UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 14-CV-20643-ALTONAGA/O'Sullivan

MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA, a sovereign nation and
Federally recognized Indian tribe,

Plaintiff,

vs.

U.S. DEPARTMENT OF JUSTICE, and its components the OFFICE OF TRIBAL JUSTICE, OFFICE OF INFORMATION POLICY, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, OFFICE OF THE INSPECTOR GENERAL, and OFFICE OF PROFESSIONAL RESPONSIBILITY

Defendants.
_____/

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR HEARING

Plaintiff, Miccosukee Tribe of Indians of Florida (the "Tribe"), respectfully moves, by and through undersigned counsel, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, as no genuine issue of material fact exists.

In support of this motion, the Tribe submits the accompanying Request for Hearing, and Memorandum of Law. *See also* Tribe's Statement of Material Facts (submitted separately).

Request for Hearing

A hearing in this case will assist the Court in understanding the broad impact of denying the Tribe's FOIA request regarding the particular individual involved, and will assist the Court in

understanding the overriding public interest in disclosure. The Tribe estimates that oral argument requires 30 minutes per side.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case concerns a Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Request filed by the Tribe for documents concerning the termination of Guy A. Lewis ("Lewis") from his position as Director of the Executive Office for United States Attorneys ("EOUSA"). The Tribe's request, filed after Lewis continued making misrepresentations regarding the end of his tenure as Director, simply sought to protect the public from the Lewis' misrepresentations. The five Department of Justice ("DOJ") agencies who received the FOIA Request, gave different responses as to why each agency could not disclose the requested information. Importantly, the ability of Lewis to continue to make these misrepresentations and the responses by the agencies provide free reign for any individual terminated for professional misconduct to lie without fear of anyone finding out the truth. This Court should make clear that once a high-level government official publicizes the reasons for the end of his or her tenure at an agency, the public interest in that claim outweighs that employee's privacy interest.

II. FACTUAL BACKGROUND

The FOIA Request

In July of 2012, the Tribe submitted a FOIA request to the Office of the Inspector General ("OIG"), Office of Tribal Justice ("OTJ"), Office of Professional Responsibility ("OPR"), Office of Information Policy ("OIP"), and EOUSA (hereinafter "the Agencies"). The FOIA letters to OIG, OPR, OIP, and EOUSA requested the following information:

> 1. Agency records which detail any investigation by the DOJ and/or any other internal inquiry of Mr. Lewis for any alleged wrongdoing in his capacity as the Director of EOUSA;
>
> 2. Agency records that detail the findings or conclusions of such an investigation and/or any other internal inquiry in regards to Mr. Lewis;
>
> 3. Agency records that detail any actual and/or any recommended disciplinary actions related to a DOJ investigation, and/or any other internal inquiry of Mr. Lewis for alleged wrongdoing in his capacity as the Director of the EOUSA;
>
> 4. Agency records of any disciplinary actions, reprimands, or related actions taken by the DOJ against Mr. Lewis during his tenure at the EOUSA;

Letter to OIG (Amended Complaint Exhibit 2) [ECF No. 27-2]; Letter to EOUSA (Amended Complaint Exhibit 3) [ECF No. 27-3]; Letter to OIP (Amended Complaint Exhibit 4) [ECF No. 27-4]; Letter to OPR (Amended Complaint Exhibit 5) [ECF No. 27-5]. The FOIA letter to OTJ requested ("OTJ Requests") the following information:

> 1. Agency records that detail Office of Tribal Justice collaboration with Mr. Lewis;
>
> 2. Agency records that detail Office of Tribal Justice collaboration with the office of AOUSA during the above referenced time frame;
>
> 3. Agency records related to any complaints against the office of AOUSA from Indian Country, individual Native-Americans or Native American Indian Tribes during the above reference time frame;
>
> 4. Agency records that detail the alleged professional misconduct that led to Mr. Lewis's termination in 2004.

Letter to OTJ (Amended Complaint Exhibit 6) [ECF No. 27-6].

OPR: On July 16, 2012, the Tribe submitted a FOIA request to OPR. [ECF No. 27-5]. OPR issued a Glomar response[1] to the entire request and cited to Exemptions 6 and 7(C). [ECF No. 27-8]. The Tribe timely appealed, [ECF No. 27-9], and on administrative appeal, OIP affirmed OPR's response. *See* Tribe's Statement of Material Facts, Exhibit C.

