IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, Defendant.	Civil Action No. 23-0046 (AHA)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Exemptions 6 and 7(C) of the Freedom of Information Act ("FOIA") shield certain records when disclosure would or could cause "an unwarranted invasion of personal privacy." In this case, the Department of Homeland Security ("DHS") invokes Exemptions 6 and 7(C) to withhold the name of a U.S. Secret Service ("Secret Service") agent who described himself as the agency's "unofficial liaison" to the Oath Keepers—a violent militia group whose leaders were later convicted of seditious conspiracy for their role in the January 6, 2021 assault on the U.S. Capitol.[1] Yet the agency's withholding of the Oath Keeper liaison's name fails every step of the Exemption 7(C)/6 analysis.

The records partially released in this case reveal Secret Service agents regularly communicating with an extremist militia organization to coordinate the group's mobilizations at events attended by Secret Service protectees mere months before the January 6th attack, including discussions about where the group could and could not carry firearms. The released records do not show the Secret Service investigating the Oath Keepers as a potential threat. Rather, agents describe the Oath Keepers in a positive and sympathetic light. One agent, the agency's "unofficial liaison" to the group, calls the Oath Keepers a "very pro" law enforcement and "Pro Trump" group who "provide protection and medical attention to Trump supporters if they come under attack by leftist groups." Ex. 1 at 1.

DHS's withholding of the Oath Keeper liaison's name under Exemptions 7(C) and 6 fails for three reasons. First, the withheld records were not "compiled for law enforcement purposes." Second, DHS fails to demonstrate anything more than a *de minimis* privacy interest in

[1] CREW lacks sufficient knowledge as to whether the redactions it challenges in this case include the names of multiple Secret Service agents or a single agent. *See* Pl.'s Resp. to Def.'s Statement of Undisputed Material Facts ¶¶ 2, 3. Thus, while the singular is used throughout this memorandum, CREW seeks release of the names of all agents who were in contact with the Oath Keepers in the months preceding the January 6, 2021 attack on the U.S. Capitol.

nondisclosure of the agent's name, offering only a conclusory assertion that disclosure would lead to "harassment and retaliation." Third, any privacy interest is outweighed by the substantial public interest in identifying the Oath Keeper liaison and shedding light on how certain Secret Service personnel—who may remain employed by the agency—carried out their statutory duties ahead of January 6th.

Indeed, the public has a significant interest in learning whether agency officials "acted negligently or otherwise improperly in the performance of their duties," especially given the "historical importance" of the January 6th attack. *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 173, 175 (2004). The failure of law enforcement to detect, understand, or prepare for the high potential for violence on January 6th is a matter of substantial public interest. That includes learning of any infiltration, coordination, or sympathy in law enforcement towards an extremist group whose leaders have since been convicted of seditious conspiracy. Because the Oath Keepers liaison may *still* be employed by the Secret Service, that public interest is urgent.

Accordingly, the Court should enter summary judgment for CREW and order the DHS to promptly release the withheld material in full.

BACKGROUND

The Oath Keepers is an anti-government militia group that focuses on recruiting former and current military and law enforcement personnel. Pl.'s Statement of Undisputed Material Facts ("Pl.'s Facts") 1. They were founded and were led by Stewart Rhodes. *Id*. Preceding the September 2020 communications at issue here, the Oath Keepers were known nationally for their organizing of "armed groups, ostensibly to serve as volunteer, self-appointed security at protests around the country" during anti-lockdown protests and Black Lives Matter rallies. *Id.* 2. The

group's leader, Stewart Rhodes, had agitated against the federal government for years, including during armed standoffs in Bunkerville, Nevada, in 2014 and Burns, Oregon, in 2016. *Id.*

The Oath Keepers played a leading role in the January 6th insurrection at the United States Capitol. *Id.* 3. During the attack, members of the Oath Keepers formed two military "stacks," marched up the Capitol's East Plaza steps, and forced their way inside the building. *Id.* 4. They contributed to an attack that delayed Congress's constitutionally mandated counting of electoral votes for the first time in American history. *Id.* 5. Fourteen Oath Keepers, including Rhodes, were later convicted of seditious conspiracy and other felonies relating to their efforts to "oppose by force the execution of the laws governing the transfer of presidential power" on January 6, 2021. *Id.* 6.

