IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC. Plaintiff, v. REX W. TILLERSON, in his official capacity as Secretary of State of the United States Defendant.	Case No. 1:15-cv-00785-JEB
CAUSE OF ACTION INSTITUTE Plaintiff, v. REX W. TILLERSON, in his official capacity as Secretary of State of the United States and DAVID S. FERRIERO, in his official capacity as Archivist of the United States Defendants.	Case No. 1:15-cv-01068-JEB

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR THE PRODUCTION OF DEFENDANTS' DECLARATION FILED *IN CAMERA* AND *EX PARTE*

Defendants offer three arguments—two substantive and one procedural—in opposition to Plaintiffs' Motion for the Production of Defendants' Declaration Filed *In Camera* and *Ex Parte*. None of these arguments justify denying the motion. To the contrary, as shown below and in the accompanying declaration of Matthew Continetti, editor in chief of the *Washington Free Beacon*, both law and public interest favor production of the un-redacted Second Priestap Declaration.

Argument

I. Plaintiffs have demonstrated a particularized need for access to the un-redacted Second Priestap Declaration

Defendants' first argument is to claim that Plaintiffs have failed to make a particularized showing of need for access to the un-redacted Second Priestap Declaration because that declaration is irrelevant to the merits of this case. This argument has two parts.

A. Plaintiffs cannot present their case to the Court without access to the un-redacted Second Priestap Declaration

First, Defendants claim that "Plaintiffs do not explain how it would advance their case for them to know the exact identities of the entities to whom the subpoenas were addressed, or the exact scope of the information sought by the subpoenas, let alone how, without this information, they will suffer an injustice in this case." Mem. in Opp'n to Pls.' Mot. for Production of Defs.' Decl. Filed *In Camera* and *Ex Parte* at 3, ECF No. 47 [hereinafter Defs.' Opp'n].

This argument simultaneously misses the point and strains credulity. Plaintiffs' motion for the production of the un-redacted Second Priestap Declaration is limited to that declaration, not the entirety of the materials produced during the grand jury proceedings related to the Clinton email investigation. The motion is necessary to allow Plaintiffs—as is their right—to know and respond to the specific arguments and evidence Defendants adduced in support of their dispositive motion. The only reason Defendants submitted the Second Priestap Declaration is because Plaintiffs attacked the sufficiency of the First Priestap Declaration and accompanying Federal Bureau of Investigation ("FBI") report for failing to establish the fatal loss of the BlackBerry Emails. Whether Defendants have established that fatal loss is the central question with regard to Defendants' dispositive motion, and it would work a fundamental miscarriage of justice to allow Defendants to respond to Plaintiffs' arguments with new evidence that Plaintiffs are never allowed to see or rebut.

In its opposition to Defendants' dispositive motion, Plaintiff Cause of Action Institute raised a "legion of unanswered questions" about the sufficiency of Defendants' proof and argued that "without those answers, Defendants' general reference to subpoenas does nothing to establish the 'fatal loss' of Secretary Clinton's BlackBerry emails." Pl. Cause of Action Inst.'s Opp'n to Defs.' Dispositive Mot. and Cross-Mot. for Disc. or, in the Alternative, Summ. J. at 8–9, ECF No. 35 [hereinafter CoA Inst. Opp'n to Disp. Mot.]. In response, Defendants submitted the Second Priestap Declaration but did so in a way to hide the key facts in it from Plaintiffs. They admit as much: "Defendants are seeking for leave to submit *in camera* an *ex parte* declaration providing further details of the subpoenas to establish to the Court's satisfaction the thoroughness of the inquiries made in this regard." Mem. in Opp'n to Pls.' Cross-Mots. for Summ. J. and/or Disc., and in Further Supp. of Defs. Mot. to Dismiss or, in the Alternative, for Summ. J. at 6, ECF No. 42. In their motion for leave to submit the declaration *in camera* and *ex parte*, Defendants state that the declaration is "in support of" their dispositive motion because it "contains additional details about the grand jury process that Assistant Director Priestap referenced in his first declaration . . . as well as about other sealed proceedings" to "supplement defendants' showing regarding the scope of the FBI investigation and [because it] will aid in the Court's resolution of the matter[.]" Defs.' Mot. for Leave to Submit *In Camera*, *Ex Parte* Decl. at 1–2, ECF No. 43.

