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)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Dylan Tokar, brought this action against the United States Department of Justice ("DOJ") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, challenging the responses he received to two FOIA requests issued to DOJ's Criminal Division. As of the date of this filing, Defendant has satisfied all of its obligations with respect to Plaintiff's FOIA requests. As there are no material facts in dispute, Defendant respectfully moves this Court pursuant to Federal Rule of Civil Procedure 56 for summary judgment as to all claims asserted in this action. Defendant respectfully submits that the attached memorandum of points and authorities, supporting declaration and exhibits thereto establish that it is entitled to the relief it seeks.

Respectfully submitted,

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DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Civil Rule 7(h), Defendant respectfully submits this Statement of Material Facts Not in Genuine Dispute in support of Defendant's Motion for Summary Judgment.

FOIA REQUEST NUMBER ONE

1. By letter dated April 24, 2015, Plaintiff, a reporter with a trade publication named Just Anti-Corruption, submitted a FOIA request to the DOJ Criminal Division for records concerning "the review and selection of independent corporate monitors under Foreign Corrupt Practices Act (FCPA) settlement agreements between the Justice Department and certain corporate defendants" which were listed in the request. (Sprung Decl. ¶ 6 and Ex. 1 to Compl.) The corporations listed were Alcatel-Lucent, S.A., Alliance One International Inc., Alstom S.A., Avon Products, Inc., BAE Systems, Bilfinger SE, Biomet Inc., Daimler AG, Diebold, Inc., Innospec, Inc., JGC Corporation, Smith & Nephew, Inc., Technip S.A., Universal Corporation, and Weatherford International.

2. Specifically, Plaintiff's request sought the following:

a. All documents submitted by counsel for the companies at the outset of each monitor selection process, including the names of up to three qualified monitor candidates whom the companies are allowed to recommend. The information should identify which candidate, if any, the company specified as its first choice as monitor.

b. All Monitor Selection Memoranda, including any files, documents, and attachments therein, submitted for review to the Standing Committee on the Selection of Monitors, and information about which monitors were approved or disapproved and the reasons therefore, including the recommendations submitted by the committee, the Assistant Attorney General for the Criminal Division, and the Office of the Deputy Attorney General.

c. Records of the Standing Committee, including its membership, attendance records, appointments of temporary designees, voting records and recusals in connection with the consideration of monitor candidates for each of the [15] companies listed [herein].

(Sprung Decl. ¶ 6 and Ex. 1 to Compl.)

3. On August 11, 2015, Plaintiff narrowed his request in a manner that no longer sought the release of the actual documents identified in the original request, but instead sought only certain information with regard to the 15 FCPA matters identified in his original request. (Sprung Decl. ¶ 7 and Ex. 2 to Compl.)

4. The narrowed request reads in relevant part as follows: "As per our discussion, we'd like to narrow our request to the following for the corporate defendants previously specified in our FOIA request:

> 1) The names of the up to three monitor candidates and their associated law or consulting firms submitted to DOJ by the defendant corporations under the terms of their negotiated resolutions."
>
> 2) The names and titles of the Criminal Division Standing Committee on the Selection of Monitors for the period Jan. 1, 2009 to the present date. Along with the names of the members of the committee, please give their dates of service. We also request that you release the names of any temporary designees appointed to the committee and their dates of service."

(Sprung Decl. ¶ 8 and Ex. 2 to Compl.)

