

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND)	
ETHICS IN WASHINGTON,)	
)	
Plaintiff)	
)	No. 1:08-cv-01468 (EGS)
v.)	Hon. Emmet G. Sullivan
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

**UNITED STATES DEPARTMENT OF JUSTICE’S RESPONSE
TO PLAINTIFF’S SUPPLEMENTAL MEMORANDUM**

The United States Department of Justice (“DOJ”) submits this response to Plaintiff’s Supplemental Memorandum in accordance with the Court’s Order of June 14, 2009.

I. The Declaration of Assistant Attorney General Breuer Provides Sufficient Support for DOJ’s Conclusion that Release of the Disputed Documents Could Reasonably Be Expected to Interfere with Law Enforcement Proceedings

Plaintiff’s Supplemental Memorandum misapprehends the nature of review in FOIA litigation. While the Court’s review is *de novo*, it is based on agency declarations, and those declarations are to be accorded a presumption of good faith, *Safecard Servs., Inc. v. Securities and Exchange Comm’n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); *Summers v. United States Dep’t of Justice*, 517 F. Supp. 2d 231, 241 (D.D.C. 2007) (Sullivan, J.), and a presumption of expertise, *Piper v. United States Dep’t of Justice*, 294 F. Supp. 2d 16, 20 (D.D.C. 2003).¹ These

¹ Plaintiff’s reliance on *Washington Post Co. v. United States Dep’t of State*, 840 F.2d 26 (D.C. Cir. 1988), *vacated*, 898 F.2d 793 (D.C. Cir. 1990), is misplaced. That case addressed the level of deference to be given to claims that material was exempt from disclosure pursuant to Exemption 6’s protection of personal privacy, and the court merely noted, in a footnote, that less deference was due to an agency in a FOIA review than in an Administrative Procedure Act review. *See* 840 F.2d at 31 n.42. While the defendant’s petition for rehearing in that case was pending, *see Washington Post Co. v. Dep’t of Health & Human Servs.*, 865 F.2d 320 325 n.6

presumptions are particularly important in this case because, like all Exemption 7(A) cases, it turns on inherently predictive judgments about how future law enforcement proceedings will be affected by the ruling that plaintiff seeks – a ruling that would make public interview reports of high ranking White House officials immediately upon the conclusion of the relevant investigation, which will often be while the officials and the President they serve are still in office.

Here, DOJ has submitted the declaration of the Assistant Attorney General in charge of DOJ's Criminal Division, perhaps, apart from the Attorney General and Deputy Attorney General, the individual most responsible for the development, enforcement and supervision of the application of all federal criminal laws (except those specifically assigned to other Department Divisions). The fact that Mr. Breuer does not list his personal experience is immaterial;² Mr. Breuer speaks for the Department and has access to the expertise and

(D.C. Cir. 1989) (discussing scope and effect of then-pending petition), the Supreme Court adopted a significantly broader standard of personal privacy than that adopted by *Washington Post v. State*. See *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). In light of the Supreme Court ruling, the D.C. Circuit vacated its earlier opinion and remanded for application of the *Reporters Committee* standard. 898 F.2d at 793. Since this vacatur, defendants are aware of no cases in this Circuit in which the vacated opinion in *Washington Post v. State* has been cited for its discussion on deference to government determinations. Rather, since that time, it has only been cited for an unrelated holding that was not challenged in the petition for rehearing. See *ASARCO Inc. v. EPA*, 2009 WL 1138830, at *1 (D.D.C. Apr. 28, 2009); *Ferreira v. DEA*, 874 F. Supp. 15, 17 (D.D.C. 1995).

In any event, regardless of whether one characterizes it as deference, this Court's holding in *Piper* that agency declarations are to be accorded a presumption of expertise counsels in favor of giving substantial weight to DOJ's judgments regarding impairment of law enforcement investigations.

² Mr. Breuer's experience in criminal law and government investigations is, in fact, extensive. Prior to his appointment as Assistant Attorney General for the Criminal Division, Mr. Breuer served as an Assistant District Attorney in Manhattan, a senior legal official in the

experience of the Criminal Division.

