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

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL RULES

OTHER AUTHORITIES

INTRODUCTION

The Court should enter partial summary judgment in favor of Defendant with respect to Defendant's invocation of Exemption 7(A) over information in documents from the sample agreed to by the parties. Defendant established in its opening brief and the accompanying declarations that release of the withheld information could reasonably be expected to interfere with enforcement proceedings. *See, e.g.*, Mem. in Support of Mtn. for Partial Summ. J. Based on Exemption 7(A) (Opening Br.), March 21, 2019, ECF No. 24. A decision in Defendant's favor would also, by extension, support: (i) Defendant taking the same approach to Exemption 7(A) in the remaining responsive documents, and (ii) the U.S. Department of Justice Office of Inspector General's (OIG's) proposed processing rate. As to the second point, Defendant explained that the need to compare potentially responsive documents to the publicly available OIG report on Andrew McCabe, to ensure that no publicly available information is being withheld, is a time-consuming process. *Id.* at 4.

Plaintiff opposes Defendant's motion. Plaintiff's Opp. to Defendant's Mtn. for Partial Summ. J. (Opp.), April 12, 2019, ECF No. 32. But its arguments are unpersuasive. Plaintiff's first substantive argument is that Defendant has not established the threshold requirement of Exemption 7(A), namely, that the documents at issue were compiled for law enforcement purposes; Plaintiff argues that the documents were gathered instead for agency oversight reasons. In fact, Defendant demonstrated in *two ways* that the documents were gathered for law enforcement purposes. Opening Br. at 8-9. Next, Plaintiff contends that Defendant has not established that releasing the withheld information would reasonably be expected to interfere with an enforcement proceedings. Its principal argument in support of this contention is that it appears to Plaintiff that the information being withheld is similar in kind to information that was made public in the McCabe OIG report. But the Declaration of OIG Special Agent Stephen Lyons explains why the release of the withheld information could reasonably be expected to interfere with enforcement proceedings notwithstanding that the McCabe OIG report is publicly available (albeit in a lightly redacted form). Decl. of OIG Special Agent Stephen F. Lyons

(Lyons Decl.), March 21, 2019, ¶ 6 (filed under seal as exhibit to Mtn. for Leave to File Doc. Under Seal, March 21, 2019, ECF No. 25). Plaintiff also insists that Agent Lyons is not a proper declarant, under Federal Rule of Civil Procedure 56(c)(4), because he lacks first-hand knowledge of the enforcement proceedings. This argument too fails. In the FOIA context, courts have repeatedly rejected arguments like Plaintiff's and held that declarations, like Agent Lyons's declaration, satisfy Rule 56(c)(4).

Accordingly, the Court should enter partial summary judgment in Defendant's favor on Exemption 7(A) and approve the processing rate suggested by OIG.

ARGUMENT[1]

DEFENDANT PROPERLY WITHHELD INFORMATION UNDER EXEMPTION 7(A)

Defendant's opening brief, and the accompanying declarations, demonstrated that Defendant properly withheld information from the 100 document agreed-to sample, as that information was "compiled for law enforcement purposes," and the release of that information "could reasonably be expected to interfere with" enforcement proceedings.[2] 5 U.S.C. § 552(b)(7)(A).

[1] Defendant explained in its opening brief that the parties were briefing the application of Exemption 7(A) prior to the conclusion of document processing to assist the Court in determining the appropriate production schedule. Opening Br. at 1, 5. Plaintiff objects, but its objection is nonsensical. Plaintiff argues that "[b]riefing the applicability of Exemption 7(A) at this juncture, however, was not to enable the Court to finalize the processing schedule." Opp. at 9. Instead, Plaintiff argues, the parties are briefing the issue now because "[p]roceeding at the pace advocated by DOJ would deprive the American public of [information regarding McCabe's firing] in a time-frame that would bring accountability." *Id.* The inexplicable thing about this argument, of course, is that it does not undermine the premise that the purpose of briefing Exemption 7(A) is to determine an appropriate production schedule. Rather, it makes the same point, but dresses it up in tendentious language. Thus, contrary to Plaintiff's claims, Defendant is neither "confused" nor being "disingenuous[ ] about the reason why the Court ordered briefing of the applicability of Exemption 7(A)." Opp. at 1. Defendant simply made a straightforward factual statement about the reason for the briefing, devoid of unnecessary bluster.

