IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, *et al.*

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,

Defendants.

No. 14-cv-1589 (EGS)

DEFENDANT FBI'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANT FBI'S RENEWED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In its opening memorandum, Defendant Federal Bureau of Investigation, a component of the United States Department of Justice ("FBI"), demonstrated that it reasonably and adequately discharged its obligation under the Freedom of Information Act ("FOIA") in response to Plaintiffs' request for FD-302 interview reports and corresponding handwritten interview notes for interviews conducted on September 15-16, 2012 in Germany that reflect the accounts of United States personnel who survived the September 11 and 12, 2012 attacks on the United States diplomatic facility in Benghazi, Libya.

Indeed, in response to the FBI's arguments, Plaintiffs have not challenged the adequacy of the FBI's search and do not object to the FBI's invocation of Exemptions 1, 3, 7(E) and 7(F) to withhold portions of the requested records. Nor do Plaintiffs object to the FBI's invocation of Exemptions 6 and 7(C), with the exception of the names and personally identifying information of three security team members that Plaintiffs speculate may appear in the FD-302 interview reports and attached handwritten interview notes. Accordingly, the only issues that remain for this Court to resolve are (1) whether the FBI's categorical invocation of Exemption 7(A) to withhold in full all of the requested records is proper; and, if the Court determines it is not, (2) whether the FBI adequately justified its decisions to withhold in full the handwritten interview notes attached to the FD-302s pursuant to Exemption 5 and whether the FBI's assertion of Exemptions 6 and 7(C) would be sufficient to withhold the names and other identifying information of the aforementioned security team members.

Plaintiffs' arguments with respect to these particular issues are without merit. As explained more fully below, the FBI has logically and plausibly justified its categorical invocation of

Exemption 7A as well as its withholdings under Exemptions 5, 6, and 7(C). The FBI is, therefore, entitled to summary judgment.

ARGUMENT

I. The FBI Properly Withheld In Full, On A Categorical Basis, The Requested Records Pursuant To Exemption 7(A)

Plaintiffs do not dispute that the FD-302s and attachments, including handwritten interview notes, were compiled for law enforcement purposes. *See* Pls.' Mem. of P. & A. in Opp'n to Def. FBI's Renewed Mot. for Summ. J., and Pls.' Cross-Mot. for Summ. J., and in Supp. of Pls.' Cross-Mot. for Summ. J. at 16-17, ECF No. 99 ("Pls.' Mem."). Nor do Plaintiffs rebut the FBI's assertion that the investigation related to the Benghazi attacks remains ongoing.[1] *See id.*; *see also* Pls.' Response to Def. FBI's Statement of Material Facts Not In Dispute ¶ 22, ECF No. 98-4 (denying pendency of investigation but providing no evidence upon which denial is predicated). Rather, Plaintiffs assert that the FBI has not adequately justified its invocation of Exemption 7(A) to withhold in full the FD-302s and attachments, including handwritten interview notes, because the agency "does not attempt to explain how information on [an alleged] stand down order could possibly interfere with any investigation or prosecution[.]" Pls.' Mem. at 16. In addition, Plaintiffs argue that the FBI waived its right to withhold the requested records under Exemption 7(A) because the agency did not object to the State Department's release of certain video clips. Plaintiffs further argue that, as a result of the State Department's disclosure, the targets of the FBI's investigation "already ha[ve] access" to the information sought in Plaintiffs' FOIA request, which requires the FBI to demonstrate precisely how release of the records would interfere with a pending

[1] As explained in the Seidel Declaration, the FBI "contacted the case agents for the responsive investigative files" who confirmed that the "investigation into the 2012 Benghazi Attack remains ongoing." Decl. of Michael G. Seidel ¶ 13, ECF No. 97-2 ("Seidel Decl.").

enforcement proceeding—a task Plaintiffs imply the FBI has failed to do. *Id.* For the reasons discussed below, Plaintiffs' arguments are unavailing.

