

responsive material in the face of the agency's failure to support its action with the kind of "detailed justification" that this Court and the D.C. Circuit have consistently required. *See, e.g., Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977) ("[W]hen an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply."). However, even in the face of Mr. DeLay's public acknowledgement that he was the subject of a DOJ investigation, and the clear public interest in understanding the manner in which DOJ conducted that investigation, the agency continues to insist that complying with the long-standing requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), would somehow constitute an "unwarranted" invasion of Mr. DeLay's purported privacy interests. Similarly, DOJ invokes Exemptions 3, 7(A), 7(D) and 7(E) on a "categorical" basis, without even attempting to make the requisite particularized showing. The Court should not countenance DOJ's radical and unsupported position.¹

I. The FBI's "Categorical" Withholding of the Requested Records Under Exemptions 6 and 7(C) is Improper

The parties agree that the applicability of FOIA Exemptions 6 and 7(C) are properly considered together, and that the Court must balance any individual privacy interests against the public interest in disclosure. The gist of the parties' dispute is whether (as DOJ contends) *all* records responsive to CREW's request may properly be withheld on a "categorical" basis, or whether (as CREW asserts) any withholdings must be supported by a specific and particularized showing as required by *Vaughn* and its progeny. As a starting point, CREW notes that the D.C.

¹ As noted in our opening brief, CREW does not seek disclosure of responsive material maintained and described by DOJ's Criminal Division. As such, the records that remain at issue in this case are the "FD-302 and FD-302 inserts" and "Investigative Materials/Reports" maintained by the Federal Bureau of Investigation ("FBI"). Memorandum in Partial Opposition to Defendant's Motion for Summary Judgment and In Support of Plaintiff's Cross-Motion for Partial Summary Judgment ("Pl. Mem.") at 5-6.

Circuit has long held that “[t]he Exemption 7(C) balancing test must be applied to the specific facts of each case.” *Stern v. FBI*, 737 F.2d 84, 91 (D.C. Cir. 1984). “Because the myriad of considerations involved in the Exemption 7(C) balance defy rigid compartmentalization, *per se* rules of nondisclosure based upon the type of document requested, the type of individual involved, or the type of activity inquired into, are generally disfavored.” *Id.* (citation omitted). Further, “[t]here are limits . . . to when categorical rules may be employed” and “[o]nly when the range of circumstances included in the category ‘characteristically supports an inference’ that the statutory requirements for exemption are satisfied is such a rule appropriate.” *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 893 (D.C. Cir. 1995), quoting *U.S. v. Landano*, 508 U.S. 165, 177 (1993). CREW submits that, upon consideration of the relevant case law, and under the circumstances present here, the balancing of interests weighs heavily in favor of disclosure and a “categorical” approach to withholding is clearly inappropriate.

A. Mr. DeLay Does Not Have a Cognizable Privacy Interest in the Fact That He Was the Subject of Investigation by DOJ

As CREW noted in its opening brief, DOJ’s “categorical” withholding of all responsive documents presents only one issue for the Court to decide with respect to the privacy side of the balancing scale under FOIA Exemptions 6 and 7(C) – whether revelation of the mere fact that Mr. DeLay was the subject of an investigation would implicate a cognizable privacy interest. As we have shown, while in many cases (such as those DOJ seeks to rely upon), courts have found that “individuals have an obvious privacy interest . . . in keeping secret the fact that they were subjects of a law enforcement investigation,” *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995), there are no such privacy issues at stake when, as here, the “secret” is already a matter of public record. *See, e.g., U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 765 n.15 (1989) (“[T]he interests in privacy fade when

the information involved already appears on the public record.”) (citation and emphasis omitted); *Hollis v. U.S. Dep’t of Army*, 856 F.2d 1541, 1545 (D.C. Cir. 1988) (“when a release consists merely of information to which the general public already has access” privacy interests are not implicated) (footnotes omitted).

