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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TRUTHOUT,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

No. CIV. S-12-2601 LKK/CKD

ORDER

Plaintiff Truthout sues the U.S. Department of Justice ("DOJ") under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), seeking the release of certain records withheld by the agency in response to a FOIA request.

The DOJ has moved for summary judgment in its favor, lodging with the court the *in camera*, *ex parte* declaration of one David Hardy in support. To date, only a redacted copy of this declaration has been filed on the court's publicly-accessible electronic docket. Truthout, in turn, has moved the court to order the declaration either stricken or filed publicly.

This matter has been decided on the papers submitted. For the reasons set forth below, the court will deny Truthout's

1 motion to either strike Hardy's declaration or order it publicly-
2 filed. Further, based on its review of the declaration, the court
3 will grant the DOJ's motion for summary judgment.

4 **I. BACKGROUND**

5 **A. Factual Background**

6 The following facts are taken from the operative complaint.
7 (ECF No. 1.)

8 **1. Initial FOIA request**

9 Truthout is a nonprofit organization organized under the
10 laws of California. (Complaint ¶ 3.) On April 12, 2011, Truthout
11 submitted a FOIA request to the Federal Bureau of Investigation
12 for all records about one Hesham Abu Zubaidah, who resides in
13 this judicial district. (Id. ¶ 7.) Zubaidah's brother is Zayn al-
14 Abidin Muhammad Husayn a/k/a Abu Zubaydah, whom Truthout
15 characterizes as "a high-value detainee currently imprisoned at
16 Guantanamo Bay." (Id.) Truthout also submitted a privacy waiver
17 signed by Mr. Zubaidah, and requested expedited processing of its
18 FOIA request. (Id.)

19 On August 26, 2011, the FBI acknowledged receipt of the FOIA
20 request, assigning it Request No. 1164662-000. The FBI did not
21 address the merits of Truthout's expedited processing request.
22 (Id. ¶ 8.)

23 On September 22, 2011, the FBI informed Truthout that it had
24 located approximately 1200 pages of responsive records. The FBI
25 requested that Truthout agree to pay an estimated fee of \$35 for
26 production of these records; Truthout did so. (Id. ¶ 9.)

27 On September 30, 2012 (*i.e.*, more than one year later), the
28 FBI made an interim release of redacted records to Truthout. (Id.)

1 ¶ 10.) But as of October 18, 2012 (the date this action was
2 filed), no final determination had been made as to the request.
3 (Id. ¶ 11.)

4 Truthout's first cause of action alleges a constructive
5 denial of its FOIA request, No. 1164662-000, and seeks, *inter*
6 *alia*, an order directing the FBI to provide all responsive
7 records in an expedited fashion.

8 It appears, at this time, that the parties have resolved
9 their dispute regarding this FOIA request. Plaintiff Truthout
10 writes, in its briefing herein, that, "This Motion only pertains
11 to Count 2 of the Complaint, as Plaintiff is satisfied with [the]
12 FBI's response to Count 1 and is not challenging any of its
13 withholdings." (Motion 2 n. 1, ECF No. 50-1.) Accordingly, the
14 court will not rule on those portions of the DOJ's motion for
15 summary judgment that address its denial of FOIA Request
16 No. 1164662-000.

17 **2. FBI interview of Mr. Zubaidah and subsequent**
18 **FOIA request**

19 On August 26, 2011, the same day that the FBI acknowledged
20 FOIA Request No. 1164662-000, an FBI agent interviewed
21 Mr. Zubaidah at his home, in an attempt to convince him to
22 rescind his privacy waiver. (Id. ¶ 17.) When Truthout reporter
23 Jason Leopold learned of this interview, he contacted the FBI "to
24 ask why agents were interfering with Truthout's FOIA request."
25 (Id. ¶ 18.)

26 Mr. Leopold was told by multiple FBI representatives,
27 including David Hardy, the chief of the FOIA office, that such
28 interviews were routine, and done to ensure that privacy waivers

1 were not forged or signed under duress. (Id.) Truthout alleges
2 that, "Despite diligent research, Truthout has not located a
3 single other instance in which [the] FBI has interviewed the
4 subject of a FOIA request regarding a privacy waiver." (Id.
5 ¶ 19.)

6 On July 19, 2012, Truthout submitted a FOIA request to the
7 FBI, seeking:

8 all FBI records pertaining to instances in
9 which the FBI has dispatched special agents,
10 or any other FBI officials, to make personal
11 visits to the homes, workplaces, and/or have
12 directed said officials to personally call
13 third parties who have signed Privacy Act
14 waivers authorizing individuals or
15 organizations to file FOIA requests on behalf
16 of the third party to discuss and/or
17 determine the legitimacy of the FOIA requests
18 the third parties authorized and the
19 authenticity of signatures on Privacy Act
20 waivers. (Id. ¶ 20.)

