IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, INC. et al., Plaintiffs, v. DEPARTMENT OF DEFENSE et al., Defendants.	Case No. 14-1589 (EGS)

DEFENDANT DEPARTMENT OF JUSTICE'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs bring this action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, seeking disclosure of documents related to the September 11, 2012 attack on the American embassy in Benghazi, Libya from Defendant the U.S. Department of Justice ("DOJ"), as well as Defendants the U.S. Departments of Defense and Treasury, and the Central Intelligence Agency. On May 13, 2015 – before the Court had even entered a scheduling order in this case – Plaintiffs moved for partial summary judgment against DOJ, seeking disclosure of three Federal Bureau of Investigation ("FBI") 302 Interview Reports ("302s") that may have been prepared from interviews FBI allegedly conducted with Mark Geist, Kris Paronto, and John Tiegen ("the requested 302s"). (ECF No. 23). Not only is Plaintiffs' motion entirely premature, but it is meritless, as it is based on rank speculation and unsupported (and unsupportable) legal theories. Individual consideration of specific agency withholdings by way of piecemeal motions for partial summary judgment is not appropriate in FOIA actions, as this tactic wastes judicial resources, results in duplicative proceedings, and may lead to inconsistent rulings. Moreover, as

explained below and in the accompanying Hardy Declaration, to the extent that the requested 302s exist,[1] they would be exempt from disclosure pursuant to FOIA Exemption 7(A). Because Plaintiffs have not even attempted to carry their burden to show that summary judgment is proper at this time, their motion should be denied.

BACKGROUND

I. Statutory Background

FOIA "represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003). While the FOIA requires agency disclosure under certain circumstances, it also recognizes "that public disclosure is not always in the public interest." *Baldridge v. Shapiro*, 455 U.S. 345, 352 (1982). Accordingly, the statute requires agencies to release documents responsive to a properly submitted request, but also provides nine statutory exemptions to this general disclosure obligation. *See* 5 U.S.C. §§ 552(a)(3), (b)(1)-(b)(9). The exemptions are grounded in Congress' recognition "that legitimate governmental and private interests could be harmed by release of certain types of information." *FBI v. Abramson*, 456 U.S. 615, 621 (1982). Thus, while the Supreme Court has instructed courts that these exemptions are to be "narrowly construed," *id.* at 630, it has cautioned that the exemptions should be given "meaningful reach and application," *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989).

[1] The FBI neither confirms nor denies whether these 302s exist. *See Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (explaining that an agency "may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception" (internal quotation marks omitted)); *Lieff, Cabraser, Heimann & Bernstein, LLP v. U.S. Dep't of Justice*, 697 F. Supp. 2d 79, 88 (D.D.C. 2010) (holding that FBI was not required to confirm or deny whether any records responsive to FOIA request existed because it had properly invoked FOIA Exemption 7(A)).

Here, to the extent that the requested 302s exist, they are exempt from disclosure pursuant to FOIA Exemption 7(A), which exempts from disclosure records compiled for law enforcement purposes, the disclosure of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

II. Factual Background and Current Proceedings

Plaintiffs' FOIA request, submitted to the FBI by letter dated February 21, 2014, seeks records related to the September 11, 2012 attack on the American embassy in Benghazi, Libya. *See* Supp. Compl. ¶¶ 126-35; Crowley Decl. Ex. A. As relevant to the instant motion, Plaintiffs requested "September 15th or 16th FBI 302 Interview Reports, and corresponding handwritten notes, of interviews conducted in Germany of United States personnel who had been in the Benghazi mission and the Benghazi CIA annex during the September 11th and 12th attacks on those facilities." *Id.* ¶ 126. By letter dated March 14, 2014, FBI wrote to Plaintiffs:

> You have requested records concerning one or more third party individuals. Because you have requested information about a third party and the FBI recognizes an important privacy interest in that information, to help us process your request we ask that you provide one of the following: (1) an authorization and consent from the individual(s) . . . ; (2) proof of death . . . ; or (3) a justification that the public interest in disclosure outweighs personal privacy . . . . In the absence of such information, the FBI can neither confirm nor deny the existence of any records responsive to your request, which, if they were to exist, would be exempt from disclosure pursuant to FOIA Exemptions (b)(6) and (b)(7)(C), 5 U.S.C. §§ 552(b) and (b)(7)(C).