A. The FBI has Adequately Explained how Disclosure of the Requested Records Could Reasonably be Expected to Interfere with Enforcement Proceedings

As an initial matter, Plaintiffs' FOIA request did not specifically seek information about an alleged "stand down order." *See* Pls.' FOIA Request to FBI (Feb. 21, 2014), attached as Exhibit A to the First Declaration of David M. Hardy, ECF No. 97-3 (requesting, among other records, "September 15th or 16th FBI 302 Interview Reports . . . conducted in Germany of United States personnel who had been in the Benghazi mission and the Benghazi CIA annex during the . . . attacks on those facilities"). Nor did Plaintiffs clarify their FOIA request to include records related to an alleged stand down order in their Amended Complaint or during the parties' subsequent discussions to narrow issues for judicial resolution. *See* Pls.' Am. Compl. for Inj. Relief ¶¶ 126-32, ECF No. 31; Jt. Mot. to Am. Briefing Schedule at 5, ECF No. 65. Plaintiffs cannot, more than nine years after submitting their FOIA request and five years after engaging in negotiations to narrow and clarify the scope of the request, rewrite their FOIA request to force the FBI to address their claims regarding an alleged stand down order. *See Am. Oversight v. U.S. Dep't of Justice*, 401 F. Supp. 3d 16, 35 (D.D.C. 2019) ("Litigation provides the parties with a forum to debate the adequacy of an agency's response to a FOIA request, which may allow the parties to work together to clarify the scope of the request. Litigation does not, however, give a requester the opportunity to rewrite the request.") (citing *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984)), *appeal dismissed*, 2021 WL 1158198 (D.C. Cir. Jan. 27, 2021). Further, the FOIA does not require the FBI "to divine [Plaintiffs'] intent." *DaVita Inc. v. U.S. Dep't of Health & Hum. Servs.*, Civ. A. No. 20-1789 (BAH), 2021 WL 980895, at *12 (D.D.C. Mar. 16, 2021) (quoting *Poitras v. U.S. Dep't of Homeland Sec.*, 303 F. Supp. 3d 136, 160 (D.D.C. 2018)); *see also id.* ("agency's duty to

construe a FOIA request 'liberally' does not obviate the requester's statutory burden to 'reasonably describe[] the records sought'") (quoting *Inst. for Justice v. IRS*, 941 F.3d 567, 572 (D.C. Cir. 2019)).

In any event, Plaintiffs' argument that the FBI failed to explain how information related to an alleged stand down order could interfere with the ongoing Benghazi investigation and prospective enforcement proceeding is based on conjecture and is immaterial. The argument assumes that the requested FD-302 interview reports and attachments, including handwritten interview notes, contain information about the alleged stand down order. But the FBI has not "revealed specific investigative information related to the focus and content of the[] interview reports." Seidel Decl. ¶ 14. Nor is it required to do so.

Exemption 7(A) permits agencies to withhold records on a categorical basis. *See Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Justice* ("*CREW*"), 746 F.3d 1082, 1098 (D.C. Cir. 2014). To categorically withhold records under the exemption, an agency must group documents into functional categories and provide *generic* explanations of how disclosure of each *category* of documents could reasonably be expected to interfere with enforcement proceedings. *See id.* (citing *Maydak v. U.S. Dep't of Justice*, 218 F.3d 760, 765 (D.C. Cir. 2000)). An agency invoking Exemption 7 on a categorical basis is not required, therefore, to explain how *specific content* in the withheld records could, standing alone, reasonably be expected to interfere with enforcement proceedings. Indeed, requiring the FBI to disclose such information to justify its categorical withholdings "would undermine the very interests that the FBI seeks to protect" under Exemption 7(A). Seidel Decl. ¶ 15; *see also Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 59 F. Supp. 3d 184, 193-94 (D.D.C. 2014) (concluding categorical invocation of Exemption 7(A) was proper because "[p]roviding a detailed description of the material within the[] specific [agency] records

. . . would undermine the very interests [the agencies] seek to protect") (citation omitted). Accordingly, whether disclosure of information related to the alleged stand down order could possibly interfere with ongoing enforcement proceedings is simply not relevant to the issue of whether the FBI's categorical withholding of the records is proper.

