IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	)	No. 1:18-cv-1766-RBW **REDACTED**

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INTRODUCTION

Plaintiff asks this Court to unseal fully the transcripts of the *ex parte* sessions of the July 9, 2019, September 9, 2019, and September 30, 2019 status conferences in this case, during which the Court probed government counsel about the details of a criminal investigation. Plaintiff makes this request despite the fact that the once-sealed declaration of Special Agent Stephen Lyons of the Department of Justice Office of Inspector General ("Lyons Decl") has now been unsealed. Lyons Decl., March 21, 2019, ECF Nos. 25, 27. The declaration identified the ongoing enforcement proceeding underlying Defendant's invocation of Freedom of Information Act ("FOIA") Exemption 7(A), categorized the records at issue, and explained how the unredacted disclosure of the records in each category risked interfering with the ongoing enforcement proceeding. Lyons Decl. ¶¶ 4, 6-10; *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009) ("An agency that has withheld responsive documents pursuant to a FOIA exemption can carry its burden to prove the applicability of the claimed exemption by affidavit . . . ." (citation omitted)); *Bevis v. Dep't of State*, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (explaining that an agency establishes the applicability of Exemption 7(A) if, after identifying a relevant enforcement proceeding, it "group[s] documents into relevant categories that are sufficiently distinct to allow a court to grasp how each . . . category of documents, if disclosed, would interfere with the investigation" cleaned up).

Plaintiff relies on two theories for demanding the transcripts of *ex parte* inquiries into the strategy and work product of the attorneys conducting the underlying criminal investigation—a common-law theory of access to judicial records, and a First Amendment theory of access. Plaintiff's arguments under both theories fail with respect to the following categories of information: Information related to (1) the stage of the enforcement proceeding, July 9 Tr. at 5:13-19, 6:23-7:1; Sept. 9 Tr. at 3:9-12; (2) the timeline for the enforcement proceeding, July 9 Tr.at 6:4-7, 6:8-7:1; Sept. 9 Tr. at 3:5-9, 3:15-17, 4:1-2; Sept. 30 Tr. at 4:20-21; (3) the materials

relied on in the enforcement proceeding, July 9 Tr. at 18:18-19:1; and (4) an assessment of the enforcement proceeding, Sept. 30 Tr. at 4:2-5. [redacted]

Plaintiff's arguments under the common-law theory of access are unpersuasive. Courts in this circuit commonly apply a six-factor test to determine whether a plaintiff has a common-law right of access. But the Court need not apply that test here because important policy reasons justify the continued sealing of the information in the categories described above, which constitutes protected prosecutorial work product. In any case, Defendant will demonstrate, in step-by-step fashion, how, if the six-factor test applies, a proper application of that test establishes that Plaintiff's argument should be rejected with respect to the categories of information specified above. The crux of the matter is this: Public access to judicial records is intended to facilitate the public's ability to assess the operations of the courts. But revealing the categories of information about the underlying criminal investigation would be akin to unlocking the prosecutor's file cabinet, and that is not necessary to evaluate the Court's performance in this FOIA case. There is simply no right of access under the common law to the information in the categories identified for continued sealing. [redacted]

Plaintiff's arguments under First Amendment fare no better. Under the First Amendment, courts apply a two-part test: (1) is there a qualified right of access, and (2) if so, is there another interest that overrides the public interest in access. In this case, the answers to these questions are "no" and "yes" respectively. No, there is no qualified right of access because there is no history of access to prosecutorial work product [redacted] and access to such information would not be beneficial to the functioning of government. Indeed,

revealing a prosecutor's work product [redacted] would undermine the government's prosecutorial function. Thus, such materials are traditionally protected. *See generally, Heggestad v. U.S. Dep't of Justice*, 182 F. Supp. 2d 1, 10 (D.D.C. 2000) (concluding that memorandum regarding declination of prosecution is protected work product); *LaRouche v. U.S. Dep't of Justice*, No. 90-2753 (HHG), 1993 WL 388601, at *11 (D.D.C. June 25, 1993) (determining that memorandum containing recommendations regarding prosecution is protected work product). [redacted] But even if there were a right of access, it would be overridden by compelling interest [redacted].

Accordingly, the Court should deny the motion with respect to the following transcript excerpts: the July 9 Transcript at 5:13-6:7, 6:8-7:1, 18:18-19:1; the September 9 Transcript at 3:5-17, 3:20-24, 4:1-2; and the September 30 Transcript at 3:8-10, 12-18, 4:2-5, 4:20-21.

