UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY and KENNETH P. VOGEL, Plaintiffs, – *versus* – UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	No. 18 Civ. 2095 (LAK) (SDA)

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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Defendant the United States Department of Justice ("DOJ" or the "government") respectfully submits this memorandum of law in support of its motion for partial summary judgment in this action brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

PRELIMINARY STATEMENT

Plaintiffs Kenneth P. Vogel and The New York Times Company submitted FOIA requests seeking both external and intra-governmental correspondence from two components of the Department of Justice relating to several sets of individuals or entities. Broadly, the requests relate to the government's enforcement of the Foreign Agents Registration Act ("FARA"), a national security statute requiring persons who act in the United States in a political or quasi-political capacity on behalf of foreign principals to register with DOJ.

The parties agree that the government has conducted an adequate search for the requested records, and has produced 43 pages of records with minor redactions to protect individual privacy. The government has also withheld records pursuant to FOIA's exemption 7(A) because the release of these records, which were compiled for law enforcement purposes, could reasonably be expected to interfere with enforcement proceedings.

The withholdings are proper. As Congress recognized when enacting exemption 7(A), release of law enforcement records before the appropriate time in an investigation or enforcement action creates obvious and predictable harms. Revealing an investigation or proceeding prematurely may allow subjects or targets to flee. If the government's files are opened to the public, witnesses, subjects or targets may seek to fabricate, alter, or destroy evidence, or they may coordinate to produce false or misleading testimony. And the government's investigative or enforcement strategies may be revealed, allowing subjects or

targets to tailor their interference to be most effective. It is not possible in a public setting to provide further detail about the enforcement proceedings that would be disrupted by the release of these particular records, or the specific nature or extent of the interference, as the public disclosure of such information would itself harm enforcement proceedings. The government has therefore provided additional detail in an ex parte declaration submitted for the Court's in camera review. As both the public and ex parte declarations demonstrate, the 7(A) assertions here are a proper exercise of the government's authority under FOIA to protect law enforcement proceedings from interference. The government's motion for summary judgment with respect to the withheld records should therefore be granted.

BACKGROUND

I. The Foreign Agents Registration Act

The Foreign Agents Registration Act, 22 U.S.C. §§ 611-621, requires certain agents of foreign principals engaged in political or quasi-political activities to register with the Department of Justice. A specialized unit within DOJ—the FARA Registration Unit, or FARA Unit, located within the Counterintelligence and Export Control Section ("CES") in DOJ's National Security Division ("NSD")—is responsible for administrative enforcement of FARA.[1] Completed FARA registrations are public. *See* 22 U.S.C. § 616; 28 C.F.R. §§ 5.600, 601.[2] As further explained in the Public Declaration of Patrick Findlay in Support of Motion for Summary Judgment ("Findlay Decl."), willful violations of FARA's requirements are criminal, and DOJ may also bring civil enforcement proceedings to require persons to register. Findlay Decl. ¶ 17; *see* 22 U.S.C. §§ 618(a) (criminal penalties), 618(f) (injunctive remedies). FARA is a national security tool: the

[1] Additional background information is available at https://www.justice.gov/nsd-fara.

[2] Indeed, DOJ maintains a public website that permits searches of certain FARA information. *See* https://efile.fara.gov/pls/apex/f?p=181:1:0::::P1_DISPLAY.

government uses FARA information to help identify foreign influence and threats to the United States political process. Findlay Decl. ¶ 18.

II. History and Background of the Instant Action

On August 8, 2017, plaintiff Kenneth Vogel sent four separate FOIA requests to the Department of Justice. *See* Amended Complaint ("Am. Compl."), ECF No. 13, Exhibits A-D; *see also* Findlay Decl. ¶ 4. The requests sought copies of correspondence related to four groups of individuals and corporations (which, for ease of reference, are termed "enumerated persons" in this brief). *See* Am. Compl. ¶¶ 14.a-d; *id*. Exs. A-D. The first three requests sought correspondence between DOJ's FARA Unit and Congress related to enumerated persons; internal correspondence within the FARA Unit related to enumerated persons; and correspondence between the FARA Unit and the enumerated persons. *See* Am. Compl. ¶¶ 15.a-c; *Id*. Exs. A-C. The final request sought the same types of correspondence with DOJ's Office of Inspector General rather than the FARA Unit. *See* Am. Compl. ¶ 15.d; *id*. Ex. D.