The Seidel Declaration demonstrates that the FBI properly invoked Exemption 7(A) on a categorical basis. *See* Seidel Decl. ¶¶ 12-20. The Seidel Declaration describes the requested records as containing information gathered through witness interviews and explains that providing a more fulsome description of the records "could reasonably lead to disclosure of the scope and focus of the pending investigative efforts[,]" which could be detrimental to the success of the ongoing investigation and prospective enforcement proceedings by, among other things, "allow[ing] investigative targets to formulate strategies to contradict evidence to be presented in Court proceedings." *Id.* ¶17. To avoid such an outcome, the FBI completed the tasks required for adopting Exemption 7(A)'s categorical or "generic approach," *CREW*, 746 F.3d at 1098 (quoting *Bevis v. Dep't of State*, 801 F.2d 1386, 1389-90 (D.C. Cir. 1986)). The FBI "reviewed each responsive record and grouped the records" into the functional category of evidentiary/investigative materials.[2] Seidel Decl. ¶16. It then provided "generic reasons for withholding," *CREW*, 746 F.3d at 1098 (quoting *Maydak*, 218 F.3d at 765), the requested evidentiary/investigative materials. Seidel Decl. ¶¶ 16-17.

Specifically, and as discussed in the FBI's opening memorandum, the Seidel Declaration explains that disclosure of the requested evidentiary/investigative material could reasonably be expected to interfere with the ongoing investigation and prospective enforcement proceedings in at least three ways: (1) by permitting the identification of sources of information, witnesses, and

[2] Plaintiffs do not challenge the FBI's categorization of the records. *See* Pls.' Mem. at 16-17.

potential witnesses who could then be targeted for potential intimidation and/or physical harm; (2) by allowing individuals to improperly utilize the information contained in the records to, among other things, alter or destroy potential evidence or create false evidence, and (3) by permitting individuals to circumvent investigators by evading detection. Mem. of P. & A. in Supp. of Def. FBI's Renewed Mot. for Summ. J. at 12, ECF No. 97-1 (June 29, 2023) ("Def.'s Mem.") (citing Seidel Decl. ¶ 19).

The FBI's predictive judgment of the harms that could reasonably be expected to result from the premature disclosure of the records is entitled to deference. *See Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003). Moreover, courts have routinely found that similar concerns regarding potential interference justify the categorical withholding of evidentiary/investigative materials under Exemption 7(A). *See* Def.'s Mem. at 12-13 (collecting cases). The FBI has thus logically and plausibly explained how disclosure of the requested FD-302s and attachments, including handwritten interview notes, which fall into the functional category of evidentiary/investigative materials, could reasonably be expected to interfere with the ongoing Benghazi investigation and prospective enforcement proceedings.

B. The State Department's Disclosure of Certain Video Clips Neither Waives the FBI's Right to Invoke Exemption 7(A) on a Categorical Basis to Withhold the Requested Records nor Requires the FBI to Precisely Describe how Disclosure Would Interfere with Enforcement Proceedings

Plaintiffs note that the FBI purportedly did not object to the State Department's August 2018 disclosure of certain videos clips, implying that the State Department's disclosure waived the FBI's right to invoke Exemption 7(A) to withhold, on a categorical basis, the requested FD-302 interview reports and attachments, including handwritten interview notes. *See* Pls.' Mem. at 16. This argument appears to be predicated on the official acknowledgment doctrine, which may compel disclosure over an agency's otherwise valid exemption claim when information in the

