extent  
11 that --

12 THE COURT: But that --

13 MS. SEABROOK: Sorry. Some of the information may  
14 include passenger manifest information. And so not necessarily  
15 passenger names, but more, sort of, granular information. And  
16 so, you know, as the Department of Commerce, we don't have  
17 privy to why CBP might not want that information public. And  
18 we have attempted multiple times -- and I should also note  
19 that, you know, plaintiff has also submitted a FOIA request to  
20 CBP for the same information. So it's not as if, sort of, DOC  
21 is not, you know, trying its best, but we've also had limits.  
22 And honestly, we couldn't have anticipated that there would be  
23 a need for information about whether CBP would release  
24 anonymized data.

25 THE COURT: Okay. Let me hear from Mr. Marshall.

1 Thank you very much, Ms. Seabrook.

2 So, Mr. Marshall, I have a lot of sympathy for your  
3 position, and the question is just whether I need a little bit  
4 more information before I just rule in your favor. So, I mean,  
5 it just seems to me that -- I guess there's one more thing I  
6 want to ask Ms. Seabrook about, which is just the logistics of  
7 getting this information. Because I think that there is a  
8 difference, perhaps, between just handing over a database and  
9 creating a new report, which they shouldn't be required to do.

10 But, so what is your view on that? Because I  
11 understand you to be asking for the I-92 database, which you  
12 believe to be anonymized and non-aggregated and they should be  
13 able to turn the whole thing over. And then the I-94 database,  
14 you've narrowed your request to just say we want it anonymized.  
15 But wouldn't that require them to make a new report, which  
16 they're not required to do?

17 MR. MARSHALL: No, Your Honor, I don't. I refer Your  
18 Honor to declaration of -- the Hull, H-U-L-L, declaration. I  
19 know there are a lot of "H" declarations. But, the declaration  
20 of Warren Hull, which is ECF number 31-7. Mr. Hull is the  
21 director the CIC Research, which is the DOC contractor that  
22 maintains the I-94 databases.

23 THE COURT: Okay. I've got it in front of me.

24 MR. MARSHALL: And I direct Your Honor to paragraph  
25 15, which says it -- more or less, that CIC could make output

1 files that reflect all information in the databases, or all  
2 information except for personally identifiable information.  
3 And --

4 THE COURT: That would involve creating new output  
5 files, which would require something additional.

6 MR. MARSHALL: I don't think so, Your Honor. The  
7 D.C. Circuit addressed what is an agency's obligation with  
8 respect to a database in *Institute for Justice*. And in that  
9 context the Court said that an agency has an obligation to  
10 produce all nonexempt data points. And the Court, in fact, I  
11 think 40 years, and said that, you know, in the context of how  
12 agencies are changing, how they store information, there may be  
13 some instances in which you need to apply minimal, you know,  
14 effort to get information out of computer files in a way that  
15 is disclosable to the public. But simply, you know, getting  
16 information out of a database is not the creation of a new  
17 record. If, for example, it's an SQL database, it's a very  
18 simple command to get -- to pick certain fields. It's a little  
19 bit similar to, like, an Excel file, just say "get," and column  
20 one, column two, column three, et cetera.

21 THE COURT: I saw that. But they're saying that this  
22 whole declaration says CIC would charge NTTD \$11,620 to prepare  
23 data files with that information. So, I mean, there is the  
24 principle that they shouldn't be required to create things,  
25 they should just have to give you what they have, right?

1           MR. MARSHALL: They're not really creating anything,  
2 they're simply -- it's a kind of almost -- I think it's more a  
3 kind of segregation. So an agency provides records, but it's  
4 going to redact some information. Simply copying the record  
5 and then redacting information isn't the creation of a new  
6 record, it's providing the nonexempt information to the public.

7           THE COURT: Right. Right, so the cost of  
8 segregability?

9           MR. MARSHALL: That's right, Your Honor.

10          THE COURT: Okay.

11          MR. MARSHALL: Your Honor, I'm happy to address any  
12 other questions you have. With respect to the way forward from  
13 here, I think Your Honor had a question about that. You know,  
14 as you noted, this case has been going on for some time. The  
15 request was submitted in 2016. If it was the Department of  
16 Commerce's position that any of the data was exempt or even  
17 could be exempt, they had multiple opportunities to make that  
18 argument. They could have made that argument in Yanofsky I, in  
19 the first case. They could have made that argument in their  
20 first motion for summary judgment in this case, and they could  
21 have made it in their second motion for summary judgment in  
22 this case. And at some point, you know, the -- I think there  
23 needs to be consequences for their -- for their failure to do  
24 that.

25                 There's -- you know, Your Honor also had questions

1 about, well, what might CBP's take on this be. Of course we  
2 don't know because there's nothing from CBP in the record. But  
3 I will point Your Honor to the exhibits to the second Yanofsky  
4 declaration, which is ECF 36-3, and specifically --

5 THE COURT: Tell me again, what number is that?

6 MR. MARSHALL: Sure. It's 36-3.

7 THE COURT: Okay.

8 MR. MARSHALL: And Exhibit A, which is at ECF page 5.  
9 And also Exhibit D, which starts --

10 THE COURT: Looks like a bunch of data to me. Am I  
11 looking at the wrong --

12 MR. MARSHALL: It is a bunch of data, Your Honor.  
13 And it is data that CBP has released to plaintiff in response  
14 to a different type of -- a different FOIA request. But it  
15 reflects what we believe to be at least similar data to what is  
16 in the DOC's databases. And this information was released by  
17 CBP to plaintiff and includes things like the flight number,  
18 the arrival date, you know, the total number of passengers, the  
19 total number of U.S. passengers, all kinds of data. And then,  
20 similarly, with respect -- so that's I-92.

21 And then with respect to I 94, again, you see the  
22 type of information that is included; country of citizenship,  
23 country of residence, port of entry, admission date, state  
24 code, departure date, birth year, gender, flight number,  
25 carrier, admission class, those types of things. So I think

1 that's pretty -- you know, it's certainly indirect evidence, I  
2 think, of what CBP's position would be. And as far as I can  
3 tell, to the extent that this information is reflected in the  
4 DOC databases, it is -- I can't -- I wouldn't be able to  
5 understand why CBP would have a problem with releasing  
6 anything.

7 THE COURT: Your point is CBP has released similar to  
8 you in another FOIA request, so you have no reason this think  
9 they would have reason to object releasing the information  
10 here?

11 MR. MARSHALL: That's right, Your Honor.

12 THE COURT: Is there case law on -- because I haven't  
13 researched this aspect of it -- sort of the whole consultation  
14 and referral part of FOIA --

15 MR. MARSHALL: Yes.

16 THE COURT: -- which says that agencies should  
17 consult and refer? Because it cannot be that just because  
18 you're in the process of consulting or referring, that relieves  
19 you of all obligation under the FOIA, which seems to be what  
20 the DOC is kind of saying here.

21 MR. MARSHALL: Yes, Your Honor, there absolutely is.  
22 I think, first, a couple things with respect to that. FOIA,  
23 the types of FOIA, as the statute certainly contemplates, that  
24 an agency might consult with another agency. So there's a  
25 provision in the timing part of FOIA that says an agency can,



1 in some instances, delay the normal determination date by ten  
2 days in order to consult with another agency that might have an  
3 interest in the record. That's the primary source of the, I  
4 think, the textual notion that an agency might confer with  
5 another agency.

6 THE COURT: The statutory time limit is ten days to  
7 do it?

8 MR. MARSHALL: In most circumstances, yes. Yes. I  
9 will note again, Your Honor, just for the record -- I'm sure  
10 you can calculate this -- the referrals have been pending for  
11 more than, I think, 1200 days for the I-92 data, and 1400 days  
12 for -- Your Honor, I might have lost you.