The government searched for responsive records, Findlay Decl. ¶¶ 10-12, and plaintiffs have agreed that the government's search was adequate, *see* Joint Letter, November 9, 2018, ECF No. 40.

In letters dated May 10 and July 10, 2018, DOJ informed plaintiffs that it was releasing some responsive records. Findlay Decl. ¶¶ 7-8. Portions of these released records were withheld in part—that is, redacted—to protect individual privacy under FOIA exemptions 6 and 7(C). Findlay Decl. ¶¶ 7-8. As of the time of this filing, the parties are still discussing whether plaintiffs will challenge these redactions. *See* Joint Letter.

In the May 10 and July 10 letters, as well as in an additional letter dated September 12, 2018, DOJ also notified plaintiffs that some records—termed in this brief the "withheld

records"—were being withheld in full pursuant to various FOIA exemptions, including, as relevant here, exemption 7(A).[3] Findlay Decl. ¶¶ 7-9.

Because the government has asserted exemption 7(A) over all of the withheld records, the parties have agreed that the instant motion will address only whether the government's assertion of exemption 7(A) is proper. *See* Joint Letter. If the Court upholds the government's exemption 7(A) withholdings, that will resolve the case (with the exception of the government's redactions for personal privacy on certain released records, which the parties are still discussing). *See* Joint Letter. If instead the Court determines that exemption 7(A) does not apply to one or more of the withheld records, the government has reserved its rights to assert and defend any other applicable exemptions, and plaintiffs have reserved their rights to challenge any other exemptions. *See id*.

III. Summary of Withheld Records

In connection with this motion, the government has produced a public *Vaughn* index describing the withheld records. *See* Findlay Decl., Ex. H. As permitted in asserting exemption 7(A),[4] the *Vaughn* index lists six categories of records that were withheld: (1) correspondence between DOJ and counsel for Paul Manafort, Richard Gates, and DMP International; (2) correspondence between DOJ and counsel for Michael Flynn and Flynn Intel Group; (3) the exhibits to a complaint (but not the complaint itself) made to the FARA Unit in mid-2016 by Hermitage Capital Management;[5] (4) other documents pertaining to one or more law

[3] The records described in the previous paragraph that were withheld in part under privacy exemptions, and not challenged by plaintiffs, are not included in the term "withheld records." Instead, as used in this brief, "withheld records" refers exclusively to records withheld in full. The Findlay Declaration also adopts this terminology. Findlay Decl. ¶ 13.

[4] Legal background on the categorical assertion of exemption 7(A) is provided in argument section II.B.1, below.

[5] The complaint (but not the exhibits) was made public by the Senate in 2017 and is publicly available at https://www.grassley.senate.gov/sites/default/files/judiciary/upload/Russia%2C%2003-31-

enforcement investigations; (5) documents on a DVD found in the FARA Unit's paper files; and (6) internal DOJ emails.[6] As explained in the public Findlay declaration, it is not possible to provide further detail about these records publicly without causing the harms exemption 7(A) is designed to avert. *See, e.g.*, *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1040 (7th Cir. 1998) ("[I]n many Exemption 7(A) cases, provision of a *Vaughn* index would itself disclose much of the information that the Exemption is intended to protect."). Additional information about these records is provided in the ex parte declaration.

ARGUMENT

Releasing the withheld records to the public could reasonably be expected to interfere with enforcement proceedings. The government's declarations establish that the withheld records were compiled for law enforcement purposes, including civil or criminal enforcement of FARA and FARA's national security functions. The ex parte declaration establishes that one or more relevant enforcement proceedings is pending or anticipated. And the declarations show the interference that could reasonably be expected to result from release. By revealing the existence of investigations or proceedings, or their nature and scope, and by showing the government's investigative or enforcement strategies, witnesses, subjects, or targets could tamper with witnesses or evidence, flee, or take other measures to interfere with proceedings. The government has thus shown that exemption 7(A) justifies withholding the records in full.

17%2C%20Magnitsky%20Act%20-%202016-%2007-15%20HCM%20Complaint%20to%20FARA%20%28003%29_Redacted.pdf.

[6] In the course of preparing this motion, the government has determined that, due to an overbroad search methodology, a limited number of internal emails in *Vaughn* category 6 (estimated to be at most a few dozen out of more than 1648 records) are not covered by exemption 7(A). The government is currently re-reviewing this subset of the records and intends to produce any as to which exemption 7(A) does not apply, subject to any other applicable exemptions, by December 10, 2018.

