SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MIKE ECKEL Senior Correspondent Radio Free Europe/Radio Liberty 1201 Connecticut Avenue, NW Suite 400 Washington, D.C. 20036 Plaintiff, v. **DISTRICT OF COLUMBIA** Defendant.	)	2017 CA 007172 B Judge Puig-Logo

PLAINTIFF'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS WRIGHT TREMAINE LLP

Eric J. Feder
1919 Pennsylvania Avenue, NW, 8th floor
Washington, D.C. 20006
Telephone: (202) 973-4273
ericfeder@dwt.com

Attorneys for Plaintiff Mike Eckel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Defendant has failed to meet its burden under the D.C. FOIA to justify its refusal to disclose documents that would shed light on the investigation by the Office of the Chief Medical Examiner ("OCME") into the highly suspicious death of a former high-ranking Russian official on U.S. soil. From its first response to Plaintiff's FOIA request through its briefing on these motions, Defendant has offered only conclusory, generic assertions that all information in its files related to the autopsy of Mikhail Lesin is exempt from disclosure. And Defendant ignores the clear public interest in understanding how local law enforcement could reach the facially absurd conclusion—obvious to anyone, with or without "medical training"—that a man could die of blunt force injuries to his head, neck, torso, arms and legs while alone in his hotel room. Although Plaintiff acknowledges that certain information likely must be redacted from the documents (for example, the identities of confidential informants), Defendant has not remotely justified the wholesale withholding of all of the documents at issue. Accordingly, the Court should grant summary judgment to Plaintiff.

ARGUMENT

I. DEFENDANT HAS NOT MET ITS BURDEN TO SHOW THE APPLICABILITY OF THE CLAIMED EXEMPTIONS TO THE WITHHELD DOCUMENTS

Consistent with the purpose of the FOIA to promote government transparency, the statute squarely places the burden on the government to establish that requested documents are exempt from disclosure. *See D.C. v. Fraternal Order of Police*, 75 A.3d 259, 264 (D.C. 2013). Indeed, "even where the requester has moved for summary judgment, the Government 'ultimately [has] the onus of proving that the [documents] are exempt from disclosure.'" *COMPTEL v. F.C.C.*, 910 F. Supp. 2d 100, 111 (D.D.C. 2012) (citation omitted). Defendant here has not met its burden to "provide a relatively detailed justification [for withholding information], [by] specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Mead Data Central, Inc. v. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977). The bare-bones affidavit from the OCME FOIA

Officer notes the document searches that were undertaken and lists the exemptions cited in the agency's denials, but provides absolutely no explanation—let alone a "detailed justification"—of how those exemptions apply. Defendant's Vaughn Index likewise provides basic descriptions of documents and citations to statutory exemptions, with no explanation as to how each exemption applies. Courts hold that "[g]eneric portrayals of categories of documents and vaguely formulated descriptions will not suffice" to meet the government's burden, *Am. Immigration Council v. DHS*, 950 F. Supp. 2d 221, 246 (D.D.C. 2013), nor will "bare legal conclusions regarding the exemptions relied upon." *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 89 (D.D.C. 2009).

Defendant has also not provided a valid basis to justify withholding all documents *in their entirety*, rather than making an attempt to segregate and redact exempt information. "It has long been a rule … that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead*, 566 F.2d at 260. Defendant must "carry its evidentiary burden and fully explain its decisions on segregability." *Am. Immigration Council*, 950 F. Supp. 2d at 248. But Defendant here states baldly that any non-exempt information "will have minimal or no informational content." Def. Opp. at 15. That type of "blanket declaration" is plainly insufficient. *Wilderness Soc'y v. Dep't of Interior*, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) (holding that "for *each* entry [in the Vaughn Index] the defendant is required to 'specify in detail which portions of the document are disclosable and which are allegedly exempt'") (citation omitted); *see also Defs. of Wildlife*, 623 F. Supp. 2d at 91 (holding agency's explanation "insufficient, because it does not show with reasonable specificity why the documents cannot be further segregated").

