ORAL ARGUMENT SCHEDULED FOR MAY 10, 2017

No. 15-5314

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM S. PRICE,
Plaintiff – Appellant pro se,

v.

U.S. DEPARTMENT OF JUSTICE ATTORNEY OFFICE, et al.,
Defendant – Appellees.

Appeal from the United States District Court
for the District of Columbia, No. 1:14-cv-00847-RJL
(Hon. Richard J. Leon)

REPLY BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF APPELLANT WILLIAM S. PRICE

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Appointed Amicus Curiae in Support of William S. Price

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GLOSSARY OF ABBREVIATIONS

DOJ: Department of Justice

EOUSA: Executive Office for United States Attorneys

FOIA: Freedom of Information Act

FBI: Federal Bureau of Investigations

OIP: Office of Information Policy

REPLY BRIEF[1]

The Government's attempt to recast the issue presented here as one of criminal procedure completely misses the point, and should not distract the Court from resolving a core matter of FOIA law. The Government claims it needs FOIA waivers for criminal defendants because of efficiency concerns—waiver prevents individual defendants from filing FOIA requests seeking information about their cases, which "is burdensome both for courts and for agencies." Gov. Br. at 46. But the proper analysis here is not whether the Government believes FOIA waivers are beneficial; it is whether waiver is consistent with FOIA. *See New York v. Hill*, 528 U.S. 110, 116 (2000) ("It is of course true that waiver is not appropriate when it is inconsistent with the provision creating the right sought to be secured.").

If this Court—in effect, *the* FOIA court—sanctions the waiver of the public right to request information via the Freedom of Information Act, the Government will undoubtedly broaden its use of FOIA waivers to

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[1] "Op. Br." refers to Appointed *Amicus* Opening Brief filed in support of Appellant William S. Price; "Gov. Br." refers to the Government's Response Brief.

many federal guilty pleas—just as it did when courts approved appellate and collateral attack waivers in guilty pleas. The end result will be that waiver prevents one group of citizens (criminal defendants) from seeking information in the government's possession, even though Congress designed FOIA as a public right so that all citizens would have the same access to information. Congress in fact codified its view that access to information in the Government's possession does not turn on the requester's identity. Yet waiver does just that.

FOIA's very structure also makes seeking waivers a foolish endeavor. Mr. Price could have his cellmate file the same FOIA request tomorrow, and the Government admits it could do nothing to prevent disclosure. Gov. Br. at 27 n.9. Congress designed FOIA as a public right that renders waiver meaningless; waiver is thus inconsistent with that design.

The ruling below should be reversed as much for the reasons advanced by the Government as by Mr. Price.

I. MR. PRICE'S FOIA REQUEST IS NOT A CHALLENGE TO HIS CONVICTION AND SENTENCE

The Government spends considerable space arguing that this forum is not the place to relitigate Mr. Price's criminal case or the voluntariness of his FOIA waiver. Gov. Br. at 18–23. It explains that allowing Mr. Price to challenge his guilty plea at this late date would undermine all guilty plea waivers and the statutes governing collateral review of criminal convictions. Gov. Br. at 20–21. And it argues that Mr. Price is estopped from arguing here that his guilty plea waiver was unknowing or involuntary because the sentencing court already rejected that argument in Mr. Price's 28 U.S.C. § 2255 action. Gov. Br. at 23. *Amicus* agrees.

Of course, Mr. Price has never argued in this civil FOIA suit that his guilty plea was unknowing or involuntary. Nor has he attempted to collaterally attack his conviction or sentence. He instead seeks information through FOIA on how the Government prosecuted his case. No more, no less. When the Government failed to disclose the requested information, Mr. Price argued that his FOIA waiver is unenforceable, and that Congress created a statutory framework inconsistent with waiver in

any context—criminal or civil.[2] Put simply, Price is not attacking the terms of his plea.

The Government conflates the separate questions of whether a plea is knowing and voluntary with whether Congress intended to categorically preclude FOIA waivers. By focusing on the former question, the Government shuffles around the critical inquiry here: whether Congress intended FOIA to be unwaivable, either because it took affirmative steps to preclude waiver or because waiver is inconsistent with the statutory right it created. *See United States v. Mezzanatto*, 513 U.S. 196, 200–01 (1995); *Hill*, 528 U.S. at 116–17; Op. Br. at 17.

