UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, *Plaintiff*, v. FEDERAL BUREAU OF INVESTIGATION *Defendant*.	Civil Action No. 17-121

OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO SUBMIT SUMMARY JUDGMENT FILINGS *EX PARTE AND IN CAMERA*

1. This Freedom of Information Act ("FOIA") litigation concerns records of extraordinary public interest—records concerning the FBI's investigation of Russian interference in the 2016 U.S. Presidential Election. In response to the four-part request of the Electronic Privacy Information Center ("EPIC") for disclosure of these records ("EPIC's FOIA Request"), the Defendant Federal Bureau of Investigation ("FBI") has sought to categorically withhold all documents responsive to the first three parts of EPIC's FOIA request. Furthermore, the FBI has sought to make legal arguments *ex parte* and to submit declarations *in camera* in support of its claims, a procedure strongly disfavored by the D.C. Circuit. The FBI also seeks to redact *unclassified material* in summary judgment filings. Yet the FBI has failed to show it is "absolutely necessary" to file *ex parte* and *in camera*. Accordingly, the FBI motion for leave to submit summary judgment filings *ex parte and in camer*a should be denied.

ARGUMENT

2. The D.C. Circuit has repeatedly stated that *in camera* declarations should be chosen only "'where absolutely necessary.'" *Arieff v. United States Dep't of Navy*, 712 F.2d 1462, 1471 (1983).

In camera affidavits in FOIA litigation necessarily lead to review "conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure." *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) (citing *Vaughn v. Rosen*, 484 F.2d 820, 825 (1973)). The presentation of *in camera* declarations represents a "greater distortion of normal judicial process [than *in camera* review of agency records], since it combines the element of secrecy with the element of one-sided, *ex parte* presentation." *Arieff,* 712 F.2d at 1469 (D.C. Cir. 1983). *See also Armstrong v. Exec. Office of the President*, 97 F.3d 575, 580 (D.C. Cir. 1996) ("The use of in camera affidavits has generally been disfavored . . ."), *Life Extension Found., Inc. v. IRS*, 915 F. Supp. 2d 174, 186 (D.D.C. 2013) ("*in camera* declarations are to be avoided unless essential.").

3. The D.C. Circuit has been particularly skeptical of the use of *in camera* declarations "in cases which do not involve national security." *Lykins v. DOJ*, 725 F.2d 1455, 1465 (D.C. Cir. 1984). The government must "explain why it chose to use an *in camera* affidavit" and must "release as much as possible of the document to the other side." *Armstrong,* 97 F.3d at 581.

4. This case concerns records of extraordinary public interest—the FBI's response to the efforts of a foreign government to change the outcome of the 2016 Presidential Election. The Intelligence Community ("IC") has called the interference the "[b]oldest" foreign influence effort carried out in the United States. Office of the Dir. of Nat'l Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections* 5 (2017).[1] Now nearly a year after Election Day, the actual extent of Russian interference with the election remains unknown to the public. New information from the intelligence community about Russian influence efforts has been scarce, and the intelligence reports released by the IC, including the FBI, predate the current

[1] https://www.dni.gov/files/documents/ICA_2017_01.pdf.

administration. *See, e.g.*, Office of the Dir. of Nat'l Intelligence, *supra*; Dep't of Homeland Sec. & Fed. Bureau of Investigation, *GRIZZLY STEPPE – Russian Malicious Cyber Activity* (2016).[2] The public remains in the dark about whether the FBI, the lead federal agency for investigating cyber attacks, took appropriate measures to investigate the Russian interference. And without this information, the public is also unable to assess whether the necessary steps will be taken to safeguard future elections.

5. Nonetheless, the FBI asserts Exemption 7(A) categorically to prevent release of agency records to EPIC and now seeks to block public disclosure of the *unclassified* reasons for withholding by submitting summary judgment legal arguments and declarations *in camera and ex parte*. Def.'s Mot. ¶ 3, ECF No. 21 (stating the redacted portions of the FBI filings are "unclassified law-enforcement-sensitive information"). This request undermines the adversarial process, and lacking justification for the redactions, the FBI has failed to establish that it is "absolutely necessary."