I. Standard of Review

FOIA disputes are generally resolved by summary judgment. *See, e.g.*, *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).[7] Summary judgment is warranted if a movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The only issue raised in this motion for summary judgment is whether the government properly applied exemption 7(A) to withhold the withheld records in their entirety. While FOIA is intended to promote transparency, some government functions, such as law enforcement, require information to be held in confidence. *F.B.I. v. Abramson*, 456 U.S. 615, 621 (1982). The law's exemptions thus balance "the public's right to know and the government's legitimate interest in keeping certain information confidential." *Assoc. Press v. U.S. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir. 2008) (internal quotation marks omitted); *see also John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (exemptions are "intended to have meaningful reach and application").

To meet its summary judgment burden, the government may rely on declarations that give "reasonably detailed explanations" for why withheld documents are exempt. *Carney*, 19 F.3d at 812 (footnote omitted). An agency's declaration is "accorded a presumption of good faith." *Id*. (quotation marks omitted); *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009). The agency's justification for asserting an exemption "is sufficient if it appears logical and

[7] The government has not submitted a Local Rule 56.1 statement. "The general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment, and Local Civil Rule 56.1 statements are not required." *New York Times Co. v. U.S. Dep't of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) (internal quotation marks and alterations omitted).

plausible." *Am. Civil Liberties Union v. United States Dep't of Def.*, 901 F.3d 125, 133 (2d Cir. 2018), *as amended* (Aug. 22, 2018).

II. The Government Has Properly Asserted Exemption 7(A) Over the Withheld Records

As explained in the two declarations of Patrick Findlay, the government has properly withheld records responsive to plaintiffs' requests because the records were compiled for law enforcement purposes and their release could reasonably be expected to interfere with one or more enforcement proceedings.

A. The Withheld Records Were "Compiled for Law Enforcement Purposes"

As a threshold matter, the withheld records qualify for FOIA's law-enforcement-specific exemptions, including exemption 7(A), because they were "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7).

The government has the burden of proving that records were compiled for law enforcement purposes, *see Ferguson v. FBI*, 957 F.2d 1059, 1070 (2d Cir. 1992), but a law enforcement agency's claim of a law enforcement purpose is entitled to deference, *see Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 926 (D.C. Cir. 2003). Records qualify as "compiled for law enforcement purposes" if they "relate to anything that can fairly be characterized as an enforcement proceeding." *Shapiro v. U.S. Dep't of Justice*, 37 F. Supp. 3d 7, 29 (D.D.C. 2014) (quotation marks omitted). Records gathered or assembled "in connection with investigations that focus directly on specific alleged illegal acts which could result in civil or criminal sanctions" plainly qualify. *Id*. (quotation marks omitted). Likewise, counterintelligence and national security enforcement qualifies as "law enforcement" for exemption 7. *See, e.g.*, *Am. Civil Liberties Union of S. California v. United States Citizenship & Immigration Servs.*, 133 F. Supp. 3d 234, 242 (D.D.C. 2015) (citing authority).

Here, as explained in the public Findlay declaration, the withheld records were "compiled for law enforcement purposes" both because they were compiled for the purpose of enforcement of FARA through civil or criminal means, and because FARA is a national security tool. *See* Findlay Decl. ¶¶ 16-18.

Enforcement of FARA and related laws—whether civil or criminal—is "law enforcement." The withheld records were found in DOJ's FARA Unit, which oversees administrative compliance with FARA's requirements. *See* Findlay Decl. ¶¶ 5 & n.1, 10-12. The FARA Unit, in turn, is part of NSD's Counterintelligence and Export Control Section, which oversees civil and criminal enforcement of FARA. Findlay Decl. ¶ 17. It is a crime to willfully violate FARA's requirements or to willfully make false statements or material omissions in FARA registration statements or documents. *See* 22 U.S.C. §§ 616(a), (b). The government may also bring civil proceedings to require a person to register under FARA. *See id*. § 616(f). Civil and criminal proceedings are brought by CES in conjunction with the local U.S. Attorney's Office or appropriate DOJ component. *See* Findlay Decl. ¶ 17. Each of these means of ensuring compliance with FARA constitutes "law enforcement," and records—such as the withheld records—that are compiled in the course of such activity meet exemption 7's threshold requirement.

The records were also compiled for a national security enforcement purpose, and therefore qualify as "compiled for law enforcement purposes" regardless of whether they might ultimately be used in a civil or criminal proceeding. As explained in the Findlay Declaration, FARA is a "national security tool used to identify foreign influence and threats to the United States political process," and "[i]nformation and records collected and synthesized by the FARA Unit are used by NSD, law enforcement, and other partners to assess national security threats."