[2] There are two points worth noting about the document sample. First, the document discussed at length on page 6 of Plaintiff's brief is not part of the 100-page sample agreed to by the parties. Second, following the filing of Defendant's summary judgment brief, Defendant re-processed and released 6 pages of the sample that had previously been withheld. There were only minimal redactions of initials and dates, which the parties agreed to (without prejudice to Plaintiff's right to challenge similar redactions on other documents).

A. The Documents Were Compiled for Law Enforcement Purposes

Plaintiff argues that "because the OIG investigation that generated the withheld documents was conducted solely to determine whether to discipline Mr. McCabe for violating internal DOJ policies it did not have a law enforcement purpose within the meaning of Exemption 7(A)." Opp. at 11. As support for this position, Plaintiff points to (i) the fact that the OIG Report concluded that McCabe violated FBI policies, and (ii) the fact that the report describes itself as a "misconduct report" and, in a section entitled "Relevant Statutes, Policies, and Practices," cites FBI policies, rather than "criminal or civil" statutes. *Id.* at 11-12. Plaintiff tries to distinguish decisions cited by Defendant in support of the conclusion that the documents were gathered for a law enforcement purpose – *Jefferson v. U.S. Dep't of Justice*, Judgment, 04-5226 (D.C. Cir. Oct. 26, 2005), at 1-2 (attached as Ex. 3 to Opening Br.); *Jefferson v. U.S. Dep't of Justice*, Memo. Opinion, 01-cv-1418 (D.D.C. March 31, 2003), at 16 (attached as Ex. 4 to Opening Br.); *Housley v. U.S. Dep't of Treasury,* 697 F. Supp. 3, 5 (D.D.C. 1988) – by contending that, unlike the investigation in this case, the investigations in those cases focused on conduct that could have resulted in criminal or civil sanctions. Opp. at 13.

Plaintiff's arguments are flawed. As an initial matter, Defendant has explained that the records have been gathered by officials working on enforcement proceedings. Lyons Decl. ¶ 6. No more is needed to satisfy the requirement that the records have been compiled for law enforcement purposes, especially as the Supreme Court has held that there is "no requirement that [the] compilation be effected at a specific time," as long as it predates the invocation of the exemption. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989). Plaintiff does not address this argument in its brief.

In any case, contrary to Plaintiff's argument, the OIG originally gathered the documents for a law enforcement purpose. The law does distinguish between "general agency monitoring," *Stern v. FBI*, 737 F.2d 84, 90 (D.C. Cir. 1984), and investigations for "law enforcement purposes," but it does not draw the line, as Plaintiff contends, based on the ultimate findings of the investigation or the sources cited in a report. Rather, in *Stern*, the D.C. Circuit wrote that,

"an agency's investigation of its own employees is for law enforcement purposes only if it focuses directly on . . . acts of particular identified officials, acts which could, if proved, result in civil or criminal sanctions." *Id.* at 89 (citation omitted).

The OIG's investigation satisfies *Stern*'s test. The OIG – an entity authorized by law to investigate criminal violations, 5 U.S.C. App. 3 § 8E(b)(2) (authorizing OIG, with inapplicable exceptions, to "investigate allegations of criminal wrongdoing . . . by an employee of the Department of Justice") – focused on the "acts of a particular identified official[]," namely, McCabe. And the acts investigated by OIG included whether McCabe lacked candor when responding, under oath, to questions posed to him by federal agents. *See* OIG, A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe, February 2018, at 1-2, https://oig.justice.gov/reports/2018/o20180413.pdf ("OIG Rpt.") (last visited May 2, 2019).

