IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Civ. No. 11-0592 (RJL)
U.S. DEPARTMENT OF JUSTICE,	)	
Defendant.	)	

MEMORANDUM IN PARTIAL OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") initiated this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, on March 22, 2011, seeking the disclosure of records maintained by defendant Department of Justice ("DOJ") relating to the agency's investigation of former House of Representatives Majority Leader Tom DeLay concerning illegal lobbying activities by Jack Abramoff and others. DOJ has moved for summary judgment, asserting that it is entitled to withhold all agency records responsive to CREW's request. For the reasons set forth below, CREW opposes DOJ's motion in part and cross-moves for partial summary judgment and entry of an order requiring DOJ to disclose certain responsive records.

Factual Background

A. DOJ's Public Corruption Investigation

In 2004, DOJ and its component, the Federal Bureau of Investigation ("FBI"), initiated an investigation into the activities of former lobbyist Jack Abramoff and his associates, an investigation the FBI characterized as "a wide-ranging public corruption investigation as part of its ongoing efforts to root out systemic corruption within the highest levels of the government."

Declaration of David M. Hardy ("Hardy Decl.") (Docket No. 9-3), ¶ 22 (footnote omitted). Since its inception, "this continuing large public corruption investigation has yielded a total of 20 guilty pleas or trial convictions in connection with the activities of Jack Abramoff and his associates." *Id.*, ¶ 23 (footnote omitted). Mr. Abramoff himself pled guilty to charges of conspiracy, aiding and abetting honest services mail fraud, and tax evasion in January 2006, and was sentenced in September 2008 to 48 months in prison. *Id.*, ¶¶ 22 & 23 n. 10. During the course of the public corruption investigation, 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 herewith).

In August 2010, former House Majority Leader Tom DeLay announced that DOJ had informed him that the department would not bring charges against him in connection with his relationship with Mr. Abramoff. Mr. DeLay stated that he had cooperated fully with the DOJ investigation and said, "While I will never understand why it took so long for the Justice Department to conclude that I was innocent, I am nevertheless pleased that they have made their determination." Mike Allen & Josh Gerstein, *DeLay "Knew This Day Would Come*," Politico, August 16, 2010 (filed herewith as Exhibit I); *see also* Carrie Johnson, *Justice Department Clears Tom DeLay Of Corruption*, National Public Radio, August 17, 2010 (filed herewith as Exhibit J). Mr. DeLay's attorney, Richard Cullen, "said a prosecutor from [DOJ's] Public Integrity Section phoned him with the news . . . and said he was free to make it public." Exhibit I.

B. <u>CREW's FOIA Requests and DOJ's Responses</u>

By letters dated October 19, 2010, to DOJ's Criminal Division and the FBI, CREW requested under the FOIA the following agency records:

> [A]ny witness statements, investigation reports, prosecution memoranda, and Federal Bureau of Investigation ("FBI") 302 reports related to [the Department's] investigation of former House Majority Leader Tom DeLay. This includes, but is not limited to, [the Department's] investigation of relationships between Mr. DeLay and Christine DeLay, Dani DeLay, Jack Abramoff, Edwin Buckham, Tony Rudy, Michael Scanlon, Susan Hirshmann, the Alexander Strategy Group, the National Center for Public Policy Research, eLottery, Inc., the U.S. Family Network, Americans for a Republican Majority PAC ("ARMPAC"), Texans for a Republican Majority PAC ("TRMPAC"), and/or the Commonwealth of the Northern Marianas Islands.

In its letters, CREW requested expedited processing of its FOIA requests, asserting that the requests met the criteria for expedited processing under DOJ's regulations, 28 CFR § 16.5(d) because 1) they pertain to a matter about which there is an "urgency to inform the public about an actual or alleged federal government activity," and the requests are made by "a person primarily engaged in disseminating information;" and 2) they involve a matter of "widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." Exhibit 1 (attached to Ellis Decl.); Exhibit A (attached to Hardy Decl.). On October 25, 2010, DOJ's Office of Public Affairs granted CREW's request for expedited processing on the ground that the topic of the FOIA requests is 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.).

1. The Criminal Division's Response

By letter dated October 22, 2010, the Criminal Division acknowledged receipt of CREW's FOIA request and asserted that the request "appears to be broad in scope, and does not clearly identify the records which you are seeking." The Criminal Division requested "clarification regarding the investigation" CREW referenced in its FOIA request. Exhibit 2 (attached to Ellis Decl.) By letter to the Criminal Division dated October 27, 2010, CREW reiterated the substance of a telephone conversation between CREW's counsel and the agency's

FOIA officer assigned to the matter. CREW stated that its "request stands on its own terms as a reasonably specific request that should enable knowledgeable government employees to locate responsive records." CREW further stated that, nevertheless, "in an effort to assist DOJ's processing of the request," CREW was willing "to accept initially, as a first step toward fulfilling the entire request, a subset of the requested records." This subset was described as follows:

> [W]itness statements, investigation reports, prosecution memoranda, and FBI 302 reports from DOJ's investigation into illegal lobbying activities in which Mr. DeLay is named or otherwise identified. This includes, but is not limited to, records directly or indirectly related to the individuals and entities specified in CREW's request. To further assist DOJ, CREW will accept responsive records from January 1, 2003 to the present.

Exhibit 3 (attached to Ellis Decl.).