5. Mr. Tokar reiterated in an email dated February 24, 2016, that he had narrowed the request so that it is "merely asking for (1) [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. Ex. 6)

6. Because Plaintiff's narrowed request did not seek underlying documents but instead certain information, DOJ reasonably responded to the FOIA request by creating a table that contained the requested information. (Sprung Decl. ¶ 9)

7. DOJ released a table to Plaintiff by letter dated January 24, 2017, and provided a revised table on April 14, 2017, and a final version of the table on July 10, 2017. (Sprung Decl. ¶ 10)

8. The tables that were released to Plaintiff redacted, pursuant to Exemption (b)(6) and (b)(7)(C), the names of the nominees who were not selected as monitors, the names of the professional services firms to which the unselected nominees were associated to the extent the size of the firm was such that it could reveal the identity of the unselected nominee, and the name of monitor selection committee members who were not part of senior DOJ management. (Sprung Decl. ¶¶ 12-17)

FOIA REQUEST NUMBER TWO

9. On January 13, 2016, pursuant to its FOIA regulation, 28 C.F.R. 16.7 (2016), DOJ notified the companies that had nominated candidates of Plaintiff's original request dated April 24, 2015, and as narrowed on August 11, 2015, and of their right to assert their position as to the release of the requested information. (Sprung Decl. ¶ 18)

10. By letter dated April 12, 2016 to the Criminal Division, Plaintiff submitted a second FOIA request for copies of "the statements that companies provided" in response to the January 13, 2016 submitter notices. (Sprung Decl. ¶ 19 and Ex. 7 to Compl.)

11. Over the period April 18, 2017 through April 20, 2017, pursuant to its internal FOIA regulation, DOJ notified the corporations that had provided responses to the submitter notices that DOJ planned to release to Plaintiff their respective response, with certain information redacted in accordance with applicable FOIA exemptions. (Sprung Decl. ¶ 21)

12. Over the period April 27, 2017 through May 5, 2017, five of the corporations objected to the release of all or certain parts of the redacted letters. These corporations invoked certain FOIA exemptions to support their objections. (Sprung Decl. ¶ 22)

13. On May 10, 2017, DOJ notified the corporations that had objected to the planned release of their submitter responses of DOJ's decision on their objections, upholding certain of

the objections and rejecting others. The corporations were informed that the redacted letters would be released within seven calendar days. (Sprung Decl. ¶ 23)

14. Thus, by letter dated May 22, 2017 to Plaintiff, the Criminal Division advised that, after reviewing responsive records, it was releasing 56 pages of documents in part, withholding certain information under FOIA Exemptions 4, 6 and 7(C). (Sprung Decl. ¶ 23) The Criminal Division subsequently provided a slightly less redacted version of that release and also clarified that it was not relying on Exemption 7(C) with respect to that release. (*Id.*)

15. By email dated July 12, 2017, Plaintiff's counsel advised that Plaintiff did not intend to challenge the information withheld under Exemption 4. (Sprung Decl. ¶ 29)

16. All reasonably segregable, non-exempt responsive documents subject to FOIA have been produced to the Plaintiff. (Sprung Decl. ¶ 33)

Respectfully submitted,

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United States Attorney
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Chief, Civil Division

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MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Department of Justice submits this memorandum in support of its motion for summary judgment in this FOIA action.

FACTUAL BACKGROUND

The accompanying Statement of Material Facts addresses the processing of the two requests at issue and that statement is incorporated herein by reference.

LEGAL STANDARD

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 248. A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations

or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

The "vast majority" of FOIA cases are decided on motions for summary judgment. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) ("FOIA cases typically and appropriately are decided on motions for summary judgment."); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) ("*CREW*"). An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records and each responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *See Weisberg v. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See McGehee v. C.I.A.*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert denied*, 415 U.S. 977 (1974); *Media Research Ctr.*, 818 F. Supp. 2d at 137.

"[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *CREW*, 478 F. Supp. 2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Media Research Ctr.*, 818 F. Supp. 2d at 137 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

ARGUMENT

I. Summary Judgment Should Be Granted On The First Request

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

Plaintiff's original request 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." (Ex. 1 to Compl.) Plaintiff thereafter narrowed that request to remove all references to "documents", "memoranda" or "records." (Ex. 2 to Compl.)

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. Ex. 2 and 6) FOIA, however, does not require an agency to "provide a requestor with specific information or answer questions." *Powell v. IRS*, No. 16-1682, 2017 U.S. Dist. LEXIS 88484, at * 21-22 (D.D.C. June 9, 2017); *see also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980) ("The [FOIA] does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained").