Importantly, *Stern* rejected the contention, advanced by Plaintiff, that an investigation should be judged by the nature of the consequences that result from the investigation: "The fact that the investigation did not end in prosecution does not remove it from Exemption 7 coverage." *Stern*, 737 F.2d at 90. And there is similarly no support in the law for Plaintiff's table-of-authorities test. Courts look at the focus of the investigation, *id.* at 89, not the editorial decisions of report writers (e.g., decisions about what authorities to cite), to determine if records were compiled for law enforcement purposes. Indeed, if the results of the investigation do not remove an investigation from Exemption 7's coverage, why should the write-up of those results do so? Plaintiff offers no answer, and there is none apparent under D.C. Circuit precedent. Finally, for the reasons stated above, this case cannot be distinguished from the *Jefferson* and *Housley* decisions, which concluded that records gathered or created in the course of investigating individual government employees constituted records compiled for law enforcement purposes.

B. Defendant Has Demonstrated That Release of the Documents Could Reasonably Be Expected to Interfere with Enforcement Proceedings

Plaintiff argues that Defendant has not met its burden to justify the withholdings under Exemption 7(A) because: 1) Defendant assumed that information in the documents was exempt, contrary to the notion that "FOIA is a mandatory disclosure statute"; 2) the information contained in the publicly available OIG report regarding McCabe "appears to be no different" than the information that has been redacted; and 3) McCabe, whom Plaintiff identifies as the subject of the investigation based on media reports, has already reviewed "the very documents CREW seeks here through its FOIA request." Opp. at 14-16. These arguments lack merit.

Defendant has not assumed that information in the documents is exempt, but has established that fact as required by law. Defendant concluded that the documents at issue in the sample – and, more generally, in Plaintiff's request – were compiled for a law enforcement purpose. *See* § II.A above. Defendant also determined, after a careful review of the sample documents, that they contained information that, if released, "could reasonably be expected to interfere with" enforcement proceedings. 5 U.S.C. § 552(b)(7)(A). More particularly, the Lyons declaration demonstrates that the documents fall into three functionally defined categories, and it explains how information from each category of documents would, if released, interfere with enforcement proceedings. Lyons Decl. ¶¶ 9-10; *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 746 F.3d 1082, 1098 (D.C. Cir. 2014) (explaining that "agency may satisfy its burden of proof by grouping documents in categories and offering generic reasons for withholding the documents in each category") (citation omitted). Finally, Defendant conducted a line-by-line review to determine whether there are any logically divisible sections that could be segregated out and released. Decl. of Ofelia C. Perez, Government Information Specialist, OIG (Perez Decl.), March 21, 2019, ¶¶ 13 (attached as Ex. 2 to Opening Br.); 5 U.S.C. § 552(b) (requiring that an agency produce "[a]ny reasonably segregable portion" of a record "after deletion of the portions which are exempt"). Pursuant to this review, Defendant released non-exempt portions of the documents. Thus, Defendant did not improperly

withhold information, but followed the process set out by precedent and statute for withholding information under Exemption 7(A).

Nor is Defendant's withholding of information improper in light of the availability of the OIG report. Plaintiff argues that Defendant has withheld, from the sample documents, "information that appears to be no different in kind to that the OIG already had made public." Opp. at 15. It is not clear what Plaintiff means by "no different in kind." If Plaintiff means that the information is similar because it was all generated or compiled in the course of the OIG investigation underlying the publicly available McCabe report, then that is true. But it is also irrelevant. The question is whether release of the withheld information "could reasonably be expected to interfere with" enforcement proceedings. 5 U.S.C. § 552(b)(7)(A). And as explained in the Lyons declaration, it could, regardless of whether it has the same provenance as information in the publicly available report. Indeed, the FOIA statute recognizes that documents may have a mix of exempt and non-exempt information, 5 U.S.C. § 552(b) (requiring that an agency produce "[a]ny reasonably segregable portion" of a record "after deletion of the portions which are exempt"). Thus, just as an agency may properly withhold information after releasing *different information* from the same *document*, by extension, an agency may properly withhold information related to an investigation after releasing *different information* related to the same *investigation*.

