IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 18-cv-1766 (RBW)
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

PLAINTIFF'S MOTION TO UNSEAL TRANSCRIPTS AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

As the D.C. Circuit has recognized, in Freedom of Information Act ("FOIA") cases like this one, the adversary process works best when the government provides the requester "as much information as possible[.]" *Lykens v. Dep't of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984). Typically the withholding agency provides that information through declarations, *id.*, but here Defendant U.S. Department of Justice ("DOJ") has amplified its declarations with *in camera* proffers from Assistant United States Attorney J.P. Cooney at three separate status conferences (in addition to the most recent status conference on November 14, 2019). Based in large part on these *in camera* representations, this Court allowed DOJ to withhold a swath of documents on which DOJ's Office of Inspector General ("OIG") relied for its conclusion that then-Acting FBI Director Andrew McCabe had lacked candor in responding to OIG investigators seeking to determine the source of a leak to the *Wall Street Journal*. That conclusion formed the basis for then-Attorney General Jeff Sessions' decision to summarily fire Mr. McCabe on March 16, 2018, less than two days before he was to retire from public service. Compl. ¶ 9.

For unexplained reasons—at least publicly—DOJ has now withdrawn its reliance on FOIA Exemption 7(A) to withhold OIG material and the Court has granted Plaintiff's motion to unseal the Declaration of Stephen F. Lyons (ECF No. 27) ("Lyons Decl."), which DOJ initially proffered to justify its invocation of Exemption 7(A). Given DOJ's changed position, Plaintiff respectfully requests that the Court also unseal portions of the hearing transcripts for July 9, September 9 and September 30, 2019, during which DOJ explained to the Court *in camera* why it needed to continue to rely on Exemption 7(A) to protect an ongoing law enforcement proceeding. Like the Lyons Declaration, there no longer is a legitimate justification for keeping sealed those portions of these hearings. There is, however, an overriding public interest in

providing full access to the government's complete rationale for keeping the OIG materials secret for well over a year.

FACTUAL BACKGROUND

The FOIA request at issue seeks on an expedited basis all documents related to any investigation or inquiry the FBI's Office of Professional Responsibility ("OPR") conducted of or related to former Acting FBI Director Andrew McCabe. Compl. ¶ 12. Attorney General Sessions summarily fired Mr. McCabe on March 16, 2018, less than two days before he was to retire from public service. *Id.* ¶ 9. With this act, the attorney general cost Mr. McCabe his pension.

Mr. McCabe's firing drew widespread public attention and speculation that Attorney General Sessions had acted to appease President Trump, *id.* ¶ 11, who had lashed out at Mr. McCabe in vitriolic tweets that continue to this day. To better understand the basis for Mr. McCabe's abrupt termination and to obtain information that would allow the public to assess the credibility of the allegations of political motivation and the role President Trump may have played in the attorney general's decision, plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") filed an expedited FOIA request with DOJ on March 19, 2018. Compl. ¶ 12. On July 30, 2018, having received no substantive response to its request, CREW filed its complaint in this action (ECF No. 1).

Once in litigation and based on input from the parties, the Court imposed a processing schedule that anticipated complete production by mid-January 2019. Order, Oct. 3, 2018 (ECF No. 10). DOJ sought to extend that time by nearly two years to accommodate its consultation and referral process, and at CREW's suggestion the parties briefed the applicability of Exemption 7(A) based on a representative sampling from the OIG materials. *See* Order, Dec. 18, 2018 (ECF

No. 17). DOJ moved for partial summary judgment relying almost exclusively on the sealed, *ex parte* Lyons Declaration (ECF No. 27).

Following a status conference on June 21, 2019, at which counsel for DOJ was unable to answer all of the Court's questions concerning the matters set forth in the Lyons Declaration, the Court scheduled another status conference for July 9, 2019, at which "the defendant, or another representative of the government, shall be prepared to address the Court's questions regarding the declaration that was filed ex parte and under seal should remain under seal." Order, June 24, 2019 (ECF No. 34). Following the June 24 status conference, during which DOJ offered the *in camera* testimony of Assistant United States Attorney Cooney, the Court ordered the Lyons Declaration to remain under seal "[b]ased upon the government's ex parte representations at the status conference[.]" Order, July 10, 2019 (ECF No. 35). From those representations the Court "conclude[d] that it is appropriate for the declarations to remain under seal at this time." *Id.*

The Court held a follow-up status conference on September 9, 2019, during which DOJ once again offered Mr. Cooney's *in camera* testimony. Following that hearing, the Court entered a minute order noting: "Government's request for a continuance; heard (ex-parte) and granted." Minute Entry, Sept. 9, 2019. As a result, the Lyons Declaration remained under seal. The follow-up status conference on September 30, 2019 followed the same pattern. In response to the Court's question as to "what the government intends to do in reference to Mr. McCabe," Transcript of Status Conference, Sept. 30, 2019 (Enclosed as Exhibit A), at 2, DOJ again proffered the *in camera* testimony of Mr. Cooney, after which the Court continued this matter further, but only until November 15, *id.* at 7. The Court made clear that unless DOJ made a call on whether to prosecute Mr. McCabe by that date the Court was "going to start ordering the release of information." *Id.* at 10.