21 On August 15, 2012, the FBI acknowledged receipt of this FOIA
22 request, assigning it Request No. 1196660-000. (Id. ¶ 21.) The
23 FBI then responded as follows:

24 Please be advised that it is the FBI's policy
25 to neither confirm nor deny the existence of
26 any records which would tend to indicate or
27 reveal whether an individual or organization
28 is of investigatory interest to the FBI.
Acknowledging the FBI's interests invites the
risk of circumvention of federal law
enforcement efforts. Thus, pursuant to FOIA,
5 U.S.C. § 552 exemption (b)(7)(E), the FBI
neither confirms nor denies the existence of
records which would indicate whether an
individual or organization is or has ever
been of investigatory interest. (Id. ¶ 21.)

29 On September 12, 2012, Truthout appealed this determination to
30 the DOJ Office of Information Policy ("OIP"), arguing that

1 "[t]his request was not for records regarding which people were
2 of investigatory interest to the FBI, it was for records about
3 how the FBI processed FOIA requests, specifically, instances in
4 which FBI agents conducted interviews to determine if private
5 parties had given consent for the release of their records, as
6 occurred during the processing of Truthout's FOIA Request No.
7 1164662-000." (Id. ¶ 22.)

8 On September 28, 2012, OIP acknowledged this appeal,
9 assigning it Appeal No. AP-2012-03443. As of the date of filing
10 of the instant action, OIP had not issued a final determination
11 on the appeal. (Id. ¶¶ 23, 24.)

12 Truthout's second cause of action alleges a denial of its
13 FOIA request, No. 1196660-000, and seeks, *inter alia*, an order
14 directing the FBI to provide all responsive records in an
15 expedited fashion.

16 **B. Procedural Background**

17 Truthout filed the instant action on October 18, 2012. The
18 DOJ answered on December 5, 2012. (ECF No. 13.) Pursuant to court
19 order, the DOJ filed a motion for summary judgment on September
20 9, 2013. (ECF No. 27.) For a variety of reasons, including the
21 government shutdown and various stipulations by the parties, the
22 hearing on the summary judgment motion was continued until March
23 2014. After reviewing the party's filings, the court determined
24 that oral argument was unnecessary.

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1 **II. TRUTHOUT'S MOTION TO STRIKE OR, ALTERNATIVELY, TO ORDER**
2 **PUBLICATION OF THE HARDY DECLARATION**

3 In support of its motion for summary judgment, the DOJ
4 lodged the *in camera, ex parte* declaration of David Hardy,¹ while
5 filing a redacted version on the court's electronic docket. (ECF
6 No. 27-5.) Plaintiff now moves the court to either strike Hardy's
7 declaration from the record or, alternatively, to order it filed
8 on the public record. (ECF No. 50.) This motion was originally
9 set for hearing on January 31, 2014, but the parties subsequently
10 stipulated to having it decided on the papers. (ECF No. 59.)

11 **A. Legal Background re: FOIA**

12 FOIA requires "every federal agency, upon request, to make
13 'promptly available to any person' any 'records' so long as the
14 request 'reasonably describes such records.'" Assassination
15 Archives & Research Ctr. v. CIA, 334 F.3d 55, 57 (D.C. Cir. 2003)
16 (quoting 5 U.S.C. § 552(a)(3)(A)). The Supreme Court recently
17 summarized relevant agency procedures under FOIA as follows:

18 FOIA requires each agency receiving a request
19 to "notify the person making such request of
20 [its] determination and the reasons
21 therefor." 5 U.S.C. § 552(a)(6)(A)(i). When
22 an agency denies a request in whole or in
23 part, it must additionally "set forth the
24 names and titles or positions of each person
responsible for the denial," "make a
reasonable effort to estimate the volume of
any [denied] matter," and "provide any such

25 ¹ The operative complaint describes Hardy as "the chief of the
26 FOIA office." (Complaint ¶ 18.) Hardy avers in his declaration
27 that he is "the Section Chief of the Record/Information
28 Dissemination Section of the Records Management Division at the
Federal Bureau of Investigation in Winchester, Virginia."
(Redacted Hardy Decl. ¶ 1.)

1 estimate to the person making the request."
2 §§ 552(a)(6)(C)(i), (F).

