IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 16-cv-1888 (RMC)
v.	)	
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel, respectfully submits this memorandum of points and authorities in opposition to Defendant's motion for summary judgment.

POINTS AND AUTHORITIES

I. Introduction.

At issue are three FD-302s – the FBI's written reports of interviews with former President Barack Obama, Valerie Jarrett, and Rahm Emanuel. The interviews were conducted in December 2008, during a criminal investigation of then-Illinois Governor Rod Blagojevich. Blagojevich was subsequently convicted on multiple corruption charges and sentenced to 168 months in prison. His conviction was largely affirmed on appeal, and, after being resentenced to the same 168-month sentence he received originally, his resentencing was affirmed in a second appeal decided on April 21, 2017.

Plaintiff seeks only the 302s and therefore takes no issue with the scope of Defendant's search. The issue for the Court to decide is whether Defendant may withhold the 302s in their entirety and, if not, what redactions may properly be applied. Plaintiff respectfully submits that

Defendant may not withhold the 302s in their entirety and, to the extent the 302s are subject to redaction, any decision on the propriety of the redactions should wait production of the redacted 302s to better allow Plaintiff and the Court to assess the context in they are asserted.

II. Argument.

A. Standard of Review.

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed. R. Civ. P. 56(c). An agency's decision to withhold all or part of a requested record is reviewed *de novo*, and the agency bears the burden of proving that its decision is correct. 5 U.S.C. § 552(a)(4)(B). The facts must be viewed in the light most favorable to the requester. *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

B. Exemption 7A.

FOIA's Exemption 7A authorizes an agency to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Obviously, the 302s were compiled for law enforcement purposes. The only question is whether their release could reasonably be expected to interfere with the criminal case against Blagojevich.

The short answer is no. Blagojevich has been tried, sentenced, and resentenced. His conviction was largely upheld, and the U.S. Supreme Court denied review. *United States of America v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1491 (2016). Just

recently, his resentencing was affirmed on appeal. *See United States of American v. Blagojevich*, 2017 U.S. App. LEXIS 6963 (7th Cir. April 21, 2017).

Defendant cites no case in an analogous procedural posture in which an Exemption 7A claim was upheld. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, 746 F.3d 1082, 1097 (D.C. Cir. 2014) ("*CREW*") does not support Defendant's claim of exemption. In *CREW*, the three criminal defendants whose prosecutions had been invoked by Defendant had all been sentenced. *Id.* Only one appealed, and his conviction and sentence had been affirmed on appeal. *Id.* Unsurprisingly, the Court found the prosecutions of the three individuals did not warrant application of Exemption 7A. *Id.*

Defendant's argument for a "bright line" rule – one that ignores the procedural posture of a case – is mistaken. It ignores Exemption 7A's express requirement that interference with a proceeding must be "reasonably expected" before the exemption applies. It also ignores FOIA's "strong presumption in favor of disclosure," the fact that FOIA's exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," and that the exemptions "must be construed narrowly." *Multi AG Media LLC v. U.S. Dep't of Agriculture*, 515 F.3d 1224, 1227 (D.C. Cir. 2007) (*quoting U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). Blagojevich may try to seek review by the Supreme Court a second time. Because the Supreme Court has already declined to review Blagojevich's conviction, it is extremely unlikely that it would grant review of his resentencing. Defendant can point to no reason why disclosure of the 302s would reasonably be expected to interfere with whatever procedural maneuvers might remain available to Blagojevich. It failed to satisfy its burden of proof that the exemption applies.

C. Exemption 5 Attorney Work Product.

FOIA Exemption 5 only protects records that would be "normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975). It does not protect records that are "routinely" or "normally" discoverable. The attorney work-product doctrine protects only the "mental impressions, conclusions, opinions, or legal theories of an attorney" made in anticipation of litigation or for trial. Fed. R.Civ. P. 26(b)(3). Defendant fails to show that the requested 302s are exempt as "work-product" records that would not "routinely" or "normally" be discoverable.