In support of its argument regarding the public availability of the OIG report, Plaintiff cites *Detroit Free Press v. U.S. Dep't of Justice*, 174 F. Supp. 2d 597 (E.D. Mich. 2001). In that case, the district court declined to accept the Department of Justice's invocation of Exemption 7(A), over information related to the criminal investigation of the disappearance of former Teamsters Union President Jimmy Hoffa, prior to an in camera review of the records at issue. *Id.* at 600-602. The court based its decision on the age of the investigation, the public's interest in the case, and supposedly leaked details of the criminal investigation that were set out in a newspaper article. *Id.* Setting aside the significant question of whether the *Detroit Free Press* decision is correct, *cf. James Madison Project v. Dep't of Justice*, 330 F. Supp. 3d 192, 214

(D.D.C. 2018) (noting that "the D.C. Circuit has repeatedly distinguished between official acknowledgments and leaks to the media"), it does not support Plaintiff's argument. First, unlike in *Detroit Free Press,* there is no reason to doubt, based simply on the passage of time, whether the release of information may interfere with enforcement proceedings. Second, through the Lyons declaration, Defendant has explained why disclosure of the withheld information would reasonably be expected to interfere with enforcement proceedings notwithstanding that the McCabe OIG report is publicly available. *See* Lyons Decl. ¶ 9.d.

Plaintiff's third argument – that releasing the information will not cause harm to enforcement proceedings because McCabe has already seen it – fares no better than its others. Defendant will not respond to Plaintiff's speculation regarding the subject of the investigation. It suffices to say that the Lyons declaration explains how releasing the withheld information could reasonably be expected to interfere with enforcement proceedings. Lyons Decl. ¶¶ 8-10.

C. Agent Lyons Is an Appropriate Declarant

Federal Rule of Civil Procedure 56(c)(4) states that a "declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the . . . declarant is competent to testify on the matters stated." Plaintiff argues that Agent Lyons's declaration is improper under the personal knowledge and competency prongs of this rule because, Plaintiff surmises, "[t]he OIG's investigation is now closed," Opp. at 17, so "Mr. Lyons' testimony cannot be based on any direct involvement in the pending enforcement matter." Opp. at 19. Given Plaintiff's lack of access to the Lyons declaration and in order not to reveal any sealed information, Defendant will address only the legal element of Plaintiff's argument – i.e., the need for a declaration to be based on personal knowledge. Plaintiff misunderstands this element.

Plaintiff recognizes that in the "FOIA context courts have given agency declarants some leeway in testifying to how the agency processed a request if they are knowledgeable about agency processes because of their job duties." Opp. at 17 (citing case allowing FOIA search declaration to be based on hearsay). But Plaintiff contends that the leeway would not extend to

Agent Lyons in this case because he has "no active role in the entity currently conducting an investigation," *id.*, and Plaintiff suggests that only a person actively involved in an enforcement proceeding can proffer a declaration in support of an exemption based on that proceeding. *See Id.* at 18.

Plaintiff's position is based on a flawed understanding of how the personal knowledge and competency requirements apply in the FOIA context. In the FOIA context, courts have not adopted the crabbed interpretation of Rule 56 that Plaintiff advocates. Contrary to Plaintiff's suggestion, the "leeway" afforded by courts to FOIA declarants extends beyond declarations about the search for responsive records. Courts have also sensibly allowed declarants in FOIA cases to provide declarations in support of law-enforcement exemptions that are based on their knowledge of the documents, familiarity with agency practices, and/or discussions with others with first-hand knowledge. *E.g., Laborers Int'l Union v. U.S. Dep't of Justice*, 578 F. Supp. 52, 55-56 (D.D.C. 1983) (concluding, regarding declaration in support of invocation of Exemption 7(C), that declarant met personal knowledge requirement based on his review of relevant document and "general familiarity with the nature of Department of Justice investigations similar to the one documented by the Report"); *Wisdom v. U.S. Trustee Program*, 232 F. Supp. 3d 97, 115-116, 127-28 (D.D.C. 2017) (concluding that attorney in charge of FOIA compliance had the requisite knowledge to provide a declaration in support of Exemption 7(E)); *Council on American-Islamic Relations v. FBI*, 749 F. Supp. 2d 1104 (S.D. Cal. 2010) (concluding that FBI official charged with FOIA compliance had the requisite personal knowledge, based on a conversation with a case agent, to testify to the existence of a pending investigation for purposes of invoking Exemption 7(A)); *Cucci v. DEA*, 871 F. Supp. 508 (D.D.C. 1994) (declarant had adequate personal knowledge to provide a declaration in support of Exemption 7(D) based on a review of the relevant records, related to the Virginia State Police, and a conversation with a representative of the Virginia State Police). The contrary, overly formalistic interpretations of the concepts of "personal knowledge" and "competen[ce]" advanced by Plaintiff – and rejected by courts – would require agencies, including law enforcement agencies, to divert yet more