3 Schindler Elevator Corp. v. U.S. ex rel. Kirk, __ U.S. __, 131 S.
4 Ct. 1885, 1893 (2011). Defendant DOJ has adopted implementing
5 regulations under the statute at 28 CFR §§ 16.1-16.12 (2013).

6 Despite FOIA's purpose of "facilitat[ing] public access to
7 Government documents," U.S. Dep't of State v. Ray, 502 U.S. 164.
8 173 (1991), the statutory scheme "contemplates that some
9 information may legitimately be kept from the public." Lahr v.
10 Nat'l Transp. Safety Bd., 569 F.3d 964, 973 (9th Cir. 2009). The
11 statute enumerates nine exemptions under which the government may
12 withhold documents or portions of document. See 5 U.S.C.
13 § 552(b)(1)-(9). An agency that invokes one of these exemptions
14 bears the burden of demonstrating its propriety. Ray, 502 U.S. at
15 173. The Ninth Circuit has held that FOIA exemptions are to be
16 interpreted "narrowly." Assembly of Cal. v. U.S. Dep't of
17 Commerce, 968 F.2d 916, 920 (9th Cir. 1992).

18 The DOJ seeks to exempt the redacted portions of the Hardy
19 declaration by invoking FOIA Exemption 7E, which exempts from
20 disclosure:

21 [R]ecords or information compiled for law
22 enforcement purposes, but only to the extent
23 that the production of such law enforcement
24 records or information . . . (E) would
25 disclose techniques and procedures for law
26 enforcement investigations or prosecutions,
27 or would disclose guidelines for law
28 enforcement investigations or prosecutions if
such disclosure could reasonably be expected
to risk circumvention of the law

5 U.S.C. § 552(b)(7)(E).

1 Ordinarily, "in camera inspection of documents is
2 disfavored . . . where the government sustains its burden of
3 proof by way of its testimony or affidavits," as it has here.
4 Lion Raisins v. U.S. Dept. of Agric., 354 F.3d 1072 (9th Cir.
5 2004). Nevertheless, the Ninth Circuit has recognized that in
6 certain cases, "the government's public description of a document
7 and the reasons for exemption may reveal the very information
8 that the government claims is exempt from disclosure." Doyle v.
9 F.B.I., 722 F.2d 554, 556 (9th Cir. 1983). In such cases, the
10 district need not "require the government to specify its
11 objections in such detail as to compromise the secrecy of the
12 information." Id.

13 The scope of judicial review of FOIA determinations is as
14 follows:

15 On complaint, the district court of the
16 United States in the district in which the
17 complainant resides . . . has jurisdiction
18 to enjoin the agency from withholding agency
19 records and to order the production of any
20 agency records improperly withheld from the
21 complainant. In such a case the court shall
22 determine the matter de novo, and may examine
23 the contents of such agency records in
24 camera² to determine whether such records or
25 any part thereof shall be withheld under any
26 of the exemptions set forth in subsection (b)
27 of this section, and the burden is on the
28 agency to sustain its action. In addition to
any other matters to which a court accords
substantial weight, a court shall accord
substantial weight to an affidavit of an

26 ² In this case, the DOJ has not provided the withheld records for
27 review; the *in camera*, *ex parte* Hardy declaration merely
28 describes the withheld records and the reasons why the agency
withheld them.

1 agency concerning the agency's determination
2 as to technical feasibility under paragraph
3 (2)(C) and subsection (b) and reproducibility
4 under paragraph (3)(B).³

5 U.S.C. § 552(a)(4)(B).

5 **B. Analysis re: Motion to Strike or Publish the
6 Unredacted Hardy Declaration**

6 The question presented is whether the DOJ's reliance on the
7 unredacted Hardy declaration is justified, *i.e.*, whether ordering
8 disclosure of the redacted portions "may reveal the very
9 information that the government claims is exempt from
10 disclosure." Doyle, 722 F.2d at 556.

11 Plaintiff Truthout moves to unseal the declaration based on
12 Local Rule 141(f), which provides:

13 Upon the motion of any person, or upon the
14 Court's own motion, the Court may, upon a
15 finding of good cause or consistent with
16 applicable law, order documents unsealed. See
17 Fed. R. Civ. P. 5.2, Fed. R. Crim. P. 49.1.

17 Truthout also cites Kamakana v. City & Cnty. of Honolulu, 447
18 F.3d 1172 (9th Cir. 2006), in support of its position. Kamakana
19 stands for the general proposition that a party seeking to seal a
20 judicial record attached to a dispositive motion must articulate
21 "compelling reasons" in favor of sealing.⁴ See id. at 1178.