As CREW has shown, “the specific facts” of this case, *Stern*, 737 F.2d at 91, do not support an all-inclusive, across-the-board claim that the disclosure of *any* responsive material would implicate protectable privacy interests of Mr. DeLay or other individuals. First, Mr. DeLay and his attorney have publicly acknowledged that he was a subject of DOJ’s investigation, that he cooperated with the agency’s investigators, and that DOJ declined to prosecute him. Exhibits I & J (filed with Pl. Mem.). Second, both the Criminal Division and the FBI concede that they maintain records concerning Mr. DeLay that were created as part of DOJ’s public corruption investigation. Declaration of Kristin Ellis (“Ellis Decl.”), ¶¶ 20-22; Declaration of David M. Hardy (“Hardy Decl.”), ¶ 24. Finally, during the course of the public corruption investigation at issue here, DOJ and the FBI issued numerous press releases identifying individuals who had been indicted, convicted and/or pled guilty to the charges against them, *see, e.g.*, Exhibits A-H (filed with Pl. Mem.), and more than 30 individuals publicly testified in the criminal trials DOJ has identified as arising from its investigation. Declaration of David Merchant (filed with Pl. Mem.).

DOJ attempts, without success, to minimize the significance of these facts. With respect to the acknowledgement by Mr. DeLay and his attorney that Mr. DeLay was the subject of investigation, the agency asserts that their “statements do not expressly link Mr. DeLay to a *specific* investigation.” Def. Opp. at 8 (emphasis added). As CREW noted in its opening brief, DOJ’s “categorical” withholding of responsive information is premised on the notion that

“associat[ing] [Mr. DeLay] with a criminal investigation would invade [his] privacy,” *see* Defendant’s Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment (“Def. Mem.”) at 13; *see also id.* at 6 (FBI’s “response is appropriate because individuals . . . have a strong interest in not being associated unwarrantedly with alleged or actual criminal activity.”).² As such, it is immaterial whether Mr. DeLay has identified a *specific* investigation in his public acknowledgement; DOJ is attempting to rely upon a “categorical” exemption claim premised upon the suggestion that associating Mr. DeLay with *any* investigation would violate his privacy interests.

DOJ next argues that the statements of Mr. DeLay and his attorney contained in newspaper articles are “hearsay,” and thus “cannot constitute a waiver of Mr. DeLay’s privacy interests.” Def. Opp. at 8 (citations omitted). As decisions of the D.C. Circuit make clear, however, such news media reports are properly considered in assessing privacy interests under FOIA. Thus, in *Nation Magazine*, 71 F.3d at 888 n.1, the court relied upon the fact that “the media reported several statements by [H. Ross] Perot and his advisors regarding Perot’s efforts to provide the federal government with private assistance in stopping the importation of illegal drugs,” including an “article report[ing] that Perot acknowledged making some efforts to aid Customs.” In considering Perot’s privacy interest in relevant agency records, the court noted “Perot’s voluntary decision to publicly disclose the fact that he has made some offers to aid in federal drug interdiction efforts” as reported by the news media. *Id.* at 896 n.10. Likewise, in

² DOJ attempts to backtrack from its earlier position, now asserting that “[i]n addition to specifying Mr. DeLay’s general privacy interest in avoiding association with a criminal investigation, . . . Defendant has also shown that Mr. DeLay maintains privacy interests in all information about him that may be contained in investigatory records.” Def. Opp. at 10 n.11 (citation omitted). If anything, DOJ’s attempt to conceal “all information” about Mr. DeLay, even facts and statements that might already be in the public domain, underscores the need for the kind of detailed and particularized showing that DOJ has thus far refused to present.

Kimberlin v. U.S. Dep't of Justice, 139 F.3d 944, 947 (D.C. Cir. 1998), an Assistant U.S. Attorney “[i]n response to an inquiry from the press . . . acknowledged that he was disciplined as a result of [an internal ethics] investigation.” In assessing the AUSA’s interest in non-disclosure, the court noted that his “statement to the press undoubtedly does diminish his interest in privacy.” *Id.* at 949.³ It is thus clear that, under relevant D.C. Circuit precedent, the statements of Mr. DeLay and his attorney may properly be considered as part of the balancing test under Exemptions 6 and 7(C).⁴

As the record shows, Mr. DeLay has himself confirmed “an investigation” into his activities. DOJ attempts to brush off the significance of that fact by oddly asserting that “even if Mr. DeLay had addressed some specific investigation of his conduct, *that is his right*,” and emphasizing that DOJ has “never publicly acknowledged an investigation of Mr. DeLay.” Def. Opp. at 8 (emphasis added). But it is the interests of Mr. DeLay – and not the agency – that govern the Court’s analysis under the FOIA privacy exemptions. It is precisely because Mr. DeLay exercised “his right” to acknowledge that he had been investigated (and cleared) by DOJ that he has no cognizable privacy interest in the fact that he was the subject of investigation.