13 THE COURT: Oh. Sorry.

14 MR. MARSHALL: Oh, you're still here. Okay. There  
15 we go.

16 The I-92 referral has been pending for more than 1200  
17 days, the I-94 referral has been pending for more than 1400  
18 days at this point. And those are back from 2018, which is,  
19 you know, two years pre-pandemic.

20 But the primary case I would point Your Honor to in  
21 evaluating this referral process is *McGehee versus C.I.A.*,  
22 which is a D.C. Circuit case. The cite is 697 F.2d 1095. And  
23 in that case the D.C. Circuit goes through a pretty  
24 exhaustive --

25 THE COURT: Give me that cite again.

1           MR. MARSHALL: Sure. Sure. It's 697 F.2d 1095. And  
2 there are a couple things that the D.C. Circuit looked at in  
3 evaluating this referral process. I think, first and foremost,  
4 the Court said that if an agency gets a FOIA request for  
5 records it has, it has to take ownership of that request. It  
6 can refer or consult with another agency if a couple of  
7 criteria are met, and some things are not -- some lines are not  
8 crossed.

9           So, first of all, the agency has to offer an  
10 explanation, a reasonable explanation for why the FOIA process  
11 would be improved by the FOIA referral. I don't think that  
12 that is -- that prong could be satisfied here because I don't  
13 think there's any suggestion that CBP is somehow uniquely  
14 qualified to evaluate whether to disclose this data or not. It  
15 seems pretty standard stuff. And it seems like, as we know  
16 from the briefing, that Department of Commerce does disclose  
17 certain types of data, sometimes in response to customized data  
18 requests.

19           But the other line that the D.C. Circuit drew is that  
20 not only does the referral process have to be justified as  
21 reasonable, but it can't -- the effect of the referral cannot  
22 be to significantly impair the ability of the requester to  
23 access data that they're entitled to under FOIA. So the Court  
24 said, quote, At the extreme procedure that in practice -- and  
25 omitting a couple words here -- but, procedure and practice

1 that resulted in very long delays would be highly difficult to  
2 justify. The Court also said, quote, A referral runs afoul of  
3 the FOIA only if it amounts to an improper withholding of the  
4 agency records; that is, if its net effect is to significantly  
5 impair the requester's ability to obtain the records or  
6 significantly to increase the amount of time he must wait to  
7 obtain them.

8 So, again, even assuming that the referrals here are  
9 justifiable at the outset and -- I have one more point I would  
10 like to make, Your Honor -- certainly we've crossed that, kind  
11 of, outer barrier the D.C. Circuit set in terms of timeliness.

12 The other thing I would like to say with respect to  
13 the justification of the referral, kind of from the outset, is  
14 at least with respect to the I-94 data, it's DOC contractor  
15 that has added additional stuff to the database. So they take  
16 data that they get from CBP, they clean it, they dedupe it and  
17 then they calculate additional information. So, it's actually  
18 DOC's contractor that is -- and DOC, by virtue of that, is  
19 creating information. And so I don't understand why CBP would  
20 be uniquely capable of evaluating the additional information  
21 that DOC is calculating.

22 So, all of that is to say, I point Your Honor to  
23 *McGehee* -- oh, I apologize, Your Honor, the last quote that I  
24 gave you, the referral returns afoul of FOIA only, is actually  
25 from a D.D.C. case it's not from *McGehee*. The D.D.C. case is

1       *Smith versus Executive Office for United States Attorneys*, it's  
2       from 2014. And the cite for that is 69 F.Supp.3d 228. I  
3       apologize Your Honor, I had two different cases there.

4               THE COURT: That's all right. Okay.

5               MR. MARSHALL: So, I point Your Honor to those two  
6       cases.

7               THE COURT: Thank you, I appreciate that.

8               MR. MARSHALL: Your Honor, I --

9               THE COURT: If I --

10              MR. MARSHALL: I'm sorry, Your Honor.

11              THE COURT: What is the information that we would  
12       want to get, if I wanted to flesh this out? I guess it would  
13       be CBP's interest -- it would be time to allow them to confer  
14       with CBP and to understand their interests, because my only  
15       hesitation here is that they're not here, I don't know what  
16       their interests are. The record that I have before me, I will  
17       say that I don't think that their interest would be very strong  
18       in not releasing the data requested. The MOU reflects only the  
19       concern about individually personalized data. And I don't --  
20       that's not what you're asking for. And I can't think generally  
21       why they would care about data that identifies airlines.

22              MR. MARSHALL: I -- I don't -- I agree with Your  
23       Honor. Again, they've released what seems to me either -- at  
24       least very, very similar data at a very granular level to  
25       plaintiff. So, I don't really understand that.

1           And, Your Honor, I do think that timeliness is  
2           important here. I mean, the FOIA, as we were just talking  
3           about, generally contemplates that an agency provides a  
4           determination within 20 working days. It is obviously far  
5           beyond that. And not only is it far beyond that, but CB -- I'm  
6           sorry, Department of Commerce has known exactly what we've been  
7           after for -- if not since the time of the request, certainly  
8           from the time of the beginning of Yanofsky II, this matter.

9           We included in the record an email conversation  
10          between plaintiff's counsel and defense counsel that was --  
11          took place shortly after defendant filed an answer in this  
12          case. And in that email defense counsel said that they  
13          understood plaintiff's request to be seeking a copy of the  
14          underlying databases from which these reports are generated.

15          So, at the very latest, at the very latest -- you  
16          know, and that was more than two years ago at this point. So,  
17          I don't -- I don't know what else -- I don't know what else we  
18          can do at this point. It's the agency's burden to show that  
19          it's exempt and they just haven't done that, and they've had  
20          years and years to do that. My client is a journalist,  
21          obviously he would prefer to report on timely data, and it has  
22          been quite awhile since this request has been made.

23          I'm very confident that he will still be able to, you  
24          know, report based on this data. But I don't think that FOIA's  
25          time requirements should be ignored because there's special

1 provisions in the FOIA for members of the news media, of which  
2 my client is part of. And part of Congress's intent was to get  
3 information to reporters quickly so that they could report on  
4 it for the benefit of the public, and it's been so many years  
5 at this point. So, that's the only other part I address, Your  
6 Honor.

7 THE COURT: Thank you.

8 MR. MARSHALL: If the Court has further questions, I  
9 would be happy to answer them.

10 THE COURT: No, thank you. I thought your briefing  
11 was very strong. Thank you.

12 MR. MARSHALL: Thank you, Your Honor.

13 THE COURT: So, Ms. Seabrook, I'll give you one last  
14 opportunity here. Like, why should I just not grant the  
15 plaintiff's motion for summary judgment right now on the  
16 record, so we can just move on?

17 MS. SEABROOK: Because, Your Honor, I do believe  
18 CBP's interests needs to be taken into account. And I think  
19 that although, you know, plaintiff has shown these documents  
20 that CBP has, you know, released some flight information,  
21 there's no evidence in the record showing that the exact  
22 information that CBP would -- or, that's contained in the I-92  
23 data or the I-94 data has been released. So while we have  
24 examples of flight data, I don't think that we have enough  
25 information to say exactly the same data is going to be

1 released, so I don't think we can infer that CBP would release.

2 I think that it makes more -- I think it will be best  
3 for the Court to allow supplementation of the record. And I  
4 think that that supplementation could include, for example,  
5 explicit identification of the information. For example, the  
6 information that is the I-92, so that we -- the Court can be  
7 sure that the information that plaintiff says is already public  
8 is the same type of information that's already in the I-92.

