UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF STATE, Defendant.	)	Civil Action No. 13-CV-1363 (EGS)

STATEMENT OF INTEREST OF THE UNITED STATES REGARDING NONPARTY DEPONENT BRYAN PAGLIANO'S MOTION TO FILE EXHIBITS *EX PARTE* AND UNDER SEAL

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, regarding nonparty deponent Bryan Pagliano's Motion to File Exhibits *Ex Parte* and Under Seal. *See* ECF No. 88.[1]

The United States respectfully submits there is no dispute before the Court that requires it to review the documents constituting Mr. Pagliano's agreements with the United States. No party to this case has requested that the Court take any action with respect to Mr. Pagliano's professed intention to assert the Fifth Amendment privilege against self-incrimination at his deposition. Rather, the motion that preceded the Court's order requiring the filing of Mr. Pagliano's agreements with the United States concerned only whether Plaintiff may create an

[1] 28 U.S.C. § 517 authorizes "[t]he Solicitor General, or any officer of the Department of Justice . . . to attend to the interests of the United States in a suit pending in a court of the United States." The Department of Justice already is representing the Department of State in this case. However, the Government has determined that because the interests that underlie this filing relate to an FBI investigation, a Statement of Interest filed on behalf of the United States is the more appropriate procedural vehicle to address the Court regarding this issue.

audiovisual recording of Mr. Pagliano's deposition. *See* Nonparty Deponent Bryan Pagliano's Motion for Entry of a Protective Order filed June 1, 2016 (ECF No. 85).

If the Court nonetheless determines that it is necessary for it to review the agreements, the Court should review them *ex parte* and under seal. The Freedom of Information Act ("FOIA") authorizes courts to examine documents *in camera* and *ex parte*. *See* 5 U.S.C. § 552(a)(4)(B); *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (citing 5 U.S.C. § 552(a)(4)(B)). Moreover, this "statutory authorization for *in camera* examination of records was merely a confirmation of (and perhaps encouragement to the use of) a power that the courts already possessed." *Arieff*, 712 F.2d at 1469; *see also United States v. Hubbard*, 650 F.2d 293, 316-17 (D.C. Cir. 1980) (the decision whether to allow access to judicial records is "left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case"). While there is a presumption in favor of public access to judicial proceedings, the D.C. Circuit has set forth six factors that can act to overcome the presumption:

> (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

E.E.O.C. v. Nat'l Children's Ctr., 98 F.3d 1406, 1409 (D.C. Cir. 1996) (applying *Hubbard*). Consideration of these factors demonstrates that, should the Court find it necessary to review the agreements, the agreements should remain *ex parte* and under seal.

The agreements to which Mr. Pagliano refers relate to an ongoing law enforcement investigation, and their contents have not been disclosed previously on the public record. Moreover, the parties to the agreements – Mr. Pagliano and the United States – both object to

public disclosure of their contents. *Hubbard*, 650 F.2d at 320 ("the fact that objection to access is made by a third party weighs in favor of non-disclosure").

In addition, the Government would be prejudiced by disclosure. The FBI has stated publicly that it received and "is working on a referral [from] Inspectors General in connection with former Secretary Clinton's use of a private e-mail server." *Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 32 (2015) (statement of FBI Director James Comey). Other than its acknowledgment of the referral from the Inspectors General of the Intelligence Community and the Department of State, the FBI cannot publicly disclose the specific focus, scope, or potential targets of any such investigation without adversely affecting the investigation. *See* Declaration of David M. Hardy ("Hardy Decl.") ¶ 15, ECF No. 9-1, *Leopold v. U.S. Dep't of Justice*, 15-cv-2117 (D.D.C.).

For this reason, the FBI has withheld from public release records regarding the investigation that are the subject of a separate FOIA request. *Id*. ¶ 18. That request sought, among other things, all records retrieved from any electronic equipment obtained from former Secretary of State Hillary Clinton for the investigation (which have not already been made public), as well as correspondence between the FBI and the Department of State regarding any electronic equipment obtained. *Id.* ¶ 10. The FBI determined that releasing all but three of the records responsive to that request could reasonably be expected to interfere with the investigation. 5 U.S.C. § 552(b)(7)(A); Hardy Decl. ¶¶ 18-22.[2] Similarly, releasing Mr. Pagliano's agreements with the United States could prematurely reveal the scope and focus of the pending investigation.

[2] These three records are the correspondence filed in this case at ECF Nos. 37-1 to 37-3, the release of which did not implicate the concerns noted above. *See* Hardy Decl. at 5 n.4.

Conversely, there is no demonstrated need for access to the agreements in connection with this case. The parties are engaged in limited discovery over the adequacy of a FOIA search. The agreements are not the subject of or responsive to the FOIA request at issue in this case, and the agreements have not been requested in discovery. Rather, the only possible relevance of the agreements is to a deposition of a nonparty. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 ("pretrial depositions and interrogatories are not public components of a civil trial"); *In re the Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1335-37, 1340 (D.C. Cir. 1985) (finding that there was no common law right of access to prejudgment records in civil cases); *Hubbard*, 650 F.2d at 315-22 (sealing of documents seized during search of non-party church, which were introduced under seal only for the purpose of showing that the search was unlawful, and were not used in the court's ruling, should not have been lifted absent a showing of a substantial factor favoring public access, where no previous access was shown, and church objected to unsealing). And, as noted above, to date the only dispute between Plaintiff and Mr. Pagliano is about whether Mr. Pagliano's deposition should be recorded on video.

Therefore, if this Court determines that it has a need to review the agreements, the United States respectfully requests that the Court exercise its inherent discretion to receive the agreements *ex parte* and under seal.

Dated: June 10, 2016

Respectfully submitted,

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