Nevertheless, in its discretion, and in a good faith effort to respond to the Plaintiff, the DOJ Criminal Division determined that it would prepare a table to reflect the information requested in the narrowed FOIA request. (Sprung Decl. ¶ 9) Because the request, as narrowed, did not seek the production of documents and was not even a proper FOIA request, DOJ was not obligated to conduct a search for responsive documents in the ordinary sense. To the extent DOJ had any obligation to conduct a search on this request as narrowed, it was limited to identifying

documents likely to contain the requested information and then reviewing those documents to extract the requested information for inclusion on the table it was creating.[1] (Sprung Decl. ¶ 9) Because Defendant's search reasonably identified the documents necessary to identify the information that Plaintiff was requesting, Defendant satisfied any obligation to conduct a search with respect to the narrowed request. *Cf. Steinberg v. Dept. of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994) (an agency is not required to examine "virtually every document in its files" to locate responsive records).

B. DOJ Properly Made Redactions To The Table It Created Under Exemptions 6 and 7(C).

DOJ properly withheld from the table that it released information under Exemption (b)(6) and (b)(7)(C). Those FOIA exemptions both protect information that, if disclosed, would invade the privacy of third parties. Exemption 7(C), however, provides a lesser standard in that it requires simply a showing of an "unwarranted" invasion of personal privacy, as opposed to Exemption 6's required showing of a "clearly unwarranted" invasion of personal privacy. *Braga v. FBI,* 910 F. Supp. 2d 258, 267 (D.D.C. 2012). Accordingly, although case law interpreting Exemption (b)(6) remains relevant, the Court need only focus on the Exemption 7(C) standard because Exemption 7(C)'s requirement that records be compiled for law enforcement purposes is satisfied here. (Sprung Decl. ¶ 11)

Exemption 7(C) allows an agency to withhold "investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but

[1] The underlying documents themselves consisted of such things as recommendation memoranda that would be subject to withholding under, among other things, Exemption (b)(5) of FOIA. (Sprung Decl. ¶ 12 n.5) Because Plaintiff's narrowed request did not seek the production of these underlying documents, however, Defendant is not addressing exemptions that would be applicable to the underlying documents. Defendant, however, reserves the right to address the underlying documents and any applicable withholdings with respect to those documents were the Court to construe the narrowed request as seeking documents and not just the information identified in the narrowed request.

only to the extent that production of such records or information would . . . constitute an unwarranted invasion of personal privacy." *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 893 (D.C. Cir. 1995) (quoting 5 U.S.C. § 552(b)(7)(C)). The courts have construed this provision as permitting exemption if the privacy interest at stake outweighs the public's interest in disclosure. *Id.* The information contained in the table was derived from records compiled for a law enforcement purpose, specifically, documents generated in connection with DOJ'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. (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*).

Exemption 6 of the FOIA protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). "The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual." *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999) (*quoting Dept. of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982)). The Court has also emphasized that "both the common law and the literal understanding of privacy

encompass the individual's control of information concerning his or her person." *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 763 (1989).

In order to determine whether there would be an "unwarranted invasion of personal privacy," the Court must balance the interests of protecting "an individual's private affairs from unnecessary public scrutiny," and "the public's right to governmental information." *Lepelletier*, 164 F.3d at 46 (interior quotation marks omitted) (*citing United States Dept. of Defense v. FLRA*, 964 F.2d 26, 29 (D.C. Cir. 1992)). In determining how to balance the private and public interests involved, the Supreme Court has sharply limited the notion of "public interest" under the FOIA: "[T]he *only* relevant public interest in the FOIA balancing analysis [is] the extent to which 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.'" *Lepelletier*, 164 F.3d at 46 (emphasis added) (*quoting United States Dept. of Defense v. FLRA*, 510 U.S. 487, 497 (1994)). Information that does not directly reveal the operation or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Reporters Committee*, 489 U.S. at 775.