BACKGROUND

On March 19, 2018, Plaintiff submitted a FOIA request to the FBI for "all documents related to any investigation or inquiry conducted by the FBI's Office of Professional Responsibility ("OPR") of, involving, or relating to former FBI Deputy Director Andrew McCabe, who was fired by Attorney General Jeff Sessions on March 16, 201[8]." *See* FOIA Request (Ex. 1 to Mtn. for Summ. J., March 21, 2019, ECF No. 24-3).

In the course of its review of the OPR file, the FBI identified various documents that were compiled or created by the Department of Justice's Office of Inspector General ("OIG") during its investigation of former Deputy Director McCabe, *see* OIG, A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe, February 2018, available at https://oig.justice.gov/reports/2018/o20180413.pdf ("OIG Rpt."). Given OIG's interest in these documents, some were referred to OIG for it to provide a response directly to the requestor, while others were the subject of consultation between the FBI and OIG; the FBI retained the responsibility of responding to Plaintiff as to documents that were the subject of consultation. *See*

28 C.F.R. § 16.4(d) ("[w]hen reviewing records . . . in response to a request, the component [of the Department of Justice] shall determine whether another component or another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA[,]" and shall consult with the other component or agency or refer the records to such component or agency, if appropriate).

The Court issued a processing schedule for the FBI: it required the FBI to process 500 pages the first month, and 750 pages per month thereafter. Order, Oct. 3, 2018, ECF No. 10. The parties subsequently disagreed about the applicability of that schedule to OIG. *See* Motion for Clarification and for Processing Schedule ("Mtn. to Clarify"), Nov. 20, 2018, ECF No. 14; Pl.'s Opp. to Def.'s Mtn. for Clarification and for Processing Schedule, Nov. 26 2018, ECF No. 15. Defendant argued that the schedule was inapplicable, and that a much more modest schedule would be appropriate. Mtn. to Clarify at 2. Its argument relied, in part, on OIG's resource limitations. *Id.* at 6. But Defendant also relied on the mechanics of applying Exemption 7(A) in this context. Under Exemption 7(A), an agency may withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings[.]" 5 U.S.C. § 552(b)(7)(A). Redacting sensitive documents, such as those compiled or created by an OIG investigation, to account for FOIA exemptions is in and of itself time consuming work. Declaration of Ofelia C. Perez, Government Information Specialist, OIG, March 21, 2019, ¶¶ 13 ('Perez Decl.") (attached as Ex. 4-2 to Def.'s Mtn. for Summ. J., ECF No. 24). But here that task was further complicated by the publicly issued OIG Report. To avoid withholding information already made public in the OIG Report, OIG had to compare the redacted information with the 35-page report. *Id.* This was an extremely time consuming process. *Id.*

After Plaintiff challenged Defendant's use of Exemption 7(A), the parties filed cross motions for summary judgment regarding its applicability. Defendant explained that it had redacted material that, if released, would reasonably be expected to interfere with pending or reasonably anticipated enforcement proceedings, and that no segregable, nonexempt information

had been withheld. Mem. in Supp. of Mtn. for Partial Summ. J., March 21, 2019, ECF No. 24, at 2. In support of its motion Defendant filed, under seal and *ex parte*, the Declaration of Office of Inspector General Special Agent Stephen F. Lyons, March 21, 2019, ECF. No. 25, 27. The declaration identified the ongoing enforcement proceeding, categorized the records at issue, and explained how the unredacted disclosure of the records in each category risked interfering with the ongoing enforcement proceeding. Lyons Decl. ¶¶ 4, 6-10.

Following a status conference on June 21, 2019, the Court issued an order stating that the parties shall "appear before the Court for a status conference on July 9, 2019, at 2:30 p.m., at which time the defendant, or another representative of the government, shall be prepared to address the Court's questions regarding whether the [Lyons] declaration that was filed *ex parte* and under seal should remain under seal." Order, June 24, 2019, ECF No. 34. Assistant United States Attorney J.P. Cooney, Chief of the Fraud and Public Corruption Section at the United States Attorney's Office for the District of Columbia, appeared at the July 9, 2019 status conference to answer the Court's questions about the enforcement proceeding. Prior to its colloquy with Mr. Cooney, the Court stated, "I think it's appropriate to hear from the government ex parte regarding the concern that I had." July 9 Tr. at 2:20-21. Following the hearing, the Court "maintain[ed] the Lyon's declaration under seal" and set a status conference for September 9, 2019. *Id.* at 19:7-8.

At the September 9 status conference, the Court stated that, at the July 9 hearing, it took "an ex parte representation from the government about the status of the investigation being conducted in this case," Sept. 9 Tr. at 2:16-18, and asked if the government was able to make a public representation about the investigation, *id.* at 2:18-20. Counsel for defendant answered no, *id.* at 2:21-22, and an *ex parte* discussion involving Mr. Cooney took place. Following the *ex parte* session, the Court stated, "we'll be in a better position in a couple of weeks to know exactly where the underlying matters [are] going, how that's going to proceed, and then be able to move this matter forward." *Id.* at 4:7-10. The Court set another status conference for September 30.