Findlay Decl. ¶ 18. Information gathered by the FARA Unit may be shared with domestic or foreign law enforcement or intelligence agencies to protect the United States from hostile intelligence or influence operations. Findlay Decl. ¶ 18. Even if such activities "do not result in criminal or civil proceedings," they are still part of the FARA Unit's and CES's law enforcement responsibilities. Findlay Decl. ¶ 18. Thus, the records meet the law enforcement threshold for this separate reason. *See, e.g.*, *Strang v. U.S. Arms Control & Disarmament Agency*, 864 F.2d 859, 862 (D.C. Cir. 1989) (noting "we do not interpret 'law enforcement' as limited to *criminal* law enforcement," and instead reading the term to encompass national security enforcement as well).

In sum, the government has established that the withheld records were compiled for law enforcement purposes and thus are subject to the law enforcement exemptions, including exemption 7(A).

B. The Withheld Records Were Properly Withheld Pursuant to FOIA's Exemption 7(A) Because Their Release Could Reasonably Be Expected to Interfere with Enforcement Proceedings

1. Legal Standard

FOIA's Exemption 7(A) protects from disclosure records or information compiled for law enforcement purposes "to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). In enacting Exemption 7, foremost among Congress's purposes "was to prevent harm to the Government's case in court . . . by not allowing litigants earlier or greater access to agency investigatory files than they would otherwise have." *NLRB. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224-25 (1978) (internal quotation marks omitted); *see also id*. at 243 (Stevens, J., concurring) (noting that "[a] statute that authorized discovery greater than that available under the rules normally applicable to an enforcement proceeding would 'interfere'

with the proceeding" and should thus fall under exemption 7(A)); *see also New York Times Co. v. United States Dep't of Justice*, No. 14 Civ. 3776 (AT)(SN), 2016 WL 5946711, at *7, 13 (S.D.N.Y. Aug. 18, 2016).

To justify withholding under exemption 7(A), the government must show that "(1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm" to the proceeding. *New York Times*, 2016 WL 5946711 at *7 (internal quotation marks omitted). With respect to the first prong, the term "enforcement proceedings" as used in subsection 552(b)(7)(A) encompasses criminal and civil proceedings—including regulatory or administrative proceedings—and proceedings must be either pending or reasonably foreseeable at the time of the withholding. *See, e.g.*, *Kay v. F.C.C.*, 976 F. Supp. 23, 37-38 (D.D.C. 1997) (citing *Robbins Tire*, 437 U.S. at 220). On the second prong, the government's factual presentation must "'allow[] the court to trace a rational link between the nature of the document and the alleged likely interference.'" *New York Times*, 2016 WL 5946711, at *7 (quoting *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 940).

Premature release of law enforcement records predictably leads to a broad array of harms; exemption 7(A) has an accordingly broad scope. For example, the Supreme Court held in *Robbins Tire* that exemption 7(A) protected witness statements from disclosure prior to an NLRB administrative hearing when ordinary procedures before the Board did not require their release; premature disclosure could allow parties to intimidate witnesses or alter their testimony before the hearing. 437 U.S. at 236-42. Likewise, the District Court for the District of Columbia recently held that exemption 7(A) covered 15,150 records in the IRS's tax audit files of an individual because their release would prematurely reveal the scope, focus and direction of the agency's investigation. *Agrama v. Internal Revenue Serv.*, 272 F. Supp. 3d 42, 48 (D.D.C. 2017).

In the criminal context, courts have applied exemption 7(A) where "disclosure would reveal the scope and direction of the investigation and could allow the target to destroy or alter evidence, fabricate fraudulent alibis, and intimidate witnesses." *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989); *see also W. Journalism Ctr. v. Office of Indep. Counsel*, 926 F. Supp. 189, 192 (D.D.C. 1996) (noting that witnesses with premature access to investigative records "could easily alter, conform or construct their testimony depending upon the information disclosed"). Exemption 7(A) also protects records that, if released, could interfere with a proceeding that is on appeal, *see, e.g.*, *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 282 F. Supp. 3d 242, 250 (D.D.C. 2017); *Kidder v. FBI*, 517 F. Supp. 2d 17, 27-28 (D.D.C. 2007), or with criminal sentencing proceedings after guilt has been determined by trial or plea, *see Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 746 F.3d 1082, 1090 (D.C. Cir. 2014).