Exemption7(C) authorizes the government to withhold "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). In order to trigger the balancing of public interests against private interests, a FOIA requester must (1) "show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and (2) "show the information is likely to advance that interest." *Boyd v. Criminal Division of U.S. Dept. of Justice,* 475 F.3d 381, 366 (D.C. Cir. 2007) (*citing Nat'l Archives &*

Records Admin. v. Favish, 541 U.S. 157, 172 (2004)). If the public interest is government wrongdoing, then the requester must "produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Favish,* 541 U.S. at 174. To determine whether disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy" for purposes of Exemption 7(C), the Court "must 'balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information.'" *Roth*, 642 F.3d at 1174.

DOJ redacted from the table under Exemption 6 and 7(C) the names of nominees who were not selected for the monitor position. (Sprung Decl. ¶ 12) Courts recognize the potential harm or embarrassment in disclosing the names of unsuccessful applicants for federal employment. *See, e.g., Neary v. FDIC*, 104 F. Supp. 3d 52, 57-58 (D.D.C. 2015). Thus, DOJ properly recognized a strong privacy interest against the disclosure of that information. In contrast, DOJ could not identify a public interest in the identity of unsuccessful applicants, and certainly not one that could overcome the privacy interest of third parties in their unsuccessful nomination, and thus properly determined that the privacy interest outweighed any public interest in disclosure. (Sprung Decl. ¶ 16)

DOJ 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. Courts recognize that the disclosure of employment information – such as the type of information that might typically appear on a resume or job application – is properly withheld under Exemption (b)(6) and (b)(7)(C) when its disclosure would risk identifying the applicant whose privacy rights are at implicated. *See, e.g., Carter v. United States Dep't of Commerce,* 830 F.2d 388, 391 (D.C. Cir. 1987) ("we give some credence

to the agency's familiarity with the patent bar in evaluating its determination that client and associate names would lead to identification of investigation targets"); *Core v. United States Postal Service*, 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 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.")

Here, DOJ identified on the table the firms of the unsuccessful nominees when the firms were of such a large size that the disclosure of that information was not likely to allow the public to identify the unsuccessful nominee. (Sprung Decl. ¶ 17) DOJ, however, withheld the name of the firm when its size was such that identifying the firm would likely identify the nominee. For instance, where firm names were withheld on the table, they were firms that had less than ten attorneys and in some cases were solo practitioners. (Sprung Decl. ¶ 17)

DOJ also withheld from the table the names of monitor selection committee members who were not part of senior DOJ management. (Sprung Decl. ¶ 13) DOJ properly determined that lower level DOJ managers had an expectation of privacy in their identity that was not overcome by any limited public interest that might exist in knowing the names of selection committee members. (Sprung Decl. ¶ 14) *See, e.g., Nat'l Ass'n of Retired Federal Employees v. Horner,* 879 F.2d 873, 879 (D.C. Cir. 1989) ("something, even a modest privacy interest, outweighs nothing every time"); *Common Cause v. NRC,* 674 F.2d 921, 938 (D.C. Cir. 1982) (exemption 6 "provides greater protection to private individuals, including applicants for federal

grants and officials of regulated private companies, and to low-level government employees, than to government officials with executive responsibilities").