22 ³ Paragraph (2)(C) requires agencies to "make available for public
23 inspection and copying . . . administrative staff manuals and
24 instructions to staff that affect a member of the public[.]" 5
25 U.S.C. § 552(a)(2)(C). Subsection (b) sets forth the nine
26 statutory exemptions from FOIA disclosure alluded to above. 5
27 U.S.C. § 552(b). Paragraph (a)(3)(B) provides, *inter alia*, that
28 "an agency shall provide the record in any form or format
requested by the person if the record is readily reproducible by
the agency in that form or format." 5 U.S.C. § 552(3)(B).

⁴ Under the "compelling reasons" standard, a district court must
weigh "relevant factors," base its decision "on a compelling

1 Truthout's reliance on Kamakana, while understandable, is
2 inapt. Importing the general standard for the sealing of records
3 into FOIA litigation threatens to vitiate the exemptions that the
4 statute sets forth. In deciding whether a FOIA exemption applies,
5 the court may be unable to "articulate the factual basis for its
6 ruling," Pintos, 605 F.3d at 679, without simultaneously
7 revealing the information that the government seeks to withhold.
8 It is in recognition of this fact that the Ninth Circuit allows
9 district courts to "rule on summary judgment in FOIA cases solely
10 on the basis of government affidavits describing the documents
11 sought." Lion Raisins, 354 F.3d at 1082 (citing Church of
12 Scientology of Cal. v. U.S. Dept. of Army, 611 F.2d 738, 742 (9th
13 Cir. 1979)).

14 Both parties cite Lion Raisins, 354 F.3d at 1072, in support
15 of their positions. Defendant DOJ describes the case as
16 "recognizing the Court's endorsement of using *in camera*
17 affidavits to decide some FOIA cases." It is better understood as
18 standing for the proposition that district courts "must require
19 the government to justify FOIA withholdings in as much detail as
20 possible on the public record before resorting to *in camera*
21 review." Id. at 1084. Lion Raisins concerns an appeal from entry
22 of summary judgment in the government's favor in a FOIA case;
23 several records had been withheld under FOIA Exemption 7(A), "law
24 enforcement records or information [which] could reasonably be
25 expected to interfere with enforcement proceedings." 5 U.S.C.

26 reason," and "articulate the factual basis for its ruling,
27 without relying on hypothesis or conjecture." Pintos v. Pac.
28 Creditors Ass'n, 605 F.3d 665, 679 (9th Cir. 2009) (quoting
Hagestad v. Tragesser, 49 F.3d 1430, 1434 (9th Cir. 1995)).

1 § 552(b)(7). The Ninth Circuit reversed the district court,
2 finding fault with the latter's "reliance on *in camera* review of
3 the sealed declaration as the sole basis for its decision," id.
4 at 1082, and remanded, requiring "the district court [to] require
5 [the government] to submit detailed public declarations,
6 testimony, or other material in support of its invocation of
7 the . . . exemption and afford [plaintiff] an opportunity to
8 advocate for the release of the reports." Id. at 1085.
9 Ultimately, the Ninth Circuit held, "the district court must
10 require the government to justify FOIA withholdings in as much
11 detail as possible on the public record before resorting to *in*
12 *camera* review." Id. at 1084.

13 The DOJ has not run afoul of Lion Raisins here. Having
14 reviewed the unredacted Hardy declaration, the court is satisfied
15 that the government "has submitted as much detail in the form of
16 public affidavits and testimony as possible" in the form of the
17 redacted Hardy declaration. Id. at 1083. Moreover, Truthout has
18 had the opportunity to advocate for the release of both the
19 unredacted Hardy declaration (by seeking an order that unseals or
20 strikes it) and the underlying records responsive to the FOIA
21 request (by opposing the DOJ's summary judgment motion).⁵
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23

24 ⁵ Despite the Ninth Circuit's admonition that "[r]equiring as
25 detailed public disclosure as possible of the government's
26 reasons for withholding documents under a FOIA exemption is
27 necessary to restore, to the extent possible, a traditional
28 adversarial proceeding by giving the party seeking the documents
a meaningful opportunity to oppose the government's claim of
exemption," Lion Raisins, 354 F.3d at 1083, the court is fully
aware that Truthout is essentially fighting blindfolded.

1 Truthout also argues that the DOJ should be required to
2 provide it with a "Vaughn index," a term of art originating in
3 the seminal case of Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir.
4 1973). The Ninth Circuit has described Vaughn indices as follows:

5 Ordinarily, rules of discovery give each
6 party access to the evidence upon which the
7 court will rely in resolving the dispute
8 between them. In a FOIA case, however,
9 because the issue is whether one party will
10 disclose documents to the other, only the
11 party opposing disclosure will have access to
12 all the facts. [citations.]