9 I think granting a motion for summary judgment at  
10 this point for plaintiff, it doesn't really take into  
11 consideration the fact that in addition to providing  
12 information, FOIA also has the interests of protecting  
13 government interests. And so I think that additional time to  
14 provide additional information would be helpful to the Court.  
15 And I believe that that -- you know, if the Court, after that,  
16 feels as though plaintiff has provided sufficient information  
17 to show that they're entitled to the records, then we would  
18 move forward and do what needs to be done at that point.

19 THE COURT: Thank you, Ms. Seabrook. I will say that  
20 as I look at the type of information that's at issue in this  
21 case, it does not strike me as the kind of information that is  
22 particularly sensitive or private. It doesn't implicate very  
23 strong privacy concerns, from what I can understand. And I  
24 think that if there was some other aspect of this that I'm  
25 missing, it was really incumbent upon the DOC to put that in

1 the record for me to consider it. Because what we're talking  
2 about here is travel information, flight information, stuff  
3 that, generally speaking, I'm not able to identify a strong  
4 privacy interest in it. I do see that it would not be  
5 appropriate to require the disclosure of personally  
6 identifiable information because I think the case law is clear  
7 that that can be something that's subject to Exemption 6 and  
8 something that we should protect. But that's not what's being  
9 requested here.

10 And to the extent that there are other interests that  
11 the government wants to rely upon, I just think that it was the  
12 government's burden to put those in the record, and I just  
13 don't see it here. So I'm just going to go ahead and rule at  
14 this time.

15 So, this case is before the Court on two motions:  
16 The defendant's second motion for summary judgment which was  
17 filed on March 13th of 2021, and the plaintiff's cross motion  
18 for summary judgment which was filed on March 14th of 2021.

19 The factual background is as follows: Plaintiff  
20 David Yanofsky is a journalist who relies on the analysis of  
21 datasets to identify newsworthy trends, especially on issues  
22 related to travel and tourism. On February 26th of 2016  
23 Yanofsky sent a request to defendant United States Department  
24 of Commerce, which I will call the DOC, under the Freedom of  
25 Information Act, or the FOIA, seeking data files and associated



1 technical documentation for the I-92 United States  
2 International Air Travel Statistics Program and the I-94  
3 Visitor Arrivals Program.

4 These two programs collect data on international air  
5 traffic and overseas visitors to the United States and the  
6 information is then provided to the International Trade  
7 Administration, ITA, a bureau the DOC. The ITA uses the data  
8 from both programs to create summary reports that are available  
9 for purchase on the ITA's website. They also provide  
10 customizable reports also for sale.

11 After litigating a fee issue, the DOC responded to  
12 Yanofsky's FOIA request by producing several data files  
13 containing standardized summary reports for the programs.  
14 According to Yanofsky, the produced records were not the  
15 records he sought, prompting him to file the instant suit on  
16 July 31st, of 2019, asserting that the DOC had not satisfied  
17 its production obligations under the FOIA.

18 In February 2020 the parties filed their first round  
19 of summary judgment briefing. The DOC argued that it had  
20 discharged its duties under the FOIA because it provided all  
21 responsive records to plaintiff. The agency also contend that,  
22 to the extent Yanofsky seeks raw data concerning the I-92 and  
23 I-94 programs, the DOC does not own that data, and even if it  
24 did, that data does not currently exist in a human-readable  
25 form. Yanofsky argued that the data files that the DOC

1 produced were not the records he requested and the DOC does  
2 possess the data files he seeks.

3 On October 6th of 2020 a predecessor judge, Judge  
4 Ketanji Brown Jackson, denied defendant's motion and  
5 plaintiff's cross motion, concluding that there were genuine  
6 issues of material fact concerning whether or not the DOC  
7 withheld responsive records; that is anonymized, non-aggregated  
8 data concerning the I-92 and I-94 programs, and, if so, whether  
9 the DOC had a valid basis for doing so.

10 Judge Jackson focused on three questions. One, what  
11 records did Yanofsky request? Two, did the DOC produce the  
12 records that Yanofsky has requested? And, three, if not, does  
13 the DOC have a valid basis for withholding the requested  
14 records?

15 Yanofsky explained that the information he was  
16 requesting under the FOIA was the data for the I-92 and I-94  
17 programs that the DOC stored in its data base. That is, quote,  
18 the data from which both DOC's annual reports and customized  
19 reports are created, unquote. Judge Jackson also found the  
20 summary reports provided by the agency did not contain all of  
21 the I-92 and I-94 data that Yanofsky sought, and that the DOC  
22 may in fact possess a database that contains the  
23 non-aggregating data points that Yanofsky requested.

24 Following the ruling of Judge Jackson, the parties  
25 filed a second round of summary judgment briefing in October of

1 2021, which is now before the Court.

2 Okay. So, the FOIA was enacted to facilitate public  
3 access to government documents in order to pierce the veil of  
4 administrative secrecy and to open agency action to the light  
5 of public scrutiny. That is *Department of State versus Ray*,  
6 502 U.S. 164, at 173, 1991.

7 Under the FOIA, an agency's required to conduct a  
8 reasonable search for records, and it must produce all  
9 responsive documents to the requester, unless the agency is  
10 entitled to withhold the records pursuant to any of the nine  
11 exemptions that are specified in the FOIA. FOIA cases  
12 typically and appropriately are decided on motions for summary  
13 judgment.

14 Rule 56 of the Federal Rules of Civil Procedure  
15 requires the Court to grant a motion for summary judgment where  
16 the pleadings, disclosure materials on file, and affidavits  
17 show that there is no genuine dispute as to any material fact  
18 and the movant is entitled to judgment as a matter of law.  
19 That's Federal Rule of Civil Procedure 56(a).

20 In the FOIA context, the district court conducts a  
21 de novo review of the record when evaluating a motion for  
22 summary judgment, and the responding federal agency bears the  
23 burden of proving that it has complied with its obligations  
24 under the FOIA.

25 With respect to the data at issue in this case, all

1 carriers operating in the United States transmit data from  
2 their automated flight manifests to the U.S. Customs and Border  
3 Protection agencies, CBP, for each flight coming to or  
4 departing from the United States. This is in the declaration  
5 of Isabel Hill, ECF No. 31-4, paragraph 8.

6 The information provides nonstop point-to-point air  
7 traffic totals between the United States and all other  
8 countries, and between the U.S. foreign airports. The CBP then  
9 provides the I-92 data to the International Trade Association,  
10 a component of the Department of Commerce, through a secure  
11 transmittal process. The I-92 data is received by the Office  
12 of the Chief Information Officer, OCIO, of ITA, which converts  
13 the data into a format that can be used by the National Travel  
14 and Tourism Office, or NTTTO, via SQL.

15 SQL is a commercially available relational database  
16 management software. That's from ECF No. 31-6, the declaration  
17 of Jeffrey Hall, paragraph 5, note 1. The I-92 data supplied  
18 by CPB is stored by the OCIO without any modification of the  
19 data provided. The I-92 data stored is identical to the  
20 original data supplied by CBP. Notably, the I-92 data  
21 furnished from CBT, quote, does not contain personally  
22 identifiable information, unquote. That's from ECF No. 31-5,  
23 the third declaration of Isabel Hill, paragraph 6. Also, the  
24 Hill declaration, paragraph 10.

25 The OCIO then transmits the I-92 data to NTTTO, which

1 executes SQL programmed routines to process and aggregate the  
2 CBP data. That's also from the Hill declaration, paragraph 10.  
3 The aggregated data is used to create seven tables of  
4 information that inform the summary monthly totals NTTO  
5 publishes on its website and the standardized reports that NTTO  
6 produces annually. The NTTO also uses the I-92 data to prepare  
7 customized data files for paying clients. The client defines  
8 the data parameters -- timeframes, ports of entry, et cetera --  
9 and NTTO provides the client with the relevant data in whatever  
10 format the client requests.

