

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**MEMORANDUM IN SUPPORT OF DEFENDANT FBI’S
UNOPPOSED MOTION FOR AN ORDER PRESERVING CERTAIN ALLEGATIONS**

Defendant Federal Bureau of Investigation (“FBI” or “the agency”) seeks 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. Counsel for Plaintiffs, Accuracy in Media *et al.* (“AIM”), has advised that he does not oppose the requested relief.

Background

Plaintiffs’ Freedom of Information Act (“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* Am. Compl. ¶¶ 126-27. Because of the existence of an ongoing investigation into the attack, the FBI plans to withhold certain responsive records pursuant to 5 U.S.C. § 552(b)(7)(A) (“Exemption 7(A)"). *See* Hardy Decl. ¶¶ 25-27. The agency respectfully requests, however, that the Court enter an order preserving its right to invoke

and justify additional FOIA exemptions if the factual basis for the assertion of Exemption 7(A) ceases to exist or in the unlikely event that the Court determines that Exemption 7(A) does not apply.

Argument

In a FOIA action, “the agency bears the burden of justifying its decision to withhold requested information.” *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987). “The agency may meet this burden by filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed.” *Id.* Exemption 7(A) permits an agency to withhold “records or information compiled for law enforcement purposes,” provided that their disclosure “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A); *see also Sussman v. U.S. Marshals Service*, 494 F.3d 1106, 1114-15 (D.C. Cir. 2007).

In the present case, the FBI plans to rely on Exemption 7(A) as grounds to withhold certain documents from release. *See Hardy Decl.* ¶¶ 25-27. The FBI believes that, at the summary judgment stage, the Court will uphold the agency’s withholdings under Exemption 7(A). Nonetheless, the FBI seeks to preserve its ability to argue that the records are exempt from release – in whole or in part – under other FOIA exemptions, in the event that the factual basis for the assertion of Exemption 7(A) lapses or the Court rejects the FBI’s legal position. Accordingly, and out of an abundance of caution, the FBI seeks an order preserving its right to assert additional FOIA exemptions. Such an order is entirely consistent with the law of this Circuit, and would lead to a timely and fair resolution of the issues raised in this action.

In *Maydak v. U.S. Department of Justice*, the defendant agency relied on Exemption 7(A) to withhold certain records pertaining to then-pending criminal proceedings. 218 F.3d 760, 762

(D.C. Cir. 2000). After the district court granted the agency's motion for summary judgment and while the case was on appeal, the criminal proceedings concluded, thereby mooting the applicability of Exemption 7(A) to the requested records. *Id.* at 764. The agency sought remand to the district court to allow it to assert additional FOIA exemptions. Denying the motion and ordering the release of all responsive records, the court stated: "We have plainly and repeatedly told the government that, as a general rule, it must assert all exemptions at the same time, in the original district court proceedings." *Id.* Courts have explained that *Maydak's* "general rule" does not preclude an agency from raising additional FOIA exemptions while a case remains pending in district court. *See, e.g., Sussman*, 494 F.3d at 1118 (explaining that a court may consider an exemption first raised in a "subsequent motion for reconsideration" because "[w]e have in the past permitted agencies to escape summary judgment in FOIA cases based on evidence first submitted on motions for reconsideration"); *Lazaridis v. U.S. Dep't of Justice*, 713 F. Supp. 2d 64, 70 n.7 (D.D.C. 2010) (rejecting the plaintiff's *Maydak* waiver argument when resolution of a motion to dismiss "d[id] not end the case"); *Sciba v. Bd. of Governor of Fed. Reserve Sys.*, No. 04 Civ. 1011 (RBW), 2005 WL 758260, at *1 (D.D.C. Apr. 1, 2005) ("[A] fair reading of [*Maydak*] leads to the conclusion that the exemption only need be raised at a point in the district court proceedings that gives the court an adequate opportunity to consider it."); *cf. Cuban v. SEC*, 795 F. Supp. 2d 43, 61-63 (D.D.C. 2011) (concluding that information was properly withheld pursuant to Exemption 3 even though the agency did not invoke Exemption 3 until its motion for reconsideration).

