UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DYLAN TOKAR, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 16-2410 (RC)

COMBINED REPLY IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO PLAINTIFF'S CROSS MOTION

The Department of Justice ("DOJ") replies as follows in support of its motion for summary judgment in this FOIA action and opposes Plaintiff's cross-motion.

ARGUMENT

I. DOJ Is Entitled To Summary Judgment On The First FOIA Request

A. Plaintiff Narrowed The Request To Seek Certain Information, Not Documents.

Plaintiff's first FOIA request originally sought "[a]ll documents" submitted by companies at the outset of each monitor selection process; sought "[a]ll Monitor Selection Memoranda;" and sought "[r]ecords of the Standing Committee." (Compl. Ex. 1) Plaintiff thereafter narrowed that request to remove all references to "documents", "memoranda" or "records." (Compl. Ex. 2) The request, as narrowed, did not seek the production of documents at all, but instead sought the production of certain "information"; specifically, '[t]he names and law firm affiliations of the three monitor candidates put forth by each company on our list [and] (2) [t]he

names and titles of members of the Standing Committee on the Selection of Monitors, including their dates of serve and any temporary designees." (Compl. Exs. 2 and 6)

Plaintiff acknowledges that his intention was to narrow his original request (Opp. at 7; ECF No. 10-3, Tokar Decl. ¶¶ 14-15) and to seek "merely" the names and law firm affiliations of monitor candidates and names and titles of members of the Standing Committee on the Selection of Monitors, including their dates of service. (Compl. Ex. 6) The DOJ Criminal Division processed the request as narrowed and provided the information requested to the extent non-exempt under FOIA. Plaintiff now contends that his narrowed request should be interpreted to be as expansive as the original request and that the Criminal Division should be ordered to produce all documents underlying the information that it has provided. Plaintiff's position is baseless for several reasons.

First, the terms of the FOIA request control and, having so narrowed his request, Plaintiff cannot now contend that his narrowed request should be interpreted to be equivalent in scope to the original request. *See Kowalczyk v. DOJ,* 73 F.3d 386, 389 (D.C. Cir. 1996) (agency "is not obliged to look beyond the four corners of the request"); *Judicial Watch v. State*, 177 F. Supp. 3d 450, 456 (D.D.C. 2016) ("an agency is required to read a FOIA request as drafted, 'not as either the agency or [the requester] might wish it was drafted'"), *aff'd,* 2017 U.S. App. LEXIS 3435 (D.C. Cir. Feb. 24, 2017). Although Plaintiff observes that he narrowed his request prior to obtaining counsel to represent him (Opp. at 7), he fails to explain the significance of that fact to the legal issue presented. There is nothing in the record to indicate that Plaintiff's decision to narrow his request was anything other than a knowing and voluntary one, nor does Plaintiff make a contrary contention. Plaintiff is a journalist and, according to his own declaration, he consulted with his editor before deciding to narrow the request. (ECF No. 10-3, Tokar Decl. ¶ 13).

Second, Plaintiff attempts in his opposition to recharacterize the narrowed request as seeking "records reflecting" the requested information. (Opp. at 2, 13) The request, however, is the best evidence of its contents and does not include those words as Plaintiff implicitly acknowledges by omitting in his opposition quotation marks around the term "records reflecting." If anything, his effort to add these words when he describes the request in his opposition is a concession that the narrowed request, as written, did not seek underlying records.

Third, Plaintiff misconstrues Defendant's observation in its motion that FOIA does not require the production of information, only documents, to suggest that he was somehow treated unfairly. (Opp. at 13). *See* ECF No. 9, Def. Mot. at 3 (citing *Powell v. IRS*, No. 16-1682, 2017 U.S. Dist. LEXIS 88484, at *21-22 (D.D.C. June 9, 2017) and *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980)). But Plaintiff misunderstands the basis for these citations in Defendant's motion. Defendant did not cite that case authority to contend that it had no obligation to provide the information requested in the narrowed request to Plaintiff. To the contrary, it is undisputed that Defendant processed the narrowed request by providing a table reflecting the information requested. Defendant instead cited that authority as a demonstration of its good faith in attempting to provide the information sought by Plaintiff and to explain how it met any search obligation with respect to a request that sought certain "information" and not underlying "documents." *See* ECF No. 9, Def. Mem. at 3.