"Even seemingly innocuous information can be enough to trigger the protections of Exemption 6." *Horowitz v. Peace Corps*, 428 F.3d 271, 278 (D.C. Cir. 2005). As the D.C. Circuit discussed in *Horowitz*, the Supreme Court has held that Exemption 6 "shielded the names and home addresses of agency employees from being released to unions that requested the lists under FOIA." *Id.* (discussing *United States Dep't of Defense v. Fed. Labor Rel. Auth.*, 510 U.S. 487, 502 (1994)). In a related context, moreover, the D.C. Circuit has recognized that current government employees have a privacy interest in their names and contact information that is sufficient to outweigh the potential of that information as a "lead[] for an investigative reporter seeking to ferret out what 'government is up to.'" *Fed. Labor Relations Auth. v. United States Dep't of Treasury*, 884 F.2d 1446, 1452 (D.C. Cir. 1989); *see also Painting and Drywall Work Preservation Fund v. HUD,* 936 F.2d 1300, 1303 (D.C. Cir. 1991) (same). Accordingly, the Criminal Division properly determined that lower level managers had a privacy interest in their names not being disclosed as members of the monitor selection committee that was sufficient to overcome any alleged limited public interest in that information. Accordingly, that information was properly withheld under Exemption 6 and, because the information appears in the context of law enforcement activity, it also is subject to the more extensive protection of Exemption 7(C). *Prison Legal News v. Samuels*, 787 F.3d 1142, 1146 n.5 (D.C. Cir. 2015).[2]

[2] Courts also recognize that private parties have a privacy interest when their names appear in government records. *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'").

II. Summary Judgment Should Be Granted On The Second FOIA Request

Plaintiff's second request sought the written responses that the Criminal Division received to the submitter notices that it had sent out to certain specified companies after receiving Plaintiff's first FOIA request that sought information about those companies. Those responses were sent to the DOJ Criminal Division and, consequently, the agency's search in response to the second FOIA request involved collecting the responsive documents that were maintained in a share drive at that office and in the files of the employees assigned to that matter. (Sprung Decl. ¶ 20). Thus, the second request sought a discrete set of documents from a readily identifiable source, thereby lending itself to a straightforward search for responsive records. Moreover, after going through a second submitter notification process (i.e., addressed to the second FOIA request), the Criminal Division released all responsive documents with only limited redactions under Exemption (b)(4) (consisting of a limited redaction on one document) and Exemption (b)(6).

Although Plaintiff has confirmed that it is not challenging the single Exemption (b)(4) withholding (Sprung Decl. ¶ 29), Defendant nevertheless addresses the grounds for that withholding in the discussion below.[3] With respect to the limited withholdings under Exemption (b)(6), those largely involve the same type of information withheld on the table that

[3] As the D.C. Circuit has explained, "a motion for summary judgment cannot be 'conceded' for want of opposition." *Winston & Strawn, LLP v. McLean*, 843 F.3d 503, 505 (D.C. Cir. 2016). However, this does not mean "that the Court must assess the legal sufficiency of each and every exemption invoked by the government in a FOIA case, regardless of whether the requester contests the government's invocation of that exemption. . . . Where the FOIA requester responds to the government's motion for summary judgment without taking issue with the government's decision to withhold or to redact specific documents, the Court can reasonably infer that the FOIA requester does not seek those specific records or information and that, as to those records or information, there is no case or controversy sufficient to sustain the Court's jurisdiction" and "there is simply no dispute to resolve." *Shapiro v. DOJ*, 2017 U.S. Dist. LEXIS 31260, at *3 n.1 (D.D.C. Mar. 6, 2017). Nevertheless, to avoid any potential issue on this question, the basis for the Exemption 4 withholding is addressed above.

was produced in response to the first FOIA request. Specifically, the Criminal Division redacted from the documents responsive to the second FOIA request references to the names of nominees who were not selected. (Sprung Decl. ¶ 30) In addition, the Criminal Division also redacted the name of private attorneys who responded to the submitter notices and the name of one of the DOJ employees who received some of the responses after determining that the privacy interests of these individuals predominated given the absence of any public interest in that information. (Sprung Decl. ¶¶ 31-32). The legal analysis supporting those withholdings is the same as addressed above with respect to the redactions made on the table of similar information and is incorporated herein by reference.[4] The discussion below, therefore, is addressed to the adequacy of the search and the limited withholding made under Exemption (b)(4) of FOIA.

