

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

ELECTRONIC PRIVACY)
INFORMATION CENTER,)

Plaintiff,)

v.)

U.S. DEPARTMENT OF JUSTICE)
CRIMINAL DIVISION, et al.,)

Defendants.)

Civil Action No. 12-cv-00127 (BJR)

**DEFENDANTS' REPLY IN SUPPORT OF THIER MOTION FOR LEAVE TO FILE
EX PARTE AND IN CAMERA A SUPPLEMENTAL DECLARATION
CONCERNING WITHHOLDING OF INVESTIGATIVE RECORDS**

Defendants the Federal Bureau of Investigation (“FBI”), the Criminal Division (“CRM”), and the National Security Division (“NSD”) (collectively, “defendants”) submit this reply memorandum in further support of their motion for leave to file a supplemental declaration under seal, *ex parte* and *in camera*, in connection with their April 25, 2104 supplemental brief.

Background

On March 11, 2014, this Court issued a Minute Order directing defendants to provide an update regarding their positions on plaintiff’s FOIA requests, and, specifically, whether the government continues to rely on Freedom of Information Act (“FOIA”) Exemption 7(A) to withhold records in this case. Defendants filed their supplemental brief on April 25, 2014. In support of that supplemental brief, and in further support of their pending (though administratively closed) motion for summary judgment, defendants submitted three publicly-filed declarations, one from each of the defendant components (Dkts. No. 33-1, 33-2, 33-3). Defendants’ public declarations included all of the information that defendants could provide on

the public docket without revealing the very information they seek to protect through enumerated FOIA exemptions, and in particular Exemption 7(A). In order to provide a full update to the Court, defendants also sought leave to file a supplemental, *ex parte* and *in camera* declaration. Dkt. No. 34. Defendants followed the Court's instructions for submitting an under-seal filing. See Defs.' Certificate of Service, Dkt. No. 34 at 4 (describing the steps taken by defendants' counsel to file defendants' motion and the sealed document).

Plaintiff opposed defendants' motion (Dkt. No. 35), and defendants now submit this reply.

Discussion

It is well-established that federal agencies may utilize any one of a number of options in order to sustain their evidentiary burden of proving that withheld information falls within a FOIA exemption. *See, e.g., Gallant v. N.L.R.B.*, 26 F.3d 168, 172 (D.C. Cir. 1994) (noting that an agency's evidence may take "the form of an *in camera* review of the actual documents, something labeled a 'Vaughn Index,' a detailed affidavit, or oral testimony"). In this case, defendants rely on ten declarations submitted in connection with their motion for summary judgment and supplemental brief, six of which were filed publicly, and four of which were filed under seal (along with motions for leave to file) for *in camera* review. *See* Defs.' Supp. Br. 5 (updated chart of declarations supporting defendants' motion for summary judgment).

The use of *ex parte* affidavits is appropriate because sometimes it is not possible for the Government to fully detail the basis for its withholdings on the public record. *See, e.g., Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (explaining that *in camera* affidavits are, "when necessary, part of a trial judge's procedural arsenal"). While "*in camera* declarations should be avoided unless truly necessary, where, as here, an agency indicates that no additional information concerning an investigation may be publicly disclosed without revealing precisely

the information that the agency seeks to withhold, the receipt of *in camera* declarations is appropriate.” *Barnard v. Dep’t of Homeland Sec.*, 598 F. Supp. 2d 1, 16 (D.D.C. 2009). Courts in this district allow the government to submit *ex parte*, *in camera* declarations where doing so provides necessary information that cannot be revealed on the public record. *See, e.g., Pub. Citizen Health Res. Group v. Dep’t of Labor*, 591 F.2d 808, 809 (D.C. Cir. 1978) (ruling that district court should not have refused to examine affidavit proffered *in camera* because affidavit was “the only matter available . . . that would have enabled [the court] to properly decide de novo the propriety of” the agency’s exemption claim); *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (requiring “as complete a public record as is possible” before examining classified affidavits *in camera*); *Jarvik v. CIA*, 741 F. Supp. 2d 106, 111-13 (D.D.C. 2010) (permitting agency leave to file *in camera* declaration where court “cannot meaningfully review the defendant’s actions based on the current public record and the [agency] cannot provide further information on the public record” due to national security concerns); *Pub. Citizen v. Dep’t of State*, 100 F. Supp. 2d 10, 27 (D.D.C. 2000) (explaining that “[w]hile . . . *in camera* declarations are disfavored as a first line of defense,” the agency had already submitted “three public declarations” amounting to a “threshold showing on the public record”), *aff’d in pertinent part & rev’d in part on other grounds*, 276 F.3d 674 (D.C. Cir. 2002).

Plaintiff argues that “the government has not shown the Court that it has met this Circuit’s standard for filing *ex parte* and *in camera* evidence.” Pl. Opp. 3, 4-5. But defendants’ motion did demonstrate why the *in camera* submission was necessary — because defendants’ public declarations had already discussed all details that could be said on the public record, and defendants had additional, necessary, law-enforcement sensitive information to explain to the Court the current applicability of Exemption 7(A) and justify defendants’ withholdings. Defs.’ Mot. 1-2. Moreover, the proposed *ex parte*, *in camera* declaration itself indicates that it contains

non-public, law-enforcement sensitive information. *See* Fourth Hardy Decl. ¶¶ 6-7. And it is evident that defendants segregated as much information as could be said publicly and included that information on the public record. Thus, defendants have met the Circuit's standard for filing an *ex parte, in camera* declaration. *See Barnard*, 598 F. Supp. 2d at 16.

Conclusion

Defendants' appropriately submitted an *ex parte, in camera*, supplemental declaration containing necessary updates that cannot be revealed publicly without harming the DOJ's and FBI's pending criminal investigation. The Court should permit the under seal filing, and should consider defendants' supplemental *in camera* declaration.

Dated: May 19, 2014

Respectfully submitted,

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