

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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CABLE NEWS NETWORK, INC., )  
)  
*Plaintiff,* )

v. )

Civil Action No. 17-1167-JEB

FEDERAL BUREAU OF INVESTIGATION, )  
)  
*Defendant.* )

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GANNETT SATELLITE INFORMATION )  
NETWORK, LLC, d/b/a USA TODAY, *et al.* )  
)  
*Plaintiffs,* )

Civil Action No. 17-1175-JEB

v. )

DEPARTMENT OF JUSTICE, )  
)  
*Defendant.* )

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JUDICIAL WATCH, INC., )  
)  
*Plaintiff,* )

Civil Action No. 17-1189-JEB

v. )

UNITED STATES DEPARTMENT OF JUSTICE, )  
)  
*Defendant.* )

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FREEDOM WATCH, INC., )  
)  
*Plaintiff,* )

Civil Action No. 17-1212-JEB

v. )

UNITED STATES DEPARTMENT OF JUSTICE )  
and FEDERAL BUREAU OF INVESTIGATION, )  
)  
*Defendants.* )

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THE DAILY CALLER NEWS )  
FOUNDATION, )  
 )  
 *Plaintiff,* )  
 )  
 v. )  
 )  
 U.S. DEPARTMENT OF JUSTICE, )  
 )  
 *Defendant.* )  
 )

Civil Action No. 17-1830-JEB

**THE DAILY CALLER NEWS FOUNDATION’S MEMORANDUM OF POINTS  
AND AUTHORITIES IN OPPOSITION TO DEFENDANTS’ MOTION FOR  
PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF ITS  
CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff The Daily Caller News Foundation, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submits this memorandum of points and authorities in opposition to the motion for partial summary judgment of Defendants Federal Bureau of Investigation and U.S. Department of Justice and in support of The Daily Caller News Foundation’s cross-motion for summary judgment.

**I. Introduction.**

While he was FBI Director, James Comey had nine one-on-one conversations with President Donald Trump. After he was fired, the Senate Select Committee on Intelligence asked Director Comey to testify about those interactions. Director Comey subsequently testified he contemporaneously authored at least five – and as many as nine – records about these conversations so that he had a record of what happened in case he needed to defend himself or the FBI. These records are colloquially known as the Comey Memos.

Director Comey did not create the Comey Memos for law enforcement purposes. His own testimony reveals he created them for administrative and institutional purposes. His

testimony also reveals the subject of each of the Comey Memos and, in some circumstances, specific passages from them. A mountain of information about these records exists in the public domain because of Director Comey's testimony. Defendants' withholding of the Comey Memos in their entirety is improper.

## **II. Factual Background.**

### **A. The Comey Memos.**

On June 8, 2017, former FBI Director James Comey testified under oath before the Senate Select Committee on Intelligence. *See* James B. Comey's Statement for the Record, Senate Select Committee on Intelligence (June 8, 2017), attached as Exhibit A to DCNF's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Partial Summary Judgment and in Support of its Cross-Motion for Summary Judgment; *see also* Transcript of Senate Intelligence Committee Hearing (June 8, 2017), attached as Exhibit B to DCNF's Memorandum. Director Comey was asked "to describe [his] interactions with President-Elect and President Trump." Exhibit A at 1. In written testimony submitted to the Committee on June 7, 2017, Director Comey stated he "recall[s] nine one-on-one conversations with President Trump in four months – three in person and six on the phone." *Id.* at 2. Director Comey also testified he created records after each of those conversations. *Id.* ("I created records after conversations, and I think I did it after each of our nine conversations. If I didn't I did it for nearly all of them, especially the ones that were substantive."). Director Comey described five of those conversations in his written testimony and detailed the other four during the question and answer portion. *Id.* at 1-7; Exhibit B at 131-132.