By letter to CREW dated November 9, 2010, the Criminal Division stated that it "conducted a search and located records potentially responsive to your request." The Criminal Division further stated that "we are withholding these records in their entireties pursuant to Exemption 7(A) of the FOIA, 5 U.S.C. § 552(b)(7)(A) . . . ." The Criminal Division advised plaintiff of its right to submit an appeal of this determination to DOJ's Office of Information Policy ("OIP"). Exhibit 5 (attached to Ellis Decl.). CREW appealed the Criminal Division's determination to OIP on November 23, 2010, OIP acknowledged receipt of the appeal, and closed it without decision after CREW initiated this action. Exhibits 6-8 (attached to Ellis Decl.).

In support of DOJ's summary judgment motion, the Criminal Division has, for the first time, identified the specific records it identified as responsive to CREW's request: 1) three legal memoranda; 2) summaries of witness interviews provided "by the Senate" (six summaries), "a foreign law enforcement agency" (two summaries), and "a private company" (one summary); and 3) witness summaries and an investigative report "originating from other Executive Branch agencies." Ellis Decl., ¶ 22.[1] Based upon the Criminal Division's descriptions of the responsive records, CREW does not seek disclosure of the three "legal memoranda" or the nine "summaries of witness interviews" it characterizes as "[t]he only responsive records originating from CRM, or for which CRM bears primary processing responsibilities."

2. The FBI's Response

By letter to CREW dated October 22, 2010, the FBI acknowledged receipt of CREW's FOIA request and indicated that without express authorization and consent of "the third party" – presumably Mr. DeLay – any release of information to plaintiff would violate the Privacy Act. The FBI further asserted that the requested records are exempt from disclosure under the FOIA on privacy grounds. The FBI advised CREW of its right to appeal that determination to OIP. Exhibit D (attached to Hardy Decl.). CREW appealed the FBI's determination to OIP on November 9, 2010, OIP acknowledged receipt of the appeal, and closed it without decision after CREW initiated this action. Exhibits E-G (attached to Hardy Decl.).

In support of DOJ's summary judgment motion, the FBI has acknowledged that it possesses records responsive to CREW's request; to wit, "documents . . . which it was able to identify by virtue of the fact that they were indexed under DeLay's name." Hardy Decl., ¶ 24. These records are described as "FD-302 and FD-302 inserts ('Interview Forms'/'Witness Statements')," *id.*, ¶ 35, and "Investigative Materials/Reports," *id.*, ¶ 40.[2] In light of CREW's decision not to seek disclosure of responsive material maintained and described by the Criminal

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[1] The Criminal Division represents that it is "working with those other [Executive Branch] agencies to respond to plaintiff" with respect to the responsive records "originating from" those agencies. *Id.*

[2] The FBI also possesses what it describes as a "public source file," which contains records "such as court records and news clippings." *Id.* As the FBI correctly notes, CREW does not seek access to that material.

Division, the records that remain at issue in this case are the "FD-302 and FD-302 inserts" and "Investigative Materials/Reports" maintained by the FBI.

Argument

I. FOIA Establishes a Presumption of Disclosure and Requires DOJ to Make a Detailed and Specific Showing that Each Responsive Agency Record is Properly Exempt from Disclosure

The Freedom of Information Act safeguards American citizens' right to know "what their Government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "[D]isclosure, not secrecy, is the dominant objective of [FOIA]." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

The statute requires disclosure of agency records when requested by the public unless the records fall within one of nine exemptions. *See* 5 U.S.C. § 552(b)(1) - (9). If requested information does not fit squarely into one of these enumerated categories, the law requires federal agencies to disclose the information. *NLRB v. Robbins,* 437 U.S. at 221 (1978). FOIA's exemptions "have been consistently given a narrow compass," and requested agency records that "do not fall within one of the exemptions are improperly withheld[.]" *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (internal quotation marks omitted).

Disputes involving the propriety of agency withholdings are commonly resolved at the summary judgment stage in FOIA cases. *Harrison v. EOUSA*, 377 F. Supp. 2d 141, 145 (D.D.C. 2005). The Court reviews the government's withholding of agency records *de novo*, and the government bears the burden of proving that a particular document falls within one of the nine narrow exemptions to FOIA's broad mandate of disclosure. 5 U.S.C. § 552(a)(4)(B); *Reporters*

Comm., 489 U.S. at 755. "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action.'" *Id.* (quoting 5 U.S.C. § 552(a)(4)(B)).

To be entitled to summary judgment, an agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (internal citation and quotation omitted). When claiming one of the FOIA's exemptions, the agency bears the burden of providing a "'relatively detailed justification' for assertion of an exemption, and must demonstrate to a reviewing court that records are *clearly* exempt." *Birch v. U.S. Postal Serv.,* 803 F.2d 1206, 1209 (D.C. Cir. 1986) (emphasis added) (citing *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). In *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973), the D.C. Circuit established the "procedural requirements" that "an agency seeking to avoid disclosure" must follow in order to carry its burden. *Vaughn* requires that "when 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." *Mead Data Cent., Inc.*, 566 F.2d at 251 (citations omitted).

The *Vaughn* requirements are typically satisfied through an agency's submission of an affidavit describing the basis for its withholdings, and providing justifications for redactions, accompanied by an index listing responsive records and indicating the precise redactions made to the records. As the D.C. Circuit recently emphasized,

> [u]nder our case law, agencies invoking a FOIA exemption must provide a specific, detailed explanation of why the exemption applies to the withheld materials. . . . Requiring agencies to provide public explanations for their redactions allows for adversarial testing of the agencies' claims, which helps

> focus the court's attention on the most important issues in the litigation and may reveal not otherwise apparent flaws in the agencies' reasoning.