A. The Criminal Division Conducted A Reasonable Search.

Under the FOIA, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."). A search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *see Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (noting that "[p]erfection is not the standard by which the reasonableness

[4] 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. Nevertheless, the balancing under Exemption (b)(6) still supports the withholding of the names of the unsuccessful nominees, private attorneys and government personnel. (Sprung Decl. ¶¶ 30-32). Specifically, these third parties have recognized privacy interests in the non-disclosure of their names and there is no countervailing public interest for such disclosure. *See supra* note 2 and accompanying text; *see also Horner,* 879 F.2d at 879 ("something, even a modest privacy interest, outweighs nothing every time").

of a FOIA search is measured"). Rather, a search is inadequate only if the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby*, 920 F.2d at 68. An agency, moreover, is not required to examine "virtually every document in its files" to locate responsive records." *Steinberg v. Dept. of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994; *see also Hall v. U.S. Dep't of Justice*, 63 F. Supp. 2d 14, 17-18 (D.D.C. 1999) (finding that agency need not search for records concerning subject's husband even though such records may have also included references to subject). Rather, as here, it is appropriate for an agency to search for responsive records in accordance with the manner in which its records are maintained. *Greenberg v. Department of Treasury*, 10 F. Supp. 2d 3, 13 (D.D.C. 1998).

Given the specific nature of the documents requested – written responses to a specific submitter notice sent by the Criminal Division to the 15 companies identified in the first FOIA request – the search conducted by the agency was reasonably calculated to locate all responsive documents. (Sprung Decl. ¶ 20) Accordingly, summary judgment should be granted to the agency on the search that it conducted in connection with the second FOIA request.

B. The Criminal Division Properly Withheld Information Under Exemption 4

Exemption 4 restricts disclosure of two categories of information: (1) trade secrets and (2) information that is (a) commercial or financial, and (b) obtained from a person, and (c) privileged or confidential. 5 U.S.C. § 552(b)(4); *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974). Whether documents contain trade secrets, financial information, or commercial information is a straightforward inquiry. *See, e.g., Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978) ("Commercial" means "pertaining to or relating to or dealing with commerce."). The D.C. Circuit has held that the terms "'commercial'

and 'financial' in the exemption should be given their ordinary meanings." *Pub. Citizen Health Research Group. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Consequently, whether information satisfies the requirements of Exemption 4 depends primarily on whether the information is "confidential."

The D.C. Circuit has adopted different tests to determine confidentiality under Exemption 4 based on whether the information at issue was provided voluntarily or by mandate. The confidentiality of voluntarily provided information is decided under the D.C. Circuit's decision in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992). *Critical Mass* holds that, if an agency receives information voluntarily, that information is "confidential" if it is customarily not released to the public. *Id.* at 879; *see also McDonnell Douglas Corp. v. Nat'l Aeronautics and Space Admin.*, 180 F.3d 303, 304 (D.C. Cir. 1999) (citing *Critical Mass*). In assessing whether information is customarily released to the public, the inquiry properly focuses on how a particular submitter of information to the government customarily treats its own information, not how the industry at large treats the same type of information. *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 148 (D.C. Cir. 2001).

By contrast, the D.C. Circuit's *National Parks* test applies when the submission of the information in question is mandatory, meaning provided under a legal obligation. Under *National Parks*, the information is considered "confidential" if disclosure would likely (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Nat'l Parks,* 498 F.2d at 770; *United Technologies Corp. v. U.S. Dep't of Defense*, 601 F.3d 557, 559

(D.C. Cir. 2010). In evaluating the second prong, actual competitive harm is not required. Rather, there need only be actual competition and a likelihood of substantial competitive injury if the information were disclosed. *National Parks Conservation Ass'n v. Kleppe*, 547 F.2d 673, 679 (D.C. Cir. 1976); *see also Gulf Western Indus., Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979). Moreover, courts should generally defer to an agency's prediction of competitive harm from disclosure. *See United Technologies Corp*., 601 F.3d at 563.