A 302 is a form used by an FBI agent to summarize a witness interview or document the collection of evidence. *See* Declaration of Michael J. Sharkey ("Sharkey Decl.") ¶ 3; *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 746 F.3d 1082, 1089 (D.C. Cir. 2014) ("FD-302s [are] forms used by FBI agents 'to record information which they obtain through witness interviews'") (internal citation omitted). 302s are prepared pursuant to FBI policy and procedures. *See* Sharkey Decl. ¶ 3.[1] They record the substance of the factual information that *an agent* takes from a witness. *Id*. at ¶¶ 4, 9. FD-302s do not record an agent's, or a government attorney's, thoughts, impressions, assessments, or evaluation of the witness. *Id*. They are the work product of the agent conducting the interview, not the assistant U.S. attorney or any other lawyer assigned to an investigation. *Id.* The fact that an assistant U.S. attorney or other lawyer might confer with an agent about an interview, provide input, or even attend an interview does

[1] *See also Manual of Operations and Procedures, Part II, February 10, 1998, Section 10-13* ("information not in a signed statement received from a witness, and concerning which the witness may testify…should be reported on Form FD-302…It may be held that the defense can call for those statements."); ("Whenever a person being interviewed could be called upon to testify at any time in the future in a trial, administrative-type hearing, or quasi-judicial proceedings, the results of the interview shall be reported on FD-302.") *Id. at § 10-13.3(3)*; ("If the interview goes to the merits of the case or is of value to the USA for the purpose of determining the desirability of prosecution, the interview shall be recorded on FD-302.") *Id*. https://vault.fbi.gov/maop/maop-part-07-of-07/view.

not change the fact that a 302 is the agent's work-product, not the attorney's work product. *Id.* It ultimately is the agent who is responsible for the 302, not anyone else.

Read carefully, the declaration on which Defendant relies does not assert that disclosure of the requested 302s would reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney." It dances around the elements of the work product doctrine, but fails to satisfy them. The declaration describes 302s generally. *See* Declaration of Debra Riggs Bonamici ("Bonamici Decl.") at ¶ 7 ("An FD-302 is a form filled out by one or more FBI Special Agents, which summarizes important facts and statements made by a potential witness in the course of an interview conducted by FBI Special Agents, sometimes in conjunction with federal prosecutors."). It gives the approximate dates of the interviews and describes the preparation for the interviews in the broadest terms possible. *Id.* at ¶ 8 ("The interviews . . . took place in December 2008 . . . Prosecutors participated in selecting these witnesses for interviews, discussing and determining in advance the investigative strategy for each interview, and questioning the witnesses"). It identifies the attendees. *Id.* ("Two Assistant United States Attorneys and two FBI Special Agents, were present at each interview."). And it identifies the purpose of the interviews. *Id.* ("The interviews were conducted for gathering evidence."). Nowhere does the declaration state that the 302s contain or reflect the "mental impressions, conclusions, opinions, or legal theories" of Ms. Bonamici or any other attorney. Defendant has failed to meet its burden of proof.

Defendant's reliance on *Winterstein v. U.S. Dep't of Justice*, 89 F.Supp.2d 79 (D.D.C. 2000) is misplaced. The record at issue was not a 302; it was a "Prosecution Memorandum" prepared by an attorney – the Acting Director, Office of Special Investigations – for the Deputy Assistant Attorney General, Criminal Division, during an investigation. 89 F.Supp.2d at 79, 82.

A supporting declaration attested that the memorandum "reflects the attorney's legal analysis, theory of the case, thoughts, impressions, opinions, and assessments of facts and issues." *Id*. at 81-82. Not only does the Bonamici declaration make no such claim, but 302s – special agents' witness summaries – are materially different from memoranda prepared by prosecutors that set forth the prosecutors' legal theories and factual assessments.

Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987) and *Patino-Restrepo v. U.S. Dep't of Justice*, 2017 U.S. Dist. LEXIS 47591 (D.D.C. Mar. 30, 2017) do not support Defendant's claim either. The records at issue in those cases included an "OSC attorney's witness interview notes" and the contents of "the lead prosecutors' files, consisting of attorney litigation work product documents, correspondence, witness interview statements, law enforcement records, and selected court filings not on the docket sheet." *Martin*, 819 F.2d at 1182; *Patino-Restrepo*, 2017 U.S. Dist. LEXIS 47591 at *5. The Court in *Martin* held that "[w]ithout doubt, attorney notes taken during witness interviews are … always privileged" and "would not 'normally' and 'routinely' be released in civil discovery." *Martin*, 819 F.2d at 1187 *citing Hickman v. Taylor*, 329 U.S. 495, 511 (1947).[2] 302s obviously are not attorney notes.

