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

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| JASON LEOPOLD,<br><br>Plaintiff,<br><br>v.<br><br>U.S. DEPARTMENT OF JUSTICE<br><br>Defendant. | Case No. 15-cv-02117 RDM |

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO SHOW CAUSE**

## I. INTRODUCTION

Defendant's submission of a classified *ex parte, in camera* declaration in support of its Motion for Summary Judgment complied with well-established procedures in this Circuit for deciding cases under the Freedom of Information Act ("FOIA").

The public declaration of David M. Hardy ("Hardy Decl."), *see* ECF No. 9-1, which was filed concurrently with Defendant's Motion, provided detailed information sufficient to establish, as a matter of law, that the Federal Bureau of Investigation ("FBI") conducted a reasonable search for records responsive to Plaintiff's FOIA request and properly withheld responsive information pursuant to FOIA Exemption 7(A). *See* Hardy Decl. ¶¶ 10-24. The Hardy Declaration also explained, however, that the FBI could not provide more information on the public record without adversely affecting the ongoing investigation that is the subject of Plaintiff's FOIA request. *See id*. ¶¶ 15, 19-20, 22. For this reason, the FBI lodged a classified, *in camera* declaration to supplement its

demonstration on the public record that it has complied with its obligations under FOIA with respect to Plaintiff's request.

The D.C. Circuit has specifically permitted the review of *in camera* declarations in these circumstances, and this procedure is routinely followed by judges in this District. Plaintiff's arguments to the contrary are based largely on cases from outside this Circuit that do not arise under FOIA. Nor is there merit to Plaintiff's contention that the FBI should have sought leave of Court or notified Plaintiff in advance of filing its classified *ex parte, in camera* declaration – no such requirement exists in this Circuit. Moreover, the filing of a redacted version of the declaration, as Plaintiff requests, would provide no additional information that is not already contained in the Hardy Declaration and was therefore not required under this Circuit's precedent. Accordingly, the Court should deny Plaintiff's Motion to Show Cause.

## II. BACKGROUND

This case concerns a November 3, 2015 FOIA request to the FBI for several categories of information relating to any records retrieved from electronic equipment obtained from former Secretary of State Hillary Rodham Clinton. After an initial status conference held on February 9, 2016, *see* Jan. 21, 2016 Minute Order, the Court ordered Defendant to file a motion for summary judgment based on Exemption 7(A) of FOIA on or before March 25, 2016. *See* Feb. 9, 2016 Minute Order.[1]

Defendant filed its Motion for Summary Judgment in accordance with the Court's Order. *See* ECF No. 7. In support of the Motion, Defendant filed the Declaration of David M. Hardy. *See* ECF No. 9-1, Hardy Decl. Defendant also filed a Notice of

[1] That order also stated that "[b]y filing such a motion, Defendant does not waive its right to later assert other FOIA exemptions." Feb. 9, 2016 Minute Order.

Lodging of Classified, *In Camera*, *Ex Parte* Declaration, informing Plaintiff and the Court that Defendant was lodging with the Department of Justice's Classified Information Security Officer a classified declaration for the Court's *in camera, ex parte* review in support of Defendant's Motion. *See* ECF No. 8. On April 19, 2016, Plaintiff filed a Motion to Show Cause why Defendant should not be required to file a redacted version of the declaration on the public record, or in the alternative requested that the declaration be stricken. *See* ECF No. 11.

## III. ARGUMENT

### A. *In Camera, Ex Parte* Submissions Are Permitted in FOIA Cases, Where Appropriate.

The D.C. Circuit has made clear that district courts have the inherent authority to examine documents *in camera*, authority that Congress specifically referenced in FOIA itself. *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (citing 5 U.S.C. § 552(a)(4)(B) (authorizing courts to "examine the contents of . . . agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions . . . .")). Therefore, "the receipt of *in camera* affidavits . . . when necessary . . . [is] part of a trial judge's procedural arsenal." *Id*. (internal quotation omitted); *see also Hayden v. NSA*, 608 F.2d 1381, 1385 (D.C. Cir. 1979) ("By providing for In camera review, Congress has acknowledged that judges must sometimes make these decisions without full benefit of adversary comment on a complete public record. The present case is one example where some of the interests of the adversary process are

outweighed by the nation's legitimate interests in secrecy and orderly process for disclosure.").[2]