Roth v. U.S. Dep't of Justice, 642 F.3d 1161, 1185 (D.C. Cir. 2011) (citations omitted).

Here, defendant DOJ has not even attempted to make the requisite showing that "*each* document that falls within the class requested" is exempt from disclosure, *Goland*, 607 F.2d at 352 (emphasis added), asserting instead that it has "*categorically withheld* the requested material." Defendant's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment ("Def. Mem.") at 9 (emphasis added). Under the facts of this case and the relevant caselaw, DOJ's action cannot be sustained.

II. DOJ's "Categorical" Withholding of Records on Privacy Grounds is Improper

Defendant DOJ devotes a substantial portion of its brief to describing a basic tenet of FOIA law that CREW does not dispute: application of the statute's privacy exemptions requires the Court to balance individual privacy interests against the public's interest in disclosure. *See, e.g.*, *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (FOIA "requires the courts to balance the competing interests in privacy and disclosure"); *Reporters Comm. for Freedom*, 489 U.S. at 776 (1989) (same).[3] CREW submits that, under the circumstances present here, the balancing of interests weighs heavily in favor of disclosure.

A. Mr. DeLay Does Not Have a Cognizable Privacy Interest

In light of DOJ's decision to "categorically withhold" all responsive documents – premised on the suggestion that "associat[ing] [Mr. DeLay] with a criminal investigation would

[3] DOJ relies upon both Exemption 6 and Exemption 7(C), and notes that "[t]he analyses under [both exemptions] are similar, and as a result, case law pertaining to one of the privacy exemptions is often germane in considering the other." As such, DOJ "considers them together" in its brief. Def. Mem. at 11-12. CREW agrees that such an approach is appropriate. As a threshold matter, CREW does not challenge DOJ's assertion that the requested records were "compiled for law enforcement purposes" within the meaning of Exemption 7. *Id*. at 12.

invade [his] privacy," Def. Mem. at 13 – the only issue presently before the Court is whether revelation of the mere fact that Mr. DeLay was the subject of an investigation would implicate a cognizable privacy interest. While it is true that in many cases "individuals have an obvious privacy interest cognizable under Exemption 7(C) in keeping secret the fact that they were subjects of a law enforcement investigation," *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 894 (D.C. Cir. 1995), there are no privacy issues at stake when, as in this case, the "secret" is already known. *See*, *e.g.*, *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, or which the recipient of the release already knows," privacy interests are not implicated) (footnotes omitted).

Here, 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. Further, 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. Ellis Decl., ¶¶ 20-22; Hardy Decl., ¶ 24.[4]

Given these facts, it is clear that DOJ's claimed desire to protect Mr. DeLay from the "stigmatizing connotation" of being "associate[d] . . . with a criminal investigation" is misplaced. *See* Def. Mem. at 13 (citations omitted).[5] The circumstances here are similar to those present in

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[4] DOJ mischaracterizes the circumstances present here when it asserts that "as is the case here, media speculation about the circumstances surrounding a possible investigation . . . is hardly tantamount to a waiver of an uncharged individual's privacy rights." Def. Mem. at 16-17. CREW relies upon Mr. DeLay's acknowledgement that he was the subject of investigation and DOJ's acknowledgement that it maintains responsive records, not "media speculation."

[5] In light of Mr. DeLay's public comments, it is apparent that DOJ's position here protects only his interest in "spinning" information about DOJ's investigation by highlighting his cooperation

Nation Magazine, where the Customs Service sought to withhold – on a categorical basis – all records concerning offers from then-Presidential candidate H. Ross Perot to assist the agency in its drug interdiction efforts. The court of appeals noted that Perot had himself publicly discussed the matter and held that, as a result, the agency's categorical exemption claim was improper.

> In this case, . . . Perot himself has made several public statements indicating that he has offered to aid the federal government in hostage rescue and drug interdiction operations. Redaction of Perot's name from any responsive documents . . . that involve the subject matter of those disclosures . . . would not serve any useful purpose in protecting his privacy. Perot's decision to bring information connecting himself with such efforts into the public domain differentiates his privacy interest from the interest of unnamed [individuals] who did not voluntarily divulge their identities; these public disclosures effectively waive Perot's right to redaction of his name from documents on events that he has publicly discussed.

71 F.3d at 896 (footnote omitted). *See also Prison Legal News v. EOUSA*, 628 F.3d 1243, 1249 (10th Cir. 2011) ("An individual can waive his privacy interests under FOIA when he affirmatively places information of a private nature into the public realm."); *Showing Animals Respect & Kindness v. U.S. Dep't of Interior*, 730 F. Supp. 2d 180, 191 (D.D.C. 2010) ("presumption [of privacy protection] does not apply where an individual has voluntarily disclosed his involvement in the records at issue") (citation omitted).

DOJ attempts to minimize the significance of Mr. DeLay's voluntary disclosure, asserting that "acknowledging that an investigation occurred is a far cry from waiving all privacy interests in information that may be contained in that investigative file." Def. Mem. at 16. That assertion begs the question, given that the agency is attempting to defend its "categorical" withholding of *all* responsive material on the ground that "*anything* that would even associate a

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and the agency's decision to decline prosecution, while shielding from disclosure any information that might reflect less favorably on him.

third party with a criminal investigation would invade that individual's privacy," *id.* at 13 (emphasis added; citation omitted).