The recent holding in *N.Y. Times Co. v. U.S. Dep't of Justice* that the 302s at issue in that case were "work product" is neither binding nor instructive here. 138 F.Supp.3d 462, 475-76 (S.D.N.Y. 2015). The Court found that "[t]he mere selection of whom to interview reveals a great deal about [attorney's] strategy." *Id*. No such concern applies here because the identity of the witnesses who were interviewed is known. Disclosing the 302s of the interviews of President

[2] The decision in *Patino-Restrepo* does not describe the records at issue in any greater detail. As a result, it is not possible to draw any more specific conclusions about the reasons the Court sustained the agency's work product claim. It does not appear, however, that 302s were at issue, as the decision makes no reference to 302s.

Obama, Rahm Emanuel, and Valerie Jarrett will not reveal any strategy about whom the FBI chose to interview. There is no dispute that the FBI chose to interview these three witnesses. Nor did the Court have before it the declaration of a retired FBI Special Agent who testified about both the substance of and procedure for preparing 302s and specifically asserted that 302s "do not reveal litigation strategy or prosecution direction." Sharkey Decl. at ¶ 11. While it would have been simple enough for Ms. Bonamici to testify in her declaration that the 302s contain her and her fellow attorneys' "mental impressions and strategic decisions about the investigation," she did not do so. That obvious omission is dispositive. The work product doctrine does not apply.

Plaintiff did not ask for attorney notes. Plaintiff only asked for 302s, which Plaintiff has regularly and routinely requested and received through FOIA. *See* Declaration of Thomas J. Fitton ("Fitton Decl."). [3] Some courts have even found that, in criminal cases, the government has a duty to disclose 302s. *See, e.g., U.S. v. Gutierrez*, 2007 U.S. Dist. LEXIS 76780, *20 (W.D. Tex. Oct. 16, 2007). 302s simply are not comparable to attorney notes or other, quintessential attorney work product. Even if the 302s at issue had been prepared by an attorney and not a special agent, it is still likely that the 302s would not qualify as attorney work product:

> If a government attorney has recorded only his own thoughts in his interview notes, the notes would seem both to come within the work product immunity and to fall without the statutory definition of a "statement." But if the attorney has made only a substantially verbatim record of his interview, then quite the contrary, his notes constitute a "statement" and include no protected material flowing from the attorney's mental process.

[3] FBI's own electronic library makes many FD-302 reports available confirming the "normal" and "routine" disclosure of these records. *See* FBI Records Reading Room Vault Index, available at http://vault.fbi.gov/reading-room-index (disclosing 302 reports related to investigation of Hillary Clinton's emails, *Judicial Watch v. Dep't of Justice*, No. 16-2046 (D.D.C. Oct. 13, 2016) (TSC).

Saunders v. United States, 316 F.2d 346, 349 (D.C. Cir. 1963).

Collaboration between FBI agents and prosecutors during an investigation does not turn the agents' work product into attorney work product. Not only is Defendant's attorney work product claim at odds with the basic nature and ordinary purpose of a 302, but Defendant has failed to even assert as a factual matter that the requested 302 contain attorneys' "mental impressions, conclusions, opinions, or legal theories." The Court cannot conclude, based on the information provided by Defendant, that requested records are attorney work product.

D. Defendant's Remaining Exemptions.

Plaintiff anticipated that the 302s might contain some redactions when produced. Plaintiff often does not challenge agencies' invocation of Exemptions 6 and 7C if it appears from the context of a record that the invocation is likely proper. In this instance, because Defendant is attempting to withhold the 302s in their entirety under Exemptions 7A and 5, Plaintiff is not able to assess the context in which Defendant's other exemptions are being asserted. While Plaintiff is not likely to challenge Defendant's invocation of Exemption 6 and 7C over the names and identifying information of FBI Special Agents, other non-FBI federal personnel, and other third parties merely mentioned in passing, Plaintiff is unable to assess either the scope or the propriety of these claims without the context a redacted document provides. The declaration submitted by Defendant in support of these are essentially categorical invocations of claims of exemption, which are particularly inappropriate for Exemption 6 and 7C claims. *See, e.g.*, *Prison Legal News v. Samuels*, 787 F.3d 1142, 1149-52 (D.C. Cir. 2015); *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 896 (D.C. Cir. 1995).