On November 13, 2019, DOJ notified the Court it was "withdrawing its invocation of Exemption 7(A) over information related to the proceeding described in the Lyons Declaration." Notice of Withdrawal of Exemption 7(A) and Motion to Excuse U.S. Attorney's Office Official (ECF No. 36) at 1. DOJ offered no explanation for its changed position. At a subsequent hearing on November 14, 2019, the Court granted Plaintiff's motion to unseal the Lyons Declaration and pursuant to Court order that declaration has now been unsealed. *See* Order, Nov. 15, 2019 (ECF No. 38). With this unsealing, the public has its first official confirmation from DOJ that the U.S. Attorney's Office for the District of Columbia has commenced a criminal investigation of Mr. McCabe. At this point portions of the transcripts of the status conferences on July 9, September 9 and September 30, 2019 during which the Court heard from Mr. Cooney about the matters addressed in the Lyons Declaration remain sealed.

ARGUMENT

Both common law and the First Amendment give the public the right to know what was said during the *ex parte* portions of the July 9, September 9, and September 30, 2019 status conferences and compel their unsealing. First, transcripts of the proceedings are judicial records, and the balance of interests under common law weighs strongly in favor of their release. *See Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017). Second, the public has the right to this information arising out of the "implicit First Amendment right of the press and public." *Press-Enter. Co. v. Super. Ct. ("Press-Enterprise II")*, 478 U.S. 1, 7 (1986) (internal quotation omitted). Where, as here, the government is a party, the importance of public access "is accentuated[.]" *Federal Trade Comm'n v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *accord Equal Employment Opportunity Comm'n v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996). These interests are particularly compelling where the

underlying matter is a FOIA action that itself is premised on the statutory right of the public to know what its government is up to.

I. THE COURT SHOULD RELEASE THE SEALED TRANSCRIPTS PURSUANT TO THE COMMON LAW RIGHT OF ACCESS

Courts have recognized a clear and "general right to inspect and copy public records and documents." *Nixon v. Warner Commc'n*, 435 U.S. 589, 597 (1978). The transcripts at issue are judicial records, which carry "a strong presumption" of public access, *Metlife*, 865 F.3d at 663, that can be rebutted only by satisfying the six-factor test established in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980). *Id* at 665. DOJ cannot make that showing here.

A. The Sealed Transcripts are "Judicial Records."

The extent to which the sealed portions of the hearing transcripts are judicial records depends on "the role [they] play[] in the adjudicatory process." *S.E.C. v. American Intern. Grp*, 712 F.3d 1, 3 (D.C. Cir. 2013) (citation omitted). Documents created "'to influence' a court's pending decision . . . [are] almost certainly a judicial record." *Cable News Network, Inc. v. FBI ("CNN")*, 384 F. Supp. 3d 19, 41 (D.D.C. 2019) (citing *Metlife*, 865 F.3d at 668). By contrast, "a document about which the court 'made no decisions' and did not 'otherwise rely,' does not qualify." *Id.* (citing *American Int'l Grp.*, 712 F.3d at 3–4); *see also Smith v. United States Dist. Ct.*, 956 F.2d 647, 650 (7th Cir. 1992) ("judicial records include transcripts of proceedings, everything on the record, including items not admitted into evidence").

In *CNN*, the FBI relied on an *in camera* declaration and testimony to support its invocation of FOIA Exemption 7(A) to withhold memoranda written by then-FBI Director James Comey. 384 F. Supp. 3d at 26. After withdrawing the exemption, the FBI released a redacted version of the declaration and transcripts of the testimony. *Id.* at 27. The court considered whether the declaration was a judicial record, found that it was, and ordered it to be released

without redactions. *Id.* at 44.

Here too, the *ex parte* portions of the hearing transcripts "clear[] the first hurdle without breaking a sweat." *Id.* at 42. DOJ used these *ex parte* discussions to advise the Court and "[b]ased upon [those] discussions," this Court "concluded that *ex parte* submissions or representations were appropriate." Transcript of July 9, Status Conference at 7–8 (Exhibit B). Unquestionably DOJ's representations were "'intended to influence' the Court," and thus played a central "role…in the adjudicatory process'" rendering the transcripts a judicial record. *CNN*, 384 F. Supp. 3d at 42.

B. The *Hubbard* Factors Support Public Access.

The "strong presumption in favor of public access to judicial proceedings," *United States v. Hubbard*, 650 F.2d at 317, can be overcome only by showing that the six factors *Hubbard* established weigh against public access. *Metlife*, 865 F.3d at 665. Those factors consider: "(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced." *Nat'l Children's Ctr.*, 98 F.3d at 1409. As applied here, the factors weigh in favor of unsealing the transcripts from the three *ex parte* proceedings.