13 "This lack of knowledge by the party seeking
14 disclosure seriously distorts the traditional
15 adversary nature of our legal system[]."
16 Vaughn, 484 F.2d at 824. The party requesting
17 disclosure must rely upon his adversary's
18 representations as to the material withheld,
19 and the court is deprived of the benefit of
20 informed advocacy to draw its attention to
21 the weaknesses in the withholding agency's
22 arguments. It is simply "unreasonable to
23 expect a trial judge to do as thorough a job
24 of illumination and characterization as would
25 a party interested in the case." Id. at 825.

26 In recognition of this problem, government
27 agencies seeking to withhold documents
28 requested under the FOIA have been required
to supply the opposing party and the court
with a "Vaughn index," identifying each
document withheld, the statutory exemption
claimed, and a particularized explanation of
how disclosure of the particular document
would damage the interest protected by the
claimed exemption. [citations.] The purpose
of the index is to "afford the FOIA requester
a meaningful opportunity to contest, and the
district court an adequate foundation to
review, the soundness of the withholding."
[King v. Dep't of Justice, 830 F.2d. 210, 218
(D.C. Cir. 1987).] The index thus functions
to restore the adversary process to some

1 extent, and to permit more effective judicial
2 review of the agency's decision.

3 Wiener v. F.B.I., 943 F.2d 972, 977-78 (9th Cir. 1991). Not only
4 did the DOJ deny Truthout's FOIA request herein, it also failed
5 to furnish a Vaughn index with its denial. The difficulty,
6 however, is that the court cannot discern a way to require the
7 DOJ to provide "a particularized explanation of how disclosure of
8 the particular document would damage the interest protected by
9 the claimed exemption," id., without also forcing the agency to
10 reveal the information contained in the withheld documents. As
11 discussed below, this information falls within FOIA Exemption 7E.

12 Accordingly, the court will deny Truthout's motion to either
13 strike Hardy's declaration or order that it be publicly filed.

14 **C. Analysis re: Summary Judgment Motion**

15 Having reviewed the unredacted Hardy declaration, the court
16 concludes that the DOJ has met its burden on summary judgment
17 regarding Request No. 1196660-000. "There is no genuine dispute
18 as to any material fact and the movant is entitled to judgment as
19 a matter of law," Fed R. Civ. P. 56(a), that the withheld
20 documents meet the criteria outlined in FOIA Exemption 7E.
21 Disclosure of the withheld information would "disclose techniques
22 and procedures for law enforcement investigations or
23 prosecutions, or would disclose guidelines for law enforcement
24 investigations or prosecutions if such disclosure could
25 reasonably be expected to risk circumvention of the law." 5
26 U.S.C. § 552(b)(7)(E).⁶

27 _____
28 ⁶ Moreover, it is arguable, though the court does not here find,
that the pertinent documents would qualify for other FOIA

1 I am bound by the FOIA statute in reaching this conclusion.
2 Nonetheless, the court must state that Hardy's unredacted
3 declaration is the quintessence of bureaucratic obfuscation.
4 While attempting to decipher its meaning, I recalled one of
5 Orwell's observations when confronted with such writing:

6 As soon as certain topics are raised, the
7 concrete melts into the abstract and no one
8 seems able to think of turns of speech that
9 are not hackneyed: prose consists less and
10 less of words chosen for the sake of their
11 meaning, and more and more of phrases tacked
12 together like the sections of a prefabricated
13 henhouse.

14 George Orwell, "Politics and the English Language," in A
15 Collection of Essays 162, 165 (Anchor Books 1954). Which begs the
16 question, why did the government resort to hackwork here? Orwell
17 again:

18 The inflated style is itself a kind of
19 euphemism. A mass of Latin words falls upon
20 the facts like soft snow, blurring the
21 outlines and covering up all the details. The
22 great enemy of clear language is insincerity.
23 When there is a gap between one's real and
24 one's declared aims, [the writer] turns, as
25 it were, instinctively to long words and
26 exhausted idioms, like a cuttlefish squirting
27 out ink.

28 **IV. CONCLUSION**

The court hereby orders as follows:

[1] Plaintiff's motion for an order striking the *ex parte*
declaration of David Hardy from the record, or


Exemptions outlined in 5 U.S.C. § 552(b)(7), thereby possibly
reinforcing the propriety of allowing the DOJ to withhold the
information from disclosure.

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alternatively, directing that it be filed on the public record, is DENIED.

[2] Defendant's motion for summary judgment is GRANTED. IT IS SO ORDERED.

DATED: May 5, 2014.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT