IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DYLAN TOKAR,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 16-cv-2410 (RC)

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

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Pursuant to Fed. R. Civ. P. 56 and Local Rules 7(d) and 56.1, Plaintiff Dylan Tokar ("Tokar"), by and through his undersigned counsel, hereby replies to the consolidated Opposition and Reply of Defendant Department of Justice ("DOJ") in response to Plaintiff's Cross-Motion for Summary Judgment and in support of DOJ's Motion for Summary Judgment ("Def. Mot."). For the reasons set forth herein, this Court should enter summary judgment in Plaintiff's favor.

INTRODUCTION

Plaintiff submitted two Freedom of Information Act ("FOIA") requests to DOJ seeking records related to the agency's selection process for corporate compliance monitors—individuals retained by corporations that have entered into Deferred Prosecution Agreements ("DPAs") to avoid prosecution for purported violations of the Foreign Corrupt Practices Act ("FCPA") to ensure the corporations are in compliance with the DPA and federal law. The selection process for these monitors has been subject to controversy; in 2008, DOJ launched an internal inquiry into its procedures after then-U.S. Attorney Chris Christie approved a contract reportedly worth between $28 million and $52 million for his former boss (and former U.S. Attorney General) John Ashcroft to serve as a compliance monitor. Responding to the public outcry, DOJ established formal principles in a document known as the Morford Memorandum that requires, among other things, that the selection of corporate compliance monitors avoid both potential and actual conflicts of interest. Though the selection of some corporate compliance monitors are subject to court review, many are not; as a result, little is known about the DOJ's screening process for candidates proposed for monitorships by corporations and whether it is effective in screening for conflicts of interest between the monitors, the DOJ officials who select them, and the companies they oversee.

Plaintiff submitted his FOIA requests to better understand how DOJ has implemented the guidance promulgated by the Morford Memorandum. In response, DOJ has flouted both the letter and purpose of FOIA at every stage of the process by ignoring statutory deadlines and attempting to use Plaintiff's willingness to work cooperatively with DOJ against him. In particular, counsel for DOJ urged Plaintiff to narrow his Requests so that he would receive responsive material, then stonewalled him until he was forced to file this lawsuit. Indeed, Defendant only provided material in response to Plaintiff's requests *after* he filed this action—more than 21 months since the First FOIA request was submitted. And, when DOJ finally *did* respond to Plaintiff's requests, it repeatedly provided inaccurate information and improperly relied on FOIA Exemptions 4, 6, and 7(C) to withhold responsive, non-exempt information. For these reasons, Plaintiff has shown that this Court should require DOJ to provide underlying records responsive to his First FOIA Request.

Further, Defendant bears the burden of establishing that its claimed exemptions are proper. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998) ("an agency bears the burden to justify exemptions under FOIA"). If, as here, the record fails to establish that an agency's withholdings are justified, "summary judgment for the agency is not proper." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). Defendant has failed to carry this burden.

The crux of Defendant's argument for withholding information responsive to the FOIA requests is that if the records Plaintiff seeks were made public, the individuals involved—*i.e.*, candidates for corporate compliance monitorships—would purportedly be subject to harm and embarrassment. This argument is not credible, is not supported by the case law relied upon by Defendant, and, in any event, cannot outweigh the public's significant interest in understanding DOJ's role in the selection process for compliance monitors for corporations that DOJ asserts

have violated the FCPA. "Providing information material for monitoring the Government's activities is a core purpose of FOIA." *Southern Utah Wilderness All., Inc. v. Hodel*, 680 F. Supp. 37 (D.D.C. 1988) (citation and internal quotation marks omitted). Yet Defendant, turning a blind eye to the undisputed controversy surrounding the corporate compliance monitor selection process, inexplicably argues that there is no public interest in understanding how DOJ has implemented the guidance laid out in the Morford Memorandum. *See* Defendant's Combined Reply in Support of Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Cross Motion (hereinafter "Def. Opp./Reply") at 9–11. This argument, too, is not credible. The DOJ's monitor selection process continues to be subject of questions regarding the qualifications of the individuals selected, even after the issuing of the Morford Memorandum. Many of the corporate compliance monitor candidates selected by the DOJ are former federal prosecutors, and some had a role in picking monitors while serving at the department. Plaintiff argues that without disclosure of the names of candidates for these lucrative positions, the public cannot be assured that the DOJ is adequately screening for conflicts of interest or selecting the most qualified candidates. The corporate compliance monitor candidates are distinguished attorneys whose credentials and qualifications are well known, particularly to a sophisticated trade publication like *Just Anti-Corruption* that specializes in reporting on FCPA compliance. As such, the names and professional services firms of these individuals will assist Mr. Tokar in his reporting on the selection process for these monitors.

For the reasons set forth in Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment, ECF No. 10-1 ("Plaintiff's MSJ" or "Pls. MSJ"), and herein, Plaintiff is entitled to agency

records responsive to his First FOIA Request, and Defendant's withholding of responsive material pursuant to Exemptions 6 and/or 7(C) is unjustified.