Near the start of the September 30 status conference, at which Mr. Cooney again joined counsel for Defendant, the Court asked whether the "decision as to what the government intends

to do in reference to Mr. McCabe has . . . been made," and whether "we need to have further discussions ex parte in reference to that?" Sept. 30 Tr. at 2:17-20. Counsel for Defendant stated that further discussions on that topic should be *ex parte*. *Id*. at 2:21. The Court and Mr. Cooney thereafter discussed the enforcement proceedings, including the timeline for its completion. Following the *ex parte* discussion (and some remarks by Plaintiff counsel), the Court announced that "on the next occasion if the government has not made a call [regarding the disposition of the enforcement proceeding] I'm going to make a ruling. And I am going to at that point, because I do think it's been a long time and this is just dragging too long. And those who have to make these hard decisions need to do it. And if they don't, I'm going to start ordering the release of information." Sept. 30 Tr. 10:19-25. The Court eventually set another status conference for November 14, 2019. Minute Order, Oct. 18, 2019.

Prior to the November 14, 2019 status conference, Defendant withdrew its invocation of Exemption 7(A) over the documents at issue in the FOIA suit. Notice of Withdrawal of Exemption 7(A) and Mtn. to Excuse U.S. Attorney's Office Official, Nov. 13, 2019, ECF No. 36. Following the status conference, the Court issued an order requiring OIG to process 200 pages per month, starting in December 2019. Order, Nov. 15, 2019, ECF No. 38. The Court also unsealed the Lyons Declaration. *Id.*

The Lyons declaration identifies the enforcement proceeding underlying Defendant's erstwhile invocation of Exemption 7(A): "DOJ-OIG referred an allegation that former FBI Deputy Director Andrew McCabe made false statements to law enforcement officials about the disclosure of law enforcement sensitive information to the media . . . [and] [t]he U.S. Attorney's Office for the District of Columbia is investigating the referral to determine whether criminal charges against McCabe are warranted." Lyons Decl. ¶¶ 3-4. It also categorizes the documents at issue, *id.* ¶¶ 7.a.-7.c., and explains across two pages how the "[u]nredacted disclosure of the Subject Documents risks interfering with the ongoing criminal investigation," *id.* ¶ 8.

Twelve days after the status conference (and on the Tuesday afternoon before Thanksgiving), Plaintiff filed its motion to unseal the July 9, September 9, and September 30 Transcripts.

ARGUMENT

Plaintiff argues that the Court should unseal, in full, the sealed portions of the transcripts from the July 9, September 9, and September 30 status conferences of this year. Plaintiff's arguments fail. Many of the statements made by counsel for the government in these *ex parte* sessions contain information properly withheld from the public record. Similarly, statements made by the Court that reveal the contents of confidential information provided by Defendant should also remain under seal.

Whether to unseal judicial records depends on whether there is a public right of access to those records. As a general matter, courts have recognized two qualified rights of access to judicial records: (1) a common-law right of access, and (2) a First Amendment right of access. *See United States v. El–Sayegh*, 131 F.3d 158, 160-61 (D.C. Cir. 1997). Notably, this Court has recognized that "the District of Columbia Circuit has expressed doubts about whether the First Amendment right of access applies outside of the criminal context[.]" *In re Fort Totten Metrorail Cases*, 960 F. Supp. 2d 2, 6 (D.D.C. 2013); *see SEC v. Am. Int'l Grp.*, 712 F.3d 1, 5 (D.C. Cir. 2013); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003). Perhaps in recognition of this fact, Plaintiff's motion starts with, and focuses on, the common-law right of access. *See* Pl.'s Mtn. to Unseal ("Mtn. to Unseal"), Nov. 26, 2019, ECF No. 40, at 5-9. This brief will do the same.

I. Under the Qualified Common-Law Right of Access, Certain Transcript Portions Should Remain Sealed.

To determine whether a covered judicial record must be disclosed, the court must "balance the government's interest in keeping the document secret against the public's interest in disclosure." *Matter of the Application of WP Co. LLC*, 201 F. Supp. 3d 109, 118 (D.D.C. 2016) (citation omitted). When evaluating claims under the common-law approach, courts in this circuit apply

the six-part test established in *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1980). Under this balancing test, courts usually consider "(1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings." *EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996); *see Hubbard*, 650 F.2d at 317-22. But Courts do not always apply this multi-factor balancing test, because "[t]here is, for instance, no right of access to documents which have traditionally been kept secret for important policy reasons." *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 504 (D.C. Cir. 1998) (cleaned up).