Defendant's invocation of Exemption 3 and 7E over references in the 302s to intercepted wire, oral, or electronic communications misses its mark. Defendant's declaration in support of

these exemptions sweeps with the broadest of brushes and ignores the fact that a great number of intercepted recordings were made public during Blagojevich's trial. The government played 102 intercepted telephone calls in its case-in-chief, and Blagojevich at least sought to use another 38. *See* Plaintiff's Response to Defendant's Statement of Material Facts ("Plf's Stmt.") at para. 8. Transcripts and audio recordings of some intercepts are available on the *Chicago Tribune's* website. *Id.* at para. 9. Many are available on youtube. *Id.* at para. 10. Under the circumstances, Defendant should be required to state whether any of the intercepts allegedly referenced in the 302s have been made public. Otherwise, it has failed to meet its burden and made it impossible for Plaintiff to try to demonstrate that the particular intercepts at issue have been made public. *See, e.g., Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

E. Segrebability.

Defendant has the burden of showing why factual material in the FD-302s cannot be segregated from privileged information. *See Sussman v. U.S. Marshals Serv.*, 494, F.3d 1106, 1116 (D.C.Cir. 2007) ("before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld"); *Soucie v. David*, 448 F.2d 1067, 1077-78 (D.C. Cir. 1971) (non-exempt material may be protected only if it is "inextricably intertwined" with exempt information). Defendant's declarations offer nothing more than conclusory statements that information is not segregable and are inadequate to meet its burden. *See Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776-77 (D.C.Cir. 2002)

(affidavit adequate where it showed agency had conducted line-by-line review of document withheld in full).

Conclusory language in agency declarations that does not provide a specific basis for segregabiliity findings by district courts may be found inadequate. *See Dorsett v. United States Dep't of the Treasury*, 307 F. Supp. 2d 28, 41 (D.D.C. 2004) (denying summary judgment in part "[b]ecause of [agency's] inadequate and conclusory segregability explanation," and ordering renewed motion with affidavit solely addressing segregability).

A district court decision may be remanded entirely on procedural grounds – even if it correctly rules for the agency in all substantive exemption respects – if it fails to make segregability findings. *See James Madison Project v. NARA*, No. 02-5089, 2002 WL 31296220, at *1 (D.C. Cir. Oct. 11, 2002) (per curiam) (remanding, despite ruling in favor of government on exemption claims, for a "more precise finding" on segregability); *McSheffrey v. Executive Office for United States Attorneys*, 13 Fed. Appx. 3, 4 (D.C. Cir. 2001) (remanding with explicit instructions that the district court "determine whether any portion of these documents can be segregated for release"); *Judicial Watch, Inc. v. United States Dep't of Justice*, No. 02-348, slip op. at 3 (D.D.C. Mar. 31, 2004) (denying summary judgment because segregability analysis was inadequate despite also finding that agency properly invoked Exemption 5 to withholding documents at issue); *Johnson v. Executive Office for United States Attorneys*, 310 F.3d 771, 777 (D.C. Cir. 2002) (approving of district court's sua sponte segregability determination).

F. In Camera Review of Withheld Records May be Appropriate

At issue are three FD-302 reports that Defendant is withholding from Plaintiff in whole. Defendant claims that these records are exempt from disclosure pursuant to FOIA Exemptions 3, 5, and 7. Plaintiff asserts that Defendant has not adequately shown that the records are in fact

wholly classified or subject to the claimed privileges. Because the requested records are "few in number and of short length[,]" Plaintiff asserts that the Court could reasonably review the responsive records *in camera*. *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980).

The Circuit Court has held:

> In cases that involve a strong public interest in disclosure there is also a greater call for in camera inspection. The Freedom of Information Act was aimed at ending secret law and insuring that this country has an informed, intelligent electorate. When citizens request information to ascertain whether a particular agency is properly serving its public function, the agency often deems it in its best interest to stifle or inhibit the probes. It is in these instances that the judiciary plays an important role in reviewing the agency's withholding of information. But since it is in these instances that the representations of the agency are most likely to be protective and perhaps less than accurate, the need for in camera inspection is greater.