In *Kimberlin v. Dep't of Justice*, 139 F.3d 944 (D.C. Cir. 1998), upon which DOJ relies, an Assistant U.S. Attorney publicly acknowledged that he had been the subject of an internal ethics investigation. In response to a FOIA request for relevant records, the agency initially "refus[ed] either to confirm or to deny that such an investigation had taken place," *id.* at 947 (citation omitted), but ultimately conducted a search, released a small amount of material, and withheld the remainder. The district court "reviewed *in camera* some or all of the [investigative] file" and determined that it was properly withheld. *Id.* On appeal, the D.C. Circuit noted (in language DOJ partially quotes here) that

> [the AUSA's] statement to the press undoubtedly does diminish his interest in privacy: the public already knows who he is, what he was accused of, and that he received a relatively mild sanction. He still has a privacy interest, however, in avoiding disclosure of the details of the investigation . . .

Id. at 949. The court ultimately held that "[i]n order to withhold an entire file pursuant to Exemption 7(C), the Government must show that disclosure of *any* part of the file" would violate the subject's privacy, and that it "must make that showing in its *Vaughn* index and in such affidavits as it may submit therewith." *Id.* at 950 (emphasis added; citation omitted). The court rejected DOJ's contention that, because the investigative file "focuses completely on one [individual] . . . release of any of the file, whether redacted or not," would constitute a violation of his privacy, *id.* (internal quotation marks omitted), finding that the agency's sweeping claim could not be accepted "without more specification of the types of material in the file." *Id.*

Kimberlin thus makes clear that where the subject of an investigation has himself acknowledged that the investigation occurred, DOJ must conduct a search for responsive records and, in compliance with standard FOIA litigation procedures, submit a *Vaughn* index containing "specification of the types of material in the file." Only then can the court determine whether any asserted privacy interests outweigh the public interests in disclosure. *See also Common Cause v. Nat'l Archives & Records Service*, 628 F.2d 179, 184 (D.C. Cir. 1980) ("we do not know enough about the documents at issue here" to determine the exempt status of information concerning "persons investigated but never subsequently prosecuted for crimes"); *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 598 F. Supp. 2d 93, 96 (D.D.C. 2009) (rejecting DOJ's "categorical" exemption claim for investigatory files and holding that the "agency must, for each record, conduct a particularized assessment of the public and private interests at stake").[6]

It is clear that Mr. DeLay has no cognizable privacy interest in the mere fact that he was the subject of an investigation conducted by DOJ – the very information that the agency seeks to conceal through its "categorical" withholding of all responsive records. Any interest that the former House Majority Leader might have in particular information contained in the agency's investigative file – should such an interest exist – can only be considered after DOJ specifically describes all responsive records and meets its burden as required by *Vaughn*. At this juncture, however, the agency's decision to "categorically withhold" all responsive documents must be rejected.

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[6] As the court of appeals recognized in *Kimberlin*, in a case such as this one, "it will ordinarily be enough for the court to consider, when balancing the public interest in disclosure against the private interest in exemption, the rank of the public official involved and the seriousness of the misconduct alleged." 139 F.3d at 949 (citation omitted). *See also Nation Magazine*, 71 F.3d at 894 n. 9 ("candidacy for federal office may diminish an individual's right to privacy") (citation omitted); *Common Cause*, 628 F.2d at 184 ("individuals whose privacy interests are argued here were candidates for federal office, not private citizens . . . with less privacy interest than others in information relating to their candidacies") (footnote omitted). As such, Mr. DeLay's "diminish[ed]" privacy interest (if any exists at all) would properly be considered only after DOJ submits a *Vaughn* index and identifies specific information it seeks to withhold from its investigative records.

While DOJ devotes the entirety of its discussion of "privacy interests" to Mr. DeLay, it also alludes to "other third parties" whose "privacy rights . . . would also be implicated in the production of any responsive records." Def. Mem. at 17 n. 4. In this regard, CREW notes that numerous individuals have been publicly identified in DOJ press releases as having been charged, convicted or otherwise implicated in its "wide-ranging public corruption investigation." *See*, *e.g.*, Exhibits A (Todd Boulanger, James Hirni, Trevor Blackann); B (Horace Cooper, Neil Volz); C (Ann Copland); D (Glenn Marshall); E (Kevin Ring); F (David Safavian); G (Italia Federici, J. Steven Griles, Jared Carpenter); H (Congressman Robert W. Ney, Roger G. Stillwell). As the D.C. Circuit recently observed,

> by routinely issuing press releases that name the individuals that it has indicted, and then naming them again when they plead guilty or are convicted, the Justice Department has itself made the process [of identifying individuals charged with crimes] infinitely easier. If someone wants to know whether his neighbor or potential employee has been indicted for, convicted of, or pled guilty to a federal offense, he may well find out by simply entering a Google search for that person's name.

Amer. Civil Liberties Union v. U.S. Dep't of Justice, 2011 U.S. App. LEXIS 18472,*23 (D.C. Cir. Sept. 6, 2011) (footnotes omitted).

In addition, more than 30 individuals publicly testified in the criminal trials DOJ has identified as arising from its "public corruption investigation." Declaration of David Merchant ("Merchant Decl.") (filed herewith), ¶¶ 3-5. It is thus clear that many individuals have already been publicly associated with DOJ's investigation, as a result of the agency's press releases and open court proceedings. Under such circumstances, DOJ's "categorical" withholding of the requested records, without the benefit of the specificity and document-by-document review that would typically be presented in a *Vaughn* index, cannot be sustained.