[redacted]

Other information from the transcripts should remain under sealed. Specifically, the Court should not unseal information related to (1) the stage of the enforcement proceeding, July 9 Tr. at 5:13-19, 6:23-7:1, Sept. 9 Tr. at 3:9-12; (2) the timeline for the enforcement proceeding, July 9 Tr.at 6:4-7, 6:8-7:1, Sept. 9 Tr. at 3:5-9, 3:15-17, 4:1-2; Sept. 30 Tr. at 4:20-21 (3) the materials relied on in the enforcement proceeding, July 9 Tr. at 18:18-19:1, and (4) an assessment of the enforcement proceeding, Sept. 30 Tr. at 4:2-5.

The Court need not employ the *Hubbard* balancing test to determine that this information should remain under seal, because the information at stake in these categories constitutes prosecutorial work product, and "important policy reasons" justify maintaining the confidentiality of such information. *In re Motions of Dow Jones & Co*., 142 F.3d at 504 (cleaned up); *see Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980) (maintaining documents under

seal after noting that "[p]ointing in the . . . direction [of sealing], however, is the public interest expressed in the doctrines of attorney-client privilege and work product immunity; a decision circumventing these doctrines poses a significant threat to the free flow of communications between clients and their attorneys and inhibits the ability of lawyers to adequately prepare their clients' cases"). The information reflects facts gathered, and opinions and assessments made, in the course of working on the criminal investigation of Mr. McCabe. This is work product. *See United States v. Deloitte LLP*, 610 F.3d 129, 134, 136 (D.C. Cir. 2010) (explaining that work product encompasses facts assembled and theories generated in anticipation of litigation, even when in "intangible" form rather than documents). And such work product is protected for important policy reasons, namely, "the integrity of our system would suffer if adversaries were entitled to probe each other's thoughts and plans concerning the case." *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 605 (D.C. Cir. 2001) (cleaned up). That logic applies here, for, as explained in the declaration of Assistant United States Attorney J.P. Cooney, revealing this information could [redacted] set a precedent that could negatively affect enforcement proceedings. *See* Cooney Decl., Dec. 10, 2019, ¶¶ 9-14 (attached). Thus, the information in the specified categories should remain under seal.

But even if the Court applies the Hubbard six-factor test, the conclusion is the same: The specified information should remain sealed. The first consideration is "the need for public access to the documents at issue." *Nat'l Children's Ctr.*, 98 F.3d at 1409. This factor weighs in favor of the information in the four specified categories remaining under seal. That the Court considered (at least some of) this information in determining whether to uphold Defendant's invocation of Exemption 7(A) points in the direction of unsealing. *Id*. But this fact is outweighed by others. Public access to judicial records is intended to facilitate the public's ability to assess the operations of the courts. *See El–Sayegh*, 131 F.3d at 163; *Matter of Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 300 F. Supp. 3d 61, 80 (D.D.C. 2018), *reconsideration denied sub nom. Matter of Leopold*, 327 F. Supp. 3d 1 (D.D.C. 2018). The information in the delineated categories, however, is not needed to assess the propriety of the Court's upholding of Defendant's

invocation of Exemption 7(A). Defendant submitted the Lyons Declaration in support of its reliance on the exemption. And that declaration, which the Court recently unsealed, Order, Nov. 15, 2019, ECF No. 38, established that there was an ongoing enforcement proceeding and that the release of the withheld information would prejudice that proceeding. *See id.* This sufficed to uphold Defendant's invocation of Exemption 7(a). *See Larson*, 565 F.3d at 862 ("An agency that has withheld responsive documents pursuant to a FOIA exemption can carry its burden to prove the applicability of the claimed exemption by affidavit . . . ." (citation omitted)).

Details about an enforcement proceeding, even one underlying an invocation of Exemption 7(A), are not the proper subject of a FOIA case and, therefore, this information is not needed to evaluate the Court's performance in this case. *See, e.g., Al-Turki v. U.S. Dep't of Justice*, 175 F. Supp. 3d 1153, 1192 (D. Colo. 2016) (concluding that while some of the information protected under Exemption 7(A) may stretch back ten years, "Exemption 7(A) has been held to apply to long-term investigations"); *Hammouda v. U.S. Dep't of Justice Office of Information Policy*, 920 F. Supp. 2d 16, 24 (D.D.C. 2013) (holding that the age of the withheld documents did not undercut the defendant's showing that law-enforcement proceeding remained pending). Put otherwise, the invocation of Exemption 7(A) in a FOIA suit is not a license for a plaintiff to superintend the Executive's discharge of its prosecutorial function, which is committed to it by the Constitution. *See United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."). Thus, there is no public "need" for information about how well a court may be assisting a plaintiff in performing that oversight function. Indeed, there is no generally recognized "need" for public access to documents about [redacted] The need for the information to remain under seal is particularly strong when, as here, the information is protected prosecutorial work product, [redacted]

[redacted]. The government's conduct in criminal matters, including that of the courts, can be assessed through open criminal proceedings if and when prosecutions are brought.