Exemption 7(A) permits the categorical withholding of records. *See Robbins Tire*, 437 U.S. at 236. In contrast to some other exemptions,

> the government is not required to make a specific factual showing with respect to each withheld document that disclosure would actually interfere with a particular enforcement proceeding. Rather, federal courts may make generic determinations that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally interfere with enforcement proceedings.

Radcliffe v. IRS, 536 F. Supp. 2d 423, 437 (S.D.N.Y. 2008). The Government's burden is not high; the Government need only show that "disclosure of particular *kinds* of investigatory records . . . would *generally* interfere with enforcement proceedings." *Robbins Tire*, 437 U.S. at 236 (emphases added); *Radcliffe*, 536 F. Supp. 2d at 437. Indeed, the government must demonstrate only a "rational link" between the requested public disclosure and interference with

the government's ongoing or prospective investigations or proceedings. *See Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986).

2. Application

The public and ex parte Findlay declarations logically and plausibly establish that releasing the withheld records could reasonably be expected to interfere with enforcement proceedings, and they are therefore protected by exemption 7(A).

One or more pending or prospective enforcement proceedings. As explained in the public declaration, the government has concluded that the withheld records "relate to one or more pending or prospective enforcement proceedings," but that "[i]t is not possible to provide additional detail about the nature" of such proceedings publicly "without revealing information that is itself protected by exemption 7(A) and causing the harms that exemption 7(A) is designed to avert." Findlay Decl. ¶ 19. Additional detail on the nature of the enforcement proceedings is provided ex parte.[8]

Expected interference. As also explained in the public declaration (and as supplemented by the ex parte declaration), release of the withheld records could reasonably be expected to interfere with enforcement proceedings for a variety of reasons.

First, release of the withheld records could reveal the existence of law enforcement proceedings that are not publicly known or officially acknowledged. Findlay Decl. ¶ 21. The premature revelation of a law enforcement proceeding can reasonably be expected to cause a range of harms. In an effort to defeat liability, witnesses, subjects, or targets may destroy evidence; they may tamper with witnesses; they may seek to coordinate their testimony; or,

[8] As in the public declaration, this brief uses the term "proceedings" in a generic fashion to indicate one or more enforcement proceedings. This usage is for ease of reading and convenience but should not be read to indicate whether one or more than one proceeding is pending or prospective.

understanding legal risk, they may try to flee.[9] Findlay Decl. ¶ 21. Courts recognize such harms and regularly uphold assertions of exemption 7(A) when release could prematurely reveal a law enforcement proceeding. *See, e.g.*, *Nishnic v. U.S. Dep't of Justice*, 671 F. Supp. 776, 794 (D.D.C. 1987) (approving 7(A) redaction to avoid revealing existence of investigations).

Indeed, even without releasing the substantive content of any records, the government's mere acknowledgment that it possesses law enforcement records relating to a particular person tends to suggest that the government has an investigative interest in that person or related persons, triggering the same harms discussed above. Findlay Decl. ¶¶ 21, 25. Because revealing even the existence of responsive records about particular persons may reveal an investigation, agencies may assert a Glomar response (that is, refuse to confirm or deny whether any responsive records exist) when the existence of records could show whether the agency has an open investigation. *See, e.g.*, *Leopold v. Dep't of Justice*, 301 F. Supp. 3d 13, 28-29 (D.D.C. 2018) (approving DOJ's 7(A) Glomar response where another response would reveal whether agency had an open investigation, and citing other examples). Although the government has not asserted a Glomar response here, similar reasons justify the government's assertion of exemption 7(A) in this instance, including the inability to provide further public detail about the nature of the withheld records. *Cf. Curran v. Dep't of Justice*, 813 F.2d 473, 475 (1st Cir. 1987) (explaining that providing detail about the content of the government's files could itself cause the harms exemption 7(A) protects).

[9] As discussed above, exemption 7(A) protects civil, as well as criminal, enforcement proceedings. However, the need for secrecy in the investigative phase of the criminal process is well known, and in the federal system is protected by (among other things) Federal Rule of Criminal Procedure 6(e), which ensures the secrecy of matters before the grand jury. Several of the reasons for the secrecy requirement in Rule 6(e) are similar to those discussed above. *See, e.g.*, *United States v. Sobotka*, 623 F.2d 764, 767 n.1 (2d Cir. 1980).