The first conversation took place on January 6, 2017 in a conference room at Trump Tower in New York. Exhibit A at 1-2. During this meeting, Director Comey briefed President-

Elect Trump on “some personally sensitive aspects of the information assembled during” the Intelligence Community assessment concerning Russian efforts to interfere in the election. *Id.* The second conversation took place over the telephone shortly before January 20, 2017. Exhibit B at 131. Director Comey testified this conversation included a follow-up to the January 6 meeting as well as a brief discussion about whether Director Comey would remain as FBI Director. *Id.*

The third conversation occurred on January 27, 2017, when President Trump called and invited Director Comey to dinner that evening. *Id.* at 132; Exhibit A at 2-3. Director Comey testified President Trump “invited [him] to dinner that night, saying he was going to invite [Director Comey’s] whole family, but decided to have just [him] this time, with the whole family coming the next time.” *Id.* The fourth conversation occurred at dinner on January 27, 2017. *Id.* at 2-4. During that conversation, President Trump and Director Comey discussed whether Director Comey would stay on as FBI Director and revisited their conversation from January 6. *Id.*

The fifth conversation occurred in the Oval Office on February 14, 2017. *Id.* at 4-6. That conversation concerned the FBI’s investigation into Mike Flynn. *Id.* The sixth conversation, occurred on March 1, 2017. Exhibit B at 131. Director Comey testified President Trump called him “just to check in.” *Id.*

The seventh conversation occurred on March 30, 2017. Exhibit A at 6-7. On that date, President Trump and Director Comey discussed the “cloud” of the Russia investigation “that was impairing [the President’s] ability to act on behalf of the country.” *Id.* The eighth conversation also occurred by telephone. *Id.* at 7. On April 11, 2017, President Trump called Director Comey to again discuss the “cloud.” *Id.* The ninth and final conversation between President Trump and

Director Comey also occurred on the telephone. Exhibit B at 132. Director Comey does not recall when this conversation took place but testified they had a “secure call” about “an operational matter that was not related” to the Russia investigation. *Id.*

In addition to testifying about the content of the Comey Memos, Director Comey testified as to why he created the records. *Id.* at 33. He explained, “I knew that there might come a day when I would need a record of what happened, not just to defend myself, but to defend the FBI and – and our integrity as an institution and the independence of our investigation.” *Id.* He also described the records as his “recollection recorded.” *Id.* at 100. At no point did Director Comey testify he created the records for law enforcement purposes.

In addition, Director Comey testified some of the records contained classified information. *Id.* at 41-42. He does not describe how many of the records contain classified information, whether any records were entirely classified, or if he properly followed the procedures necessary to classify the records in their entirety or in part. However, at least some of the records were specifically written to not contain classified information. Exhibit A at 5 (“I immediately prepared an unclassified memo of the conversation.”).

#### **B. DCNF’s FOIA Request.**

Prior to Director Comey’s testimony, the New York Times reported Director Comey created memoranda “about every phone call and meeting he had with” President Trump. Based on this report, DCNF submitted a Freedom of Information Act request to the FBI seeking copies of all unclassified memoranda authored by former FBI Director James Comey that contemporaneously memorialized his discussions with President Trump and his aides. The FBI continues to withhold all the records in their entirety pursuant to Exemption 7.

### **III. Summary Judgment Standard.**

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). In FOIA cases, agency decisions to “withhold or disclose information under FOIA are reviewed *de novo*.” *Judicial Watch, Inc. v. U.S. Postal Service*, 297 F. Supp. 2d 252, 256 (D.D.C. 2004). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the plaintiff. *Weisberg v. U.S. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

### **IV. Defendants Have Failed to Demonstrate They Conducted an Adequate Search.**

DCNF seeks all unclassified memoranda authored by Director Comey memorializing his conversations with President Trump. Director Comey testified that he had nine one-on-one conversations with President Trump and that he believes he memorialized each of those conversations. Defendants however fail to provide any evidence whatsoever about how many records they have in their possession, how many records they located, and how many records they determined to be responsive. Based on Director Comey’s testimony, there are at least five – and as many as nine – records responsive to DCNF’s request. For DCNF and the Court to evaluate whether Defendants conducted an adequate search, Defendants must identify the number of records they located and are withholding.