B. There is Substantial Public Interest in the Requested Records

DOJ quotes *Nat'l Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989), in support of the proposition that "[s]omething . . . outweighs nothing every time" when a privacy interest is balanced against public interests. Def. Mem. at 11. Contrary to DOJ's suggestion, however, the missing element in *this* case (as we have shown) is any cognizable privacy interest to weigh against the public interest in disclosure. *See Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008) (balancing occurs only where there is "a greater than *de minimis* privacy interest in the requested information")*; Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 33 (D.C. Cir. 2002) ("*[i]f a significant privacy interest is at stake*, the court then must weigh that interest 'against the public interest in the release of the records . . .'") (emphasis added; citation omitted). Although the court, in the absence of a cognizable privacy interest, "need not linger over the balance" between competing interests, *Horner*, 879 F.2d at 879, CREW submits that the public interest in disclosure of the requested information is substantial.

In assessing the public interest in disclosure, courts must be mindful of the Supreme Court's dictate that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose." *Reporters Comm.*, 489 U.S. at 773; *see also Multi AG Media*, 515 F.3d at 1231 (same); *Nation Magazine*, 71 F.3d at 894-895 ("the mere fact that records pertain to an individual's activities does not necessarily qualify them for exemption [as] [s]uch records may still be cloaked with the public interest if the information would shed light on agency action").

In this case, it is clear that disclosure of information concerning DOJ's investigation of Mr. DeLay would "shed[] light on [the] agency's performance of its statutory duties," and there is a substantial public interest in reviewing DOJ's enforcement of the ethics and anti-corruption laws governing the activities of federal officials, such as Mr. DeLay. Indeed, a long line of cases in our circuit recognizes that interest. *See*, *e.g.*, *Common Cause*, 628 F.2d at 183 n. 10 ("the [Federal Corrupt Practices Act] . . . amounts to a Congressional pronouncement that the circumstances surrounding campaign contributions are *per se* matters of public concern") (citation omitted); *Washington Post Co. v. U.S. Dep't of Health & Human Services*, 690 F.2d 252, 265 (D.C. Cir. 1982) ("Our belief that public disclosure of conflict-of-interest information is vital is strengthened by Congress's passage of the Ethics in Government Act of 1978.") (footnote omitted); *Congressional News Syndicate v. U.S. Dep't of Justice*, 438 F. Supp. 538, 545 (D.D.C. 1977) (noting "the undeniable public interest concerning the details of an illicit political fundraising operation in which members of the White House staff participated"); *Dow Jones & Co. v. U.S. Dep't of Justice*, 724 F. Supp. 985, 990-991 (D.D.C. 1989) ("The federal statute requiring disclosure of acceptance of free meals [by members of Congress] . . . tips the balance in favor of disclosure.") (footnote omitted). Indeed, CREW notes that DOJ, in contrast to its position here, has previously recognized that there is a significant public interest in disclosure of the specific material CREW seeks. 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.).

DOJ asserts that "to the extent that CREW contends that [DOJ's] decision not to prosecute Mr. DeLay . . . constitutes agency misconduct," it must present "evidence . . . that the alleged . . . impropriety might have occurred." Def. Mem. at 20 (quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). First, and most importantly, CREW does not, as DOJ suggests, rely upon a claim of "agency misconduct" in support of disclosure. Rather, it relies upon the undisputed public interest in DOJ's "performance of its statutory duties." *See, e.g., Showing Animals Respect & Kindness*, 730 F. Supp. 2d at 195 n. 17 ("Plaintiff does not argue that there was any negligence or misfeasance on the part of government officials," so that "*Favish* standard" does not apply.).[7]

Second, DOJ cites authority addressing circumstances wholly dissimilar to those present here. In *Favish*, the requester sought disclosure of graphic death-scene photographs that were taken as part of the investigation into the death of deputy White House counsel Vincent Foster. Because of the controversy and suspicion surrounding the case, it was the subject of five separate investigations. 541 U.S. at 162.[8] In a holding that "would allow the Government to deny [such] gruesome requests in appropriate cases," 541 U.S. at 170, the Court wrote:

> In the case of photographic images and other data pertaining to an individual who died under mysterious circumstances, *the justification most likely to satisfy Exemption 7(C)'s public interest requirement is that the information is necessary to show the investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties*. . . .
>
> We hold that, where there is a privacy interest protected by Exemption 7(C) and *the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties*, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a

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[7] At the administrative level, CREW asserted, *inter alia*, that disclosure of the requested records "would shed light on DOJ's conduct in conducting the investigation of Mr. DeLay, and its apparent decision to close the investigations without bringing charges against Mr. DeLay." Exhibit B (attached to Hardy Decl.).

[8] "The [initial] investigation [by the United States Park Police] concluded that Foster committed suicide by shooting himself with a revolver. Subsequent investigations by the Federal Bureau of Investigation, committees of the Senate and the House of Representatives, and independent counsels Robert Fiske and Kenneth Starr reached the same conclusion. Despite the unanimous finding of these five investigations, a citizen interested in the matter, Allan Favish, remained skeptical [and submitted the FOIA request at issue]." *Id*. at 161.

