UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 14-20643-CIV-ALTONAGA

MICCOSUKEE TRIBE OF INDIANS
OF FLORIDA,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,
Defendant.
_____/

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, United States Department of Justice ("DOJ"), hereby responds to Plaintiff Miccosukee Tribe of Indians of Florida's ("Tribe") Motion for Summary Judgment. Also incorporated herein is DOJ's Reply to the Tribe's Response to DOJ's Motion for Summary Judgment.

A. **The Tribe's Argument Concerning a Lack of a Response from DOJ's Office of the Inspector General and Executive Office of United States Attorneys is Moot**

The Tribe's Motion for Summary Judgment first argues that DOJ's Office of United States Attorneys ("EOUSA") and Office of the Inspector General ("OIG") have not responded to the FOIA requests sent to them. Plaintiff, therefore, seeks an order from the Court compelling these DOJ Components to respond to the FOIA requests. Each of these components, however, *did* respond to Plaintiff's FOIA requests. EOUSA responded to Plaintiff's FOIA request on August 5, 2014. Similarly, OIG responded to the Tribe's request on March 8, 2013. Both Components issued a *Glomar* response invoking FOIA Exemption 7(C). A copy of each DOJ Component's

response is included in Composite Exhibit A to Defendant's Motion for Summary Judgment. Accordingly, Plaintiff's request for an order compelling a response from the Components is moot.

B. There Has Been No Disclosure of the Existence or Non-Existence of Records

The Tribe argues that the DOJ Components' *Glomar* responses were inappropriate because Guy Lewis himself has already disclosed the nonexistence of the records sought by the Tribe's requests. The basis of the Tribe's argument is that Mr. Lewis, in deposition testimony given in an unrelated civil case, denied having been terminated from his employment with EOUSA, or leaving that employment because of wrongdoing or malfeasance on his part, or leaving that employment because of any type of ongoing investigation against him for wrongdoing or malfeasance. The Tribe argues that the foregoing testimony was a disclosure by Mr. Lewis that records responsive to the Tribe's FOIA requests do not exist. The Tribe argues that Mr. Lewis thus relinquished any privacy interest he may have had in the information sought.

DOJ does not agree that Mr. Lewis's deposition testimony regarding the end of his employment with EOUSA constitutes a public acknowledgment of the existence or non-existence of records responsive to the Tribe's FOIA requests.

Mr. Lewis's testimony does not, in fact, acknowledge any malfeasance or wrongdoing on his part, or that he was investigated or disciplined by DOJ for the same. The mere fact that Mr. Lewis's deposition testimony involved the same subject matter as the Tribe's request (i.e., the circumstances surrounding the end of his employment with EOUSA) does not constitute a waiver of Mr. Lewis's privacy interests in the information at issue. *See, e.g., Scales v. EOUSA*, 594 F.Supp.2d 87 (D. C. Dist. 2009) (holding that the third party subject of the plaintiff's FOIA request had not, by testifying at trial that there were forgery charges pending against her, waived

her privacy rights in all records related to the charges); *Burge v. Eastburn*, 934 F.2d 577, 579 (5th Cir.1991) (holding that the third party subjects of the plaintiff's FOIA request had not waived any privacy interest in statements given to the FBI by testifying at the requestor's murder trial because "[t]he fact that both [the statements and the testimony] may refer to the same event ... is plainly not enough to diminish significantly the privacy interest at issue"); *Seme v. FBI*, 892 F.Supp.2d 77, 83–84 (D.D.C.2012) (finding that a third-party maintained his privacy interest even though the third party's status as an FBI informant "may have been disclosed in deposition testimony and trial testimony"); *Meserve v. U.S. Dep't of Justice*, 2006 WL 2366427 (D.D.C. Aug. 14, 2006) (holding that privacy interests of the third party who was the subject of the plaintiff's FOIA requests were not diminished by the third party's testimony at trial); *Rahim v. F.B.I.*, 947 F.Supp2d 631, 644 (E.D. La. 2013) (finding that where the third party subject of a plaintiff's FOIA request had testified in open court and made statements to the press that he worked as an FBI informant in other cases, the subject had made no such statements regarding a case involving the plaintiff or his organization and *Glomar* response was appropriate); *Tanks v. Huff*, 1996 WL 293531, at *4 (D.D.C. May 28, 1996) (finding that persons who testified at the requester's trial maintained significant privacy interests and that the government properly neither confirmed nor denied the existence of records unrelated to the requestor or his prosecution under exemption 7(C)).