Plaintiff argues that there is "an overriding public interest in providing full access to the government's complete rationale for keeping OIG materials secret for well over a year." Mtn. to Unseal at 1-2. Stripping away the hyperbole, Plaintiff seems to be arguing that the public has an interest in understanding the government's rationale for invoking Exemption 7(A). As an initial matter, public access to judicial records is designed to facilitate evaluation of the courts; it is not a key to prosecutor's file cabinets. *See El–Sayegh*, 131 F.3d at 163. And the public's legitimate interest in assessing the Court's decision to uphold Defendant's invocation of Exemption 7(A) was served by the unsealing of the Lyons declaration, which was filed by Defendant in support of its summary judgment motion defending the invocation of Exemption 7(A). Revealing confidential details of the enforcement proceeding will not further the public's legitimate interest in assessing the Court's operation in this FOIA case.

Plaintiff also maintains that "[t]he need for public access . . . weighs heavily in favor of unsealing the Transcripts" because "Mr. McCabe's firing has drawn significant media attention and public interest, an interest that has only increased over time with the mounting evidence suggesting politically motivated actions by DOJ officials." Mtn. Unseal at 7. There is no such "mounting evidence," and in any event, public interest does not pierce attorney-work product protection. (In the past, to support statements like the one about mounting evidence, Plaintiff has relied on allegations in the complaint filed by Mr. McCabe challenging his dismissal, *see, e.g.*, Pl.'s Opp. to Def.'s Mtn. to Excuse USAO Official, Nov. 13, 2019, ECF. No. 37, at 2-3, but allegations in complaint are not evidence, and the government has moved for dismissal and summary judgment in that suit, *McCabe v. Barr, et al.*, 19-2399 (RDM), Nov. 1, 2019, ECF No. 23.) But, in any case, the transcripts address the enforcement proceeding that was the basis for the invocation of Exemption 7(A); they do not address the basis for Mr. McCabe's dismissal from the FBI. Plaintiff's argument is unpersuasive.

The second *Hubbard* factor is the "extent of previous public access to the documents[.]" *Nat'l Children's Ctr*., 98 F.3d at 1409. Previous public access weighs in favor of unsealing, while a lack of access weighs against unsealing. *See Hubbard*, 650 F.2d at 318. This factor too weighs against unsealing. As Plaintiff admits, "the content of the *ex parte* discussions between DOJ officials and the Court has never been publicly available." Mtn. to Unseal at 7. Plaintiff tries to counter this fact by arguing that the sealed portions of the transcripts "pertain[ ] directly to the Lyons Declaration, which has now been unsealed in full." *Id.* But Plaintiff's revelation-by-association argument fails: the information in the transcripts is not the same as the information in the Lyons declaration, so this factor weighs against unsealing. *See Zapp v. Zhenli Ye Gon*, 746 F. Supp.2d 145, 149 (D.D.C. 2010) (factor weighs in favor of unsealing when information is in public forum).

The third factor to consider is whether "someone has objected to disclosure," and if so, "the identity of that person[.]" *Nat'l Children's Ctr*., 98 F.3d at 1409. The fact that a party objects to disclosure weighs against disclosure. *United States ex rel. Durham v. Prospect Waterproofing, Inc.*, 818 F. Supp. 2d 64, 68 (D.D.C. 2011). Thus, this factor too weighs against disclosure. As for the fourth factor, Defendant does not assert any property or privacy interests.

The fifth factor—"the possibility of prejudice to those opposing disclosure[,]" *Nat'l Children's Ctr*., 98 F.3d at 1409—weighs against unsealing. The possibility of prejudice refers to "whether disclosure of the documents will lead to prejudice in future litigation to the party seeking the seal." *Friedman v. Sebelius*, 672 F. Supp.2d 54, 60 (D.D.C. 2009). Disclosure of the information sought would prejudice [redacted], and could otherwise prejudice Defendant. Cooney Decl. ¶¶ 9-14. Plaintiff argues that, by withdrawing its invocation of Exemption 7(A), "DOJ has conceded that there is a low risk of prejudicing future litigation at least from the disclosure of the fact that DOJ is investigating Mr. McCabe—which presumably is what the *ex parte* discussions were all about." Mtn. to Unseal at 8. But the information in the records and the sealed transcript portions is not identical, and, as explained in

the Cooney Declaration, disclosure of the information from the sealed transcripts would prejudice Defendant. Cooney Decl. ¶¶ 9-14.

