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

PLAINTIFF'S RENEWED CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff Christopher Brick hereby moves for summary judgment in this case brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, on the ground that there is no genuine issue of disputed material fact and that plaintiff is entitled to judgment as a matter of law. Defendant Department of Justice (DOJ) has not demonstrated that the withheld records are exempt from disclosure under 5 U.S.C. §§ 552(b)(3) and (b)(7)(E), or that there is any other basis for withholding them under FOIA. Accordingly, judgment should be entered for plaintiff.

In support of this motion and in opposition to defendant's renewed motion for summary judgment, plaintiff submits the accompanying Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment; Statement of Material Facts as to Which There is No Genuine Issue; and Response to the Statement of Undisputed Material Facts filed in support of Defendant's Renewed Motion for Summary Judgment. Plaintiff also continues to rely on the Declaration of Christopher Brick (Doc. 14-1) and exhibits annexed thereto, as well as the opening and reply memoranda in support of his original summary judgment motion (Docs. 14 & 20).

Respectfully submitted,

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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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case concerns the withholding of information in 60-year-old documents from the FBI's surveillance files on Eleanor Roosevelt—specifically, the redaction of passages on 12 pages of the documents that appear to provide information on Mrs. Roosevelt's travel to the Soviet Union and participation in events and activities where she was likely to encounter Soviet United Nations personnel. Plaintiff Christopher Brick requested the documents under the Freedom of Information Act (FOIA). After he sued over the withholding of the redacted passages, the FBI claimed that the redactions were justified by exemptions 3, 6, 7(C), and 7(E).

In briefing on the parties' motions for summary judgment, plaintiff demonstrated that the FBI had failed to support its claims of exemption with anything beyond conclusory assertions that the exemptions were warranted. This Court agreed but granted the government a second chance to carry its burden of demonstrating that the information was properly withheld. *See* Order Denying Cross Motions (Doc. 24) ("Order").

In response, the government has doubled down on its refusal to provide support for its exemption claims. Although abandoning its personal privacy claims under exemptions 6 and 7(C), the government insists that the bulk of the redactions are justified under exemptions 3 and 7(E). But it refuses to provide even the slightest explanation of why. The government's public filings offer not even the most general account of how the records would reveal intelligence sources and methods, provide no inkling of the basis for the assertion that the records were compiled for law enforcement purposes, and offer no explanation of how they would reveal investigative techniques and methods and create a risk of circumvention of the law. Nor does the government even attempt to explain why it is impossible to provide any public justification for its exemption claims.

The government's attempt to hide the reasons for its claims of exemption do not comport with precedents applying exemptions 3 and 7(E), which consistently require the government to provide an explanation that is adequate to support the claimed exemptions without revealing the information that the exemptions are designed to protect. Such an explanation is especially necessary here, where the face of the redacted records renders it highly unlikely that the redacted passages would reveal intelligence or law enforcement methods within the meaning of the exemptions, or that their release would foreseeably "harm an interest protected by an exemption described in subsection (b)." 5 U.S.C. § 552(a)(8)(A). The government's failure to justify its claimed exemptions makes a mockery of FOIA, the adversary process, and this Court's order that it present justifications "sufficiently detailed" to allow "meaningful review of the FBI's invocation of Exemptions 3 … and 7(E)." Order at 1. The Court should deny the government's renewed motion for summary judgment and grant plaintiff's motion because the government has failed, again, to carry its burden of demonstrating that the redacted portions of the records are exempt.

ARGUMENT

I. The government's public filings provide no support for its claimed exemptions.

Plaintiff's opening and reply memoranda in support of its original cross-motion for summary judgment set forth the factual background of the case and demonstrate that the government's original summary judgment submissions failed to carry its burden of supporting its claims of exemption. Those arguments, which the Court found persuasive in its Order denying the parties' cross-motions, are not repeated here. It suffices to say that the government's earlier submissions "do not provide a sufficient justification for [its] withholdings, because the declarations provide no details about, or context for, the FBI's redaction determinations." Order at 2.

The government's renewed motion does nothing to remedy the deficiencies of its original submissions. The government's memorandum merely repeats a few boilerplate propositions of law, discusses the adequacy of the FBI's search for records (which plaintiff has not disputed), and then relies entirely on its sealed submission to justify its claims of exemption. Similarly, the government's declarant, Mr. Hardy, says nothing of substance other than that everything he has to say to support the claimed exemptions is in his sealed declaration. *See* Fourth Hardy Dec. (Doc. 26-1) ¶ 4.