The Tribe relies heavily on *Wilson v. U.S. Dep't of Justice*, 2014 WL 2115508 (D.C. Dist. May 21, 2014), to support its argument that Mr. Lewis relinquished his privacy interest by testifying about the end of his employment with DOJ, but this case is nothing like *Wilson*. In *Wilson*, a man convicted of aiding and abetting murder sought from DOJ a copy of a recorded conversation between an informant and the principal perpetrator of the murder. In response to

the FOIA request, DOJ issued a *Glomar* response, refusing to acknowledge the existence or non-existence of the recording and citing the privacy of the principal murderer and of the informant. The court disagreed with DOJ's issuance of the *Glomar* response because testimony at the requester's criminal trial had already publicly revealed the identity of the informant, that the subject recording existed, and that the principal murderer was captured on the recording. Under those circumstances, the Court found that DOJ could not issue a *Glomar* response and was at least required to confirm or deny the existence of the recording.

Because neither DOJ nor Mr. Lewis have publicly acknowledged the existence or non-existence of responsive records, and because confirmation or denial of the existence of responsive records would itself cause harm cognizable under FOIA Exemptions 6 and 7(c), the DOJ's *Glomar* responses were lawful and appropriate. *See Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011) (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)). Although Mr. Lewis's deposition testimony concerns the end of his employment with EOUSA, the testimony contains neither an admission nor a denial by Mr. Lewis that he engaged in wrongdoing, or that he was investigated or disciplined by DOJ.[1]

[1] The case of *Citizens for Responsibility & Ethics in Washington ("CREW") v. U.S. Dep't of Justice*, 746 F.3d 1082, 1091 (D.C. Cir. 2014), provides an illustration of where public acknowledgment by the subject of a FOIA request diminishes the privacy interest sought to be protected by an agency's *Glomar* response. In *CREW*, DOJ issued a *Glomar* response to the plaintiff's FOIA request for records concerning an investigation of House of Representatives Majority Leader Tom DeLay's relationship with lobbyist Jack Abramoff. Before *CREW* had made its FOIA request, however, Mr. DeLay had made public statements confirming the fact that he had been, but was no longer, under investigation by the Department of Justice. He explained the extent of his cooperation with the investigation and announced the DOJ had decided not to charge him. In light of those statements publicly acknowledging the investigation, the D.C. Circuit found that DOJ's *Glomar* response neither denying nor acknowledging the existence of records relating to the investigation was inappropriate. The Court observed that "DeLay's obvious privacy interest in keeping secret the fact that he was the subject of an FBI investigation was diminished by his well-publicized announcement of that very fact." *Id*. at 1092. In this case, by contrast, there has been no acknowledgement by Guy Lewis of any investigation.

C. Neither Mr. Lewis's Former Position as Director of EOUSA Nor the Tribe's Allegations of Wrongdoing on his Part Warrant Disclosure of the Information Sought

The Tribe alternatively argues that if Mr. Lewis did not disclose the existence of responsive records, his position as a high-level government official and the malfeasance allegedly committed nevertheless outweigh his privacy interest. The first problem with this argument is that it suggests that Mr. Lewis has waived his privacy interests by serving as Director of EOUSA. While government officials may have a somewhat diminished privacy interest (*see Fund for Constitutional Gov't v. National Archives and Records Serv.*, 656 F.2d 856, 865 (D.C.Cir. 1981)), "[they] do not surrender all rights to personal privacy when they accept a public appointment." *Bast v. Department of Justice*, 665 F.2d 1251, 1255 (D.C.Cir.1981). Furthermore, even a government employee who is the subject of a publicly acknowledged investigation still possesses a strong privacy interest in avoiding disclosure of the details of the investigation. *Kimberlin v. Department of Justice*, 139 F.3d 944, 949 (D.C.Cir.1998).

The second problem with the Tribe's argument is that it is based on nothing but bare suspicion that Mr. Lewis engaged in wrongdoing. Seemingly acknowledging the lack of a factual basis for its claims regarding Mr. Lewis, the Tribe argues that "[t]he public interest in [alleged] wrongdoing—*even unsubstantiated*—by a high-level government official outweighs the privacy interest under Exemption 6 and Exemption 7(C)." Pl.'s Mot. Sum. Judg. at p. 12 (emphasis added). The cases the Tribe cites, however, do not support its argument because Mr. Lewis never actually admitted to any alleged wrongdoing or investigation, nor has the Tribe made any showing of wrongdoing by Mr. Lewis. More importantly, the Supreme Court has expressly rejected the argument.