[1] A response that does not confirm or deny the existence of the records. *Wilson v. United States Dep't of Justice*, 2014 WL 2115508, at *4 (D.D.C. May 21, 2014).

OTJ: On July 18, 2102, the Tribe submitted a FOIA request to OTJ. [ECF No. 27-6]. OTJ disputes that it received the FOIA request, however, on August 29, 2014, during the discovery phase of this case, OTJ finally responded. *See* Tribe's Statement of Material Facts, Exhibit A. OTJ completed a search of Request Nos. 1, 2, and 3, and found no responsive documents. *Id.* However, OTJ responded with a Glomar response only to the last request, and cited ***only*** Exemption 7(C). *Id.* OTJ specifically noted the unique situation that occurs when an agency issues a response during pending litigation, stating that where the "request is the subject of ongoing litigation . . . appeals are not ordinarily acted on." *Id.*

OIP: On July 16, 2012, the Tribe submitted a FOIA request to OIP. [ECF No. 27-4]. On April 5, 2013, OIP issued a Glomar response to the Tribe's entire request, but cited ***only*** Exemption 7(C). *See* Tribe's Statement of Material Facts, Exhibit B.

OIG: On July 14, 2012, the Tribe submitted a FOIA request to OIG. [ECF No. 27-2]. OIG acknowledged the Tribe's request on August 6, 2012. [ECF No. 27-7]. OIG however has not informed the Tribe of its determination.

EOUSA: On July 16, 2012, the Tribe submitted a FOIA request to the EOUSA. [ECF No. 27-3]. EOUSA has not responded to the Tribe's FOIA Request.

In sum: Two agencies (OPR and OIP) issued a Glomar response to the entirety of the Tribe's request. One agency (OTJ) completed a search of OTJ Requests Nos. 1, 2, and 3, but issued a Glomar response to Request No. 4. One agency (OPR) cited both Exemption 6 and 7(C). Two agencies (OIP and OTJ) cited only Exemption 7(C). Finally, two agencies (OIG and EOUSA) have not responded to the Tribe's requests.

III. STANDARD OF REVIEW

The FOIA safeguards the American public's right to know "what their Government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (quotations omitted); *Office of the Capital Collateral Counsel v. U.S. Dep't of Justice*, 331 F.3d 799, 802 (11th Cir. 2003). The central purpose of the statute is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978). The FOIA "is a broad disclosure statute which evidences a strong public policy in favor of public access to information in the possession of federal agencies." *Cochran v. United States*, 770 F.2d 949, 954 (11th Cir. 1985); *accord Sharkey v. Food & Drug Admin.*, 250 F. App'x 284, 287 (11th Cir. 2007); *see Campos v. I.N.S.*, 32 F. Supp. 2d 1337, 1345 (S.D. Fla. 1998).

FOIA lawsuits are typically resolved on motions for summary judgment. *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) (*quoting Miscavige v. I.R.S.*, 2 F.3d 366, 369 (11th Cir.1993)). Summary judgment is appropriate when there is no genuine issue as to the material facts, and the moving party demonstrates it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Tribe*, 516 F.3d at 1243.

FOIA requests must be construed liberally, "disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The FOIA requires an agency to disclose records at the request of the public unless the records fall within one of nine narrow exemptions. 5 U.S.C. § 552(b); *Moye, O'Brien, O'Rourke, Hogan, & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270, 1276–77 (11th Cir. 2004). The exemptions "have been consistently given a narrow compass," and agency records that "do not fall within one of the exemptions are improperly withheld." *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989)

(internal quotations omitted); *see Moye*, 376 F.3d at 1277 ("Because FOIA's purpose is to encourage disclosure, its exemptions are to be narrowly construed"); *Cochran*, 770 F.2d at 955 ("If the balance is equal the court should tilt the balance in favor of disclosure").

Courts review an agency handling of a FOIA request *de novo*, *Tribe*, 516 F.3d at 1243, and the agency bears the burden of proving that a particular set of documents fall within the narrow exemptions. 5 U.S.C. § 552(a)(4)(B); *Reporters Comm.*, 489 U.S. at 755; *Moye*, 376 F.3d at 1277. "Courts must apply [the government's] burden with an awareness that the plaintiff, who does not have access to the withheld materials, is at a distinct disadvantage in attempting to controvert the agency's claims." *Maricopa Audubon Society v. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997) (internal citations and quotations omitted).

An agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978) (internal citations and quotations omitted). When claiming an exemption, the agency must provide a "'relatively detailed justification' for assertion of an exemption and must demonstrate to a reviewing court that records are clearly exempt." *Birch v. USPS*, 803 F.2d 1206, 1209 (D.C. Cir. 1986) (*citing Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)). An agency may submit affidavits to satisfy its burden, but "the government may not rely upon conclusory and generalized allegations of exemptions." *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995) (internal quotations and citations omitted). All doubts as to whether a FOIA exemption applies are resolved in favor of disclosure. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010).

For a Glomar response—a response that does not confirm or deny the existence of the records—to be appropriate, the government "must show that revealing the very existence of

records would cause harm cognizable under a FOIA exception." *Wilson v. United States Dep't of Justice*, 2014 WL 2115508, at *4 (D.D.C. May 21, 2014) (*citing Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)).

IV. ARGUMENT

This Court should order the Agencies to respond, disclose whether the records exist, and find Exemptions 6 and 7(C) inapplicable. First, the agencies have not timely responded to the Tribe's FOIA request. Second, the DOJ's Glomar response in this matter is unlawful because the alleged nonexistence of the records is already public. Finally, the inconsistent responses by the agencies and the misconduct by the high-level government official demonstrate that the agencies lack any factual foundation for the assertion that the relevant records are subject to FOIA Exemption 6 and Exception 7(C).

A. The Agencies Have Not Timely Responded

Section 552(a)(6)(A)(i) requires each agency to "determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefore." More than 20 days have elapsed since the Tribe's letter to EOUSA and OIG. EOUSA and OIG have not responded and therefore this Court should order them to respond.

B. The Glomar response was inappropriate because Lewis disclosed the alleged nonexistence of all the records

A Glomar response is inappropriate where there is already a confirmation of the existence or nonexistence of the records. In this case, Lewis disclosed the alleged nonexistence of all the records. Thus, Lewis and therefore the Agencies have no privacy interest in withholding the existence or nonexistence of the records. Therefore, this Court should find that the DOJ erred by asserting a Glomar response.

A Glomar response neither confirms nor denies the existence of the documents sought in the FOIA request. *See Office of Capital Collateral Counsel*, 331 F.3d at 802 n.3. In *Glomar* cases, Exemption 7(C) allows agencies to conceal the existence of responsive documents if the presence of such records in the agency's system would "associate the individual named in the request with criminal activity" or otherwise compromise the person's privacy. *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 893 (D.C. Cir. 1995). A response might be appropriate when the "mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation." *Schrecker v. Dep't of Justice*, 349 F.3d 657, 666 (D.C. Cir. 2003). If the government cannot identify a requisite privacy interest, then no balancing is necessary. *Wilson*, 2014 WL 2115508, at *5 (*citing Nation Magazine*, 71 F.3d at 896). If, however, there is a prior public disclosure, then the question on review is whether "the prior [public] disclosure establishes the ***existence*** (or not) of records responsive to the FOIA request, regardless whether the contents of the records have been disclosed." *Am. Civil Liberties Union v. C.I.A.*, 710 F.3d 422, 427 (D.C. Cir. 2013) (internal quotations and citations omitted).

In *Nation Magazine*, H. Ross Perot made statements indicating that he offered aid to the US Customs Service ("Customs"). *Nation Magazine*, 71 F.3d at 887–88, 896. When Nation Magazine requested records from Customs regarding the offering of aid by Perot, Customs issued a Glomar response using Exemption 7(C). *Id.* at 887–88. The D.C. Circuit held that the public disclosures by Perot, waived Perot's right to redaction. *Id.* at 896. The court reasoned that redaction "would not serve any useful purpose in protecting [the individual's] privacy." *Id.* This makes sense, agencies cannot rely on Exemption 7(C), or any other exemption, to withhold "information that has been 'officially acknowledged' or is in the 'public domain.'" *Davis v. US*

Dep't of Justice, 968 F.2d 1276, 1279 (D.C. Cir. 1992). Thus, where the agency, or the individual in question, "has disclosed exactly the same information on a prior occasion, the agency must, at the very least, confirm the existence of that information in its records." *Wilson*, 2014 WL 2115508, at *5 (citing *Marino v. Drug Enforcement Admin.*, 685 F.3d 1076, 1081–82 (D.C. Cir. 2012) (Glomar response not appropriate where existence of records has been acknowledged); *Am. Civil Liberties Union*, 710 F.3d at 427 ("the plaintiff can overcome a *Glomar* response by showing that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records")).