³ Interestingly, DOJ, later in its opposition, seeks to rely upon *Nation Magazine* and *Kimberlin*, noting that “in both of those cases, the relevant individuals made statements that clearly and unambiguously acknowledged their connection to the specific underlying documents sought by Plaintiffs,” Def. Opp. at 9, ignoring the fact that those “statements,” like those CREW points to here, were contained in news media reports.

⁴ The cases DOJ cites in support of its “hearsay” argument are far less persuasive than *Nation Magazine* and *Kimberlin*. In *Bast v. U. S. Dep't of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981), the “previous publicity consisted of little more than journalistic speculation” and did not quote the individuals whose privacy interests were at issue. The material at issue in *Schoenman v. FBI*, 763 F. Supp. 2d 173 (D.D.C. 2011), did not involve claims of personal privacy, and *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), was not a FOIA case.

DOJ continues its attempt to rely upon *Kimberlin* and *Nation Magazine*. See Def. Opp at 9-12. As CREW showed in its opening brief, Pl. Mem. at 10-12, neither case supports DOJ's position here; in fact, both stand for the proposition that "categorical" withholding determinations are inappropriate in circumstances such as those present here, and that DOJ must support its actions with a specific and particularized *Vaughn* submission.

In *Kimberlin*, DOJ initially refused to conduct a search on the ground that any confirmation of the existence of responsive records would violate the privacy of a DOJ attorney who (as previously noted) had publicly acknowledged that he was the subject of an internal misconduct investigation. The agency eventually relented, conducted a search, and sought to withhold a substantial amount of responsive material. In support of its withholding claim, DOJ submitted a *Vaughn* index, and the district court conducted an *in camera* review of withheld material. 139 F.3d at 950. While it was not clear to the D.C. Circuit whether the district court had applied a "categorical" rule in approving the withholding of the disputed information, the court of appeals nonetheless made clear that reliance upon such a rule would be inappropriate. *Id.* at 948-949. Holding that "case-by-case balancing" of private versus public interests is the proper approach, the court found that DOJ's *Vaughn* submission was not sufficiently specific to support withholding of the entire investigative file.

In order to withhold an *entire* file pursuant to Exemption 7(C), the Government must show that disclosure of *any* part of the file "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Moreover, the Government must make that showing in its *Vaughn* index and in such affidavits as it may submit therewith. . . .

In the *Vaughn* index it submitted in this case, the Government asserts only that entire documents are exempt from disclosure. . . . In the most egregious instance the Government claims that Exemption 7(C) applies to a 37-page document consisting of a cover letter and 36 pages described only as "material collected by the United States Attorney's Office." As we have pointed out before, "*Vaughn* itself requires agencies to 'specify in detail which portions of the document are

disclosable and which are allegedly exempt.’ A submission that does not do that does not even qualify as a ‘*Vaughn* index.’”

Id. at 950 (emphasis added; citations omitted). Under the holding of *Kimberlin*, DOJ’s position here, where it seeks to assert that all responsive material is “categorically exempt” – and does not attempt to support its action with *any Vaughn* index – cannot be sustained.

In *Nation Magazine*, the Customs Service sought to rely upon a “Glomar” response (a refusal to confirm or deny the existence of records) to a FOIA request for information concerning offers of assistance made to the agency by H. Ross Perot. Noting that “a Glomar response is appropriate where an acknowledgment that records exist would provide the requester with the very information the exemption is designed to protect,” the D.C. Circuit rejected the agency’s position because Perot (as earlier discussed) had publicly revealed the fact that he had offered to assist the agency.

[I]f Perot waived his right to § 7(C) protection of his identity in the first instance by publicly claiming to have done the very things that documents responsive to the request discuss, it would follow that unless some other exemption were applicable, he had also waived his right to a Glomar response, which is simply a way of preventing disclosure of information substantively protected by one of the FOIA exceptions.