Fourth, Plaintiff suggests that, notwithstanding the plain language of the narrowed request, he is entitled to the underlying documents that were not requested because of "errors" in the table as originally produced by Defendant. (Opp. at 10) But that argument has the same flaw as the related argument often made by plaintiffs against agencies who conduct a renewed search for records after realizing the initial search was deficient. In such cases, courts reason that, far

from demonstrating an inadequate search as plaintiffs often contend, "the additional releases suggest 'a stronger, rather than a weaker, basis' for accepting the integrity of the search." *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986). The same analysis applies to Plaintiff's reference to corrections made by DOJ to the table as originally produced. Although corrections were made to prior versions of the table, Plaintiff does not contend that the final version that was produced on July 10, 2017 (ECF No. 9-2, Sprung Decl. ¶ 10), is inaccurate in any way. Because agency declarations are entitled to a presumption of good faith, *see SafeCard Servs., Inc. v. SEC,* 926 F.2d 1197, 1200 (D.C. Cir. 1991), Plaintiff cannot question the accuracy of that table simply by pointing to the fact that two previously produced versions required correction.

Ultimately, Plaintiff acknowledges that he "would have been satisfied with an accurate, unredacted table providing only the specific information that is the subject of his First FOIA Request, as narrowed, in lieu of responsive records." (Opp. at 14) Plaintiff's complaint, therefore, is not with his receipt of the information in a table format, but with the redaction of certain limited information from the table under Exemptions 6 and 7(C). Plaintiff implies that, because of these redactions, DOJ "failed to hold up its end of the bargain." (Opp. at 2) But as Plaintiff's own declaration establishes, there never was any agreement by the Criminal Division to waive the right to assert appropriate FOIA exemptions with respect to the information sought in the narrowed request. Plaintiff concedes in his declaration that, in his conversations with Mr. Sprung of the Criminal Division, Mr. Sprung stated that "he believed that privacy exemptions… could be asserted as justifications for withholding the names of the individual monitor candidates" and reiterated that position in reference to the narrowed request. (ECF No. 10-3, Tokar Decl. ¶¶ 13, 17). The Criminal Division, therefore, has been consistent from the outset that "privacy exemptions" likely would apply to certain information sought by Plaintiff, and it is

incorrect for Plaintiff to imply in his opposition that the agency suggested otherwise. For all of these reasons, the Criminal Division's reliance on certain "privacy exemptions" is immaterial to the threshold question of whether DOJ properly responded to the first FOIA request, as narrowed, with a table of information rather than underlying documents. The record amply supports the Criminal Division's processing of the narrowed request in that manner.

B. Redactions To The Table Under Exemptions 6 and 7(C).

The Criminal Division withheld from the table that it released certain information under Exemption 6 and 7(C).[1] Specifically, DOJ redacted from the table the names of nominees who were not selected for the monitor position. *See, e.g., Neary v. FDIC*, 104 F. Supp. 3d 52, 57-58 (D.D.C. 2015) (recognizing potential harm and embarrassment in disclosing the names of unsuccessful applicants). The Criminal Division also withheld the names of the professional services firms at which the unsuccessful nominees worked when the size of the firm was such that its disclosure could allow the public to identify the unsuccessful nominees. *See, e.g., Core v. U.S. Postal Serv.*, 730 F.2d 946, 948 (4th Cir. 1984) ("Even if their names were deleted, the [employment] applications generally would provide sufficient information for interested persons to identify [the applicants] with little further investigation"); *Judicial Watch v. Export-Import*

[1] The information contained in the table was derived from records compiled for a law enforcement purpose, specifically, documents generated in connection with the agency's enforcement of the Foreign Corrupt Practices Act, and included such things as memoranda prepared for senior DOJ management assessing the monitor nominees and providing recommendations for the selection of monitors. (ECF No. 9-2, Sprung Decl. ¶¶ 11-12 n.6) Although the table itself was not created for a law enforcement purpose, information originally compiled for law enforcement purposes does not lose its Exemption 7 protection if summarized in a new document not created for law enforcement purposes. *FBI v. Abramson,* 456 U.S. 615, 631-32 (1982); *see also Stein v. DOJ*, 134 F. Supp. 3d 457, 485 (D.D.C. 2015) ("'information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements of [exemption (b)(7)] where that recorded information is reproduced or summarized in a new document prepared for a non-law-enforcement purpose.'") (quoting *Abramson*).