Despite being in contact with some of the perpetrators and organizers of the attack, federal and local law enforcement failed to understand or prepare for the high potential for violence that day. There is also evidence of law enforcement coordination with now-convicted January 6th seditionists. During Rhodes' criminal trial, a former member of the Oath Keepers testified that he observed Rhodes speaking on the phone with a Secret Service agent about "what weapons the group's members could carry" at a September 2020 Trump rally. *Id.* 7. Following other reporting that claimed members of the Secret Service had multiple phone calls with members of the Oath Keepers in the months leading up to January 6, *id.* 8, the House Select Committee to Investigate the January 6th Attack on the United States Capitol requested Secret Service records of all contacts between the agency and the Oath Keepers. *Id.* 9. More recently, a federal judge found a Washington, D.C. Metropolitan Police officer guilty of federal crimes related to his communications with another January 6th organizer later convicted of seditious

conspiracy, then-Proud Boys chairman Enrique Tarrio, including by warning Tarrio that he had a warrant out for his arrest. *Id.* 10.

On October 21, 2022, CREW submitted a FOIA request to DHS, seeking "all communications between the [Secret Service] and any member of the Oath Keepers between August 1, 2020 and January 31, 2021." Compl. 9, ECF No. 1. After confirming receipt, the Secret Service did not respond to Plaintiff's records request. CREW filed this suit on January 6, 2023. Compl., ECF No. 1. After nearly two years, DHS released a total of 14 pages in part in response to CREW's FOIA request. It initially released eleven pages on July 31, 2023 (attached as Exhibit 1), and released three additional pages on September 27, 2024, after the first search had proven to be inadequate. *See* Jt. Status Rep. ¶¶ 2–6, ECF No. 27.

The released records show an agent was in regular contact with the Oath Keepers and their leader Stewart Rhodes in September 2020, including fielding and passing on messages and "specific questions" from Rhodes to other Secret Service personnel, in the months prior to the January 6th attack on the U.S. Capitol. Ex. 1 at 1. The agent called himself the Secret Service's "unofficial liaison to the Oath Keepers (inching towards official)." *Id.* The records do not reflect the suspicion one would expect from communications between the protective detail of the President of the United States and an anti-government extremist group with a history of violence. Rather, the unidentified agent described the Oath Keepers in a positive light, asserting that the Oath Keepers were "pro-LEO" (law enforcement officers) and were present to "provide protection and medical attention to Trump supporters if they come under attack by leftist groups." Ex. 1 at 1; *see also* Ex. 1 at 8 (an unidentified federal official asserting that the Oath Keepers "are NOT there to demonstrate or push a political agenda"). The agent passed on Stewart Rhodes' cell phone number to other Secret Service personnel, so Rhodes could ask

questions about the Oath Keepers' mobilization at a rally, including about weapons possession in and around Secret Service zones of protection. *Id.* at 1, 3, 7.

The parties have narrowed their dispute to DHS's Exemption 6 and 7(C) redactions of the Oath Keepers liaison's name in DHS's July 31, 2023 production, which is attached as Plaintiff's Exhibit 1. *See* Jt. Status Rep. 2, ECF No. 27. The parties now cross-move for summary judgment with respect to the disputed withholdings.

LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). A court reviews an agency's response to a FOIA request de novo. *See* 5 U.S.C. § 552(a)(4)(B); *Elec. Priv. Info. Ctr. v. Dep't of Homeland Sec.*, 777 F.3d 518, 522 (D.C. Cir. 2015).

FOIA reflects "a general philosophy of full agency disclosure." *Elec. Priv. Info. Ctr.,* 777 F.3d at 522 (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)). FOIA's central purpose is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

Accordingly, FOIA "mandates that an agency disclose records on request, unless they fall within one of nine exemptions. These exemptions are "'explicitly made exclusive,' and must be 'narrowly construed.'" *Milner v. Dep't of Navy*, 562 U.S. 562, 565 (2011) (first quoting *Env't Prot. Agency v. Mink*, 410 U.S. 73, 79 (1973); then quoting *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 630 (1982)). "'[T]he burden is on the agency' to show that requested material falls within a FOIA exemption." *Burka v. Health & Hum. Servs.*, 87 F.3d 508, 514 (D.C. Cir. 1996) (quoting *Petrol. Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992)).