71 F.3d at 894 n.8 (citation omitted).

DOJ seeks to distinguish the case on the ground that Perot’s public disclosure concerned offers of assistance, rather than investigation of illegal activity and that, as such, “the instant records would thus implicate a more substantial privacy interest.” Def. Opp. at 12. But the agency misconstrues the court’s reference to the privacy interests that apply to “law enforcement investigations.” In *Nation Magazine*, Perot had acknowledged that he had offered assistance to the Customs Service and not, as Mr. DeLay did here, that he had been the subject of a “law enforcement investigation.” As such, the disclosure of information that might associate Perot

with such an investigation (as opposed to his offers of assistance, which he acknowledged) would implicate a “substantial privacy interest.” As the court explained:

We agree . . . that, to the extent any information contained in 7(C) investigatory files would *reveal the identities* of individuals who are subjects, witnesses, or informants in law enforcement investigations, those portions of responsive records are categorically exempt from disclosure under [*Safecard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991)]. But we do not read *Safecard* as permitting an agency to exempt from disclosure *all* of the material in an investigatory record solely on the grounds that the record includes some information which identifies a private citizen or provides that person’s name and address. Because such a blanket exemption would reach far more broadly than is necessary to protect the identities of individuals mentioned in law enforcement files, it would be contrary to FOIA’s overall purpose of disclosure, and thus is not a permissible reading of Exemption 7(C).

71 F.3d at 896. The court emphasized that Perot’s own public disclosures “differentiate[] his privacy interest from the interest of unnamed *Safecard* witnesses *who did not voluntarily divulge their identities*,” and that those “public disclosures effectively waive Perot’s right to redaction of his name from documents on events that he has publicly discussed.” *Id.* (emphasis added; citation and footnote omitted). It is thus clear that individuals who, like Mr. DeLay, “voluntarily divulge their identities” – even in connection with “law enforcement investigations” – are deemed to have “waive[d]” any privacy interest they might otherwise have had in concealing their connection to such investigations. As DOJ concedes, Mr. DeLay exercised “his right” to disclose his connection to (and cooperation with) DOJ’s investigative activities, and the agency cannot now invoke his “privacy” interests to withhold all relevant records.

Finally, DOJ asserts, as it did in its opening brief, that CREW’s FOIA request “implicates the privacy rights of several other third-party individuals in addition to Tom DeLay.” Def. Opp. at 14 (citation omitted). As CREW has shown, however, a substantial amount of information concerning third parties other than Mr. DeLay has already been made public through DOJ’s own press releases and testimony in several criminal trials growing out of the agency’s broad public

corruption investigation. *See* Pl. Mem. at 13. In the face of these facts (which the agency does not dispute), the only response DOJ can muster is that “it cannot be that connecting some individuals to an investigation precludes the possibility that the privacy rights of other individuals implicated in that investigation could be violated by disclosure.” Def. Opp. at 15 (footnote omitted). This assertion misses the point; CREW does not discount the “possibility” that some (currently unknown) individuals might have cognizable privacy interests that would weigh against disclosure. But in light of the substantial amount of information concerning DOJ’s investigation that has already been made public – including the identities of numerous individuals connected to the investigation – the agency’s “categorical” attempt to withhold *all* responsive records, without the benefit of a particularized *Vaughn* showing, is clearly improper. Given the situation present here, DOJ has simply failed to demonstrate that “the range of circumstances included in the category ‘characteristically supports an inference’ that the statutory requirements for exemption are satisfied.” *Nation Magazine*, 71 F.3d at 893.

B. There is Substantial Public Interest in Disclosure of the Requested Records

As CREW noted in its opening brief, because DOJ’s “categorical” withholding of responsive records cannot be sustained based upon any cognizable privacy interest that would warrant the withholding of *all* responsive information, the Court need not even identify a countervailing public interest in release of the information. Pl. Mem. at 14; *see also Multi AG Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (“[i]f no significant privacy interest is implicated, . . . FOIA demands disclosure.”) (citation and internal quotation marks omitted). The public interest in disclosure, however, is substantial.