In *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 173-74 (2004). The Supreme Court held that the privacy interests protected by FOIA Exemption 7(C) cannot be overcome simply by a requester's suspicion of malfeasance. Requiring disclosure of information based only on a FOIA requestor's suspicion of wrongdoing, the Court observed, would leave Exemption 7(C) with "little force or content." *Id*. at 173. Accordingly, the Court held that "where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure[;] [r]ather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id*. at 174. The Tribe has made no such showing in this case. "Only when the FOIA requester has produced evidence sufficient to warrant a belief by a reasonable person that the alleged Government impropriety might have occurred will there be a counterweight on the FOIA scale for a court to balance against the cognizable privacy interests in the requested documents." *Id.* at 159.

Notwithstanding the Supreme Court's opinion in *Favish*, the Tribe relies on several cases to support its argument that "even unsubstantiated" allegations of wrongdoing warrant disclosure under FOIA. The Tribe primarily relies on *Cochran v. United States*, 770 F.2d 949, 956 (11th Cir. 1985), but the Eleventh Circuit's decision in *Cochran* – a case concerning the Privacy Act -- does not even remotely suggest that the public's interest in *unsubstantiated* alleged wrongdoing by a government official outweighs the official's privacy interest. The plaintiff in *Cochran*, a Major General in the Army, brought an action against the United States alleging that the Army had violated the Privacy Act by improperly issuing a press release about a non-judicial disciplinary proceeding against him. The district court and the Eleventh Circuit ruled against the

plaintiff, holding that disclosure of the information was required under FOIA and not a violation of the Privacy Act. Unlike the case now before this court, the wrongdoing at issue in *Cochran* was undisputed and already a matter of public record as a result of the Army's press release concerning the investigation. In the press release, the Army acknowledged that the plaintiff official had used a military aircraft for a private purpose and had his private property—a stove—repaired with public resources and had been investigated and disciplined for his conduct. In contrast, the Tribe's allegation that Guy Lewis engaged in unspecified travel malfeasance while serving as director of EOUSA is entirely unsubstantiated and appears to be based on pure speculation.

The Tribe also relies on *Perlman v. United States Dept. of Justice*, 312 F.3d 100 (2d Cir. 2002), *vacated*, 541 U.S. 970 (2004), *reaffirmed*, 380 F.3d 110 (2d Cir. 2004) for its contention that unsubstantiated allegations of wrongdoing by a public official trump the official's privacy interests under FOIA. In *Perlman*, the Second Circuit held that the public's interest in disclosure of a report of investigation by the DOJ's Office of the Inspector General substantially outweighed the privacy interests of a former Immigration and Naturalization Service (INS) general counsel identified in the report. The INS general counsel had been investigated on allegations of serious wrongdoing involving the EB-5 investor visa program. Far from being unsubstantiated allegations of misconduct, the wrongdoing at issue in *Perlman*, concerning INS's administration of the EB-5 Investor Visa program, was publicly acknowledged. Indeed, portions of the Report of Investigation regarding the wrongdoing had been disclosed. What had *not* been disclosed was information in the report concerning the INS general counsel. In this case, however, there has been no similar acknowledgment of any wrongdoing by Mr. Lewis, or

of any investigation into the same, or of any disciplinary action against Mr. Lewis. The Tribe's FOIA requests are apparently based only on its suspicion of wrongdoing.[2]

"The public's interest in disclosure of personnel files derives from the purpose of [FOIA]—the preservation of 'the citizens' right to be informed about what their government is up to.'" *Beck v. Department of Justice*, 997 F.2d 1489 (D.C. Cir. 1993) (quoting *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) and citing *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991) and *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). "This statutory purpose is furthered by disclosure of official information that 'sheds light on an agency's performance of its statutory duties.'" *Id*. (quoting *Reporters Committee*, 489 U.S. at 773. "Information that 'reveals little or nothing about an agency's own conduct' does not further the statutory purpose; thus the public has no cognizable interest in the release of such information." *Id*. (citing *Reporters Committee*, 489 U.S. at 773, 109 S.Ct. at 1482).