Whether information submitted is mandatory or voluntary does not depend upon the state of mind of the submitter. As the D.C. Circuit made clear in *Center for Auto Safety*:

> [i]n determining that the submission was not mandatory, we hold that actual legal authority, rather than parties' beliefs or intentions, governs judicial assessments of the character of submissions. We reject the argument that, in assessing submissions for the purpose of Exemption 4 analysis, we should look to subjective factors, such as whether the respondents believed that the Information Request was voluntary, or whether the agency, at the time it issued the request for information, considered the request to be mandatory. Focusing on parties' intentions, for purposes of analyzing submissions under Exemption 4, would cause the court to engage in spurious inquiries into the mind. On the other hand, linking enforceability and mandatory submissions creates an objective test; regardless of what the parties thought or intended, if an agency has no authority to enforce an information request, submissions are not mandatory.

Id., 244 F.3d at 149.

"Legal authority providing for mandatory submission includes 'informal mandates' that require submission 'as a condition of doing business with the government.'" *Soghoian v. Off. of Mgmt. and Budget*, 932 F. Supp. 2d 167, 175 (D.D.C. 2013), *quoting Lepelletier v. F.D.I.C.*, 977 F. Supp. 456, 460 n.3 (D.D.C. 1997), *aff'd in part, rev'd in part, and remanded on other grounds*, 165 F.3d 37 (D.C. Cir. 1999); *see Pub. Citizen Health Research Group v. FDA*, 964 F. Supp. 413, 414 n.1 (D.D.C. 1997) ("In this case, submission of the protocol was necessary in order to obtain FDA approval and was therefore required.") (citation omitted); *McDonnell Douglas Corp. v. NASA*, 895 F. Supp. 316, 318 (D.D.C. 1995) ("NASA required that the contract

itemize the prices for specific services."); *Honeywell Tech. Solutions, Inc. v. Dep't of Air Force,* 779 F. Supp. 2d 14, 21 (D.D.C. 2011) ("Indeed, there is precedent in this Circuit for treating certain information submitted as part of a bid for a government contract as voluntarily submitted while treating accompanying information as involuntarily submitted.")

The burden is lower to support the withholding of confidential information voluntarily provided to the Government than it is to support the withholding of involuntarily provided information. *Honeywell,* 779 F. Supp. 2d at 21 n.2 (referring to the latter as involving a "more stringent" standard). Voluntarily submitted information "need only be 'of a kind that would customarily not be released to the public by the person from whom it was obtained' to be withheld as confidential." *Id.* at 20.

As described in the Sprung declaration, the information withheld under Exemption 4 was voluntarily submitted and is not of a type customarily released to the public. (Sprung Decl. ¶¶ 21-22, 28) Accordingly, the information has been properly withheld under the *Critical Mass* test. Moreover, the withheld information constitutes "commercial or financial" information and also was "obtained from a person," a term which includes an individual, partnership or corporation, *see* 5 U.S.C. § 551(2), thus establishing the other requirements of Exemption (b)(4).

In addition, as explained in the Sprung declaration, there is a likelihood of substantial competitive harm to the submitter if the information were disclosed. (*Id.* ¶ 28 n.6) Thus, the withheld information also has been properly withheld to the extent the more stringent *National Parks* test applies. (*Id.*)

C. The Criminal Division Complied With FOIA's Segregability Requirement.

Under the FOIA, if a record contains information exempt from disclosure, any "reasonably segregable," non-exempt information subject to FOIA must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with 'reasonable specificity'" that the information it has withheld cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep't of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

Here, the first FOIA request did not request the production of documents but instead information that the Criminal Division provided in a table format. With respect to the second FOIA request, the Criminal Division released the requested documents nearly in full, with only a limited redaction of information under Exemption (b)(4) and the limited redaction of names under Exemption 6. (Sprung Decl. ¶ 33 and accompanying *Vaughn* Index). Accordingly, the Criminal Division complied with FOIA's segregability requirement.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court grant summary judgment in favor of Defendant as to all claims in this case.

Respectfully submitted,

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