Bank, 108 F. Supp. 2d 19, 37 (D.D.C. 2000) ("This Court and other courts agree that information in the resumes cannot be reasonably segregated. If too little information is be [sic.] disclosed, the bits of disclosed information are meaningless. In contrast, if too much information is disclosed, it could easily be used to identify the individual.")

DOJ also withheld from the table the names of monitor selection committee members who were not part of senior DOJ management. (Sprung Decl. ¶ 13) On further review, DOJ has determined that because those individuals held supervisory positions and were publicly associated with the respective corporate resolutions involving the imposition of the monitor, the balance tilts in favor of disclosure in this case. (Suppl. Sprung Decl. ¶ 7). Accordingly, DOJ has released a revised chart that provides the names of those monitor selection members whose names previously were redacted from the chart. (Ex. A to Suppl. Sprung Decl.)

Consequently, the only remaining issues with respect to the table concern redactions under Exemptions 6 and 7(C) of the names of the unsuccessful monitor candidates and their affiliated firms where the firm size was so small that it could identify the individuals whose names have been redacted. Plaintiff argues that these redactions are not justified because, in Plaintiff's view, "corporate monitor candidates simply do not have a privacy interest in the fact that they were nominated for, but did not receive, a monitorship appointment." (Opp. at 19-20) Moreover, because in Plaintiff's view a privacy interest is lacking, redaction of other information that might identify these unsuccessful candidates (such as the name of their affiliated firm) also is inappropriate. (*Id.*)[2]

[2] Plaintiff states that Defendant is "inconsistent[]" in relying on Exemptions 6 and 7(C) for the redactions on the table and only Exemption 6 for redaction of the same information that appears in letters provided to DOJ by the companies at issue. (Opp. at 17) There is, however, no inconsistency. The information on the table was derived from documents in DOJ's possession compiled for law enforcement purposes. In contrast, the information provided by the companies was derived from information within the companies' own files. Because the latter was not

Contrary to Plaintiff's assertion, courts have long recognized that unsuccessful applicants for federal employment have a privacy interest in not having their names disclosed to the public. *See, e.g., Pinson v. DOJ*, 202 F. Supp. 3d 86, 114 (D.D.C. 2016) ("The Court agrees with DOJ's assessment that the individual 'has a considerable privacy interest' in avoiding having his or her non-selection disclosed to the public, a disclosure which would likely cause embarrassment."); *Neary v. FDIC,* 104 F. Supp. 3d 52, 59 (D.D.C. 2015) (proper to withhold under Exemption 6 the names of applicants to FDIC's Corporate Employee Program); *Voinche v. FBI*, 940 F. Supp. 323, 330 (D.D.C. 1996) (proper to withhold under Exemption 6 the names of candidates for vacancies on the Supreme Court).

Plaintiff's attempt to distinguish corporate compliance monitor candidates from candidates for other government appointments is unavailing. Plaintiff first argues that these candidates are not applying for "federal employment" and would remain employees of their professional services firm whether selected or not for the compliance monitor position. (Opp. at 19-20) But that is a distinction without a difference. The relevant factors under Exemptions 6 and 7(C) include that (a) these individuals were nominated but not selected for a position, (b) a record of their unsuccessful candidacy is maintained by the government, and (c) information about that unsuccessful candidacy is sought through a FOIA request. Although the nature of the position is technically different from "federal employment,"[3] these individuals still have the same

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compiled from law enforcement documents, DOJ is not claiming Exemption 7(C) over redactions on the company-submitted documents. However, even under Exemption 6, the redactions are appropriate.

[3] Notably, this Court has recognized that individuals that occupy compliance monitor positions fall within the consultant corollary doctrine of Exemption 5, and that their communications with the government related to the monitorship constitute intra-agency communications. *100Reporters v. DOJ,* No. 14-1264, 2017 U.S. Dist. LEXIS 49574, at *52 (D.D.C. Mar. 31, 2017). Thus, the compliance monitor position serves in a capacity similar to a government consultant, rendering Plaintiff's attempted distinction even more tenuous.

privacy interest to avoid the potential stigma of rejection as other unsuccessful candidates whose names may appear in government records. *See, e.g., Pinson,* 202 F. Supp. 3d at 114 ("The Court agrees with DOJ's assessment that the individual 'has a considerable privacy interest' in avoiding having his or her non-selection disclosed to the public, a disclosure which would likely cause embarrassment.").