Id. at 1299.

The Court should order production of the FD-302s for in camera inspection, which is within the Court's broad discretion. *See Lam Lek Chong v. DEA*, 929 F.2d 729, 735 (D.C. Cir. 1991). This will allow the Court to determine whether any privileges attach to the records at issue.

IV. Conclusion.

For the foregoing reasons, Defendant's motion should be denied and Defendant should be required to produce redacted versions of the 302s so Plaintiff and the Court may assess the propriety of Defendant's redactions in the context in which they are being asserted.

Dated: May 15, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

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PLAINTIFF'S RESPONSE TO DEFENDANT'S
STATEMENT OF MATERIAL FACTS

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this response to Defendant's statement of material facts:

1. By letter dated June 1, 2011, Plaintiff Judicial Watch, Inc. ("Judicial Watch") submitted a FOIA request to the FBI seeking the following four categories of records:

> 1) Records of any and all FBI interviews with Barack Obama concerning or relating to Rod Blagojevich, including but not limited to notes, summaries, and recordings of the interview.
>
> 2) Records of any and all FBI interviews with Rahm Emanuel concerning or relating to Rod Blagojevich, including but not limited to notes, summaries, and recordings of the interview.
>
> 3) Records of any and all FBI interviews with Valerie Jarrett concerning or relating to Rod Blagojevich, including but not limited to notes, summaries, and recordings of the interview.
>
> 4) All records concerning or relating to any of the aforementioned interviews with Barack Obama, Rahm Emanuel, or Valerie Jarrett.

Plaintiff's Response: Undisputed, although Plaintiff asserts that its request was inadvertently misdated and that the actual date of the request was May 9, 2012.

2. The time period for Judicial Watch's FOIA request was December 1, 2008 to January 1, 2009.

Plaintiff's Response: Undisputed.

3. The FBI acknowledged Judicial Watch's FOIA request by letter dated May 23, 2012, and explained that it was searching the FBI's Central Records System for information responsive to the request.

Plaintiff's Response: Undisputed.

4. In a letter dated June 18, 2012, the FBI informed Judicial Watch that the material responsive to its FOIA request was located in an investigative file and exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(A) ("Exemption 7(A)") because releasing the information could reasonably be expected to interfere with law enforcement proceedings.

Plaintiff's Response: Plaintiff does not dispute that the June 18, 2012 letter asserted that material responsive to the request was located in an investigative file and was exempt from disclosure under Exemption 7(A). Plaintiff has no independent knowledge of where the material was located and therefore cannot admit or deny the accuracy of Defendant's assertion in that regard. *See, e.g.*, *Judicial Watch, Inc. v. Food and Drug Admin.*, 449 F.3d 141, 145-46 (D.C. Cir. 2006) (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution."). Plaintiff disputes that the material is exempt from disclosure under Exemption 7(A), which is a legal conclusion, not a factual assertion.

5. Judicial Watch appealed the FBI's decision to DOJ's Office of Information Policy ("OIP") by letter dated August 16, 2012.

Plaintiff's Response: Undisputed.

6. By letter dated January 23, 2016, OPI affirmed the FBI's decision that the records were exempt from disclosure under Exemption 7(A).

Plaintiff's Response: Undisputed.

7. In response to Judicial Watch's FOIA request, the FBI attempted to locate responsive records by conducting an index search of its Central Records System ("CRS"). The FBI searched the CRS for "Rod Blagojevich," taking into account the December 1, 2008 to January 1, 2009 timeframe of Judicial Watch's request. The search included a three-way phonetic breakdown of Blagojevich's names.

Plaintiff's Response: Plaintiff has no independent knowledge of Defendant's search efforts and therefore cannot admit or deny the accuracy of Defendant's assertion about those efforts. *See, e.g., Judicial Watch, Inc.*, 449 F.3d at 145-46 (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

8. Once the FBI had located records responsive to the search for Blagojevich, it conducted further keyword searches within those records using the names of the three individuals named in Judicial Watch's request.

Plaintiff's Response: Plaintiff has no independent knowledge of Defendant's search efforts and therefore cannot admit or deny the accuracy of Defendant's assertion about those efforts. *See, e.g., Judicial Watch, Inc.*, 449 F.3d at 145-46 (noting that the "asymmetrical

distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

9. The FBI's searches within the CRS were reasonably calculated to locate the files responsive to Judicial Watch's request.

