IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTOPHER BRICK, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 15-1246 Judge Ketanji Brown Jackson

REPLY IN SUPPORT OF PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The government's Reply/Opposition absurdly criticizes the plaintiff's opening brief on the parties' cross-motions for summary judgment for "focus[ing] on the adequacy of Defendant's *public* filings" rather than refuting the unknown averments made in the government's "*in camera* classified declaration." Reply/Opp. 1. Beyond expecting the impossible from the plaintiff, the government's argument ignores that the wholly insubstantial public filings not only provide no support for its claims of exemption, but also fail to provide even a minimally coherent explanation for its concealment of the entirety of its arguments for exemption behind its *in camera* filing—a disfavored procedure that the government bears the burden of justifying. *See Lykins v. DOJ*, 725 F2d 1455, 1463–65 (D.C. Cir. 1984).

The government blames the plaintiff for the government's own litigation tactics, asserting that its *in camera* filing was necessary because "Plaintiff was dissatisfied with Defendant's prior public declarations, arguing that additional justification was necessary." Reply/Opp. 3. Of course, it was not just the plaintiff who was "dissatisfied": This Court found that the government's "declarations do not provide a sufficient justification for these withholdings, because the

declarations provide no details about, or context for, the FBI's redaction determinations." Order Denying Cross Motions 2 (Doc. 24) ("Order").

Although the government professes not to know what to do in this circumstance except to hide the entirety of its explanation in an *in camera* submission, Reply/Opp. 3, the answer is simple. As in a host of other cases in which the government asserts claims under Exemptions 3 and 7(E), it could have described as specifically as possible how (and which parts of) each of the records in question reveals foreign intelligence sources and methods or law enforcement techniques that are not widely known to the public, how their compilation served law enforcement purposes, and how revealing them would lead to circumvention of the law. To the extent that any part of that explanation would genuinely reveal protected information, the government could have explained its basis for that conclusion and submitted details that genuinely required protection *in camera*. The government's assertion that "[t]here is, apparently, no way to satisfy Plaintiff without revealing the very information protected from disclosure by the FOIA," Reply/Opp. 4, is unfounded. It is the government that seeks to escape the obligation to justify "to the greatest extent possible on the public record" its resort to *in camera* affidavits. *Lykins*, 725 F.2d at 1465. The government has made no serious effort to do so in this case.

Moreover, despite its rhetoric about the need for secrecy, the government has no answer to the point that the face of the records themselves render its claims of exemption highly implausible. The government does not contest that, as a legal matter, records that reveal no more about methods and techniques than that the Hoover-era FBI relied on informants and wrote down what they said would not qualify for protection under either Exemption 3 or 7(E). Tellingly, however, the government is not willing to aver publicly, or even to assert in its briefs, that these documents do any more than that (other than to say that the identification number of a confidential source appears

in one of them), nor has it averred that the techniques supposedly revealed by the documents are not already widely known to the public. Moreover, the government's publicly stated bases for claiming that the documents were compiled for law enforcement purposes manage to be not only entirely conclusory, but also self-contradictory, and it has offered no reason to think that revealing the contents of the documents would lead to any circumvention of the law.

The government has again failed to carry its burden of showing that the records are protected by either Exemption 3 nor Exemption 7(E). The records are not exempt from disclosure, and the plaintiff's motion for summary judgment should be granted.

ARGUMENT

I. The government has not justified its exclusive reliance on an *in camera* declaration to carry its burdens under Exemptions 3 and 7(E).

The government asserts that the plaintiff, in arguing that its public submissions do not support its claims of exemption, wrongly "assume[s] that the totality of the government's justification for its withholdings must appear on the public record." Reply/Opp. 2. Not so: The plaintiff first explained that the public filings did not support the claims of exemption, and then went on to explain that the government had not justified its failure to provide any coherent public explanation of those claims. *See* Pl's Renewed Sum. J. Mem. 3–9. The plaintiff nowhere asserted that the "totality" of the government's showing must be public, only that it must provide as specific a public justification as possible and has not done so here. Absent a sufficient public justification, the government's *in camera* declaration should be disregarded.

In contesting these points, the government places itself at odds with governing case law and the very authorities on which it purports to rely. Nowhere does the government's brief acknowledge the longstanding law of this and other circuits that reliance on *in camera* declarations is "disfavored," *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 580 (D.C. Cir. 1996), and