"This court has approved the procedure in FOIA cases, most frequently in connection with an agency's assertion of Exemption 1, relating to classified materials, but on occasion with regard to the assertion of other exemptions as well." *Arieff*, 712 F.2d at 1469 (approving district court's review of *in camera* affidavit when evaluating Exemption 6 claim and citing, *inter alia*, *Campbell v. HHS*, 682 F.2d 256, 265 (D.C. Cir. 1982) (suggesting that, on remand, district court could accept *in camera* submissions to support Exemption 7(A) claim)) (internal citation omitted). In fact, the review of *in camera* submissions can be particularly appropriate in Exemption 7(A) cases. To demonstrate that information is properly withheld under that Exemption, the agency must show that disclosure could reasonably be expected to interfere with enforcement proceedings. 5 U.S.C. § 552(b)(7)(A). Often the agency cannot fully articulate the harm that could reasonably be expected to result if the information is disclosed without revealing the very information regarding the investigation that the agency seeks to protect. *See Campbell*, 682 F.2d at 265 (in Exemption 7(A) cases, "the interests of the adversary process may be outweighed by the agency's legitimate interest in secrecy").

[2] While in *Hayden* the agency requested court permission to file classified affidavits *in camera*, there was no suggestion that this was required, and the request arose in a different procedural context than the situation here. 608 F.2d at 1383. The agency had already filed an affidavit that the district court had found insufficient under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and granted the plaintiff's motion for detailed itemization, indexing, and justification for non-disclosure. *Id*. The agency responded with a supplemental affidavit and a request to file classified affidavits, because further justification would have required the use of evidence that was itself classified and sensitive. *Id.*

While receiving an *ex parte, in camera* affidavit "should be chosen only where absolutely necessary," *Arieff*, 712 F.2d at 1471 (internal quotations omitted), this "necessity exists when (1) the validity of the government's assertion of exemption cannot be evaluated without information beyond that contained in the public affidavits and in the records themselves, and (2) public disclosure of that information would compromise the secrecy asserted." *Id*. The unique nature of FOIA cases makes the consideration of *in camera* declarations more common:

> FOIA cases as a class present an unusual problem that demands an unusual solution: One party knows the contents of the withheld records while the other does not; and the courts have been charged with the responsibility of deciding the dispute without altering that unequal condition, since that would involve disclosing the very material sought to be kept secret. The task can often not be performed by proceeding in the traditional fashion, so that what is a rarity among our cases [the submission of *ex parte* filings] generally must become a commonplace in this unique field.

*Id*. Moreover, while a court must create "as complete a public record as possible" in FOIA cases, there is no need to release a redacted version of an *in camera* declaration when doing so would "merely duplicate[] material already in the public record." *Hayden*, 608 F.2d at 1385, 1389.

### B. Defendant's Submission of an *In Camera* Declaration Was Appropriate Under the Circumstances, and Filing a Redacted Declaration Would Not Provide Plaintiff With any Additional Information.

Defendant's submission of a classified *in camera, ex parte* declaration in support of is Motion for Summary Judgment was entirely appropriate. Defendant submitted the public declaration of David M. Hardy in support of its Motion. *See* ECF No. 9-1, Hardy Decl. This declaration provides detailed information sufficient to establish, as a matter of law, that the FBI conducted a reasonable search for records responsive to Plaintiff's

FOIA request and properly withheld responsive information pursuant to FOIA Exemption 7(A). *See* Hardy Decl. ¶¶ 10-24. The Hardy Declaration also explained that the FBI cannot provide more information on the public record without adversely affecting the ongoing investigation that is the subject of Plaintiff's FOIA request. *See id*. ¶¶ 15, 19-20, 22.

Records responsive to Plaintiff's request that are subject to FOIA relate to a pending investigation. *Id*. ¶ 18. The FBI has stated publicly that it received and "is working on a referral [from] Inspectors General in connection with former Secretary Clinton's use of a private e-mail server." *Id*. ¶ 15 (quoting *Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 32 (2015) (statement of FBI Director James Comey)). However, "[b]eyond Director Comey's acknowledgment of the security referral from the Inspectors General of the Intelligence Community and the Department of State, the FBI has not and cannot publicly acknowledge the specific focus, scope, or potential targets of any such investigation without adversely affecting the investigation." *Id*.

The FBI therefore submitted a classified *in camera, ex parte* declaration to provide the Court with additional details to demonstrate that responsive information was properly withheld, and explained on the public record that this was the purpose of the *in camera* declaration. *Id*. ¶ 22 ("The FBI is submitting an *in camera, ex parte* declaration to provide additional details demonstrating that it has properly protected records responsive to plaintiff's request."). Only one paragraph of the *in camera* declaration contains information that is not classified or otherwise exempt under 5 U.S.C.