ARGUMENT

I. Plaintiff is entitled to agency records responsive to his First FOIA Request.

Plaintiff's First FOIA Request was submitted in April 2015 and sought the following records related to the investigations of 15 companies that had settled FCPA charges with DOJ: (1) all documents submitted by counsel for the 15 companies in the monitor selection process, including the three qualified candidates; (2) all monitor selection memoranda in the selection of candidates by DOJ Standing Committee on the Selection of Monitors; and (3) records of the Standing Committee including its membership, attendance, and voting records. Declaration of Dylan Tokar ("Tokar Decl.") ¶ 9, Ex. D. As detailed in Plaintiff's Motion for Summary Judgment, Plaintiff was told by counsel for DOJ—in order to "manag[e] [Plaintiff's] expectations"—that DOJ would seek to assert various FOIA exemptions to Plaintiff's First Request and that the collection and processing of documents responsive to that request could take a considerable amount of time. Tokar Decl. ¶ 12. Based on his discussions with DOJ counsel, Plaintiff was under the impression that he would not get material responsive to his First FOIA Request without narrowing its scope. Accordingly, Plaintiff agreed to narrow his FOIA Request to seek records reflecting "[t]he names and titles of members of the Criminal Division's Standing Committee on the Selection of Monitors for the period Jan. 1, 2009 up through the present date," along with the Standing Committee's "dates of service" and "the names of any temporary designees appointed to the committee and their dates of service." Tokar Decl. ¶ 15, Ex. F. Soon thereafter, Defendant stopped responding to Plaintiff's inquiries about the status of

his Request, and failed to produce any material responsive to Plaintiff's Request, as narrowed, until after he filed the present lawsuit. Tokar Decl. ¶¶ 30–33.

Astonishingly, the Government alleged in its Motion for Summary Judgment that Plaintiff's "request, as narrowed … was not even a proper FOIA Request." Def. Mot. at 3. The Government now appears to back away from this baseless assertion after Plaintiff noted in his Motion for Summary Judgment that DOJ took the normal steps in processing his narrowed request, including providing Plaintiff with a request number for processing. *See* First Declaration of Peter Sprung ("First Sprung Declaration") ¶ 8. Plaintiff conferred with DOJ in a good faith effort to streamline his FOIA Request and reduce the amount of work required of the agency to respond to it; individuals seeking records under FOIA should be encouraged to follow this practice. DOJ, however, took advantage of Plaintiff's willingness to respond to its purported concerns about the scope of his First FOIA Request by encouraging him to narrow his Request and then failing to provide *any* response to the Request over the course of 21 months.

It is well established that FOIA "obligates [agencies] to provide access to [records] which it has in fact created and retained." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980). Defendant does not dispute that records responsive to Plaintiff's First FOIA Request exist and are retained by the agency. Further, federal agencies have a duty to construe FOIA records requests liberally. *See Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (concluding that the Customs Service should have liberally construed a request for records "pertaining to" Ross Perot as seeking even those records that were not specifically indexed under Perot's name). And DOJ itself has long issued guidance to federal agencies on the duty of liberal construction. *See* Dep't of Justice, Office of Info. Privacy, FOIA Update, Vol. XVI, No. 3 (1995) ("[A]gencies should interpret FOIA requests 'liberally'

when determining which records are responsive to them." (quoting *Nation Magazine*, 71 F.3d at 890)), *available at* https://www.justice.gov/oip/blog/foia-update-oip-guidancedetermining-scope-foia-request; *see also* Dep't of Justice, Office of Info. Privacy, Department of Justice Guide to the Freedom of Information Act: Procedural Requirements 27 (last updated July 11, 2016) ("[A]n agency 'must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester.'" (quoting *Hemenway v. Hughes*, 601 F. Supp. 1002 (D.D.C. 1985)), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf. Given that FOIA requires agencies to release agency records upon request, and that Plaintiff submitted a FOIA request that sought information in records maintained by the agency, FOIA obligates DOJ to produce those records.

As stated in his Motion for Summary Judgment, Plaintiff would have been satisfied with an accurate, unredacted chart providing the specific information that is the subject of his First FOIA Request, as narrowed. But the chart DOJ finally provided to Plaintiff after he filed suit contained significant inaccuracies; Defendant has now twice revised this table to correct its own mistakes. Though Defendant cites *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986) for the notion that "the additional releases suggest 'a stronger, rather than a weaker, basis' for accepting the integrity of the search[,]" its reliance on that case is misplaced. Plaintiff does not challenge the integrity of DOJ's search for documents; Plaintiff is unable to mount such a challenge given that Defendant never produced documents in response to Plaintiff's First FOIA Request, as narrowed. Instead, DOJ repeatedly gave *inaccurate information* to Plaintiff in response to his First FOIA Request. Pls. SMF ¶¶ 46, 49; Tokar Decl. ¶ 40. Where, as here, DOJ has repeatedly failed to produce accurate information (information that, had it been accurate and

complete, would have alleviated Plaintiff's need to pursue this litigation), DOJ must release the underlying records responsive to Plaintiff's First FOIA Request, as narrowed.

II. Defendant has failed to justify its withholding of responsive information; Plaintiff is entitled to summary judgment as to those withholdings.

Defendant's arguments fail to justify their withholding, pursuant to Exemptions 6 and 7(C), the names of all corporate compliance monitor candidates who were not selected for a particular monitorship, as well as some of the professional services firms those candidates are associated with, in response to Plaintiff's First FOIA Request. Defendant's arguments also fall far short of justifying their redactions, pursuant to Exemption 6, of the names of corporate compliance monitor candidates, the names of private attorneys who responded to the submitter notices on behalf of their clients, and the name of two DOJ employees named in the responses, in response to Plaintiff's Second FOIA Request.[1] Defendant has wholly failed to carry its burden of demonstrating that these withholdings are permitted under FOIA.

A. Defendant has not shown that corporate compliance monitor candidates have substantial privacy interests in the information Plaintiff seeks.

Asserting Exemptions 6 and 7(C), Defendant withheld the names and professional services firms for all corporate compliance monitor candidates from the chart it produced in response to Plaintiff's First FOIA Request; asserting only Exemption 6, Defendant withheld the names and professional services firms for corporate compliance monitor candidates from the materials produced in response to Plaintiff's Second FOIA Request. Defendant claims it is withholding this information because its release would purportedly compromise the candidates' personal privacy. Def's Reply/Opp at 7. However, Exemption 6 "does not categorically exempt

[1] Acknowledging the flaw in their blanket strategy of withholding *all* names on the basis of spurious "privacy" concerns, Defendant has released the names of the two DOJ employees who served on the DOJ's Standing Committee on the Selection of Monitors.

individuals' identities," *Judicial Watch, Inc. v. Food Drug Admin.*, 449 F.3d 141 (D.C. Cir. 2006), and "[a] name and work telephone number is not personal or intimate information, such as a home address or a social security number, that normally would be considered protected information under FOIA Exemption 6." *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005). Further, the privacy interests contemplated by Exemption 6 are aimed at protecting only "intimate details of personal and family life, not business judgments and relationships." *Sims v. Cent. Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1980) (holding that Exemption 6 does not "shield matters of such clear public concern as the names of those entering into contracts with the federal government.").

The Exemption 7(C) analysis is similar. *See Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1125 (D.C. Cir. 2004) (noting that the privacy inquiries under Exemptions 6 and 7(C) are "essentially the same"). Though the D.C. Circuit in *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991), adopted a rule which permits an agency to withhold information identifying private citizens mentioned in law enforcement records unless disclosure is "necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity," *id.*, subsequent clarification from the D.C. Circuit makes clear that the *SafeCard* rule does not apply here. *See Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 81 F.3d 885 (D.C. Cir. 1995). In *Nation Magazine,* the D.C. Circuit found the district court's broad reading of *SafeCard* to be "sufficiently problematic" enough to "clarify that precedent." 81 F.3d at 869. The Court noted that "to the extent any information contained in 7(C) investigatory files would reveal the identities of individuals who are *subjects, witnesses, or informants* in law enforcement investigations, those portions of responsive records are categorically exempt from disclosure under *SafeCard*." *Id.* (emphasis added). However, the Court was clear that *SafeCard* cannot be

read to "permi[t] an agency to exempt from disclosure *all* of the material in an investigatory record solely on the grounds that the record includes some information which identifies a private citizen or provides that person's name and address" because "such a blanket exemption would reach far more broadly than is necessary[.]" *Id.* (emphasis in original). In short, an agency cannot reflexively employ Exemption 7(C) "in all situations where a third-party FOIA requester seeks information from [] law enforcement files naming another individual [] if the requester credibly demonstrates that the records sought may shed light on agency conduct in which the requester is interested." *Id.* at 887–88. Instead, the agency must, pursuant to Exemption 7(C), "perform an ad hoc balancing of the privacy and public interests implicated by disclosure of any responsive material." *Id.* at 888. The corporate compliance monitor candidates at issue here are neither subjects, witnesses, nor informants in law enforcement investigations; the release of their names will not therefore "carr[y] a stigmatizing connotation" with criminal acts, a noted purpose of the exemption. *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1174 (D.C. Cir. 2011) (citation omitted). The underlying reasoning for the rule in *SafeCard* simply does not apply to the facts in this case, and *Nation Magazine* makes clear that the *SafeCard* rule should not be read so broadly as to thwart FOIA's central purpose, which is "to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

