IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC. Plaintiff, v. REX W. TILLERSON, in his official capacity as Secretary of State of the United States Defendant.	)	Case No. 1:15-cv-00785-JEB
CAUSE OF ACTION INSTITUTE Plaintiff, v. REX W. TILLERSON, in his official capacity as Secretary of State of the United States and DAVID S. FERRIERO, in his official capacity as Archivist of the United States Defendants.	)	Case No. 1:15-cv-01068-JEB

PLAINTIFFS' MOTION FOR THE PRODUCTION OF DEFENDANTS' DECLARATION FILED *IN CAMERA* AND *EX PARTE*

Plaintiffs Cause of Action Institute and Judicial Watch, Inc. respectfully move the Court to order the production in the record of the un-redacted supplemental declaration of E.W. Priestap, which Defendants filed *in camera* and *ex parte* on June 26, 2017.

> *"It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions."*
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> *Abourezk v. Reagan*, 785 F.2d 1043, 1060–61 (D.C. Cir. 1986)

BACKGROUND

On April 24, 2017, in support of their dispositive motion, Defendants disclosed the existence of a grand jury that issued subpoenas during the investigation into the use of a private email system for official government business by former Secretary of State Hillary Clinton. Specifically, Defendants filed a declaration from an agent of the Federal Bureau of Investigation ("FBI") stating that the FBI had "obtained Grand Jury subpoenas related to the [Clinton] Blackberry e-mail accounts, which produced no responsive materials, as the requested data was outside the retention time utilized by those providers." Decl. of E.W. Priestap, Fed. Bureau of Investigation ¶ 4, ECF No. 33-2 [hereinafter First Priestap Declaration]. Neither Defendants nor the FBI provided any further details regarding the subpoenas or their results.

On May 12, 2017, Plaintiffs filed their oppositions to Defendants' dispositive motion. They argued, *inter alia*, that Defendants' passing reference to grand jury subpoenas did not establish the fatal loss of the BlackBerry emails. *See* Pl. CoA Inst. Opp. to Defs.' Dispositive Mot. & Cross-Mot. for Disc. or, in the Alternative, Summ. J. at 7–9, ECF No. 35. In particular, Plaintiffs argued that Defendants had not identified the targets or scope of the subpoenas, nor had they established that the emails could not be recovered through forensic means. *Id*. at 8–9.

On June 23, 2017, Defendants filed a Motion for Leave to submit, *in camera* and *ex parte*, a supplemental declaration from E.W. Priestap of the FBI. *See* ECF No. 43.[1] In a public filing the same day, Defendants revealed that the un-redacted declaration "identified the targets of the subpoenas and described the subpoenas' scope." Defs.' Resp. to Pl. CoA Inst.'s Statement of Undisputed Material Facts ¶ 10, ECF. No. 41-4 (citing Second Priestap Decl.). In another filing on June 23, 2017, Defendants claimed, without citation, that the BlackBerry "service providers have stated that they have not retained any records relating to the BlackBerry emails." Mem. in Opp. Pls.' Cross-Mots. for Summ. J. &/or Disc., & in Further Supp. of Defs.' Mot. to Dismiss or, in the Alternative, for Summ. J. at 7, ECF No. 41.

On June 26, 2017, the Court granted Defendants' motion for leave to file the Second Priestap Declaration *in camera* and *ex parte*. *See* Minute Order, June 26, 2017. On June 27, 2017, Defendants filed notice that they had submitted the un-redacted Second Priestap Declaration to the Court *in camera* and *ex parte*. ECF No. 44.

As a result of this opaque process, Plaintiffs are left to surmise—and this, of course, is the danger of *in camera* and *ex parte* submissions—that the FBI issued subpoenas to the service providers in search of the BlackBerry emails. Without access to the un-redacted declaration, however, Plaintiffs do not know the scope of those subpoenas and cannot assess or properly respond to, contest, or impeach the relevance of these new facts in their Replies, which are currently due July 14, 2017.

[1] Despite receiving two extensions to file their opposition, Defendants provided Plaintiffs with only five hours' notice, on Friday night after the close of business, before filing their motion, in which they stated they had not received a response. If Defendants had provided timely notice during business hours, Plaintiffs would have lodged their objections to the motion at that time and the Court would have been aware the motion was contested.