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[2] *Providence Journal Co. v. U.S. Dept. of Army*, 981 F.2d 552 (1st Cir. 1992), another case the Tribe relies on for its argument that even an unsubstantiated allegation of wrongdoing can warrant disclosure under FOIA, is similarly distinguishable. In *Providence Journal*, the plaintiff FOIA requester sought disclosure of the Army's records pertaining to an investigation by its Inspector General of the Rhode Island National Guard. In response, the Army released a redacted version of the IG's report regarding the investigation, withholding several exhibits to the report pursuant to FOIA Exemptions 5, 6 and 7 (C). The requester sued under FOIA for a complete and unredacted version of the report, including three source statements that made explicit references to the names of two senior National Guard Officers. The district Court ordered disclosure of the full report (including the statements) minus the names of confidential informants. The Circuit Court modified and affirmed the district court's ruling. Although the First Circuit observed, *in dicta*, that there may be a greater public interest in even unsubstantiated allegations of misconduct by higher ranking government officials, its ultimate decision in favor of disclosure was not based on the weight of the public's interest, but instead based on the fact that the invasion of the named Officers' privacy would be "unusually slight." *Id*. at 569. Specifically, the court observed that the Army had already disclosed one the unsubstantiated allegations and that the undisclosed allegation was only a blurred suggestion of possible impropriety. Here, by contrast, there has been no acknowledgment of any alleged wrongdoing by Guy Lewis, or of any DOJ investigation of the same. The Tribe has provided absolutely no evidence of any wrongdoing. To the extent the Tribe argues disclosure under FOIA is required on the basis of its suspicion that Guy Lewis engaged in travel malfeasance while serving as Director of FOIA, the Supreme Court in *Favish* expressly held the opposite.

In an attempt to recast its private interest in obtaining records concerning Guy Lewis for use in its litigation against him, the Tribe argues that disclosure of the information it seeks would serve a public interest in knowing how DOJ "handles misconduct by employees." First Am. Compl. at ¶ 32.[3] Without questioning whether, or the extent to which, the public has an interest in knowing how DOJ or its components address misconduct by agency employees in general, disclosure of the identities of particular employees does not serve such an interest. *Id*. (citing *Reporters Committee, 489 U.S. at 773*).

Relying on *Stern v. F.B.I.*, 737 F.2d 84, 92 (D.C. Cir. 1984), the Tribe additionally argues that the public has an interest 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." Pl.'s Mot. for Sum. Judg. at 11 (quoting *Stern*). This same argument, however, was made and rejected in *Beck*, for the same reason it should be rejected in this case: "The *Stern* case is distinguishable from this one . . . in one critical, factual dimension: That case occurred against the backdrop of a well-publicized scandal, and the public was aware that certain employees had been censured, one of them for having

[3] As explained in its complaint and in the FOIA requests underlying this lawsuit, the Tribe's need for the information at issue arises from "two pending lawsuits filed by the Miccosukee Tribe against Mr. Lewis." First Am. Compl. ¶ 23. Although the United States Supreme Court has observed that any peculiar interest of the requesting party is irrelevant to evaluating the general public interest to be served by disclosure under FOIA (*See John Doe Agency v. John Doe Corp*., 493 U.S. 146 (1989)), it should be noted that summary judgment has already been granted in favor of Guy Lewis, and against the Tribe, in one of the two lawsuits identified in the Tribe's complaint, *Miccosukee Tribe of Indians v. Lewis*, et al., Case No. 12-12816-CA-27. In that case, the Tribe had alleged that Mr. Lewis, his law partner and others fraudulently charged the Tribe millions of dollars in excessive legal fees, committed civil theft and legal malpractice, and breached a fiduciary duty owed to the Tribe. The second case, *Miccosukee Tribe of Indians v. Cypress*, et al., Case No. 13-35956-CA-40, which remains pending in Florida State Circuit Court, is a refiled version of a case that was dismissed by this District Court, *Miccosukee Tribe of Indians v. Lewis*, et al., 12-22439-CIV. In the federal District Court case, the Court awarded sanctions directed to legal counsel for the Tribe " *See* Omnibus Order Granting Defendants' Motions for Sanctions 2015 WL 235433 (Jan. 16, 2015). .

deliberately suppressed evidence." *Beck* (citing *Stern* at 86-87).[4] Here, no public acknowledgement of any alleged wrongdoing by Mr. Lewis exists.[5]

