

January 15, 2021

D.C. CIRCUIT ISSUES RARE OPINION CLARIFYING RIGHT OF PUBLIC ACCESS TO NATIONAL SECURITY INFORMATION IN JUDICIAL DOCUMENTS

To Our Clients and Friends:

On January 8, 2021, the United States Court of Appeals for the D.C. Circuit in *CNN v. FBI*, -- F.3d --, 2021 WL 68307 (D.C. Cir. Jan. 8, 2021), issued a rare precedential opinion clarifying application of the factors relevant to determining whether competing interests outweigh the “strong presumption” of public access to judicial records, in particular, in a context in which the government provides a national security justification for continued sealing. The case arose out of CNN’s efforts to obtain copies of the “Comey Memos”—memos former FBI Director James Comey claimed to have written about his conversations with President Trump—though the D.C. Circuit’s decision does not concern access to the Comey Memos themselves, but rather access to an FBI declaration submitted in the course of litigation about the Comey Memos.

I. Background

Following President Trump’s firing of FBI Director James Comey in 2017, news outlets, including CNN, filed Freedom of Information Act (“FOIA”) requests to obtain access to memos that Director Comey claimed to have written about his meetings with President Trump.[1] The FBI denied the FOIA request, including on the basis of the then-ongoing investigation of Special Counsel Robert Mueller into Russian interference in the 2016 presidential election.[2] CNN challenged the denial of the FOIA request in court, and to support the denial of the FOIA request, the FBI submitted an *ex parte, in camera* declaration from then-Deputy Assistant Director of the FBI David Archey, who oversaw all FBI employees working on the Mueller probe. Relying on the Archey declaration, Judge Boasberg of the District Court for the District of Columbia initially ruled that the FBI could withhold the Comey Memos at least until the end of the ongoing Mueller investigation.[3]

After the Department of Justice subsequently released the Comey Memos to members of Congress in redacted form, after which they were released to the public, CNN sought disclosure of the Archey declaration. Rather than disclose the declaration in its entirety, however, the FBI filed a redacted version. In a June 7, 2019 decision, the district court considered whether CNN had a common-law right of access to the unredacted Archey declaration as a judicial document.[4] The court found that CNN had established that the Archey declaration was a judicial record because the government had filed it to support its motion for summary judgment, raising a “strong presumption in favor of public access.”[5] The court next considered whether the government had established that its interest in secrecy outweighed the public right of access according to factors set forth in *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1980):

(1) [T]he 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.

The district court found that none of these factors strongly favored redaction, and in particular, that factor (1) favored disclosure due to the “enormous public interest in the Comey Memos,” even though “the Court sees little public value in the specific information that remains redacted” in the Archey declaration.^[6] The district court also found that factor (2) favored disclosure because “the vast majority of the declaration” had already been released.^[7] With respect to factor (3), the district court noted that while the government had objected to the disclosure on national security grounds, a “third-party objection”—which had not been made—would have more weight.”^[8] The district court also found that factor (6) was the “most important” factor in its assessment and favored disclosure because the FBI introduced the declaration to persuade the court to rule in the FBI’s favor regarding disclosure of the Comey Memos.^[9] The district court thus concluded that there was a heightened public interest in the redacted material that weighed in favor of its complete disclosure.^[10] The district court ordered disclosure of the redacted material in the Archey declaration

II. Access to Judicial Documents in the D.C. Circuit

On appeal, the D.C. Circuit held that the district court had erred in evaluating several of the *Hubbard* factors, and vacated and remanded for further proceedings.

In reviewing the district court’s decision, the D.C. Circuit acknowledged that it “ha[d] not previously given . . . sufficient guidance regarding the meaning of” the multi-factor test set forth in *United States v. Hubbard*,^[11] which had been the subject of only six precedential opinions since its issuance in 1980.^[12]

With respect to the first two *Hubbard* factors, the D.C. Circuit held that the district court’s lens was too broad. With respect to factor (1) the relevant consideration was the “public’s need to access the information that remains sealed, not the public’s need for other information sought in the overall lawsuit,” including the Comey Memos, which the district court had taken into consideration in evaluating this factor.^[13] Similarly, with respect to factor (2), the D.C. Circuit held that the relevant consideration was “the public’s previous access to the *sealed* information, not its previous access to the information available in the overall lawsuit,” including the disclosed parts of the Archey declaration, which the district court had considered in evaluating this factor.^[14]