Mr. Breuer sets forth the three judgments that DOJ has made in coming to its conclusion that release of this material “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A):

- First, given the history of law enforcement investigations that have involved obtaining information from senior White House officials (a history that is demonstrated in the submissions of both parties), “the Department of Justice believes that there is a reasonable probability of future law enforcement investigations by the Department of Justice that will require and benefit from obtaining information from White House officials.” Breuer Decl. ¶ 2.
- Second, because of the “particular[] importan[ce] of confidentiality to “senior-level White House officials, given the public role of such witnesses, the sensitive nature of the subject matters that may be discussed, the potential politicization of these sensitive issues, and the possibility that whatever matter is being investigated may not warrant any law enforcement action,” DOJ has determined that “if law enforcement interviews of the President, Vice President or other senior White House officials become subject to routine public disclosure, even upon conclusion of the investigation, there is an increased likelihood that such officials could feel reluctant to participate in voluntary interviews or, if they agree to such voluntary interviews, could decline to answer questions on certain topics.” *Id.* ¶¶ 4-5. “A law enforcement investigation based upon interviews subject to an expectation of confidentiality also benefits from senior officials more inclined to provide identifiable leads, name percipient witnesses, offer credibility assessments of the accuser or other witnesses, and even articulate inferences, insight or hunches that can be invaluable to a law enforcement investigator.” *Id.* ¶ 6.
- Third, “[a] White House official’s reluctance to submit voluntarily to an interview or share certain information in an interview could hamper an investigation in several important ways,” which are spelled out in detail in Paragraphs 6-8 of Mr. Breuer’s declaration.

Plaintiff’s primary dispute with Mr. Breuer’s declaration is that he does not address plaintiff’s argumentative contentions, some of which it makes for the first time in its Supplemental Memorandum. For example, plaintiff for the first time contends in Part 1.e of its

Clinton Administration, and the Co-Chair of Covington & Burling’s White Collar Defense and Investigations practice group. See <http://www.usdoj.gov/criminal/links/aa.html>.

Supplemental Memorandum that there is a “widely-held” belief that public officials must submit to all requested law enforcement interviews.³ This argument, however, is ultimately immaterial because, while in some circumstances public pressure could possibly force a White House official to sit down for an interview, it cannot ensure that that official will be willing “to provide law enforcement officials with a full account of relevant events,” or will be “inclined to provide identifiable leads, name percipient witnesses, offer credibility assessments of the accuser or other witnesses, and even articulate inferences, insight or hunches that can be invaluable to a law enforcement investigator.” Breuer Decl. ¶¶ 3, 6. In the words of the Supreme Court, “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances” *United States v. Nixon*, 418 U.S. 683, 705 (1974).

Similarly, plaintiff’s reference to David Addington’s attempts to reserve privilege and confidentiality over produced documents compares apples to oranges. On the one hand, plaintiff asserts that when the Office of the Vice President produced documents, *the Office of the Vice President* claimed confidentiality and privilege. On the other hand, plaintiff asserts that when Vice President Cheney was interviewed, *the Special Counsel* made no promises or agreements “regarding the conduct and use of the interview or interviews.” Pl’s Supp. Mem. at 9 n.6. It is one thing for the Vice President’s counsel to claim the reservation of rights and to claim confidentiality. It is quite another for a high ranking White House official to successfully negotiate a *prosecutor’s agreement* of confidentiality and the reservation of rights, particularly in a high profile investigation where the senior official may be a potential subject of the

³ As a preliminary matter, plaintiff’s source for this “widely-held” belief is clearly inadmissible hearsay. In fact it is double hearsay: The Newsweek article is hearsay and the statements attributed to Michael Bromwich constitute hearsay within hearsay.