Instead of identifying the number of records it located, Defendants submitted a declaration containing conclusory statements. Specifically, Mr. Hardy testified that employees of the FBI’s Records Management Division “identified what they believed to be the set of records constituting the Comey Memos[,]” and that employees of the FBI’s National Security

and Cyber Branch confirmed the records identified by RMD “were, in fact, the full set of” responsive records. Declaration of David M Hardy (filed Oct. 13, 2017) at ¶ 62. Yet the declaration is silent as to how both components reached their determination that the unidentified number of records are all the records sought by DCNF. Because Defendants have failed to even identify the number of records they located or how they know the records are all the records responsive to DCNF’s request, Defendants’ motion for partial summary judgment with respect to the adequacy of the search should be denied, and DCNF’s cross-motion should be granted.

**V. Hardy’s Declaration Is Woefully Insufficient to Justify Defendants’ Claims of Exemptions.**

As this Court recently stated:

FOIA was drafted with the objective of affording the public maximum access to most government records. *See Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). The government, as a result, bears the burden of demonstrating that at least one exemption applies. *See id.* In order to assist a court in its de novo review of the withholdings and to allow the party seeking access to documents to engage in effective advocacy, the government must furnish “detailed and specific information demonstrating ‘that material withheld is logically within the domain of the exemption claimed.’” *Campbell v. U.S. Department of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) (quoting *King v. U.S. Department of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987)). This allows for “as full a public record as possible, concerning the nature of the documents and the justification for nondisclosure.” *Hayden v. National Security Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979). Courts in this Circuit have stressed that the government cannot justify its withholdings on the basis of summary statements that merely reiterate legal standards or offer “far-ranging category definitions for information.” *King*, 830 F.2d at 221; *see, e.g., Campbell*, 164 F.3d at 30 (emphasizing that an agency's explanations will not suffice if they “‘are conclusory, merely recit[e] statutory standards, or if they are too vague or sweeping’”) (quoting *Hayden*, 608 F.2d at 1387).

*Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*, 955 F. Supp. 2d 4, 13 (D.D.C. 2013).

DCNF generally objects to Defendants’ categorical denial of its FOIA request for all unclassified memoranda authored by former FBI Director James Comey that contemporaneously

memorialized his discussions with President Trump and his aides. Defendants refuse to provide even the most basic information about the Comey Memos, such as the number of records and the dates each record was created. They also refuse to provide detailed and specific information about why they are withholding such information. They merely recite the statutory standard for withholding. Hardy Decl. at ¶ 72 (“[I]dentifying the precise number/volume of the particular – and the very narrow universe – of records sought by plaintiffs could reasonably be expected to reveal non-public information about the scope and focus of the investigation.”). Defendants’ failure to provide any meaningful information about the Comey Memos prevents DCNF from engaging in effective advocacy.<sup>1</sup> For this reason alone, Defendants’ motion for partial summary judgment should be denied.

#### **VI. Defendants Are Improperly Withholding the Comey Memos.**

Defendants are withholding an undisclosed number of records in their entirety pursuant to Exemption 7(A), which 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). Defendants are also withholding information contained in the records pursuant to Exemptions 1, 3, 6, 7(C), and 7(E). Defendants have failed to satisfy their burdens with respect to their Exemption 1 and 7(A) claims.<sup>2</sup> To the extent they have

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<sup>1</sup> Defendants’ categorical denial is even more egregious because, at most, nine records exist. *Citizens for Responsibility & Ethics in Washington*, 955 F. Supp. 2d at 14 (“This Circuit’s cases seem to hint at the idea of a sliding scale inversely correlating the number of withheld documents and the level of detail required to justify their withholding.”).

<sup>2</sup> The Daily Caller does not challenge the withholdings pursuant to Exemptions 3, 6, 7(C), and 7(E) to the extent they are limited to select information as described in the Hardy declaration.

satisfied their burden, Defendants' withholding of at least some of the information is improper considering Director Comey's testimony to the Committee.

**A. The Comey Memos were not compiled for law enforcement purposes.**

“To determine ‘whether records are compiled for law enforcement purposes, this circuit has long emphasized that *the focus is on how and under what circumstances the requested files were compiled* and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding.’” *Clemente v. Federal Bureau of Investigation*, 867 F.3d 111, 119 (D.C. Cir. 2017) (citing *Jefferson v. U.S. Department of Justice, Office of Professional Responsibility*, 284 F.3d 172, 176-177 (D.C. Cir. 2002) (emphasis added)). Defendants however fail to provide any evidence of how and under what circumstances the Comey Memos were compiled.