public domain has been "'officially acknowledged[.]'"[3] *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). "But '[a] strict test applies to claims of official disclosure.'" *Moore v. CIA*, 666 F.3d 1330, 1333 (D.C. Cir. 2011) (citation omitted). To be recognized as an "officially acknowledged" disclosure the requested information (1) "must be as specific as the information previously released[;]" (2) "must match the information previously disclosed[;]" and (3) "must already have been made public through an official and documented disclosure." *Wolf*, 473 F.3d at 378 (quoting *Fitzgibbon*, 911 F.2d at 765). "In this context, '[t]he plaintiff[s] bear[] the burden of identifying specific information that is already in the public domain due to official disclosure.'" *Buzzfeed, Inc. v. FBI*, 613 F. Supp. 3d 453, 472 (D.D.C. 2020) (quoting *Mobley v. CIA*, 806 F.3d 568, 583 (D.C. Cir. 2015)).

Plaintiffs fail to carry their burden for two reasons. First, the FD-302 interview reports and attachments, including the handwritten interview notes, do not even remotely match the State Department's video clips. The video clips are not recordings of the FBI's interviews of U.S. personnel conducted on September 15 and 16, 2012, in Germany. Rather, the video clips consist of the State Department's surveillance footage that shows certain locations within the diplomatic facility in Benghazi and certain activity that occurred at those locations during the attack. *See* Accuracy in Media, *Combined 54 Benghazi videos the State Dept. produced*, YouTube (Sept. 22, 2018), https://www.youtube.com/watch?v=pjaDJYeS3sg. Even if the Court were to accept Plaintiffs' implied suggestion that the video clips provide information similar to the content of the FD-302 interview reports and attachments (which they do not), "[p]rior disclosure of similar

[3] The "official acknowledgment" doctrine is also commonly referred to as the "public domain exception." *BuzzFeed, Inc. v. U.S. Dep't of Justice*, 344 F. Supp. 3d 396, 407 (D.D.C. 2018) (citing *Am. Civ. Liberties Union v. CIA*, 710 F.3d 422, 426-27 (D.C. Cir. 2013) (observing that the D.C. Circuit uses the terms interchangeably)).

information does not suffice; instead, the *specific* information sought by the plaintiff[s] must already be in the public domain by official disclosure." *Buzzfeed*, 613 F. Supp. 3d at 472 (quoting *Wolf*, 473 F.3d at 378).

Second, the video clips Plaintiffs point to were disclosed by the State Department, not the FBI. It is well-established in this Circuit that "[d]isclosure by one federal agency does not waive another agency's right to assert a FOIA exemption." *Knight First Am. Inst. at Columbia Univ. v. CIA*, 11 F.4th 810, 816 (D.C. Cir. 2021) (quoting *Mobley*, 806 F.3d at 583); *see also Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) ("[W]e do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought."). Accordingly, the video clips released by the State Department, regardless of whether or not the FBI objected to their release, do not constitute an official disclosure that waives the FBI's right to invoke Exemption 7(A) to withhold, on a categorical basis, the FD-302 interview reports and attachments, including handwritten interview notes.

Plaintiffs further argue that, as a result of the State Department's disclosure of certain video clips, the targets of the FBI's investigation have access to the withheld information. *See* Pls.' Mem. at 16-17. Consequently, Plaintiffs contend, the FBI "must show, by more than conclusory statements . . . precisely" how release of the requested FD-302 interview reports and attachments, including handwritten interview notes, would interfere with a pending enforcement proceeding. *Id.* (quoting *Goldschmidt v. U.S. Dep't of Agric.*, 557 F. Supp. 274, 278 (D.D.C. 1983)). Plaintiffs essentially argue that because the State Department released certain video clips, the FBI may not utilize Exemption 7(A)'s categorical or "generic approach," *CREW*, 746 F.3d at 1098 (quoting *Bevis*, 801 F.2d at 1389-90), to withhold the requested FD-302 interview reports and attachments;

instead, it must explain with greater particularity how disclosure of the records could interfere with enforcement proceedings.