Here, Lewis has disclosed the alleged nonexistence of the responsive records, thus a Glomar response is inappropriate. During a deposition on October 9, 2012, Mr. Ramon Rodriguez, counsel to Carlos E. Bermudez in *Bermudez v. Bert*, Case No. 00-25711, a wrongful death suit in Florida Circuit Court, asked Lewis questions regarding his termination from EOUSA. Mr. Rodriguez asked Lewis if he left EOUSA due to any type of wrongdoing or malfeasance on his behalf. Lewis consistently answered No:

> Q. Okay. Have you ever been fired or terminated from a place of employment?
> A. No.
> Q. The position that you held in Washington, D.C. as Director of the Executive Office for United States Attorneys, was that a position that -- that you held which was terminated as a result of any type of wrongdoing or malfeasance on your behalf, Mr. Lewis?
> A. No.
> Q. And without going into an extensive amount of details, was that a position that you walked away from or that you stepped away from?
> A. Yes.
> Q. And did your decision to walk away or take yourself out of that position in Washington, D.C. was that as a result of any type of wrongdoing or malfeasance on your behalf?
> A. No.
> Q. Or as a result of any type of ongoing investigation against you stemming from wrongdoing or malfeasance?

> A. No. I left and went into private practice. Many of the people with whom I had been working were leaving, including the Attorney General and the Deputy Attorney General. And the Department was becoming, in my view, more and more political.

Lewis Dep., Proceedings in *Bermudez v. Bert*, Case No. 00-25711-CA-21, at 7:25–8:25 (attached hereto as Exhibit A).[2] Plainly, Lewis has asserted that the records do not exist. Lewis thus has no privacy interest in concealing this already acknowledged information, and the government's Glomar response was unjustified. *Wilson*, 2014 WL 2115508 at *7.

Therefore, the Glomar response was unjustified and disclosure under Exemption 6 does not "constitute a clearly unwarranted invasion of privacy," 5 U.S.C. § 552(b)(6), and disclosure under Exemption 7(C) could not "reasonably be expected to constitute an unwarranted invasion of privacy." 5 U.S.C. § 552(b)(7)(C).

C. In the alternative, if Lewis did not disclose the alleged nonexistence of the records, his position as a high-level government official and the malfeasance committed outweigh his privacy interest

In the alternative, if the court does not find the existence (or nonexistence) of the records in the public domain, then the public interest in the information is sufficient to outweigh Exemption 6 and 7(C)'s personal privacy concerns. *Cf. Marino*, 685 F.3d at 1082. First, Exemption 7 does not apply because the records were not compiled for law enforcement purposes. Second, the public interest in the wrongdoing by Lewis, a high-level government official, outweighs the privacy interest in Exemption 6 and 7(C). Finally, the conflicting responses by the Agencies demonstrate the lack of factual foundation for Exemption 6 and 7(C).

FOIA Exemption 6 exempts from disclosure information contained in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted

[2] The Deposition of Guy Lewis cited and attached herein is public record as it was filed with the court by Plaintiff's Counsel, Ramon Rodriguez, in *Bermudez v. Bert*, on November 13, 2012.

invasion of privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) exempts from disclosure "records and 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 constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). *See FBI v. Abramson*, 456 U.S. 615, 622 (1982). To determine whether the records are exempt, the court balances the privacy interest with the public interest in disclosure. *Sensor Systems Support, Inc. v. FAA*, 851 F. Supp. 2d 321, 333 (D.N.H. 2012).

Exemption 7 does not apply because the information was not compiled "for law enforcement purposes." 5 U.S.C. § 552(b)(7); *see Ely v. F.B.I.*, 781 F.2d 1487, 1490 n.3 (11th Cir. 1986) (explaining that the court must first determine if the information is of the type covered by the exemption, and if so, only then does the court balance the privacy interests). As Lewis previously asserted, he left the office on his own terms, and not due to any investigation, wrongdoing, or malfeasance. *See* Exhibit A at 7:25–8:25. Thus, the information is not exempt under Exemption 7.

