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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI`I

HONOLULU CIVIL BEAT INC., Plaintiff, vs. FEDERAL BUREAU OF INVESTIGATION, Defendant.	CIV. NO. 23-CV-216 SASP-WRP PLAINTIFF'S REPLY IN SUPPORT OF COUNTER-MOTION FOR SUMMARY JUDGMENT [DKT. 73] AND IN OPPOSITION TO DEFENDANT FEDERAL BUREAU OF INVESTIGATION'S MOTION FOR SUMMARY JUDGMENT [DKT. 67] JUDGE: Hon. Shanlyn A. S. Park HEARING DATE: Feb. 20, 2025 HEARING TIME: 10:00 A.M. TRIAL: April 1, 2025

PLAINTIFF'S REPLY IN SUPPORT OF COUNTER-MOTION FOR SUMMARY JUDGMENT [DKT. 73] AND IN OPPOSITION TO DEFENDANT FEDERAL BUREAU OF INVESTIGATION'S MOTION FOR SUMMARY JUDGMENT [DKT. 67]

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OPEN Government Act of 2007, 110 Pub. L. No. 175, 121 Stat. 2524 3

Defendant Federal Bureau of Investigation (FBI) has failed to justify withholding all information—other than public court records—about how it investigated former state legislators Ty J.K. Cullen and Jamie Kalani English for corruption. Redaction would appropriately address any legitimate concerns.

In the end, Plaintiff Honolulu Civil Beat (Civil Beat) may not dispute properly supported redactions for names of witnesses, secret investigative techniques, attorney-client privilege, or other information. But the FBI disclosed nothing, which it can only do if there is a basis for "categorical" exemption; otherwise, it must disclose redacted records.[1] It is not possible to resolve—and no reason for this Court to address—limited exemption claims without knowing if the FBI contemplates redacting a few words or entire documents based on an exemption.

Thus, Civil Beat has only moved for summary judgment on the FBI's assertions of categorical withholding, *i.e.*, the FBI claims that it can withhold everything requested based on a cited exemption. As a matter of law, it has failed

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[1] Before filing its counter-motion, Civil Beat asked if the FBI invoked any exemptions (other than privacy [6/7(C)] and ongoing investigation [7(A)]) to categorically withhold everything. The FBI was "baffled" by the request, so Civil Beat addressed each claim as categorical withholding. The FBI now makes clear that, for other exemptions, it only seeks to withhold limited information. *E.g.*, Dkt. 76 at PageID.800 ("*some of the information* contained in the requested records implicates confidential sources" (emphasis added)).

to justify any categorical withholding. Other claimed exemptions—seeking to withhold only some information—are premature until the FBI releases redacted records.

Civil Beat respectfully requests that the Court grant its counter-motion for summary judgment on the FBI's categorical exemption claims, deny the FBI's motion for summary judgment, and require the FBI to release redacted records.

I. FOIA IS NOT A CONFIDENTIALITY LAW.

FOIA does not require agencies to withhold records simply because a FOIA exemption applies. *Chrysler Corp. v. Brown*, 441 U.S. 281, 291-92 (1979). Unless other federal law requires an agency to withhold records from the public, the agency always has the discretion under FOIA to disclose information—even if an exemption applies. *E.g.*, *Pac. Architects & Eng'rs, Inc. v. U.S. Dep't of State*, 906 F.2d 1345, 1346-47 (9th Cir. 1990).

After *Chrysler*, Congress did not amend FOIA to *require* withholding for exempt records. Quite the opposite, Congress has emphasized that FOIA's purpose is *disclosure* of records because federal agencies aggressively seek to deny public access. *E.g.*, 114 H.R. Rep. No. 391 (2016) ("FOIA has been amended multiple times in efforts to increase agency compliance with the requirements of the Act and to improve the process. FOIA was amended in 1974, 1976, 1986, 1996, 2007, and 2010. Despite these amendments, barriers to the public's right to

know persist.”). In 2007, Congress found that “the American people firmly believe that our system of government must itself be governed by a presumption of openness” and that “in practice, the Freedom of Information Act has not always lived up to the ideals of that Act.” OPEN Government Act of 2007, 110 Pub. L. No. 175 § 2, 121 Stat. 2524, 2524. More recently, Congress imposed the reasonably foreseeable harm standard—even where an exemption applies—and reinforced the importance of redaction. FOIA Improvement Act of 2016, 114 Pub. L. No. 185 § 2, 130 Stat. 538. “[T]here is concern that agencies are overusing these exemptions to protect records that should be releasable under the law.” 114 H.R. Rep. No. 391 (2016). Congress sought to codify and reinforce a presumption of openness:

> In the face of doubt, openness prevails. . . . All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

Id. (quoting President Obama’s January 21, 2009 memorandum to executive agencies regarding FOIA).