Rather than conducting the normal analysis for when rights are generally waivable under *Mezzanatto*—which decides whether a particular statutory right is waivable for all cases—the Government says

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[2] The Government argues that the "inquiry most focuses on the intent and conduct of the criminal defendant seeking to escape the plea bargain, rather than on the intent of Congress or public policy." Gov. Br. at 26. But again, the Government fails to understand the nature of Mr. Price's argument here. Mr. Price does not challenge the guilty plea. He instead challenges the enforceability of one term in the plea agreement, which is no different than arguing that a particular term within a contract is unconscionable or contrary to public policy.

district courts must focus on the case-by-case voluntariness of a FOIA waiver to decide if it is enforceable. That is, waiver is unenforceable only if the requester shows by "clear evidence" that his waiver was the result of ineffective assistance of counsel or if waiver would result in a miscarriage of justice. Gov. Br. at 22. The Government borrows that "clear evidence" standard from *United States v. Guillen*, 561 F.3d 527, 528–30 (D.C. Cir. 2009), where this Court rejected an argument that sentence appeal waivers could never be knowing and voluntary (a facial attack on waiver quite different from here) and created the test for determining whether such a waiver is knowing and voluntary.

This novel "clear evidence" rule will burden busy district courts with litigating FOIA waivers on a case-by-case basis. Worse yet, it will not work. The Government rightly acknowledges that the sentencing court might not be the court deciding the FOIA waiver's validity. In that situation, the FOIA court would need to determine whether the requester has satisfied the "clear evidence" and miscarriage of justice standard without having presided over the criminal case and with a cold record. The Government's solution to this obvious problem is for the sentencing

court to decide the waiver's validity in every case, Gov. Br. at 34, presumably on federal habeas review under 28 U.S.C. § 2255.

FOIA's square peg cannot be forced into the round hole of habeas. A claim that the waiver is not enforceable because Congress made FOIA unwaivable cannot be raised on habeas review. Such a claim would not disturb the conviction or lead to earlier release, which is a prerequisite to habeas relief. *See Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005) (noting that habeas relief generally entails challenging a conviction or sentence, leading to "immediate release or a shorter period of detention"); *United States v. Pollard*, 959 F.2d 1011, 1028 (D.C. Cir. 1992) (holding that a claim that the government breached a plea agreement is cognizable under § 2255 only where challenging a "fundamental defect"). So Mr. Price could not have presented the FOIA claim raised here in his § 2255 proceeding. That makes sense considering there is no indication in either § 2255 or FOIA to support the Government's clear evidence standard.

For all its complexity, the Government's proposed process for litigating FOIA waivers fails to prevent those who have waived their rights from gaining access to the requested information. If all else fails,

waivors can simply ask their family, friends, or cellmates to make the relevant FOIA requests. As long as those third parties request information on their own behalf, the Government cannot prevent disclosure unless permitted by FOIA's enumerated exemptions. *See Ebling v. U.S. Dep't of Justice*, 796 F. Supp. 2d 52, 54 (D.D.C. 2011) ("Ms. Ebling has an independent right to request records under FOIA, and Mr. Price could not, and did not, unilaterally waive that right [for Ms. Ebling] merely by executing his plea agreement."). So much for the Government's efficiency and finality concerns. Gov. Br. at 46–47. That FOIA waivers are so ineffectual indicates that Congress designed the public right of FOIA to be unwaivable. *See infra*, at 11–13.

II. WAIVER IS INCONSISTENT WITH FOIA'S STATUTORY FRAMEWORK

The presumption of waivability is overcome when waiver is inconsistent with the provision creating the right sought to be secured. *See Hill*, 528 U.S. at 116. That is so here.

First, waiver is fundamentally inconsistent with FOIA's statutory scheme establishing a public right of equal access to information for all. FOIA waivers would create a nationwide FOIA patchwork, with different citizens entitled to different subsets of information. That conflicts with

the "fundamental principle" that Congress expressly codified: "the identity of the requesting party has no bearing on the merits of his or her FOIA request." *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1177 (D.C. Cir. 2011); *see also* Op. Br. at 21–25.

Second, waiver is inconsistent with FOIA's self-contained exemption scheme. *See U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 155 (1989). The statute first commands that "each agency, upon any request for records…shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). It then enumerates a set of exemptions, § 552(b), which it "explicitly [makes] exclusive[.]" *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citing § 552(c), now codified at § 552(d)). FOIA's jurisdiction-granting provision in turn limits district court review to "determin[ing] whether such records . . . shall be withheld under any of the exemptions set forth in [§ 552(b)]." § 552(a)(4)(B). FOIA's text and structure thus restrict a district court's inquiry to only whether the requested agency records fall within one of the exemptions; if not, those records are "improperly withheld" and the court must order the Government to hand over the requested documents. *Tax Analysts*, 492

U.S. at 151.

In that way, the FOIA's exemption regime's textual structure operates similarly to Federal Rule of Criminal Procedure 43, which the Supreme Court held unwaivable in *Crosby*. Criminal Rule 43 first commands that "[t]he defendant shall be present . . . at every stage of the trial[.]" *Crosby v. United States*, 506 U.S. 255, 258–59 (1993). It then enumerates a set of exemptions. The Court found that Criminal Rule 43's "language and structure" established that the exemptions were exclusive. Because waiver was not a listed exemption, the Rule was not waivable. *Id.* at 259 ("The list of situations in which the trial may proceed without the defendant is marked as exclusive not by the 'expression of one' circumstance, but rather by the express use of a limiting phrase."). Because FOIA is similarly structured to the Rule 43, *Crosby* suggests that FOIA is equally unwaivable.

