IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

HERITAGE FOUNDATION, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

CABLE NEWS NETWORK, INC., *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Case No. 1:24-cv-00700-TJK
(Consolidated Cases)

PLAINTIFF JUDICIAL WATCH'S REPLY IN SUPPORT OF
ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, by counsel, respectfully submits this reply in support of its Cross-Motion for Summary Judgment.

1. DOJ spills 50 pages of ink. Yet, it says nothing new.

2. DOJ continues to argue that FOIA Exemptions 5, 6, 7(A), and 7(C) allows for it to withhold the audio recordings that contain the voice of the President of the United States, who has been an elected federal officeholder for more than 50 years, speaking the same substantive information contained in the transcripts.

3. As Judicial Watch plainly demonstrated in its initial filing, the law – as currently written and applied – simply does not support DOJ's claims of Exemption.

4. With respect to Exemption 5, DOJ does not address three of the five arguments Judicial Watch makes in showing that the exemption applies. DOJ has therefore conceded those arguments. *Twelve John Does v. District of Columbia*, 117 F.3d 571, 577 (D.C. Cir. 1997) (noting that arguments not addressed are treated as conceded).

5. First, DOJ fails to identify what "information" it seeks to withhold. Plf's Mem. at 4-5. It again asserts that it seeks to withhold the audio recordings, which is indisputably a type of record. *See, e.g.,* Def's Opp. at 2 (DOJ asserting that it is properly withholding the "audio recordings.") However, the law could not be clearer: "For the government to assert the law enforcement privilege . . . the ***information*** for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege.'" *Sulemane v. Mnuchin*, No. 16-cv-01822 (TJK), 2019 U.S. Dist. LEXIS 5, *14 (D.D.C. Jan. 2, 2019) (quoting *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988) (emphasis added). Because DOJ fails to

identify the information it seeks to withhold pursuant to the law enforcement privilege, DOJ fails to satisfy its burden demonstrating that its withholding is proper.[1]

6. Second, DOJ fails to not refute that the common-law law enforcement privilege only applies to ongoing criminal investigations. Plf's Mem. at 5 (citing *In Re U.S. Department of Homeland Security*, 459 F.3d 565, 569 (5th Cir. 2006) (collecting cases from the Second, Fifth, Seventh, Tenth, and D.C. Circuits)). It only cites FOIA Exemption 7 cases to assert that the law enforcement privilege applies to ongoing as well as closed investigations. *See, e.g.,* Def's Opp. at 19-20 (citing *Aspin v. U.S. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973)).

7. Third, to the extent that the law enforcement privilege is a component of executive privilege, the historical application of the privilege does not support DOJ's privilege claim. JW's Mem. at 6. Not only does the law enforcement privilege principally protect ongoing criminal investigations, but it also is intended to protect unpublished details of allegations against individuals, confidential sources, investigative techniques or methods, and a prosecutor's decision-making process. *Id*. at 6-7 (collecting OLC opinions). DOJ does not assert that the withholding of the audio recordings will protect an ongoing investigation. Def's Opp. at 17-20. Nor does DOJ assert that its claim of law enforcement privilege over the audio recordings will protect unpublished details of allegations against individuals, confidential sources, investigative techniques or methods, or the special counsel's decision-making process. *Id*. The privilege simply does not allow DOJ to withhold the audio recordings at issue here.

8. With respect to FOIA Exemption 7(A), DOJ doubles down on its argument that vague assertions about potential harm to unspecified and undefined ongoing investigations is

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[1] As Judicial Watch demonstrates in its opening brief, DOJ most likely does not identify "information" because the information contained on the audio recordings is not the type of information protected by executive privilege. JW's Mem. at 3-8.

sufficient. Def's Opp. at 40-42. However, case law does not support its position. In *Blackwell v. Federal Bureau of Investigation*, on which DOJ relies, Judge Collyer held that the FBI was not required to identify "the exact nature and purpose of its investigations in order to satisfy FOIA Exemption 7(A)" when a FOIA requester seeks the disclosure of "the name of a pending FBI investigation" contained in an otherwise responsive, non-exempt record. 680 F. Supp. 2d 79, 84 (D.D.C. 2010). The audio recordings that contain the President's voice speaking the same substantive information contained in the transcripts are not comparable in any way whatsoever to the redacted name at issue in *Blackwell*.