investigation. Indeed, as Independent Counsel Walsh's unsuccessful attempt to secure a second interview with C. Boyden Gray demonstrate, such negotiations can break down, leading to an inability of the prosecutor to secure the interview that he seeks. *See* DOJ's Supp. Mem., at 9 n.6. Nor should this Court seek to tie the hands of prosecutors by forcing them to negotiate such an agreement in order to get needed cooperation. A confidentiality agreement will have effects beyond FOIA that may limit the use of the information in the investigation and thereby hinder the law enforcement proceeding. Moreover, even where a prosecutor agrees to confidentiality, such agreement is "subject to applicable statutes, regulations and rules." Breuer Decl. ¶ 4. These applicable statutes include FOIA. *See Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983) (holding that "agencies cannot alter the dictates of [FOIA] by their own express or implied promises of confidentiality").⁴

Finally, it is noteworthy that none of plaintiff's proffered objections to the adequacy of Mr. Breuer's declaration actually address the purported topic of this section of plaintiff's Supplemental Memorandum, which is the requirement of *Sussman v. United States Marshals Service* that the agency declaration must contain "specific information about the impact of the disclosures." 494 F.3d 1106, 114 (D.C. Cir. 2007). Mr. Breuer's declaration is replete with

⁴ In any event, whether, and under what circumstances, a prosecutor's promise of confidentiality could override the disclosure requirement in FOIA is an issue of law, not of fact, and thus not an appropriate topic for a declaration. Plaintiff cites no cases in support of suggestion that a confidentiality agreement would protect against disclosure pursuant to a FOIA request. Thus, if disclosure is ordered here, a subsequent interview subject could have no assurance that, even if he could successfully negotiate an agreement of confidentiality, it would protect against FOIA disclosure of the content of his interview. *See generally* Jham Decl. ¶ 3 (noting that NARA made the FBI 302 report of former President George H.W. Bush's December 1993 interview with Independent Counsel DiGenova public despite an apparent request or agreement as to confidentiality).

specifics as to how disclosure can be expected to impact law enforcement investigations requiring the assistance of senior White House officials. *See* Breuer Decl. ¶¶ 6.⁵

II. The Reasonable Probability of Future Law Enforcement Investigations Requiring the Cooperation of Senior White House Officials Is Sufficiently Concrete

While discussing the genesis in the caselaw of the term “concrete prospective enforcement proceeding,” plaintiff never actually provides a definition of the term “concrete.” Indeed, most of the authorities quoted by plaintiff appear to be discussing the term “prospective” rather than “concrete.” In any event, it is clear from its usage in the caselaw that “concrete” is an adjective that modifies “enforcement proceeding,” and that it thus describes the type of enforcement proceeding that can be considered in the Exemption 7(A) context. It does not describe the nexus between the proceeding and the release – that nexus is described in the statutory language “could reasonably be expected to interfere with.”⁶ The application of that

⁵ Plaintiff further “assert[s] that Mr. Cheney waived any privileges to which *he may have otherwise been entitled to under Exemption 5* when he voluntarily consented to the interview at issue here without any” agreement as to the use of the interview. Pl’s Supp. Mem., at 10 n.7 (emphasis supplied). But none of the privileges at issue here was ever his to waive. These privileges belong to the government. The presidential communications privilege belongs to the President; the deliberative process privilege asserted here belongs to the White House; and the law enforcement privilege asserted here belongs to DOJ. A government official, even one as senior as the Vice President cannot implicitly waive these governmental privileges by individually submitting to an interview. *See, e.g., In re Sealed Case*, 121 F.3d 729, 740-41 (D.C. Cir. 1997) (holding that failure to reserve deliberative process privilege by White House in public statement saying it would comply with subpoena did not waive that privilege: “Since executive privilege exists to aid the governmental decisionmaking process, a waiver should not be lightly inferred.” (quotation omitted)). Moreover, government entity to government entity release of information does not waive privileges. *See Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108 (D.C. Cir. 2004) (privileges applied to documents passed between DOJ and White House).

⁶ Senator Hart’s 1974 amendment language discussed in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221 (1978) and in plaintiff’s Supplemental Memorandum was subsequently replaced in 1986 by the significantly broader phrase “*could reasonably be expected to* interfere

nexus to this case is discussed in the previous Part.