11 These customized data files could provide the date of  
12 individuals flights, which is aggregated in the standardized  
13 report, and may also contain business proprietary information  
14 of the client, which the NTTO does not otherwise disclose.  
15 That's paragraph 10, note 4 of the Hill declaration.

16 This strongly implies that NTTO has the ability to  
17 provide non-aggregated data that does not contain the business  
18 proprietary information that defendant asserts is protected by  
19 the FOIA.

20 The OCIO also uses its I-92 database, which is a copy  
21 of the unmodified I-92 records provided by CBP, to create  
22 reports. Each report is a filtered view of data existing in  
23 the OCIO's database -- that's paragraph 9 -- that indicates  
24 that defendant is able to sort and filter the information in  
25 its database.

1           The I-94 program and database. The I-94 data is  
2           NTTO's source of, quote, visitor volume from overseas, all  
3           travel modes, and Mexico, air and sea only. That's the Hill  
4           declaration, paragraph 14. CBP collects the I-94 data from  
5           carriers in the United States and other sources before securely  
6           transmitting the records directly to NTTO's contractor, which  
7           is CIC Research, Inc. Next, CIC Research extracts, aggregates,  
8           and anonymizes the data relevant to travel and tourism for  
9           NTTO. To complete this process CIC Research inputs the raw  
10          I-94 data received into a SAS database. This is the  
11          declaration of Warren Hull, ECF No. 31-7, paragraph 5.

12                 SAS stands for Statistical Analysis System, which is  
13          a software that can mine, alter, manage, and retrieve data from  
14          a variety of sources and perform statistical analysis on it.  
15          That's paragraph 5, note 1.

16                 CIC Research then creates summary tables that it  
17          sends to NTTO, along with a copy of all current data files and  
18          program files in its possession. So, NTTO does receive a copy  
19          of all the current data files and program files in its  
20          possession. That's ECF No. 20-3. That's Exhibit 3, NTTO's  
21          agreement with CIC, at page 9.

22                 Using the I-94 data, NTTO can prepare customized  
23          reports and data files for paying clients, who can select data  
24          parameters like timeframe and ports of entry.

25                 So based on this evidence in the record, I conclude

1 that the Department of Commerce has the underlying data that  
2 underlies reports for the I-92 and the I-94 reports, and that  
3 is the data that the plaintiff is seeking in his FOIA request.

4 The Department of Commerce has it on its own servers  
5 for the I-92 data, and it is not personally identifiable, that  
6 I-92 data on the DOC server. And for the I-94 data, it is both  
7 contained by a contract -- both contained in the server of a  
8 contractor, which is retained by the Department of Commerce to  
9 manage data. And so there's a statutory provision within FOIA  
10 which says that that is -- those records are in the possession  
11 of the agency. But in addition, that contractor provides the  
12 actual data files to the agency subject to a contract between  
13 them. So, the Court concludes that this information is in the  
14 possession of the Department of Commerce.

15 So, turning to the motions. The Department of  
16 Commerce argues that it reasonably and lawfully interpreted  
17 Yanofsky's request to seek only the summary standardized  
18 reports that it produces under the I-92 and I-94 programs, and  
19 that it has already provided that information and so its  
20 obligations have been met in this case.

21 However, in her October 2020 opinion, Judge Ketanji  
22 Brown Jackson found that Yanofsky's requested, quote, the data  
23 for the I-92 and the I-94 programs that the DOC stored in its  
24 database, i.e., quote, the data from which both DOC's annual  
25 reports and customized reports are created, unquote. That's in

1 the memorandum opinion at page 4.

2 Judge Jackson also noted, quote, Yanofsky seeks the  
3 anonymized, non-aggregated data that is seemingly in the DOC's  
4 database -- I'm going to omit citations here -- which, based on  
5 the statements in the DOC's submitted declarations, may, in  
6 fact, exist.

7 In the current motion that the Department of Commerce  
8 has filed, the Department asks this Court to revise that  
9 portion of the decision and find that, contrary to what Judge  
10 Jackson found, the DOC reasonably interpreted the request and  
11 has met the request. This Court declines to do that. The  
12 Court will not revisit the findings of Judge Jackson in this  
13 regard.

14 Federal Rule of Civil Procedure 54(b) governs  
15 situations in which a party seeks reconsideration of an  
16 interlocutory order. Rule 54(b) provides any order or other  
17 decision, however designated, that adjudicates fewer than all  
18 the claims or the rights and liabilities of fewer than all the  
19 parties does not end the action as to any of the claims or  
20 parties and may be revised at any time before the entry of a  
21 judgment adjudicating all the claims and all the parties'  
22 rights and liabilities.

23 Relief under Rule 54(b) is to be provided as justice  
24 requires and may be warranted when a Court has, quote, patently  
25 misunderstood the parties, made a decision beyond the



1 adversarial issues presented, made an error in failing to  
2 consider controlling decisions or data, or where controlling or  
3 significant change in the law has occurred, unquote. That's  
4 *U.S. ex rel. Westrick versus Second Chance Body Armour*, 893  
5 F.Supp.2d 258, at 268, that's D.D.C. 2012.

6 These considerations leave a great deal of room for  
7 the court's discretion, but at the same time the court's  
8 discretion is limited by the law of the case doctrine and  
9 subject to the caveat that where litigants have once battled  
10 for the court's decision, they should either be required, nor  
11 without good reason permitted, to battle for it again. That's  
12 *Singh versus George Washington University*, 383 F.Supp.2d at --  
13 I'm sorry, F.Supp.2d 99, at 101, D.D.C. 2005.

14 Here, the Department of Commerce has identified no  
15 reason for this Court to reconsider the October 20th  
16 interpretation of Yanofsky's FOIA request.

17 Department of Commerce argues that the Court, quote,  
18 failed to consider controlling decisions and data when it did  
19 not take into account consideration of the extensive case law  
20 that limits the interpretation of a FOIA request to the plain  
21 language within the four corners of the request and, two, took  
22 into consideration plaintiff's September 2019 clarification of  
23 the records the FOIA request sought but neglected to consider  
24 the fact that the alleged clarification was not provided to  
25 defendant until 15 months after defendant had already

1 interpreted and responded to the FOIA request. That's from  
2 defendant's opposition, pages 5 to 6. This argument fails to  
3 meet the standard of Rule 54(b). It's merely a disagreement  
4 with the Court's analysis. The Court considered the law and  
5 the facts before it, and the Department of Commerce is merely  
6 asking for a different result based on the same law and facts.  
7 And so the Court declines to reconsider that ruling.

8 The only arguments made in the Department of  
9 Commerce's motion for summary judgment are, first, that the  
10 standardized reports it provided adequately responded to the  
11 plaintiff's request, which it permissibly and reasonably  
12 interpreted to be different from what Judge Jackson held. The  
13 Court is going to reject that argument.

14 And the second argument is that the Department of  
15 Commerce does not have the records that Yanofsky requests. And  
16 that is based on an understanding of the records that I think  
17 is not accurate or supported at that point, given subsequent  
18 briefing and argument in this case. And so the Court is going  
19 to deny the Department of Commerce's motion for summary  
20 judgment. Those are the only two grounds that it raised in its  
21 motion for summary judgment.

22 Plaintiff has moved for summary judgment on the  
23 grounds that the Department of Commerce has the records that  
24 plaintiff has requested and has failed to release them. It  
25 asserts that the I-92 database is anonymized and non-aggregated

1 and should simply be released. And the I-94 database is not  
2 anonymized, but plaintiff has narrowed his request to seek only  
3 anonymized, non-aggregated data. And, so, to the extent the  
4 Court doesn't believe that we know exactly what the Department  
5 of Commerce has, plaintiff is requesting expedited discovery.  
6 In that regard, I don't think we need to go there because I  
7 think the record is clear enough that the Department of  
8 Commerce has the records that plaintiff is requesting and  
9 should release them.