Notably, neither the government's memorandum nor the declaration describes in even the most general terms how disclosure of the redacted material would disclose intelligence sources or methods or law enforcement techniques that are not already known to the public, as required to support the claims of exemption. Nor does the government provide any further explanation of how the records or information in them qualify as having been compiled for law enforcement purposes, or how revealing them would facilitate circumvention of the law. And beyond the bare assertion that "the FBI cannot provide further details on the public record without risking harms protected

against by FOIA Exemptions (b)(3) and (b)(7)(E)," *id*., neither the memorandum nor the declaration even takes a stab at explaining *why* it would not be possible to provide further explanation on these points without revealing information legitimately protected by the claimed exemptions.

Under such circumstances, it is obviously not possible for a FOIA claimant to demonstrate the legal or factual inadequacy of the agency's arguments: The agency has made none. Because the government's public filings offer no support for its claimed exemptions, they cannot carry its burden of establishing that the records fall within the exemptions—burdens the government concedes it bears. *See* Def. Renewed S.J. Mem. 6 (quoting *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011)). And as the party with the burden of persuasion on claims of exemption, the government has the obligation of coming forward in its summary judgment papers with facts that could support a ruling in its favor. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1985). Its failure to do so requires entry of summary judgment against it and in favor of the requester.

This Court has already determined that the government's original summary judgment submissions were inadequate and that summary judgment for the plaintiff would be required if the government made no further showing that remedied the deficiencies in its first attempt: Absent a submission "that contains sufficient detail for the Court to ascertain the particular bases for the government's withholdings," the Court ruled, it would "rely solely upon the insufficient materials that have thus far been submitted, and as a result, … grant Plaintiff's cross motion for summary judgment and require production of unredacted copies of these 12 pages of records." Order at 5–6. The public filings in support of the government's renewed motion add exactly nothing to the government's earlier showing and thus provide no basis for granting the government's motion or denying the plaintiff's. The government's astonishing assertion that it "has met its burden" and

thus shifted to the plaintiff the burden of presenting "some objective evidence that would enable the Court to find he is entitled to relief" in order "to avoid summary judgment," Def. Renewed S.J. Mem. 6, flies in the face of the Court's ruling.

II. Sealed submissions cannot remedy the government's failure to provide any basis for believing that its claims of exemption are proper.

Both the government's exemption 3 and exemption 7(E) claims require it to demonstrate that disclosing the redacted portions of the records would reveal information not known to the public about intelligence sources and methods (exemption 3) or law enforcement techniques or procedures (exemption 7(E)). Courts have consistently required agencies to make such showings by providing explanations that "describe the documents and the justifications for nondisclosure with reasonably specific detail [and] demonstrate that the information withheld logically falls within the claimed exemption[s]." *Military Audit Proj. v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). Such showings are essential to "afford the FOIA requester a meaningful opportunity to contest" the agency's claims and thus "ensure meaningful review of an agency's claim to withhold information subject to a FOIA request." *King v. Dep't of Justice*, 830 F.2d 210, 217, 224 (D.C. Cir. 1987). Here, the government's bald assertion that it cannot provide any meaningful public explanation of its withholdings is entirely unsupported and would, if accepted, frustrate the ability of FOIA litigation to provide a check on unjustified and unlawful withholding of records.

The government's apparent view that invocations of exemptions 3 and 7(E) do not require any rational public explanation of how disclosure would entail the harms those exemptions seek to prevent is contradicted by decades of case law. Courts adjudicating exemption 3 and 7(E) claims, as well as claims of national security classification under exemption 1, which raise similar issues, regularly rely on agency submissions describing the kinds of sources, methods, and techniques at issue and explaining how the disclosure of records at issue would provide the public

with otherwise unknown information about them. For example, in *Larson v. Department of State*, 565 F.3d 857 (D.C. Cir. 2009), a decision cited by the government, the agency provided a detailed, public explanation of the nature of the information in the CIA cables at issue as well as how revealing it would necessarily reveal who provided the information to the CIA as well as CIA intelligence methods. *See id*. at 863–64. The government has provided nothing comparable here, nor has it provided any coherent, logical explanation of why it cannot do so.

As set forth in detail in plaintiff's earlier summary judgment memoranda, courts have consistently required such explanations to satisfy the government's burden of justifying its withholdings of records that would allegedly reveal intelligence or law enforcement methods. The cases are replete with public descriptions of the kinds of technologies, surveillance techniques, analytical methods, confidential sources, etc., that would be revealed by disclosure of exempt records—descriptions that are simultaneously general enough not to reveal the protected information itself, but substantial enough to provide a meaningful explanation of why the claimed exemptions apply. *See*, *e.g.*, *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011); *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1192 (D.C. Cir. 2009); *Morley v. CIA*, 508 F.3d 1108, 1125 (D.C. Cir. 2007); *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 835 (D.C. Cir. 2001); *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 785 (D.C. Cir. 1980); *Halperin v. CIA*, 629 F.2d 144, 148-149 (D.C. Cir. 1980); *Leopold v. CIA*, 106 F. Supp. 3d 51, 58 (D.D.C. 2015); *Sack v. CIA*, 49 F. Supp. 3d 15, 21 (D.D.C. 2014); *Subh v. CIA*, 760 F. Supp. 2d 66, 72 (D.D.C. 2011); *James Madison Project v. CIA*, 605 F. Supp. 2d 99, 114 (D.D.C. 2009); *Schoenman v. FBI*, 2009 WL 763065, at *25 (D.D.C. Mar. 19, 2009); *see also* Pl. S.J. Mem. (Doc. 14) 6–10, 16–17; Pl. S.J. Reply (Doc. 20) 4, 15. The assertion that the government could supply no similar explanation here