First, the need for public access to these transcripts is especially high because they were "specifically referred to in the trial judge's public decision," *Hubbard*, 650 F.2d at 318, and because the government is a party to this litigation, which "strengthens the already strong case for access," *Nat'l Children's Ctr.*, 98 F.3d at 1409. This *in camera* testimony served as the basis for the Court's decision to keep the Lyons Declaration under seal and to delay the release of a

considerable portion of the material requested in this FOIA action for well over a year. Mr. McCabe's firing has drawn significant media attention and public interest, an interest that has only increased over time with the mounting evidence suggesting politically motivated actions by DOJ officials. The need for public access, therefore, weighs heavily in favor of unsealing the transcripts.

The second factor essentially considers the potential impact of making new, and possibly harmful, information publicly available. *See Friedman v. Sebelius*, 672 F. Supp. 2d 54, 58 (D.D.C. 2009). Although the content of the *ex parte* discussions between DOJ officials and the Court has never been publicly available, it pertains directly to the Lyons Declaration, which has now been unsealed in full. Thus, rounding out that picture will enhance public understanding, while causing no harm given that with the unsealing of the Lyons Declaration DOJ has now publicly acknowledged its criminal investigation of Mr. McCabe.

Factors three, four, and five "are interrelated, and require courts to look at the strength of the property and privacy interests involved, and to take into account whether anyone has objected to public disclosure and the possibility of prejudice to that person." *Gillard v. McWilliams*, 2019 WL 3304707, at *4 (July 23, 2019) (internal quotation omitted). Whether or not DOJ objects to disclosure, the only potential privacy interest at issue would be that of Mr. McCabe and his association with a criminal investigation. With the unsealing of the Lyons Declaration, however, that association has now been publicly acknowledged. Accordingly, revealing the contents of the sealed hearing transcripts will not encroach any further on any privacy interest he may enjoy.

The fifth factor, which considers "whether disclosure of the documents will lead to prejudice in future litigation to the party seeking the seal," *Friedman*, 672 F. Supp.2d at 60, is

more relevant to a government party, but it too leans toward public disclosure. DOJ previously claimed that plaintiff's FOIA request implicated an ongoing law enforcement proceeding. Now, however, DOJ has withdrawn its reliance on Exemption 7(A), thereby consenting to the release of documents about Mr. McCabe's firing. In essence DOJ has conceded that there is a low risk of prejudicing future litigation at least from the disclosure of the fact that DOJ is investigating Mr. McCabe—which presumably is what the *ex parte* discussions were all about.

Finally, the sixth factor "concerns itself with the nature of the records and why they were introduced in the first place." *Gilliard*, 2019 WL 3304707, at *5. "This is the 'single most important' *Hubbard* factor." *CNN*, 384 F. Supp. 3d at 43 (quoting *Hubbard*, 650 F.2d at 321). There is a strong presumption against keeping the transcripts sealed because "what transpires in the court room is public property." *In re Nat. Broadcasting Co.*, 653 F.2d 609, 614 (D.C. Cir. 1981) (internal quotation omitted). Unlike discovery materials, which have a stronger presumption of privacy, *see Nat'l Children's Ctr., Inc.*, 98 F.3d at 1411, these conferences happened during a publicly noticed proceeding. The *ex parte* discussions concerned the status of a pending law enforcement proceeding, information that the Court elicited to expand upon the information in the now unsealed Lyons Declaration, and affected a pending FOIA action. Taken as a whole, the declaration and *ex parte* proffers from the government provided the justification for significantly delaying public access to critical information on the real basis for Mr. McCabe's abrupt termination. The public is entitled to a full explanation for that delay.

Accordingly, factor six and the *Hubbard* factors as a whole weigh squarely in favor of releasing the *ex parte* portions of the hearing transcripts.

II. THE FIRST AMENDMENT AFFORDS THE PUBLIC THE RIGHT TO ACCESS THE SEALED TRANSCRIPTS

Under Supreme Court precedent, courts employ "a two-stage process for resolving

whether the First Amendment affords the public access to a particular judicial record or proceeding." *Dhiab v. Trump*, 852 F.3d 1087, 1102 (D.C. Cir. 2017) (Williams, J., concurring). The first stage focuses on "whether a qualified First Amendment right of public access exists." *Id.* (internal quotation omitted). Finding such a right, the court then turns to an examination of whether "closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* (internal citations omitted). Only then may a record or judicial proceeding be closed. *Id.*

A. The First Amendment Right of Public Access Applies to the Transcripts.

Courts recognize "a qualified First Amendment right of access to judicial proceedings" by the public where "(i) there is an 'unbroken, uncontradicted history' of openness, and (ii) public access plays a significant positive role in the functioning of the proceeding." *United States v. Brice*, 649 F.3d 793, 795 (D.C. Cir. 2011). While the D.C. Circuit has never explicitly "*found* a qualified First Amendment right outside the criminal context," it has "never categorically ruled it out[.]" *Dhiab*, 852 F.3d at 1104 (emphasis in original). Other courts have "uniformly" extended that right to civil proceedings and records from those proceedings. *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d 27, 36 (D.D.C. 2009); *see also Doe v. Pub. Citizen*, 749 F.3d 246, 265 (4th Cir. 2014); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014); *New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 298 (2nd Cir. 2012).