The FBI repeatedly argues, however, that FOIA requires denial of public access if any exemption applies. Dkt. 76 at PageID.790 (“The FBI cannot ignore

those exemptions.").[2] The FBI's attitude of government secrecy for anything potentially exempt disregards FOIA's core value of public disclosure. *E.g.*, *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) ("[D]isclosure, not secrecy, is the dominant objective of the Act."); *Church of Scientology Int'l v. IRS*, 995 F.2d 916, 919 (9th Cir. 1993) ("while there are specific exemptions from disclosure set forth in the Act, these exemptions are limited and must be narrowly construed with doubts resolved in favor of disclosure."). Such an attitude epitomizes why FOIA "has not always lived up to [its] ideals."

As Congress has recognized, redaction, not secrecy, is the solution for the limited concerns of the FOIA exemptions. 5 U.S.C. § 552(a)(8) & (b).

II. COURTS DO NOT DEFER TO CONCLUSORY AGENCY DECLARATIONS.

Courts review FOIA challenges de novo. 5 U.S.C. § 552(a)(4)(B). Contrary to the FBI's insinuation, this Court is not supposed to simply take the FBI's word that records are exempt or cannot be redacted. *See* Dkt. 76 at PageID.792-93. Deference, if any, is reserved for situations in which an agency has special expertise, such as national security concerns. *See, e.g.*, *Ctr. for Nat'l Sec. Studies*

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[2] *Accord* Dkt. 76 at PageID.794 &796 ("Congress and the President decided that information should not be released to the public."), PageID.797 ("Rather, individuals named in the records have a privacy interest that must be protected under federal law.")

v. U.S. Dep't of Justice, 331 F.3d 918, 926-30 (D.C. Cir. 2003) (explaining the constitutional and other special reasons for deference on FOIA determinations related to national security); *accord Schaerr v. U.S. Dep't of Justice*, 69 F.4th 924, 929 (D.C. Cir. 2023) ("Because withholding national security information is 'a uniquely executive purview,' we exercise great caution before compelling an agency to release such information."); *McDonnell v. United States*, 4 F.3d 1227, 1243-44 (3d Cir. 1993) (giving "substantial weight" to agency affidavits only as it concerns "classified status of disputed records").[3]

The D.C. Circuit's analysis in *CREW v. U.S. Dep't of Justice*, 746 F.3d 1082 (D.C. Cir. 2014) [*CREW I*], illustrates the issue. In that case, the court passingly referenced deference for Exemption 7(A) determinations regarding harm—albeit citing *Center for National Security Studies*, a national security case—but only to then hold that the FBI's affidavits were insufficient. *Id.* at 1098 ("although we give deference to an agency's predictive judgment of the harm that will result from disclosure of information, it is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; 'it must rather demonstrate *how* disclosure' will do so. The DOJ has made no such demonstration here."

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[3] The FBI also cites *ACLU v. FBI*, 881 F.3d 776 (9th Cir. 2018), about whether records were compiled for law enforcement purposes—an undisputed issue here.

(citations omitted)). The FBI's declaration there—as rejected by the D.C. Circuit—outlined the same sort of generic harms proffered here. *Compare CREW v. U.S. Dep't of Justice*, No. 12-5223 (D.C. Cir.), Dkt. 1428245 (Appendix) at 40-43,[4] *with* Dkt. 68-1 at PageID.433-34 & Dkt. 68-13 at PageID.527-30.