In its Opposition/Reply, Defendant continues to base the entirety of its argument for non-disclosure on the notion that corporate compliance monitor candidates are "applicants for positions with the federal government" that possess a privacy interest in their candidacy, Def. Opp./Reply at 8. This assertion is baseless. Corporate compliance monitor candidates are experienced professionals employed by professional services firms—like law firms—who pitch their services to corporations entering into DPAs with the Government, and are ultimately

selected by these corporations subject to DOJ approval. *See* Steven Davidoff Solomon, *In Corporate Monitor, a Well-Paying Job but Unknown Results*, N.Y. Times, Apr. 15, 2014, *available at* https://perma.cc/H8YF-CAYK (discussing prominent former prosecutors who serve as corporate compliance monitors). After their selection, they continue their employment with their professional services firms, where they handle multiple matters for a variety of clients, and are paid for their monitor services by the corporation. Defendant has not, and cannot, show that corporate compliance monitor candidates have any privacy interest, whatsoever, in the fact of their candidacy for such an appointment, nor that they had any expectation of privacy in the fact of their candidacy; as such, case law in this Circuit points distinctly toward disclosure. *See, e.g., Physicians Comm. for Responsible Medicine v. Glickman*, 117 F. Supp. 2d 1 (D.D.C. 2000); *Lardner v. U.S. Dep't of Justice*, 2005 WL 758267 (D.D.C. Mar. 31, 2005).

The case Defendant continues to primarily rely upon*, Neary v. FDIC*, 104 F. Supp. 3d 52 (D.D.C. 2015), remains inapposite; *Neary* concerned a FOIA request for personnel files containing federal job applicants' home addresses, among other personal information, that extended well beyond their names. Here, Plaintiff seeks the names of and professional services firms associated with the corporate compliance monitor candidates for the selected fifteen corporations that entered into DPAs with the DOJ for purported FCPA violations, not private information such as their home address. Nor is their reliance on *Pinson v. U.S. Dep't of Justice*, 202 F. Supp. 3d 86 (D.D.C. 2016) any more convincing. In *Pinson*, the Court permitted DOJ to withhold the name of a nominee for director of the Bureau of Prisons pursuant to Exemption 6, noting that the individual had a privacy interest that was not outweighed by the public interest in disclosure of his name. *Id.* at 114. However, in determining that the nominee's privacy interest outweighed the public interest in release, the Court found persuasive the fact that there was no

indication the candidate "affirmatively sought public office or bid to run BOP." *Id.* Here, corporate compliance monitor candidates have affirmatively sought these positions, pitching their services to corporations entering into DPAs with the Government. Further, as discussed below, *supra* Section II.C., there is a significant public interest in knowing the candidates for corporate compliance monitorships.

The Government's passing reference to *Voinche v. FBI*, 940 F. Supp. 323 (D.D.C. 1996) fares no better; there, the court did not analyze the privacy interests of candidates for vacancies on the Supreme Court, instead determining that these names could be withheld under Exemption 6 because "[t]here is no reason to believe that the public will obtain a better understanding of the workings of various agencies by learning the identities of … candidates for vacancies on the U.S. Supreme Court." *Id.* at 330. As discussed in more detail below, *supra* Section II.C., the names of corporate compliance monitor candidates will assist the public in understanding the DOJ's selection and approval process for corporate compliance monitorships, a matter of significant public interest; *Voinche*, therefore, is unpersuasive.

The Government's attempt to lump corporate compliance monitor candidates—about half of whom are distinguished former prosecutors[2]—into a category with all "applicants for federal government" employment is both perplexing and unpersuasive. The Government states, without support, that "[t]he privacy exemptions of FOIA would protect the unsuccessful applicant's names" in scenarios where applicants "have just completed school," are "in between jobs," or "may hold positions in which their employers would encourage the opportunity to gain

[2] *See* Alison Frankel, *DOJ Should End Secret Selection Process for Corporate Watchdogs*, Reuters, July 14, 2014, *available at* https://perma.cc/T3N2-QRPR (noting that "half of all corporate monitors appointed in Justice Department deferred prosecution and non-prosecution agreements with corporate defendants since 2001 are former prosecutors."

government experience." Def. Opp./Reply at 8. Plaintiff is unaware of any court precedent that provides that all candidates for any form of federal employment are categorically exempt from disclosure under FOIA, and Defendant fails to cite any. And even if such a rule existed, it would not apply here; as Plaintiff has demonstrated (and Defendant has acknowledged, *see* Def. Opp./Reply at 7), corporate compliance monitor candidates are *not* applicants for federal employment. Though Defendant speculates that corporate compliance monitor candidates will somehow have their professional reputations harmed by disclosure, courts have noted that "protection of professional reputation … is not at [Exemption 6's] core." *Kurzon v. Dep't of Health & Human Servs.*, 649 F.2d 65, 69 (1st Cir. 1981). The Government fails to explain to the Court why corporate compliance monitor candidates have any privacy interest in the fact of their candidacy beyond such speculative, abstract claims of possible embarrassment.