Although *Maydak* would not necessarily foreclose the FBI's assertion of additional FOIA exemptions at a later stage in this district court litigation, out of an abundance of caution the agency seeks an order preserving its right to invoke and justify exemptions other than 7(A). *See*

U.S. Department of Justice, Office of Information and Privacy, Freedom of Information Act Guide, 1043 (Mar. 2007) (“[The] prudent course of action [is] to obtain the court’s permission to raise the threshold defense first in order to specifically reserve the right to invoke the remaining exemptions at a later date, if necessary.”). The FBI’s motion reflects a procedure commonly employed by district courts in this Circuit as a means to promote judicial economy and the speedy and just resolution of FOIA matters. *See, e.g., Pub. Investors Arbitration Bar Ass’s v. SEC*, No. 1:11cv2285 (BAH), Minute Order (D.D.C. July 16, 2012) (granting defendant’s request to move for summary judgment on Exemption 8 without waiving any allegation that records are exempt from release under other FOIA exemptions); *Ciralsky v. CIA*, No. 1:00cv1709 (RWR), Minute Order (D.D.C. Aug. 8, 2005) (granting defendant’s request to move for summary judgment on Exemption (b)(1) without waiving any allegation that records are exempt from release under other FOIA exemptions). Indeed, the D.C. Circuit authorized a similar procedure in *United We Stand America, Inc. v. IRS*, 359 F.3d 595, 598, 605 (D.C. Cir. 2004), in which the court remanded a FOIA case to the district court to allow a defendant agency to assert certain exemptions that it had not previously asserted. The court concluded that the agency had reserved its right to assert these additional exemptions through its district court filings, in which it stated, “[s]hould the Court determine that the documents in question constitute agency records for purposes of the FOIA . . . the defendant reserves the right, pursuant to the statute, to assert any applicable exemption claim(s), prior to disclosure, and to litigate further any such exemption claims.” *Id.* Here, rather than assuming that additional exemptions would be preserved, as did the agency in *United We Stand*, the FBI seeks an order authorizing its planned processing procedure.

The proposed relief would benefit both the parties, as well as the Court, by promoting judicial economy, preserving agency resources, and ensuring the speedy and efficient resolution of this matter. Indeed, it would not be an efficient use of either the parties' or the Court's resources to require the FBI to prepare a motion justifying the non-7(A) exemptions until the protection afforded by Exemption 7(A) has lapsed or is rejected. Moreover, if the Court denies this unopposed motion, the time it will take for the FBI to process and produce to plaintiffs any responsive, non-exempt documents will drastically increase. As explained in the accompanying Hardy Declaration, "[t]he process of reviewing the Exemption 7(A) material for additional underlying exemptions transforms the review process from a categorical document-by-document review, to a much lengthier page-by-page review to identify additional, underlying exemptions for assertion despite the blanket coverage of Exemption 7(A)." Hardy Decl. ¶ 26. If this motion is denied, the FBI would have to justify additional – and likely superfluous – exemptions by (1) reviewing each page of every document to determine exactly what documents, or portions thereof, are responsive to plaintiffs' FOIA request; (2) determining, for responsive information, whether that information is protected by an exemption in addition to Exemption 7(A); and (3) preparing a *Vaughn* index comprehensively detailing all possible exemptions for each document. The FBI estimates that these additional steps would double the time that it needs to respond to Plaintiffs' request, *see* Hardy Decl. ¶¶ 27-28, thereby thwarting FOIA's goals of "efficient, prompt, and full disclosure of information," *August v. FBI*, 328 F.3d 697, 699 (D.C. Cir. 2003).

Where, as here, the request is not made for the purpose of "gain[ing] a tactical advantage over the FOIA requester," it can and should be granted. *See id.* at 698.

Conclusion

For the foregoing reasons, the FBI's Unopposed Motion For An Order Preserving Certain Allegations should be granted.

Dated: March 3, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2015, I filed the attached Defendants' Answer electronically with the Clerk of the United States District Court for the District of Columbia through the CM/ECF system, which caused the following counsel of record to be served by electronic means:

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