DOJ first asserts that CREW has failed to demonstrate a public interest in “shed[ding] light on [DOJ’s] performance of its statutory duties,” *Reporters Comm.*, 489 U.S. at 773, because

“[t]he only agency action that [CREW] alleges is implicated by the requested documents is an interest in whether DOJ is performing its law enforcement and investigatory functions as it is charged to do.” Def. Opp. at 16.⁵ DOJ’s assertion ignores the context in which CREW’s FOIA request arose: a decision not to prosecute the former House Majority Leader during the course of an investigation of widespread political corruption, an investigation touted by DOJ itself in a stream of press releases. As such, this case clearly does not involve a garden variety claim of public interest in “whether DOJ is performing its law enforcement and investigatory functions as it is charged to do.” Rather, it involves the manner in which the agency pursued high-profile allegations of public corruption, a matter in which there is a substantial and demonstrated public interest. For instance, several months after Mr. DeLay announced that DOJ had decided not to prosecute him, the New York Times published an article in which it highlighted the controversy surrounding that and other DOJ decisions not to pursue allegations of corruption against members of Congress. It noted, in pertinent part:

The Justice Department has shut down a wave of high-profile investigations of members of Congress over the past few months, drawing criticism that the

⁵ DOJ cites *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Security*, 736 F. Supp. 2d 202, 211 (D.D.C. 2010), in support of the proposition that “oblique references to information sought to ‘open() up government action to the light of public scrutiny’ have repeatedly been found insufficient.” Def. Opp. at 16. In fact, *Judicial Watch* illustrates the impropriety of DOJ’s position here. The cited decision was rendered on the agency’s renewed motion for summary judgment, after the Court had rejected the agency’s earlier attempt to rely upon a “categorical” withholding claim. See *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 598 F. Supp. 2d 93 (D.D.C. 2009). After the agency subsequently submitted a *Vaughn* index and specifically described the withheld material and the basis for its withholding claims, the Court concluded that the asserted privacy interests outweighed the public interest in disclosure. In any event, because “[t]he Exemption 7(C) balancing test must be applied to the specific facts of each case,” *Stern*, 737 F.2d at 91, neither *Judicial Watch* nor the other authority upon which DOJ seeks to rely is dispositive of the public interest analysis required here. In this case, CREW does not make “oblique reference” to the public interest, but rather cites clear indications of a demonstrated public interest in the manner in which DOJ pursued a high-profile public corruption investigation.

government's premier anticorruption agency has lost its nerve after the disastrous collapse last year of its case against former Senator Ted Stevens.

This month, lawyers for Senator John Ensign, Republican of Nevada, announced that federal prosecutors had told them they would not charge the senator with conspiring to help a former aide, with whose wife he had had an extramarital affair, violate a lobbying law.

A few days later, lawyers for Representative Jerry Lewis, Republican of California, facing scrutiny for steering government spending to campaign donors, said they were told that their client would not be charged, either.

Other federal corruption investigations known to have been ended without charges this year had focused on Tom DeLay, the former House majority leader and Republican of Texas; Representative Don Young, Republican of Alaska; and Representative Alan B. Mollohan, Democrat of West Virginia.

...

[O]fficials would not discuss why they declined to bring charges in specific investigations. The subjects of inquiries are free to announce that cases have been closed, however, and frequently portray such decisions as proof that they had done nothing wrong.

Charlie Savage, *Justice Dept. Is Criticized as Corruption Cases Close*, New York Times

(December 20, 2010) (filed herewith as Exhibit A). *See also* Alana Goodman, *Is the Justice*

Department Covering Up Congressional Corruption?, National Legal and Policy Center

(January 2, 2011) (filed herewith as Exhibit B) ("Ethics groups are wondering whether the U.S.

Department of Justice has become skittish when it comes to investigating members of Congress, after numerous congressional corruption investigations were closed without trial last year."').⁶

⁶ The substantial and continuing public interest in DOJ's handling of public corruption investigations is further demonstrated by the recent publication of articles concerning the agency's investigation of the late member of Congress, John Murtha. Notably, the recent news coverage was based upon information released to CREW by DOJ pursuant to a FOIA request. *See, e.g.*, Carol D. Leonnig, *FBI was investigating Murtha for corruption, new records show*, Washington Post (October 18, 2011) (filed herewith as Exhibit C); Paul Singer, *FBI Saw Dark Side of Rep. John Murtha*, Roll Call (Oct. 25, 2011) (filed herewith as Exhibit D).