The operative paragraph of the Hardy Declaration is paragraph 67. In it, Hardy testified:

The Comey Memos include numerous references to sensitive information directly related to the Russia investigation, including information which would reveal aspects of the investigation's subjects, scope, and focus. That investigation is clearly within the law enforcement duties of the FBI to undertake counterintelligence and national security investigations, and to detect and investigate possible violations of Federal criminal laws. *See* 28 U.S.C. § 533. Thus, information contained in the memos was compiled as part of and in relation to an investigation within the FBI's law enforcement duties; as such, that information and by extension the memos in which it is referenced were compiled for law enforcement purposes.

Hardy Decl. at ¶ 27. The first sentence simply states information contained within the Comey Memos relate to the Russia investigation. The second sentence says the Russia investigation is a law enforcement proceeding. The third sentence is conclusory in nature.

There is no evidence whatsoever the records were compiled for law enforcement purposes. The only evidence submitted by Defendants shows nothing more than Hardy believes the records were compiled for such purposes. He has no firsthand knowledge, nor claims to.

Without knowing Director Comey's intent behind writing the memos, he could not testify to their purpose.

Director Comey, on the other hand, testified about why he created the records. He explained, "I knew that there might come a day when I would need a record of what happened, not just to defend myself, but to defend the FBI and – and our integrity as an institution and the independence of our investigation." Exhibit B at 33. He authored the records not for law enforcement purposes but for administrative and institutional purposes. His testimony could not be clearer.

The location of the Comey Memos is also revealing. Hardy testified the records were found in Director Comey's archives. Hardy Decl. at ¶ 62. The records were not stored in the Central Records System, which is the system of records that ordinarily and routinely store investigative files. *See Majid v. Federal Bureau of Investigation*, 2017 U.S. Dist. LEXIS 44929, \*\*12-13 (D.D.C. March 28, 2017). They were stored with the administrative files.

In addition, DCNF requested the Comey Memos from the FBI, not the Justice Department or Special Counsel Mueller. The FBI, not Special Counsel Mueller, located the records. Even if Special Counsel Mueller gathered the Comey Memos as part of his investigation – and Defendants present no evidence he has done so – the specific records requested by DCNF still would not have been compiled for law enforcement purposes. *Labow v. U.S. Department of Justice*, 831 F. 3d 523, 529-30 (D.C. Cir. 2016).

Simply put, the Comey Memos were not compiled for law enforcement purposes.

**B. The production of the Comey Memos could not reasonably be expected to interfere with law enforcement proceedings.**

Even if Defendants could demonstrate – which they cannot – the Comey Memos were compiled for law enforcement purposes, they have failed to demonstrate the production of the

records could reasonably be expected to interfere with law enforcement proceedings. The author of the Comey Memos has already made public, through testimony to the Committee, substantial information about the records. Director Comey identified the number of records, when the records were created, and why he wrote them. He has also revealed the subject of the records, the content of the records, and has even quoted from passages from some of the records. Very little, if any, information about the Comey Memos and the information contained within them remains secret. Exactly how could the release of the Comey Memos containing information already in the public domain reasonably be expected to interfere with law enforcement proceedings?

Defendants do not answer this question. Nor do they attempt to. They merely suggest they considered Director Comey's testimony. Hardy Decl. at ¶ 71. Hardy however does not identify how he reached his conclusion. Nor does he identify what specific information he reviewed when reaching his decision. His conclusory, bare bones assertion is insufficient to justify Defendants' withholding of all Comey Memos in their entirety.<sup>3</sup>

**C. Defendants have failed to demonstrate the information contained within the Comey Memos was classified in accordance with the procedural requirements of the executive order.**

To properly invoke Exemption 1, the withheld information "must be classified in accordance with the procedural criteria of the governing Executive Order as well as its substantive terms." *Lesar v. U.S. Department of Justice*, 636 F.2d 472, 483 (D.C. Cir. 1980).