As argued below, the interests that grand-jury secrecy seek to protect are no longer applicable in this matter. Accordingly, Plaintiffs respectfully move the Court to require Defendants to file the un-redacted Second Priestap Declaration in the public docket or, in the alternative, under seal and subject to a protective order, so that Plaintiffs may have access to the document and properly respond to Defendants' new evidence.

In compliance with Local Rule 7(m), Plaintiffs contacted counsel for Defendants, Carol Federighi, and she indicated that Defendants oppose this motion.

ARGUMENT

As a general rule, the Federal Rules of Criminal Procedure require grand-jury proceedings to remain secret. Fed. R. Crim. P. 6(e)(2). This secrecy requirement extends to, among others, grand jurors and attorneys for the government. *Id*. 6(e)(2)(B). The rule requires the secrecy of "[r]ecords, orders, and subpoenas relating to grand-jury proceedings . . . as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." *Id*. 6(e)(6). But the rule has exceptions. Relevant here, a "court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter . . . in connection with a judicial proceeding[.]" *Id*. 6(e)(3)(E).

The leading Supreme Court case on Rule 6(e) disclosures is *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979). In that case, the Supreme Court summarized its prior decisions and established the standard that a party seeking access to grand jury materials "under Rule 6(e) must show [1] that the material they seek is needed to avoid a possible injustice in another judicial proceeding, [2] that the need for disclosure is greater than the need for continued secrecy, and [3] that their request is structured to cover only material so needed." *Id*. at 219–20. This is true even after the grand jury "has concluded its operations." *Id*.

at 222. The "burden of demonstrating [that] this balance [tips in favor of disclosure] rests upon the private party seeking disclosure." *Id*. at 223.

This standard is "a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others." *United States v. John Doe, Inc.*, 481 U.S. 102, 116–17 (1987) (citation and quotation marks omitted). And it is "clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification." *Douglas Oil*, 441 U.S. at 223.

The Court of Appeals and district courts within this Circuit have addressed Rule 6(e) disclosures in a number of high-profile cases, including investigations into journalist Judith Miller, Lieutenant Colonel Oliver North, and President Bill Clinton. In doing so, the Court of Appeals has cautioned that "[g]rand jury secrecy is not unyielding . . . [and] [j]udicial materials describing grand jury information must remain secret only '*to the extent and as long as necessary* to prevent the unauthorized disclosure of a matter occurring before a grand jury.'" *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) (citing Fed. R. Crim. P. 6(e)(6)) (emphasis added in *In re Miller*). Grand jury materials may be disclosed "when information is sufficiently widely known that it has lost its character as Rule 6(e) material. The purpose in Rule 6(e) is to preserve secrecy. Information widely known is not secret." *In re North*, 16 F.3d 1234, 1245 (D.C. Cir. 1994).

In this case, Defendants have already revealed the existence of the grand jury and the issuance of subpoenas related to the Clinton email investigation, and that revelation has been covered in the press and discussed in a congressional hearing. *See, e.g.*, Josh Gerstein, FBI confirms grand jury subpoenas used in Clinton email probe, Politico, Apr. 27, 2017,

http://politi.co/2pUFh5Y; CoA Inst., Senator Grassley Questions FBI Director Comey About Clinton Grand Jury Revelation made in CoA Institute Federal Records Act Litigation, May 3, 2017, http://coainst.org/2r3o9HN. That public revelation has undermined the need to maintain secrecy regarding the grand jury proceedings and its materials.

It was Defendants' choice to reveal the existence of the grand jury and the subpoenas it issued. To allow them to selectively present facts gathered from that proceeding, including hiding the facts from Plaintiffs through an *in camera* and *ex parte* statement, and then to ask this Court to grant their dispositive motion by relying upon those hidden facts would work an injustice by preventing Plaintiffs from exercising their right to assess and respond to potentially dispositive evidence. *See Secs. & Exchange Comm'n v. Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997) ("The prohibition against selective disclosure of confidential materials derives from the appropriate concern that parties do not employ privileges both as a sword and as a shield.").

In this motion, Plaintiffs also are not asking for the entirety of the grand jury materials to be disclosed but only seek the production of the specific information that Defendants have introduced in the Second Priestap Declaration. The Court is in a position to review the submission *in camera* and determine whether the privacy interests of any individuals mentioned in the Second Priestap Declaration need be protected, but where the information goes to the very issues in dispute in this proceeding, that information should be disclosed to Plaintiffs.