To obtain summary judgment, "the agency must provide a detailed description of the information withheld through the submission of a so-called '*Vaughn* index,' sufficiently detailed affidavits or declarations, or both." *Hussain v. Dep't of Homeland Sec.*, 674 F. Supp. 2d 260, 267 (D.D.C. 2009). The agency must "disclos[e] as much information as possible without thwarting the exemption's purpose," *King v. Dep't of Just.*, 830 F.2d 210, 224 (D.C. Cir. 1987), and can obtain summary judgment only if its submissions "contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith," *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008). "Because of FOIA's critical role in promoting transparency and accountability, '[a]t all times courts must bear in mind that FOIA mandates a "strong presumption in favor of disclosure."'" *Rosenberg v. Dep't of Def.*, 342 F. Supp. 3d 62, 72 (D.D.C. 2018) (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)) (brackets in original).

ARGUMENT

I. FOIA Exemptions 6 and 7(C) Do Not Shield the Identity of the Secret Service Agent Who Communicated with Oath Keepers Months Before Their Attack on the U.S. Capitol.

"'Exemption 7(C) is more protective of privacy than Exemption 6' and thus establishes a lower bar for withholding material." *Prison Legal News v. Samuels*, 787 F.3d 1142, 1146 n.5 (D.C. Cir. 2015) (quoting *ACLU v. Dep't of Just.*, 655 F.3d 1, 6 (D.C. Cir. 2011)). Thus, because DHS relies on Exemptions 6 and 7(C) coextensively, the Court need engage only in an analysis of whether the agency properly redacted information pursuant to Exemption 7(C). *See Roth v. U.S. Dep't of Just.*, 642 F.3d 1161, 1173 (D.C. Cir. 2011); Def.'s Mem. at 5, ECF No. 28. As here, if DHS's arguments fail under Exemption 7(C), they will fail under Exemption 6.

Exemption 7(C) excludes "records or information compiled for law enforcement purposes…to the extent that the production of such law enforcement records or information…could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). As a threshold requirement for any Exemption 7 claim, the agency must show that the record was "compiled for law enforcement purposes." *Id.* § 552(b)(7). When evaluating Exemption 7(C) withholdings, a court first must determine if there is a privacy interest in the information to be disclosed. *See ACLU*, 655 F.3d at 6–7. If the court finds a privacy interest, it must balance that privacy interest against the public interest in disclosing the information, considering only the public interest "that focuses on 'the citizens' right to be informed about 'what their government is up to.'" *Davis v. Dep't of Just.*, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (quoting *Dep't of Just. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

Here, DHS's withholdings fail every step of the analysis. First, Exemption 7 does not apply because the records in question were not compiled for law enforcement purposes. Second, DHS's declaration fails to demonstrate more than a *de minimis* privacy interest in the Oath Keepers liaison's name sufficient to trigger the exemption's protections. Third, even if DHS had demonstrated such a privacy interest, it is outweighed by the substantial public interest in identifying the agent who coordinated with an extremist militia group ahead of their unprecedented attack on the United States Capitol.

A. DHS Fails to Demonstrate the Withheld Records Were Compiled for Law Enforcement Purposes As Required by Exemption 7

Not all documents generated by law enforcement agencies are "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). To establish a law enforcement purpose, the agency's declarations must establish (1) "a rational nexus between the investigation and one of

the agency's law enforcement duties;" and (2) "a connection between an individual or incident and a possible security risk or violation of federal law." *Ctr. for Nat'l Sec. Studies v. Dep't of Just.*, 331 F.3d 918, 926 (D.C. Cir. 2003) (quoting *Campbell v. Dep't of Just.*, 164 F.3d 20, 32 (D.C. Cir. 1998), *as amended* (Mar. 3, 1999)).

DHS has failed to make any such showing here. The documents in question discuss a Secret Service agent regularly and "unofficially" liaising with the Oath Keepers—not to investigate them as a potential security risk, but to help what they understood as a "very pro" law enforcement organization coordinate their mobilization with the Secret Service. Ex. 1 at 1. The documents also describe calls with Stewart Rhodes about permissible weapons possession in and around Secret Service zones of protection. *Id.* at 3, 8 (agent asserting that the Oath Keepers "are NOT there to demonstrate or push a political agenda"). DHS offers no evidence that the records concern any "investigation" tied to the "agency's law enforcement duties," nor does it identify any "connection between an individual or incident and a possible security risk or violation of federal law." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926. Indeed, in this unusual case where a federal law enforcement agent was coordinating with, rather than investigating or enforcing the law against, an extremist militant group in the months before their attack on the U.S. Capitol, DHS cannot claim a rational nexus to any of the Secret Service's law enforcement duties. Its Exemption 7(C) claim thus fails out of the gate.