The issue to which “concrete” applies is the degree of specificity to which the predicted enforcement proceeding must be described. *See* DOJ’s Supp. Mem., at 5-6. The D.C. Circuit has clearly held Exemption 7(A) to be applicable when there is a class of potential future law enforcement proceedings that can be identified. *See Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1540 (D.C. Cir. 1993). Plaintiff concedes that *Mapother* sustained the invocation of Exemption 7(A) despite the “lack of an identifiable, pending investigation.” Pl’s Supp. Mem., at 6 n.4. Indeed, in *Mapother*, there was only a class of potential future proceedings:

The critical question facing us, then, is not whether Mr. Waldheim is likely to appeal his listing, but whether, in the run of cases involving persons excluded from the United States [for Nazi-related activity], there is a reasonable likelihood of a challenge. Although the district court did not direct its attention to this issue, we think it plain that the prospect of such a challenge is not so unreasonable as to permit us to affirm the district court’s ruling. The desire of many tens of thousands of aliens to enter the United States is too manifest, and the crimes committed by the Nazis too heinous, to permit the assumption that an exclusion order will not be challenged. We hold, then, that in such cases and therefore this one—Exemption 7(A)’s requirement that enforcement proceedings be reasonably anticipated is met.

Id. at 1542.

Following the reasoning of *Mapother*, the critical question facing this Court is not, as plaintiff contends, whether there is a “pending investigation,” but whether “in the run of cases” going forward “there is a reasonable likelihood” that DOJ will require the voluntary cooperation

with” enforcement proceedings. *See* Pub. L. No. 99-570 § 1802, 100 Stat. 3207, 3207-48 (emphases supplied). “The 1986 amendments relaxed the standard . . . by requiring the government to show *merely* that production of the requested records ‘could reasonably be expected’ to interfere with enforcement proceedings,” *Gould Inc. v. GSA*, 688 F. Supp. 689, 703 n.33 (D.D.C. 1988) (emphasis supplied), a point plaintiff conceded in its initial motion in this case, *see* Docket No. 9, at 8.

of the White House. *Mapother* mandates the conclusion that such a defined class of reasonably probable future proceedings is clearly sufficiently concrete (*i.e.* specified) to meet the requirements of Exemption 7(A).

III. Release of Deliberative Material Does Not Effect a Broad Waiver Over Other Privileged Material on the Same Topic

Plaintiff submits the declaration of James J. Duane IV and contends that this declaration identifies “previously disclosed information that appears to be similar, if not identical, to the information the government continues to withhold in this case” pursuant to deliberative process privilege. Pl’s Supp. Mem., at 14 n.11. However, plaintiff’s suggestion that any such similarity or overlap would result in a waiver of the deliberative process privilege rests on a misunderstanding of that privilege. In *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997), the D.C. Circuit made it clear that deliberative process privilege, like other executive privileges, is not subject to broad subject matter waiver in the way that the attorney-client privilege is. *Id.* at 741 (“[T]his all-or-nothing approach has not been adopted with regard to executive privileges generally, or to the deliberate process privilege in particular.”). Thus, the government’s release of deliberative material waives the privilege only over the precise documents that were released. *Id.* There is no subject matter waiver, and other documents concerning the same or similar information remain privileged. *Id.* “This limited approach to waiver in the executive privilege context is designed to ensure that agencies do not forego voluntarily disclosing some privileged material out of fear that by doing so they are exposing other, more sensitive documents.” *Id.*

In *In re Sealed Case*, the White House publicly released a White House Counsel report but claimed privilege over the source documents used to prepare that report. *See id.* at 740. The D.C. Circuit held that the release of the report did not constitute a waiver of privilege and that

the White House could retain privilege over all documents that had not specifically been provided to individuals outside the government. *Id.* at 741. Similarly here, the fact that DOJ has released certain deliberative material into the public domain as part of the prosecution of I. Lewis Libby does not waive privilege over other, unreleased, documents that may contain material relating to the same deliberations.

Moreover, as a factual matter, the portions of the FBI 302 protected by the deliberative process privilege are not identical to the public domain information submitted by plaintiff, and in several instances, the FBI 302 contains information that is not at all similar to any information found in plaintiff's submission. DOJ is unable to expand further on these differences in a public filing without disclosing the privileged information. DOJ can submit further analysis *in camera* if the Court so directs.