resources from their core missions to responding to FOIA requests, potentially at a significant cost to those core missions.

The cases cited by Plaintiff do not support a different result. First, there is *Larouche v. Dep't of the Treasury*, No. CIV. A. 91–1655 (RCL), 2000 WL 805214, at *14 (D.D.C. Mar. 31, 2000), *amended in part sub nom.*, 2000 WL 33122742 (D.D.C. Nov. 3, 2000); Opp. at 18. In that FOIA case, the court struck a declaration that was not based on personal knowledge. *Larouche*, 2000 WL 805214, at *14. But the declarant, who filed a declaration regarding an agency investigation in support of the FOIA requester, was not even an agency employee: "Instead of being an internal agency observer, with direct personal knowledge of the general procedures surrounding the investigation, [the declarant] is an outside observer reporting on events from second-hand knowledge." *Id.* Next, Plaintiff cites *Shaw v. FBI*, 749 F.2d 58, 63 n.2 (D.C. Cir. 1984). But this citation centers on dicta in a footnote, and nothing more. *Id.* Finally, Plaintiff cites *Londrigan v. FBI*, 670 F.2d 1164, 1174 (D.C. Cir. 1981). To the extent that case is applicable – it is a Privacy Act case, not a FOIA case – it supports Defendant's argument, as discussed in *Laborers' Int'l Union*, 578 F. Supp. at 55-56 (explaining that *Londrigan* is only partially applicable because it is a Privacy Act case, but that to the extent it is applicable, it allows an affiant to testify to his own observations based on a review of the records, his knowledge of the agency's practice and procedures, and his personal experiences as an agency employee).

In short, a proper understanding of the application of Rule 56(c)(4) to the FOIA context demonstrates that Agent Lyons is a proper declarant.

D. Defendant Invoked Exemption 7(A) to Protect Enforcement Proceedings

Over the last 2.5 pages of its brief, Plaintiff argues that Defendant invoked Exemption 7(A) for an improper purpose, namely, "to prevent the public from doing its own comparison of the evidence the OIG assembled during its investigation and the characterization of that evidence by the OIG in explaining its conclusion that Mr. McCabe committed misconduct." Opp. at 21. Not so. The OIG is an independent component of the Department of Justice. It investigated Mr.

McCabe and released a thorough and detailed report, which includes responses to arguments made by Mr. McCabe, to enable the public to read its findings and understand the bases of those findings. And as explained in the opening memorandum and accompanying declarations, it has invoked Exemption 7(A) to protect enforcement proceedings. Plaintiff's arguments to the contrary are baseless.

CONCLUSION

For the reasons stated above and in Defendant's opening brief, Defendant has properly applied Exemption 7(A) to the sample documents. Accordingly, Defendant is entitled to summary judgment with respect to its invocation of Exemption 7(A) over the sample documents. The propriety of Defendant's application of Exemption 7(A) to the sample documents also supports: (i) Defendant taking the same approach to Exemption 7(A) in the remaining responsive documents, and (ii) the processing schedule that Defendant has proposed for records referred to OIG.

Date: May 2, 2019

Respectfully submitted,

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