B. DHS Fails to Demonstrate a Sufficient Privacy Interest to Trigger Exemptions 7(C) or 6

DHS's declaration also fails to demonstrate a sufficient privacy interest to trigger the protections of Exemptions 7(C) or 6. When invoking those exemptions, "[t]he government bears the burden of showing that a *substantial* invasion of privacy will occur if the documents are released." *Prison Legal News*, 787 F.3d at 1147 (emphasis added); *see also ACLU*, 655 F.3d at 12

("[T]o warrant consideration under Exemption 7(C)," the government must show that disclosure "compromise[s] more than a de minimis privacy interest"). The government's affidavits must "contain reasonable specificity of detail rather than merely conclusory statements." *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013).

Here, DHS relies on one declaration whose "conclusory reasoning regarding [the Secret Service agent's] privacy interest is essentially indistinguishable from reasoning rejected in other recent cases in this District." *100Reporters LLC v. Dep't of Just.*, 316 F. Supp. 3d 124, 162 (D.D.C. 2018) (citing cases). DHS's declaration includes no specific facts—none—demonstrating *why* disclosing the Oath Keeper liaison's name risks any harm to that agent. The declarant generically asserts that law enforcement investigations can create "serious disturbances to people and their lives" and can result in "serious intrusion into the lives of others, which creates resentment and sometimes a desire for retaliation." Tyrrell Decl. 16. But here, as explained above, DHS has identified no "investigation" of the Oath Keepers that would trigger such concerns. And the Oath Keepers already know the liaison's identity. So public disclosure of the agent's name would not increase any risk of retaliation by the Oath Keepers.

DHS's declarant also makes the bare assertion that disclosing the Oath Keepers liaison's name "would subject the agent, and other law enforcement agency personnel, to harassment and retaliation." *Id.* 17. These are identical to the "generic reasons" that judges in this District have previously rejected. *Stonehill v. Internal Revenue Serv.*., 534 F. Supp. 2d 1, 12 (D.D.C. 2008) (finding no privacy interest where agency generically argued that disclosure "could cause harassment and/or undue embarrassment or could result in undue public attention which would constitute an unwarranted invasion of personal privacy"), *aff'd*, 558 F.3d 534 (D.C. Cir. 2009); *see also United Am. Fin., Inc. v. Potter*, 667 F.Supp.2d 49, 60 (D.D.C. 2009) (same, where

agency's declarations "set forth no factual basis to support any concerns of harassment, intimidation, or physical harm."). Allowing DHS to reflexively shield the agent's name from disclosure would create the type of "blanket exemption for the names of [law enforcement] agents" that this Circuit has long rejected. *Baez v. Dep't of Just.*, 647 F.2d 1328, 1329 (D.C. Cir. 1980). Because DHS has failed to identify any *specific* harm the Oath Keepers liaison might face if his name were disclosed, the analysis need proceed no further: the agency's Exemptions 7(C) and 6 claims fail.

C. The Substantial Public Interest in Identifying the Secret Service's Oath Keepers Liaison Outweighs Any Minimal Privacy Interest in Nondisclosure

Even if DHS had articulated a sufficient privacy interest to trigger Exemptions 7(C) and 6, that interest would be easily outweighed by the substantial public interest in disclosure. Evidence that an "agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties" gives rise to a substantial public interest in disclosure. *Favish*, 541 U.S. at 173. Indeed, allegations of improper conduct by government officials directly implicate the "strong public interest in monitoring the conduct and actual performance of public officials." *Baez*, 647 F.2d at 1339 ("We think that the public interest might be served by the release of the names of particular agents in instances, for example, in which the agent is called upon to testify concerning his activities, or in which the performance of a particular agent otherwise is called into question."). Plaintiff must "at a minimum 'produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.'" *Blackwell v. Fed. Bureau of Investigation*, 646 F.3d 37, 41 (D.C. Cir. 2011) (quoting *Favish*, 541 U.S. at 174).

Here, the public has a significant interest in knowing who in federal law enforcement "acted negligently or otherwise improperly in the performance of their duties" in communicating

with, coordinating with, and expressing sympathy toward a violent militia group and their leader in advance of their unprecedented assault on the Capitol on January 6, 2021. *Favish*, 541 U.S. at 173. The "historical importance," *id. at* 175, of the events January 6, 2021, cannot be overstated—it was the culmination of "a campaign to overturn a democratic election, an action unprecedented in American history," Pl.'s Facts 12. Accordingly, federal law enforcement's communications with members of the extremist groups, including the Oath Keepers, that attacked the Capitol have become "a topic of considerable public interest." *ACLU*, 655 F.3d at 12–13 (public interest in warrantless cell phone tracking, among other factors, outweighed private individuals' privacy interests); *see, e.g.*, Pl.'s Facts ¶¶ 6–9. And because the Oath Keepers liaison may *still* be employed by the Secret Service, that interest is urgent.