Plaintiff also contends that these unsuccessful candidates are distinct because their affiliated law firms presumably would know that they sought a monitor position, which Plaintiff speculates may not be the case with applicants who are seeking to leave a job and would not want their candidacy known by their employers. That argument, however, assumes without basis that all other applicants for positions with the federal government are currently employed and that their jobs are such that it would be detrimental for their current employers to learn of their efforts to obtain a position with the federal government. In making this argument, Plaintiff chooses to overlook applicants for federal employment who may have just completed school, may be in between jobs, or may hold positions in which their employers would encourage the opportunity to gain government experience. The privacy exemptions of FOIA would protect the unsuccessful applicant's name in all of these scenarios. In any case, embarrassment before a current employer is not the only potential harm that might be caused by disclosure of this information. The stigma of rejection, for instance, may be professionally harmful to these individuals before clients and prospective clients if their unsuccessful candidacy is disclosed.

Finally, Plaintiff likens this case to *Physicians Committee for Responsible Medicine v. Glickman,* 117 F. Supp. 2d 1 (D.D.C. 2000), where, as described by Plaintiff, "approximately 140 individuals . . . were nominated but ultimately not appointed" to an advisory committee and the names of the non-selected applicants were sought under FOIA. In that case, the court held

that the "asserted stigma of rejection is significantly diluted when shared among approximately 140 people." *Id.* at 6. Here, in contrast, there is less than a handful of unsuccessful nominees for each position. Indeed, Plaintiff's narrowed request sought "[t]he names and law firm affiliations of the *three* monitor candidates put forth by each company on our list." (Compl. Ex. 6) (emphasis added). The "asserted stigma of rejection," therefore, is not diluted under these circumstances.

The other case cited by Plaintiff, *Korzon v. Department of Health & Human Services*, 649 F.2d 65 (1st Cir. 1981), is distinguishable for the same reason. At issue there was a FOIA request that sought disclosure of the names of unsuccessful applicants for research grants to the National Cancer Institute. In finding that the privacy interest at stake was minimal, the court also focused on the volume of applicants in that context and the fact that, given the limited funding available and average award rate of only 30 percent, "[r]ejection . . . is not so rare an occurrence as to stigmatize the unfunded applicant." *Id.* at 69, 69 n. 3. Here, in contrast, the limited number of candidates at issue reasonably led the Criminal Division to reach the opposite conclusion in its Exemptions 6 and 7(C) analysis. Thus, contrary to Plaintiff's position, the privacy interest in non-disclosure is considerable.

Plaintiff also fails to identify any public interest sufficient to outweigh this privacy interest. Although Plaintiff contends that the information would allow the public to understand the agency's selection process, a similar argument was rejected by this Court in *Pinson*, 202 F. Supp. 3d at 114, under analogous circumstances. There, DOJ withheld under Exemption 6 the identity of a candidate for the position of Director of the Bureau of Prisons who was not ultimately selected for that position. *Id.* at 97. DOJ acknowledged in that case that the public interest in understanding the qualifications of a high-level official would generally outweigh a

successful nominee's privacy interest in the information but asserted that "'the public interest in a failed candidate is less significant because that candidate's qualifications do not assist the public in evaluat[ing] the selectee's qualifications.'" *Id.* at 114. This Court agreed, explaining that "[a]lthough the public has an interest in evaluating the competence of individuals who are appointed as government employees, in the case of individuals who are not ultimately selected, the privacy interest outweighs public interest in disclosure." *Id.* As this Court observed, other courts have held that the "'public interest in knowing whether the . . . most qualified applicant [was selected is] satisfied by release of the successful applicant's employment information.'" *Id.* (quoting *Commodity News Serv. v. Farm Credit Admin.*, 1989 U.S. Dist. LEXIS 8848 (D.D.C. July 31, 1989)); *see also Core v. USPS*, 730 F.2d 946, 949 (4th Cir. 1984) ("the public interest in learning the qualifications of people who were not selected to conduct the public's business is slight. Disclosure of the qualifications of people who were not appointed is unnecessary for the public to evaluate the competence of people who were appointed.").