In short, Defendants submitted the un-redacted Second Priestap Declaration in response to and in an attempt to answer the "legion of unanswered questions" Plaintiffs raised to rebut Defendants' initial showing. It is untenable for Defendants now to claim that Plaintiffs have not established why they need to see the evidence upon which Defendants rely to answer the very questions Plaintiffs raised to undermine Defendants' position. Plaintiffs deserve an opportunity

to review the full extent of the evidence in this case and the opportunity to argue why that evidence does not establish the fatal loss of the records in question, thus defeating Defendants' mootness and summary judgment arguments. *See Secs. & Exchange Comm'n v. Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997) ("The prohibition against selective disclosure of confidential materials derives from the appropriate concern that parties do not employ privileges both as a sword and as a shield."); *Abourezk v. Reagan*, 785 F.2d 1043, 1060–61 (D.C. Cir. 1986) ("It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions.").

Some possible scenarios may provide the Court with more clarity about how Plaintiffs could use information in the un-redacted Second Priestap Declaration to further undercut Defendants' case. For example, if the subpoenas referenced in the First Priestap Declaration were sent to Secretary Clinton's staff or attorneys and those individuals responded that they were unable to secure the BlackBerry emails, that would not establish fatal loss but would still be consistent with the statements in the First Priestap Declaration. Plaintiffs would present arguments that such efforts are insufficient to satisfy Defendants' Federal Records Act obligations. Another possibility is that the subpoenas were sent to the commercial email providers that housed the BlackBerry emails and the providers' response was not that they tried and failed to recover the emails but only that the emails sought were created "outside the retention time utilized by those providers." [First] Decl. of E.W. Priestap, Fed. Bureau of Investigation ¶ 4, ECF No. 33-2. That information also would be consistent with the First

Priestap Declaration but, standing alone, would not establish the fatal loss of the BlackBerry Emails because it would not speak to whether they could be recovered through forensic means, especially if investigators from the FBI or other components of the Department of Justice had access to the servers and back-up systems. *See* CoA Inst. Opp'n to Disp. Mot. at 7–9.

Plaintiffs have resorted to describing these possible scenarios and arguments because they do not have access to the complete evidence upon which Defendants' base their new allegations. By allowing Plaintiffs access to the un-redacted Second Priestap Declaration, Plaintiffs would be in the position to argue directly to the specific issues presented.

B. Defendants cannot have it both ways by submitting evidence to the Court while arguing it is not relevant to the case

The second part of Defendants' argument that Plaintiffs have not shown a particularized need for the un-redacted Second Priestap Declaration is that the declaration is not pertinent to the merits of this case. Defendants frame the issue on the merits as whether Defendants have met their burden "*based on the evidence that was before those agencies*. That evidence consisted of the FBI report, outlined in the First Priestap Declaration, which was cited by the agencies as the basis for their assessments." Defs.' Opp'n at 4 (emphasis in original). Defendants further argue that because "[t]he additional detail contained in the unredacted Supplemental Priestap Declaration was not a basis for those agencies' conclusion [that information] therefore is not relevant to the issue in this suit—that is, whether the conclusions made by those agencies were reasonable." *Id.* at 2.

If the un-redacted Second Priestap Declaration and the information it contains are not part of the record that was before the agencies when they made their decision not to initiate action through the Attorney General, and for that reason is not relevant to the merits of this case, then why did Defendants submit the declaration at all? Defendants attempt to answer that

question in a footnote, contending that "the information was nevertheless provided to the Court, *in camera* and *ex parte*, in an abundance of caution, to give the Court further confidence that an 'injustice' was not occurring." Defs.' Opp'n at 4 n.1. But Defendants cannot have it both ways: they cannot both assert the declaration's irrelevance and simultaneously present it as evidence for the Court to consider in deciding their dispositive motion. Plaintiffs' ability to present their case has been prejudiced by the *in camera* and *ex parte* submission because Defendants have presented new evidence to the trier of fact to support their dispositive motion. They cannot now un-ring that bell by claiming that the declaration actually is irrelevant to the Court's determination on the merits of this case. Basic notions of fair play counsel that Plaintiffs must be provided an opportunity to impeach Defendants' new evidence.

