ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5337

UNITED STATES DEPARTMENT OF JUSTICE,

Appellant,

v.

GEORGE LARDNER,

Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for appellant certifies as follows:

(A) Parties and Amici: In the district court, George Lardner appeared as the plaintiff, and the Department of Justice (DOJ) appeared as the defendant. In this Court, DOJ is the appellant, and George Lardner is the appellee. There are no amici.

(B) Rulings Under Review: Appellant seeks review of the district court's July 31, 2009, order granting in part Plaintiff's Motion for Summary Judgment and requiring DOJ to release to Mr. Lardner information that he requested under the Freedom of Information Act. The decision is reported at 638 F. Supp. 2d 14 (D.D.C. 2009).

(C) Related Cases: Counsel is aware of no related cases. This case was not previously before this Court or any other court.

/s/
Allison M. Zieve

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GLOSSARY

DOJ	United States Department of Justice
FBI	Federal Bureau of Investgation
FOIA	Freedom of Information Act
OIG	Office of the Inspector General, United States Department of Justice
OPA	Office of the Pardon Attorney

INTRODUCTION

This case arises from a Freedom of Information Act (FOIA) request submitted by plaintiff-appellee George Lardner to the Office of the Pardon Attorney (OPA) at the Department of Justice (DOJ). Mr. Lardner sought the identities of pardon applicants and commutation applicants whose applications had been denied during President George W. Bush's term in office. DOJ denied the request in full, citing FOIA's personal privacy exemptions, 5 U.S.C. § 552(b)(6) & § 552(b)(7)(C). However, as the district court held, because clemency applicants have only a minimal privacy interest in the fact that they have sought and been denied clemency, and the public has a substantial interest in the information, the requested records are not exempt from disclosure under either exemption 6 or 7(C). Indeed, Mr. Lardner and DOJ litigated OPA's withholding of the names of unsuccessful pardon applicants in a prior case, which the district court there held presented "a paradigmatic case for disclosure." *Lardner v. DOJ*, Civ. A. No. 03-0180 (JDB), 2005 WL 758267, at *17 (D.D.C. Mar. 31, 2005) (*Lardner I*). In addition, the exemption 7(C) argument fails at the threshold because DOJ's list or database of unsuccessful clemency applicants was not compiled for law enforcement purposes. As in *Lardner I*, this case presents a paradigmatic case for disclosure. The Court should affirm the district court's decision.

STATEMENT OF THE ISSUE

Whether FOIA exemption 6 or 7(C) shields from disclosure the names of people whose clemency applications were denied by former President George W. Bush.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

George Lardner, a retired Washington Post reporter, is writing a book on the use of the presidential pardon power. Lardner Decl. ¶ 1 (App. 22). In preparing his book, Mr. Lardner has been examining historical records concerning pardons and other clemency actions. *Id*. Some of the records of interest to Mr. Lardner are held by OPA at DOJ. *Id.*

By letter dated April 10, 2008, Mr. Lardner submitted a FOIA request for the "identities of all those denied pardons and, separately, all those denied commutations since President George W. Bush took office." *Id.*, Exh. A (App. 26). The information is contained in a list and an OPA database that includes the name of each unsuccessful applicant, the offense for which a pardon or commutation was sought, the date of denial, and other information. *Id*. ¶ 7 (App. 23); Second Bollwerk Decl. ¶ 2 (App. 121). Mr. Lardner's FOIA request explained that, in a prior FOIA case, the district court had rejected OPA's claim that the names of unsuccessful pardon applicants were exempt from disclosure. In that case, the court had concluded that

disclosure would shed light on the exercise of the pardon power and that, "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." Lardner Decl., Exh. F (App. 26) (quoting *Lardner I*, 2005 WL 758267, at *17).

By letter dated May 22, 2008, OPA denied Mr. Lardner's FOIA request, citing exemptions 6 and 7(C), and *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1124-26 (D.C. Cir. 2004). Lardner Decl., Exh. B (App. 28). The letter stated that under OPA's "established policy, we must have each applicant's prior written consent or proof of death before releasing these documents to a third party." *Id.* (App. 30-31).

Mr. Lardner appealed the denial of his FOIA request by letter dated June 9, 2008. *Id.*, Exh. C (App. 30). His appeal letter noted that the cited portion of *Judicial Watch* did not address disclosure of the names of clemency applicants, but rather the disclosure of sensitive information contained in clemency files, and that his request did not seek such information. The letter also pointed out that OPA routinely confirms via telephone whether a particular person has been granted or denied clemency or has a petition pending, and it pointed to the 2005 decision in *Lardner I*. *Id*. DOJ did not substantively respond to the appeal, and Mr. Lardner filed this lawsuit.