The Tribe also suggests that its FOIA request serves the public interest because disclosure of the information sought would "assist in determining whether Mr. Lewis is misrepresenting his tenure at EOUSA to potential clients." Pl.'s Mot. Sum. Judg. at 15. This, however, is not a valid public interest cognizable under FOIA. Again, the public interest in disclosure of information under FOIA is derived from the purpose of the Act—to inform the public of what the government is up to. *See Reporters Committee*, 489 U.S. at 773. The purpose of FOIA is furthered by disclosure of information that sheds light on an agency's performance of its statutory duties. *Id*. Clearly, Mr. Lewis's current conduct as a private citizen engaged in the private practice of law has nothing to do with what the government is up to. Accordingly, any interest the public may have in knowing whether Mr. Lewis is accurately representing his employment with EOUSA is not cognizable under FOIA.

[4] Insofar as the Tribe suggests that DOJ ignored or inadequately investigated any alleged wrongdoing by Mr. Lewis, it has provided absolutely no evidence of the same. The government's conduct is presumed to be proper unless contradicted by evidence. *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991); *see also United States v. Chem. Found., Inc*., 272 U.S. 1, 14–15, 47 S.Ct. 1, 71 L.Ed. 131 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

[5] In contrast, the D.C. Circuit in *Stern* ordered disclosure of the identity of a high-level employee who was, following a highly publicized investigation, found to have participated deliberately and knowingly in the withholding of damaging information in an inquiry to determine whether FBI officials acted improperly in failing to discover and report all instances of surreptitious entries and wiretappings. Indeed, courts follow a general rule that demonstrated wrongdoing of a serious and intentional nature by high-level government officials is of sufficient public interest to outweigh almost any privacy interest of that official. See, e.g., Perlman v. U.S. Dep't of Justice, 312 F.3d 100, 107 (2d Cir. 2002).

D. DOJ has Properly Asserted FOIA Exemptions 6 and 7(c)

On Page 11 of its Motion for Summary Judgment, the Tribe argues that FOIA Exemption 7(C) does not apply "because the information was not compiled for law enforcement purposes." The Tribe, however, has absolutely no factual basis for that assertion. The Declaration of Deborah Waller, FOIA Officer for DOJ's Office of the Inspector General (Exhibit "B" to DOJ's Motion for Summary Judgment), explains that, if records responsive to the Tribe's FOIA requests exist, they would be maintained in an investigative records system that contains records "compiled for law enforcement purposes" and would be subject to Exemption 7(C). Waller Decl. at ¶ 24.[6] Moreover, DOJ's *Glomar* responses to the Tribe's FOIA requests did not rely exclusively on FOIA Exemption 7(C). DOJ's Office of Professional Responsibility, which is the DOJ component responsible for investigating allegations of professional misconduct involving DOJ attorneys, invoked FOIA Exemption 6 to protect personal privacy interests, in addition to FOIA Exemption 7(c).

As explained in DOJ's Motion for Summary Judgment, Exemption 7(C) covers law enforcement records, the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy," while FOIA Exemption 6 covers information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) and (7)(C). Thus, DOJ has invoked FOIA Exemptions applicable not only to records compiled for law enforcement, as the Tribe's Response suggests, but also to records about individuals in personnel, medical and similar files. Although the privacy language in Exemption 7(C) is broader than the privacy language in Exemption 6, courts employ a similar analysis to

[6] Agency affidavits or declarations are accorded a presumption of good faith. *Del Rio v. Miami Field Office of the FBI*, No. 08-21103, 2009 WL 2762698, at *6 (S.D. Fla. Aug. 27, 2009).

decide whether a FOIA request may be categorically denied on either ground. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press* (" *Reporters Comm.*"), 489 U.S. 749, 756–62 (1989); *Judicial Watch v. U.S. Dep't of Homeland Sec'y*, 598 F.Supp.2d 93, 97 n. 1 (D.D.C.2009) ("The privacy inquiries under Exemptions 6 and 7(C) are 'essentially the same' ") (quoting *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1125 (D.C.Cir.2004)).

CONCLUSION

For the reasons provided above, in addition to those provided in its Motion for Summary Judgment, DOJ respectfully submits that summary judgment in its favor is appropriate.

Dated: March 23, 2015
Miami, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2015, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system.

/s/ Carlos Raurell
Assistant United States Attorney