A look at the specific exemptions Defendant cites confirms that it has not met its burden. Defendant relies on the deliberative process privilege to justify withholding dozens of documents in their entirety, but argues only that, because a draft autopsy report could be altered over time, all of the documents in the file are inherently pre-decisional and deliberative. Courts reject such

"conclusory allegations" to show that the privilege applies. *Bloche v. Dep't of Def.*, 279 F. Supp. 3d 68, 87 (D.D.C. 2017) (ordering production of document because agency provided "no factual basis to support [its] claim"). And Defendant does not even attempt to address its withholding of categories of documents that, as a matter of law, are not subject to the privilege at all. *See* Pl. Mem. at 14-15 (discussing non-applicability of privilege to draft press releases).

Likewise, the D.C. Circuit has been clear that, to justify the withholding of documents under the "investigative techniques" exemption, the agency must, at a minimum, "demonstrate logically how the release of the requested information might create risk of circumvention of the law." *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011).[1] "Generic description[s] of documents," like what Defendant provides here, "do[] not suffice." *Davis v. FBI*, 770 F. Supp. 2d 93, 100 (D.D.C. 2011). Moreover, under the express language of the statute, a threshold requirement for the exemption is that the techniques are "not generally known outside the government." D.C. Code § 2-534(a)(3)(E); *see also Campbell v. DOJ*, No. 89-cv-3016, 1996 WL 554511, at *10 (D.D.C. Sept. 19, 1996) ("It is well established that [federal] Exemption 7(E) does not extend to 'routine techniques...well known to the public.'") (citation omitted), *rev'd on other grounds*, 164 F.3d 20 (D.C. Cir. 1998). The particular technique at issue here—an autopsy—is one of the most commonly known parts of a police investigation. Indeed, given that many states *require* that autopsy reports be made public as a matter of course (*see* Pl. Mem. at 12 n.12), Defendant cannot plausibly claim that

[1] Defendant cites a case from the Second Circuit to argue that it is "settled law" that the law enforcement privilege "provides categorical protection for techniques and procedures," with no requirement to show "harm" from disclosure. Def. Opp. at 14 (quoting *Allard K. Lowenstein Int'l Human Rights Project v. DHS*, 626 F.3d 678, 681 (2d Cir. 2010)). But that decision analyzed language in the federal FOIA statute exempting production of documents that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The court interpreted the "risk of circumvention" requirement as applying only to the second clause ("guidelines") and not the first ("techniques and procedures"). But unlike the Second Circuit, the D.C. Circuit "applie[s] the 'risk of circumvention of the law' requirement to techniques and procedures, as well as guidelines." *CREW v. DOJ*, 160 F. Supp. 3d 226, 242 (D.D.C. 2016) (expressly declining to follow Second Circuit approach) (citing *Blackwell*, 646 F.3d at 41-42).

disclosure of the autopsy files here would reveal any secret technique—let alone that such disclosure would create any risk of circumvention of the law. *See, e.g.*, *Campbell*, 1996 WL 554511, at *10 (holding that government failed to show that use of "pretext telephone calls" was not known to the public); *Nat'l Sec. Archive v. F.B.I.*, 759 F. Supp. 872, 885 (D.D.C. 1991) (rejecting exemption based on "conclusory" assertion that particular technique was not generally known).

Given Defendant's failure to meet its burden to justify the application of the cited exemptions, the vast majority of the documents requested should be produced.