A. The information in the Second Priestap Declaration "is needed to avoid a possible injustice in another judicial proceeding."

The party seeking disclosure of grand jury information must show "with particularity" why it needs the information. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). Typical needs include using "the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like." *Douglas Oil*, 441 U.S. at 222 n.12 (citation

and quotation marks omitted); *see also Doe v. Cabrera*, 126 F. Supp. 3d 160, 163 (D.D.C. 2015) (collecting cases). Using grand jury information in this way "is necessary to avoid misleading the trier of fact." *Id.* The party seeking disclosure must show that the information sought is "absolutely necessary, rather than simply beneficial to [the party's] action and . . . could not have been obtained through normal discovery channels." *Lucas v. Turner*, 725 F.2d 1095, 1102 (7th Cir. 1984). A generalized and "alleged public interest in scrutinizing the activities of a misdirected investigation" does not qualify. *United States v. Aisenberg*, 358 F.3d 1327, 1337 (11th Cir. 2004). Nor does "a fishing expedition . . . to satisfy an unsupported hope of revelation of useful information." *United States v. Garcia*, 311 F. App'x 314, 317 (11th Cir. 2009) (citation omitted).

In this case, Plaintiffs are not engaged in any kind of fishing expedition or generalized request for information but instead seek full disclosure of the facts that Defendants rely on in support of their dispositive motion. Plaintiffs must have access to the un-redacted Second Priestap Declaration to avoid the injustice of not being able to respond to Defendants' use of new evidence not otherwise available to Plaintiffs. Left unrebutted, these new assertions may mislead the Court, the trier of fact in this matter, about the sufficiency of Defendants' obligations and efforts under the Federal Records Act. Indeed, if Plaintiffs are not granted access to the un-redacted declaration, the Court should not allow Defendants to rely on the declaration at all in this proceeding. *See Abourezk*, 785 F.2d at 1061 ("It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions."); *United States v. Libby*, 429 F.Supp.2d 18, 21 (D.D.C. 2006) ("courts routinely express their disfavor with *ex parte* proceedings and permit such proceedings only in the rarest of circumstances").

B. In this case, "the need for disclosure is greater than the need for continued secrecy."

In addition to facilitating grand jury operations, secrecy is honored to protect the privacy of both those innocently accused of wrongdoing and third parties. "These substantial privacy and reputational interests extend to the target or subject of the criminal investigation as well as to third parties who may be mentioned or somehow involved in the investigation." *Matter of the Application of WP Co. LLC*, 201 F. Supp. 3d 109, 123 (D.D.C. 2016) (analogizing from Freedom of Information Act ("FOIA") privacy standards and citing *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 746 F.3d 1082, 1092 n.3 (D.C. Cir. 2014)). Proceedings are kept secret to "assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil*, 441 U.S. at 219. These concerns also extend to "witnesses, informants, and suspects [who] have particularly strong privacy interests." *Hodge v. Fed. Bureau of Investigation*, 703 F.3d 575, 580–81 (D.C. Cir. 2013).

It is possible to establish "that the need for disclosure is greater than the need for continued secrecy," *Douglas Oil*, 441 U.S. at 219, by applying the "common-sense proposition that secrecy is no longer 'necessary' when the contents of grand jury matters have become public." *In re Miller*, 438 F.3d at 1140. Grand jury information can become public "when it has been disclosed by a party and widely disseminated by the media," *In re Nichter*, 949 F. Supp. 2d 205, 214 (D.D.C. 2013), or if it is accidently disclosed in open court in the presence of journalists and "'the cat is out of the bag[.]'" *In re North*, 16 F.3d at 1245 (citing *In re Charlotte Observer*, 921 F.2d 47, 50 (4th Cir. 1990)).

