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 RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff, Miccosukee Tribe of Indians of Florida (the "Tribe"), respectfully files, by and through undersigned counsel, Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment and requests that this Court deny Defendants' Motion for Summary Judgment ("Defendants' Motion") [ECF No. 39]. As grounds therefore the Tribe asserts as follows:

MEMORANDUM OF LAW

I. ARGUMENT

A. Introduction

The premise of the Defendants' Motion is the incorrect assumption that there is no prior public disclosure of the responsive records. As Lewis publicly disclosed the "existence or not" of

the records, the Defendants' Motion fails as a matter of law. The deposition, part of the court record in a state case (and now this case), is a public record. Thus, this Court should deny Defendants' Motion and grant Plaintiff's Motion for Summary Judgment, remanding this issue and prohibiting the Department of Justice (the "DOJ") Components from issuing a Glomar response.

B. Prior Public Disclosure Defeats Defendants' Motion for Summary Judgment

The Defendants have not met their burden because of the prior public disclosure by Lewis. This prior public disclosure also contradicts the affidavit submitted by the DOJ. An agency's reliance on a statutory exemption to avoid disclosing information under the FOIA is an affirmative defense. *Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1557 (11th Cir. 1990), *rev'd on other grounds*, *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991). The agency bears the burden to prove that it has properly invoked a FOIA exemption in order to withhold information from the public. 5 U.S.C. § 552(a)(4)(B); *Tribe v. United States*, 516 F.3d 1235, 1258 (11th Cir. 2008). Therefore, when an agency fails to meet that burden, disclosure of the requested information is required.

As recognized by the Defendants, "in *Glomar* cases, courts may grant summary judgment on the basis of agency affidavits that contain 'reasonable specificity of detail rather than mere conclusory statements, ***and if they are not called into question by contradictory evidence in the record*** or by evidence of agency bad faith'" *Electronic Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012) (*quoting Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982)) (emphasis added); *see also Florida Immigrant Advocacy Center v. NSA*, 380 F. Supp. 2d 1332, 1338 (S.D. Fla. 2005) (summary judgment for the federal agency is proper "[i]f the affidavits provide specific information sufficient to place the documents within the exemption category, ***if this information is not contradicted in the record***, and if there is no evidence in the record of agency

bad faith." (*quoting Hayden v. NSA*, 608 F.2d 1381, 1384 (D.C. Cir. 1979)) (emphasis added)); Defendants' Motion at 5–6 [ECF No. 39]. Additionally, if there is a prior public disclosure, then the question on review in a Glomar case 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).

Here, contradictory evidence calls into question the affidavit of Waller [ECF No. 39-2]. Waller asserts: "[t]here is no public acknowledgment of any misconduct by Guy Lewis during his term as Director of EOUSA, or of any investigation into alleged wrongdoing or misconduct." Waller Decl. at 7–8 [ECF No. 39-2]; *see also* Defendants' Motion at 9 [ECF No. 39] ("there has been no public acknowledgment of any misconduct by Guy Lewis during his term as Director of EOUSA, or of any investigation into alleged wrongdoing."). This statement is factually incorrect. *See infra* Part I.C.

Additionally, the Defendants have not met their burden, 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)). This is because Lewis' "prior [public] disclosure establishes the ***existence*** (or not) of records responsive to the FOIA request." *Am. Civil Liberties Union*, 710 F.3d at 427; *see* Lewis Dep., Proceedings in *Bermudez v. Bert*, Case No. 00-25711-CA-21, at 7:25–8:25 [ECF No. 41-1]. Thus, the affidavit submitted by the government is called into question by contradictory evidence in the record, Lewis waived his privacy interest, and this Court should deny the Defendants' Motion for Summary Judgment [ECF No. 39].

C. Lewis' Filed Deposition Is A Public Record

It is axiomatic that a filed deposition is public record. This Court should look to Florida substantive law because the deposition was filed in a Florida case. *See e.g.*, *Grupo Televisa, S.A. v. Telemundo Commc'ns Grp., Inc.*, 485 F.3d 1233, 1246 (11th Cir. 2007) (applying Florida law where the conduct occurred in Florida). The Florida Constitution holds as paramount, the right of public access to judicial records. Art. I, § 24(a), Fla. Const. ("Every person has the right to inspect or copy any public record . . . . This section specifically includes the legislative, executive, and judicial branches."). This principle is repeated in the Florida Rules of Judicial Administration and Florida case law. *See* Fla. R. Jud. Admin. 2.420(b)(1)(A) (defining court records as "the contents of the court file"); *Cf. Miami Herald Pub. Co. v. Gridley*, 510 So. 2d 884, 884–85 (Fla. 1987) (unfiled discovery materials are not public record). This Court can also look to federal case law, which explicitly holds that filed depositions are part of the public record. *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355 (11th Cir. 1987) (the public record includes "pleadings, docket entries, orders, affidavits or depositions ***duly filed***") (internal citation and quotation omitted); *Jackson v. U.S.*, 2009 WL 2436577, at *3 (M.D. Fla. 2009) (same). *See, e.g.*, *In re Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1362 (N.D. Ga. 2002) ("the two depositions were, as it turns out, never actually filed under seal; they have arguably already been made part of the public record.").