Given this demonstrated public interest in DOJ's policy and practice with respect to its handling of public corruption allegations, the agency is mistaken when it asserts that a recognition of the public interest present here would enable a requester to "seek records about *any* decision to prosecute or not prosecute." Def. Opp. at 17 (emphasis added; footnote omitted). Indeed, the circumstances present here are clearly distinguishable from those in many cases in which the requisite public interest is found lacking, where individuals seek information about their own prosecutions in support of their defense. *See, e.g., Oguaju v. United States*, 288 F.3d 448, 450 (D.C. Cir. 2002) ("public interest in disclosure . . . does not include helping an individual obtain information for his personal use"); *Lewis v. U.S. Dep't of Justice*, 609 F. Supp. 2d 80, 85 (D.D.C. 2009) ("the public interest in disclosure 'does not include helping an individual obtain information for his personal use' to overturn a conviction.").⁷

The record in this case establishes that DOJ's investigation of Mr. DeLay is not a "secret," and that he himself publicly touted his cooperation with the investigation and DOJ's decision not to prosecute him. Further, numerous details about DOJ's public corruption investigation have already been disclosed through DOJ's own press releases and testimony in

⁷ As CREW noted in its opening brief, Pl. Mem. at 15, DOJ, in contrast to its position here, previously recognized that there is a significant public interest in disclosure of the specific material at issue in this case. In granting CREW's request to expedite the processing of its FOIA request, DOJ explicitly found that the request involves "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." Exhibit C (attached to Hardy Decl.). In its opposition, DOJ states, without any support, that "[t]he standards for expedited processing and withholding under FOIA are different." Def. Opp. at 19 n.17. The agency further asserts that "courts have affirmed withholdings of documents even in cases where expedited processing was granted." *Id.*, citing *CREW v. Nat'l Archives and Records Admin.*, 583 F. Supp. 2d 146 (D.D.C. 2008). That case, however, was decided under FOIA Exemption 5, which does not require consideration of the public interest in disclosure, and the Court thus had no occasion to consider the impact of the agency's grant of expedited process on public interest grounds. This case, in contrast, presents a situation in which the agency initially acknowledged a public interest but subsequently attempts to argue that such an interest is absent.

open court proceedings. As such, there is no cognizable privacy interest that would be harmed by disclosure of information associating Mr. DeLay with an investigation. There is, however, a demonstrated and substantial public interest in the disclosure of material that would “shed light” on the manner in which DOJ conducted its public corruption investigation. As such, the balance of interests weighs entirely on the disclosure side of the scale. DOJ’s attempt to withhold *all* responsive information on a “categorical” basis, without making the particularized showing required by *Vaughn*, should be rejected.

II. DOJ’s “Categorical” Withholding of Records Under “Exemption 7(A) is Improper

CREW argued in its opening brief that DOJ’s “categorical” attempt to withhold all responsive material under Exemption 7(A), given the particular facts of this case, is improper. Pl. Mem. at 18-20. In response, DOJ goes to great lengths to advance a proposition that CREW does not dispute: that under appropriate circumstances, “agencies asserting Exemption 7(A) can do so based on categorical withholdings, and are not required to produce a *Vaughn* index.” Def. Opp. at 22. While it is true, as DOJ notes, that in many cases the courts have approved such an approach, reliance upon categorical exemption claims, under Exemption 7(A) as with the privacy exemptions, are limited to situations in which “the range of circumstances included in the category ‘characteristically supports an inference’ that the statutory requirements for exemption are satisfied.” *Nation Magazine*, 71 F.3d at 893; *see also Long v. U.S. Dep’t of Justice*, 450 F. Supp. 2d 42, 76 (D.D.C. 2006).