Indeed, while not a perfect fit, this case is much more akin to *Lardner v. U.S. Dep't of Justice*, 2205 WL 758267 (D.D.C. Mar. 31, 2005), in which a FOIA requester sought the names of unsuccessful candidates for presidential pardons. Noting that pardon applicants had not been provided a "firm promise of anonymity," the court noted that, while application materials that contained highly personal information about an applicant may implicate privacy concerns, "[i]t is far more difficult to understand … how the mere fact that an individual has sought a pardon reveals 'sensitive personal information' about the individual amounting to a 'clearly unwarranted invasion of personal privacy.'" *Id.* at *16 (citing *Judicial Watch*, 365 F.2d at 1126; *Reed v. National Labor Relations Board*, 927 F.2d 1250, 1251 (D.C. Cir. 1991)). As the court noted in *Lardner*, "[t]he applicant is petitioning the government for the performance of a public act; this is not a situation where [the candidate] is a third-party who finds himself in government records through no action of his own." *Id.* at *17; *see also Alliance for the Wild Rockies v. Dep't of the*

Interior, 53 F. Supp. 2d 32, 37 (D.D.C. 1999) (requiring disclosure of identity of "individuals who respond[ed] to a [Department of the Interior] solicitation for comments on an agency proposal" in part because the comments "were submitted voluntarily" and thus the individuals did not have an expectation of privacy). Here, corporate compliance monitor candidates are pitching their services to corporations, who are in turn asking DOJ to review the merits of their candidacy and approve the corporation's selection; "this is not a situation in which [the candidates are] third-part[ies] who find [themselves] in government records through no action of [their] own." *Lardner*, 2015 WL 758267 at *17.

In short, both the Government and this Court understand what Plaintiff's FOIA Requests seek, and it is *not* private information about candidates for federal employment. Candidates for corporate compliance monitorships are distinguished attorneys and professionals who have built their careers on pitching their services to corporations in high-profile government investigations and handle a number of matters at once for a variety of clients; they have not "just completed school," nor are they "in between jobs." Public knowledge of their candidacy for lucrative monitorship positions with corporations that have settled FCPA claims with the Government is not the kind of "sensitive personal information" about an individual that could give rise to a "clearly unwarranted invasion of personal privacy"—the information that Exemptions 6 and 7(C) are designed to protect. *Judicial Watch*, 365 F.3d at 1126. A specific showing that such privacy interests are jeopardized by disclosure is required, and DOJ has not met that burden here. *See COMPTEL v. FCC*, 910 F. Supp. 2d 100, 124 (D.D.C. 2012) (courts will uphold redaction of personal identifying information under Exemption 5, but "the agency must at least provide the Court with some basis for such an interest"); *United Am. Fin., Inc. v. Potter*, 667 F. Supp. 2d 49, 60 (D.D.C. 2009) (To invoke Exemption 7(C), "agency must at least explain the ground for

concluding that there is some factual basis for concerns about 'harassment, intimidation, or physical harm.'").

B. Defendant has not shown that counsel for corporations who drafted responses to submitter notices and DOJ employees named in the responses have substantial privacy interests in the information Plaintiff seeks.

As detailed in Plaintiff's Motion for Summary Judgment, Plaintiff's Second FOIA Request sought the written responses that the Criminal Division received to the submitter notices it sent out to certain specified companies following Plaintiff's First FOIA Request. Tokar Decl. ¶ 24, Ex. K. Asserting Exemption 6 "privacy interests," Defendant categorically withheld the names of the attorneys who drafted, on behalf of their clients, responses to the submitter notices, the names of two DOJ employees named in two of the responses, and the names of corporate compliance monitor candidates named in two of the responses. Def. Opp./Reply at 11–12; *see also* First Sprung Declaration, Ex. A (Defendant's *Vaughn* Index). As discussed above, *supra* Section II.A, and below, *infra* Section II.C, the corporate compliance monitor candidates named in the responses do not have a substantial privacy interest in their names sufficient to overcome the significant public interest in understanding the process by which DOJ selects corporate compliance monitor candidates.[3] And, as detailed below, the Government has failed to show that the attorneys who corresponded with the government on behalf of their clients, and the DOJ employees named in the submitter notice responses, have anything more than a *de minimis* privacy interest that is insufficient to justify withholding their names pursuant to Exemption 6.

As an initial matter, FOIA "does not categorically exempt individuals' identities … because the 'privacy interest at stake may vary depending on the context in which it is asserted.'"

[3] Further, Defendant does not assert that Exemption 7(C) applies to the names of corporate compliance monitor candidates named in the corporations' responses to the submitter notices. *See* Def. Opp./Reply at 6–7, n. 2.

People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 304 (D.D.C. 2007) (quoting *Judicial Watch*, 449 F.3d at 153). The Supreme Court has emphasized that the question of whether disclosure of one's identity "is a 'significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being [identified], and the consequences likely to ensue.'" *U.S. Dep't of State v. Ray*, 502 U.S. 164, 176-77 (1991) (quoting *Nat'l Ass'n of Retired Fed.Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)).