> reasonable person that the alleged Government impropriety might have occurred.
> . . .
>
> It would be quite extraordinary to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion. . . . *[T]he balancing exercise in some other case might require us to make a somewhat more precise determination regarding the significance of the public interest and the historical importance of the events in question. We might need to consider the nexus required between the requested documents and the purported public interest served by disclosure*. We need not do so here, however.

Id. at 173-175 (emphasis added).[9]

Unlike this case, *Favish* did not involve an agency's attempt to "categorically withhold" *any* responsive records located in its investigative files. Instead, it involved a very specific request for highly sensitive images relating to a matter that had been the subject of "five different inquiries [which] reached the same conclusion." Under those circumstances, the Court found that "the justification most likely to satisfy [the] public interest requirement is that the information is necessary to show the investigative agency or other responsible officials acted negligently or otherwise improperly," and that the requisite showing had not been made.[10] Because CREW does not allege agency misconduct, such a showing is not required here. As the D.C. Circuit recently held, in distinguishing *Favish*, where (as here) a FOIA requester is "not (or at least not only) seeking to show that the government's [action] is legally improper," evidence

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[9] The Court emphasized that, "We do not in this single decision attempt to define the reasons that will suffice, or the necessary nexus between the requested information and the asserted public interest that would be advanced by disclosure. *Id*. at 172-173.

[10] Similarly, in *McCutchen v. U.S. Dep't of Health & Human Servs.*, 30 F.3d 183 (D.C. Cir. 1994), which DOJ cites, Def. Mem. at 20, the court noted that, *"[w]hen . . . governmental misconduct is alleged as the justification for disclosure*, the public interest is insubstantial unless the requester puts forward compelling evidence that the agency denying the FOIA request is engaged in illegal activity and shows that the information sought is necessary in order to confirm or refute that evidence." 30 F.3d at 189 (quoting *Davis v. Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992)) (emphasis added). *See also SafeCard Servs v. S.E.C.*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991) (same).

of misconduct is not required. "'[M]atters of substantive law enforcement policy . . . are properly the subject of public concern,' whether or not the policy in question is lawful." *Amer. Civil Liberties Union*, 2011 U.S. App. LEXIS 18472 at *38 (quoting *Reporters Comm.*, 489 U.S. at 766, n.18).

Like this Court recently found in *Judicial Watch*, 598 F. Supp. 2d at 96, the records at issue here – which DOJ has thus far refused to specifically identify – "could well be suffused, from top to bottom, with information about DOJ's performance of its duties." As such, the agency "therefore must conduct an assessment of each responsive document to determine whether it is exempt." *Id*. *See also Kimberlin*, 139 F.3d at 950; *Common Cause*, 628 F.2d at 184. In light of the absence of a cognizable privacy interest, and the substantial public interest in disclosure, DOJ's decision to "categorically withhold" all records responsive to CREW's request must be rejected because the agency has failed to comply with the requirements of *Vaughn* and has not "provide[d] 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." *Mead Data Cent., Inc.*, 566 F.2d at 251 (citations omitted).

III. DOJ's "Categorical" Withholding of Records Under Exemption 7(A) is Improper

In addition to its "privacy" claims, the FBI also seeks to "categorically" withhold all responsive material on the basis of Exemption 7(A), which protects from disclosure law enforcement records to the extent that release "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). DOJ asserts that "the applicability of Exemption 7(A) may be demonstrated categorically, based on the category of records involved, rather than on a document-by-document basis." Def. Mem. at 28 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). The issue in *Robbins Tire*, however, was whether the

FOIA "requires the National Labor Relations Board to disclose, prior to its hearing on an unfair labor practice complaint, statements of witnesses whom the Board intends to call at the hearing." *Id*. at 216. The Court emphasized that it was "dealing here with the *narrow question* whether witnesses' statements must be released five days prior to an unfair labor practice hearing," and concluded, "we cannot see how FOIA's purposes would be defeated by deferring disclosure until after the Government has 'presented its case in court.'" *Id*. at 242 (emphasis added; citation omitted).[11]

The circumstances here are a far cry from those present in *Robbins Tire*. In this case, DOJ seeks to withhold *all* witness statements and "investigation reports" collected during the course of what it describes as a "broad, widespread investigation into illegal lobbying activities of Jack Abramoff and others," Def. Mem. at 22 n.7, an investigation that has resulted in several public proceedings, numerous DOJ press releases and the public identification of a host of individuals involved in the matter. DOJ asserts, in a generic fashion, that harm would result from the disclosure of, *inter alia*, the names of "witnesses and other third parties" and "information, leads and other valuable investigative information supplied by various sources." *Id*. at 29. In light of the fact that here, unlike in *Robbins Tire*, the agency has already "presented its case in court" on several occasions, with the resulting public testimony of numerous witnesses, *see* Merchant Decl., the circumstances here are particularly ill-suited for a "generic" claim that the disclosure of *any* witness information would harm an investigative interest.