9. DOJ also continues to argue – contrary to the statutory language and binding D.C. Circuit precedent – that it can rely on potential harm to unspecified and undefined future investigations. Def's Opp. at 42-45. Because "Congress has not enacted [FOIA Exemption 7(A)] the Government desires[,]" DOJ should "seek relief from Congress." M*ilner v. U.S. Department of the Navy*, 562 U.S. 562, 581 (2011). This Court should not rewrite FOIA as DOJ wishes.

10. In addition, DOJ speculative concerns that the release of the audio recordings could reasonably be expected to chill cooperation with future high-profile law enforcement investigations is wholly unsupported by history. DOJ does not dispute that the records at issue in *CREW v. U.S. Department of Justice*, 658 F. Supp. 2d 217, 222 (D.D.C. 2009) were released to the public. Def's Resp. to JW's SOF at ¶ 49. It also does not dispute that since those records were released, Presidents and Vice Presidents (both while in office and after their terms have ended) have been interviewed by law enforcement concerning criminal investigations. *Id*. at ¶ 50. Therefore, history shows that even though records about high-profile law enforcement

interviews have been made public, Presidents and Vice Presidents continue to sit for such interviews. DOJ's speculative concerns are not reasonable.

11. With respect to FOIA Exemptions 6 and 7(C), DOJ simply repeats its arguments that the balancing test favors withholding. Of note, however, DOJ does not dispute that any record – even a printed record – can be altered. Def's Resp. to JW's SOF at ¶ 53. Therefore, if DOJ's argument that the potential manipulation of the audio recordings is sufficient to withhold them, all government records could be withheld in the future. This simply cannot be the law.[2]

12. In addition, DOJ argues that "malicious actors would create fake versions [of the audio recordings] because Mr. Biden is the current President and is running for re-election." Def's Opp. at 34. President Biden however is no longer running for re-election.

13. Even though President Biden is no longer running for re-election, the substantial public interest in determining whether the Special Counsel "pulled any punches" (or even "swung too far") when investigating President Biden remains. *CREW v. U.S. Department of Justice*, 746 F.3d 1082, 1093 (D.C. Cir. 2014).

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For the reasons stated in its initial brief and the above, Judicial Watch respectfully requests that the Court grant Judicial Watch's Cross-Motion for Summary Judgment and order the audio recording to be produced within 14 days.[3]

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[2] The Heritage plaintiffs assert that DOJ could embed digital watermarks into the audio recordings. Heritage Mem. at 41. Judicial Watch opposes any alterations to the audio recordings, especially if such watermarks could allow DOJ to "trace" who uses or accesses the recordings as the Heritage plaintiffs' expert proposes. Hatchett Decl. at ¶ 5(f).

[3] Judicial Watch also respectfully requests that the Court expedite its consideration of the parties' cross-motions. *See* 28 U.S.C. § 1657(a) (courts shall expedite any case "if good cause therefor is shown. For purposes of this subsection, 'good cause' is shown if a right under … a

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Respectfully submitted,

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Federal Statute (including rights under section 552 of title 5) would be maintained in a factual context that indicates that a request for expedited consideration has merit."); *see also* Priorities Act Report 5784 ("It is the intent of the Committee that the 'good cause' provision be liberally construed by the courts in granting requests for expedited consideration under the Freedom of Information Act."). To assist with such expedition and because Judicial Watch's position is straightforward and supported by precedent, Judicial Watch does not believe an oral hearing is necessary. JW's Mem. at 1. If, however, the Court grants the requests of the Heritage and media plaintiffs, Judicial Watch would request an opportunity be heard and address any questions the Court may have.