Here, the Government makes no attempt to put these individuals' purported privacy interests into context. Indeed, the Government fails to identify *any* specific privacy interest held by the attorneys who drafted the responses to the submitter notices or the DOJ employees, asserting without support that "government employees and third-parties whose names appear in government records have at least a modest privacy interest in nondisclosure." Def. Opp./Reply at 12. Defendant's *Vaughn* Index provides no more assistance; the Government sets forth only boilerplate language indicating, without support, that the attorneys and DOJ employees "have protected interests in avoiding the release of their private personal information." First Sprung Decl. Ex. A at 1. Absent a "particularized assertion of the affected individuals' expectations of privacy with respect to the letters written and information provided to the government," which DOJ has failed to provide, the court cannot "find more than a *de minimis* privacy interest[.]" *Landmark Legal Foundation v. I.R.S.*, 87 F. Supp. 2d 21, 27 (D.D.C. 2000) (holding that Exemption 6 does not extend to the names of people who write to the IRS to express opinions or provide information); *see also Alliance for the Wild Rockies*, 53 F. Supp. 2d at 37 (requiring disclosure of identity of "individuals who respond[ed] to a DOI solicitation for comments on an agency proposal," in part because the comments "were submitted voluntarily" and therefore the individuals did not have an expectation of privacy); *Potter*, 667 F. Supp. 2d at 60, 63–64 (D.D.C.

2009) (ordering release of the names of investigators and postal inspectors involved in a U.S. Postal Service investigation, as the agency failed to provide factual evidence to support its claim that the release of the names could lead to "harassment, intimidation, or physical harm").

Though the Government criticizes Plaintiff for "fail[ing] to identify any public interest in this information," Def. Opp/Reply at 12, this misstates the standard for Exemption 6. Where, as here, there is no more than a *de minimis* privacy interest implicated by disclosure, the public interest balance need not be reached. *See Horner*, 879 F.2d at 874 (noting that "[i]f no significant privacy interest is implicated (and if no other Exemption applies), FOIA demands disclosure" but that "*if*, on the other hand, a substantial privacy interest is at stake, *then* we must weigh that privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy.") (emphasis added); *see also Sims*, 642 F.2d at 573 (same).

The cases cited by Defendant in support of its argument that 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," Def. Opp./Reply at 12, only serve to highlight the threadbare nature of their arguments. For example, plaintiffs in *Shapiro v. DOJ*, 153 F. Supp. 3d 253, 285 (D.D.C. 2016) *did not challenge* the agency's argument that information contained in FBI files about private parties should be excluded pursuant to Exemptions 6 and 7(C); instead, plaintiffs sought release of the records pursuant to a doctrine that is not at issue in this case. Defendant's reliance on a footnote in *Prison Legal News v. Samuels*, 787 F. 3d 1142 (D.C. Cir. 2015) fares no better. Plaintiff does not dispute that courts have upheld the redaction of personal identifying information under Exemption 6, as noted in the footnote the Government relies upon; however, "the agency must at least provide the Court with such basis for an

interest." *COMPTEL*, 910 F. Supp. 2d at 124. Indeed, the holding *Prison Legal News* supports Plaintiff's arguments; there, the Court remanded the case to the district court because the agency had failed to sufficiently distinguish and assert the privacy interests of various categories of individuals whose names were withheld pursuant to Exemption 6. *Prison Legal News*, 787 F.3d. at 1149–51 (remanding to district court where the agency "lump[ed] the privacy interests" of different categories of individuals "based on the type of document in which the individual's information appears" and provide "only cursory statements … to justify the redactions."); *see also 100Reporters LLC v. U.S. Dep't of Justice*, 2017 WL 1229709 (D.D.C. Mar. 31, 2017) (holding that an agency's "failure to establish the different privacy interests at stake makes it impossible for the Court to balance the private interests with the public's interest in knowing 'what their government is up to'") (citations omitted). Here, DOJ has lumped the privacy interests of attorneys who drafted responses to submitter notices and DOJ employees together, providing only cursory statements to justify withholding their names. *See* First Sprung Declaration, Ex. A.

Finally, Defendant quotes out of context *National Association of Retired Fed. Employees v. Horner* in support of its contention that "something, even a modest privacy interest, outweighs nothing every time." 879 F.2d at 879. In *Horner*, the Court determined that individuals had a "significant," rather than a *de minimus*, interest in their names and home address being released to a nonprofit organization where "the information requested [] would interfere with the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes"; the court further held that the public interest arguments in support of disclosure were not enough to overcome the substantial privacy interests the individuals possessed. *Id.* at 876–878. No such privacy interests exist here; the Government has failed to assert any privacy

interest in (1) an attorney's association with a letter drafted on behalf of his or her client in response to a submitter notice; or (2) an employee named and associated with their role at DOJ. Moreover, as discussed below, there is a substantial public interest in release of the information sought by Plaintiff here.