Here, the historic openness of court arguments to the general public and the press presents a compelling case for public access to transcripts of the *ex parte* testimony from DOJ officials. *See Press-Enterprise II*, 478 U.S. at 8. Public accountability is especially important in a FOIA action because the purpose and spirit of the FOIA are openness and transparency. Mr.

McCabe's firing, investigation, and potentially politically motivated actions by DOJ officials are issues of great public significance. To bar the public from learning why until now this information has been kept secret risks undermining the public's ability to fully evaluate the basis for the government's arguments as to why critical information remains exempt from public disclosure as well as the underlying decision itself to terminate Mr. McCabe. Holding the government accountable through public disclosure of the kind of information in the sealed transcripts furthers the FOIA's central purpose.

B. The Balance of Interests Weighs in Favor of Public Access.

Continuing to withhold from the public the *ex parte* portions of the hearing transcripts risks palpable harm: "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like a fiat and requires rigorous justification." *Matter of Leopold to Unseal*, 300 F. Supp. 3d 61, 80 (D.D.C. 2018) (quoting *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006)). That is why the presumption of public access can be overcome only if continued secrecy "(1) serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *Washington Post v. Robinson*, 935 F.2d 282, 290 (D.C. Cir. 1991) (internal quotation omitted).

In re Special Proceedings, in which the court ordered the release of an investigative report detailing alleged governmental misconduct in the prosecution of U.S. Senator Ted Stevens, underscores the importance of public access to the transcripts requested here. 842 F. Supp. 2d 232, 235–236 (D.D.C. 2012). There, the court noted that in that highly public trial "the identity of the subjects was known from the outset" and "the matters under investigation were largely known to the public from the outset[.]" *Id.* at 246. Because of the public availability of

these fundamental facts, the government could not demonstrate a compelling interest for continued withholding. *Id.*

Here too, the essential facts are not a surprise: Mr. McCabe was abruptly fired and has been under investigation, facts that have been extensively covered in the media. Accordingly, there is no compelling reason to withhold the *ex parte* portions of the transcripts. The Lyons Declaration sheds some light on DOJ's investigation and the reasons for delaying production of documents responsive to CREW's FOIA request, but that is not enough. Only full disclosure of the three hearing transcripts will satisfy the public's right to understand why DOJ has kept information of great public significance out of the public light for well over a year.

On the other hand, continued secrecy serves no compelling interest in light of the information now in the public domain through the unsealing of the Lyons Declaration. Further, in light of these facts there is virtually no likelihood that any legitimate interest of the government will be harmed by disclosing the contents of the *ex parte* discussions, which pertain to the contents of the Lyons Declaration. Quite simply there is no government interest in secrecy to weigh against the significant public interest in disclosure.

Pursuant to Local Rule 7(m) counsel for Plaintiff contacted DOJ's counsel regarding this motion. DOJ's counsel represented that DOJ plans to oppose this motion, at least in part, and to file a responsive brief.

CONCLUSION

For the foregoing reasons, plaintiff respectfully asks this Court to unseal the *ex parte* portions of the July 9, September 9, and September 30, 2019 status conferences.

Respectfully submitted,

/s/ Anne L. Weismann
Anne L. Weismann

(D.C. Bar No. 298190)
Adam J. Rappaport
(D.C. Bar No. 479866)
Citizens for Responsibility and Ethics
in Washington
1101 K Street, N.W., Suite 201
Washington, D.C. 20005
Phone: (202) 408-5565
Facsimile: (202) 588-5020

Dated: November 26, 2019

Attorneys for Plaintiff

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff,	.	
vs.	.	Docket No. CV18-1766-RBW
U.S. DEPARTMENT OF JUSTICE	.	Washington, D.C.
	.	Monday, September 30, 2019
Defendant.	.	
. . . . .	x	9:35 a.m.

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE SENIOR JUDGE REGGIE B. WALTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Anne L. Weismann, Chief FOIA Counsel
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
455 Massachusetts Avenue, NW
Washington, DC 20001

For the Defendant: Justin M. Sandberg, Attorney-at-Law
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW - Room 11004
Washington, DC 20005

Court Reporter: Cathryn J. Jones, RPR
Official Court Reporter
Room 6521, U.S. District Court
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, this morning this is In re: Citizens For Responsibility and Ethics In Washington versus the U.S. Department of Justice. This is Civil Action Number 18-1766.

Ask the parties to step forward and identify yourselves for the record, please.

MS. WEISMANN: Good morning, Your Honor, Anne Weismann on behalf of the plaintiffs, Citizens For Responsibility and Ethics In Washington.

THE COURT: Good morning.

MR. SANDBERG: Good morning, Your Honor, Justin Sandberg on behalf of the defendants. With me at counsel is Madeleine Hensler from U.S. Department of Justice Office of Inspector General and Assistant United States Attorney, J.P. Cooney.

THE COURT: The decision as to what the government intends to do in reference to Mr. McCabe has that determination been made, and do we need to have further discussions ex parte in reference to that?

MR. SANDBERG: Ex parte, Your Honor.