DOJ cites *Long* as among the cases “approving categorical withholding of certain documents,” Def. Opp. at 22, and, indeed, the case is illustrative of the exacting manner in which this Court has considered categorical invocations of Exemption 7(A). There were two distinct categories of information at issue in *Long*, and the Court first held that the “criminal lead charge”

field in a DOJ database could not be withheld on a categorical basis because “the range of circumstances included in the Department’s Exemption 7(A) claims with respect to the ‘criminal lead charge’ entries do not ‘characteristically support’ an inference that disclosure of this information would interfere with law enforcement proceedings.” 450 F. Supp. 2d at 76 (citation omitted). Turning next to the “program category” field of data, and “[a]ccording ‘appropriate deference’ to the Department’s judgments regarding matters of national security” (a consideration not present here), the Court “conclude[d] that the Department has provided adequate justification, under Exemption 7(A), for withholding the ‘program category’ entries related to terrorism.” *Id.* at 78. *Long* thus demonstrates that the Court must consider “the range of circumstances included in the Department’s Exemption 7(A) claims,” and reject a categorical approach where not all relevant circumstances “support an inference” that the claims are appropriate.

The “range of circumstances” present in this case includes the distinct possibility that some (and perhaps a great deal) of the withheld information has already been made public through DOJ press releases and testimony at trial. Indeed, the FBI’s declarant, in describing the alleged harm that might result from disclosure of the withheld material, asserts that “[o]nce documents are released and are in the public domain, information concerning the investigation could reach the very individuals who remain under investigation.” Hardy Decl., ¶ 31. He does not, however, assert that none of the information at issue has previously been disclosed in press releases or trial testimony. *See generally*, Exhibits A-H (filed with Pl. Mem.) (numerous press releases identifying individuals who had been indicted, convicted and/or pled guilty to the charges against them); Declaration of David Merchant (filed with Pl. Mem.) (listing more than 30 individuals who publicly testified in the criminal trials DOJ has identified as arising from its

public corruption investigation).

As the D.C. Circuit has noted, where a FOIA request reaches “information to which a potential target apparently has access” (as is clearly possible here), the Court “must conduct a more focused and particularized review of the documentation on which the government bases its claim that the information [requested] would interfere with the investigation.” *Campbell v. Dep’t of Health & Human Servs.*, 682 F.2d 256, 265 (D.C. Cir. 1982). *See also Gray v. U.S. Army Crim. Investigation Command*, 742 F. Supp. 2d 68, 75 (D.D.C. 2010) (rejecting invocation of Exemption 7(A) where agency claims “appear designed to cover every scenario in which a plaintiff seeks the disclosure of records related to a law enforcement proceeding”). DOJ’s position in this case, where it seeks to “categorically” withhold *all* responsive material on the ground that disclosure “could *reasonably be expected* to interfere with enforcement proceedings,” 5 U.S.C. § 552(b)(7)(A) (emphasis added), must fail given the particular circumstances present here.

III. DOJ’s Withholding of Information Under Exemptions 3, 7(D) and 7(E) is Improper

As discussed in CREW’s opening brief, Pl. Mem. at 20-21, DOJ, on behalf of the FBI, seeks to withhold some unspecified amount of information on the basis of Exemptions 3, 7(D) and 7(E). CREW noted that, although the Bureau asserts that it conducted a search for responsive records, the agency has made no attempt to quantify how many responsive records exist and, in the absence of a *Vaughn* index, it is impossible for CREW or the Court to determine the extent to which any specific information has been withheld under the claimed exemptions. In its opposition, DOJ makes no attempt to rectify this defect, instead asserting that when Exemptions 3, 7(D) and 7(E) “are cited in connection with another categorical exemption like 7(A),” it is entitled to meet its burden “through generic, categorical showings similar to that for

Exemption 7(A),” and is not required to submit a *Vaughn* index. Def. Opp. at 23 (citation and internal quotation marks omitted). As we have shown, however, under the specific circumstances of this case, the “categorical” approach that DOJ seeks to employ in support of *all* of its exemption claims is improper because the “range of circumstances” present here do not “support an inference” that the statutory requirements for exemption are satisfied. As such, DOJ’s attempt to bootstrap its “categorical” invocation of Exemptions 3, 7(D) and 7(E) to its reliance upon “another categorical exemption like 7(A)” is unavailing.