Second, releasing the withheld records could not only suggest the existence of enforcement proceedings, but could shed light on their nature, scope, and direction. Findlay Decl. ¶ 22. As described in the Findlay declaration, the withheld records show what DOJ knew and at what times, and what information DOJ sought and from whom; taken together, they may show what the government is and is not aware of. Findlay Decl. ¶ 22. Releasing these records would allow sophisticated witnesses, subjects, or targets to disrupt proceedings by tampering with witnesses, destroying or altering evidence, conforming their testimony to the released information, or alerting associates of an potential enforcement action. Findlay Decl. ¶ 22. Exemption 7(A) protects against these precise harms. *See, e.g.*, *Hammouda v. U.S. Dep't of Justice Office of Info. Policy*, 920 F. Supp. 2d 16, 24 (D.D.C. 2013) (upholding assertion of exemption 7(A) with respect to various information about FBI investigative files, because disclosure could "prematurely reveal the nature, scope, focus, or direction of the FBI's investigation" and would allow targets to "elude detection or tamper with evidence," among other harms); *North*, 881 F.2d at 1097-98 (describing range of harms exemption 7(A) protects, and citing examples, including witness or evidence tampering).

Third, releasing the withheld records could also reveal the government's investigative or prosecutorial strategy. Many of the withheld records are wholly intra-governmental communications, and they include deliberations about enforcement proceedings. Findlay Decl. ¶ 23. Releasing the withheld records would allow witnesses, subjects, or targets to understand the government's strategy or the government's own perceptions of the strengths and weaknesses of its case "and tailor countermeasures accordingly." Findlay Decl. ¶ 23. Exemption 7(A) protects against this harm as well. *See, e.g.*, *Local 32B-32J, Serv. Employees Int'l Union, AFL-CIO v. Gen. Servs. Admin.*, No. 97 Civ. 8509 (LMM), 1998 WL 726000, at *8 (S.D.N.Y. Oct. 15,

1998); *Gould Inc. v. Gen. Servs. Admin.*, 688 F. Supp. 689, 705 (D.D.C. 1988) (citing examples); *see also Mapother v. Dep't of Justice*, 3 F.3d 1533, 1543 (D.C. Cir. 1993) (approving withholding of an index to a law enforcement file because it would "provide a virtual road map through the [government's] evidence; and because it identifies the gleanings from a mass of potential evidence that the agency considers probative of its case, its disclosure is apt to provide critical insights into its legal thinking and strategy").

Additional information on the basis for the government's assertion of exemption 7(A) is provided in the ex parte declaration. For these reasons, and the reasons set forth in the ex parte declaration, releasing the withheld records could reasonably be expected to interfere with enforcement proceedings. The withholdings were therefore proper under exemption 7(A).

C. The Government Properly Withheld the Withheld Records in Full

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Where, as here, an agency asserts exemption 7(A) by describing the categories of records it has withheld, it is also permissible for the government to explain why those categories of records do not contain segregable non-exempt information. *See, e.g.*, *Robbins, Geller, Rudman & Dowd, LLP v. United States Sec. & Exch. Comm'n*, No. 3:14-CV-2197, 2016 WL 950995, at *9 (M.D. Tenn. Mar. 12, 2016) (citing examples).

The records were withheld in full here because the government determined that there was no information in these records that reasonably could be segregated and released to plaintiffs. Findlay Decl. ¶¶ 24-25. Even scattered, high-level information—for example, which government personnel communicated with which others and when, or the date and recipients of external communications—may shed light on an investigation by, for example, suggesting what the government knew (or did not know) and when. Findlay Decl. ¶ 25. Likewise, the number of

communications between specific people may suggest the government's investigative interests or focuses. Findlay Decl. ¶ 25. Given these potential harms, it was not possible to segregate any non-exempt information in the withheld records. Findlay Decl. ¶ 25; *see, e.g.*, *New York Times Co. v. Fed. Bureau of Investigation*, 297 F. Supp. 3d 435, 446-47 (S.D.N.Y. 2017) (holding that exemption 7(A) protected information that formed part of a "mosaic" in a national security case, even where individual pieces might seem inconsequential, and citing *C.I.A. v. Sims*, 471 U.S. 159 (1985)).

Additional information on the government's basis for withholding these records in full is provided in the ex parte declaration.

For all these reasons, and the reasons set forth in the ex parte declaration, it was not possible to segregate any information for disclosure, and withholding in full was proper.

CONCLUSION

The government's motion for partial summary judgment as to the withheld records should be granted.

Dated: November 9, 2018
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Respectfully submitted,

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