of the basis for its claims by describing the nature of the supposed sources, methods, and techniques without revealing protected material strains credulity.

The government's exemption 7(E) claims, moreover, also require it to establish that the records or information were compiled for law enforcement purposes, and that their disclosure would risk circumvention of the law. *See*, *e.g.*, *Pub. Employees for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195 (D.C. Cir. 2014) ("*PEER*"). As to the first requirement, the government previously acknowledged that the records and the information they contain were not created as part of a law enforcement investigation, but were somehow later transformed into law enforcement records by being "integrated" into files involving investigations of third parties. *See* Order at 3. The government's prior submissions, however, failed to provide any detail corroborating the existence of any such investigations or explaining how the information from the records here were "integrated" into records concerning such supposed law enforcement matters. *Id*. The government thus failed to establish that it was "able to identify a particular individual or a particular incident as the object of its investigation and the connection between that individual or incident and a possible security risk or violation of federal law." *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982). If the government had information that could correct that omission, there is no reason why it could not submit a public declaration averring that some such investigation in fact occurred and that the records or information at issue were compiled as part of it.

Likewise, the government's earlier submissions failed to do more than allege in conclusory fashion that disclosure of the law enforcement techniques or methods supposedly described in the records at issue would lead to circumvention of the law. Again, the public submissions in support of its renewed motion not only fail to fill that gap, but fail to offer any explanation of why it is not

possible to provide such an explanation in public, as agencies routinely do in claiming exemption 7(E). *See Mayer Brown*, 562 F.3d at 1193–94; *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248 (D.C. Cir. 1993).

All these omissions are particularly telling in light of the nature of the documents at issue. It is evident on the face of the redacted records that they are not treatises describing intelligence or law enforcement methods. Rather, they are memoranda that appear to report statements about Mrs. Roosevelt's activities made by informants: They typically report that some person whose identity is redacted made a statement to the agency, the substance of which is redacted. At most, they may reveal the "method" of using confidential informants and writing down what those informants say, but that widely known "method" does not qualify for protection, *see Am. Immigration Council v. Dep't of Homeland Sec.*, 950 F. Supp. 2d 221, 246 (D.D.C. 2013), and, in any event, the government's utilization of that "method" is already revealed by the very existence of the memoranda, regardless of the redactions. Nothing the government has yet said publicly in the course of this litigation provides any basis for concluding that the documents provide any "detailed … description of … Hoover-era methods," *Campbell v. Dep't of Justice*, 164 F.3d 20, 31 (D.C. Cir. 1998), let alone that disclosing them would reveal unknown intelligence or law enforcement methods, or risk damage to national security or circumvention of the laws. Indeed, the unlikelihood that they genuinely reveal intelligence methods is underscored by the fact that they apparently are no longer classified, and the government does not even claim protection for them under exemption 1.[1] And the conceded fact that the memoranda were not originally generated

[1] As stated in plaintiff's reply in support of his original summary judgment motion, however, plaintiff does not contest redaction of a "permanent source symbol number" that the government's declarant specifically stated was included in one of the records. *See* Pl. S.J. Reply (Doc. 20) 2–3.

as part of a law enforcement investigation makes it all the more implausible that they would genuinely reveal law enforcement techniques.

In sum, the government's inability to provide a plausible account of why the redacted portions of the records merit protection should doom its claim that they are exempt, regardless of its attempt to provide a secret explanation for its withholdings. In the unlikely event, however, that the government's secret submission provides any arguable support for its claims that was missing from its previous summary judgment submissions, the Court should require the agency to provide the substance of its justifications, excluding information that might legitimately be protected from public disclosure (if any), in its public filings so that they can be meaningfully tested in the litigation process.

CONCLUSION

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

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Dated: March 1, 2018

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PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

In support of his Renewed Cross-Motion for Summary Judgment., plaintiff submits the following statement of material facts as to which there is no genuine issue, pursuant to LCvR 7(h)(1).

1. On June 25, 2013, plaintiff Christopher Brick filed a request with the Federal Bureau of Investigation (FBI) for "previously unreleased materials from the FBI's file on Eleanor Roosevelt." Brick Dec. (Doc. 14-1) ¶ 4.

