UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Case No. 1:13-cv-01961-KBJ

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

CAROLINE J. ANDERSON
Trial Attorney
U.S. Department of Justice, Civil Division
20 Massachusetts Ave. NW. Room 7220
Washington, D.C. 20530
(202) 305-8645
Caroline.J.Anderson@usdoj.gov

Counsel for Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

PRELIMINARY STATEMENT

Plaintiff's Opposition fails to advance any arguments justifying summary judgment in its favor or sufficient to defeat Defendant's Cross-Motion for Summary Judgment. First, Plaintiff's repeated attempts to characterize Defendant's release of additional information as evidence of "bad faith" by the Department of Justice are unavailing. Indeed, in the time that has elapsed since the parties' submitted their most recent briefs, Defendant declassified an additional investigation technique and released new information to Plaintiff from within the remaining challenged withholdings. Defendant's recent conduct only underscores its good faith efforts to produce as much information to Plaintiff as possible.

Second, the Department of Justice has adequately justified its redactions of the remaining challenged withholdings under Exemptions 1, 3, and 7(e) on the basis of detailed declarations submitted by Mr. Hardy and Mr. Sherman. Plaintiff's novel efforts to invoke the concept of waiver to overcome Defendant's Exemption 3 claims misapprehend the procedural posture of this case. This Court dismissed the parties' initial Cross-Motions for Summary Judgment without prejudice and without rendering judgment, such that Defendant is entitled to rely upon any appropriate FOIA Exemption in this round of summary judgment briefing irrespective of what had previously been argued. Finally, Plaintiff's suggestion that Defendant's Exemption 7(E) assertions are inadequate because they do not comport with the test articulated in *Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982) ignore superseding precedent. A subsequent amendment to the language of Exemption 7 and ensuing D.C. Circuit decisions have clarified that the test outlined in *Pratt* is no longer a threshold requirement for the assertion of Exemption 7.

Accordingly, Defendant's Motion for Summary Judgment should be granted, and Plaintiff's Cross-Motion for Summary Judgment should be denied.

ARGUMENT

I. THE GOVERNMENT IS ENTITLED TO SUMMARY JUDGMENT

A. The Government Properly Withheld Classified Information Pursuant to FOIA Exemption 1.

Defendant properly withheld classified information pursuant to Exemption 1 from within the Semi-annual reports ("SARs") and Westlaw printouts. *See* 5 U.S.C. § 552(b)(1); Def's. Mot. for Sum. J. at 8-10, Def's Opp. to Pl's. Mot. for Summ. J. at 5-10. Contrary to Plaintiff's claims, Pl's. Opp. to Def's. Mot. for Summ. J. at 2 ("Pl's. Opp."), Defendant provided detailed justifications explaining why the remaining challenged withholdings are properly classified. Specifically, the Federal Bureau of Investigation ("FBI") explained that the withheld information describes specific intelligence activities or methods that are used by the FBI in gathering intelligence information, Fourth Hardy Decl. ¶ 12, and that release of such information would reveal to hostile entities specific targets of investigations, intelligence gathering capabilities, and intelligence gathering methods and activities generally. *Id.* ¶ 13. Mr. Hardy plausibly explained that the release of such information could reasonably be expected to cause serious and/or exceptionally grave damage to the national security. *Id.* ¶ 10. The National Security Agency ("NSA") likewise explained that if the information withheld from page 51 of Document 129 were disclosed, it could be reasonably expected to cause exceptionally grave damage to national security. Second Sherman Decl. ¶ 8.

That some of the details justifying the withholdings contained in the declarations submitted by the FBI and NSA are redacted, *see* Pl's. Opp. at 2, is common and appropriate. *In camera, ex parte* review of classified declarations in FOIA cases is necessary where a more detailed public explanation cannot be provided without revealing the very information that is sought to be protected. *See, e.g.*, *Krikorian v. Dep't of State*, 984 F.2d 461, 464-65 (D.C. Cir. 1993); *Maynard v. CIA*, 986 F.2d 547, 557 (1st Cir. 1993); *Hayden v. NSA/Cent. Sec. Serv.*, 608

F.2d 1381, 1385 (D.C. Cir. 1979). Such is the case here, and Defendant respectfully refers the Court to those portions of the classified declarations for additional support for its Exemption 1 withholdings.

Defendant's release of additional information to Plaintiff does not lend credence to Plaintiff's allegations of "bad faith." Pl's. Opp. at 5-6. Rather, "the mere allegation of bad faith does not undermine the sufficiency of agency submissions . . . [t]here must be *tangible* evidence of bad faith; without it, the court should not question the veracity of agency submissions." *Carter v. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987) (emphasis added) (citing *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)). Plaintiff's generic assertion that Defendant "contradicted its own prior statements about the scope of classified material," Pl's. Opp. at 2, ostensibly by "releas[ing] a substantial amount of new material," *id.* at 5, does not amount to tangible evidence of bad faith. To the contrary, "under settled law of this circuit, the subsequent disclosure of documents initially withheld does not qualify as evidence of 'bad faith.'" *Gutman v. U.S. Dep't of Justice*, 238 F. Supp. 2d 284, 291 (D.D.C. 2003) (citation omitted); *see also Pub. Citizen v. Dep't of State*, 276 F.3d 634, 645 (D.C. Cir. 2002); *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1983).[1] Accordingly, this allegation cannot undermine Defendant's Exemption 1 assertions.