Even if the information was compiled for law enforcement purposes, "[u]ndoubtedly, there is a strong public interest in 'monitoring the conduct and actual performance of public officials.'" *Trentadue v. Integrity Committee*, 501 F.3d 1215, 1234 (10th Cir. 2007) (*quoting Baez v. U.S. Dep't of Justice*, 647 F.2d 1328, 1339 (D.C. Cir. 1980)). Additionally, when the FOIA request seeks investigatory records, the public interest is in "knowing that the investigation is comprehensive, that a report of the investigation is accurate, that disciplinary measures are adequate, and that those who are accountable are dealt with in an appropriate manner." *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984); *accord Trentadue*, 501 F.3d at 1233. When the FOIA request seeks the identity of the individual, the public interest in disclosure is in "knowing ***who***

the public servants are that were involved in the governmental wrongdoing, in order to hold the governors accountable to the governed." *Id.* Two factors affect the weight of public interest, (1) the level of responsibility; and (2) the activity for which such an employee has been censured. *Trentadue*, 501 F.3d at 1234 (*citing Stern*, 737 F.2d at 92). *See Providence Journal Co. v. U.S. Dep't of Army*, 981 F.2d 552, 568–69 (1st Cir. 1992); *Sensor Systems*, 851 F. Supp. 2d at 334.

The public interest in wrongdoing—even unsubstantiated—by a high-level government official outweighs the privacy interest under Exemption 6 and Exemption 7(C). *Cochran*, 770 F.2d at 956; *Perlman v. U.S. Dep't of Justice*, 312 F.3d 100, 107–09 (2d Cir. 2002) (ordering release of extensive details of former INS general counsel), *vacated*, 541 U.S. 970 (2004), *reaffirmed*, 380 F.3d 110 (2d Cir. 2004); *Providence Journal*, 981 F.2d at 568–69; *Stern*, 737 F.2d at 93–94 (name of higher level government official could be disclosed); *Chang v. Department of Navy*, 314 F. Supp. 2d 35, 44 (D. D.C. 2004) (disclosure of discipline and identifying information of a Navy commander "very much in the public interest"). *Cf. Trentadue*, 501 F.3d at 1234–35 (withholding identifying information of low-level government officials generally permitted); *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 949 (D.C. Cir. 1998) (investigation of a staff-level government lawyer properly withheld); *Maynard v. CIA*, 986 F.2d 547, 566–67 (1st. Cir. 1993) (withholding identifying information of low-level government officials generally permitted); *Stern*, 737 F.2d at 92–93 (names of lower level government employees could be withheld); *Sensor Systems*, 851 F. Supp. 2d at 334 (name of low-level FAA employee could be withheld).

The Eleventh Circuit holds that disclosure is mandatory when the information "***relat[es] to*** a violation of the public trust by a government official." *Cochran*, 770 F.2d at 956 (emphasis

added).[3] *See also Dobronski v. Fed. Communications Comm'n*, 17 F.3d 275, 280 (9th Cir.1994), ("public interest in uncovering alleged abuse of public monies and public office outweighs the privacy interests). In *Cochran*, the Army began an investigation of Army Major General Cochran for misuse of public funds and facilities. *Id.* at 951. After "inflammatory rumors" circulated regarding the internal Army investigation, the Army released a press statement that identified Cochran. *Id.* at 951, 951 n.1. After the Army imposed discipline, it released a second press statement, identifying Cochran again, along with the details of the investigation and the result of the disciplinary proceeding. *Id.* at 951–52. Cochran subsequently sued the Army. The court held that disclosure of Cochran's disciplinary proceedings, and Cochran's identifying information, was permitted under Exemption 6. Explaining that violations of public trust include "misuse of public funds or facilities," the court reasoned that disclosure is required for "information ***relating to*** a misappropriation of government funds, in whatever amount, by a high level government official." *Id.* at 957 (emphasis added).