With respect to the FBI’s reliance upon Exemption 3 to withhold grand jury material, DOJ challenges CREW’s assertion that there are limits to the scope of that protection. *See* Pl. Mem. at 22-23. The agency cites *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 500 (D.C. Cir. 1998), in support of the proposition that the protection extends not only to matters that occurred before a grand jury, but also to “what is likely to occur.” Def. Opp. at 24. DOJ ignores the fact that the D.C. Circuit, in the passage that it cites, referenced its earlier decision in *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (*en banc*), where it held that Rule 6(e) “does not require . . . that a veil of secrecy be drawn over all matters occurring in the world that happen to be investigated by a grand jury.” (footnote omitted). *See* 142 F.3d at 500. Without more than the FBI’s meager assertion that disclosure of some unspecified information “would violate the secrecy of grand jury proceedings,” Def. Opp. at 24 (quoting Hardy Decl. ¶ 36), the Court simply cannot determine the scope or propriety of the agency’s exemption claims.

In opposing the FBI’s reliance upon Exemption 7(D) to withhold “confidential source” information, CREW noted that the agency has failed to provide the kind of detailed information that the courts have long required to justify invocation of the exemption. Pl. Mem. at 23-24. As the D.C. Circuit has held,

When no express assurance of confidentiality exists, courts consider a number of factors to determine whether the source nonetheless “spoke with an understanding that the communication would remain confidential.” These factors include “the character of the crime at issue,” “the source’s relation to the crime,” whether the source received payment, and whether the source has an “ongoing relationship” with the law enforcement agency and typically communicates with the agency “only at locations and under conditions which assure the contact will not be noticed.” Even when the FBI contends that a source received an express assurance of confidentiality, it must, in order to “permit meaningful judicial review,” present sufficient evidence that such an assurance was in fact given.

Roth v. U.S. Dep’t of Justice, 642 F.3d 1161, 1184 (D.C. Cir. 2011) (emphasis added; citations omitted).

Here, the FBI’s declarant merely asserts that individuals for whom the Bureau seeks source protection “were interviewed either under express confidentiality and/or under circumstances from which an assurance of confidentiality may be implied.” Hardy Decl., ¶ 38. With respect to individuals who were purportedly interviewed “under express confidentiality,” the agency has not provided “sufficient evidence that such an assurance was in fact given.” For those whose understanding of confidentiality “may be implied,” the FBI has addressed none of the factors the court of appeals required in *Roth*. The best that the agency can muster is an assertion in its brief that “the nature of the crimes involved in the investigation, and the toll that connection to this investigation could have on a source’s reputation” warrant an inference that confidentiality may be assumed. Def. Opp. at 25 n.26. *But see Landano*, 508 U.S. at 179 (“Most people would think that witnesses to a gang-related murder likely would be unwilling to speak to the Bureau except on the condition of confidentiality,” so confidentiality may be implied); *Mays v. DEA*, 234 F.3d 1324, 1330-1331 (D.C. Cir. 2000) (“an informant is at risk to the extent the criminal enterprise he exposes is of a type inclined toward violent retaliation . . . [and the threat of such retaliation] is enough to establish the inference of implied confidentiality for those who give information about such a conspiracy”). The white-collar corruption investigation at issue

here is a far cry from the types of cases in which assurances of confidentiality may be implied. As such, DOJ has clearly failed to meet its burden.⁸

Conclusion

DOJ has obviously failed to support its attempt to “categorically” withhold *all* responsive information contained in the FBI “FD-302 and FD-302 inserts” and “Investigative Materials/Reports” at issue in this case. Because Mr. DeLay has acknowledged that he was a subject of DOJ’s underlying “public corruption investigation,” and many aspects of the investigation have been disclosed in press releases and open court proceedings, this case is simply not suited for the kind of “categorical” approach to withholding that has been approved in other cases that arose under circumstances far different from those present here. As such, in order for the Court to conduct a meaningful *de novo* review of DOJ’s actions, the agency must provide the more exacting, detailed justification that this circuit has long required. Upon DOJ’s failure to do so, the agency’s motion for summary judgment should be denied, CREW’s cross-motion for partial summary judgment should be granted, and an order should be entered requiring the disclosure of the withheld material.

Respectfully submitted,

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⁸ CREW noted in its opening brief that DOJ has failed “to provide any specific information that would permit the Court to assess the propriety of [its] withholdings” under Exemption 7(E). Pl. Mem. at 24. DOJ fails to address this deficiency in its opposition, or to distinguish the authority CREW cited, asserting only, without elaboration, that “sometimes it is ‘not possible to describe secret law enforcement techniques without disclosing the very information withheld.’” Def. Opp. at 23 n.23 (citation omitted).

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