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.	)	

PLAINTIFF'S MOTION TO UNSEAL TRANSCRIPTS AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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INTRODUCTION

As the D.C. Circuit has recognized, in Freedom of Information Act ("FOIA") cases like this one, the adversary process works best when the government provides the requester "as much information as possible[.]" *Lykens v. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984). Typically the withholding agency provides that information through declarations, *id.*, but here Defendant U.S. Department of Justice ("DOJ") has amplified its declarations with *in camera* proffers from Assistant United States Attorney J.P. Cooney at three separate status conferences (in addition to the most recent status conference on November 14, 2019). Based in large part on these *in camera* representations, this Court allowed DOJ to withhold a swath of documents on which DOJ's Office of Inspector General ("OIG") relied for its conclusion that then-Acting FBI Director Andrew McCabe had lacked candor in responding to OIG investigators seeking to determine the source of a leak to the *Wall Street Journal*. That conclusion formed the basis for then-Attorney General Jeff Sessions' decision to summarily fire Mr. McCabe on March 16, 2018, less than two days before he was to retire from public service. Compl. ¶ 9.

For unexplained reasons—at least publicly—DOJ has now withdrawn its reliance on FOIA Exemption 7(A) to withhold OIG material and the Court has granted Plaintiff's motion to unseal the Declaration of Stephen F. Lyons (ECF No. 27) ("Lyons Decl."), which DOJ initially proffered to justify its invocation of Exemption 7(A). Given DOJ's changed position, Plaintiff respectfully requests that the Court also unseal portions of the hearing transcripts for July 9, September 9 and September 30, 2019, during which DOJ explained to the Court *in camera* why it needed to continue to rely on Exemption 7(A) to protect an ongoing law enforcement proceeding. Like the Lyons Declaration, there no longer is a legitimate justification for keeping sealed those portions of these hearings. There is, however, an overriding public interest in

providing full access to the government's complete rationale for keeping the OIG materials secret for well over a year.

FACTUAL BACKGROUND

The FOIA request at issue seeks on an expedited basis all documents related to any investigation or inquiry the FBI's Office of Professional Responsibility ("OPR") conducted of or related to former Acting FBI Director Andrew McCabe. Compl. ¶ 12. Attorney General Sessions summarily fired Mr. McCabe on March 16, 2018, less than two days before he was to retire from public service. *Id.* ¶ 9. With this act, the attorney general cost Mr. McCabe his pension.

Mr. McCabe's firing drew widespread public attention and speculation that Attorney General Sessions had acted to appease President Trump, *id.* ¶ 11, who had lashed out at Mr. McCabe in vitriolic tweets that continue to this day. To better understand the basis for Mr. McCabe's abrupt termination and to obtain information that would allow the public to assess the credibility of the allegations of political motivation and the role President Trump may have played in the attorney general's decision, plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") filed an expedited FOIA request with DOJ on March 19, 2018. Compl. ¶ 12. On July 30, 2018, having received no substantive response to its request, CREW filed its complaint in this action (ECF No. 1).

Once in litigation and based on input from the parties, the Court imposed a processing schedule that anticipated complete production by mid-January 2019. Order, Oct. 3, 2018 (ECF No. 10). DOJ sought to extend that time by nearly two years to accommodate its consultation and referral process, and at CREW's suggestion the parties briefed the applicability of Exemption 7(A) based on a representative sampling from the OIG materials. *See* Order, Dec. 18, 2018 (ECF

No. 17). DOJ moved for partial summary judgment relying almost exclusively on the sealed, *ex parte* Lyons Declaration (ECF No. 27).

Following a status conference on June 21, 2019, at which counsel for DOJ was unable to answer all of the Court's questions concerning the matters set forth in the Lyons Declaration, the Court scheduled another status conference for July 9, 2019, at which "the defendant, or another representative of the government, shall be prepared to address the Court's questions regarding the declaration that was filed ex parte and under seal should remain under seal." Order, June 24, 2019 (ECF No. 34). Following the June 24 status conference, during which DOJ offered the *in camera* testimony of Assistant United States Attorney Cooney, the Court ordered the Lyons Declaration to remain under seal "[b]ased upon the government's ex parte representations at the status conference[.]" Order, July 10, 2019 (ECF No. 35). From those representations the Court "conclude[d] that it is appropriate for the declarations to remain under seal at this time." *Id.*

