UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JASON MOUNT, Plaintiff, v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY and JOHN F. KELLY, Secretary of Homeland Security, Defendants.	Civil Action No. 16-2532 (CRC)

REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants U.S. Department of Homeland Security and Secretary of Homeland Security John F. Kelly respectfully submit this reply in further support of Defendant's Motion for Summary Judgment ("Motion") in this Freedom of Information Act case.

I. The Question Before the Court is Whether the Very Existence of Responsive Documents is Protected From Disclosure

In their Motion, Defendants explained that the Office of Inspector General at the Department of Homeland Security ("DHS OIG") properly refused to confirm or deny the existence of records pertaining to an alleged investigation concerning Supervisory Special Agent Peter Edge when those records would be exempt from disclosure pursuant to FOIA Exemption 7(C). Motion at 4-7. Plaintiff's response reflects a basic misunderstanding of the nature of the Glomar response asserted by DHS OIG. Specifically, Plaintiff argues that DHS OIG's response was inadequate because it did not provide "a *Vaughn* index so that this Court could review the documents *In Camera*[.]" Opp'n at 7; *see also id*. at 10-11 (arguing that Defendants should be

ordered to submit a *Vaughn* index or submit documents for *in camera* review). But to acknowledge the existence of responsive documents, if any do exist, by submitting a *Vaughn* index or by providing such documents to the Court obviously would defeat the very purpose of the Glomar response. A Glomar response "is proper if the fact of the existence or nonexistence of agency records falls within a FOIA exemption." *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). To justify the response, an agency must explain why it can neither confirm nor deny the existence of responsive records. *See Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976) ("Adapting these procedures to the present case would require the Agency to provide a public affidavit explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records."). This inquiry is not based on the content of the requested documents, but on whether the mere existence of the documents is itself protected by a FOIA exemption. *See Wolf*, 473 F.3d at 374.

Accordingly, the question presented here is whether Exemption 7(C), which allows nondisclosure of certain records, supports a Glomar response to Plaintiff's FOIA request. If the very existence of the documents requested is exempt from disclosure, then the Glomar response is appropriate, regardless of the specific content of the alleged documents. Compare *Phillippi*, 546 F.2d at 1013 ("When the Agency's position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the Agency's refusal."), with *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973) (requiring "a system of itemizing and indexing" the relevant documents by the government for the opposing counsel and the court to review when it relies on an exemption to withhold disclosure). "So, the question the Court must resolve at this point is not whether the documents need to be produced but whether merely acknowledging their existence invades an

interest that the FOIA exemptions were designed to protect." *People for the Ethical Treatment of Animals v. Nat'l Insts. of Health Dep't of Health & Human Servs.*, 853 F. Supp. 2d 146, 155 (D.D.C. 2012), aff'd in relevant part, 745 F.3d 535 (D.C. Cir. 2014).[1]

II. The Very Existence of Responsive Documents, if Any, is Protected From Disclosure

Plaintiff has not rebut Defendants' showing that whether responsive documents exist is protected information under Exemption 7(C).[2] As explained in Defendants' Motion, if there ever was an investigation concerning Mr. Edge, Mr. Edge would maintain a privacy interest in the non-disclosure of the fact of that investigation. *See* Motion at 5-6. Indeed, according to the D.C. Circuit, the "privacy interest at stake" in this situation is "substantial." *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) ("There is little question that disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm."). Plaintiff's only response on this point is to claim that Defendants' "reasons for invoking Glomar and their affidavit are very vague and sweeping." Opp'n at 7. To the contrary, the justifications for invoking the Glomar response are thoroughly described in Defendants' Motion and supporting documentation. Defendants' declaration states specifically why DHS OIG determined that the subject of the alleged investigation had a privacy interest against disclosure, Parnes Decl. ¶ 14, and explains

[1] Plaintiff confusingly states that he "does not contend that the records" at issue "were compiled for law enforcement purposes," which is a prerequisite for the application of Exemption 7(C). Opp'n at 6. It is unclear if Plaintiff's statement contains a typographical error but, in any event, he makes no argument explaining why any responsive records would not have been compiled for law enforcement purposes. For the reasons explained in Defendants' Motion (at 4-5), any responsive records would easily satisfy the threshold Exemption 7 determination that the records be compiled for law enforcement purposes.