IV. The Public Domain Documents Attached to Ryan Jham's Declaration Have No Bearing on the Legal Issues in this Case

Plaintiff also filed a declaration of its investigator attaching approximately 180 pages of material pertaining to law enforcement interviews of White House officials, some of whom could be characterized as "senior."⁷ Plaintiff seems to suggest that the existence of this material within the public domain undercuts DOJ's position that the release of the disputed material would deter or diminish future cooperation by senior White House officials such as the President and Vice President. It does not.

⁷ There is no established definition of "senior White House official." In compiling its Supplemental Memorandum DOJ used a broad definition. Plaintiff, however, uses a substantially broader definition, including even personal secretaries. Because this case deals with the interview of the then-sitting Vice President, the second most senior Executive Branch official, this Court is not called on to delineate precisely who in the White House qualifies as "senior."

It is not DOJ's contention that interview reports of White House officials can never be released without impairing law enforcement interests. Rather, the predictive judgment as to whether release could deter future needed cooperation by senior White House officials depends on case-specific factors such as how high-ranking the official was, whether he or she or the President he or she served was in office at the time of the interview, and the period of time that has elapsed since the individual has left office. *Cf.* Breuer Decl. ¶ 5 (noting the particular deterrent to cooperation that could exist if an official "believe[s] that the information provided could become public while the official is still in office"). The facts in the instant case warrant non-disclosure: the interviewee was the then-sitting Vice President of the United States and disclosure was initially sought while he was in office and is sought now only months after he left office. A further relevant factor is that the law enforcement component of executive privilege was initially asserted in response to a Congressional subpoena from a committee that appeared to be conducting a contentious investigation of the White House. Separation of powers concerns were thus paramount, *see* Mukasey Letter, at 4 (attached as Exhibit B to Bradbury Decl.) (finding that "the Committee's subpoena raises serious separation of powers concerns related to the integrity and effectiveness of future law enforcement investigations").

The documents attached to Mr. Jham's declaration fall on the other side of the spectrum from the material disputed here. As an initial matter, some of the documents are not interview reports, but summaries from Independent Counsel Reports that were required under the now-expired Independent Counsel statute. These investigatory summaries by court-appointed prosecutors should not be compared with the raw interview material sought here. Of those materials presented by plaintiff that do consist of interview reports or notes, the considerable

majority pertain to interviews conducted between 1972 and 1980 of individuals (none of whom were as senior as Vice President) who left office no later than 1981 (and most long before that). The release of decades-old material can hardly be equated to the release of the interview report of the Vice President who left office just this year.

Excluding these two categories of documents (1972-1980 material, and summaries in Independent Counsel reports) leaves only two documents - the transcript of the deposition of former President Reagan taken in July of 1992 and the FBI 302 report of former President George H.W. Bush's December 1993 interview. NARA has informed DOJ that the Reagan transcript was opened to the public on March 11, 1999 and the Bush 302 was opened to the public on August 3, 1999. NARA's release of these documents does not in any way lessen the impact that would be caused by a Court order releasing the documents at issue here, which would signal that henceforth all interview reports of future Presidents and Vice Presidents will become available to the public immediately upon conclusion of the then-current investigation, often while the President and Vice President are still in office. *See* Breuer Decl. ¶ 5.

As an initial matter both the Reagan and Bush interviews occurred after the respective men had left office. The Reagan interview occurred three and a half years after the end of his Presidency, and contains almost no specific information about government activity. The Bush interview also occurred after he had left office. As important, if not more so, the documents were not released until years after each had left office. The Reagan transcript was released more than a decade after his Presidency. The Bush 302 was released six and a half years after his Presidency. It is quite possible, even likely, that, in 2015 or 2019 (six to ten years after Mr. Cheney left office), the release of the documents at issue here can be accomplished without

impairment to law enforcement interests. DOJ has concluded, however, that this cannot be accomplished now.

CONCLUSION

For the reasons stated above and in DOJ's prior memoranda submitted in this case, DOJ's Motion for Summary Judgment should be granted.

July 16, 2009

Respectfully submitted,

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