6. The FBI's redactions in the summary judgment motion and declaration impede the adversarial process. The proportion of redacted to unredacted sections in the filings is irrelevant where the redacted content set before the Court by one party and unavailable to the opposing party is essential to the disposition of the disputed matter. For instance, the FBI has redacted from the Hardy Declaration the *descriptions* of many of the records listed as responsive to EPIC's FOIA request. Hardy Decl. ¶ 31, ECF 22-5. The FBI concedes the significance of the redactions by relying principally on the redacted material. The agency cannot then credibly argue in the motion for leave that the redactions are "sufficiently limited" to avoid distortion of the adversarial process. Def.'s Mot. ¶¶ 6, 9. The FBI cannot have it both ways. If the redacted

[2] https://www.uscert.gov/sites/default/files/publications/JAR_16-20296A_GRIZZLY%20STEPPE-2016- 1229.pdf

material is essential to the FBI's exemption claims, then that information is equally essential to EPIC's opportunity to dispute those claims.

7. The FBI has also failed to demonstrate that it is necessary to submit these materials *in camera*. The FBI refuses even to provide a reason for seeking to redact the public summary judgment filings. Instead, FBI states generically that the FBI's investigation of the Russian interference will be harmed by release of the information "[f]or reasons that will be clear to the Court when it reviews the unredacted version" of the materials. Def.'s Mot. ¶ 4. This bare, conclusory assertion cannot suffice to demonstrate that the filing is "absolutely necessary." *Arieff*, 712 F.2d at 1470–71 (citing *Salisbury v. United States,* 690 F.2d 966, 973 n. 3 (D.C. Cir. 1982); *Allen,* 636 F.2d at 1298 n. 63).

8. Finally, this Court should not endorse the FBI's withholding of unclassified information in support of a categorical exemption claim. The FBI points to recent two cases where such redacted filings were recently permitted, but only one of those decisions was the result of adversarial briefing and neither binds this Court. Def.'s Mot. ¶ 8 (citing *Judicial Watch, Inc. v. CIA*, Case No. 17-cv-397 (TSC), Sept. 30, 2017 Minute Order; *Leopold v. Dep't of Treasury*, Case No. 16-cv-1827 (KBJ), Sept. 1, 2017 Order Granting Motion For Leave to File In Camera). The FOIA itself provides *no* statutory basis for *in camera* affidavits, much less *ex parte* arguments in a summary judgment motion. While the FOIA specifically authorizes *in camera* review, it is only to "examine the contents of . . . agency records in camera," 5 U.S.C. § 552(a)(4)(B), in furtherance of disclosure. Motions for *in camera* review are typically made by the party seeking release of agency records, not by an agency seeking to withhold records. *See, e.g.*, *EPIC v. DOJ*, 584 F. Supp. 2d 65, 82–83 (D.D.C. 2008) (granting in part EPIC's motion for *in camera* review of documents withheld by the DOJ where the court found the agency's

declarations "still lacking"). The Supreme Court has rejected FOIA doctrines that are untethered to the text of the Act. *See Milner v. U.S. Dep't of Navy*, 562 U.S. 562, 573 (2011) (overturning the "High 2" exemption created by the D.C. Circuit and stating the interpretation was "disconnected" from the text, "ignore[d] the plain meaning," and "adopt[ed] a . . . requirement with no basis or referent in Exemption 2's language"). Courts must apply the statute's text. As the Court explained in *Milner*, "Super 2 in fact has no basis in the text, context, or purpose of FOIA, and we accordingly reject it." 562 U.S. at 579. *See also John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153-54 (1989) ("As is customary, we look initially at the language of the statute itself. The wording of the phrase under scrutiny is simple and direct . . .").

9. There is no statutory authority for the submission of declarations *in camera* or the filing of summary judgment motions *ex parte*.

CONCLUSION

10. For the foregoing reasons, the Court should deny the FBI's motion for leave to submit summary judgment filings *in camera and ex parte*.

Respectfully Submitted,

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