§ 552(b)(7)(A), and this one paragraph repeats information that is already contained in the Hardy Declaration.[3]

Defendant's submission thus satisfies the standard in the D.C. Circuit for a court's consideration of an *in camera* declaration. While the detail in the Hardy Declaration is sufficient for the Court to grant Defendant's Motion for Summary Judgment, to the extent the Court disagrees, consideration of the *in camera* declaration would provide the Court with additional information to evaluate the FBI's assertions. *See Hayden*, 608 F.2d at 1388 (affidavit submitted *in camera* spelled out justification for non-disclosure with greater specificity).[4] Moreover, the Hardy Declaration states that public disclosure of additional information would compromise the very information that the FBI asserts is protected by Exemption 7(A). *See* Hardy Decl. ¶ 22 ("The FBI is limited in the amount of detail it can provide on the public record in order to defend its protection of information in this FOIA matter without adversely affecting its active, ongoing investigation.").

Finally, ordering Defendant to file a redacted version of the declaration on the public record, as Plaintiff requests, would not further the goal of providing as complete a public record as possible. *See Hayden*, 608 F.2d at 1385, 1388-89 (district court reasonably decided not to order portions of classified affidavit disclosed). Such a filing would provide no additional information, as the only paragraph that could be publicly

[3] The identity of the declarant for the classified *in camera, ex parte* affidavit cannot be disclosed without revealing information that could reasonably be expected to interfere with the FBI's pending investigation.

[4] *See also Cucci v. DEA*, 871 F. Supp. 508, 511 n.2 (D.D.C. 1994) ("Because the Court concludes on the basis of Mr. Moran's public declaration that the agency has complied with the FOIA, it need not and does not consider Mr. Moran's *in camera* declaration.").

released is one paragraph that repeats information that is already contained in the Hardy Declaration.

Courts in this Circuit have considered *in camera* declarations in similar circumstances, without any mention of redacted versions being filed on the public record.[5] *See Campbell*, 682 F.2d at 265 (remanding for the district court to consider submissions justifying the withholding of records under Exemption 7(A) and noting that "the district court, in its discretion, may accept in camera submissions"); *August v. FBI*, 328 F.3d 697, 699, 702 (D.C. Cir. 2003) (granting petition for panel rehearing after reviewing attached *in camera* declaration, and remanding to the district court "for in camera consideration of the applicability of FOIA Exemptions 7(C), 7(D), and 7(E)"); *Elkins v. FAA*, Civil Action No. 14-1791 (JEB), 2015 WL 5579542 (D.D.C. Sept. 21, 2015) (granting motion for reconsideration and finding that a record could be withheld under Exemption 7(E) based on *in camera* motion and declarations, which contained classified information); *Life Extension Found. v. IRS*, 915 F. Supp. 2d 174, 186 (D.D.C. 2013), *aff'd*, 559 Fed. App'x 3 (D.C. Cir. Apr. 25, 2014) (reviewing *in camera* declarations and finding that agency properly invoked Exemptions 3 and 7(D) where the "*in camera* declarations provide additional details explaining why the IRS has not described any investigation or informant information in any greater detail in its public

[5] The Court does not need to conduct *in camera* review of any of the records at issue before determining whether review of the *in camera* declaration is appropriate. *See Mobley v. CIA*, 806 F.3d 568, 588 (D.C. Cir. 2015) ("Here, as our own review confirms, the district court, after reviewing *in camera* the FBI's classified declaration, acted within its sound discretion when it decided that it did not need to review the classified document *in camera* to conclude that the FBI withheld it as properly classified."); *Elec. Privacy Info. Ctr. v. DOJ*, 82 F. Supp. 3d 307, 323 (D.D.C. 2015) (declining to conduct *in camera* review of documents where "the agencies' public and ex parte declarations provide sufficient basis to determine that Exemption 7(A) applies to the responsive documents").

submissions"); *Barnard v. DHS*, 598 F. Supp. 2d 1, 16 (D.D.C. 2009) ("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"); *id.* at 19-20 (considering *in camera* declaration in finding that agency met its burden with regard to Exemption 7(A) claim).[6]

Plaintiff bases his argument that Defendant's submission of an *in camera* declaration was improper on one D.C. Circuit case that is easily distinguishable, and on non-FOIA cases. In *Lykins v. U.S. Dep't of Justice*, 725 F.2d 1455, 1466 (D.C. Cir. 1984), relied upon by Plaintiff, the "proper predicates for acceptance of *in camera* affidavits were not met" because the district court did not ensure that sufficient information was placed in the public record. There, the plaintiff "was given no information concerning which exemptions were claimed for the report, the circumstances surrounding the report's creation, the length of the report, the possibility of segregating exempt portions from nonexempt portions, or the identity of the author of the report." *Id*. at 1465. Here, the Hardy Declaration provides most of this information. *See* Hardy Decl. ¶¶ 10-23. To the extent the Hardy Declaration does not contain this information, it is not necessary for the Court to assess Defendant's exemption claim, and placing it on the public record could compromise the investigation that is the subject of the FOIA request. *Id*.; *see also Armstrong v. Exec. Office of the President*, 97 F.3d 575, 581 (D.C. Cir. 1996) (excusing government's failure to explain why it used an *in camera* affidavit and

[6] In *Barnard*, the defendant submitted a motion for leave to file an *in camera* declaration after filing its motion for summary judgment, 598 F. Supp. 2d at 7, but there was no indication that this was required and the declaration did not contain classified information.

failed to release as much as possible of the affidavit to the other side because, unlike in *Lykins*, submission did not make it impossible for the adversary process to function effectively).