is proper only when exceptional circumstances make resort to it "necessary," *Lykins*, 725 F.2d at 1465. *See also*, *e.g.*, *Oglesby v. Dept. of Army*, 79 F.3d 1172, 1182 n.3 (D.C. Cir. 1996); *Philippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976); *Lion Raisins v. Dep't of Agric.*, 354 F.3d 1072, 1082–83 (9th Cir. 2004), *overruled in part on unrelated grounds*, *Animal Legal Defense Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016). Even when exceptional circumstances are present, a district court must "be certain to make the public record as complete as possible" and "see to it that such use [of *in camera* affidavits] is justified to the greatest extent possible on the public record." *Lykins*, 725 F.2d at 1465. Thus, the court must "require the Agency to provide a public affidavit explaining in as much detail as possible the basis for its [exemption] claim[s]." *Philippi*, 546 F.2d at 1013. Upon receiving a sealed declaration, the court is also required to "make as much as possible of the in camera submission available to the opposing party." *Armstrong*, 97 F.3d at 580; *accord*, *e.g.*, *Lykins*, 725 F.2d at 1465 (citing cases); *Hayden v. NSA*, 608 F.2d 1381, 1388 (D.C. Cir. 1979). Only by enforcing adherence to these requirements can the court protect "the judicial system's interest in an effective adversary system." *Lykins*, 725 F.2d at 1465.

Thus, in *Public Citizen v. Department of State*, 100 F. Supp. 2d 10 (D.D.C. 2000), *rev'd in part & aff'd in part*, 276 F.3d 634 (D.C. Cir. 2002), which the government touts as an example of the proper use of *in camera* declarations, the court recognized that such declarations are "disfavored as a first line of defense," but permitted their use in the circumstances of that case because the government's detailed public declarations explaining the justification for classification of the records and the danger involved in releasing them provided a "threshold showing on the public record" supporting the claim of exemption, albeit one not sufficient for the court to decide the issue. *Id*. at 27. The court further found that "describ[ing] these files in greater detail in a public declaration would reveal the information that the agency is trying to withhold." *Id*. at 28.

Here, by contrast, this Court has already determined that the government's public declarations did *not* provide such a threshold showing, but were so conclusory and lacking in detail that the Court would have been justified in granting summary judgment against the government, although it chose to give the government a second chance to carry its burden. And the government does not contest that its most recent public filings add nothing to those that the Court already found inadequate. Thus, as in *Oglesby*, the agency "ha[s] not created a sufficient public record to justify an *in camera* review because it ha[s] not made public as much information as possible." 79 F.3d at 1182 n.3. Indeed, this Court's memorandum opinion specifically found that the government's public declarations shared the same defect as the ones the D.C. Circuit said were insufficient to justify resort to *in camera* affidavits in *Oglesby*. Order at 2.

Moreover, the government has not demonstrated that it is impossible to disclose *any* information describing the intelligence sources and methods or law enforcement techniques that the records here would supposedly reveal, *any* information substantiating that the records relate to foreign intelligence or were compiled for law enforcement, or *any* information explaining how their disclosure would lead to circumvention of the law, without disclosing the information the government claims is protected. In most cases, it is possible at least for an agency to "describe the general nature of the technique while withholding the full details." *Boyd v. Bur. of Alcohol, Tobacco, Firearms & Explosives*, 2006 WL 2844912, at *9 (D.D.C. 2006). The government's assertion that it is irrelevant that such explanations are possible in most cases, Reply/Opp. 4, is nonsensical. Although in rare cases a bare public explanation may be impossible because even the general nature of the method or technique at issue is secret, the government still bears the burden of explaining in non-conclusory terms why that is the case. *See Smith v. Bur. of Alcohol, Tobacco & Firearms*, 977 F. Supp. 496, 501 (D.D.C. 1997).

Here, the government has failed to offer any such explanation. It strains credulity to assert that 60-year-old, unclassified portions of records that on their face appear to be no more than accounts of what informants told the FBI about Eleanor Roosevelt involve intelligence methods or law enforcement techniques that are so sensitive that it is impossible decades later even to identify them generically or to explain how the documents reveal them—and impossible even to provide any explanation of how they can conceivably involve matters so sensitive.

II. The records do not fall within Exemptions 3 and 7(E).

Despite the government's complete reliance on *in camera* declarations to remedy the deficiencies identified in its showing by the Court, what the government has said—and not said—publicly demonstrates that its reliance on Exemptions 3 and 7(E) is unfounded. Both exemptions require the government to establish that the records would reveal some method or technique, whether relating to foreign intelligence or law enforcement. On their face, the records at issue appear to reveal nothing more than that the FBI receives information from confidential informants and prepares memoranda recording that information. The plaintiff's opening memorandum on the renewed cross-motions for summary judgment explained that such a generic, widely known method, the existence of which is in any event confirmed by the publicly disclosed portions of these records, does not qualify for protection under either Exemption 3 or Exemption 7(E). Pl's Renewed Sum. J. Mem 8.[1] The government's Opposition/Reply notably does not contest this point,

[1] Courts construing Exemption 7(E) have "uniformly" insisted that the covered law enforcement methods or techniques not be widely known to the general public. *See Department of Justice Guide to the Freedom of Information Act: Exemption 7(E)* 5 (2013), https://www.justice.gov/oip/foia-guide/exemption_7e/download. In his concurrence in the court's per curiam opinion in *Ray v. Turner*, 587 F.2d 1187, 1221 n.89 (D.C. Cir. 1978), Judge Skelly Wright likewise observed that "[a] court may determine … that the terms 'intelligence sources and methods,' like the terms 'investigative techniques and procedures' in Exemption 7(E), 'should not be interpreted to include routine techniques and procedures already well known to the public.'"

effectively conceding it. At the same time, however, the government's brief does not publicly assert that the records reveal any methods or techniques beyond the writing down of information conveyed by confidential sources. Yet there is no reason why the government could not, without disclosing legitimately confidential information, publicly make and explain an averment that the records reveal more than that the FBI prepares memoranda reporting what informants tell it—if there were a basis for such a claim.