THE COURT: Very well. I'll have to ask counsel for the plaintiff to leave the courtroom while I have discussions with government counsel. And anybody else in the courtroom not associated with the case will also have to

wait outside.

[Thereupon, plaintiff's counsel exits the courtroom.]

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

THE COURT:

MR. SANDBERG:

THE COURT:

[Thereupon, plaintiff's counsel enters the

courtroom.]

THE COURT: Unfortunately, this matter will have to be continued. I have for the benefit of the plaintiff expressed my dismay with the fact that this matter has to be continued further, but under the circumstances I don't think I have any alternatives. Because obviously, I've got to weigh the plaintiff's and society's right to have access to information about what its government is doing on the one hand. But on the other hand, I have to obviously weigh a lot of other factors that come into play including the interest that both the government and Mr. McCabe have in reference to the dissemination of information about his situation before a determination of how the underlying matter is going to proceed.

So balancing those prospectives and fully appreciative of the public's right to know and the plaintiff's right to access to the information, I have concluded that a continuance is necessary, but not to the extent that the government has requested. So if counsel is available will continue this matter until November 15th at 9:30, if that's good. Hopefully some movement --

MS. WEISMANN: Your Honor, may I be heard?

THE COURT: You may.

MS. WEISMANN: Thank you, Your Honor. Your Honor, I realize that we are not privy to the information that's

been shared with you in camera. I know you know this, but the government's promised deadlines have come and go, gone, and in the mean time this situation is not static.

As you may know, Mr. McCabe has filed his own lawsuit, and that complaint reveals exactly what we had feared, which is, that there is, in fact, evidence that was shared with Mr. McCabe by the IG that is exculpatory. That's referenced in his complaint, but it is not referenced at all in the Inspector General report, so that verifies the concern we had that that report does not fully reflect the outcome of that investigation.

In the mean time there's been a lot of public reporting about the fact that a Grand Jury was released, called back, no indictment is forthcoming. Mr. McCabe and his lawyers have publicly and with the Department of Justice pleaded to know the status. This is like the sword of Damocles over his head.

There's also, and I say this, you know, as a 20-plus some year veteran of the Justice Department, but sadly we're in dark times where there's growing evidence that the president aided by the attorney general is using the power of his office to go after perceived political enemies. He's going after the intelligence community. He's going after the law enforcement community. And we believe that Mr. McCabe was swept up in that.

THE COURT: Going after the courts too.

MS. WEISMANN: And he's going after the courts, the press. It's hard to find someone who isn't a victim of his abuse of powers. And at the same time I submit it's more critical than ever that the public have information. We need to be able to restore our faith in the law enforcement community, in the FBI.

I know you're aware of this, but I just feel compelled to put it on the record that we feel that more than ever the kind of evidence we're seeking here is critical. And it's very hard to understand how, for example, withholding the transcript of Michael Kortan, who's the person identified in Mr. McCabe's complaint as having offered exculpatory evidence, how that could possibly interfere with a pending investigation.

I mean again, I realize I'm not in the position to have inside knowledge, but it appears that the active investigatory stage of whatever is going on with the U.S. Attorney's office is over. And so I think the bar is especially high here to continue to withhold this based on some it sounds like mad effort to find some way to indict Mr. McCabe to appease the president. That certainly from the public what looks like, what it looks like is going on here.

And so, you know, I understand that you are

weighing factors that we don't have access to, but I would submit that the public interest here really could not be higher. And it is time we believe for the public to get access to what's going on. Thank you.

THE COURT: I totally appreciate what you just said and share many of the same concerns that you have expressed. And it's not an easy decision for me because having myself been a member of the Justice Department for a period of time, and having had to as the number three in the U.S. Attorney's office, make some of these hard decisions as to whether a prosecution should go forward. And I fully appreciate having been a defense lawyer also the difficulty that the government puts someone who's under investigation on, under, when somebody is under the cloud of potential prosecution I am fully sympathetic to that prospective.

As I said I considered what the government's represented. And I would send this message to those in positions of authority in the U.S. Attorney's office and the Justice Department that on the next occasion if the government has not made a call I'm going to make a ruling. And I am going to at that point, because I do think it's been a long time and this is just dragging too long. And those who have to make these hard decisions need to do it. And if they don't, I'm going to start ordering the release of information. That's just the reality.

So hopefully you're under, you're -- not being critical of current counsel, but those in positions need to understand that I will not condone further delay. So you all have got to cut and make your decision. It's not a hard decision, and I think it needs to be made. If it's not made I'm going to start ordering the release of information because I think our society, our public does have a right to know what's going on.

This matter is a high profile matter. And I think it does while the matter hangs in limbo it does undermine the credibility, not only of the Justice Department because it's not making these hard decisions, but also the Court. Because Congress enacted this legislation for the purpose of the American public being made aware of what its government is doing. And if the Court continues to not accord society that interest which the Congress decided was appropriate, I think it undermines the integrity of the court process and I will not condone that.

So the government will have to make a call. If it doesn't, I'm going to start ordering the release of information on the next occasion. Thank you.

MS. WEISMANN: Thank you, your Honor.

[Thereupon, the proceedings adjourned at 9:50 a.m.] 9:50 a.m.

CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter for the United States District Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, the proceedings had and testimony adduced in the above case.

I further certify that the foregoing 11 pages constitute the official transcript of said proceedings as transcribed from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 30th day of September, 2019.

/s/_Cathryn J. Jones
Cathryn J. Jones, RPR
Official Court Reporter

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
Plaintiff,
vs.
U.S. DEPARTMENT OF JUSTICE
Defendant.

Docket No. CV 18-1766-RBW

Washington, D.C.

July 9, 2019

2:33 p.m.

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE SENIOR JUDGE REGGIE B. WALTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Anne L. Weismann, Chief FOIA Counsel
CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON
455 Massachusetts Avenue, NW
Washington, DC 20001

For the Defendant: Justin M. Sandberg, Attorney-at-Law
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street, NW - Room 11004
Washington, DC 20005

Court Reporter: Cathryn J. Jones, RPR
Official Court Reporter
Room 6521, U.S. District Court
333 Constitution Avenue, N.W.

Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, this is Civil Action 18-362 [sic], Citizens For Responsibility and Ethics In Washington versus the U.S. Department of Justice.

Going to ask counsel, please approach the podium, state your appearance for the record, introduce any parties at your table.

MS. WEISMANN: Good afternoon, your Honor, Anne Weismann on behalf of CREW.

THE COURT: Good afternoon.

MR. SANDBERG: Good afternoon, your Honor, Justin Sandberg for the Department of Justice. Also with me at counsel table is Madeleine Hensler from the U.S. Department of Justice, Office of Inspector General and Assistant U.S. Attorney, J.P. Cooney.

THE COURT: Good afternoon. I set this matter because I had a question to inquire of the government about, and since at least at this point there is a sufficient predicate to maintain the submission that was made to me under seal, I think it's appropriate to hear from the government ex parte regarding the concern that I had. So I'll have to order that counsel for the plaintiff wait outside and anybody else associated with plaintiffs.

[Ex parte discussion outside presence of plaintiff's counsel.]

THE COURT:

MR. SANDBERG:

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

THE COURT:

[Plaintiff counsel reenters the courtroom.]

THE COURT: Oky. Based upon my discussions ex parte with government counsel regarding this matter, and to what extent I should continue to permit a submission made to the Court to be maintained under seal, I do conclude that the representations made by government counsel do afford a sufficient basis to continue at this point to maintain the submission made by government counsel under seal.

I will as I indicated to government counsel closely monitor this matter. And based upon what was

represented I think that a further continuance maintaining the document under seal for an additional 60 days is appropriate.

I'm sure that plaintiff doesn't agree with that, and it's unfortunate that the discussions have to be under seal, but in order to advance the objectives of the Freedom of Information Act exceptions I have concluded that ex parte submissions or representations were appropriate. And therefore to protect the interest of the government as it relates to the exemption that's being claimed I will continue the matter for 60 days.

Anything you want to put on the record, plaintiff's counsel?

MS. WEISMANN: Thank you, your Honor. Just briefly. I mean obviously we're at a considerable disadvantage not having seen the sealed declaration, but I would submit as we argue in our papers that putting that aside the public record more than adequately demonstrates that the government has not met its burden of showing that these are records complied for law enforcement purpose.

And I would direct the Court specifically to the IG Ofelia Perez declaration that was filed on the public record in which she explains that she actually made the call for the IG, that these were records complied for law enforcement investigation, and that she did so based

exclusively on the fact that the IG had conducted a misconduct investigation of Mr. McCabe. And she says in her declaration that it was based on that background that she concluded that they were compiled for a law enforcement purpose.

So I would submit, your Honor, that the evidence that the government has offered in this record shows that it was, they relied exclusively on a misconduct investigation. And we have explained in our papers that the case law here in the D.C. Circuit is that when an IG is looking into allegations of employee misconduct that aren't specifically directed to a civil or criminal violation of law that the predicate for Exemption 7 is not met.

THE COURT: I understand that, but you're not suggesting that every IG investigation regarding alleged employee misconduct cannot be associated with some other type of investigation, are you?

MS. WEISMANN: I am not suggesting that, Your Honor. I am arguing that the records that the OPR initially identified as responsive to our requests and that they referred to the IG for a direct response, meaning that the IG had all the equities in those records, and that the IG treated as records from its misconduct investigation of Mr. McCabe that that is the set of records at issue.

And I would draw a distinction between our case

and a case that the government relied on in its papers the *John Doe* case, the Supreme Court case. In that case the request at issue was made directly to the investigating entity that had recompiled the records, and that is not the case here.

I can, of course, speculate on what the underlying investigation you know who it's conducting. But whether I'm right or wrong the bottom line is CREW did not make its request of that entity. We made our request of OPR. OPR said we've done a search. We found in our file records that originated with the IG. The IG got those records, looked at them and said oh, these are records from our misconduct investigation of Mr. McCabe, their now closed investigation. And they said based on that character, that characteristic they were compiled for law enforcement purpose.