Substantial deference to agency declarations is all the more questionable in light of Congress's more recent requirement in 2016 that harm from disclosure must be "reasonably foresee[able]." 5 U.S.C. § 552(a)(8)(A)(i). Assuming an agency provides sufficient detail, courts have sufficient expertise to determine whether harms from disclosure are foreseeable and whether an agency's claims of harm are reasonable. Broad deference for *any* FOIA issue—as the FBI seeks here—is not grounded in the plain language of FOIA or Congressional intent.

In any event, no level of deference can hold the weight of what the FBI claims in this case. In light of all that is known already about the Cullen and English prosecutions and Choy's conduct, the FBI's vague and conclusory allegations that nothing from its investigation files may be disclosed to the public is contrary to the evidence and unsustainable.

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[4] Civil Beat requests that the Court take judicial notice of the court filings in the case given the FBI's reliance on it. *E.g.*, *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

III. THE FBI PROVIDED AN INADEQUATE FACTUAL BASIS FOR WITHHOLDING.

Agencies have a heavy burden in FOIA cases to provide the requester a meaningful opportunity to respond to exemption claims. Dkt. 73 at PageID.582-86. The FBI argues that it need not respond to any discovery because it identified documents as requested in the proposed interrogatories. Dkt. 76 at PageID.793. The FBI apparently did not read the Instructions that describe what information would "identify" a document. Dkt. 74 at PageID.768-69 (definitions of "identify" (r), (s), and (t)). The FBI's Exhibit M is inadequate.[5] An entry on Exhibit M is virtually indistinguishable from any other entry.

The Ninth Circuit's analysis in *Hamdan* is instructive. In that case, the Court of Appeals held that the FBI's less than "robust" affidavits were sufficient only because the FBI released documents "redacting only the bare minimum of information." *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 780 (9th Cir. 2015).

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[5] Exhibit M does not include dates or any individualized information regarding the content of any document. It does not even have column headings for most entries to inform Civil Beat which exemptions the FBI has claimed; it is just a scattering of "X"s on a page. Dkt. 68-14 at PageID.539-55. "Serial numbers" in the index repeat with different descriptions or have gaps without any explanation by the FBI. *E.g.*, *id.* at PageID.558-60, 565 (four instances of serial number "2" with four different descriptions). Also, the FBI nowhere identifies media records, even though it reported that there were 28 minutes of "media" responsive to the requests. *E.g.*, Dkt. 61 at PageID.359.

But the Ninth Circuit rejected the Defense Intelligence Agency (DIA) affidavits. *Id.* at 780-81. The DIA did not provide individualized explanations for the information withheld in each document, and "[a]ll of the DIA's documents are completely withheld, so the district court did not have an opportunity to observe the DIA's approach to redaction." *Id.*

Civil Beat should be permitted discovery.

IV. THE FBI'S PRIVACY CONCERNS ONLY SUPPORT, AT BEST, REDACTION.

The FBI cannot withhold from the public entire investigation files for Cullen and English based on Exemption 7(C).[6] Dkt. 73 at PageID.586-91. The FBI offers no genuine dispute that there is public interest in these records.[7] Dkt. 77. The

[6] Contrary to the FBI's argument, Dkt. 76 at PageID.795, the Exemption 6 privacy standard is not relevant here. If the FBI must disclose information under Exemption 7(C), then it must disclose the same information under Exemption 6, which requires greater disclosure. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989). The U.S. Supreme Court also has held that there is no deference to agencies in Exemption 7(C) cases. *Id.* at 756 n.9. Agencies have no special expertise concerning privacy determinations.

[7] Without citation, the FBI implies that Civil Beat had to disclose facts to the FBI before filing its counter-motion. Dkt. 76 at PageID.791. The FBI, however, insisted that no discovery, including initial disclosures, occur in this case. Dkt. 14 at PageID.52-54. Instead, the parties agreed that the FBI would first prepare a *Vaughn* index—which obligation the FBI ignored for over a year. Dkt. 52 at PageID.329. Unlike Civil Beat, the FBI served no discovery before the discovery deadline and did not seek to extend the deadline. Dkt. 60 at PageID.355-56.

FBI's concerns about the privacy interests of individuals other than Cullen, English, and Choy or highly sensitive information about those three can be addressed through redaction.

