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 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO DIVISION

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 14 AMERICAN CIVIL LIBERTIES UNION
 FOUNDATION, et al.,

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 16 Plaintiffs,

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 18 v.

19 UNITED STATES DEPARTMENT OF
 20 JUSTICE, et al.,

21 Defendants.
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Case No. 3: 19-cv-00290-EMC

**DEFENDANT’S OPPOSITION TO
 PLAINTIFF’S ADMINISTRATIVE
 MOTION FOR PUBLIC RELEASE OF
 EX PARTE HEARING TRANSCRIPT**

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INTRODUCTION

1
2 Defendant Department of Homeland Security (“DHS” or “Defendant”) opposes
3 Plaintiff’s request to publicly release the transcript of the *ex parte, in camera* hearing this Court
4 conducted on September 17, 2021. *See* Clerk’s Notices, ECF Nos. 139, 141. This Court called
5 the hearing to discuss the unredacted documents Defendant submitted for *in camera* review at
6 this Court’s request, *see* Minute Entry, ECF No. 137, and ordered that the transcript of the
7 hearing “will be filed under seal such that only the Government’s counsel and the Court will have
8 access to it,” Clerk’s Notice, ECF No. 139. Release of this transcript, redacted or otherwise, is
9 not compelled under public right-to-access doctrines. Rather, the Freedom of Information Act, 5
10 U.S.C. § 552 *et seq.*, specifically provides for *in camera* review of the agency records, and
11 discussion of the contents of the *in camera* submission should similarly be protected. Because
12 Plaintiff fails to establish either the historical basis for release of *ex parte* FOIA proceedings or
13 the logic of releasing such a transcript, its motion should be denied. Alternatively, any
14 consideration of a redacted transcript would require additional time for the agency to conduct an
15 appropriate review.

ARGUMENT

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17 Whether to release or unseal judicial records depends on whether there is a public right of
18 access to those records. As a general matter, courts have recognized two qualified rights of
19 access to judicial records: (1) a common-law right of access and (2) a First Amendment right of
20 access. *In re Copley Press, Inc.*, 518 F.3d 1022, 1029 (9th Cir. 2008). Neither right is absolute.
21 The First Amendment analysis turns on “(1) whether historical experience counsels in favor of
22 public access and (2) whether public access would play a ‘significant positive role in the
23 functioning of the particular process in question.’” *Cal-Almond, Inc. v. U.S. Dep’t of Agric.*, 960
24 F.2d 105, 109 (9th Cir. 1992) (quoting *Press–Enterprise II*, 478 U.S. 1, 8 (1986)). Similarly, the
25 common-law right of access “doesn’t apply to “documents which have traditionally been kept
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1 secret for important policy reasons.” *Id.* (cleaned up) (quoting *Times Mirror Co. v. United States*,
2 873 F.2d 1210, 1219 (9th Cir. 1989)).

3 Under the First Amendment, the Supreme Court has only ever recognized a right of
4 public access in the context of criminal judicial proceedings. *See Courthouse News Serv. v.*
5 *Planet*, 750 F.3d 776, 786 (9th Cir. 2014); *Ctr. for Nat. Sec. Stud. v. U.S. Dep’t of Just.*, 331 F.3d
6 918, 935 (D.C. Cir. 2003). According to the Ninth Circuit, “the federal courts of appeals have
7 widely agreed that it extends to civil proceedings and associated records and documents.”
8 *Courthouse News Serv.*, 750 F.3d at 786; *but see Ctr. for Nat’l Sec. Studies*, 331 F.3d at 935
9 (expressing doubts about whether the First Amendment right of access applies outside of the
10 criminal context); *see also SEC v. Am. Int’l Grp.*, 712 F.3d 1, 5 (D.C. Cir. 2013).

11 **First Amendment.** Neither of these qualified rights require disclosure here. To begin, the
12 “experience and logic” analysis under the First Amendment reveals that no constitutional right of
13 access attaches to the contents of an *ex parte, in camera* hearing conducted to examine the
14 contents of agency records withheld under a FOIA exemption. First, no “historical experience
15 counsels in favor of public access.” *Press–Enterprise II*, 478 U.S. at 8. The FOIA is a long
16 standing statute, having originally been enacted in 1966, 80 Stat. 378, Pub.L. 89–554, with no
17 history of access to statutorily exempt information; *see In re New York Times Co. to Unseal*
18 *Wiretap & Search Warrant Materials*, 577 F.3d 401, 410 (2d Cir. 2009) (concluding that
19 “wiretap applications have not historically been open to the press and general public” because
20 they have been “subject to a statutory presumption against disclosure” since the creation of
21 wiretap applications in 1968). And there is no body of case law concluding that *ex parte* or *in*
22 *camera* FOIA proceedings be made public, for good reason: disclosing what is exempt under the
23 statute would undermine the entire purpose of the statute’s protections. On the other hand, the
24 FOIA specifically allows for courts to “examine the contents of such agency records in camera to
25 determine whether such records or any part thereof shall be withheld” under any FOIA
26 exemption. 5 U.S.C. § 552(a)(4)(B). In the absence of any law bearing up Plaintiff’s assertion, it
27 fails the “experience” portion of this test. *See Am. C.L. Union v. Holder*, 652 F. Supp. 2d 654,

1 662–63 (E.D. Va. 2009), *aff'd*, 673 F.3d 245 (4th Cir. 2011) (concluding that no historical
2 experience counseled in favor of releasing sealed *qui tam* complaints because “for the twenty-
3 three years this procedure has been in operation so far, no court has found a First Amendment
4 right of access” to such complaints).

