IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., *Plaintiff*, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Defendant*.	)	Case No. 1:26-cv-01113 (RDM)

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

I. Introduction.

Defendant Board of Governors of the Federal Reserve System is withholding two grand jury subpoenas it received in full under Exemption 5 alone. Exemption 5 protects "inter-agency or intra-agency memorandums or letters" that "would not be available by law to a party … in litigation with the agency." 5 U.S.C. § 552(b)(5). Grand jury subpoenas are compulsory process, not inter-agency or intra-agency communications. Rule 6(e)(2) of the Federal Rules of Criminal Procedure generally does not bind subpoena recipients, and the Board has not established that any separate order prohibits it from disclosing its own copies. The Board's sole claim of exemption is without merit.

II. Factual Background.

On January 9, 2026, the United States Attorney's Office for the District of Columbia served two grand jury subpoenas on the Board. Mem. in Supp. of the Board of Governors of the Federal Reserve System's Mot. to Quash Subpoenas, *In re Grand Jury Subpoenas Nos. [Redacted] & [Redacted]*, No. 1:26-mc-00012-JEB (D.D.C. Feb. 3, 2026), ECF No. 25, at 1, 11

("Mot. to Quash Mem."). Chair Powell publicly described the subpoenas two days later, in a statement posted on the Board's website. Bd. of Governors of the Fed. Rsrv. Sys., *Statement by Chair Jerome H. Powell* (Jan. 11, 2026); *see* Caperton Decl. (ECF No. 9-1) at ¶ 5.

Plaintiff Judicial Watch, Inc. submitted a FOIA request to the Board on January 16, 2026, seeking "[a]ll subpoenas received by the Federal Reserve, or any official or employee thereof, on or about January 9, 2026 that Chairman Powell referenced during his January 11, 2026 public statement." *Id*. The Board denied the request in full on February 13, 2026, stating that the records "by [their] nature" consist of information relating to a law enforcement proceeding and invoking Exemption 7(A). *Id.* at ¶ 6. Plaintiff appealed on February 17, 2026, explaining that Exemption 7(A) reaches records only to the extent their production could reasonably be expected to interfere with enforcement proceedings. *Id.* at ¶ 7. The Board did not respond to the appeal. Plaintiff filed this action on April 1, 2026, and the Board now moves for summary judgment, asserting Exemption 5. *See generally* Def.'s Mot. for Summary Judgment (ECF No. 9).

Before it denied Plaintiff's request, the Board retained outside counsel and, on February 3, 2026, moved to quash both subpoenas. Mot. to Quash Mem. at 1. In the now-public version of that memorandum, the Board described what each subpoena demands, explaining that the first seeks materials concerning Chair Powell's June 25, 2025 testimony before the Senate Banking Committee about the Board's renovation projects and that the second seeks materials relating to the renovations themselves. *Id.* at 11-12. The Board also described at length what it believed to be the true purpose of the subpoenas. *Id.* at 1-2, 20-24. On March 13, 2026, Chief Judge Boasberg quashed both subpoenas. *In re Grand Jury Subpoenas Nos. [Redacted] & [Redacted]*, 823 F. Supp. 3d 1 (D.D.C. 2026).

III. Argument.[1]

The Board does not invoke Exemption 3, and it does not contend that Federal Rule of Criminal Procedure 6(e) independently prohibits it from releasing the subpoenas. Its motion rests on Exemption 5 alone. Def.'s Mem. (ECF No. 9) at 3-7.

The question, therefore, is narrow: whether the two subpoenas fall within the scope of Exemption 5. To withhold them, the Board must demonstrate that the subpoenas are "inter-agency or intra-agency" communications and that they "would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The Board cannot satisfy either prong.

A. The subpoenas are not inter-agency or intra-agency communications.

The Board devotes no more than one sentence to the threshold requirement: "There is no question that the subpoenas are inter-agency communications." Def.'s Mem. at 4. That conclusory assertion, unsupported by facts or authority, is insufficient.

A grand jury subpoena is compulsory process issued under the authority of the court, not a communication exchanged between Executive Branch agencies. Rule 17(a) of the Federal Rules of Criminal Procedure requires the clerk to issue a signed and sealed subpoena, which issues in the name of the court. Fed. R. Crim. P. 17(a). The prosecutor may complete, serve, withdraw, or negotiate the scope of the subpoena, but he supplies none of its compulsory force; only the issuing court may compel compliance or punish noncompliance. Fed. R. Crim. P. 17(g). The grand jury itself "cannot compel the appearance of witnesses and the production of

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[1] The standard of review governing summary judgment is well established and needs no explication. Unlike in most litigation, the defendant in a FOIA lawsuit bears the burden of sustaining its actions, and the Court reviews the withholding *de novo*. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989). An agency may carry that burden by affidavit, but only if the affidavit justifies the withholding in reasonably specific detail; conclusory and generalized allegations of exemption will not do. *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973).

evidence, and must appeal to the court when such compulsion is required." *United States v. Williams*, 504 U.S. 36, 48 (1992). That is why the Board, when it sought relief from these subpoenas, moved to quash before Chief Judge Boasberg rather than taking the matter up with the United States Attorney's Office. Compulsory process that its recipient can defeat only by obtaining judicial relief is not communication between two agencies.