In *Providence Journal*, the Journal filed a FOIA suit seeking documents relating to an internal Army criminal investigation of allegations against six officers. *Providence Journal*, 981 F.2d at 555. The investigation started with four anonymous letters implicating the six officers in alleged misconduct. *Id.* Some of the allegations were later substantiated. *Id.* at 567. The district court ordered disclosure of the names of the senior officers but not the low-level officers, and did not distinguish between material related to substantiated or unsubstantiated allegations. *Id.* The First Circuit confined its discussion to Exemption 7(C), *Id.* at 567 n.18, and first, held that the material related to the substantiated allegations must be disclosed. *Id.* at 567–68. Second, the

[3] Similar to the purpose of FOIA, the term "relates to" is broad. *Morales v. Trans. World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *Denis v. Attorney Gen.*, 633 F.3d 201, 209 (3rd Cir. 2011).

court analyzed the privacy interests stemming from the disclosure of material related to the unsubstantiated allegations. *Id.* at 568. The court reasoned,

> there may be a greater public interest in disclosure where the allegation-although determined unsubstantiated by the agency-may nevertheless be true, and may pose a serious threat to the public interest. Or an "unsubstantiated" allegation may bear upon a claim, supported by independent evidence, that the investigating agency actively engaged in the concealment of the target official's misconduct or otherwise failed to perform its mission.

Id. at 569. In that case, the court determined that disclosure of material relating to ***unsubstantiated allegations***, would not be "unwarranted," 5 U.S.C. § 552(b)(7)(C), and held that Exemption 7(C) favored disclosure for the senior officers. *Providence Journal*, 981 F.2d at 569.

Similar to *Providence Journal*, in *Stern*, the D.C. Circuit allowed the FBI to withhold the names of low-level employees, but ordered disclosure of the high-level official. *Stern*, 737 F.2d at 86. In *Stern*, the high-level official knowingly participated in the illegal activity, *Id.* at 87, and "took part in an effort to withhold information." *Id.* at 93. The court held that the public interest in disclosure outweighs the employee's privacy interest under both Exemption 6 and Exemption 7(C). *Id.* at 86. The court noted the difference between a low-level employee who negligently performed particular duties, and the deception by a high-level officer. *Id.* at 94. While the high-level officer may have a privacy interest, it would not be an "'unwarranted invasion of personal privacy' to reveal his name, despite the potential association with notorious and serious allegations of criminal wrongdoing." *Id.* at 93–94. The court concluded, the public has a "great interest" in the name of the high-level employee who "deliberately and knowingly" covered up the activity, and ordered disclosure. *Id.* at 94.

Similarly, in *Trentadue*, the Tenth Circuit concluded that under Exemption 6, the identity of the employees were protected because they were low-level employees even though they had committed serious acts of misconduct. 501 F.3d at 1234. Disclosing their names "would shed

little light on the operation of government." *Id.* However, the court held that disclosure of names for individuals who have already been publicly identified "does not constitute an unwarranted invasion of personal privacy." *Id.* at 1236. Finally, the court noted that the "important" public interest in understanding how the government responds to serious allegations "outweighs any privacy interest." *Id.*

Here, the Tribe's FOIA request requires the identity of the individual, and the investigatory records. Disclosure will reveal "what the government is up to." *Reporters Comm.*, 489 U.S. at 773. The interest is in knowing that the investigation is comprehensive, that a report is accurate, that disciplinary measures were adequate, and that Lewis was dealt with in an appropriate manner. *Stern*, 737 F.2d at 92. Undoubtedly, it is in the public interest to know if the DOJ's response was altered based upon Lewis's previous tenure with the Office of U.S. Attorneys, and this public interest—in knowing how the DOJ responded to Lewis' malfeasance—"outweighs any privacy interest." *Trentadue*, 501 F.3d at 1236. *See Lissner v. Customers Service*, 241 F.3d 1220, 1223 (9th Cir. 2001) (public interest in determining if government official received "preferential treatment."). Finally, the misconduct at issue was directly related to how the government functions and how Lewis performed his official responsibilities. The public has an interest in the requested information as it pertains to how the DOJ responds to misconduct of high-level employees. *Reporters Comm.*, 489 U.S. at 773.

The disclosure will also assist in determining whether Mr. Lewis is misrepresenting his tenure at the EOUSA to potential clients. Lewis currently holds his tenure as EOUSA as a reason to hire him. Potential clients are thus misinformed and would potentially hire Lewis on the false assumption that there was no misconduct—Lewis in fact states that he walked away from it without any investigation, wrongdoing, or malfeasance on his behalf. Exhibit A at 7:25–8:25.