Congress designed FOIA to curb the "unbridled discretion" agencies traditionally enjoyed in withholding information. *See GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 385 (1980); *Soucie v. David*, 448 F.2d 1067, 1076 (D.C. Cir. 1971). Recognizing this reality, the

Supreme Court and sister circuits have consistently rebuffed discretionary bases for withholding that are nowhere permitted by FOIA's text. *See, e.g.*, *Tax Analysts*, 492 U.S. at 155; *Maricopa Audubon Soc. v. U.S. Forest Serv.*, 108 F.3d 1082, 1087 (9th Cir. 1997). Waivers, of course, implicate the same concerns—after all, unbridled discretion is precisely what animates FOIA waivers, as they are obtained and enforced solely at the Government's behest. *See Tax Analysts*, 492 U.S. at 155 ("[I]t was the Department's decision, and the Department's decision alone, not to make the [information] available.").

The Government goes on to insist that agencies may decline to process "invalid" requests wholly apart from the § 552(b) exemptions. Gov. Br. at 29–30. A request on the heels of a waiver, it says, is per se invalid. But the Government's attempt to ignore FOIA's text and structure again fails. FOIA expressly defines an improper request as one that fails to "reasonably describes [the] records" or that is not "made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." § 552(a)(3)(A); *see Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180, 185 n.3 (D.C. Cir. 2013) ("A proper

request [is one that complies with § 552(a)(3)(A)]."). The Government does not contend that Mr. Price's request is deficient on any enumerated ground; it instead attempts to supplement the statutory definition. But once a compliant request is lodged (as happened here), the § 552(b)'s exemptions are the only bases for withholding, to the exclusion of all others.[3] *See* § 552(d); *FBI v. Abramson*, 456 U.S. 615, 631 (1982) ("Congress thus created a scheme of categorical exclusion").

Third, waiver of FOIA's public right is either ineffectual or inconsistent with the statute's purposes. If Mr. Price's cellmate can request the information that Price seeks, then waiver is futile. Congress

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[3] The Government appears to concede this fact. *See* Gov. Br. at 29 ("[§ 552(d)] merely prohibits agencies from withholding records for reasons not explicitly articulated in the FOIA when responding to an otherwise valid request."). And only once has the Supreme Court approved withholding on a basis not enumerated in § 552(b), notwithstanding an otherwise valid request. *See GTE Sylvania*, 445 U.S. at 375 (withholding is not "improper" if another federal court has enjoined disclosure). But "[a]lthough…*GTE Sylvania* represents a departure from the FOIA's self-contained exemption scheme," it "arose in a distinctly different context" in which the agency "was powerless to comply" with the requests. *Tax Analysts*, 492 U.S. at 155.

designed this public right—with equal access for all—in a way that renders waiver ineffective.

But even assuming a FOIA waiver does burden Mr. Price's ability to gain information that everyone else can obtain, then waiver is in tension with the "judicially enforceable *public right* to secure such information from possibly unwilling official hands." *Envtl. Prot. Agency v. Mink*, 410 U.S. 73, 80 (1973) (emphasis added). That is especially true when the effect of FOIA's statutory framework is framed in the aggregate, as the Supreme Court has instructed for the categorical waivability analysis. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710 (1945) (holding liquidated damages claims unwaivable in part because they would "tend to nullify the deterrent effect which Congress plainly intended"); *Evans v. Jeff D.*, 475 U.S. 717, 734 (1986) (holding attorneys fee provision waivable and criticizing "uncertainty introduced into settlement negotiations" across the sweep of civil rights claims). If the Government begins seeking waivers from many criminal defendants and those waivers lead to the Government being spared disclosure of information that is otherwise subject to disclosure, then FOIA waivers undercut the

statute's purpose of increasing public access to governmental records. Indeed, though waiver will usually be futile as a practical matter, its intended effect—in removing the most interested potential requester from the equation—strikes at the very heart of FOIA.

The Government rightly notes that "not all public interest is in disclosure," Gov. Br. 37, and that, in particular, the public also has interests in protecting effective law enforcement and the privacy of those involved in investigations. That is true, but cuts just the other way. Those interests have already been weighed by Congress, which embodied its policy judgment in express exemptions. 5 U.S.C. § 552(b). It is appropriate for agencies (and courts reviewing their actions) to "balance privacy interests against the public's interest in learning about the operations of its government," *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 33 (D.C. Cir. 1998) *as amended* (Mar. 3, 1999), when a statutory exemption calls for such balancing. But where Congress has already struck the balance in an express exemption, it would be improper to override its judgment by importing this interest into the waivability inquiry. *See Milner v. Dep't of Navy*, 562 U.S. 562, 571 n.5 (2011)

("[N]othing in FOIA either explicitly or implicitly grants courts discretion to expand (or contract) an exemption . . . . Congress struck the balance it thought right—generally favoring disclosure, subject only to a handful of specified exemptions—and did so across the length and breadth of the Federal Government.").