The Court held a follow-up status conference on September 9, 2019, during which DOJ once again offered Mr. Cooney's *in camera* testimony. Following that hearing, the Court entered a minute order noting: "Government's request for a continuance; heard (ex-parte) and granted." Minute Entry, Sept. 9, 2019. As a result, the Lyons Declaration remained under seal. The follow-up status conference on September 30, 2019 followed the same pattern. In response to the Court's question as to "what the government intends to do in reference to Mr. McCabe," Transcript of Status Conference, Sept. 30, 2019 (Enclosed as Exhibit A), at 2, DOJ again proffered the *in camera* testimony of Mr. Cooney, after which the Court continued this matter further, but only until November 15, *id.* at 7. The Court made clear that unless DOJ made a call on whether to prosecute Mr. McCabe by that date the Court was "going to start ordering the release of information." *Id.* at 10.

On November 13, 2019, DOJ notified the Court it was "withdrawing its invocation of Exemption 7(A) over information related to the proceeding described in the Lyons Declaration." Notice of Withdrawal of Exemption 7(A) and Motion to Excuse U.S. Attorney's Office Official (ECF No. 36) at 1. DOJ offered no explanation for its changed position. At a subsequent hearing on November 14, 2019, the Court granted Plaintiff's motion to unseal the Lyons Declaration and pursuant to Court order that declaration has now been unsealed. *See* Order, Nov. 15, 2019 (ECF No. 38). With this unsealing, the public has its first official confirmation from DOJ that the U.S. Attorney's Office for the District of Columbia has commenced a criminal investigation of Mr. McCabe. At this point portions of the transcripts of the status conferences on July 9, September 9 and September 30, 2019 during which the Court heard from Mr. Cooney about the matters addressed in the Lyons Declaration remain sealed.

ARGUMENT

Both common law and the First Amendment give the public the right to know what was said during the *ex parte* portions of the July 9, September 9, and September 30, 2019 status conferences and compel their unsealing. First, transcripts of the proceedings are judicial records, and the balance of interests under common law weighs strongly in favor of their release. *See Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017). Second, the public has the right to this information arising out of the "implicit First Amendment right of the press and public." *Press-Enter. Co. v. Super. Ct. ("Press-Enterprise II")*, 478 U.S. 1, 7 (1986) (internal quotation omitted). Where, as here, the government is a party, the importance of public access "is accentuated[.]" *Federal Trade Comm'n v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *accord Equal Employment Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996). These interests are particularly compelling where the

underlying matter is a FOIA action that itself is premised on the statutory right of the public to know what its government is up to.

I. THE COURT SHOULD RELEASE THE SEALED TRANSCRIPTS PURSUANT TO THE COMMON LAW RIGHT OF ACCESS

Courts have recognized a clear and "general right to inspect and copy public records and documents." *Nixon v. Warner Commc'n*, 435 U.S. 589, 597 (1978). The transcripts at issue are judicial records, which carry "a strong presumption" of public access, *Metlife*, 865 F.3d at 663, that can be rebutted only by satisfying the six-factor test established in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980). *Id* at 665. DOJ cannot make that showing here.

A. The Sealed Transcripts are "Judicial Records."

The extent to which the sealed portions of the hearing transcripts are judicial records depends on "the role [they] play[] in the adjudicatory process." *S.E.C. v. American Intern. Grp*, 712 F.3d 1, 3 (D.C. Cir. 2013) (citation omitted). Documents created "'to influence' a court's pending decision . . . [are] almost certainly a judicial record." *Cable News Network, Inc. v. FBI ("CNN")*, 384 F. Supp. 3d 19, 41 (D.D.C. 2019) (citing *Metlife*, 865 F.3d at 668). By contrast, "a document about which the court 'made no decisions' and did not 'otherwise rely,' does not qualify." *Id.* (citing *American Int'l Grp.*, 712 F.3d at 3–4); *see also Smith v. United States Dist. Ct.*, 956 F.2d 647, 650 (7th Cir. 1992) ("judicial records include transcripts of proceedings, everything on the record, including items not admitted into evidence").

In *CNN*, the FBI relied on an *in camera* declaration and testimony to support its invocation of FOIA Exemption 7(A) to withhold memoranda written by then-FBI Director James Comey. 384 F. Supp. 3d at 26. After withdrawing the exemption, the FBI released a redacted version of the declaration and transcripts of the testimony. *Id.* at 27. The court considered whether the declaration was a judicial record, found that it was, and ordered it to be released

without redactions. *Id.* at 44.