B. The Government has Properly Withheld Information Pursuant to the National Security Act and FOIA Exemption 3.

Defendant has properly asserted Exemption 3 pursuant to the National Security Act of 1947 to withhold relevant portions of the remaining challenged withholdings. Defendant has not "wait[ed] until the eleventh hour to invoke Exemption 3," Pl.'s Opp. at 7–9, rather, this

[1] Because pages 3-6 of Plaintiff's Opposition are duplicative of Plaintiff's Motion for Summary Judgment at 12-15, Defendant respectfully refers the Court to the responses articulated in its Opposition to Plaintiff's Motion for Summary Judgment at 5-10.

argument was appropriately asserted in its Motion for Summary Judgment. *See* Def.'s Mot. for Summ. J. at 11-15. Plaintiff appears to misunderstand the relevant procedural posture of the case: Defendant has not "waived" its Exemption 3 claims (or any other arguments) by declining to assert them in previous rounds of summary judgment briefing in 2014; because the Cross-Motions for Summary Judgment were dismissed without prejudice in February of 2016, *see EPIC v. U.S. Dep't Of* Justice, Civil No. 13-01961, 2016 WL 447426, *3 (D.D.C. Feb. 4, 2016), Defendant is free to advance whatever arguments it deems appropriate at this stage. Black's Law Dictionary is clear on this point: "[i]n dismissing motions . . . 'without prejudice,' no right or remedy of the parties is affected . . . [i]n other words it leaves the whole subject as open to litigation *as if no proceeding had ever been had in the matter*." *Without Prejudice*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). Because the parties are effectively litigating on a blank slate, Defendant appropriately asserted Exemption 3 claims in its opening Motion for Summary Judgment. *See* Def.'s Mot. for Summ. J. at 11-15.

Plaintiff's case citations do not suggest otherwise. Plaintiff primarily relies on *Maydak v. DOJ*, 218 F.3d 760 (D.C. Cir. 2000) for the proposition that Defendant was required to invoke all FOIA Exemptions in the original district court proceedings, Pl.'s Opp. at 7, but *Maydak* is inapposite. There, the government originally denied plaintiff's FOIA request on the basis of FOIA Exemption 7, and the district court granted summary judgment in the government's favor on that basis. *Maydak*, 218 F.3d at 763. The government later conceded partial error as to its Exemption 7 assertion and sought a remand so that it could defend the withholdings on the basis of other FOIA exemptions. *Id.* at 764. While *Maydak* explained that "*as a general rule*, [the government] must assert all exemptions at the same time," *id.*(emphasis added), there is no indication that this principle would apply where, as here, a court issues an intervening denial,

without prejudice, of both parties' motions for summary judgment. Because *Maydak* involved a decision on the merits, the case is plainly distinguishable. *Id.*

The same is true of *Senate of Puerto Rico v. DOJ*, 823 F.2d 574, 580 (D.C. Cir. 1987); Pl.'s Opp. at 7–8, in which the court observed that "agencies [may] not make new exemption claims to a district court *after the judge has ruled in the other party's favor*," 823 F.2d at 580 (alteration in original) *vacated in part as moot*, 455 U.S. 997 (1982) (quoting *Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 846 (D.C. Cir. 1980) (emphasis added)). Because there has been no ruling in Plaintiff's favor, *Senate of Puerto Rico* is no bar to Defendant's Exemption 3 assertions. Plaintiff has identified no pertinent case law demonstrating that Defendant's Exemption 3 arguments are waived or otherwise precluded. To the contrary, Defendant's Exemption 3 assertions are timely and well supported by the Declaration of Mr. Hardy.[2] *See* Fourth Hardy Decl. ¶¶ 15, 17**.**

Plaintiff's reiterated argument that it is "impermissible" for "a non-IC agency [to] assert an Exemption 3 claim based on the National Security Act," is baseless. Pl.'s Opp. at 9; Pl.'s. Mot. for Summ. J. at 16. Defendant asserted Exemption 3 on the basis of the National Security Act on behalf of the FBI, a member of the intelligence community. *See* "Members of the IC," available at https://www.dni.gov/index.php/intelligence-community/members-of-the-ic (last visited June 9, 2016) (listing the Federal Bureau of Investigation as a member of the Intelligence Community.). Such vicarious assertions are commonplace. As previously explained, the Government has long taken the position that any member of the intelligence community, including the FBI, may assert the National Security Act to protect intelligence

[2] As noted in Defendant's Opposition, Plaintiff's Motion for Summary Judgment does not contest, and therefore concedes, the NSA's Exemption 3 assertion. *See* Def.'s Opp. at 10; Pl's. Mot. for Summ. J. at 15-17.

sources and methods, and courts have regularly upheld other agencies' assertions of the Act in support of Exemption 3 withholdings. *See, e.g., Larson v. Dep't of State*, 565 F.3d 857, 868–69 (D.C. Cir. 2009) (National Security Agency); *Krikorian v. Dep't of State*, 984 F.2d 461, 465–66 (D.C. Cir. 1993) (Department of State); *Shoenman v. FBI*, 763 F. Supp. 2d 173, 193 n.12 (D.D.C. 2011) (Department of Justice on behalf of FBI), *aff'd*, 841 F. Supp. 2d 69 (D.D.C. 2012).[3]

C. The Government has Properly Withheld Information Concerning Law Enforcement Techniques and Procedures Pursuant to FOIA Exemption 7(E).