Finally, the last factor—"the purposes for which the documents were introduced during the judicial proceedings," *Nat'l Children's Ctr*., 98 F.3d at 1409—weighs against unsealing. There is "less of a pressing concern to unseal [records] if they are not relevant to the claims[.]" *Gilliard v. McWilliams*, No. 16-20007 (RC), 2019 WL 3304707, at *5 (D.D.C. July 23, 2019) (quotation marks omitted). As discussed above in addressing the first *Hubbard* factor, the identified sections of the sealed transcript portions are not relevant to this FOIA case. These portions of the sealed sections of the transcripts address the timeline for completion of, and details about, the underlying enforcement proceeding. But such information, while relevant to the Executive's exclusive authority to prosecute a case, *Nixon*, 418 U.S. at 693, is not relevant to FOIA—or, more specifically, the Court's performance in handling a FOIA case, *see El–Sayegh*, 131 F.3d at 163—even when a defendant invokes Exemption 7(A). With respect to the invocation of Exemption 7(A), the relevant question about the enforcement proceeding is whether it is "pending or reasonably anticipated." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993). An open criminal investigation is a pending law enforcement proceeding under Exemption 7(A), *W. Journalism Ctr.. v. Office of Indep. Counsel*, No. 96-5178, 1997 WL 195516, at *1 (D.C. Cir. Mar. 11, 1997) (per curiam) (holding that "a pending criminal investigation which could lead to a prosecution is an enforcement proceeding within the meaning of exemption 7(A) of the Freedom of Information Act"), and the propriety of the Court's upholding of defendant's invocation of Exemption 7(A) does not turn on whether, in exercise of its exclusive prosecutorial authority, the Executive is moving fast enough for Plaintiff's liking. Plaintiff argues the transcripts should be unsealed because they provide "the justification for significantly delaying public access to critical information on the real basis for Mr. McCabe's abrupt termination." Mtn. to Unseal at 8. But as explained above, the public does not need details about a criminal investigation to assess the Court's performance in this FOIA case. Thus, this factor weighs against unsealing.

In short, under the test for common-law access to judicial records, all but one of the six factors weighs against unsealing the information in the four categories described earlier. And "[i]n addition, the most significant factors concerning the need for public access, the strength of the interests involved, and the comparative prejudice all militate against [un]sealing" the specified information. *Prospect Waterproofing, Inc.*, 818 F. Supp. 2d at 69. Thus, the Court should not unseal the following transcript excerpts: the July 9 Transcript at 5:13-6:7, 6:8-7:1, 18:18-19:1; the September 9 Transcript at 3:5-17, 3:20-24, 4:1-2; and the Sept. 30 Transcript at 3:8-10, 12-18, 4:2-5, 4:20-21.

II. The Same Information Should Remain Sealed Under the First Amendment Standard.

Courts apply a two-step test to assess a claimed right of access under the First Amendment. *See United States v. Brice*, 649 F.3d 793, 795-96 (D.C. Cir. 2011). "The inquiry's first step, sometimes called the experience and logic test, is to determine whether a qualified right of access exists." *Matter of Leopold*, 300 F. Supp. 3d at 80 (cleaned up). A qualified right of access exists under the First Amendment if "(i) there is an unbroken, uncontradicted history of openness" *Brice*, 649 F.3d at 795 (cleaned up), and (ii) "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enters. Co. v. Superior Ct. of Cal. for Cty. of Riverside*, 478 U.S. 1, 8 (1986) (citation omitted). If there is a qualified right of access, then the court moves to the second step. At the inquiry's second step, the court determines whether there is an "overriding interest" that outweighs the interest in disclosure. *Matter of Leopold*, 300 F. Supp. 3d at 81 (cleaned up). "Where there is a First Amendment right of access to a judicial proceeding, the presumption of access can be overridden only if (1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Brice*, 649 F.3d at 796 (cleaned up).

Plaintiff has no right of access to the four categories of information identified in the first section, i.e., information regarding (1) the stage of the enforcement proceeding, (2) the timeline

for the enforcement proceeding, (3) the materials relied on in the enforcement proceeding, and (4) an assessment of the enforcement proceeding.