Crowley Decl. Ex. B. Plaintiffs never provided the FBI with these required waivers. Hardy Decl. ¶ 3 n.1.

While Plaintiffs' February 21, 2014 request sought 302s from the FBI, it did not specifically request 302s related to any interviews with Mr. Geist, Mr. Paronto, and Mr. Tiegen. *See* Crowley Decl. Ex. A. Nor were these specific 302s mentioned in Plaintiffs' complaint or supplemental complaint. (*See* ECF Nos. 1 & 11). Instead, on March 2, 2015, Plaintiffs first

requested production of these specific documents and informed undersigned counsel that they intended to file a motion for partial summary judgment to compel their disclosure if the FBI withheld them under applicable FOIA exemptions.[2] Crowley Decl. ¶ 4.

On March 3, 2015, the FBI filed an Unopposed Motion for an Order Preserving Certain Allegations, requesting that the Court enter an order permitting it to move for summary judgment based on the applicability of 5 U.S.C. § 552(b)(7)(A) to certain records covered by that exemption without waiving any allegation that those records are exempt from release for other reasons. (ECF No. 18). The Court has not yet ruled on that Unopposed Motion.

By letter dated April 21, 2015, undersigned counsel informed Plaintiffs that the FBI could neither confirm nor deny the existence of the requested 302s, but if they were to exist, the documents would be exempt from disclosure under Exemption 7(A). *See* Crowley Decl. Ex. C. The letter noted that in their FOIA request, Plaintiffs had not specifically requested these 302s. It then explained that the FBI could not confirm or deny their existence because Plaintiffs never provided the requisite privacy waivers described in the FBI's March 14, 2014 letter. The letter reiterated that "in absence of such waivers, the FBI can neither confirm nor deny the existence" of the 302s, but that, in any event "even if Plaintiffs had provided the requisite privacy waiver documents . . . , the FBI continues to assert [that the 302s] would be exempt from disclosure under FOIA Exemption 7(A), 5 U.S.C. § 552(b)." *Id.* at 2. On May 13, 2015, Plaintiffs filed the instant motion, asking the Court to order the FBI to disclose the requested 302s.

[2] Undersigned counsel urged Plaintiffs to wait to file one single motion for summary judgment because a separate motion for partial summary judgment on these documents would be a waste of time for the Court and the parties. *See* Crowley Decl. ¶ 4.

III. Applicable Standards

Summary judgment is the procedure by which courts resolve nearly all FOIA actions. *See, e.g., Georgacarakos v. FBI*, 908 F. Supp. 2d 176, 180 (D.D.C. 2012). When an agency's response to a FOIA request is to withhold responsive records, either in whole or in part, the agency "bears the burden of proving the applicability of claimed exemptions." *Am. Civil Liberties Union v. U.S. Dep't of Def.* ("*ACLU/DOD*"), 628 F.3d 612, 619 (D.C. Cir. 2011). "The government may satisfy its burden of establishing its right to withhold information from the public by submitting appropriate declarations and, where necessary, an index of the information withheld." *Am. Immigration Lawyers Ass'n v. U.S. Dep't of Homeland Sec.*, 852 F. Supp. 2d 66, 72 (D.D.C. 2012). "If an agency's affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption," and "is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith, then summary judgment is warranted on the basis of the affidavit alone." *ACLU/DOD*, 628 F.3d at 619.[3]

"To successfully challenge an agency's showing that it complied with the FOIA, the plaintiff must come forward with 'specific facts' demonstrating that there is a genuine issue with respect to whether the agency has improperly withheld extant agency records." *Span v. U.S. Dep't of Justice*, 696 F. Supp. 2d 113, 119 (D.D.C. 2010) (quoting U.*S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989)). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Id.*

[3] The FBI is prepared to shoulder that burden with a timely motion for summary judgment after the Court has ruled on its pending Motion to Preserve Certain Allegations and after the agency has completed its review of documents that are responsive to Plaintiffs' request. Summary judgment on the entirety of Plaintiffs' request to the FBI would be proper at that point, when the Court has in front of it and is able to review all arguments and evidence submitted for all records withheld (or, for records withheld pursuant to 5 U.S.C. § 552(b)(7), each category of records withheld).