In moving to quash, the Board stated that the subpoena power "formally belongs to the grand jury" and invoked authority establishing that "federal prosecutors have no independent subpoena authority." Mot. to Quash Mem. at 15. It argued that Rule 17 exists to keep the grand jury from being "misused" by the Department of Justice and that the grand jury's subpoena power is subject to the supervision of a judge. *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)). The Board cannot now recharacterize the same documents as communications from the Department of Justice.

The Board's motion here also confirms the point. Both the Board's *Vaughn* index and its declaration describe the records as "Two Grand Jury subpoenas." Caperton Decl. ¶¶ 5, 8-10 & Ex. 4. In addition, the Board describes the subpoenas as process of the grand jury, supervised by the Chief Judge, sealed on his docket, and released only through Local Criminal Rule 6.1. Def.'s Mem. at 4, 6 & n.6, 7. Plainly put, the two subpoenas are grand jury process, not DOJ agency communications.

B. The subpoenas do not meet the definition of inter-agency or intra-agency records even when treated as interbranch communications.

A record that originates outside an executive branch agency meets Exemption 5's threshold only in narrow circumstances, and none of them exists here. Another court in this District has held that interbranch communications qualify only if the receiving agency requested the record, or if the record came out of a consultant-type relationship, and only if it was created

to aid the agency's own deliberative process. *Am. Oversight v. Dep't of Transp.*, No. 18-1272, 2022 WL 103306, at *4 (D.D.C. Jan. 11, 2022). The threshold was satisfied in that case because congressional and agency staff were working together toward a shared objective and the communications assisted the agency's policy deliberations. *Id.* at *6. The Supreme Court has drawn the same line from the other direction: a submission from an outside party pursuing its own interest does not become an intra-agency record simply because an agency received it. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001).

The Board's own conduct defeats its position. The Board did not request these subpoenas, did not consult with the prosecutors who served them, and received them in no advisory capacity whatsoever. It retained outside counsel and moved to quash them.

The Board's own words remove any doubt. It told the Chief Judge that the purpose of the subpoenas was "to harass, pressure, and punish" the Federal Reserve and Chair Powell until they set monetary policy as the President wished, and that the United States Attorney's Office had proceeded by "abuse of the criminal process." Mot. to Quash Mem. at 1. It described the subpoenas as issued with the "dominant, if not sole, intent to harass and intimidate" the Board and its Chair, and as an effort to force the Federal Reserve to "surrender its independence" over monetary policy. *Id.* at 1-2. An agency does not solicit records it describes in those terms, and records issued for those purposes are not created to aid the recipient's deliberative process. The Board may respond that these statements went to the propriety of the subpoenas rather than to their character as records, and that Exemption 5 does not turn on whether a document was welcome. The consultant-relationship inquiry, however, asks why a record was created and for whom, *Am. Oversight*, 2022 WL 103306, at *4, and the Board's own account of why these subpoenas were issued and whom they were meant to serve is therefore dispositive. As

described by the Board, the subpoenas were not created to assist it in any way whatsoever.

C. Exemption 5 incorporates only settled civil-discovery protections.

Exemption 5 principally incorporates the civil-discovery privileges, along with other well-settled and generally recognized protections from civil discovery. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-800 (1984).

The Board names no privilege. It asserts instead that grand jury subpoenas are "not typically available through civil discovery" and are unavailable absent a showing of "particularized need." Def.'s Mem. at 4-5. The law does not support the Board's broad claim. First, the Board twice acknowledges that Rule 6(e)(2) of the Federal Rules of Criminal Procedure generally does not bind recipients of grand jury subpoenas. Def.'s Mem. at 6; Caperton Decl. ¶ 9. The Board therefore cannot derive a categorical civil-discovery protection merely from Rule 6(e)'s restrictions on grand jurors, prosecutors, and other enumerated persons. Nor does it identify any other privilege that attaches to a subpoena in the recipient's possession. The D.C. Circuit requires that any such protection be well settled and generally applicable to the category of record at issue, and an agency may not manufacture one from an isolated decision granting a protective order. *Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 517-18 (D.C. Cir. 1996). Its claim consequently depends on showing a well-settled civil-discovery protection applicable to subpoenas themselves – a showing its authorities do not make.