II. THE PUBLIC INTEREST IN UNDERSTANDING OCME'S CONCLUSION IN THE LESIN INVESTIGATION OUTWEIGHS THE ASSERTED PRIVACY INTEREST

Defendant glibly dismisses the need for public scrutiny of OCME's facially implausible determination of Lesin's cause of death, insisting that the public interest is based on no more than a "bare suspicion" from a "reporter without medical training," no different from the conspiracy-addled plaintiffs who refused to accept that Vincent Foster committed suicide in the *Favish* case. Def. Opp. at 16 (citing *Nat'l Archives Records Admin. v. Favish*, 541 U.S. 157, 174 (2004)). But it takes no medical training to question how it is physically possible for an adult man (no matter how drunk) to sustain lethal blunt force injuries to every part of his body while alone in a room. Indeed, unlike the plaintiffs in *Favish*, who refused to accept the conclusions of five totally independent investigations, skepticism of OCME's risible explanation is widespread throughout the media, based not only on common sense but multiple law enforcement sources with inside knowledge of the investigation. *See* Pl. Mem. at 1-2 (summarizing press reports).[2] Courts have long recognized the weighty public interest in understanding the conduct of high-profile criminal investigations—an

[2] Defendant attempts to liken this case to *Favish* by arguing that "multiple investigation agencies" reached the same conclusion about Lesin's death. Def. Opp. at 9. But in *Favish*, there were five wholly independent investigations that re-examined the evidence to confirm what was already obvious at first blush—that a man who was found dead with a gunshot wound to his head and a pistol in his hand died by suicide. Here, the conclusion from the single investigation (albeit involving multiple agencies, as many investigations do) is implausible on its face, and has been widely questioned. *See, e.g.,* Pl. Exs. 9, 12-13.

interest that is particularly heightened here, given the broader context of the dramatic rise in suspicious deaths of Russian dissidents on foreign soil. *See* Pl. Mem. at 2, 8-9.

Plaintiff does not argue that there are no potential privacy interests in any portions of the autopsy records. Plaintiff disclaimed interest in the photos from the report for precisely that reason. But the law is clear that a document is not *per se* exempt from disclosure simply because it is part of an autopsy report. *See* Pl. Mem. at 11 (citing cases); *see also Journal-Gazette Co. v. U.S. Dep't of the Army*, No. F89-147, slip op. at 8-9 (N.D. Ind. Jan. 8, 1990) (holding that because autopsy report of National Guard pilot killed in training exercise contained "concise medical descriptions of the cause of death," not "graphic, morbid descriptions," survivors' privacy interest was outweighed by public interest).[3] Defendant has not established that disclosure of basic explanatory information from the autopsy report would "shock the sensibilities" of Lesin's family any more than the already-public official report that Lesin died after stumbling around Dupont Circle in a drunken stupor and (somehow) repeatedly throwing himself against hard objects in his hotel room. *Badhwar v. Dep't of Air Force*, 829 F.2d 182, 185–86 (D.C. Cir. 1987). *Cf. Bartko v. DOJ*, 898 F.3d 51, 69 (D.C. Cir. 2018) (holding that privacy interests in secrecy of investigative file are "substantially diminished" where "allegations of misconduct … are already a matter of public record").

Given the significant public interest in understanding a law enforcement investigation with significant geopolitical implications and the amount of intimate information about Lesin's death that is already in the public domain, Defendant cannot justify withholding the autopsy report under the privacy exemption, and Plaintiff's motion for summary judgment should be granted.

CONCLUSION

For the reasons set forth above, Plaintiff's cross-motion should be granted.

[3] Indeed, the District of Columbia—unlike some states, *see* Def. Opp. at 11 n.7—has elected *not* to bar public access to autopsy records, and instead affirmatively allows disclosure to "any person with a legitimate interest" in the records. D.C. Code. § 5-1412(c). Defendant's position would allow the FOIA exemptions to nullify that allowance.

Dated: Washington, District of Columbia
February 8, 2019

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/Eric J. Feder
Eric J. Feder

1919 Pennsylvania Avenue, NW, 8th floor
Washington, D.C. 20006
Telephone: (202) 973-4273
Email: ericfeder@dwt.com

Benjamin Herman (D.C. Bar #490433)
General Counsel, RFE/RL, Inc.
1201 Connecticut Avenue, NW
Suite 400
Washington, D.C. 20036
(202) 457-6966
hermanb@rferl.org

Attorneys for Plaintiff Mike Eckel