10 The Department of Commerce has argued that the  
11 requested records are not agency records within the scope of  
12 FOIA. This is the defendant's reply in support of the second  
13 motion for summary judgment.

14 A document is not an agency record unless an agency  
15 quote, one, creates or obtains it and, two, controls it at the  
16 time of the FOIA request. That's *U.S. Department of Justice*  
17 *versus Tax Analysts*, 492 U.S. 136, at 144 to 145, 1989. The  
18 burden is on the agency to demonstrate, not the requester to  
19 disprove, that the materials sought are not agency records.

20 To determine whether an agency has sufficient control  
21 over a record to make it an agency record, courts in the D.C.  
22 Circuit consider four factors. These factors are listed in  
23 *Judicial Watch versus U.S. Secret Service*, which is 726 F.3d  
24 208, at 218, D.C. Circuit 2013. And that's citing the *Tax*  
25 *Analysts versus U.S. Department of Justice* opinion at 845 F.2d

1 1060, at 1067, D.C. Circuit 1988. That was affirmed by the  
2 U.S. Supreme Court in the opinion I previously cited.

3 The four factors that courts consider to determine  
4 whether the agency has sufficient control over the record to  
5 make it an agency record are as follows:

6 Number one, the intent of the document's creator to  
7 retain or relinquish control over the records;

8 Number two, the ability of the agency to use and  
9 dispose of the record as it sees fit;

10 Number three, the extent to which agency personnel  
11 have read or relied upon the document, and;

12 Number four, the degree to which the document was  
13 integrated into the agency's record system or files.

14 In the four-factor analysis, the third and the fourth  
15 factors are deemed the most important. That's *Judicial Watch*  
16 *versus Federal Housing and Finance Agency*, 744 F.Supp.2d 228,  
17 at 235, that's D.D.C. 2010. And that's that is reaffirmed by  
18 several other cases as well, which I will not read the cites  
19 into the record.

20 Plaintiff argues that the Department of Commerce  
21 waived the argument that the I-92 and I-94 databases are not  
22 agency records. The Court agrees with plaintiff that this  
23 argument and the argument that FOIA exemptions apply are waived  
24 to the extent that DOC seeks summary judgment because those  
25 arguments should have been raised in the first, and certainly

1 the second motion for summary judgment filed by the Department  
2 of Commerce. I've already denied the Department of Commerce's  
3 motion for summary judgment without considering these  
4 arguments.

5 But, the DOC also raises this argument in opposition  
6 to plaintiff's motion for summary judgment and the Court will  
7 consider the arguments in ruling on plaintiff's motion.

8 The databases are agency records because the agency  
9 obtained the records, and may have created them as well, at  
10 least some of them, and the DOC fails to establish that it does  
11 not control them. As an initial matter, the Court concludes  
12 that the DOC obtained the records at issue, as the agency  
13 itself concedes. The agency conceded that in its  
14 opposition/reply at page 19. And the first part of the agency  
15 records test, which requires that the agency created or  
16 obtained the records, is, therefore, satisfied by the  
17 Department of Commerce's own admission.

18 If we put aside the MOU for a moment, the Court has  
19 no trouble concluding that the databases are under DOC 's  
20 control and, therefore, should be considered agency records.  
21 First, in *Tax Analyst* the Supreme Court explained that by  
22 "control" we mean that the materials are come into the agency's  
23 possession in the legitimate conduct of its official duties,  
24 that's 492 U.S. at 145. That standard is satisfied here.  
25 These records come to the Department of Commerce so we can

1 perform statutory requirements of keeping track of and  
2 publishing travel data.

3 Second, the overall system that is in place, as  
4 reflected in this record, supports the conclusion that DOC is  
5 in control of this data.

6 First factor, the intent of the creator to relinquish  
7 control. The CBP gathers the data and provides it to the DOC  
8 and the DOC then uses the data to create reports and to do  
9 statistical analysis. Some reports are standardized and some  
10 are customized. The customized ones are tailored to the  
11 requester's needs, which could not be anticipated when the CBP  
12 provided the data to DOC. The structure of these programs  
13 gives DOC control over releasing and presenting the data.

14 Number two, the ability of the agency to use the data  
15 as it sees fit. CBP is giving DOC discretion to create  
16 standardized reports, as well as customized reports, as  
17 requested by unknown future requesters. So there is discretion  
18 on the part of DOC on how the data will be ultimately released,  
19 but there are -- reflected in the MOU, which I'll talk about in  
20 moment -- some limits on this. But overall DOC uses the data,  
21 CBP just provides the data, with an understanding of how it  
22 will be used.

23 Third, the extent to which agency personnel read and  
24 rely on the data. DOC personnel use this data to create  
25 standardized reports, as well as customized reports. They are

1 clearly reading and using this data.

2 And, fourth, the degree to which the data is  
3 integrated into the agency's files. The I-92 data is on DOC  
4 servers, and the I-94 data is in the possession of a contractor  
5 that holds the data of behalf of DOC for data management  
6 purposes. That contractor, CIC Research, holds those data --  
7 that data for the DOC. The FOIA makes clear that the  
8 definition of records subject to FOIA includes information,  
9 quote, maintained for an agency by an entity under government  
10 contract, for the purposes of records management. That's 5  
11 U.S.C. § 552(f).

12 Clearly, that is the case here. To the extent that  
13 CIC Research holds the data, it is for DOC. Moreover, the  
14 DOC's contract with CIC mandates that on an annual basis CIC,  
15 quote, shall provide the Office of Travel and Tourism  
16 Industries, the OTTI, a component of DOC, with a copy of all  
17 current data files and program files, unquote. That's ECF No.  
18 14-4. And so that's further evidence that these data files are  
19 in the possession of the Department of Commerce.

20 The question -- so, applying the four factors based  
21 on the structure and the intent of how this data is used, the  
22 Court has no trouble concluding that DOC is in control of this  
23 data. There is a question, however, about a memorandum of  
24 understanding that is here within the record and how it should  
25 affect the analysis.

1           In the record is an MOU that the Department of  
2 Commerce contends governs the use of the data CBT provides to  
3 the Department of Commerce. It is Exhibit 1 to the Huether  
4 declaration.

5           As an initial matter, the MOU here is unsigned and  
6 undated. The Court is not inclined to give it the weight that  
7 a signed MOU would have. The burden is on the agency to  
8 establish that the records at issue are not agency records, and  
9 reliance on an unsigned and undated document that expressly  
10 states that it is effective only after it's signed, and only  
11 for five years after its effective date, does not fully meet  
12 that burden.

13           The MOU says, on its last page, quote, This MOU shall  
14 be effective upon signature by both parties and shall  
15 terminate, unless extended by virtue of written agreement, five  
16 years from the effective date, unquote.

17           So in the record the DOC is relying on declarations  
18 that say we understand this MOU to be in effect and it has been  
19 verbally extended, but this Court is not clear that this MOU is  
20 in effect or that it's currently in effect based on the terms  
21 within the MOU itself and the fact that it's not sign and not  
22 dated.

23           In any event, even assuming a signed MOU, this Court  
24 is not inclined to rule that the records are not under DOC's  
25 control. In *Judicial Watch, Inc., versus U.S. Secret Service,*



1 which is at 726 F.3d 208, that's a D.C. Circuit case from 2013,  
2 the D.C. Circuit analyzed whether records of visitors to the  
3 White House were, quote, agency records, unquote, of the Secret  
4 Service subject to disclosure under FOIA, or if those records  
5 of the White House were not subject to FOIA because they  
6 were -- they belong to the White House and not the Secret  
7 Service. The Secret Service and the White House had a  
8 memorandum of understanding about the records, and the MOU  
9 explicitly provided that those records were not agency records.