Second, the Board relies solely on a single out-of-circuit district court decision from 1981 for the proposition that grand jury subpoenas are unavailable in civil discovery. *See* Def.'s Mem. at 4, 5, 7 (citing *Bd. of Educ. of Evanston Twp. High Sch. Dist. No. 202 v. Admiral Heating & Ventilation, Inc.*, 513 F. Supp. 600 (N.D. Ill. 1981)). *Admiral Heating* does not stand for that proposition, however.

The discovery request in that case sought all documents submitted to the grand jury, every subpoena or request pursuant to which they were furnished, the accompanying lists and substitute productions, privilege-related records, transcripts, and presentence memoranda. *Admiral Heating*, 513 F. Supp. at 601-02. The court expressly held that preexisting documents do not become undiscoverable merely because they were submitted to a grand jury. *Id.* at 603. The problem was the *form* of the request. Assembled as the materials had been presented to the grand jury, and indexed by the subpoenas and lists, the production would have disclosed the scope and direction of the investigation. *Id.* at 603-04. The court held that the request "closely tracks the 'general request' situation," and observed that including the subpoenas "add[ed] to the danger" already created by compelled production of the compiled universe of records. *Id.* at 604. It therefore denied the motion to compel. *Id.* at 605.

The court did not decide whether the subpoenas alone would have been discoverable, and it recognized no categorical privilege. Plaintiff has not requested the documents the Board produced, any list or index, or any transcript. *Admiral Heating* simply does not support the Board's position.

IV. The Board's Remaining Arguments Fail.

A. The Board has not shown that the seal prohibits disclosure of its own copies.

Although the Board does not squarely assert that the subpoenas are beyond the reach of FOIA, it suggests that the subpoenas remain under seal before Chief Judge Boasberg and need not be produced. Def.'s Mem. at 4, 6 n.6. Even if that claim were affirmatively made – and Plaintiff does not concede that it was – the argument fails on the law and on this record.

The D.C. Circuit has made clear that a seal alone is not enough. The question is whether the sealing court intended its order to operate as the functional equivalent of an injunction

barring the agency from disclosing copies in its own possession, and the Government bears the burden of proving that intent. *Morgan v. U.S. Dep't of Justice*, 923 F.2d 195, 197-98 (D.C. Cir. 1991). A seal frequently does no more than restrict public access to what has been filed on a court's docket, leaving the parties free to do as they wish with their own copies. *Id.* Where the order is ambiguous, the agency must seek clarification from the issuing judge. *Jud. Watch, Inc. v. U.S. Dep't of Justice*, 813 F.3d 380, 383-84 (D.C. Cir. 2016) ("An ambiguous court order does not protect a record from disclosure pursuant to the FOIA.").

The Board has supplied none of what *Morgan* requires. It has not produced the sealing order. It identifies no language purporting to restrain the Board from releasing its own file copies. It offers no extrinsic evidence of the order's intended scope, no evidence of the Chief Judge's practice in comparable matters, and no clarification from Chief Judge Boasberg. The Caperton declaration does not mention the seal's scope at all. That the Board holds its own copies is not in doubt: it attached both subpoenas as exhibits to its motion to quash. *See* Decl. of Leah B. Grossi ¶¶ 3-4 & Exs. A, B, No. 1:26-mc-00012-JEB, ECF No. 25. What the record shows is that the Chief Judge kept the copies on *his* docket under seal while unsealing his opinion and much of the parties' briefing. 823 F. Supp. 3d at 25-26. That is a docket-access ruling, not an injunction against the Board. The ruling therefore is of no consequence here.

B. The Board has not shown reasonably foreseeable harm.

Even if Exemption 5 otherwise applied, the Board must separately show that it "reasonably foresees that disclosure would harm an interest protected by" that exemption. 5 U.S.C. § 552(a)(8)(A)(i)(I). The explanation must be focused and concrete rather than a recitation of the interests the exemption generally serves. *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 369-70 (D.C. Cir. 2021). The Board offers no such explanation.

Because the Board has not identified a privilege or other settled civil-discovery protection applicable to the subpoenas, it necessarily fails to identify an interest protected by Exemption 5 that disclosure would harm.

Finally, the Board asserts that the subpoenas are "by definition, wholly exempt from disclosure" and "by their nature" contain no segregable information. Def.'s Mem. at 7; Caperton Decl. ¶ 10. Whether the subpoenas are wholly exempt is the question presented, and an agency does not discharge its obligation by assuming its conclusion. Even where an exemption covers an entire record, the agency must determine whether particular information may be released without causing reasonably foreseeable harm. *Leopold v. U.S. Dep't of Justice*, 94 F.4th 33, 37-39 (D.C. Cir. 2024). The Board's conclusory assertion that the subpoenas contain no segregable information does not satisfy that obligation. *See Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

V. Conclusion.

For these reasons, Defendant's motion for summary judgment should be denied, Plaintiff's cross-motion for summary judgment should be granted, and Defendant should be ordered to produce the requested records.

Dated: August 17, 2026

Respectfully submitted,

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