Lewis' deposition was filed in state court (and now in federal court), thus his statements are public record. This contradicts the affidavit of Waller, and prevents the entry of summary judgment for the Defendants.

D. *Kimberlin* And *Mordenti* Involved Low-Level Government Officials Where The DOJ Withdrew The Glomar Response After Public Disclosure

Contrary to *Kimberlin* and *Mordenti*, Lewis, as Director of the Executive Office for United States Attorneys ("EOUSA"), was a high-level government official, and unlike the DOJ's actions in *Kimberlin* and *Mordenti*, here, the DOJ has not withdrawn its Glomar response after the public disclosure by Lewis.

As stated in the Tribe's Motion for Summary Judgment, *Kimberlin v. Dep't of Justice*, concerned an investigation of a staff-level government lawyer. 139 F.3d 944, 949 (D.C. Cir. 1998). In that case, Assistant United States Attorney John Thar disclosed the findings of an investigation by the DEA against then-U.S. Senator Dan Quayle. *Id.* at 946. The Office of Professional Responsibility ("OPR") then investigated the disclosure. *Id.* Subsequently, Kimberlin sued in district court seeking "all papers, documents and things pertaining to the OPR investigation of Thar." *Id.* at 947 (internal quotation omitted).

OPR, similar to the DOJ's action here, issued a Glomar response. *Id.* Thar, similar to Lewis' action here, disclosed the "the ***existence*** (or not) of records responsive to the FOIA request." *Am. Civil Liberties Union*, 710 F.3d at 427; *see Kimberlin*, 139 F.3d at 947. After being confronted with the public disclosure, "OPR withdrew its Glomar response and released two press clippings from its file on the investigation. The OPR withheld the balance of the file on the ground that it comes within Exemption 7(C) to the FOIA." *Kimberlin*, 139 F.3d at 947. The D.C. Circuit then analyzed if OPR properly withheld the remaining files. *Id.* The court explained, "[i]n view of the purpose of the FOIA, it will ordinarily be enough for the court to consider, when balancing the public interest in disclosure against the private interest in exemption, ***the rank of the public official involved*** and the seriousness of the misconduct alleged." *Id.* at 949 (emphasis added) (*citing Stern v. F.B.I.*, 737 F.2d 84, 94 (D.C. Cir. 1984) ("There is a decided difference

between knowing participation by a high-level officer in such deception and the negligent performance of particular duties by the two other lower-level employees")). Resting its holding on the rank of the employee involved, the court permitted the withholding of the material. *Id.* ("the OPR has investigated a staff-level government lawyer in connection with the possibly unauthorized and perhaps illegal release of information to the press. ***Under these circumstances*** . . ." (emphasis added)).

Mordenti also involved a low-level government employee, Assistant United States Attorney Karen Cox. *Office of the Capital Collateral Counsel, Northern Region of Florida*, ex rel. *Mordenti v. Dep't of Justice*, 331 F.3d 799, 801 (11th Cir. 2003). After investigation by OPR, Cox was reported to the Deputy Director of EOUSA.[1] *Id.* Afterword, the Florida Bar referee disclosed the "***existence*** (or not) of the responsive records." *Am. Civil Liberties Union*, 710 F.3d at 427; *see Mordenti*, 331 F.3d at 801. The Office of the Capital Collateral Counsel requested responsive records, and the DOJ issued a Glomar response. *Mordenti*, 331 F.3d at 801–02. However, the DOJ later retracted the Glomar response, released responsive material, and withheld five documents. *Id.* at 802.

The Eleventh Circuit recognized the similarities to *Kimberlin*, 139 F.3d 944: both involved a retraction of a Glomar response, both involved some kind of public disclosure, and both involved a low-level government official. *Mordenti*, 331 F.3d at 801–03. The court held that withholding two of the documents was permissible because those specific documents would

[1] According to the DOJ, the Deputy Director of EOUSA reports to the Director (the high-level position Lewis previously occupied). *EOUSA Organizational Chart*, United States Department of Justice, U.S. Attorneys, Executive Office for United States Attorneys (last updated Jan. 6, 2015), available at http://www.justice.gov/usao/eousa/eousa-organizational-chart ("EOUSA Organizational Chart") [ECF No. 42-7].

"reveal Cox's candid disclosure of her private thoughts and feelings concerning her misconduct in Sterba and its effect on her, her family, and her career." *Id.* at 803.