Plaintiff likely will contend that the public interest he has identified – understanding the "selection process" – is distinct from evaluating the competence of the selected candidates. But in the context of this case, where the FOIA request sought only the names of the candidates and their affiliated firms, that is a meaningless distinction. Plaintiff fails to explain how the limited information he seeks would shed light on the selection process itself. [4] Accordingly, because unsuccessful candidates have a "'considerable'" privacy interest in not having their identities disclosed to the public, *Pinson*, 202 F. Supp. 3d at 114, and any public interest identified by Plaintiff for that information is "slight," *Core*, 730 F.2d at 949, the Criminal Division properly

[4] To the extent *Physicians Committee*, *supra*, reaches a different conclusion about the public interest in such information, 117 F. Supp. 2d at 6, that case is distinguishable for reasons already addressed above. Among other things, the privacy interest in that case was deemed minimal given the high volume of applicants whereas the privacy interest here is much greater. The "'considerable'" privacy interest here outweighs any public interest in disclosure.

withheld the names of the unsuccessful candidates under Exemptions 6 and 7(C). Likewise, the Criminal Division properly redacted the name of the individuals' affiliated law firms when the firm was of a small size such that its disclosure would enable the public to identify the unsuccessful candidate. *See Core*, 730 F.2d at 949 ("Even if their names were deleted, the applications generally would provide sufficient information for interested persons to identify them with little further investigation.").

II. Defendant Is Entitled To Summary Judgment On The Second FOIA Request

Plaintiff's second request sought written responses that the DOJ Criminal Division received to submitter notices that it had sent out to certain specified companies in January 2016 after receiving Plaintiff's first FOIA request. Plaintiff does not challenge the search for responsive records that DOJ conducted in response to this request, nor does he challenge the limited redactions made under Exemption 4 on the records produced in response to this request. (Opp. at 28) Accordingly, for reasons stated in Defendant's motion, summary judgment should be granted to the Defendant on these issues.

The Criminal Division also made limited redactions under Exemption 6 to the companies' written responses that were produced in response to this request. Specifically, the Criminal Division redacted from the documents references to the names of nominees who were not selected. (ECF No. 9-2, Sprung Decl. ¶ 30) In addition, the Criminal Division also redacted the names of private attorneys who responded to the submitter notices and the names of two DOJ employees because the privacy interests of these individuals predominated given the absence of any public interest in that information. (*Id.* ¶¶ 31-32).

The legal analysis supporting the withholding of the names of the unsuccessful nominees is the same as addressed above with respect to the redactions made on the table of similar

information. The only difference is that the Criminal Division is not relying on Exemption 7(C) for the redactions on the responses to the submitter notices because those documents were not complied for a law enforcement purpose but instead to respond to the January 2016 submitter notice. *See supra* note 2. Nevertheless, the balancing under Exemption 6 still supports the withholding of the names of the unsuccessful nominees for reasons already discussed above. *See Pinson,* 202 F. Supp. 3d at 114 (upholding the redaction of the name of an unsuccessful candidate under Exemption 6).

The other redactions consist of the names of private counsel who submitted the responses and the names of two DOJ employees (an information specialist and a trial attorney that handled one of the underlying Foreign Corrupt Practices Act cases). (ECF No. 9-2, Sprung Decl. ¶ 30; Supp. Sprung Decl. ¶ 7). Plaintiff has failed to identify any public interest in this information, and it is well-established that government employees and third-parties whose names appear in government records have at least a modest privacy interest in non-disclosure. *See Shapiro v. DOJ,* 153 F. Supp. 3d 253, 285 (D.D.C. 2016); *see also Prison Legal News*, 787 F.3d at 1147 n.6 ("the redactions at issue here – covering individuals' names and other personal identifying information — fall within the scope of exemption 6, which extends to 'bits of personal information, such as names and addresses'"). And, because "something, even a modest privacy interest, outweighs nothing every time," *Nat'l Ass'n of Retired Fed. Employees v. Horner,* 879 F.2d 873, 879 (D.C. Cir. 1989), the Criminal Division properly redacted those names under Exemption 6.

CONCLUSION

For the reasons set forth above, and those in Defendant's motion, Defendant respectfully requests that this Court grant summary judgment in favor of Defendant as to all claims in this case and deny Plaintiff's cross-motion.

Respectfully submitted,

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