ARGUMENT

Here, Plaintiffs' fatuous motion for partial summary judgment should be denied. As an initial matter, the motion is entirely premature and inappropriate. Individual consideration of specific agency withholdings by way of piecemeal motions for partial summary judgment is not appropriate in FOIA actions. Plaintiffs do not even attempt to explain why deviation from the well-established procedures in FOIA actions is appropriate in this case. On these grounds alone, Plaintiffs' motion should be denied. In any event, even if the Court were to consider Plaintiffs' motion on the merits, it should be denied, as the requested 302s would be exempt from disclosure under FOIA Exemption 7(A).[4] Plaintiffs have not – and cannot – meet their burden to show that summary judgment on this issue is warranted.

I. Plaintiffs' Motion for Partial Summary Judgment Is Premature

Both as a matter of law and as a practical matter, Plaintiffs' motion for partial summary judgment is premature. In a FOIA case, the government has the burden of proving that its withholding of documents or portions of documents was justified. 5 U.S.C. § 552(a)(4)(B). Thus, as the Court is well aware, the standard practice in FOIA litigation is to allow the defendant agency to file a dispositive motion along with its explanations for the claimed exemptions, and the court then determines whether the agency has met its burden by showing that the withheld documents are exempt from disclosure. *See Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) ("[D]ue to the peculiar nature of the FOIA, [courts] have created exceptions to the normal summary judgment review processes applicable to litigation

[4] Information responsive to Plaintiffs' request is also exempt pursuant to several other underlying FOIA exemptions that the FBI does not waive by way of this opposition brief. If the Court denies the FBI's unopposed Motion for an Order Preserving Certain Allegations (ECF No. 18) and does not deny Plaintiffs' motion for partial summary judgment, the agency requests that the Court grant it the opportunity to submit a supplemental brief and declaration in opposition to the instant motion, in which the FBI would assert any other underlying exemptions that may apply to the requested 302s in the event those 302s exist.

under that statute."). This standard practice helps to maintain an efficient adjudicative process in FOIA cases. *See id.*

Without offering any justification for their deviation from this standard procedure, Plaintiffs have filed a premature motion for partial summary judgment, in which they ask the Court to compel production of the requested 302s before the agency has had the opportunity to complete its review of potentially-responsive documents, produce to Plaintiffs any responsive, non-exempt documents, and file its own motion for summary judgment. Courts routinely reject such efforts to hijack the orderly process that governs judicial procedure in FOIA actions. *See, e.g.*, *Natural Resources Defense Council v. EPA*, No. 08-1429 (PLF), 2009 WL 1767570, at *1 (D.D.C. June 23, 2009) ("[A]n immediate award of judgment [to plaintiff in a FOIA action] typically is considered premature."); *Kooritzky v. McNary*, No. 92-1270 (LFO), 1993 WL 79519, at *1 (D.D.C. Mar. 11, 1993) ("[Plaintiff's] motion is untimely, as summary judgment is not appropriately considered until defendant has filed its *Vaughn* declaration and index.").

Indeed, consideration of Plaintiffs' motion at this time is particularly inappropriate, as the Court has not yet entered a scheduling order in this case nor ruled on DOJ's Motion to Preserve Certain Allegations (ECF No. 18). In short, consideration of Plaintiffs' motion for partial summary judgment at this time – followed by consideration of the FBI's own motion for summary judgment months from now – not only would depart from the well-established procedure for resolving FOIA cases in this Circuit, but also would hinder judicial economy, result in duplicative proceedings, and lead to inconsistent rulings. Accordingly, the Court should deny Plaintiffs' premature motion.[5]

[5] In the alternative, the Court should stay consideration of the motion and consider all summary judgment briefing together.