The evidence of potential impropriety or negligence was provided by the government itself. In emails partially released in this case, an agent representing the Protective Intelligence Division ("PID") of the Secret Service, Tyrrell Decl. ¶¶ 13, 15, refers to himself as the "unofficial liaison to the Oath Keepers (inching towards official)." Ex. 1 at 1. Responsibilities of agents assigned to PID include "investigations into potential threats . . . compiling information, conducting investigative interviews, conducting threat assessments, and transmitting intelligence information throughout the agency and federal government. Tyrrell Decl. 15; s*ee also Final Report, The Secret Service's Preparation for, and Response to, the Events of January 6, 2021*, DHS OIG Report at 13 (July 31, 2024), https://www.oig.dhs.gov/sites/default/files/assets/2024-08/OIG-24-42-Aug24-Redacted.pdf ("The division analyzes, evaluates, disseminates, and maintains incoming information about individuals, groups, and activities, both foreign and domestic, that pose a potential threat to protectees or key locations, such as the White House.").

Yet the disclosed communications do not show a Secret Service agent investigating a threat as his duties required. They show an agent casting an anti-government extremist group with a history of violence—and who would months later forcibly breach the U.S. Capitol—as "pro-LEO" (law enforcement officers). Ex. 1 at 1. Rather than investigating the Oath Keepers, the agent passes on Stewart Rhodes' cell phone number to other Secret Service personnel to answer "specific questions" Rhodes had about an upcoming event in Fayetteville, North Carolina. *Id.*

There is further public interest in identifying the Oath Keepers liaison in order to investigate potential violations of the Federal Records Act ("FRA"), and federal criminal statutes concerning government records. *See, e.g.*, 18 U.S.C. § 2071. The agent's reference to himself as "the unofficial liaison" indicates that there may have been unofficial communications with the Oath Keepers through unofficial channels, raising concerns about whether communications with the unidentified employee were saved in government systems as required by the FRA. *See* 44 U.S.C. §§ 3101, 3105. A separate email, sent by what appears to be another Secret Service official on September 16, 2020, stated: "On 9/15/20, the organizer for the group 'Oath Keepers' contacted SA [Secret Agent] [redacted] *as he often does*," likely referring to the call to the "unofficial liaison." Ex. 1 at 8 (emphasis added). Later in that email, the same Secret Service official wrote: "The leader's name is Stewart Rhodes (NRID) and he *often contacts* SA [redacted] when their group plans to attend one of our events." *Id.* (emphasis added). The email indicates that such communication was a normal occurrence. Yet no such communications were uncovered in DHS's FOIA search, so it is likely other communications took place through unofficial channels. If leaders of the Oath Keepers "often contact[]," Ex. 1 at 8, this agent, one would expect more productions, including communications preceding or following this one

specific rally. These records preservation questions raise possible violations of FOIA and the FRA, 44 U.S.C. § 3106. And yet, without knowing the Oath Keeper liaison's identity, the public cannot investigate those potential violations through FOIA.

The communications provide evidence of agency, and this agent's, neglect of duty and a miscalculation of the Oath Keepers' goals and motives. Referencing the Oath Keepers' presence at a rally in North Carolina, an agent erroneously explained that "They are NOT there to demonstrate or push a political agenda" and advised the Oath Keepers on their mobilization at the event, including about weapons possession in and around Secret Service zones of protection. *Id.* at 3, 8. Instead, the Oath Keepers liaison noted the Oath Keepers were present to "provide protection and medical attention to Trump supporters if they come under attack by leftist groups." Ex. 1 at 1, 8. The liaison's comfort with a paramilitary group being tasked with "provid[ing] protection and medical attention," sympathetic views toward the group, and discussions with the Oath Keepers about where they could mobilize with firearms at the event, is reasonable evidence of potential governmental impropriety or at least negligence.

CONCLUSION

The undisputed facts demonstrate that the Secret Service's Exemption 6 and 7(C) claims fail. Accordingly, the Court should enter summary judgment for CREW and order the Secret Service to promptly release the withheld material in full.

Date: January 10, 2025

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