Plaintiffs' argument is based on *Campbell v. United States Department of Health & Human Services*, which held that a "district court must conduct a more focused and particularized review of the documentation on which the government bases its claim that the information [the plaintiff] seeks would interfere with [an] investigation" when an agency withholds records requested by a third party to which the targets of the investigation have access. 682 F.2d 256, 265 (D.C. Cir. 1982); *see also Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng'rs*, 677 F. Supp. 2d 101, 108 (D.D.C. 2009) (concluding agency's invocation of Exemption 7(A) was improper where it failed to "explain how its investigation will be impaired by the release of information that the targets of the investigation *already possess*"). This argument misses the mark, however, because the targets of the FBI's investigation do not have access to, or possession of, the information withheld under Exemption 7(A). As discussed above, the State Department's video clips are not recordings of the interviews memorialized in the FD-302 interview reports—they consist of the State Department's surveillance footage of the diplomatic facility in Benghazi. Indeed, the Seidel Declaration confirms that the FBI has not disclosed specific investigative information related to the focus and content of the FD-302 interview reports and attachments. *See* Seidel Decl. ¶ 14. The holding set forth in *Campbell* is, therefore, inapplicable.

II. The FBI Properly Invoked Exemptions 5, 6, And 7(C) To Withhold Portions Of The Requested Records

With respect to the FBI's invocation of several exemptions to withhold certain portions of the FD-302 interview reports and attachments, Plaintiffs only challenge the FBI's withholding of the handwritten interview notes under Exemption 5 and the names and identifying information

of three security team members under Exemptions 6 and 7(C).[4] *See* Pls.' Mem. at 12-14, 15. For the reasons discussed below, Plaintiffs' arguments are meritless.[5]

A. The Handwritten Interview Notes are Exempt from Disclosure Pursuant to Exemption 5

In response to the FBI's explanation justifying its withholding of the handwritten interview notes attached to the FD-302 interview reports, Plaintiffs simply state: "Information on the question of whether an order to stand down does not involve deliberation. It is a fact." Pls.' Mem. 15. This statement solicits specific information from the FBI that Plaintiffs did not explicitly seek in their FOIA request. As discussed above, *see supra* at 3-4, Plaintiffs may not use this litigation to re-write their FOIA request to obtain information about the alleged stand down order, especially given that they have had ample opportunities to clarify their request.

Moreover, Plaintiffs' statement does not specifically respond to any of the FBI's arguments in support of its position that it properly invoked Exemption 5 to protect from disclosure the handwritten interview notes attached to the FD-302s. Given this failure, Plaintiffs have essentially conceded the FBI's arguments. *See Shankar v. ACS-GSI*, 258 F. App'x 344, 345 (D.C. Cir. 2007) (plaintiff conceded merits of issue when he "did not respond in any way to defendant's argument[s]"); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, ---F. Supp. 3d---, 2023 WL 2663005, at *6 (D.D.C. Mar. 28, 2023) (concluded that because Plaintiff "did not address any of the arguments opposing its arbitrary and capricious challenge," Plaintiff "effectively concedes

[4] Plaintiffs do not object to the FBI's withholdings under Exemptions 1, 3, 7(E) and 7(F). *See* Pls.' Mem. at 14-15, 17.

[5] It is not necessary for the Court to consider the FBI's invocation of Exemption 5, 6, and 7(C) to withhold certain portions of the FD-302s and attachments, including handwritten notes, if the Court concludes, as it should, that the FBI properly invoked Exemption 7(A) to withhold, on a categorical basis, the records in full. *See, e.g.*, *Am. Civ. Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 623 n.3 (D.C. Cir. 2011).

them"), *appeal filed*, No. 23-5089 (D.C. Cir. Apr. 27, 2023); *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 268 (D.D.C. 2012) (explaining that "the Court may treat the plaintiff's failure to oppose the defendant's [ ] arguments as a decision to concede those arguments"), *aff'd*, 969 F.3d 406 (D.C. Cir. 2020).

In any event, the FBI has logically and plausibly explained in its opening memorandum, *see* Def.'s Mem. at 21-25, that the handwritten interview notes are properly withheld under the deliberative process privilege and Exemption 5. The fact that some information in the handwritten interview notes is factual "does not categorically exclude the application of Exemption 5." *Ctr. for Biological Diversity v. U.S. EPA*, 369 F. Supp. 3d 128, 139 (D.D.C. 2019) (citing *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011)). It is long settled that information revealing an agency's decision-making process is properly withheld under Exemption 5. *Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

The handwritten interview notes are, in essence, draft documents subject to change that precede the creation and finalization of the official FD-302 interview reports. Seidel Decl. ¶¶ 30-31; *see also* Def.'s Mem. at 22-23. The contents of the handwritten notes may be "fleshed out" or "distilled during the editorial process for the creation of the official FD-302" reports and thus "may not reflect the entire scope of information covered during the interview." Seidel Decl. ¶ 30. For example, "additional information may be added to the official FD-302 [interview report] during the editing phase." *Id.* Conversely, information contained in the handwritten interview notes may not be included or may be truncated in the official FD-302 if the "Special Agent ultimately concludes during the FD-302 editorial process that the information is not pertinent to the investigation." *Id.* The differences between the handwritten interview notes and the official FD-302 interview reports, therefore, "reflect an exercise of judgment as to what [facts are] most

relevant[,]" *Hardy v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 243 F. Supp. 3d 155, 170 (D.D.C. 2017) (quoting *Ancient Coin Collectors Guild*, 641 F.3d at 513-14), for inclusion in the official report memorializing an interview and how those facts should be presented. As the FBI observed in its opening memorandum, *see* Def.'s Mem. at 24-25, it is "[f]or this reason, interview notes and summaries are routinely found to be subject to Exemption 5." *Hardy*, 243 F. Supp. 3d at 169 (collecting cases); *see also Huddleston v. FBI*, Civ. A. No. 4:20-CV-00447, 2022 WL 4593084, at *18 (E.D. Tex. Sept. 29, 2022); *Abramyan v. U.S. Dep't of Homeland Sec.*, 6 F. Supp. 3d 57, 66-67 (D.D.C. 2013); *Phillips v. Immigr. & Customs Enf't*, 385 F. Supp. 2d 296, 303 (S.D.N.Y. 2005). The Court should reach the same conclusion here.

B. The Names of the Three Security Team Members are Exempt from Disclosure Pursuant to Exemptions 6 and 7(C)

Plaintiffs have narrowed their objection of the FBI's invocation of Exemptions 6 and 7(C) to the names of "three security team members[,]" who defended U.S. personnel during the attack: Mark Geist, Kris Paronto, and John Tiegan.[6] Pls.' Mem. at 12-13. Each of these individuals, however, fall within the "Personnel from Non-FBI Federal Agencies" category of individuals—a category of individuals Plaintiffs concede is properly withheld from disclosure. *See* Seidel Decl. ¶ 40; Def.'s Mem. at 29-30; Pls.' Mem. at 12.

Plaintiffs distinguish these three security team members from the other individuals in the "Personnel from Non-FBI Federal Agencies" category by asserting that their accounts of the

[6] Plaintiffs state that they have no objection to the FBI's invocation of Exemptions 6 and 7(C) to protect from disclosure the names and other personally identifying information of the six categories of individuals the FBI identified in its opening memorandum. *See* Pls.' Mem. at 12 (citing Def.'s Mem. at 26-34). These categories include: (1) FBI Special Agents and Professional Staff; (2) Personnel from Non-FBI Federal Agencies; (3) Third Parties Merely Mentioned in the Responsive Records; (4) Persons of Investigative Interest; (5) Local Law Enforcement Personnel, and (6) Individuals who Provided Assistance to the CIA. *See id.*

Benghazi attacks have been publicized in a September 2014 book, September and October 2014 interviews on Fox News, and a January 2016 movie released by Paramount Pictures. *See* Pls.' Mem. at 12-14. Given their "very public" accounts, Plaintiffs argue that the FBI "cannot explain any harm resulting from [the] disclosure of the[ir] names." *Id.* at 12. In essence, Plaintiffs argue that these three security team members have no discernible privacy interest in the association of their names with the FBI's investigation given the scope of their public statements about their experiences during the Benghazi attacks. This argument is unavailing.