III. THE GOVERNMENT'S CONCLUSORY DECLARATION CANNOT SUFFICE TO ESTABLISH THAT THE DOCUMENTS WERE ALL WITHIN THE SCOPE OF MR. PRICE'S WAIVER

Mr. Price has argued that even if FOIA is waivable, his FOIA request encompasses some records that fall outside scope of his FOIA waiver. Op. Br. at 37–40. The Government now contends that Mr. Price's request plainly falls within the scope of his waiver. Gov. Br. 41–42. But Mr. Hardy made *no* reference to Mr. Price's EOUSA requests in his declaration, and his declaration on behalf of the FBI amounted to little more than the blanket assertion that all records in the FBI's possession were covered by Mr. Price's waiver. To be sure, the district court may rightfully rely on agency affidavits, which are entitled to a presumption of good faith. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). Still, these affidavits must be "relatively detailed" and "nonconclusory." *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 352

(D.C. Cir. 1978). Mr. Hardy's declaration is lacking in that it provides neither any specificity as to documents withheld nor the basis for Hardy's knowledge that Mr. Price's FOIA waiver covered every requested record, even as to documents the federal government created before it began criminally investigating him. *See Campbell*, 164 F.3d at 34 ("No matter which method the agency adopts to meet its burden of proof, its declarations must permit meaningful judicial review by providing a sufficiently detailed explanation of the basis for the agency's conclusion.").

The Government asserts, without authority, that Mr. Price's waiver takes him "outside the body of law on evidence that typically is expected at summary judgment stage in FOIA suits." Gov. Br. 43 n.12. But this is a rather breathtaking claim in which the Government seems to suggest that it bears *no* evidentiary burden to justify withholding documents from a requester who has waived request rights as to a particular subject. That cannot be right. When the Government invokes a statutory exemption, it must provide more than "bald assertion[s]" or "recitation[s] of the statutory standard." *Billington v. U.S. Dep't of Justice*, 233 F.3d 581, 584 (D.C. Cir. 2000). And no one disputes that the Government is

obliged to process requests—subject to the usual requirements—that are outside the scope of a FOIA waiver. Gov. Br. at 44–45 n.13.

But the district court cannot ensure compliance with the Government's continuing obligation to process requests outside the scope of a waiver if the Government need only say that Mr. Price's guilty plea waiver bars the request. *See Scholl v. Various Agencies of the Fed. Gov't*, 2016 WL 5313202, at *3 (D.D.C. Sept. 22, 2016). This sort of "bald statement" provides neither the court nor the requester with any sense of what the Government has, or how its declarant knows these documents are encompassed by the waiver. Even if the government has met its burden by making that sort of conclusory assertion, Mr. Hardy's declaration failed even to do that with respect to Mr. Price's EOUSA request. That request was essentially ignored following OIP's ruling. *See* Op. Br. 40.

The Government argues that Mr. Price has waived the right to challenge the adequacy of EOUSA's search. Gov. Br. at 45. But this misses the point. *Amicus* argued not that EOUSA's search was inadequate, but instead that it had failed to establish that requested

records were within the scope of Mr. Price's waiver. *See* Op. Br. 37–38; *cf. John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) ("Before it may invoke [Exemption 7], the Government has the burden of proving the existence of such a compilation for such a purpose."). Search adequacy is not the relevant question here; the Government has demonstrated that where it believes documents fall within the scope of a waiver, it flatly declines to process the request. *See Scholl*, *supra*, at *3. So the problem is not that the Government has failed to conduct an adequate search, but that it has not established its right to refuse Mr. Price's request altogether with respect to the documents that it sweepingly contends are covered by his waiver.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the Court reverse the order granting summary judgment.

Dated: April 17, 2017 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,336 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook, Size 14 in Microsoft Word (2013).

Dated: April 17, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 17, 2017, I electronically filed the Reply Brief of Appointed Amicus Curiae in Support of the Appellant William S. Price and Joint Appendix with the Clerk of the Court. I certify that the following attorneys are registered CM/ECF participants for whom service will be accomplished electronically by the CM/ECF system and with hard copies provided by a courier: R. Craig Lawrence and Peter C. Pfaffenroth. I also certify that on this day I sent, by Federal Express, a paper copy of the Reply Brief to William S. Price, appellant, at the following address:

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