[2] Plaintiff's FOIA request sought DHS OIG records relating to an allegation that Mr. Edge "lost his official credentials to a prostitute and the credentials had to be retrieved by local police." Declaration of Jonathan Parnes (Office of Inspector General) in Support of Defendants' Motion for Summary Judgment ("Parnes Declaration") ¶ 5. Providing any responsive records would necessarily disclose the existence of the alleged DHS OIG investigation concerning Mr. Edge.

that Plaintiff articulated no public interest in the disclosure of the requested information and that DHS OIG determined that disclosure would shed little to no light on the agency's mission and was far outweighed by the privacy interests at stake, *id.* ¶¶ 16-17. Plaintiff's contention that the affidavit "simply recites statutory standards and portions of case law" is flatly incorrect. In any event, there is only so much elaboration that is necessary or possible where the basis for Exemption 7(C) is so clear.

Plaintiff next argues that the public interest outweighs the privacy interests at stake. Opp'n at 10. Plaintiff, however, ignores the relevant standard articulated by the D.C. Circuit. Under that standard, "unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *SafeCard Services*, 926 F.2d at 1206. Plaintiff fails to present any argument, much less compelling evidence, that the agency is engaged in illegal activity nor does he contend that the requested records are necessary to confirm or refute such evidence.

Plaintiff also fails to grapple with D.C. Circuit authority approving use of the Glomar response in nearly identical contexts as here. Indeed, the D.C. Circuit has "consistently found" the "public interest in shedding light on agency investigatory procedures . . . without more, insufficient to justify disclosure when balanced against the substantial privacy interests weighing against revealing the targets of a law enforcement investigation." *People for the Ethical Treatment of Animals v. NIH, HHS*, 745 F.3d 535, 543 (D.C. Cir. 2014) (citing *Beck v. Dep't of Justice*, 997 F.2d 1489, 1493-94 (D.C. Cir. 1993) (upholding Glomar response to request for any complaints or other investigatory files concerning two named Drug Enforcement Administration

agents); *Dunkelberger v. Dep't of Justice*, 906 F.2d 779, 782, 285 U.S. App. D.C. 85 (D.C. Cir. 1990) (upholding Glomar response to request for a specific FBI agent's disciplinary records)).

Instead of presenting relevant evidence or argument, Plaintiff relies on two decisions, neither of which support his position. In *National Whistleblower Center v. HHS*, 849 F. Supp. 2d 13 (D.D.C. 2012), the court reaffirmed the familiar principle that "[i]ndividuals involved in law-enforcement investigations – including targets, witnesses, complainants, and investigators – have a privacy interest in the non-disclosure of their names and identifying information." *Id*. at 28. That privacy interest outweighed any public interest in disclosure as to the majority of the pages withheld in that case. *Id*. at 34. As Plaintiff notes, the court also held that a few pages could be released in part but that was only because redactions could protect identifying information and because those pages related to an employee who signed a privacy waiver in connection with the FOIA requests. *Id*. In contrast, here, the third party at issue did not waive his privacy rights. *See* Parnes Decl. ¶ 14.

Plaintiff fares no better by citing *Cuban v. SEC*, 744 F. Supp. 2d 60 (D.D.C. 2010). There, the court held that "the issue of whether Exemption 7(C) has been properly relied upon can not yet be resolved on the existing record." *Id*. at 89. This was because there was nothing to show "why redacting the names and any other identifying characteristics of the persons involved in the OIG investigations will not adequately protect the privacy interests at stake[.]" *Id*. In contrast, here, the reason why redactions would not resolve the Exemption 7(C) concern is obvious. Plaintiff requested records relating to a specific individual, so any release of such records – even if redacted – would be an acknowledgement that records pertaining to that individual exist, thereby disclosing the existence of an investigation concerning that individual. Accordingly, if DHS OIG were to produce any responsive documents, whether redacted or

unredacted, the entire purpose of Exemption 7(C) would be defeated. This is precisely the reason for the Glomar response, which refused to confirm or deny whether responsive records even exist.[3]

Accordingly, Plaintiff has failed to overcome Defendants' showing that the Glomar response was appropriate here.

CONCLUSION

For the reasons set forth above and in the Motion, Defendants respectfully request that this Court grant summary judgment in favor of Defendants as to all claims in this case.

Respectfully submitted,

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[3] For the same reasons, Plaintiff's argument is not advanced by its citation to *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 896 (D.C. Cir. 1995), which also dealt with redactions of identifying information.