In *Tuffly*, the Ninth Circuit did not condone withholding entire files from the public on privacy grounds as the FBI has done here. *Tuffly v. U.S. Dep't of Homeland Sec.*, 870 F.3d 1086 (9th Cir. 2017). In that case, DHS released extensive files concerning 149 detainees released pending removal proceedings, but redacted names and file numbers. *Id.* at 1090-91. The Ninth Circuit only addressed whether releasing the names would shed any additional light on government action. *Id.* at 1094-95. In light of the information already released—including "the relevant information that ICE had before it when it made its decision to release them"—the "names of the detainees would do nothing to further illuminate the government's decision that these individuals should be released pending completion of their removal proceedings." *Id.*

In contrast, the FBI has released nothing from its investigation files here.[8] The FBI implies that it does not need anyone to confirm that it is doing its statutory

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[8] The FBI also cites *CREW I* to point out that the investigation in that case was closed. Dkt. 76 at PageID.800. But the investigations into Cullen and English are closed. And *CREW I* made that remark relevant to Exemption 7(A), not in the lengthy analysis of Exemption 7(C). 746 F.3d at 1091-96. Conflating those issues only underscores contradictions in the FBI's reply. The FBI claims that privacy interests justify withholding everything in the files about Cullen and English, but

duty. Dkt. 76 at PageID.799. That response shows that the FBI fundamentally misunderstands FOIA's core purpose. FOIA exists to ensure the checks and balances in our form of government. *E.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and *to hold the governors accountable to the governed*." (emphasis added)); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) ("The statute is designed 'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'"). Releasing anything from the FBI's investigation files obviously will shed more light on government action than what the FBI has released thus far—nothing.

Moreover, there is further public interest that outweighs any generic privacy concerns because it is undisputed that the FBI directed Choy to use federal monies to pay Cullen and English to ensure that bills did not pass the state Legislature.[9]

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also claims that it will release records when some unspecified investigation is done. Dkt. 76 at 790-91. Privacy interests—if they truly exist—do not simply disappear when an investigation is concluded. The fact that the FBI plans to release these records after it finishes a separate investigation illustrates that there are no legitimate privacy interests *that justify withholding everything*, only efforts by the FBI to confuse the issues and delay disclosure.

[9] The FBI does not like describing its conduct as meddling in or manipulating the legislative process, but regardless how it wordsmiths the facts, that is what it did.

Dkt. 77 at PageID.808-10. What information did the FBI have when it made the decision to change the course of state legislation? What safeguards exist to ensure that the FBI does not regularly use federal monies to covertly influence state legislation? Why did the FBI use federal monies to kill state legislation when it already had evidence of bribes before the 2020 legislative session started? Did the FBI even consider how important this legislation was for the community? *E.g.*, Tom George, *Bribery Scheme Hurts Efforts to Fix Hawaii's Cesspool Problem*, KITV (Feb. 9, 2022) (discussing with advocates how the FBI's bribes "set back ongoing efforts to fix Hawaii's massive problem with cesspools"). Did the FBI alert anyone in state government that Cullen and English were corrupt?[10] The public interest in the FBI's policies around meddling in state legislative affairs is exceptionally strong. *E.g.*, *CREW I*, 746 F.3d at 1093 ("we have repeatedly recognized a public interest in the manner in which the DOJ carries out substantive law enforcement policy").

Lastly, the FBI does not dispute the existence of general public interest in the FBI's investigations. Dkt. 77 at PageID.810 (only claiming that such evidence

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[10] The FBI argues that it did not have the power to remove Cullen and English from office. Dkt. 76 at PageID.800. Civil Beat never claimed otherwise. But the FBI remained silent; it did not alert authorities who could have removed Cullen and English from office, and it did not alert the electorate before the November 2019 elections despite knowing that Cullen had accepted multiple bribes.

of public interest is "immaterial").[11] That interest has continued even in the short time since Civil Beat filed its counter-motion last month.[12]

The FBI cannot justify withholding everything on privacy grounds.

V. THE FBI'S PENDING INVESTIGATION CONCERNS ONLY SUPPORT, AT BEST, REDACTION.

The FBI cannot withhold from the public entire investigation files for Cullen and English based on Exemption 7(A).[13] Dkt. 73 at PageID.591-95. The FBI

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[11] The FBI claims that national media (other than numerous articles by Associated Press) did not "extensively" cover the investigation. That is not a material dispute. Regardless, it ignores the coverage published by New York Post, The Hill, Center Square, Daily Wire, and New York Times.