Here too, the *ex parte* portions of the hearing transcripts "clear[] the first hurdle without breaking a sweat." *Id.* at 42. DOJ used these *ex parte* discussions to advise the Court and "[b]ased upon [those] discussions," this Court "concluded that *ex parte* submissions or representations were appropriate." Transcript of July 9, Status Conference at 7–8 (Exhibit B). Unquestionably DOJ's representations were "'intended to influence' the Court," and thus played a central "role…in the adjudicatory process'" rendering the transcripts a judicial record. *CNN*, 384 F. Supp. 3d at 42.

B. The *Hubbard* Factors Support Public Access.

The "strong presumption in favor of public access to judicial proceedings," *United States v. Hubbard*, 650 F.2d at 317, can be overcome only by showing that the six factors *Hubbard* established weigh against public access. *Metlife*, 865 F.3d at 665. Those factors consider: "(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced." *Nat'l Children's Ctr.*, 98 F.3d at 1409. As applied here, the factors weigh in favor of unsealing the transcripts from the three *ex parte* proceedings.

First, the need for public access to these transcripts is especially high because they were "specifically referred to in the trial judge's public decision," *Hubbard*, 650 F.2d at 318, and because the government is a party to this litigation, which "strengthens the already strong case for access," *Nat'l Children's Ctr.*, 98 F.3d at 1409. This *in camera* testimony served as the basis for the Court's decision to keep the Lyons Declaration under seal and to delay the release of a

considerable portion of the material requested in this FOIA action for well over a year. 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. The need for public access, therefore, weighs heavily in favor of unsealing the transcripts.

The second factor essentially considers the potential impact of making new, and possibly harmful, information publicly available. *See Friedman v. Sebelius*, 672 F. Supp. 2d 54, 58 (D.D.C. 2009). Although the content of the *ex parte* discussions between DOJ officials and the Court has never been publicly available, it pertains directly to the Lyons Declaration, which has now been unsealed in full. Thus, rounding out that picture will enhance public understanding, while causing no harm given that with the unsealing of the Lyons Declaration DOJ has now publicly acknowledged its criminal investigation of Mr. McCabe.

Factors three, four, and five "are interrelated, and require courts to look at the strength of the property and privacy interests involved, and to take into account whether anyone has objected to public disclosure and the possibility of prejudice to that person." *Gillard v. McWilliams*, 2019 WL 3304707, at *4 (July 23, 2019) (internal quotation omitted). Whether or not DOJ objects to disclosure, the only potential privacy interest at issue would be that of Mr. McCabe and his association with a criminal investigation. With the unsealing of the Lyons Declaration, however, that association has now been publicly acknowledged. Accordingly, revealing the contents of the sealed hearing transcripts will not encroach any further on any privacy interest he may enjoy.

The fifth factor, which considers "whether disclosure of the documents will lead to prejudice in future litigation to the party seeking the seal," *Friedman*, 672 F. Supp.2d at 60, is

more relevant to a government party, but it too leans toward public disclosure. DOJ previously claimed that plaintiff's FOIA request implicated an ongoing law enforcement proceeding. Now, however, DOJ has withdrawn its reliance on Exemption 7(A), thereby consenting to the release of documents about Mr. McCabe's firing. In essence 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.

Finally, the sixth factor "concerns itself with the nature of the records and why they were introduced in the first place." *Gilliard*, 2019 WL 3304707, at *5. "This is the 'single most important' *Hubbard* factor." *CNN*, 384 F. Supp. 3d at 43 (quoting *Hubbard*, 650 F.2d at 321). There is a strong presumption against keeping the transcripts sealed because "what transpires in the court room is public property." *In re Nat. Broadcasting Co.*, 653 F.2d 609, 614 (D.C. Cir. 1981) (internal quotation omitted). Unlike discovery materials, which have a stronger presumption of privacy, *see Nat'l Children's Ctr., Inc.*, 98 F.3d at 1411, these conferences happened during a publicly noticed proceeding. The *ex parte* discussions concerned the status of a pending law enforcement proceeding, information that the Court elicited to expand upon the information in the now unsealed Lyons Declaration, and affected a pending FOIA action. Taken as a whole, the declaration and *ex parte* proffers from the government provided the justification for significantly delaying public access to critical information on the real basis for Mr. McCabe's abrupt termination. The public is entitled to a full explanation for that delay.

Accordingly, factor six and the *Hubbard* factors as a whole weigh squarely in favor of releasing the *ex parte* portions of the hearing transcripts.