Defendants' position also ignores that their pending hybrid dispositive motion is first and foremost a motion to dismiss on Federal Rule of Civil Procedure 12(b)(1) mootness grounds. In considering such a motion, it is proper for this Court to examine materials outside the pleadings and administrative record to ensure that it has jurisdiction. *See Green v. McHugh*, 793 F. Supp. 2d 346, 350 (D.D.C. 2011) (The court "'is not limited to the allegations of the complaint in deciding a Rule 12(b)(1) motion.' Rather, a court 'may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction to hear the case.'") (quoting *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987); *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000)).

Therefore, if the Court treats Defendants' motion as one to dismiss, it is proper for it to consider the un-redacted Second Priestap Declaration in its mootness analysis, so long as Plaintiffs have an opportunity to examine it and present the Court with counter-arguments as to

why the case is not moot. If, in the alternative, the Court treats Defendants' motion as one for summary judgment under Federal Rule of Civil Procedure 56, the record under review must be only that which was before the agency, which Defendants admit does not include the Second Priestap Declaration. *See Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582–83 (D.C. Cir. 2001) (holding judicial review of informal adjudications must be based only on the "whole record" before the agency and not "the parties' written or oral representations") (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419–21 (1971)).

II. Plaintiffs' particularized need for full access to the facts Defendants placed before the Court outweighs any lingering grand-jury secrecy concerns

For its second substantive argument, Defendants state there is a continuing interest in maintaining the secrecy of the grand-jury proceedings as described in the un-redacted Second Priestap Declaration. Defs.' Opp'n at 5. As a threshold matter, Defendants appear to concede the subpoena targets were not natural persons. They argue only for policy considerations that attach "[e]ven where the 'witnesses' are companies who may have relevant information, rather than individuals or victims[.]" *Id.* Defendants make no parallel arguments applicable to natural persons, raise no personal privacy defenses, and do not respond to Plaintiffs' argument that commercial email providers have no privacy interests to protect. *See* Pls.' Mot. for Production of Defs.' Decl. Filed *In Camera* and *Ex Parte* at 10, ECF No. 45 [hereinafter Pls.' Mot. to Produce].

One of the primary reasons grand-jury proceedings are kept secret is to "ensure that 'persons who are accused but exonerated by the grand jury will not be held up to public ridicule.'" *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir. 2007) (quoting *Douglas Oil Co. v. Petrol Stops Nw.,* 441 U.S. 211, 219 (1979)). The "D.C. Circuit has identified the individual 'privacy interests at stake' for persons subject to criminal investigations, include[e] 'avoiding the stigma of having [the subject's] name associated with a

criminal investigation' and 'keeping secret the fact that they were subjects of a law enforcement investigation[.]'" *Matter of the Application of WP Co. LLC*, 201 F. Supp. 3d 109, 123 (D.D.C. 2016) (quoting *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice*, 746 F.3d 1082, 1091–92 (D.C. Cir. 2014)). These interests also include "'a second, distinct privacy interest in the contents of the investigative files.'" *Id*. Defendants do not contend that any of these privacy concerns applicable to natural persons are relevant here.

Instead, they rely solely on the theory that disclosure of information that a target provides in response to a grand-jury subpoena could "strain or damage those targets' relationships with other entities or individuals, and lead to less willingness to cooperate in the future." Defs.' Opp'n at 5. This, Defendants argue, is akin to a "[f]ear of future retribution or social stigma[.]" *Id*. (citing *Douglas Oil Co*., 441 U.S. at 222).