10 Notably, the Court declined to be bound by the MOU's  
11 legal assertions that the records were presidential records,  
12 that they were not the records of an agency subject to FOIA, or  
13 that they were under the exclusive legal custody and control of  
14 the White House. But the Court relied on the MOU's description  
15 of the purpose, generation, and use of the records, as well as  
16 the government's intentions, understandings, and practice  
17 regarding the records.

18 What I glean from this is that the terms of the MOU,  
19 while instructive, are not binding upon the Court. Just  
20 because two agencies agree on the terms of disclosure of  
21 certain information, those agencies are not empowered to  
22 determine what is required or not under the FOIA. In *Judicial*  
23 *Watch* some of the records were found to be governed under the  
24 Presidential Records Act, instead of FOIA. Here, there is no  
25 alternative statutory framework to apply, and the terms of the

1 MOU itself plainly cannot supersede the requirements of FOIA.

2 Here, the MOU is instructive about the intent of the  
3 parties and their understanding of how the data would have been  
4 used to create reports and statistics about international  
5 travel. The MOU discusses how the DOC and travel industry  
6 would rely on the data to analyze the international travel  
7 market, and how DOC would use the data in an in-flight survey  
8 program. These are the primary purposes of sharing the data at  
9 issue. Notably, however, in MOU does not address FOIA. It  
10 does not address FOIA requests at all and it does not  
11 explicitly limit disclosure in the context of FOIA.

12 In *Judicial Watch* the Court applied the four-factor  
13 test regarding control and found the test to be inconclusive.  
14 It held that such uncertainty would, quote, redound to the  
15 benefit of the plaintiff because it is the burden of the agency  
16 to demonstrate, not the requester to disprove, that the  
17 materials sought are not agency records, unquote. And that's  
18 *Judicial Watch* at pages 220 to 221, quoting the *Tax Analysts*  
19 opinion.

20 The Court noted in that case that there were special  
21 policy considerations at stake and, thus, a somewhat different  
22 control test was applied. Special policy considerations  
23 include when the records originated in an entity not subject to  
24 FOIA, such as Congress or the White House and, therefore,  
25 separation of powers concerns were implicated.

1           Here, there are no special policy considerations, no  
2 special policy concerns. So if the analysis is inconclusive,  
3 it redounds to the benefit of Yanofsky.

4           Application of the four-factors, even taking the  
5 unsigned MOU into account, weighs in favor of disclosure, or  
6 the weighing of these factor is, at best, inconclusive, and  
7 that would redound to the benefit of plaintiff.

8           The first factor, which is the intent of the creator  
9 of the record, in *Judicial Watch* the Court accepted the MOU's  
10 statement of intent as to which entity should control the  
11 records, noting that the MOU in that case was, quote,  
12 unequivocal in asserting that the control over the records is  
13 at all times maintained by the White House and not the Secret  
14 Service, unquote, and that any information provided to the  
15 Secret Service for the creation of such records, quote, is  
16 provided under an express reservation of White House control,  
17 unquote. That's on page 218 of *Judicial Watch*. And, thus, it  
18 found that the first intent factor weighed in favor of  
19 defendant in that case.

20           Here, however, there is no such strong language in  
21 the MOU before this Court. The MOU notes that the data is,  
22 quote, collected by the INS, unquote -- the INS is the  
23 predecessor agency of the CBP -- but, the MOU says, it is,  
24 quote, used by the DOC for the express purposes set forth  
25 herein, unquote. Then it goes on to describe the expected uses

1 of the data.

2 So, from my reading of the MOU, it divides  
3 responsibility for this data. CBP collects it and then DOC  
4 uses it and there is no explicit statement that CBP has a  
5 greater interest than the DOC in this data. There's no  
6 explicit statement that the CBP reserves the right to control  
7 the data or should have -- be the ultimate arbitrator of what  
8 should be done with this data. This MOU says that CBP collects  
9 the data and then DOC uses the data. What's at issue in this  
10 case is how this data is used. So in this Court's opinion, the  
11 MOU does not indicate that CBP intended to retained close  
12 control over this data.

13 Rather, the MOU indicates that after collecting the  
14 data, CBP was providing it to the DOC for use for the purposes  
15 that were outlined in the MOU. But that MOU was specifically  
16 addressing the report-making and the statistical analysis of  
17 that -- that was enumerated there and says nothing about FOIA.

18 Secondly, the second factor, ability of the agency to  
19 use and dispose of the record as it sees fit. The MOU between  
20 the DOC and the CBP indicates that the DOC is limited in some  
21 respects in how it can use the data. For example, Section 2.B  
22 of the MOU states, quote, pursuant to 5 U.S.C. 552a(b)(5), the  
23 INS is authorized to disclose this data to DOC upon advanced  
24 adequate written assurances that the data will be used solely  
25 as a statistical research or reporting record, and that the

1 record will be transferred in a form that is not individually  
2 identifiable, unquote.

3 So, the terms of the MOU thus make clear that the DOC  
4 does not have unfettered ability to use and dispose of the  
5 records as it sees fit. So this factor may weigh in favor of  
6 finding that DOC does not have at least complete control over  
7 these records.

8 But in practice, the DOC has substantial discretion  
9 to use the records to create reports and to perform other  
10 statistical analysis, it's just not unlimited control.

11 So, the case law says that the third and the fourth  
12 factors are the most important. And in this Court's opinion,  
13 those factors weigh in favor of finding that the DOC is in  
14 control of these records. The DOC relies on the records to  
15 create the reports, both standardized and customized, and so  
16 its employees plainly read and rely on the data. I don't think  
17 there's any way they can see this otherwise. And, further, the  
18 I-92 data is uploaded to the DOC server and the I-94 data is  
19 stored in the server of the DOC's contractor, which holds the  
20 data for DOC. So this fourth factor, which speaks to where the  
21 data is housed or stored, in this Court's opinion, favors  
22 finding that DOC is in control of the data.

23 And so, those third and fourth factors, which are the  
24 most important, weigh in favor of finding that there's control.  
25 I think the second factor could be viewed as weighing against.

1 But I think the first factor, the intent, is also inconclusive.  
2 And so I think, on balance, these four factors, especially the  
3 most important ones, weigh in favor of finding that DOC has  
4 control of these records and, therefore, it has obtained and  
5 controls the records and they are agency records.

6 To the extent that it's not as clear on two of the  
7 four factors, if we were to find that this was an inconclusive  
8 weighing of the factors, under *Judicial Watch* that would still  
9 redound to the benefit of Yanofsky and these would be agency  
10 records that should be disclosed.

11 And so, even assuming there is a valid and proper  
12 MOU, which is not clear to this Court, the four factors support  
13 a finding that the DOC controls the data, the databases are  
14 agency records.

15 So, I want to note, too, that I don't think that the  
16 disclosure that is contemplated and requested by the plaintiff  
17 would violate the MOU or CBP's interests as I can divine them  
18 from the MOU itself. MOU's terms -- the MOU's at ECF No.  
19 34-4 -- Section 1.D says, quote, none of the information INS  
20 provides to DOC is to be released in any form identifiable to  
21 any individuals. Upon collection and processing of statistical  
22 information, the DOC releases the following types of  
23 information:

24 The number of arrivals to the United States; the  
25 total number of travelers using business, pleasure, and student

1 visas; estimates on the number of individuals arriving by air,  
2 land, and sea, and; age group data falling under selected  
3 categories, including the destination and port of entry at the  
4 time of travel. No other data is ever released, unquote.