II. FOIA Exemption 7(A) Protects any Requested 302s From Disclosure

Even if the Court were to consider Plaintiffs' premature motion, it should be denied because Plaintiffs have not met their burden of establishing that summary judgment in their favor is appropriate. As explained in the Hardy Declaration and below, any existing 302s related to Mr. Geist, Mr. Paronto, and Mr. Tiegen would be exempt from disclosure pursuant to FIOA Exemption 7(A), which protects from disclosure "records or information" compiled for law enforcement purposes, the production of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).

As a threshold matter, for Exemption 7 to apply, the records at issue must have been compiled for law enforcement purposes. *Schoenman v. FBI*, 575 F. Supp. 2d 166, 174 (D.D.C. 2008). "To show that . . . documents were compiled for law enforcement purposes, the [agency] need only establish a rational nexus between the investigation and one of the agency's law enforcement duties and a connection between an individual or incident and a possible security risk or violation of federal law." *Blackwell v. FBI*, 646 F.3d 37, 40 (D.C. Cir. 2011) (internal quotations and citations omitted). Here, any 302s related to possible interviews with Mr. Geist, Mr. Paronto, and Mr. Tiegen would clearly have been prepared for law enforcement purposes, *see* Hardy Decl. ¶ 6, and Plaintiffs do not contend otherwise.

With respect to the showing of harm to a law enforcement proceeding required to invoke Exemption 7(A), courts have long accepted that Congress intended the Exemption to apply whenever the government's case could be harmed by the premature release of evidence or information, or when disclosure could impede any necessary investigation prior to the enforcement proceeding. *See, e.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978) ("[T]he release of information in investigatory files prior to the completion of an actual,

contemplated enforcement proceeding was precisely the kind of interference that Congress continued to want to protect against."). "Courts allow withholding under Exemption 7(A), for example, when '[p]ublic disclosure of information could result in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation.'" *Tipograph v. Dep't of Justice*, No. 1:13-CV-00239 (CRC), 2015 WL 1245921, at *3 (D.D.C. Mar. 18, 2015) (quoting *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998)). Such is the case here.

As explained in the attached Hardy Declaration, to the extent that they exist, the requested 302s "would be maintained in files related to the FBI's investigations into the attacks on U.S. Government personnel and facilities in Benghazi, Libya." Hardy Decl. ¶ 6. These investigations "are ongoing and fall within the law enforcement duties of the FBI to detect and undertake investigations into possible violations of federal criminal and national security laws." *Id.* Mr. Hardy explains that these investigations are "are currently open and active." *Id.*

Further, it is easy to see – and Mr. Hardy has ably explained – how the release of such information could reasonably be expected to cause severe and manifest harm to ongoing criminal investigations. As Mr. Hardy describes, "[w]hile it's publically known [that] the FBI is actively investigating the Benghazi attacks, specific details such as the direction, scope, pace, and focus of the investigation are not known." *Id.* ¶ 9. "As such, the mere acknowledgement that a particular witness statement has been obtained or not obtained itself undermines the integrity of the ongoing investigation." *Id.* Specifically, "revealing whether the FBI has or has not collected witness statements from certain individuals alone would reveal specific details about the scope of the Benghazi investigation. As a result, the premature release of such details could reasonably

be exploited by criminal elements and terrorists, and potentially alert them to the fact that they are subject to law enforcement scrutiny." *Id.*

Moreover, as Mr. Hardy explains, to release of the names of other third-parties who might be named in the requested 302s could lead to intimidation, harassment, or even retaliation against witnesses or potential witnesses. *Id.* As Mr. Hardy explains and courts have recognized, such disclosure could have a chilling effect on sources' willingness to cooperate with the investigation. *See id.* ("[A]cknowledgment that any individual has or has not provided the FBI with a statement would chill the FBI's investigative efforts as perspective witnesses would reasonably be reluctant to cooperate if they know the FBI will inform third party requesters about their involvement, if any, in an investigation."); *see also FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("No other provision of FOIA could compensate for the potential disruption in the flow of information to law enforcement agencies by individuals who might be deterred from speaking because of the prospect of disclosure.").