Any concern about the possibility of future self-censorship is without merit in this case. "[S]everal courts have noted that the release of grand jury testimony is no longer a rarity, and grand jury witnesses are likely to learn that before testifying." *Anilao v. Spota*, 918 F. Supp. 2d 157, 180 (E.D.N.Y. 2013) (collecting cases discussing the common-place release of grand-jury materials). A district court in the Southern District of New York found the self-censorship concern to be "nonsense when the question is whether witnesses might self-censor out of fear that their testimony may be used against another person." *Frederick v. New York City*, No. 11-469, 2012 WL 4947806, at *6 (S.D.N.Y. Oct. 11, 2012). This is so, the court reasoned, because the whole point of grand-jury witnesses is that "their testimony may affect third parties, and [because] witnesses often testify without full knowledge of what legal implications may follow from their statements." *Id*. "This is even more obviously the case," the court continued, "when we turn to the decidedly unlikely specter of self-censorship resulting from fear that grand jury

statements may ultimately be used against other people in a civil suit arising years later from misconduct in the original criminal case." *Id.* A district court in Colorado found that an unspecified potential future impact on grand juries is not a basis to deny disclosure when a movant has established a particularized need for the information, as Plaintiffs have done here. *See United States v. Le*, No. 13-295, 2014 WL 1882111, at *3 (D. Colo. May 12, 2014) ("[A]s the only secrecy concern relevant here is the possible effect of disclosure upon future grand juries, the Court finds that the [movant] has shown that his need for the grand jury transcript and materials prevails.").

In cases where district courts *have* paid close attention to the self-censorship concern, they have focused on the potential stigmatic effect on individuals, not corporate reputations. *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, 931 F. Supp. 2d 458, 466 (E.D.N.Y. 2013) (denying disclosure where it "may very well subject *both individuals* to 'retribution and social stigma' within the industry in which they have made their careers" because they testified against their supervisors) (emphasis added); *Goldstein v. City of Long Beach*, 603 F. Supp. 2d 1242, 1259 (C.D. Cal. 2009) (finding disclosure posed no adverse consequences for future grand juries where the government "cannot identify any consequences *for specific individuals* if their status as a grand jury witness were disclosed in the limited manner proposed") (emphasis added); *United States v. Boffa*, 513 F. Supp. 444, 495 (D. Del. 1980) (denying disclosure in the context of RICO investigations "because [they] are likely to involve elements of organized crime and witness' fears of possible reprisals are likely to be more acute"). Defendants point the Court to no cases where potential "strain or damage [to] targets' relationships with other entities or individuals"—either by individuals or corporate respondents—is a sufficient policy concern to deny disclosure. Defs.' Opp'n at 5.

Here, the existence of a grand jury concerning the Clinton email investigation is well known. Indeed, the fact of the grand-jury proceedings was already revealed in this case and has since been covered in the press and was the subject of congressional inquiry during the testimony of former FBI Director James Comey before the Senate Committee on the Judiciary. *See* Pls.' Mot. to Produce at 5–6. The grand-jury proceeding itself and its primary target, former Secretary Clinton, are not a secret, and neither is the fact that former Secretary Clinton used a Blackberry and private email account to conduct official government business during the first weeks of her tenure. Defendants point to no other privacy interests that would justify hiding the information contained in the Second Priestap Declaration from Plaintiffs.

Just as importantly, given the high-profile nature of former Secretary Clinton and the considerable public interest in her use of a private email system during her tenure as Secretary of State, as well as the subsequent FBI investigation, production of the un-redacted Second Priestap Declaration would serve the public interest. *See* Decl. of Matthew Continetti ¶¶ 4–5 (Ex. 1) ("The fact of the FBI's investigation has long been a matter of public knowledge and public interest. The more facts that are made public about this investigation, the better equipped the public will be to assess the merits and outcome of the investigation. . . . It is essential for the public to understand the full scope and breadth of the FBI's investigation into Secretary Clinton's email server for the public to make an informed decision about what transpired during Secretary Clinton's service at the State Department.").

III. This Court is the proper venue for Plaintiffs to lodge their request for disclosure of the un-redacted Second Priestap Declaration

Finally, Defendants argue that even if this Court grants Plaintiffs' motion it is nonetheless unable to provide the relief requested because Plaintiffs are required to "proceed to the court which empaneled the grand jury at issue, for the latter court to make a final determination as to

whether plaintiffs' need for the information outweighs the need for continued grand jury secrecy in this case." Defs.' Opp'n at 6. Defendants rely on *United States v. Alston*, 491 F. Supp. 215, 216 (D.D.C. 1980), which stated that the proper procedure is for the:

> movant to apply first to the court in which the principal action lies for certification that disclosure is warranted. This relieves the grand-jury court of the difficult task of attempting to ascertain, in a case in which it is not otherwise involved, that there is a true need for disclosure. Under the certification procedure, the court that is most competent to make that determination has the responsibility for making it. If it does certify the matter to the grand-jury court, that court is then in a position to balance the need for disclosure against the need for secrecy, a determination which it is most competent to make.