I am not suggesting that all IG investigations, you know, never rise to the level of being for a law enforcement purpose, but I think the record here demonstrates that from the outset this was always conceived of as a misconduct investigation. It was started by the FBI's inspection division when they thought they had evidence that suggested that Mr. McCabe had committed misconduct by lacking candor in his responses to their questions. They made a referral just of that matter to the IG.

The IG opened its own investigation. Again, though they always framed it as a misconduct investigation. And we know from the public report that they put in the public of their investigation they explain what specific charges they were looking at, and they are all either internal FBI policies or FBI offense codes such as lack of candor. There's never been a suggestion in that entire record from start to finish that they ever considered whether or not Mr. McCabe had committed a criminal or civil violation.

THE COURT: Any response from government counsel?

MR. SANDBERG: As we point out in our papers these were compiled for a law enforcement purpose in two ways. One way is by the OIG in the course of their initial investigation, and I'm happy to circle back to that.

The second way is for the purposes of the ongoing enforcement procedure, which *John Doe Corp versus John Doe Agency* says, is a valid indication of that exemption that you don't have to look just at the initial compilation, that compilation captures subsequent compilations. And there's no suggestion in that case that you can sort of get at documents which are essential to a potential enforcement proceedings by saying oh, but we asked the other agency first before they were, you know, documents essential to an enforcement proceeding were, you know, we asked that agency

not the agency involved in the enforcement proceeding. Nothing in *John Doe Corp* suggests there's such a back door to get such documents.

THE COURT: I don't know of any cases that say that if a misconduct investigation is initially conducted that that means that because the initial purpose of the investigation was employee misconduct that those documents can't be covered by 7(a) if during the course of that investigation things occur that convert that into something different.

MR. SANDBERG: That's correct. And that's where they, that's the sort of *John Doe Corp* point that if they're then compiled for the enforcement proceeding as you're referring to that that allows them to be subject to 7(a). They're not sort of forever kept out of 7(a), because at one point they were being compiled perhaps initially for a different purpose.

But in fact here they were being compiled for a law enforcement purpose under the *Stern* test in the D.C. Circuit, which says sort of was the agency involved in looking at a lot specific individual's conduct and does that conduct potentially present criminal liability? And the OIG was looking at a specific individual's conduct, Mr. McCabe, and that conduct involved lack of candor to the FBI. So we think both in the initial compilation and in the subsequent

compilation we satisfied the complied for law enforcement prerequisite to Exemption 7.

I did want to add one other point relevant to the processing rate before I forget, which is just yesterday another FOIA processer began at OIG which would not be remarkable at some agencies, but OIG only has some I think four folks who are involved at all in FOIA and I think two who do it full-time processing. So they're now going from two full-time processers to someone who spends 2.75 or something. She has other responsibilities hence the point 75.

The FOIA processing capacity has increased, so I wanted to apprize the Court of that and I apprized plaintiff's counsel of that before the hearing.

MS. WEISMANN: Your Honor, may I respond?

THE COURT: Yes.

MS. WEISMANN: The language from the D.C. Circuit is as follows; the investigation must focus directly on specific alleged illegal acts which could result in civil or criminal sanctions. And I think there really is no serious question here as described by the IG itself. This was not an investigation into specific civil or criminal, that could result in specific civil or criminal sanctions. From start to finish it was a misconduct investigation that led to Mr. McCabe's termination. And the fact that subsequently

there may have been a referral, for example, to the U.S. Attorney's office for a possible criminal investigation does not negate the character of the initial investigation that was done.

Now let me try to explain what I think is the critical difference between this case and the *John Doe* case. The *John Doe* case involved a contractor that was subject to audit by the defense contract audit agency. It found some irregularities, but nothing was done about them. Several years later the U.S. Attorney's office opened up a separate criminal investigation. And through a Grand Jury subpoena they subpoenaed the records from the defense contract audit agency.

The contractor then made a FOIA request with the FBI, the entity that had recompiled the records. And it was under those circumstances that the Supreme Court said the fact that they were originally compiled for a non-law enforcement purpose does not mean that they can never have a law enforcement purpose if they've been recompiled.

And, your Honor, again, I go back if we had made our FOIA request that's at issue here if we had made it with the United States Attorney's office who is ever doing an ongoing investigation then I think it would be directly parallel to the *John Doe* case. But think about it, we asked for records from a closed IG investigation. Both the OPR

and the IG described the responsive records as from that investigation. And had they just gone ahead and processed them and released them we would have had no idea that they in any way implicated some pending investigation.

So I think this is a situation that is harmed that's caused by the government itself by acknowledging in tying these records into another investigation which we haven't even asked for records from, so I think that's a critical difference.

And the other thing I would just urge on the issue of harm where I think obviously we are the least prepared to discuss because the government relies exclusively on the Lyon's declaration. But on harm I think it defies credibility to say as the government appears to be saying that records that come from a closed investigation and that investigation at least as described by the Inspector General's office related exclusively to Mr. McCabe and exclusively to allegations that he had lacked candor, and had not followed FBI policies about speaking to the press and that it resulted in a very detailed report that documents that underlie that investigation that at least by the IG's own description in that investigation pertain only to Mr. McCabe and only to his conduct vis-a-vis a leak investigation into an October 2016 Wall Street Journal article, the notion that revealing further detail would harm

an ongoing investigation I submit is implausible on its face.