As the D.C. Circuit has held, "[t]here are limits . . . to when categorical rules may be

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[11] The only other authority DOJ cites in support of its "generic," categorical invocation of Exemption 7(A) is *Spannaus v. Dep't of Justice*, 813 F.2d 1285 (4th Cir. 1987). Def. Mem. at 28. Our circuit, however, has expressly rejected *Spannaus*, holding that "we decline to follow the Fourth Circuit's lead" in "setting a lower hurdle" for invocation of the exemption and noting that this circuit applies a "more probing standard of review." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 & n.4 (D.C. Cir. 2007).

employed. Only 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*, 71 F.3d at 893 (quoting *U.S. v. Landano*, 508 U.S. 165, 177 (1993)); *see also Long v. U.S. Dep't of Justice*, 450 F. Supp. 2d 42, 76 (D.D.C. 2006) (rejecting categorical invocation of Exemption 7(A) where "the range of circumstances . . . do not 'characteristically support' an inference that disclosure of this information would interfere with law enforcement proceedings"). In this case, the "range of circumstances" includes the strong possibility that many of the withheld records contain the names of, and information derived from, individuals who testified publicly at trial or whose involvement in the "broad, widespread investigation into illegal lobbying activities" is already a matter of public record. The disclosure of such information cannot "reasonably be expected to interfere with enforcement proceedings." As such, "the range of circumstances included in the category" DOJ seeks to rely upon does not "'characteristically supports an inference' that the statutory requirements for exemption are satisfied." 71 F.3d at 893.

In the absence of a *Vaughn* index specifically describing the material DOJ seeks to withhold, there is simply no foundation for " adversarial testing of [DOJ's] claims," nor the kind of specific information that would "help[] focus the court's attention on the most important issues in the litigation and [that] may reveal not otherwise apparent flaws in [DOJ's] reasoning." *Roth*, 642 F.3d at 1185. Under the circumstances present here, the agency's generic and categorical invocation of Exemption 7(A) cannot be sustained.

IV. **DOJ's Withholding of Information Under Exemptions 3, 7(D) and 7(E) is Improper**

In addition to its attempt to "categorically withhold" all responsive records under Exemption 6, 7(C) and 7(A), DOJ, on behalf of the FBI, seeks to withhold some unspecified amount of information on the basis of Exemptions 2, 3, 7(D) and 7(E). Def. Mem. at 32-35, 42-

45.[12] As a threshold matter, CREW notes that, although the FBI asserts that it conducted a search for responsive records and that "the search was adequate to assert the exemptions relied upon here," *id.* at 24 & n.9, 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.[13] As such, DOJ's motion presents a classic example of the "information asymmetry" that "distort[s] . . . the traditional adversary nature of our legal system's form of dispute resolution" and motivated the D.C. Circuit to impose the *Vaughn* index requirement in 1973. *Campaign for Responsible Transplantation v. FDA*, 511 F.3d 187, 196 (D.C. Cir. 2007); *see also Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) ("those who contest denials of FOIA requests – who are, necessarily, at a disadvantage because they have not seen the withheld documents – can generally prevail only by showing that the agency's *Vaughn* index does not justify withholding information under the exemptions invoked") (citations omitted).

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[12] To the extent that DOJ relies upon Exemption 2 to withhold "secure and nonsecure internal telephone numbers and secure internal facsimile numbers of FBI personnel," *id.* at 32, CREW does not challenge the agency's claims.

[13] DOJ devotes one paragraph of its brief to a description of the FBI's records search, but does not even attempt to show that the Bureau made "a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Rather, DOJ suggests that the standard announced in *Oglesby* does not apply because "[a] lesser showing is required to withhold documents pursuant to categorical exemptions." Def. Mem. at 24 n.8 (citing *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982)). *Perry*, however, says nothing about "categorical exemptions" and does not support DOJ's claim. In any event, in the absence of a *Vaughn* index, or any indication of the amount of material the FBI purportedly located, it is simply impossible for CREW or the Court to assess the reasonableness of the Bureau's search. *See Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994) ("agency affidavits that 'do not provide information specific enough to enable [the requester] to challenge the [search] procedures utilized' are insufficient to support summary judgment") (quoting *Weisberg v. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980)). As such, DOJ has failed to establish the adequacy of the FBI's search.

A. <u>Exemption 3</u>

Even in the face of this "disadvantage," CREW submits that DOJ has clearly failed to meet its burden of justifying its withholding claims because it argues in support of them only hypothetically, with no apparent basis in the actual nature of the material it seeks to withhold. For instance, DOJ asserts that

> to the extent that [CREW] has requested documents related to the broad lobbying investigation . . ., the FBI *would* assert Exemption 3 in conjunction with Rule 6(e) of the Federal Rules of Criminal Procedure to withhold any Federal Grand Jury information. Specifically, the FBI *would* withhold information which explicitly discloses matters that *would* occur before a Federal Grand Jury, including information contained in FD-302s that identifies specific records that *may* be subpoenaed by a Federal Grand Jury, names of potential grand jury witnesses and interview statements pertaining to proffer agreements and immunity statements, which *could* be used as evidence before a Federal Grand Jury.

Def. Mem. at 34 (emphasis added; citation omitted). Notably, DOJ does not assert that it *has* withheld information about matters that *did* occur before a grand jury, but only that it *might* withhold information matters that *might* occur before a grand jury.