Defendant properly asserted Exemption 7(E) over the remaining challenged withholdings contained within the SARs and Westlaw printouts. The Fourth Hardy Declaration clearly establishes that the remaining challenged withholdings were "compiled for law enforcement purposes" and that their release "would disclose techniques and procedures [of] law enforcement investigations or prosecutions," such that Defendant's Exemption 7(E) assertion was proper. *See* Fourth Hardy Decl. ¶¶ 4, 18-20.

The suggestion that Defendant's Exemption 7(E) claims are inconsistent with the test articulated in *Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982) and adopted in *Jefferson v. DOJ, Office of Prof'l Responsibility*, 284 F.3d 172, 177 (D.C. Cir. 2002)," Pl's. Opp. at 10, is of no consequence. A subsequent "amendment to the language of Exemption 7" effectively superseded the test articulated in *Pratt*, *see Am. Civil Liberties Union of Southern California v. U.S. Citizenship and Immigration Services*, 133 F. Supp. 3d 234, 242 (D.DC. 2015) (citing *Tax*

[3] The notion that the remaining challenged withholdings are "*created and controlled* by a non-Intelligence Community[] agency," Pl.'s Opp. at 8 (emphasis added), does not preclude the application of Exemption 3. Plaintiff points to no case suggesting that this standard is a predicate to a proper Exemption 3 assertion. The FBI possesses highly sensitive equities at stake in the remaining challenged withholdings, and accordingly Defendant was entitled to assert the Exemption on its behalf.

Analysts v. I.R.S., 294 F.3d 71, 79 (D.C. Cir. 2002), and the D.C. Circuit has clarified that "*Pratt* is still applicable in cases where the records are tied to a particular investigation, but *that is no longer a threshold requirement for Exemption 7*." *Tax Analysts*, 394 at *id.* (emphasis added). Thus, whether or not Defendant's withholdings are tied to a particular investigation, *see* Pl.'s Opp. at 10-11, is not dispositive, *Am. Civil Liberties Union*, 133 F.Supp.3d at 243, and *Pratt* presents no barrier to Defendant's successful invocation of Exemption 7(E).

Finally, there can be no doubt that Defendant "serve[s] a law enforcement purpose." *Cf.* Pl.'s Opp. at 11. The D.C. Circuit has long "held that national security is within the realm of law enforcement purposes sufficient to justify withholding based on Exemption 7," *id.* at 242 (citing *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 862 (D.C. Cir. 1989), and of course, maintenance of the national security is the namesake and mission of Defendant, the National Security Division of the Department of Justice. *See Milner v. Dep't of Navy*, 562 U.S. 562, 583-85 (2011) (Alito, J. Concurring). It is uncontroversial that "the DOJ is an agency specializ[ing] in 'law enforcement,'" such that "its claim of [] law enforcement purpose is entitled to deference." *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003). Defendant's Exemption 7(E) withholdings were proper.[4]

D. Defendant has Released All Non-Exempt, Reasonably Segregable Portions of the Responsive Documents.

Defendant has produced all "reasonably segregable portion[s]" of the responsive records. 5 U.S.C. § 552(b). Plaintiff has advanced no new arguments contradicting Defendant's arguments on this score, or challenging the veracity of the declarations of Mr. Hardy and Mr.

[4] Because pages 12-15 of Plaintiff's Opposition are duplicative of Plaintiff's Renewed Motion for Summary Judgment, *see* Pl.'s Mot. for Summ. J. at 18-20, Defendant respectfully refers the Court to the responses articulated in its Opposition to Plaintiff's Motion for Summary Judgment at 12-13.

Sherman, *see* Fourth Hardy Decl. ¶¶ 45–46, Second Sherman Decl. ¶¶ 16–17. *See* Pl.'s Opp. at 14-15.

CONCLUSION

For all of the foregoing reasons, the Court should grant Defendant's Motion for Summary Judgment and deny Plaintiff's Cross-Motion for Summary Judgment.

Dated July 20, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Caroline J. Anderson
CAROLINE J. ANDERSON
Trial Attorney
U.S. Department of Justice, Civil Division
20 Massachusetts Ave. NW, Room 7220
Washington, D.C. 20530
(202) 305-8645
Caroline.J.Anderson@usdoj.gov

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2016, a copy of the foregoing Reply in Support of Defendant's Motion for Summary Judgment was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Caroline J. Anderson
Caroline J. Anderson