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<sup>3</sup> At a minimum, the Court should review the Comey Memos *in camera*. *Citizens for Responsibility & Ethics in Washington*, 955 F. Supp. 2d at 13. The Court should compare the information contained within the records with the written and oral testimony of Director Comey. The Court could therefore make an informed decision about what, if any, information remains secret and whether such information should be withheld. The Court could then order the production of the Comey Memos containing the information already in the public domain.

Defendants rely on Hardy's declaration to support their claim they have satisfied Executive Order 13526's procedural criteria. The declaration however provides little more than a self-serving, conclusory statement: "I determined that the information protected pursuant to Exemption (b)(1) in the Comey Memos is currently and properly classified at the SECRET or CONFIDENTIAL level pursuant to EO 13526, and satisfies both the procedural and substantive requirements set forth in the Executive Order." Hardy Decl. at ¶ 81.

Hardy's testimony does not identify when the Comey Memos were classified. This is significant because different procedures exist for records classified prior to the receipt of a FOIA request and for records classified after the fact. Once a FOIA request has been received, a government agency can only classify material "if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4 of this order." EO 13526, § 1.7(d). Hardy's declaration is completely silent as to when the classification took place and under what procedure.

DCNF asked for all unclassified records on June 1, 2017. June 1 is therefore the operative date. Any records classified after that date would be responsive to DCNF's FOIA request. In addition, to the extent such records have been classified in their entirety or information contained within them has been classified after the request was received, the executive order requires such classification be performed on a document-by-document basis. Defendants fail to provide the necessary evidence.<sup>4</sup>

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<sup>4</sup> To the extent the classification took place before June 1, the Daily Caller is entitled to any record that is not classified in its entirety. If information contained within one or more Comey Memos is properly classified, such information may be redacted.

**D. At least some information contained within the Comey Memos has been officially acknowledged.**

Director Comey indisputably testified about his nine one-on-one conversations with President Trump and the records he authored immediately following the interactions. Defendants however assert the testimony is of no consequence. *See Hardy Decl.* at ¶ 108 (“Because former-Director Comey was no longer an FBI official at the point that he provided his testimony before the SSCI, the FBI has concluded that his testimony did not and does not require any modification in its response.”). This simply cannot be the case.<sup>5</sup>

Contrary to Defendants’ assertions, Director Comey’s testimony cannot be compared to WikiLeaks or even a former government official’s memoir. Director Comey was asked to testify shortly after he was removed from office. He testified about conversations he had and records he authored while he was FBI director. Besides President Trump, Director Comey is the only individual that could answer the Committee’s questions or provide such information. He may have been a private citizen at the time he testified, but he was providing testimony based on actions he took while FBI director and was under oath while doing so.

Importantly, Defendants did not prevent Director Comey from testifying. Nor do they dispute, disavow, and even disagree with any of his testimony. Nor have Defendants sought to initiate an investigation against Director Comey for violating any non-disclosure agreements or removing records from the FBI when he was fired. Defendants have done little, if anything, expected of an agency facing an unauthorized leak or disclosure of information. Their silence and inaction speak volumes. *Barre*, 932 F. Supp. at 9.

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<sup>5</sup> To be officially acknowledged, the information requested must: (1) be as specific as the information previously released; (2) match the information previously disclosed; and (3) have already been made public through an official and documented disclosure. *Barre v. Obama*, 932 F. Supp. 2d 5, 8 (D.D.C. 2013). In this case, the only prong at issue is the third one.

Because the information contained in the Comey Memos has been disclosed by their author, the Comey Memos must be disclosed regardless of Defendants' otherwise valid claims of exemption. *Fitzgibbon v. Central Intelligence Agency* 911 F.2d 755, 765 (D.C. Cir. 1990).

**VII. Conclusion.**

For the reasons stated above, DCNF respectfully requests Defendants' Motion for Partial Summary Judgment be denied, DCNF's Cross-Motion for Summary Judgment be granted, and Defendants promptly produce all records responsive to DCNF's FOIA request.

Dated: November 3, 2017

Respectfully submitted,

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