The Government has failed to make any showing whatsoever to support its claim that an individual who corresponded with the government on behalf of their client in response to a submitter notice, or a DOJ employee named in such a response, had any expectation of privacy in disclosure of their name or that any such individual would be subject to harassment or abuse if his or her name were disclosed. Nor could they—the submitter notices sent to the corporations specifically notes that "the information provided by a submitter under 28 C.F.R. § 16.8(f) may itself be subject to disclosure under the FOIA." Tokar Decl. Ex. H, at 2. And, as detailed in Plaintiff's Motion for Summary Judgment, there is a "presumption of favor of disclosure" in the context of Exemption 6 that "is as strong as can be found anywhere in the Act." *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (citations and internal quotation marks omitted). FOIA demands disclosure where, as here, the agency fails to persuasively explain "how any of this relatively generic information about [] similarly situated businesspeople could lead to clearly unwarranted invasions of their personal privacy." *Wash. Post. Co. v. U.S. Dep't of Agriculture*, 943 F. Supp. 31, 34 (D.D.C. 1996).

C. Defendant has failed to sufficiently address the significant public interest in disclosure, which outweighs any individual privacy concerns.

In the context of Exemption 7(C), the D.C. Circuit has recognized that a "relevant public interest in the FOIA balancing analysis [is] the extent to which the disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Citizens for Responsibility & Ethics in*

Washington v. DOJ, 746 F.3d 1082, 1093 (D.C. Cir. 2014) (brackets in original). "Indeed, we have repeatedly recognized a public interest in the manner in which the DOJ carries out substantive law enforcement policy (whether or not that interest outweighs any privacy interest at stake in a given case)." *Id.* (collecting cases). The Government argues that Plaintiff "fails to identify any public interest sufficient to outweigh this privacy interest" in obtaining the names and professional services firms of individuals nominated for corporate compliance monitorships. Def. Opp./Reply at 9. In particular, the Government asserts that the "limited information [Plaintiff] seeks" would not "shed light on the selection process itself." Def. Opp./Reply at 10. This is incorrect for a number of reasons.

As an initial matter, it is striking that Defendant would take this position given that Plaintiff's First FOIA Request initially sought a broader swath of documents regarding the DOJ's selection of corporate monitor candidates, which would undoubtedly contain even more information of significant public interest; it was only after excessive delay and pressure from counsel for the Government that Plaintiff offered to narrow his Request in the hopes of receiving some of what he had requested, and was entitled to, under FOIA. Setting this aside, however, Defendant's speculation is without merit; the names and professional services firms of corporate compliance monitor candidates would certainly assist Plaintiff in his reporting on how DOJ has implemented the directives of the Morford Memorandum. *Just Anti-Corruption* specializes in covering FCPA enforcement, and corporate compliance monitors are often former prosecutors whose credentials and qualifications are well-known. Knowledge of the candidates' names is enough to permit *Just Anti-Corruption* to conduct an analysis of how DOJ has applied the guidance implemented by the Morford Memorandum in the selection of corporate compliance monitors.

Further, as detailed in Plaintiff's Complaint and reiterated in Plaintiff's Motion for Summary Judgment, these records would allow the public to gauge whether the principles and procedures established in the Morford Memorandum are being applied and whether they have effectively eliminated potential or actual conflicts of interests in regard to the deferred prosecutions of companies investigated for FCPA violations. Without disclosure of the names of candidates who are nominated, but not ultimately selected, for corporate monitorship positions, it is difficult (if not impossible) to know whether either the government or the corporate entity under investigation is taking advantage of the selection process in a manner that undermines the objectives of the DPA. Journalists and scholars have questioned the opaque process by which compliance monitors are selected, noting that "there are a range of concerns that flow from having highly paid monitors that do important work hired by prosecutors and not approved and supervised by judges." *Frankel*, *supra* p. 4, n. 2 (quoting law professor Brandon Garrett of the University of Virginia, who has analyzed corporate monitor assignments). Further, "[t]here is the transparency concern that their work is not public" and "[t]here is the cronyism concern that so many of them are former prosecutors." *Id.* "Monitoring corporate violators and making sure compliance is improved is so important that it shouldn't be done in the dark, even if the settlements themselves are negotiated behind closed doors." *Id.*

As detailed above and in Plaintiff's opening brief, the compliance monitor selection process has been subject to controversy, with members of Congress noting that the practice creates opportunities for abuse. *See, e.g., Deferred Prosecution: Should Corporate Settlement Agreements be Without Guidelines: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 312 (2008) (statement of Rep. William Pascrell) (urging that Congress should ensure the independence of corporate monitors by