For example, "in the wake of Iran-Contra [the D.C. Circuit] ordered the release of the independent counsel's report detailing the outcome of his investigation, notwithstanding the fact that the report was primarily based on grand jury testimony." *In re Miller*, 438 F.3d at 1140

(citing *In re North*, 16 F.3d 1234). The *In re North* court found it was no longer necessary to keep the information secret because the "material was given currency among the extended community of persons named in the Report and ultimately became part of the media accounts, though not necessarily identified as grand-jury-related by that time." 16 F.3d at 1244. In another example, "[d]uring the grand jury's investigation into the Monica Lewinsky matter, [the D.C. Circuit] similarly held that staffers at the Office of the Independent Counsel could not have violated Rule 6(e) when they told the *New York Times* they believed then-President Clinton should be indicted for perjury and obstruction of justice." *Id*. (citing *In re Sealed Case*, 192 F.3d 995, 1001–05 (D.C. Cir. 1999)). The Court of Appeals "recognized that [although] revealing a witness's identity and naming the target of a grand jury's investigation would ordinarily constitute Rule 6(e) violations, [the court] found that the staffers 'did not reveal any secret, for it was already common knowledge' both that President Clinton had testified and that the grand jury was investigating possible perjury and obstruction charges against him." *Id*.

In this case — which has the same level of public interest as the investigations discussed in the cases above — Defendants and the FBI have already made the existence of a grand jury concerning the Clinton email investigation public knowledge. That information has been covered in the press, and Senator Grassley questioned former FBI Director Comey about the grand jury proceedings in an open congressional hearing. The fact of the grand jury proceeding, its overall scope, and its most high-profile target (former Secretary Clinton) are no longer secret, which eliminates any need to keep the information contained in the Second Priestap Declaration hidden from Plaintiffs. Indeed, it is also known that Secretary Clinton and many of her high-level staff were interviewed by the FBI during its investigation, which is confirmed by the FBI report attached to the First Priestap Declaration. *See* Ex. A to First Priestap Declaration, ECF

33-2. Those individuals' privacy interests at it relates to a grand jury proceeding on this matter are significantly reduced.

To the extent that the targets of the subpoenas are commercial email providers, they have no privacy interests to protect. *See Matter of the Application of WP Co. LLC*, 201 F. Supp. 3d at 123 (collecting cases summarizing grand jury privacy interests of "persons subject to criminal investigations," "private citizens," and "personal privacy"). As the Supreme Court has ruled in the FOIA context, corporations do not have the same privacy interests as individuals. *See Fed. Commc'ns. Comm'n v. AT&T Inc*., 562 U.S. 397, 403–07 (2011); *see also Sims v. Cent. Intelligence Agency*, 642 F.2d 562, 573 (D.C. Cir. 1980) (FOIA "Exemption 6 is applicable only to individuals.").

Because Plaintiffs do not know the specific targets of the subpoenas, the exact scope of the subpoenas, or the actual content of the responses to the subpoenas, they are unable to properly assess the validity of any remaining privacy interests. Plaintiffs urge the Court to review the materials *in camera* and determine whether any such privacy interests should be protected. To the extent that any valid privacy interest remain, they can be protected by requiring the un-redacted Second Priestap Declaration to be filed under seal and subject to a protective order. *See* Fed. R. Civ. P. 5.2.

C. Plaintiffs' "request is structured to cover only material so needed."

Finally, the party seeking disclosure must show "that their request is structured to cover only material [it] need[s]." *Douglas Oil*, 441 U.S. at 220. The party fails to do this when "the information contained [within the materials sought] would [not] help resolve any ambiguities in the historical record or bring [the party seeking disclosure] any closer to solving the questions he presents." *In re Nichter*, 949 F. Supp. 2d at 214. *In camera* review is appropriate "to determine

what material, if any, is responsive to the need asserted by the requesting party[.]" *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1074 (D.C. Cir. 1998).

Plaintiffs' request for access to grand jury materials is limited. In this motion, they seek only the production of the un-redacted Second Priestap Declaration so they can properly respond to the evidence upon which Defendants rely in their attempt to show that they have established the fatal loss of the BlackBerry emails, a key issue in dispute in this proceeding. Further discovery may be appropriate if the Court determines that the parties' pending dispositive motions do not resolve the case, but within the current context, production of the un-redacted Second Priestap Declaration is narrowly focused and necessary to Plaintiffs' case.

CONCLUSION

For the reasons stated, the Court should order the production in this proceeding of un-redacted Second Priestap Declaration. The Court should require Defendants to file the un-redacted declaration in the public docket or, in the alternative, under seal and subject to a protective order. Plaintiffs also respectfully request the Court to resolve this issue before Plaintiffs are required to file their Reply.

Date: June 27, 2017

Respectfully submitted,

/s/ James F. Peterson
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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States District Court for the District of Columbia by using the ECF system, thereby serving all persons required to be served.

Date: June 27, 2017

/s/ John J. Vecchione
John J. Vecchione