Contrary to the assertions by the DOJ, the privacy interest and "disclosure of the details of DOJ's disciplinary proceedings and final sanctions," Defendants' Motion at 11 [ECF No. 39], only refers to Cox's "private thoughts and feelings." *Mordenti*, 331 F.3d at 803. In fact, there was already "substantial information available to the public about Cox's misconduct and her subsequent sanctions." *Id.* at 804. It was this substantial public information that satisfied "[t]he public interest in knowing how DOJ responded to Cox's misconduct." *Id.* The court found the "personal reflections [by Cox] on her misconduct and its effects on her life" irrelevant to the public interest. *Id.*

This case, just like *Kimberlin* and *Mordenti*, also involves a public disclosure. However, there are two notable differences. First, in *Kimberlin* and *Mordenti* the government withdrew its Glomar response after informed of the public disclosure. *Kimberlin*, 139 F.3d at 947; *Mordenti*, 331 F.3d at 802.[2] Here, Lewis disclosed the "the ***existence*** (or not) of records responsive to the FOIA request," *Am. Civil Liberties Union*, 710 F.3d at 427, but the DOJ has not withdrawn the Glomar response. This Court should deny Defendants' Motion and order the DOJ to withdraw its Glomar response; the same action the DOJ took in *Kimberlin* and *Mordenti*.

Second, both government officials in *Kimberlin* and *Mordenti* were low-level government officials: Assistant United States Attorneys. *Kimberlin*, 139 F.3d at 949; *Mordenti*, 331 F.3d at 801. The rank of the government official is an important consideration. *Kimberlin*, 139 F.3d at 949. For example, in the Eleventh Circuit, "misappropriation . . . . by a high level government official qualifies as a textbook example of information the FOIA would require to be

[2] In *Kimberlin*, the individual at issue made the public disclosure. *Kimberlin*, 139 F.3d at 947. In *Mordenti*, another party made the public disclosure. *Mordenti*, 331 F.3d at 802.

disclosed." *Cochran v. United States*, 770 F.2d 949, 956–57 (11th Cir. 1985). Furthermore, when courts balance the privacy interests of government officials, the weight of any alleged privacy interest of high-level employees is *de minimis*. *Compare* Defendant's Motion at 11 [ECF No. 39] *with Cochran*, 770 F.2d at 956–57; *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 Co. v. U.S. Dep't of Army*, 981 F.2d 552, 567 (1st Cir. 1992) (ordering disclosure of information related to senior officers but not low-level officers); *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 v. Integrity Committee*, 501 F.3d 1215, 1234–35 (10th Cir. 2007) (withholding identifying information of low-level government officials generally permitted); *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 Support, Inc. v. FAA*, 851 F. Supp. 2d 321, 334 (D.N.H. 2012) (name of low-level FAA employee could be withheld).

Lewis, as Director of EOUSA, was a high-level government employee who supervised a large number of individuals and possessed policy-making authority. *Meet the Director*, United States Department of Justice, U.S. Attorneys, Executive Office for United States Attorneys (last updated Feb. 13, 2015), available at http://www.justice.gov/usao/eousa/meet-director [ECF No. 42-5]; *Mission and Functions*, United States Department of Justice, U.S. Attorneys, Executive Office for United States Attorneys (last updated Dec. 9, 2014), available at http://www.justice.gov/usao/eousa/mission-and-functions [ECF No. 42-6]; EOUSA

Organizational Chart [ECF No. 42-7]; *see also* Defendants' Motion at 11 [ECF No. 39]. Lewis' position, along with his public disclosure, significantly lessens or eliminates his privacy interest.[3]

Finally, in order to determine if Lewis' "private thoughts and feelings," *Mordenti*, 331 F.3d at 803, are included in the responsive documents, the DOJ must first issue a Vaughn index, and make an *in camera* disclosure. *Mordenti*, 331 F.3d at 801–02. However, withdrawing the Glomar response is a prerequisite to these two steps.

As to the public interest, *see* Defendants' Motion at 11 [ECF No. 39], the Tribe reasserts the explanations in the Tribe's Motion for Summary Judgment [ECF No. 41]. *See also* Tribe's Response in Opposition to Defendants' Statement of Material Facts, at ¶ 4.

Therefore, based upon *Kimberlin* and *Mordenti*, the Defendants cannot meet their burden and this Court should deny the Defendants' Motion.

II. CONCLUSION

For the reasons stated, Plaintiff respectfully requests that this Court DENY Defendants' Motion for Summary Judgment [ECF No 39], and GRANT Plaintiff's Motion for Summary Judgment [ECF No. 41].

Respectfully submitted this March 9, 2015.

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[3] *Wichlacz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 333 (E.D. Va. 1996), and *Franklin v. DOJ*, No. 97-1225, slip op at 10 (S.D. Fla. June 15, 1998), are not applicable because the name of the individual has already been disclosed, and the individual is not a private citizen.

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 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
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