First, there is no qualified right of access to the information in the four categories. As noted earlier, and as this Court has previously noted, the D.C. Circuit has not recognized a First Amendment right of access to records of civil proceedings. Rather, the "District of Columbia Circuit has expressed doubts about whether the First Amendment right of access applies outside of the criminal context[.]" *In re Fort Totten Metrorail Cases*, 960 F. Supp. at 6. But even if there is a qualified First Amendment right of access to certain information in civil proceedings, the "relevant inquiry" is "whether *information* of the sort at issue here—regardless of its prior or current classification as court records—was traditionally open to public scrutiny." *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1337 (D.C. Cir. 1985) (emphasis added and omitted). There is no "unbroken, uncontradicted history," *Brice*, 649 F.3d at 795 (cleaned up), of access to information related to prosecutorial work product, [redacted] To the contrary, such information historically has been viewed as confidential. *See, e.g., Heggestad,* 182 F. Supp. 2d at 10 (concluding that memorandum regarding declination of prosecution is work product protected from disclosure); *LaRouche,* 1993 WL 388601, at *11 (determining that memorandum containing recommendations regarding prosecution is work product protected from disclosure); [redacted]

The "logic" portion of the "experience and logic" test yields the same result: there is no right of access to the specified portions of the sealed transcript sections. Public access to prosecutorial work product [redacted] would not play a "significant positive role in the functioning of the particular process in question." *Press-Enters.*

Co., 478 U.S. at 8 (citation omitted). To the contrary, [redacted]. *Id.* at 8-9 ("[I]t takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly."). Indeed, a court in this District has recognized this very point, concluding albeit in different circumstances, that logic militates against recognizing a right of access because [redacted] The Cooney Declaration details that harm here. Cooney Decl. ¶¶ 9-14. And as noted earlier, the government's conduct in criminal matters, including that of the courts, can be assessed through open criminal proceedings if and when prosecutions are brought.

[redacted]

[redacted]

With respect to the "experience" element of the experience and logic test, Plaintiff contends that "the historic openness of court arguments to the general public and the press presents a compelling case for public access to transcripts of the *ex parte* testimony from DOJ officials." Mtn. to Unseal at 9. But the D.C. Circuit has expressed doubt about whether the right of access extends outside the criminal context. *Am. Int'l Grp.*, 712 F.3d at 5; *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 935. And in any event, the court of appeals has also recognized that the "relevant inquiry" is not the abstract one of whether there is a right to records of civil proceedings in some contexts, but "whether information of the sort at issue here—regardless of its prior or current classification as court records—was traditionally open to public scrutiny." *In re Reporters Comm. for Freedom of the Press*, 773 F.2d at 1337 (emphasis omitted). As explained above, prosecutorial work product [redacted] have not been "traditionally open to public scrutiny."

Plaintiff's argument on the logic prong of the test fares no better. Plaintiff argues that "[t]o bar the public from learning why until now this information [in the records sought in the FOIA action] has been kept secret risks undermining the public's ability to fully evaluate the basis for the government's arguments as to why critical information remains exempt from public disclosure as well as the underlying decision itself to terminate Mr. McCabe." Mtn. to Unseal at 10. But there is no mystery about the basis for Defendant's prior withholding of information under Exemption 7(A). It was spelled out in Defendant's summary judgment brief and in the Lyons Declaration, which was recently unsealed. Order, Nov. 14, 2019, ECF No. 38. And the information in the sealed transcript pertained directly to the enforcement proceeding, not to the basis for Mr. McCabe's removal. Plaintiff's argument is unpersuasive.

Second, even if there were a qualified right of access under the First Amendment, with respect to the four specified categories of information, that right would be overridden [redacted]

[redacted] As the Cooney Declaration establishes, this interest would harmed by revelation of information from the four specified categories. Cooney Decl. ¶ 12. Finally, there is no less restrictive measure that the Court could adopt, as Defendant is advocating for the continued sealing of only the specified portions, not all information in the sealed transcript sections.[2]

Plaintiff insists that "continued secrecy serves no compelling interest in light of the information now in the public domain through the unsealing of the Lyons Declaration." Mtn. to Unseal at 11. But the information in the transcripts does not mirror the information in the Lyons Declaration, and the Cooney Declaration explains how release of the information that Defendant contends should remain sealed would prejudice the government. Cooney Decl. ¶¶ 9-14.

Thus, the transcript excerpts should remained sealed to the extent previously detailed in this brief.

CONCLUSION

The Court should deny Plaintiff's motion to the extent specified above.

[2] [redacted]

Date: December 10, 2019

Respectfully submitted,

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Assistant Attorney General

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Deputy Branch Director

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	No. 1:18-cv-1766-RBW
v.	)	
	)	**REDACTED**
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

DECLARATION OF J.P. COONEY

I, J.P. Cooney, declare as follows:

Personal Background

1. I have served as a federal prosecutor since April 2007. Currently, I am an Assistant United States Attorney (AUSA) serving as the Chief of the Fraud and Public Corruption Section in the Criminal Division of the United States Attorney's Office—a position I have held since March 2018. During my career, I have served as a line prosecutor in the Superior Court and Appellate Divisions of the United States Attorney's Office and as a line prosecutor and deputy chief in the Public Integrity Section in the Criminal Division of the United States Department of Justice.