5 So what Mr. Yanofsky is asking for is anonymized,  
6 non-aggregated data. And it's not clear to this Court that  
7 this would run afoul of this provision. I don't think it does.  
8 This provision says, quote, Upon collection and processing of  
9 statistical information certain information may be released.  
10 But this FOIA request is not asking for processing of  
11 information, it's just -- it just wants the underlying data  
12 that's in the database.

13 So you could read this provision to not apply the  
14 limits where the data is not processed, that is, where the  
15 underlying data is released under FOIA. This could be read as  
16 applying only to when the data is released pursuant to normal  
17 reporting activities, which is contemplated by the MOU. So I  
18 don't think that, in any event, what is to be released is  
19 anonymized and, therefore, it complies with the provision of  
20 the MOU that says that the data cannot be in a form  
21 identifiable to any individuals. So, I don't think this runs  
22 afoul of that provision of the MOU.

23 Section 2.B of the MOU says, "Pursuant to 5 U.S.C.  
24 552a(b)(5), the INS is authorized to disclose this data to DOC  
25 upon advanced adequate written assurances that the data will be

1 used solely as statistical research or reporting record, and  
2 that the record will be transferred in a form that is not  
3 individually identifiable.

4 So, as we've discussed, it will not be individually  
5 identifiable, and it seems to me that Mr. Yanofsky's intent is  
6 to do statistical research or reporting based on those records.  
7 So I don't think the release of these records to Mr. Yanofsky  
8 violates § 2.B of the MOU either.

9 The other sections that I've reviewed are §§ 4.B and  
10 6.B. And, again, because the records to be released are  
11 anonymized or not personally identifiable, I don't think  
12 release of the records will run afoul of the MOU. Just based  
13 on my reading of it, I don't see it.

14 Okay. Finally, I want to address the DOC's argument  
15 that the I-92 and I-94 data should be withheld based on FOIA  
16 exemptions. The DOC argues that the I-92 data contains  
17 confidential business information that would be exempt from  
18 disclosure pursuant to FOIA Exemption 4, and that the I-94 data  
19 contains personally identifying information that would be  
20 exempt from disclosure pursuant to FOIA Exemption 6. This is  
21 in the defendant's opposition at 26 and 30.

22 FOIA Exemption 4 covers trade secrets and commercial  
23 or financial information obtained from a person that are  
24 privileged or confidential. Such information may be withheld  
25 from disclosure under 5 U.S.C. § 552(b)(4).



1           An agency may rely on Exemption 4 if it can bear the  
2 burden of establishing that the withheld materials are, No. 1,  
3 commercial and financial. No. 2, obtained from a person. No.  
4 3, privileged or confidential.

5           A Court's analysis of whether information is  
6 confidential turns on whether the information was provided to  
7 the government voluntarily or involuntarily, and the party  
8 invoking Exemption 4 does not, quote, need to prove disclosure  
9 certainly would cause it substantial competitive harm, but only  
10 that disclosure would likely do so.

11           Finally, the exemption only applies to, quote, harm  
12 flowing from the affirmative use of proprietary information by  
13 competitors, unquote. That's *Public Citizen Health Research*  
14 *Group*, 704 F.2d at 1291, note 30.

15           Okay. So, the Department of Commerce's arguments in  
16 this regard are as follows: Quote, defendant properly asserts  
17 Exemption 4 to protect from disclosure confidential business  
18 information provided by air carriers to CBP pursuant to  
19 statutory mandate. Defendant asserts this exemption to  
20 withhold data that consists of non-aggregated, detailed records  
21 of arrival or departure by air that include an air carrier  
22 name, flight number, an arrival or departure date, and closely  
23 guarded competitive data of airlines' passenger volume for  
24 various routes at various times of the day and throughout the  
25 year, as well as information about the nationality of its

1 passengers.

2 Notably, DOC cites no evidence to support its  
3 arguments that, quote, it is valuable data that is used in the  
4 business of the provider of the information, i.e., the air  
5 carriers, unquote. Or, quote, the confidentiality standard is  
6 met because the owners of the information -- private and  
7 commercial airlines -- customarily do not disclose the  
8 information or make it publicly available in any way, unquote.

9 The briefing on this point cites no evidence  
10 whatsoever to support these assertions. Furthermore, in his  
11 reply brief plaintiff cites publicly available sources for the  
12 information that the DOC claims is confidential. That's the  
13 reply brief of plaintiff at pages 15 to 17. Thus, DOC fails to  
14 meet its burden to establish that the exemption applies to the  
15 I-92 data.

16 Exemption 6. Exemption 6 protects personnel and  
17 medical files and similar files, the disclosure of which would  
18 constitute a clearly unwarranted invasion of personal privacy.  
19 In determining whether an otherwise responsive record qualifies  
20 for the protections of Exemption 6, a Court must first  
21 determine that the record fits into one of the relevant  
22 categories -- personnel, medical, or similar files; all  
23 information that applies to a particular individual meets the  
24 threshold requirement for Exemption 6 protection. If a record  
25 so qualifies, the Court then determines whether disclosure of

1 that document would compromise a substantial -- as opposed to  
2 de minimis -- privacy interest. And, finally, if the defendant  
3 successfully identifies a substantial privacy interest, the  
4 Court applies a balancing test that weighs the privacy interest  
5 in withholding the record against the public's interest in the  
6 record's disclosure.

7 The DOC's arguments on this point do not seem to  
8 account for the fact that the I-92 data is anonymized, and the  
9 request regarding the I-94 data has been narrowed to encompass  
10 only anonymized data. And I'm defining anonymized as not  
11 including any personally identifiable information for  
12 individuals.

13 So, Yanofsky has narrowed his request to eliminate,  
14 No. 1, the names of any individuals. No. 2, any record  
15 identification numbers unique to a passenger and visit. And,  
16 3, any addresses, except for Zip Codes. That's in the second  
17 Marshall declaration at paragraph 3.

18 So to the extent that the data files to be disclosed  
19 are anonymized, in this Court's view the privacy interests of  
20 the individuals that are subject to the data are de minimis.  
21 And so because what is contemplated is the release of  
22 anonymized data, the Court finds Exemption 6 does not apply,  
23 since the privacy arguments are de minimis. I don't think I  
24 even need to do the balancing because I find that that's  
25 de minimis. But I do think that what Marshall is trying to

1 do -- I'm sorry, what Yanofsky is trying to do is to research  
2 this data not for his own personal interests, but as a reporter  
3 trying to report about the travel industry, and also to  
4 determine whether the travel reports issued by the government  
5 are in fact accurate. And so I do think that his interests  
6 would outweigh the de minimis privacy concerns raised by  
7 anonymized data about travel being released.

8 I've noted at the beginning -- or, during this  
9 hearing that the data issue here is travel data. You know,  
10 flight information, how many people are on the flights, where  
11 the flights come from. In this Court's view that's not the  
12 type of data that implicates very serious privacy concerns,  
13 things that's are very sensitive things that we have to be very  
14 careful about. To the extent that there's anything like that,  
15 it's not in the record and if there is, the government should  
16 have put it there. I don't see any reason to safeguard this  
17 information.

18 I also want to note a couple of other things that  
19 were raised at this hearing. There was a lot of discussion  
20 about what does anonymization mean? And I have taken it to  
21 mean the elimination of personally identifying information for  
22 individuals. And Ms. Seabrook, on behalf of the Department of  
23 Commerce has argued that some of the data could be not  
24 anonymized in the sense that it can identify airline carriers  
25 or certain businesses. And in this Court's view that's a

1 distinction that doesn't make much of a difference because I  
2 don't see what the privacy concern is for airlines to safeguard  
3 their identity in terms of where they're traveling and how many  
4 people they're carrying. I just don't see a strong interest in  
5 that. I don't think that makes a difference. And I'll note  
6 that the FOIA request itself did not define anonymized or  
7 non-anonymized in any way.