2. The FBI responded by disclosing 338 pages of records, but redacted certain information from the records based on Freedom of Information Act (FOIA) exemptions 6, 7(C), 7(D), and 7(E). *Id.* ¶ 5.

3. Plaintiff appealed the redactions on twelve of the released pages. He argued that the passage of time had reduced any potential harm from the release of the information and that the deletions appeared too broad to be justified under exemption 7(E). *Id.* ¶ 6.

4. DOJ's Office of Information Policy responded by letter dated February 9, 2015, and denied the appeal, affirming without explanation the FBI's withholdings under exemptions 6, 7(C), and 7(E). *Id.* ¶ 7.

5. After plaintiff filed the complaint commencing this lawsuit, he received a letter from the FBI dated September 29, 2015, stating that the FBI had re-processed the twelve pages and was now claiming that the withheld information was exempt from disclosure pursuant to FOIA exemption (b)(3), in addition to exemptions (b)(6), (b)(7)(C) and (b)(7)(E). *Id.* ¶ 8.

6. Following this Court's November 9, 2017, Memorandum Opinion and Order Denying Cross Motions for Summary Judgment and Requiring Supplemental Submissions (Doc. 24), the defendant abandoned any reliance on exemptions (b)(6) and (b)(7)(C), and provided copies of some of the documents removing redactions of the names of third persons. Fourth Hardy Dec. (Doc. 26-1) ¶ 3 & Exh. A.

7. None of the requested records was compiled for law enforcement purposes. Brick Decl. ¶¶ 10-25.

8. None of the withholdings in the requested records would reveal any techniques, procedures, or guidelines for law enforcement investigations or prosecutions. *Id.* ¶¶ 10-25.

9. None of the withholdings in the requested records is necessary to protect any intelligence sources or methods. *Id.* ¶¶ 10-25.

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PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to LCvR 7(h)(1), plaintiff reproduces and responds to each numbered averment in Defendants Statement of Undisputed Material Facts as follows:

1. By letter dated June 25, 2013, Plaintiff submitted a FOIA request to the FBI requesting nine documents "from the FBI's file on Eleanor Roosevelt." Declaration of David M. Hardy ("First Hardy Decl."), ECF No. 12-1, ¶ 5; Ex. A.

Plaintiff's Response: Undisputed.

2. By letter dated July 3, 2013, the FBI acknowledged receipt of Plaintiff's request and assigned it FOIPA Request No. 1218867. The letter advised Plaintiff that the FBI was searching the indices of the Central Records System for responsive records, and provided Plaintiff the website to check the status of his request. First Hardy Decl. ¶ 6; Ex. B.

Plaintiff's Response: Undisputed.

3. By letter dated August 28, 2014, the FBI advised Plaintiff it had reviewed 338 responsive pages and that it was releasing 338 pages. The FBI further advised it was withholding information pursuant to FOIA Exemptions (b)(3), (b)(6), (b)(7)(C), and (b)(7)(E). First Hardy Decl. ¶ 7, Ex. C.

Plaintiff's Response: Undisputed, except for the statement in the second sentence that that that the FBI cited exemption (b)(3) in its response; it in fact claimed only exemptions (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E). Doc. 13-4, Exh. C; *see also* Third Hardy Dec. (Doc. 21-1) ¶¶ 3–5 (acknowledging that the FBI did not rely on exemption 3 in its response).

4. By letter dated October 7, 2014, Plaintiff filed an administrative appeal. Plaintiff limited his appeal to only 12 of the 338 released pages. First Hardy Decl. ¶ 10; Ex. F.

Plaintiff's Response: Undisputed.

5. On February 9, 2015, the Department of Justice, Office of Information Policy affirmed the FBI's action on the contested pages. First Hardy Decl. ¶ 12; Ex. H.

Plaintiff's Response: Undisputed.

6. Upon receipt of Plaintiff's complaint in this case, the FBI re-reviewed the twelve pages at issue and segregated additional information. By letter dated September 29, 2015, the FBI advised Plaintiff that it had re-reviewed the 12 pages in question and was re-releasing 12 pages. The FBI advised that it was withholding information pursuant to FOIA Exemptions (b)(3), (b)(6), (b)(7)(C), and (b)(7)(E). First Hardy Decl. ¶ 14; Ex. I.

Plaintiff's Response: Undisputed.

7. After further review, on February 1, 2018, the FBI informed Plaintiff that it was no longer asserting Exemptions (b)(6) and (b)(7)(C) to protect information in the 12 pages in question, and released additional information to Plaintiff. Fourth Declaration of David M. Hardy ¶¶ 3-4.

Plaintiff's Response: Undisputed.

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