2. [redacted]

The McCabe Matter

3. [redacted]

4. Consistent with the longstanding policy and practice of the Department of Justice (to include the United States Attorney's Office), the Department did not confirm the existence of any criminal investigation of Mr. McCabe until acceding on November 14, 2019, to the unsealing of the Declaration of Stephen F. Lyons (the Lyons Declaration) filed on March 21, 2019, in this civil suit. [redacted]

5. [redacted]

6. [redacted]

The Harm of Disclosure

7. Prosecutorial discretion and prosecutors' capacity to address Court inquiries like the ones made in this matter would be harmed substantially by unsealing any of the transcripts of the sealed ex parte hearings. [redacted]

8. [redacted]

9. As I noted to this Court during the sealed ex parte portion of the the November 14, 2019, hearing, the discretion of whether and when to seek criminal charges is a matter strictly within the discretion of the Executive Branch. In response to specific inquiries by a federal court, such as the inquiries posed in this matter, it is sometimes appropriate to reveal limited information under seal and ex parte about the scope and nature of a criminal investigation, as the Department elected to do here. In so doing, however, federal prosecutors must have confidence that deliberative matters reserved to prosecutorial discretion will not be publicly disclosed later, simply because the specific purpose for the limited disclosure has passed, an investigation has continued on for a long time, or some other circumstance occurs. Subsequent public disclosure of sensitive information about criminal investigations—such as projected timeframes for decisions, the difficulty of certain decisions, the persons involved in decisions, or the precise scope and nature of a criminal investigation (all of which were touched upon in the sealed ex parte hearings)—risks

chilling prosecutors' ability to lend insight to courts about discretionary matters. Chilling such exchanges, which are appropriate in limited instances, risks hindering communication between the Executive Branch and Judicial Branch that is directed at serving important public interests.

10. The records sought by the plaintiff's Freedom of Information Act (FOIA) request and lawsuit are different from the information that I provided the Court during the sealed ex parte hearings. The FOIA records relate to the substantive misconduct and criminal allegations against Mr. McCabe and the process leading to his dismissal from the FBI's rolls; the information discussed in the sealed ex parte hearings relates to the Department of Justice's exercise of prosecutorial discretion concerning those allegations. There is an important distinction between the substantive allegations underlying a criminal investigation and the deliberative process leading to a prosecutorial decision. Here, the Department has determined that the public interest weighs in favor of relenting in certain FOIA exemptions so that the public can access information about a serious allegation of misconduct and potential criminality by the former second-ranking law enforcement official in the FBI. But that determination does not and should not extend to information about the Department's deliberative process, which is fundamentally different. Unsealing ex parte communications with the Judicial Branch concerning prosecutorial discretion is unnecessary to the public's access to information about the substantive allegations and will hinder prosecutors' ability to share such information in the future.

11. It is important that prosecutorial discretion remain restricted to the Executive Branch. Where there exists concern—real or perceived—that the Judicial Branch is forcing the hand of prosecutors through public disclosure of discretionary information confided in an ex parte proceeding, prosecutorial discretion is eroded; in that circumstance, there is a risk that the public will perceive that a court influenced a prosecutorial decision about matters such as whether to

bring charges and the timeframe within which they should be brought. [redacted]

12. [redacted]

13. For the most part, prosecutors speak through charging documents or they do not speak at all. The information shared with the Court about the Department's internal deliberations over the McCabe Matter was not intended to be shared beyond the participants in that hearing—the information was intended to assure the Court that the Department was carrying out its obligations. Maintaining the confidentiality of that information is important to maintaining prosecutorial discretion, including federal prosecutors' confidence that the deliberative process in which they engage will not be infringed upon—even inadvertently—by federal courts.

14. Finally, having been involved in many investigations like this one, where the allegations under investigation are the subject of public scrutiny, I anticipate that the release of the sealed ex parte transcripts here would prompt similarly situated investigation subjects to try and leverage civil process, such as FOIA, to invade upon prosecutorial discretion. That would risk the disclosure of information that could undermine a criminal investigation. It would also undermine FOIA's Exemption 7(A)'s purpose, insert courts into Executive Branch functions, and threaten the well-established principle that prosecutorial discretion should be restricted to the Executive Branch.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

J. P. Cooney 12/10/2019

J.P. Cooney
Chief
Fraud and Public Corruption Section
Criminal Division
United States Attorney's Office for the District of Columbia

Signed December 10, 2019