In connection with the third factor, the D.C. Circuit noted that while the absence of any third-parties objecting to disclosure would usually weigh in favor of disclosure, the “national security context” had to be taken into account. Here, “the National Security Act requires the FBI to keep intelligence sources and methods confidential.”^[15] Thus, the FBI was “no ordinary agency” in this context, and “the third parties with the most acute interest in the disclosure of the sealed material”—namely, “the intelligence sources whose lives may depend on those redactions”—were not in a position to object without outing themselves.^[16] Thus, the D.C. Circuit noted that in assessing this factor, district courts “should consider

whether secrecy plays an outsized role in the specific context” at issue.[17] The national security context also had to be considered with respect to factor (5); specifically, courts “should consider the dire consequences that may occur if an agency discloses its intelligence sources and methods” because “[e]ven a small chance that some court will order disclosure of a source’s identity could well impair intelligence gathering and cause sources to close up like a clam.”[18]

The D.C. Circuit held that the district court had erred in considering factor (6)—the purpose for which the document was introduced—as the “most important” factor in its analysis.[19] It explained that when the *Hubbard* court referred to this factor, the purpose for which a document was used, as “the most important element” in assessing whether or not to require its disclosure, that holding was confined to “the context of that case.”[20] Indeed, “when the sixth factor highlights the fact that a sealed document didn’t affect a judicial decision, it can be the ‘most important’ element cutting against disclosure,” but “the reverse can also be true” “[w]hen a sealed document is considered as part of judicial decisionmaking.”[21] Once again, taking the “national security context of the sealed information” into account, the “sixth factor [did]n’t outweigh other factors.”[22] Rather, the D.C. Circuit found that this factor “cut both ways”; while the fact that the Archey declaration was “submitted to influence a judicial decision” weighed in favor of disclosure, the fact that “the government necessarily had to disclose information to the court for the very purpose of keeping it secret” “cut[] against disclosure.”[23]

In light of this elucidation of the *Hubbard* factors, the D.C. Circuit remanded the matter for further consideration by the district court. The D.C. Circuit expressly declined to address whether a First Amendment right of access might have provided an alternative ground for affirmance of the lower court’s initial decision requiring disclosure of the Archey declaration in its entirety.[24]

III. Conclusion

CNN v. FBI offers a rare elaboration of the *Hubbard* factors that will be critically important for litigants seeking to withhold or force the disclosure of judicial documents, in particular in the face of objections from government agencies in the national security context. By narrowing the analysis to focus only on the public’s interest in particular information withheld, rather than the broader context, the opinion appears to put a thumb on the scale in favor of non-disclosure, at least in the national security context, for keeping secret redacted portions of court filings in all manner of litigation.

[1] *CNN v. FBI*, 271 F. Supp. 3d 108 (D.D.C. 2017).

[2] 5 U.S.C. § 552 (b)(7)(A) (exempting from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with law enforcement proceedings”).

[3] *CNN v. FBI*, 293 F. Supp. 3d 59, 65-66 (D.D.C. 2018).

[4] *CNN v. FBI*, 384 F. Supp. 3d. 20, 43-44 (D.D.C. 2019).

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[5] *Id.* at 41-42 (internal quotation marks omitted).

[6] *Id.* at 42.

[7] *Id.* at 42-43.

[8] *Id.* at 43.

[9] *Id.* at 43-44.

[10] *Id.* at 44.

[11] *CNN*, -- F.3d --, 2021 WL 68307 at *3.

[12] *See Leopold v. United States*, 964 F.3d 1221 (D.C. Cir. 2020); *League of Women Voters v. Newby*, 963 F.3d 130 (D.C. Cir. 2020); *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661 (D.C. Cir. 2017); *In re Sealed Case*, 237 F.3d 657 (D.C. Cir. 2001); *EEOC v. Nat'l Children's Ctr.*, 98 F.3d 1406 (D.C. Cir. 1996); *In re Application of NBC*, 653 F.2d 609 (D.C. Cir. 1981).

[13] *CNN*, -- F.3d --, 2021 WL 68307 at *3.

[14] *Id.* (emphasis added).

[15] *Id.*

[16] *Id.* at *4.

[17] *Id.*

[18] *Id.* (quoting *CIA v. Sims*, 471 U.S. 159, 175 (1985)).

[19] *Id.*

[20] *Id.*

[21] *Id.* at *5.

[22] *Id.*.

[23] *Id.*

[24] *Id.* at *2 n.4.



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