

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY)	
AND ETHICS IN WASHINGTON,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 18-cv-1766 (RBW)
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
)	

REPLY IN SUPPORT OF PLAINTIFF’S MOTION TO UNSEAL TRANSCRIPTS

In ruling on Plaintiff’s motion to unseal portions of three hearing transcripts the Court should start with the premise that “courts are public institutions that best serve the public when they do their business openly and in full view.” *E.E.O.C. v. Nat’l Children’s Center, Inc.*, 98 F.3d 1406 (D.C. Cir. 1996) (internal quotation marks omitted). Plaintiff’s motion to unseal seeks to give full force to this core value, which has particular force in the context of FOIA litigation brought to enforce the statute’s fundamental purpose of “ensur[ing] an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed,” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978), all of which have been described as “a structural necessity in a real democracy.” *NARA v. Favish*, 541 U.S. 157, 172 (2004).

Notwithstanding these values, the Department of Justice (“DOJ”) argues for continued secrecy of specific hearing transcript passages that it claims constitute historically protected “prosecutorial work product.” The facts and law do not bear this out, and DOJ’s arguments fail to account for the context in which it provided the Court with this information and the burden it

bears under the FOIA to justify its actions. Taken as a whole, these factors point decisively to unsealing the hearing transcripts.

1. DOJ has not demonstrated the withheld information is prosecutorial work product that must be protected from public disclosure.

DOJ's objection to unsealing rests primarily on its characterization of the withheld material as "protected prosecutorial work product" that if revealed "would be akin to unlocking the prosecutor's file cabinet[.]" Defendant's Partial Opposition to Motion to Seal Transcripts ("D's Opp.") (ECF No. 42) at 2. Beyond the hyperbole this claim is factually incorrect. To be sure, without access to the sealed material Plaintiff must rely on other indicia of its contents, but those indicia point to all or nearly all of it being non-protected.

First, by DOJ's own admission, the bulk of the sealed material includes purely factual information such as "the stage of the enforcement proceeding," "the timeline for the enforcement proceeding," and the materials on which DOJ relied in that proceeding. D's Opp. at 9. These are precisely the kinds of factual details an agency must proffer to support its invocation of FOIA Exemption 7(A), specifically a showing that the withheld material was "an investigatory record compiled for law enforcement purposes" and that releasing the withheld material would cause harm to an ongoing enforcement proceedings. *FBI v. Abramson*, 456 U.S. 615, 622 (1982). Such a showing necessarily requires details about the stage of and timeline for the enforcement proceeding as well as a showing that the withheld material consists of documents on which the agency actually relied in conducting its law enforcement proceeding. That these are the factual details DOJ offered in camera and *ex parte* therefore is hardly surprising, and certainly does not rise to the level of "prosecutorial work product."

Second, the context in which these *ex parte* submissions were made reinforces this conclusion. The Court initiated the July 9, 2019 *in camera* discussion to address a specific concern the Court had regarding DOJ's written *in camera* submission. July 9 Tr. at 2. Based on that discussion, the Court concluded "that the representations made by government counsel do afford a sufficient basis to continue at this point to maintain the submission made by government counsel under seal." *Id.* at 7. The Court further concluded that, based on the *in camera* discussions, a 60-day continuance was appropriate. *Id.* at 7-8. The public record confirms that the government's *in camera* representations were limited and likely concerned questions of timing.

Similarly, the Court's remarks at the September 9, 2019 status conference following an *in camera* discussion suggest the discussion centered on the timing of the investigation. Specifically, the Court stated after hearing briefly from Mr. Cooney: "Hopefully we'll be in a better position in a couple of weeks to know exactly where the underlying matters going, how that's going to proceed, and then be able to move this matter forward." Sept. 9 Tr. at 4.

The Court also initiated the September 30, 2019 *in camera* colloquy to address a very narrow issue: "[t]he decision as to what the government intends to do in reference to Mr. McCabe has that determination been made[.]" Sept. 30 Tr. at 2. The discussion that followed in open court further confirms that the *in camera* dialogue concerned whether or not the ongoing enforcement proceeding remained pending and, if it did, the timing of the government's decision whether or not to prosecute Mr. McCabe. *See id.* at 7-11. These facts are essential to DOJ's continued ability to rely on Exemption 7(A) and cannot properly be characterized as work product.

Third, statements of DOJ counsel at the last status conference on November 14, 2019 undermine DOJ's suggestion that it elected to share with the Court work-product protected information. When pressed on why DOJ had decided to withdraw its reliance on Exemption 7(A) counsel resisted sharing this information even *ex parte*, stating that the answers to the Court's questions "even in *ex parte* proceeding, should remain matters that are of the government's internal deliberations and not proper for sharing." Nov. 14 Tr. at 18. DOJ's obvious reluctance to provide more than factual information casts doubt on its newly minted claims that the information it previously shared with the Court *ex parte* is so privileged that revealing it publicly "would be akin to unlocking the prosecutor's file cabinet[.]" D's Opp. at 2.

Finally, DOJ's description of the withheld material as prosecutorial work product does not conform to the description offered by its declarant J.P. Cooney. Mr. Cooney describes this material variously as "deliberative matters reserved to prosecutorial discretion," Declaration of J.P. Cooney ("Cooney Decl.") (ECF No. 42-1), at 3, and as being part of "the deliberative process leading to a prosecutorial decision." *Id.* at 4. By contrast, DOJ in its brief describes the withheld material solely as work product. DOJ's Opp. at 12, 16. Even accepting DOJ's claim that information orally provided the Court to justify DOJ's invocation of Exemption 7(A) may fall within a privilege,¹ the fundamental variance in these descriptions leaves the Court with no proper foundation to conclude any of the withheld material is properly privileged.

¹ In this regard DOJ cites *United States v. Deloitte LLP*, 610 F.3d 129, 34, 136 (D.C. Cir. 2010), for the proposition that work product can exist in both a tangible and intangible form. DOJ's Opp. at 10. While this may be true as a general proposition, DOJ has failed to explain how the specific information it conveyed *in camera* to the Court constitutes protectible work product, a showing made all the more difficult by the inconsistent description of the material as deliberative that its declarant provides.

2. DOJ's request for secrecy cannot be squared with the purpose of the FOIA.

DOJ argues that both the common law right of access and the First Amendment provide no basis to unseal portions of the three hearing transcripts because, according to DOJ, the “crux of the matter” is that these principles foster public access “to facilitate the public’s ability to assess the operations of the courts.” DOJ’s Opp. at 2. Beyond the explanation CREW’s opening brief provides of how the standards of both the common law and First Amendment theories of access are met, DOJ’s arguments misconstrue the context in which this issue has been raised. This is a FOIA lawsuit where DOJ bears the burden of proving the legitimacy of any challenged exemption claims, and DOJ proffered the information at issue specifically for that purpose. Thus, contrary to what DOJ claims, the crux of the matter here is whether CREW and the public should have access to information that would allow them to assess DOJ’s exemption claims and the representations it made to the Court that resulted in a months-long delay of these proceedings. The answer to both questions is yes.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff’s opening brief, the Court should grant this motion and unseal the sealed portions of the hearing transcripts for July 9, September 9, and September 30, 2019.

Respectfully submitted,

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