The real concern, the concern that I have articulated before for this Court is that the public is being deprived of the real story here. And I can't -- I have to acknowledge --

THE COURT: What about the counter balancing concern that the government may have that to release the information could if there is an investigation being conducted compromise that investigation?

MS. WEISMANN: But I guess what I'm saying is the mere fact if they've said that I question how it can compromise the investigation, that's really what I'm asking.

THE COURT: Isn't there a FOIA authority that says that even though information may have been somehow in the public domain doesn't necessarily mean that an exemption in reference to those matters can nonetheless still be asserted?

MS. WEISMANN: Yes, I'm not saying that all information that's been in the public domain there, but I think what's --

THE COURT: And here it's not even in the public domain. You're just saying it's a part of another component of the Justice Department. And again, I don't know if any authority that says that if a FOIA request is made of the

Department itself that that means that an individual component of the department can't take the position that the matter is exempt. Because you seem to be conceding that if your request had been made to the U.S. Attorney's office, if they are in fact conducting an investigation, that conceivably the government's position would have merit.

MS. WEISMANN: Right. But our request, in fact, was made to the FBI's Office of Professional Responsibility. It was a very targeted, specific request to a very specific office.

THE COURT: I think what you've said causes me to have to ask the government a couple more questions to complete the record in the event there's ultimately an appeal of this matter, and I'll have to do that ex parte.

MR. SANDBERG: I just had a few more points.

THE COURT: Yes.

MR. SANDBERG: It doesn't matter whether, you know, if we'd released the records plaintiffs wouldn't have been aware of the investigation. The question is releasing that information would it have harmed the investigation in some way. And it's possible to harm an investigation even if plaintiffs don't know that an investigation is ongoing.

Second quickly, *John Doe Corp versus John Doe Agency* does not suggest that if only the plaintiffs there had filed their FOIA request against the defense contractor

agency that things would have come out differently, which as I said would be a weird back door and would undermine the purpose of the 7(a) exemption. And as we've previously discussed and I'm not going to sort of beat this dead horse, you know, the OIG report tells the whole story. And so to the extent there's a suggestion that it doesn't, you know, we object to that.

And finally, as your Honor noted this information is not in the public domain, and that's specifically the point of what's going on here is what's taken so long in producing this is we go through -- when material is deemed otherwise subject to 7(a) we go through and unredact material that is in the public domain to make sure that we're not withholding material that is in fact in the public domain.

THE COURT: Very well. I need to have a further short discussion with government counsel ex parte.

[Ex parte discussion outside presence of plaintiff's counsel.]

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

THE COURT:

MR. COONEY:

[Plaintiff's counsel reenters the courtroom.]

THE COURT: Over objection I will again conclude that it's appropriate to maintain the Lyon's declaration under seal for at least an additional 60-day period. Obviously, if counsel wants to challenge it on appeal that's appropriate, but I think based upon the representations made to me ex parte I do conclude that it's appropriate to maintain the matter under seal.

Okay. That would take us to September 9th. I am in trial at that time, but we could do it first thing in the morning at 9:15. Is that good?

MS. WEISMANN: That works for me, your Honor. Thank you.

THE COURT: Government counsel?

MR. SANDBERG: That's fine with the government, your Honor.

THE COURT: Thank you.

MS. WEISMANN: Your Honor, can I ask for a point of clarification?

THE COURT: Yes.

MS. WEISMANN: I think it's obvious, but I just want to be clear. You are not yet ruling on the applicability of the exemptions just on the declaration? Just that it be filed -- you're allowing it to be filed under seal?

THE COURT: Not a definitive ruling, but I do think based upon the representations made that at least at this stage of proceedings that the exemption does apply for the purpose of the declaration being maintained under seal.

MS. WEISMANN: Thank you, your Honor.

THE COURT: Thank you.

[Thereupon, the proceedings adjourned at 3:00 p.m.]

CERTIFICATE

I, Cathryn J. Jones, an Official Court Reporter for the United States District Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, the proceedings had and testimony adduced in the above case.

I further certify that the foregoing 20 pages constitute the official transcript of said proceedings as transcribed from my machine shorthand notes.

In witness whereof, I have hereto subscribed my name, this the 20th day of November, 2019.

/s/_Cathryn J. Jones
Cathryn J. Jones, RPR
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Civil Action No. 18-cv-1766 (RBW)
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

[PROPOSED] ORDER

The Court having considered Plaintiff's motion to unseal the *ex parte* portions of the transcripts for status hearings held on July 9, September 9 and September 30, 2019, Defendant's opposition thereto, and the entire record, Plaintiff's motion is hereby

GRANTED, and the Clerk is hereby ordered to unseal all previously sealed portions of the hearing transcripts for July 9, September 9, and September 30, 2019.

SO ORDERED.

Date: _____

_____
UNITED STATES DISTRICT JUDGE