An agency may only rely upon Rule 6(e), under Exemption 3, to withhold specific information that would reveal "matters occurring before the grand jury," *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 866 (D.C. Cir. 1981), as opposed to matters that *might* occur before a grand jury. *See*, *e.g.*, *In re Complaint Against Circuit Judge Richard D. Cudahy*, 294 F.3d 947, 951 (7th Cir. 2002) ("Rule 6(e) does not cover all information developed during the course of a grand jury investigation, but only information that would reveal . . . [what] *actually occurred* before the grand jury") (emphasis added) (quoting DOJ Federal Grand Jury Practice manual); *In re Grand Jury Impaneled October 2, 1978 (79-2)*, 510 F. Supp. 112, 115 (D.D.C. 1981) ("documents the disclosure of which would reveal what *actually occurred* before the grand jury and would thus frustrate the purpose of grand jury secrecy are governed by Rule 6(e)") (emphasis added). As such, DOJ's broad and improper attempt to withhold responsive information under Exemption 3 must be rejected.[14]

B. <u>Exemption 7(D)</u>

As with its invocation of Exemption 3, DOJ's reliance upon Exemption 7(D) to withhold "confidential source" information is hypothetical and not supported by specific facts relating to the circumstances of this case. Again, DOJ asserts that it "would" withhold such material, Def. Mem. at 42-43, suggesting that a concrete, legally supported decision to do so has not actually been made. In the most generic of terms, the FBI's declarant, Mr. Hardy, asserts:

> Numerous confidential sources report to the FBI on a regular basis and are "informants" within the common definition of the term. During the course of an investigation, individuals and organizations provide information under circumstances from which assurances of confidentiality can be inferred. These individuals and organizations are considered to be confidential sources since they furnish information with the understanding that their identities and information provided will not be divulged outside the FBI.

Hardy Decl., ¶ 61. Notably, Mr. Hardy makes no specific reference to the investigation at issue here, nor does he provide any information upon which the Court could determine whether specific records have been properly withheld.

The FBI's claim is precisely the kind that the D.C. Circuit recently held is insufficient to justify withholdings under Exemption 7(D):

> The agency invoking Exemption 7(D) bears the burden of proving that it applies, and with respect to the FBI, *it is not enough for the agency to claim that all sources providing information in the course of a criminal investigation do so on a confidential basis.* Instead, the FBI must "point to more narrowly defined circumstances that . . . support the inference" of confidentiality. 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

[14] To the extent that DOJ can demonstrate, through an appropriate *Vaughn* submission, that it has withheld information that would reveal matters that *actually* occurred before a grand jury, CREW will not seek disclosure of such material, provided that such information was not subsequently revealed in the course of open court proceedings.

> 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, 642 F.3d at 1184 (emphasis added; citations omitted); *see also Billington v. U.S. Dep't of Justice*, 233 F.3d 581, 584-586 (D.C. Cir. 2000); *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 34 (D.C. Cir. 1998). Under our circuit's controlling authority, DOJ's invocation of Exemption 7(D) cannot be sustained.

C. Exemption 7(E)

Finally, DOJ asserts hypothetically that it "*would* properly invoke Exemption 7(E) to protect investigation techniques and procedures." Def. Mem. at 43 (emphasis added). In support of its claim, DOJ again fails to provide any specific information that would permit the Court to assess the propriety of any such withholdings, instead merely reciting the general standards governing invocation of the exemption. *Id.* at 44; *see also* Hardy Decl., ¶¶ 63-64. Such an approach falls far short of the kind of showing this Court requires.

In *Hussain v. U.S. Dep't of Homeland Sec.*, 674 F. Supp. 2d 260, 267 (D.D.C. 2009), the agency (unlike here), submitted a "fairly lengthy" *Vaughn* index, "identifying each document by page number and providing three categories of information for each: a brief description of the document, the exemption(s) cited, and the content of the withheld portion and the basis for its withholding." Nonetheless, the Court held that the agency had not met its burden to justify its withholding, noting that

> [w]hen a *Vaughn* Index only recites the language of the statute and does not explain "why the release of the information would compromise law enforcement by, for example, revealing investigatory techniques that are not widely known to

> the general public" *with at least some specificity*, it is inadequate to justify withholding under Exemption 7(E).

Id. at 271 (emphasis added). Likewise, in *Boyd v. BATF*, 2006 U.S. Dist. LEXIS 71857, *30 (D.D.C. Sept. 29, 2006), the agency submitted three *Vaughn* indices, but the Court found that it "offer[ed] practically no description of the material withheld." Noting that the "agency is not excused . . . from providing the court with information sufficient for it to decide whether the information is properly withheld under Exemption 7(E)," the Court held that the agency failed to justify its withholding of the material.

In the absence of a *Vaughn* index, or any other "information sufficient for [the Court] to decide whether the information is properly withheld under Exemption 7(E)," DOJ's invocation of the exemption here, as in *Hussain* and *Boyd*, must be rejected.[15]

Conclusion

DOJ has 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, particularly in light of the fact that Mr. DeLay has acknowledged that he was a subject of DOJ's underlying "public corruption investigation" – an investigation that has resulted in the public identification of numerous individuals and open court

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[15] After presenting its exemption claims, DOJ briefly asserts that it has "met [its] segregability obligations" with respect to non-exempt material in the responsive records. Def. Mem. at 45. In support of its assertion, DOJ states that its "components have relied on categorical exemptions and, therefore, there is no non-exempt information for the components to have released." *Id.* Because, as we have shown, the agency's reliance upon "categorical" exemption claims is improper, the Court must also reject DOJ's *pro forma* segregability argument. *See*, *e.g.*, *Beltranena v. Clinton*, 770 F. Supp. 2d 175, 186 (D.D.C. 2011) (agency did not meet its burden where its "*only* explanation as to how it met the segregability requirement is one blanket statement in the last paragraph of [its] declaration") (emphasis in original).

proceedings in several criminal trials. As such, DOJ's motion for summary judgment should be denied with respect to that material, 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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