That the records have been declassified also significantly undermines any assertion that they would in fact reveal intelligence sources or methods. The government's assertion that not all Exemption 3 records need be classified, Reply/Opp. 6, may be true in the abstract, but it ignores that classification is the principal means by which the Director of National Intelligence is supposed to protect intelligence sources and methods under the Exemption 3 statute on which the government relies. *See* 50 U.S.C. § 3024(i)(2). Moreover, although the government's declarant previously averred that the records were "declassified due to … age," Second Hardy Dec. (Doc. 18-2) ¶ 6, at 4, agencies are permitted to exempt from automatic declassification records that would reveal intelligence sources or "impair the effectiveness of an intelligence method." Executive Order 13526, § 3.3(b)(1). The declassification of the records thus casts further doubt on the genuineness of the claim that disclosure would reveal intelligence sources or methods.

Moreover, the government has never explained why it could not identify any parts of the records that actually name a foreign intelligence source (if there are any such portions) and segregate the identification from the substance of the information conveyed by the source, which is not protected. *See Ray v. Turner*, 590 F.2d at 1196. And the government has never explicitly asserted that the records would identify any sources they do not actually name, let alone explained how they might do so. *Cf. Larson v. Dep't of State*, 565 F.3d 857, 863 (D.C. Cir. 2009) (citing

agency declaration that explained how releasing certain information would allow identification of an intelligence source).

With respect to Exemption 7(E), the government's Reply/Opposition asserts in conclusory fashion that the records were compiled in the course of the FBI's "national security" responsibilities, which it equates with a "law enforcement" purpose. Reply/Opp. 5. But as the Supreme Court has noted, "the label of 'national security' may cover a multitude of sins." *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985). The government has failed to provide any explanation of how its application of this label to its surveillance of a former First Lady establishes that the files are a product of legitimate law enforcement activities. *Cf. Quiñon v. FBI*, 86 F.3d 1222, 1228–29 (D.C. Cir. 1996) (law enforcement purpose must be legitimate rather than pretextual).

The government's assertion that "proactive steps designed to prevent criminal activity and to maintain security" involve law enforcement purposes, Reply/Opp. 6 (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring)), adds nothing to its showing, as the government has not offered even the vaguest explanation of how these records involved such "proactive steps." Equally unpersuasive is the government's observation that "information compiled for [law enforcement] purposes does not lose protection under Exemption 7 simply because it has been reproduced or summarized in another document prepared for a non-law enforcement purpose." *Id*. at 6–7. Nothing that the government has said in this case demonstrates that these records meet that description. Indeed, the government's declarant previously speculated that these records, although not originally compiled for law enforcement purposes, were subsequently "recompiled" into law enforcement files. Second Hardy Dec. ¶ 8, at 4; *see also* Order, at 3. The government's inability to keep its story straight about whether these records were

compiled for law enforcement purposes significantly undercuts its credibility and the plausibility of its Exemption 7(E) claim.

Finally, the government gives only the briefest of nods to the requirement under the law of this Circuit that the revelation of the methods and techniques supposedly described in the records would reasonably risk circumvention of the law. *See Pub. Employees for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 204 n.4 (D.C. Cir. 2014). The government's inability to muster an argument on this point reflects the facial implausibility of its claim that aspiring criminals would be assisted in violating the law by 60-year-old documents in which the FBI recorded specifics of what informants told it about Mrs. Roosevelt's activities.

In short, the government has failed to offer a public justification for invoking the exemptions claimed that provides "reasonably specific detail" and "appears 'logical' or 'plausible.'" *Larson*, 565 F.3d at 862. The government's decision to present its justifications entirely in an *in camera* declaration places the onus on the Court to evaluate the logic and plausibility of the averments in the non-public filing if it finds the *in camera* filing justified. Based on the information in the public record, however, the government's submissions fail to carry its burden of establishing a proper basis for withholding the records.

CONCLUSION

For the foregoing reasons, as well as those set forth in the plaintiff's renewed cross-motion, its original summary judgment papers, and the Court's Order, the plaintiff's renewed cross-motion for summary judgment should be granted.

Respectfully submitted,

/s/ Scott L. Nelson

Scott L. Nelson (D.C. Bar No. 413548)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff

Dated: April 9, 2018