The weight of the public interest is high. First, Lewis, as Director of EOUSA, was a high-level government employee who supervised a large number of individuals and possessed policy-making authority. *See* Tribe's Statement of Material Facts, Exhibit D; Tribe's Statement of Material Facts, Exhibit E; Tribe's Statement of Material Facts, Exhibit F; Tribe's Statement of Material Facts, Exhibit G; Tribe's Statement of Material Facts, Exhibit H at 125:1–127:9. Second, the allegations of wrongdoing are not as simple as negligence. It does not matter that these allegations are allegedly unsubstantiated. *Providence Journal*, 981 F.2d at 569. Similar to *Cochran*, even if these are "rumors," the ***relation to*** the violation of public trust requires disclosure. *Cochran* at 956; *supra* Part IV.C.n.3. *See Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1172 (9th Cir.2000) ("Nothing in the statutory command [of the FOIA] conditions agency compliance on the requesting party showing that he has knowledge of misfeasance by the agency."). It is in the interest of the United States, the Tribe, and the public to be informed of the malfeasance (or even the existence of such) by Lewis as Director of the EOUSA. Finally, because Lewis has stated that the records do not exist, *see Trentadue*, 501 F.3d at 1236, if the records exist, he has "deliberately and knowingly" covered up this activity. *Stern*, 737 F.2d at 94. Disclosure is also in the interest of Lewis: if his claims were true, the disclosure would validate his claims.

Additionally, the public has a strong interest in the veracity of Lewis' claim that the records do not exist. *Castaneda v. US*, 757 F.2d 1010, 1012 (9th Cir. 1985) ("the public need for supervision and disclosure is necessarily heightened" where motives or truthfulness are in doubt), *amended*, 773 F.2d 251 (9th Cir. 1985). Contrary to OTJ's response that there was no "official acknowledgement," Lewis has acknowledged the circumstances surrounding the end of his tenure at EOUSA. The public has an interest in testing the veracity of such statements. Lewis

holds the position, that no professional misconduct took place, out to the public. This would be a different case if Lewis had not spoken publicly by refusing to answer the questions during the deposition on the reasons for his termination. Finally, the conflicting responses by the Agencies demonstrate the lack of factual foundation for Exemption 6 and 7(C).

In conclusion, the responses by the Agencies provide free reign for any individual terminated for professional misconduct to lie without fear of anyone finding out the truth. *See Braun v. City of Taft*, 154 Cal. App. 3d 332, 343 (1984) (recognizing strong public interest in determining whether a public official engaged in official misconduct). If the government's rationale here were adopted, FOIA would be gutted as a tool to release records of government corruption and malfeasance. Therefore, disclosure under Exemption 6 does not "constitute a clearly unwarranted invasion of privacy," 5 U.S.C. § 552(b)(6), and disclosure under Exemption 7(C) could not "reasonably be expected to constitute an unwarranted invasion of privacy." 5 U.S.C. § 552(b)(7)(C).

V. CONCLUSION

In conclusion, this Court should find that (1) the Agencies have not timely responded; (2) a Glomar response to the Tribe's request is inappropriate because the existence or nonexistence of the information has already been disclosed; and (3) Exemption 6 and 7(C) do not apply because the public interest in wrongdoing by a high-level government official outweighs that official's privacy interest. At a minimum, the DOJ should make an *in camera* disclosure instead of a Glomar response, so this Court may determine if the records may be properly withheld under Exemptions 6 and 7(C).

WHEREFORE, the Tribe requests this Court enter summary judgment in its favor, order OIG and EOUSA to respond, order that the Agencies Glomar responses were unlawful, order the Agencies to forthwith disclose the documents, award the Tribe reasonable costs and attorney's

fees, and grant other such relief as this Court may deem just and proper. In the alternative, this Court should conduct an *in camera* review.

Respectfully submitted this February 19, 2015.

/s/ Bernardo Roman III
BERNARDO ROMAN III, ESQ.
(Fla. Bar No.: 0002739)
Tribal Attorney
Miccosukee Tribe of Indians of Florida
P.O. Box 440021, Tamiami Station
Miami, Florida 33144
Telephone: (305) 894-5214
Facsimile: (305) 894-5212
E-mail: bromanlaw@bellsouth.net

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2015, I electronically filed the foregoing with the Clerk of the United States District Court for the Southern District of Florida by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Each of the parties have counsel registered as CM/ECF users.

Respectfully Submitted,

/s/ Bernardo Roman III
Bernardo Roman III, Esq