The harms articulated in the Hardy Declaration are precisely the kinds of harms that courts routinely find sufficient to justify the withholding of records under Exemption 7(A). *See, e.g.*, *Boyd v. Dep't of Justice*, 475 F.3d 381, 386 (D.C. Cir. 2007) (approving the withholding of records under Exemption 7(A) where release "could reasonably be expected to reveal to the targets [of the government's investigation] the size, scope and direction of the investigation, and allow them to destroy or alter evidence, . . . and take other actions to frustrate the government's case" (internal quotation marks and brackets)); *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 312 (D.C. Cir. 1988) (observing that Exemption 7(A) is properly invoked where the disclosure could "allow for the destruction or alteration of relevant evidence," and "chill future

investigations by discouraging witnesses from providing information"). Accordingly, if the requested 302s exist, they would be exempt from disclosure under Exemption 7(A).

Seeking to evade the controlling case law that establishes that the 302s would be exempt from disclosure, Plaintiffs stake their motion on two mistaken arguments. First, Plaintiffs appear to argue that the unsealing of the indictment of Ahmed Abu Khatallah renders Exemption 7(A) inapplicable. *See* Mot. at 4, 7. Yet, the fact that the government has unsealed one indictment in an *ongoing* investigation does not render all information in the investigation subject to disclosure. As explained in the Hardy Declaration, the government's investigation into the attacks on Benghazi is "ongoing . . . open and active," *see* Hardy Decl. ¶ 6; there is no suggestion that the investigation is limited to Khatallah alone. Plaintiffs' rank speculation that the criminal investigation has concluded is woefully insufficient to rebut the sworn testimony in the Hardy Declaration.

Second, Plaintiffs appear to argue that the FBI's right to assert Exemption 7(A) has been waived by the publication of the book *13 Hours*. *See* Mot. at 6-7. This argument merely illustrates Plaintiffs' fundamental misunderstanding of the law. In considering whether an agency has waived a FOIA exemption, Plaintiffs have the burden of "pointing to specific information in the public domain that appears to duplicate that being withheld." *Whalen v. U.S. Marine Corps*, 407 F. Supp. 2d 54, 59 (D.D.C. 2005) (quoting *Afshar v. Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983)). Plaintiffs have not – and cannot – make this showing because the FBI has not made the requested records or the information contained therein available to the public, and Plaintiffs do not contend otherwise.

"An agency only waives its right to assert an otherwise valid exemption defense when it has *officially acknowledged* the *precise* information at issue." *Leopold v. CIA*, No. CV 13-1324

(JEB), 2015 WL 2255957, at *7 (D.D.C. May 14, 2015). "That is, 'the information requested must match the information previously disclosed,' and a '[p]rior disclosure of *similar* information does not suffice.'" *Id.* (quoting *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007)). Here, Plaintiffs do not argue that the FBI or DOJ made *any* relevant disclosures regarding the information allegedly contained in the requested 302s – official or otherwise. This alone is fatal to Plaintiffs' waiver argument. *See ACLU*, 664 F. Supp. 2d at 77 ("Without official disclosure, classified information is not considered . . . public."). Moreover, Plaintiffs make no effort to establish that the "information requested . . . match[es] the information previously disclosed." *Leopold*, 2015 WL 2255957, at *7. Instead, Plaintiffs' suggestion of waiver is based on pure conjecture – speculation about what information the requested 302s *could* contain and what information certain non-FBI personnel *could* have provided to the authors of *13 Hours*. Thus, any implication that the FBI waived its assertion of Exemption 7(A) fails as a matter of law. *See Wolf*, 473 F.3d at 378 ("An agency's official acknowledgment of information by prior disclosure, however, cannot be based on mere public speculation, no matter how widespread."); *Whalen*, 407 F. Supp. 2d at 59 (noting that a requester's "educated *guess*" as to the contents of a withheld report does not constitute a waiver of a FOIA exemption).

In sum, because disclosure of 302s from any interviews with Mr. Geist, Mr. Paronto, and Mr. Tiegen would interfere with an ongoing criminal investigation into the attacks on the American embassy in Benghazi, Libya, these documents (should they exits) would be exempt from disclosure under Exemption 7(A).

CONCLUSION

For the reasons discussed above, the Court should deny Plaintiffs' premature and meritless motion for partial summary judgment.

Dated: June 8, 2015

Respectfully submitted,

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