8           So I think that the FOIA request itself was broad  
9 enough to encompass the way I am talking about anonymized data.  
10 But it didn't request anonymized data. The FOIA request itself  
11 just requested the data files that underlie the I-92 and I-94  
12 reports. And in the course of this litigation the request has  
13 been narrowed, and it has been narrowed to now encompass  
14 anonymized, non-aggregated data. Anonymized in the sense that  
15 it doesn't contain individually personally identifying  
16 information. And I think the agency has that data, is able to  
17 provide it and is obligated to do so.

18           There's also the issue of consultation and referral.  
19 The Department of Commerce has argued that it is required to  
20 consult with CBP and that it has in fact referred the FOIA  
21 request over to CBP because, in DOC's view, CBP is the owner of  
22 the data. As this Court has ruled, the Court does not think  
23 the record supports a finding that CBP owns the data and has  
24 the exclusive right to determine whether it should be released  
25 and that -- or even that the CBP is the appropriate agency to

1 which the FOIA request should have been directed. The I-92 and  
2 I-94 reports are produced by the DOC, not by CBP. The MOU  
3 between the two agencies indicates that while CBP collects the  
4 data, it's DOC that uses the data. And what we're talking  
5 about here is the use of the data.

6 In this Court's view the record supports that DOC is  
7 the proper agency to determine what should be revealed, and  
8 it's the DOC that has the burden of meeting this FOIA request,  
9 appropriately so, because it is the agency that creates the two  
10 reports, the I-92 and the I-94 reports, that form the basis of  
11 the FOIA request. The request is for the data files underlying  
12 those reports. There's no indication in this record that CBP  
13 has any particularly specialized knowledge or ability to  
14 articulate interest in this data.

15 There's -- as we've discussed in oral argument here  
16 today, the record is devoid of any indication of what CBP's  
17 interests are in this data and the release of it. And the  
18 Court is not able to discern, just from its reading of the  
19 record, that there is any reason why CBP would have any problem  
20 with releasing anonymized data pursuant to this FOIA request.  
21 The MOU seeks to protect data that is individually  
22 identifiable, and the fulfilment of this FOIA request would not  
23 divulge any information that's personally identifiable.

24 And so to the extent that the MOU expresses the  
25 interest that CBP has, there's no violation of that interest.

1 As the Court has stated, I don't think that release of this  
2 information under FOIA violates any provision of the MOU. And,  
3 in addition, there is evidence in the record, pointed out by  
4 Mr. Marshall, that the CBP itself has released very similar  
5 data in connection with a different FOIA request.

6 And so all the circumstantial evidence that I do have  
7 indicates that the CBP does not have a strong interest in  
8 protecting this data in the form that it's going to be  
9 released. And to the extent that there is some other interests  
10 that the Court is not aware of, it was incumbent upon the DOC  
11 to put that information in the record, and it's not there.

12 I would emphasize that it is the agency's burden to  
13 act reasonably in responding to a FOIA request. And the  
14 referral in this case of the FOIA request to the CBP has  
15 resulted in a delay of, according to Mr. Marshall, 1200 days  
16 for the I-92 data and 1400 days for the I-94 data. Based on  
17 the case cited by Mr. Marshall and just based on the general  
18 reasonableness requirement under FOIA, it is not reasonable for  
19 an agency to fulfil its FOIA responsibilities simply by stating  
20 that it's consulting and then referring the request to another  
21 agency for basically what has been an indefinite amount of  
22 time.

23 And I think it's clear -- I think the citation was  
24 697 F.2d 1095, that case, *McGehee*, stated that the referral  
25 process must be justified as reasonable and the effect should

1 not be to deny the request to records he is otherwise entitled  
2 to or increase the amount of time for fulfillment of the  
3 request in an unreasonable way. And clearly what the  
4 Department of Commerce has done here is not reasonable under  
5 the FOIA or under the existing case law, because even assuming  
6 it was proper to consult with the DOC, the manner in which it  
7 was done -- I'm sorry, with the CPB, the manner in which it was  
8 done was not reasonable. And so that is not a reason not to  
9 grant the motion for summary judgment in favor of Mr. Yanofsky.

10 Okay. Does either party want any additional findings  
11 of fact or conclusions of law for the record? I ordinarily  
12 would have written, but I -- just given the age of this case, I  
13 wanted to resolve it.

14 Ms. Seabrook, do you have anything that you would  
15 like me to address on the record at this time?

16 MS. SEABROOK: I don't believe so, Your Honor.

17 THE COURT: All right. Thank you.

18 Mr. Marshall, is there anything you would like me to  
19 address on the record?

20 MR. MARSHALL: No, Your Honor.

21 THE COURT: All right. Thank you. So I'm going to  
22 deny the motion for summary judgment of the Department of  
23 Commerce. I'm going to grant the motion for summary judgment  
24 Mr. Yanofsky.

25 Mr. Marshall, could you submit a proposed order?



1 Because I don't know logistically how you want this to be.  
2 Could the parties actually confer on what a proposed order  
3 would be in terms of how the record should be released, if the  
4 logistics should be addressed in the order?

5 What are the parties' views on that? Do we need  
6 to have sort of a timeline, or how should this be?

7 MR. MARSHALL: Your Honor, I think a couple of things  
8 on that. In the meet and confer correspondence, before the  
9 first round of summary judgment in this matter, plaintiff set  
10 forth all the formats that he would be able to accept the data  
11 in; it's essentially any format.

12 But we can certainly confer with counsel for DOC and  
13 confer about timing. You know, again, I think in light of the  
14 Court's ruling and the amount of time that this has been  
15 pending, we would like for it to be quick, and so there's not  
16 further delay. And I would think, you know, given that the CIC  
17 research declarant has already said that he could -- or, that  
18 CIC Research could do this, and given that the I-92 data is  
19 already with DOC, I don't think it should take too long. But  
20 we can certainly confer and propose that to Your Honor.

21 THE COURT: That's fine. Is that okay with you,  
22 Ms. Seabrook? Or do you want anything else?

23 MS. SEABROOK: Yes, Your Honor.

24 THE COURT: Okay.

25 MS. SEABROOK: Your Honor, I'm sorry. Just a point

1 of clarification. Will there be a written memorandum opinion?

2 THE COURT: I'm not going to do a memorandum opinion.  
3 So you'll have to just order the transcript for this. And so  
4 the docket entry should reflect that the government's motion  
5 for summary judgment is denied. The plaintiff's cross motion  
6 for summary judgment is granted for the reasons stated on the  
7 record. And the parties are to be meet and confer and propose  
8 a joint -- propose a joint order that would reflect how the  
9 release of records -- that schedule for the release of records.

10 MS. SEABROOK: Thank you, Your Honor.

11 THE COURT: All right. Thank you. So, I really want  
12 to thank the parties for their hard work in the briefing in  
13 this case. I know the case was pending for a long time and  
14 there was a lot here. But I think that the briefing and the  
15 representation of both parties was very strong. So, thank you  
16 both very much. Okay.

17 All right. If there's nothing further, the parties  
18 are excused.

19 MR. MARSHALL: Thank you, Your Honor.

20 MS. SEABROOK: Thank you, Your Honor.

21 THE COURT: And for the court reporter, if you would  
22 like a copy of my notes in this case, you can just contact  
23 chambers and we're happy to send it to you.

24 Okay. All right. Thank you. The parties are  
25 excused.

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 3rd day of June, 2022

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Janice E. Dickman, CRR, CMR, CCR  
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