Plaintiff's Response: Plaintiff has no independent knowledge of Defendant's search efforts and therefore cannot admit or deny the accuracy of Defendant's assertion about those efforts. *See, e.g., Judicial Watch, Inc.*, 449 F.3d at 145-46 (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

10. As a result of its search efforts, the FBI located material responsive to Judicial Watch's FOIA requests. The only responsive material consisted of FBI Forms FD-302 ("302's'), which are forms used to record the results of FBI interviews.

Plaintiff's Response: Plaintiff has no independent knowledge of Defendant's search efforts and therefore cannot admit or deny the accuracy of Defendant's assertion about those efforts. *See, e.g., Judicial Watch, Inc.*, 449 F.3d at 145-46 (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution."). Plaintiff does not dispute that 302's are forms used to record the results of FBI interviews.

11. The responsive 302s were compiled during the criminal investigation of Rod Blagojevich for public corruption at the state level, specifically including his effort in 2008 to illegally trade the appointment of a United States Senator in exchange for personal benefits.

Plaintiff's Response: Undisputed.

12. All of the responsive 302s resulted from interviews that took place during December 2008. Those interviews were conducted at the direction of the career prosecutors from the Northern District of Illinois's U.S. Attorney's Office who were assigned to the Blagojevich investigation and were steering the investigative efforts at that point. Prosecutors participated in selecting the witnesses for these interviews, discussing and determining in advance the investigative strategy for each interview, and questioning witnesses. Two Assistant United States Attorneys, and two FBI Special Agents, were present at each interview. The interviews were conducted for the purpose of gathering evidence that could be presented to a grand jury and that could factor into the case to be presented at the trial of Blagojevich and others.

Plaintiff's Response: Plaintiff has no independent knowledge of the interviews and therefore cannot admit or deny the accuracy of Defendant's assertions about them. *See, e.g.*, *Judicial Watch, Inc.*, 449 F.3d at 145-46 (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

13. Releasing the 302s would reveal information about the scope and extent of the FBI's investigation, as well as the extent of third party individuals' cooperation with the investigation.

Plaintiff's Response: Plaintiff has no independent knowledge of the contents of the 302s and therefore cannot admit or deny the accuracy of Defendant's assertions about them. *See, e.g.*, *Judicial Watch, Inc.*, 449 F.3d at 145-46 (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

14. The FBI has concluded that release of the 302s could reasonably be expected to interfere with the ongoing prosecution of Blagojevich.

Plaintiff's Response: Plaintiff objects to Defendant's assertion because it is a legal conclusion, not a factual assertion. Plaintiff disputes Defendant's assertion that the prosecution of Blagojevich is ongoing. *See United States of America v. Blagojevich*, Case No. 16-3254, slip. op. (7th Cir. April 21, 2017) (affirming Blagojevich's resentencing to 168 months imprisonment) (*Blagojevich* slip. op.").

15. The FBI has also concluded that the 302s are covered by the attorney work-product privilege.

Plaintiff's Response: Plaintiff objects to Defendant's assertion because it is a legal conclusion, not a factual assertion.

16. The 302s include information that is protected from disclosure pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 ("Title III").

Plaintiff's Response: Plaintiff has no independent knowledge of the contents of the 302s and therefore cannot admit or deny the accuracy of Defendant's assertions about them. *See, e.g., Judicial Watch, Inc.*, 449 F.3d at 145-46 (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution."). Plaintiff also objects to Defendant's assertion the 302s are protected from disclosure under Title III because it is a legal conclusion, not a factual assertion.

17. The FBI has determined that the information protected from release pursuant to Title III is exempt from disclosure under FOIA pursuant to Exemption 3.

Plaintiff's Response: Plaintiff objects to Defendant's assertion because it is a legal conclusion, not a factual assertion.

18. Portions of the 302s name, or otherwise provide identifying information about, FBI Special Agents, non-FBI government personnel, third parties of investigative interest to the FBI, and third parties who are merely mentioned in the documents.