In this case, Plaintiffs are following the process in *Alston*. Plaintiffs petitioned this Court because it already is in possession of the materials to which Plaintiffs seek access. Plaintiffs also are unaware of—and presently have no way of knowing—the judicial district where the grand jury was convened, and so are unable to petition that court directly. As Defendants suggest, if this Court finds disclosure is appropriate, it may certify the matter to the grand-jury court. That such a procedure is applicable, however, is not a basis to deny Plaintiffs' motion.

What's more, it is almost certain that attorneys for Defendants have already engaged with the court that supervised the grand jury and received permission to make the public disclosures concerning the grand-jury proceedings and subpoenas that they did in the First Priestap Declaration. Federal Rule of Criminal Procedure 6(e)(2)(B)(vi) prohibits "an attorney for the government" from disclosing "a matter occurring before [a] grand jury[.]" The rule contains an exception that allows disclosure *to* "an attorney for the government for use in performing that attorney's duty[.]" Fed. R. Crim. P. 6(e)(3)(A)(i). That exception, however, does not permit further disclosure *by* that attorney. The Supreme Court has stated that this exception does not mean that "any Justice Department attorney is free to rummage through the records of any grand jury in the country, simply by right of office." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418,

428–30 (1983).[1] The Court continued that the exception was "never intended to grant free access to grand jury materials to attorneys not working on the criminal matters to which the materials pertain." *Id.* at 429. The Court concluded that access is limited to when government attorneys' "*prosecutorial* duties require it." *Id.* (emphasis in original).

Appropriately, Rule 6(e) provides a mechanism for the government to petition the grand-jury court for broader disclosure. *See* Fed. R. Crim. P. 6(e)(3)(F) (authorizing an *ex parte* hearing "when the government is the petitioner" for disclosure); *see also United States v. Kellogg Brown & Root Servs., Inc.*, No. 12-4110, 2016 WL 5344419, at *7 & n.18 (C.D. Ill. Sept. 16, 2016) (recognizing government attorneys must request access under Rule 6(e) and secure an order after doing so). Here, it is evident that attorneys for the government not only accessed protected grand-jury materials but disseminated them to other government employees and disclosed them to the public when filing Defendants' dispositive motion and the First Priestap Declaration. Those attorneys could not properly have done so without first petitioning the grand-jury court and receiving its permission to make those disclosures public. Plaintiffs are asking that they be afforded the same opportunity.

CONCLUSION

For the reasons stated, the Court should order the production of the un-redacted Second Priestap Declaration.

---

[1] A district court has noted that *Sells Engineering* was superseded by statute, allowing government attorneys to use grand jury materials in civil proceedings. *See United States v. Warshak*, No. 06-111, 2007 WL 4410237, at *12–13 (S.D. Ohio Dec. 13, 2007) (citing 18 U.S.C. § 3322). But that statutory authority is limited to disclosures to other attorneys for the government and only for the purpose of financial, banking, or civil-forfeiture proceedings, none of which are relevant here.

Date: July 28, 2017

Respectfully submitted,

/s/ James F. Peterson
James F. Peterson (D.C. Bar. No. 450171)

JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172
jpeterson@judicialwatch.org

Counsel for Plaintiff Judicial Watch, Inc.

/s/ John J. Vecchione
John J. Vecchione (D.C. Bar. No. 431764)
Lee A. Steven (D.C. Bar No. 468543)
R. James Valvo, III (D.C. Bar. No. 1017390)

CAUSE OF ACTION INSTITUTE
1875 Eye St., NW, Suite 800
Washington, DC 20006
Telephone: (202) 499-4232
Facsimile: (202) 330-5842
john.vecchione@causeofaction.org
lee.steven@causeofaction.org
james.valvo@causeofaction.org

Counsel for Plaintiff Cause of Action Institute

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States District Court for the District of Columbia by using the ECF system, thereby serving all persons required to be served.

Date: July 28, 2017

/s/ John J. Vecchione
John J. Vecchione