II. THE FIRST AMENDMENT AFFORDS THE PUBLIC THE RIGHT TO ACCESS THE SEALED TRANSCRIPTS

Under Supreme Court precedent, courts employ "a two-stage process for resolving

whether the First Amendment affords the public access to a particular judicial record or proceeding." *Dhiab v. Trump*, 852 F.3d 1087, 1102 (D.C. Cir. 2017) (Williams, J., concurring). The first stage focuses on "whether a qualified First Amendment right of public access exists." *Id.* (internal quotation omitted). Finding such a right, the court then turns to an examination of whether "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* (internal citations omitted). Only then may a record or judicial proceeding be closed. *Id.*

A. The First Amendment Right of Public Access Applies to the Transcripts.

Courts recognize "a qualified First Amendment right of access to judicial proceedings" by the public where "(i) there is an 'unbroken, uncontradicted history' of openness, and (ii) public access plays a significant positive role in the functioning of the proceeding." *United States v. Brice*, 649 F.3d 793, 795 (D.C. Cir. 2011). While the D.C. Circuit has never explicitly "*found* a qualified First Amendment right outside the criminal context," it has "never categorically ruled it out[.]" *Dhiab*, 852 F.3d at 1104 (emphasis in original). Other courts have "uniformly" extended that right to civil proceedings and records from those proceedings. *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d 27, 36 (D.D.C. 2009); *see also Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014); *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 298 (2nd Cir. 2012).

Here, 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. *See Press-Enterprise II*, 478 U.S. at 8. Public accountability is especially important in a FOIA action because the purpose and spirit of the FOIA are openness and transparency. Mr.

McCabe's firing, investigation, and potentially politically motivated actions by DOJ officials are issues of great public significance. To bar the public from learning why until now this information 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. Holding the government accountable through public disclosure of the kind of information in the sealed transcripts furthers the FOIA's central purpose.

B. The Balance of Interests Weighs in Favor of Public Access.

Continuing to withhold from the public the *ex parte* portions of the hearing transcripts risks palpable harm: "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like a fiat and requires rigorous justification." *Matter of Leopold to Unseal*, 300 F. Supp. 3d 61, 80 (D.D.C. 2018) (quoting *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006)). That is why the presumption of public access can be overcome only if continued secrecy "(1) 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." *Washington Post v. Robinson*, 935 F.2d 282, 290 (D.C. Cir. 1991) (internal quotation omitted).

In re Special Proceedings, in which the court ordered the release of an investigative report detailing alleged governmental misconduct in the prosecution of U.S. Senator Ted Stevens, underscores the importance of public access to the transcripts requested here. 842 F. Supp. 2d 232, 235–236 (D.D.C. 2012). There, the court noted that in that highly public trial "the identity of the subjects was known from the outset" and "the matters under investigation were largely known to the public from the outset[.]" *Id.* at 246. Because of the public availability of

these fundamental facts, the government could not demonstrate a compelling interest for continued withholding. *Id.*

Here too, the essential facts are not a surprise: Mr. McCabe was abruptly fired and has been under investigation, facts that have been extensively covered in the media. Accordingly, there is no compelling reason to withhold the *ex parte* portions of the transcripts. The Lyons Declaration sheds some light on DOJ's investigation and the reasons for delaying production of documents responsive to CREW's FOIA request, but that is not enough. Only full disclosure of the three hearing transcripts will satisfy the public's right to understand why DOJ has kept information of great public significance out of the public light for well over a year.

On the other hand, continued secrecy serves no compelling interest in light of the information now in the public domain through the unsealing of the Lyons Declaration. Further, in light of these facts there is virtually no likelihood that any legitimate interest of the government will be harmed by disclosing the contents of the *ex parte* discussions, which pertain to the contents of the Lyons Declaration. Quite simply there is no government interest in secrecy to weigh against the significant public interest in disclosure.

Pursuant to Local Rule 7(m) counsel for Plaintiff contacted DOJ's counsel regarding this motion. DOJ's counsel represented that DOJ plans to oppose this motion, at least in part, and to file a responsive brief.

CONCLUSION

For the foregoing reasons, plaintiff respectfully asks this Court to unseal the *ex parte* portions of the July 9, September 9, and September 30, 2019 status conferences.

Respectfully submitted,

/s/ Anne L. Weismann
Anne L. Weismann

(D.C. Bar No. 298190)
Adam J. Rappaport
(D.C. Bar No. 479866)
Citizens for Responsibility and Ethics
in Washington
1101 K Street, N.W., Suite 201
Washington, D.C. 20005
Phone: (202) 408-5565
Facsimile: (202) 588-5020

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Attorneys for Plaintiff