5 Moreover, the “logic” portion of the “experience and logic” test yields the same result.
6 The *in camera* review process allows this Court to view the unredacted material to determine
7 whether the FOIA withholdings are proper, and “[i]t would be highly illogical to give the public
8 a right to read the transcripts” of the *ex parte* hearing conducted for further clarification from
9 Defendant because the unredacted material—which is entitled to protection unless this Court
10 concludes that the asserted exemptions were unlawfully asserted—was the very subject of the
11 hearing. *In re Copley Press*, 518 F.3d at 1027–28. The transcript “inevitably contain[s]” the
12 information that Defendant asserts is protected from disclosure. *Id.* Further, Defendant has
13 already provided extensive access to the basis for its withholdings in lengthy briefing on cross-
14 motions for partial summary judgment, three *Vaughn* indexes, six declarations, and argument in
15 a previous public motion hearing. Against this backdrop, it strains logic to require the review the
16 *ex parte* hearing transcript against the withholdings in the production, the inevitable redaction of
17 vast swaths of the transcript discussing the withholdings, and the ultimate release of any
18 references to Defendant’s previously disclosed reasoning for protecting the withheld
19 information.

20 **Common law.** Meanwhile, the “important policy reasons” for allowing this Court to
21 conduct *in camera* review and to seek *ex parte* clarification from the government based on that *in*
22 *camera review* precludes a common-law right of access. *In re Copley Press*, 518 F.3d at 1029.
23 As with the First Amendment analysis, the Ninth Circuit has historically not “recognized a
24 common law right of access to judicial records when there is neither a history of access nor an
25 important public need justifying access.” *Times Mirror*, 873 F.2d at 1219. Again, Plaintiff can
26 point to no history of access to *in camera* or *ex parte* FOIA proceedings, even if redacted. Nor do
27 policy concerns weigh in favor of disclosure. As the D.C. Circuit recently noted in examining the

1 common-law right of access in the context of a redacted agency declaration in a FOIA
 2 proceeding, “the fact that” the agency declaration at issue was “of the type that can be so vital to
 3 the proper resolution of FOIA litigation—in which the government necessarily had to disclose
 4 information to the court for the very purpose of keeping it secret—cuts against disclosure.”
 5 *Cable News Network, Inc. v. Fed. Bureau of Investigation*, 984 F.3d 114, 121 (D.C. Cir. 2021).

6 While Plaintiff asks for a transcript redacted to remove protected information, Defendant
 7 cannot assess whether redaction is possible here without reviewing the transcript. If the Court
 8 were inclined to order a redacted transcript, Defendant requests at least 14 days to review the
 9 transcript and recommend redactions. That time is needed for each agency component to cross-
 10 reference the transcript with the withholdings in the production and to flag parts of the discussion
 11 that would reveal the contents of its withholdings or disclose other protected information.¹²

CONCLUSION

12 For the foregoing reasons, this Court should deny Plaintiff’s administrative motion.

13 Dated: September 21, 2021

14 Respectfully submitted,

15 BRIAN M. BOYNTON
 16 Acting Assistant Attorney General

17 ELIZABETH J. SHAPIRO
 18 Deputy Director, Federal Programs Branch

19 /s/ Vinita B. Andrapalliyal
 20 VINITA B. ANDRAPALLIYAL
 21 U.S. Department of Justice, Civil Division

22 ¹ Any redactions in the transcript should not be made “pursuant to FOIA,” as Plaintiff suggests,
 23 Pl.’s Admin. Mot. at 2, because the transcript is not a record subject to FOIA production. *Metlife,*
 24 *Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 672 (D.C. Cir. 2017) (“FOIA applies
 25 solely to information in the hands of executive agencies and expressly excludes federal courts
 26 from its domain.”); *see also* 5 U.S.C. § 551(1)(B). Rather, any redactions would be made
 27 without citing to particular FOIA exemptions.

28 ² Finally, Plaintiff’s alternative suggestion for counsel for Defendant to provide a written
 summary of the hearing must be rejected out of hand as burdensome and unwarranted.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

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[PROPOSED] ORDER

Upon review of Plaintiff’s Motion for Public Release of the Hearing Transcript, ECF No. 142, and of Defendant’s opposition thereto, this Court hereby orders the motion is DENIED.

IT IS SO ORDERED.

Dated: _____, 2021

Hon. Edward M. Chen
United States District Judge