"'[T]hird parties who may be mentioned in investigatory files' and 'witnesses and informants who provide information during the course of an investigation' have an 'obvious' and 'substantial' privacy interest in their information[,]" *Martin v. U.S. Dep't of Justice*, 488 F.3d 446, 457 (D.C. Cir. 2007) (quoting *Nation Mag. v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995)), including in "seeing that their participation" in an investigation "remains secret[,]" *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 666 (D.C. Cir. 2003) (quoting *Senate of the Commonwealth of P.R. ex rel. Judiciary Comm. v. U.S. Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987)). Consequently, "a person's privacy interest in law enforcement records that name him is not diminished by the fact that the *events* the[] [person] describe[d] were once a matter of public record." *Martin*, 488 F.3d at 457 (finding unavailing FOIA requester's contention that privacy interests were "*de minimis*" due to revelations in "open public court opinions" describing "the gist of the *Brady* material") (emphasis added and cleaned up). As such, these three security team members continue to have a privacy interest in the non-disclosure of their association (if any) with the FBI's investigation notwithstanding their prior public statements regarding their experiences during the attacks. *See, e.g.*, *Sellers v. U.S. Dep't of Justice*, 684 F. Supp. 2d 149, 159-60 (D.D.C. 2010) ("Even if plaintiff already knows the identities of trial witnesses, the agency's decision to

withhold their names and other identifying information under Exemption 7(C) is justified."); *Lardner v. U.S. Dep't of Justice*, No. Civ.A.03-0180 (JDB), 2005 WL 758267, at *19 (D.D.C. Mar. 31, 2005) ("Although the identity of some of these individuals may be public[ly] known, their presence in an FBI investigatory file is not.").

To the extent Plaintiffs argue that the public statements of these three security team members serve as a waiver of their privacy interests, none of the statements Plaintiffs discuss in their opening memorandum demonstrate that the three men have disclosed their association with the FBI's investigation. *See* Pls.' Mem. at 13-14 & n.19. This failure forecloses Plaintiffs' inference that the three security team members' public statements waived their respective privacy interests in their names and personally identifying information that Plaintiffs speculate appear in the FD-302 interview reports and attached handwritten interview notes. *See Reps. Comm. for Freedom of Press v. FBI*, Civ. A. No. 17-17011 (RC), 2022 WL 13840088, at *4-5 (D.D.C. Oct. 21, 2022) (finding that special agents had "not waived their privacy rights to their identifying information" where there was no showing that the special agents had "publicly disclosed their involvement in the [] investigation").

Plaintiffs do attempt to make a specific showing of waiver by attaching to their opening memorandum a privacy waiver executed by John Tiegan, one of the security team members, on August 9, 2023—more than nine years after Plaintiffs submitted their FOIA request in February 2014. *See* Pls.' Mem. at 13; Affidavit of John Tiegan, ECF No. 98-1. "[P]ersonal privacy exemptions may be overcome by a waiver signed by the third person whose privacy interest would be affected by the disclosure." *Harrison v. Fed. Bureau of Prisons*, 611 F. Supp. 2d 54, 66 (D.D.C. 2009). This is because "[t]he privacy interest at stake belongs to the individual, not the government agency." *Petrucelli v. U.S. Dep't of Justice*, 153 F. Supp. 3d 355, 360 (D.D.C. 2016) (citing *U.S.*

Dep't of Justice v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 763-64 (1989)). Such a waiver, however, does not overcome the concurrent application of exemptions that are designed to protect the interests of the government, including Exemption 7(A). *See, e.g.*, *CREW*, 746 F.3d at 1096 (explaining that "Exemption 7(A) reflects the Congress's recognition that 'law enforcement agencies ha[ve] legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it [comes] time to present their case'") (quoting *Nat'l Lab. Rels. Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)). Accordingly, where disclosure of personal information subject to a signed waiver would reveal information concurrently withheld pursuant to a non-personal privacy exemption, the signed waiver does not overcome an agency's valid invocation of the non-personal privacy exemption. *See Am. Civ. Liberties Union*, 628 F.3d at 623 n.3 ("We reiterate that the government need prevail on only one [FOIA] exemption; it need not satisfy both.").