Plaintiff's Response: Plaintiff has no independent knowledge of the contents of the 302s and therefore cannot admit or deny the accuracy of Defendant's assertions about those contents. *See, e.g., Judicial Watch, Inc.*, 449 F.3d at 145-46 (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

19. The FBI has determined that these names and pieces of identifying information are exempt from disclosure under FOIA Exemptions 6 and 7(C).

Plaintiff's Response: Plaintiff objects to Defendant's assertion because it is a legal conclusion, not a factual assertion.

20. Portions of the 302s reveal the manner in which information obtained via Title III intercepts is analyzed and/or exploited. Disclosing this information would show the non-public details about when, how, and under what circumstances such intercepts are routinely used in investigations.

Plaintiff's Response: Plaintiff has no independent knowledge of the contents of the 302s and therefore cannot admit or deny the accuracy of Defendant's assertions about those contents. *See, e.g., Judicial Watch, Inc.*, 449 F.3d at 145-46 (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution.").

21. The FBI has determined that these details about the use of Title III intercepts are exempt from disclosure pursuant to FOIA Exemption 7(E).

Plaintiff's Response: Plaintiff objects to Defendant's assertion because it is a legal conclusion, not a factual assertion.

22. The FBI processed all of the responsive records to achieve maximum disclosure consistent with the access provisions of the Privacy Act and FOIA. The FBI reviewed the records for any material in the public domain and/or any reasonably segregable portions of releasable material. The FBI found that all of the responsive records were exempt pursuant to one or more FOIA exemptions and no information could reasonably be segregated.

Plaintiff's Response: Plaintiff has no independent knowledge of Defendant's processing of the 302s and therefore cannot admit or deny the accuracy of Defendant's assertions about the records' processing. *See, e.g.*, *Judicial Watch, Inc.*, 449 F.3d at 145-46 (noting that the "asymmetrical distribution of knowledge" between the agency and the requestor in FOIA litigation "distorts the traditional adversary nature of our legal system's form of dispute resolution."). Plaintiff objects to Defendant's assertions about the applicability of FOIA exemptions and segregablity because both assertions are legal conclusions, not a factual assertions.

II. Plaintiff's Statement of Undisputed Material Facts in Support of Cross-Motion for Summary Judgment.

1. Rod Blagojevich was convicted of 18 crimes committed while he was Governor of Illinois. *Blagojevich*, slip. op. at 1.

2. The district court sentenced Blagojevich to 168 months' imprisonment. *Blagojevich* slip. op. at 1.

3. An initial appellate decision, *United States of America v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015), vacated five of the convictions, but affirmed the others and remanded for a potential retrial on the five vacated charges and for resentencing. *Blagojevich* slip. op. at 1.

4. Blagojevich asked the U.S. Supreme court to review the initial appellate decision, and, while the petition for certiorari was pending, the district court put proceedings in abeyance. *Blagojevich* slip. op. at 1-2.

5. After the U.S. Supreme Court denied the petition, *Blagojevich v. United States of American*, 136 S. Ct. 1491 (2016), *rehearing denied*, 136 S. Ct. 2386 (2016), the prosecutor announced that the five vacated charges would not be retried and the district judge resentenced Blagojevich on the remaining 13 convictions. *Blagojevich* slip. op. at 2.

6. The sentence was again 168 months. *Blagojevich* slip. op. at 2.

7. Blagojevich's resentencing was affirmed on April 21, 2017. *Blagojevich* slip. op. at 6.

8. The government played 102 intercepted telephone calls in its case-in-chief, and Blagojevich at least sought to use another 38. *See U.S.A. v. Blagojevich*, Case No. 08-cr-00888, Defendant Rod Blagojevich's Motion for Mistrial Based on Rulings Limiting the Defendant's ability to Play FBI Recordings and Present a Case in Chief (Dkt. No. 504) (N.D. Ill. July 16, 2010)

9. Transcripts and audio recordings of some intercepts are available on the *Chicago Tribune's* website at http://media.apps.chicagotribune.com/blago/documents.html.

10. Many are available on YouTube. *See, e.g.*, https://www.youtube.com/watch?v=wf9X6C0c-70;

https://www.youtube.com/watch?v=p1IqRBX6kqM;

https://www.youtube.com/watch?v=3pXhoC9nLFA.

Dated: May 15, 2017

Respectfully submitted,

JUDICIAL WATCH, INC.

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