The remainder of the cases relied on by Plaintiff did not involve FOIA requests, and most were between private parties (and thus could not have implicated classified or law enforcement sensitive information). Given the unique nature of FOIA cases and explicit allowance of *in camera* submissions in the FOIA itself, *Arieff*, 712 F.2d at 1469, Plaintiff's reliance on non-FOIA cases as a basis for questioning Defendant's submission of a classified, *in camera* declaration is inapposite.[7]

[7] *Compare Arieff*, 712 F.2d at 1470 (distinguishing FOIA case from cases that involve pretrial discovery with respect to consideration of *in camera* submissions) *with* Pl.'s Mot. to Show Cause at 5-6 (citing *United States v. Zolin*, 491 U.S. 554, 565-71 (1989) (examining Rules of Evidence and policies underlying the attorney-client privilege to determine standards for the use of *in camera* review to establish the applicability of the crime-fraud exception to the privilege); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1144-45 (5th Cir. 1992) (observing, in *dicta*, that the government should have provided notice to plaintiffs and opportunity to object to *in camera* production of documents and affidavit, but saying that this did not alter conclusion that the very subject of the case was a state secret, since the court did not rely on the *in camera* material); *United States v. Hall*, 854 F.2d 1036, 1041-42 (7th Cir. 1988) (criminal defendant used inappropriate procedure when submitting *ex parte* affidavit to court, and there was no reason for submission where affidavit did not provide any new evidence of which government was not already aware); *Williams v. Bd. of Trs. for the Univ. of Conn.*, Case No. 3:06CV1999 (AWT), 2008 U.S. Dist. LEXIS 8956 (D. Conn. Feb. 7, 2008) (defendants violated local rule by submitting affidavit *ex parte* in support of motion for protective order without seeking leave of court); *Parisi v. Rochester Cardiothoractic Assocs.*, 159 F.R.D. 406 (W.D.N.Y. 1995) (rejecting submission for *in camera* review of index to a document that was the subject of a discovery dispute)). Moreover, whereas the Supreme Court in *Zolin* referenced potential due process implications of routine use of *in camera* proceedings, it cited to two cases that also involved *in camera* submissions to determine the applicability of the crime-fraud exception, and the circuit courts determined that the use of such proceedings *was* appropriate under the circumstances. *See* 491 U.S. at 571.

### C. D.C. Circuit Precedent and This Court's Local Rules Do Not Require Prior Notice or Court Approval for the Submission of an *In Camera* Declaration in FOIA Cases, Especially Where the Declaration Contains Classified Information.

Finally, Plaintiff does not point to any D.C. Circuit authority or Local Rule that required the FBI to seek permission from or provide prior notice to Plaintiff or the Court before lodging the classified, *in camera* declaration, and there is none.[8] *See, e.g.*, *Life Extension Found.*, 915 F. Supp. 2d at 178-79 (considering *in camera* declarations after defendant filed notice of lodging). Moreover, to the extent prior notice or permission might have been the preferred course here, any prejudice caused to Plaintiff by the lodging of the declaration (which Defendant denies) will be cured by the briefing on Plaintiff's Motion to Show Cause and this Court's ruling on Defendant's Motion for Summary Judgment. Defendant has demonstrated why the lodging of, and the Court's consideration of, the *in camera* declaration is proper under D.C. Circuit precedent. While Defendant believes the Hardy Declaration provides sufficient information for this Court to grant Defendant's Motion for Summary Judgment, if this Court decides to rely on the *in camera* declaration in deciding that motion, the Court can explain in its opinion why its consultation of the declaration was appropriate under the governing law. *See Armstrong*, 97 F.3d at 581 (district court committed harmless error by not explaining its reasons for consulting an *in camera* affidavit).

## IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Show Cause should be denied.

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[8] The standards for sealing material, *see* Local Civil Rule 5.1(h), are different than for lodging classified, *in camera* declarations, which are lodged with the Department of Justice's Classified Information Security Officer to ensure proper safeguarding of information.

Dated: April 26, 2016

Respectfully submitted,

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