[12] The Cullen and English investigations have been referenced recently in connection with the Legislature revising its rules concerning the legislative process and introducing legislation for the 2025 session. Patti Epler, et al., *Major Reform Bills Are Still on the Table. Will This Be the Year They Pass?*, Honolulu Civil Beat (Jan. 26, 2025); Dan Nakaso, *Bills Aimed at Corralling Hawaii Government Corruption Raise Hopes*, Honolulu Star-Advertiser (Jan. 19, 2025); Editorial Board, *Transparent Isle Lawmaking a Must*, Honolulu Star-Advertiser (Jan. 16, 2025); Sunshine Editorial Board, *The Sunshine Blog: Here's When It Pays To Be a Doctor—and a Governor*, Honolulu Civil Beat (Jan. 10, 2025); Andrew Gomes, *Advocates Renew Push for Hawaii Legislative Reforms*, Honolulu Star-Advertiser (Jan. 10, 2025).

[13] The FBI claims that it need not prove that a law enforcement proceeding is "pending" because that word is not used in the FOIA exemption. Dkt. 76 at PageID.795-96. For disclosure to "interfere with enforcement proceedings" as required by Exemption 7(A), an enforcement proceeding must exist or be anticipated; if there is no pending proceeding, disclosure will not interfere. *E.g.*, *CREW I*, 746 F.3d at 1097 ("We therefore 'require a law enforcement agency invoking the exception to show that the material withheld 'relates to a concrete prospective law enforcement proceeding.'"). The mere existence of an

claims that it does not want to disclose "who it is investigating, who its sources are, what investigative techniques it is using, et cetera" for investigations other than Cullen and English. Dkt. 76 at PageID.796. Civil Beat never sought that information. Dkt. 68-2 at PageID.486 & Dkt. 68-7 at PageID.503 (requesting materials concerning the "criminal charges brought against" Cullen and English, not others). Moreover, those limited concerns can be addressed by redaction;[14] withholding the entire investigation is not warranted by such narrower concerns.

VI. RESOLVING OTHER CLAIMS IS PREMATURE.

As clarified in the FBI's reply, all other claimed FBI exemptions focus on specific information that can be redacted in the first instance. Beyond that, for the reasons stated in the counter-motion, Civil Beat lacks sufficient information to meaningfully address the claimed exemptions because the FBI has failed to

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investigation into other people for similar crimes is not enough. *See* Dkt. 73 at PageID.592-93. If it were, records may never be disclosed because the government claims that it is "always investigating" public corruption. *Id.*

[14] And as discussed above, *CREW I* does not support the assertion that this Court must simply accept the FBI's conclusory claim that disclosure will cause harm under Exemption 7(A). To the contrary, the D.C. Circuit reversed summary judgment and held that the FBI could not categorically withhold all its files concerning a public corruption investigation into one person simply because it was investigating others—as it seeks to do here. *CREW I*, 746 F.3d at 1098-99.

sufficiently explain the scope of what it is withholding.[15] It is possible that disclosure of redacted records—if properly limited in scope to the strict construction of the exemptions—would resolve any issues. Thus, the Court need not address those claims at this time if it grants Civil Beat's counter-motion against any FBI claims for categorical withholding of everything and orders disclosure of redacted records.

CONCLUSION

Civil Beat respectfully requests that the Court grant its counter-motion for summary judgment on the FBI's categorical exemption claims, deny the FBI's motion for summary judgment, and require the FBI to release redacted records.

DATED: Honolulu, Hawai`i, January 29, 2025

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[15] For example, the FBI claims that it is "obvious" that any internal documents may be withheld under the deliberative process privilege. Dkt. 76 at PageID.803-04. That is not true. A document is not privileged simply because it is "internal". *E.g.*, *Transgender Law Ctr. v. Immigration & Customs Enf't*, 33 F.4th 1186, 1197-98, 1201 (9th Cir. 2022); *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 20 F.4th 49, 54-57 (D.C. Cir. 2021). Redactions will further inform whether the FBI excessively withholds information based on these other exemption claims and whether there is in fact any dispute.