Here, setting aside the fact that Plaintiffs submitted the privacy waiver after the FBI provided a final response to the FOIA request and filed its renewed motion for summary judgment, the FBI has logically and plausibly shown that it properly invoked Exemption 7(A) on a categorical basis to withhold in full the FD-302 interview reports and attachments, including handwritten notes. *See* Def.'s Mem. at 7-13; *supra* at 2-9. Mr. Tiegan's waiver does not, therefore, require the FBI to re-process the requested records and, if his name does appear in one or more of the FD-302 interview reports and attached handwritten interview notes, release versions of those records with Mr. Tiegan's name unredacted.

Finally, on the public interest side of the scale, Plaintiffs assert that disclosure of the names of these three security team members would contribute significantly to the public's understanding of the operations of the government. *See* Pls.' Mem. at 14. Although Plaintiffs do not identify the

specific government operation that would, in their view, benefit from such a disclosure, *see id.*, it can be inferred from the entirety of their memorandum that they believe disclosure of the names of the three security team members would shed light on whether the "CIA ordered the stand down," *Id.* at 15.

But it is well-settled that names and other personally identifying information appearing in law enforcement records "is simply not very probative of an agency's behavior or performance." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991). Such information serves a "significant" public interest only if "there is compelling evidence that the agency denying the FOIA request is engaged in illegal activity[.]" *Id.* at 1205-06. Accordingly, "unless access to the names . . . of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is [categorically] exempt from disclosure." *Id.* at 1206.

Plaintiffs have not even attempted to explain that disclosure of the three names would shed light on whether the FBI, as the agency denying Plaintiffs' FOIA request, engaged in illegal activity. *See* Pls.' Mem. at 14. Even if the question of whether the CIA issued a stand down order could be imputed to the FBI for purposes of analyzing the public interest in disclosure—which it cannot—Plaintiffs have made no attempt to explain how release of the names of these security team members, if they appear in the FD-302 interview reports and attached handwritten interview notes, would serve the public interest by shedding light on the questions surrounding the alleged stand down order. *See id.*

Because Plaintiffs have failed to carry their burden to demonstrate that the public statements made by the three security team members extinguished or effectively waived their respective privacy interests, failed to show that the eleventh-hour affidavit signed by John Tiegan

waived his privacy rights in such a manner as to overcome the FBI's valid invocation of Exemption 7(A), and failed to identify a significant public interest in disclosure, the Court should conclude that the FBI properly invoked Exemptions 6 and 7(C).

III. The FBI Has Complied With Its Segregability Obligations Under The FOIA

The FOIA requires an agency to provide "[a]ny reasonably segregable portion of a record . . . to any person requesting such records after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Because Exemption 7(A) applies to the remaining documents in their entirety, *see* Def.'s Mem. at 7-13; *supra* at 2-9, there is no non-exempt material the FBI is required to produce. Specifically, as Defendants explained in their opening memorandum, the FBI reviewed the responsive records and determined that no additional information could be disclosed without interfering with the FBI's ongoing law enforcement investigation of the Benghazi attacks and prospective prosecutions resulting from that investigation. Def.'s Mem. at 41; *see* Seidel Decl. ¶ 58; *see also id.* ¶¶ 10-20. Accordingly, the FBI has satisfied its segregability obligations under the FOIA. *See Juarez v. U.S. Dep't of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008) ("A court may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated[.]").

CONCLUSION

For the foregoing reasons, the Court should grant Defendant FBI's renewed motion for summary judgment and deny Plaintiffs' cross-motion for summary judgment.

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