"establish[ing] safeguards and eliminate[ing] the culture of favoritism and political interference that permeates these corporate monitor agreements"). Even after the guidance established by the Morford Memorandum was implemented, journalists at *Just Anti-Corruption* and other media outlets have extensively reported on the "revolving door" between the DOJ Criminal Division's Fraud Section and well-compensated private sector jobs that lead to lucrative compliance monitorships. *See* Supplemental Declaration of Dylan Tokar ("Supp. Tokar Decl.") Ex. P; *see also* Nathan Vardi, *The Bribery Racket*, Forbes, June 7, 2010, *available at* https://perma.cc/ZTM9-FL52 (discussing examples of former Justice Department officials who began FCPA practices at large law firms, noting that it is "routine for lawyers who leave the Justice Department to do white-collar defense work for corporations" and commenting that "there is nothing to stop prosecutors from ginning up cases that will feed the lawyers who used to have their jobs or from looking forward to a payday in the private sector that will be made possible by their busy successors at Justice"). Most recently, three veterans of the DOJ's criminal fraud section were appointed as monitors: Charles Duross,[4] former chief of the section's FCPA unit, was appointed as the corporate monitor for Brazilian conglomerate Odebrecht in its $4.5 billion settlement with the U.S., Brazil, and Switzerland; Billy Jacobson, former assistant chief of the section's FCPA unit, was appointed as one of two corporate monitors for Brazil petrochemical company Braskem SA in its $957 million settlement with DOJ; and Alex Rene, former prosecutor in the same division, was appointed as a corporate

[4] As discussed above, *infra* n. 1, Defendant has released the previously-redacted names of the two DOJ employees who served on the DOJ's Standing Committee on the Selection of Monitors. One of the two names is that of Charles Duross, then-Deputy Chief, Fraud Section; Mr. Duross was on the selection committee for the Alcatel-Lucent, S.A. monitorship in 2011.

monitor for Brazil aircraft manufacturer Embraer in its $205 million settlement with DOJ and SEC. *See* Suppl. Tokar Decl. Exs. Q, R.

A recent district court ruling, in particular, illustrates the ways in which the corporate monitor selection process is vulnerable to manipulation, and why the release of candidates' names is important in guarding against such manipulation. In *U.S. Commodity Futures Trading Comm'n v. Deutsche Bank AG*, Judge William H. Pauley III of the U.S. District Court for the Southern District of New York ordered the CFTC to submit the names of at least three candidates for the monitor position. *See* Order at 1-2, *U.S. Commodity Futures Trading Comm'n v. Deutsche Bank AG*, No. 16-6544 (S.D.N.Y. Sept. 22, 2016). After the CFTC filed the names with the Court, Judge Pauley issued a follow-up order concluding that "two candidates had been proposed by Deutsche Bank and were offered *merely to comply in form* with this Court's earlier order." Op. & Order Appointing Independent Monitor at 4 (emphasis added). The Court interviewed the remaining candidate but ultimately "conducted its own search" and picked an alternative for the monitor position. *Id.* During a conference before the court, Judge Pauley called the monitor candidates "underwhelming"; in particular, the Court noted that one of the two candidates selected by the corporation was a full-time law student, a revelation Judge Pauley deemed "stunning." *See* Suppl. Tokar Decl. Ex. S at 6, 7–8. Judge Pauley refused to permit the agency to submit the CVs of the candidates under seal, noting that he "[found] it a little strange that you would nominate to the court monitors, but you want their CVs under seal" and stating that "[t]here is apparently considerable interest in the case" and for that reason he would "not keep it in a black box." *Id.* at 19–20. With the names of corporate compliance monitor nominees, Mr. Tokar and *Just Anti-Corruption* will be able to analyze if other corporations are

engaging in this type of behavior; setting forth inadequate candidates to bolster the chances its preferred candidate, or the DOJ's preferred candidate, will be approved. [5]

Finally, as discussed above, *infra* Section II.A., the principles explained in *Lardner v. U.S. Dep't of Justice* are directly applicable here. In turning to the public interest in disclosure of applicants for presidential pardons, the court in *Lardner* found that "[a] comparison of successful and unsuccessful applicants would illuminate—indeed, a claim could be made that it is essential to an understanding of—the circumstances in which the executive chooses to grant or deny a pardon and the factors that bear on that decision." 2005 WL 758267 at *17. "The names of unsuccessful [] applicants are therefore far closer to information that 'sheds lights on an agency's performance of its statutory duties' than to 'information about private citizens that is accumulated in various governmental files but reveals little or nothing about an agency's own conduct.'" *Id.* at *18 (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). "This is a paradigmatic case for disclosure, in that the information would serve directly to open the Government's activities 'to the sharp eye of public scrutiny.'" *Id.* (quoting *Reporters Comm.*, 489 U.S. at 773). Given the minimal privacy interests at play here, the public interest in disclosure of these individuals' identifying information clearly tips the scale in favor of disclosure. *Nation Magazine*, 71 F.3d at 893–94.

[5] Judge Pauley is not the only federal judge to have expressed frustration with aspects of the corporate compliance monitor process. In a 2010 article, *Just Anti-Corruption* reported that Judge Ellen Segal Huvelle of the U.S. District Court for the District of Columbia said that [i]t's an outrage that people get $50 million to be a monitor," when chemicals firm Innospec pleaded guilty to FCPA violations in her Washington, D.C. courtroom, calling it a "boondoggle" and stating that she "want[s] to know how this is going to work" because she "[has] an obligation to the public to find out." *See* Suppl. Tokar Decl. Ex. T.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's motion for summary judgment, and enter summary judgment in favor of Plaintiff.

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Respectfully submitted,

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