In the district court, both parties moved for summary judgment. The court granted Mr. Lardner's motion and denied DOJ's motion. Order (App. 138).[1] The court held that exemption 6 does not apply because the strong public interest in disclosure of the requested records outweighs the minimal privacy interest of unsuccessful clemency applicants. Opinion 26-27 (App. 164-65). The court further held that exemption 7(C) does not apply because the requested records are not "law enforcement records"—a prerequisite to the application of that exemption. *Id.* 27.

SUMMARY OF ARGUMENT

Neither exemption 6 nor exemption 7(C) justifies withholding the names of unsuccessful clemency applicants. Exemption 6 applies to "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), and exemption 7(C) covers "records or information compiled for law enforcement purposes . . . [that] could reasonably be expected to constitute an unwarranted invasion of personal privacy."

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[1]Although the district court's order states that each motion is granted in part and denied in part, the court in fact granted Mr. Lardner the full relief he requested. The court stated that it was denying Mr. Lardner's motion to the extent that he argued that DOJ's exemption 6 claim was barred by collateral estoppel and because his argument about segregability had become moot by a subsequent agreement of the parties. D. Ct. Order (App. 138); Opinion 34 (App. 172). Nonetheless, the court held that neither exemption 6 nor 7 applied, granted summary judgment on the cause of action stated in the complaint, and ordered disclosure of the requested information.

Id. § 552(b)(7)(C). DOJ bears the burden of showing that an exemption applies. *Id*. § 552(a)(4)(B). As the district court held, the agency has failed to carry that burden here.

To begin with, unsuccessful applicants for clemency cannot reasonably have any expectation of privacy in the requested records because OPA policies and regulations state, and OPA informs applicants in advance, that OPA will disclose the fact and status of any application to "anyone who asks." Moreover, disclosure would reveal only that the listed individuals were once convicted of a federal crime and that they applied for and were denied clemency. These facts are a far cry from the detailed files of personal information at issue in *Judicial Watch*, on which DOJ so heavily relies. In addition, the notion that *Judicial Watch* made a drive-by segregability ruling, in which it sub silentio held that the names of pardon applicants fell within the scope of exemption 6, is implausible.

Likewise, DOJ's suggestion that disclosure will stigmatize the people listed lacks merit. President Bush denied clemency far more often than he granted it and to approximately 9,200 people, and the denial letter itself emphasizes that clemency is granted sparingly and that denial does not reflect on the applicant's progress since conviction. In support of the related argument that disclosure will inform employers about the criminal convictions of their employees, causing them to fire the employees,

DOJ offers no evidence. And OPA's practice of interviewing current and former employers in connection with pardon applications, the common practice of asking job applicants about prior criminal convictions, and the user-friendly system of the Bureau of Prisons for locating anyone who has been incarcerated in a federal prison also show that DOJ's stigma theory does not support the agency's exemption 6 and 7(C) arguments.

At the same time, "release of the identity of unsuccessful pardon applicants" would "serve directly to open the Government's activities 'to the sharp eye of public scrutiny.'" *Lardner I*, 2005 WL 758267, at *17. The list is of particular public interest given evidence that the prior Pardon Attorney considered inappropriate and perhaps unconstitutional factors in deciding whether to recommend that President Bush grant clemency.

Exemption 7(C) does not apply for the independent reason that the records at issue were not "compiled for law enforcement purposes." The paper lists of applicants whose applications were denied are prepared months after OPA finishes any investigation; and the database serves a record-keeping function, not an investigatory function. The fact that OPA "freely releases the names of unsuccessful clemency applicants to the general public" upon specific request, Opinion 33 (App. 171), further

belies the claim that the records must be withheld to prevent disclosure of investigatory materials.

The Court should therefore affirm the district court's decision and order that OPA disclose the requested records.

ARGUMENT

I. Exemption 6 Does Not Apply Here.

A. Any Privacy Interest Implicated By Disclosure Of A List Of Unsuccessful Clemency Applicants Is Minimal At Best.

For exemption 6 to apply, "disclosure [must] compromise a substantial, as opposed to a de minimis, privacy interest. If no significant privacy interest is implicated . . . FOIA demands disclosure." *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (quoting *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)). "[W]hether disclosure of a list of names is a 'significant or a de minimis threat [to privacy] depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.'" *Dep't of State v. Ray*, 502 U.S. 164, 176 n.12 (1991) (quoting *Nat'l Ass'n of Retired Fed. Employees*, 879 F.2d at 877). Here, disclosing the fact that someone applied for and failed to obtain clemency would reveal nothing about the applicant's characteristics and would be unlikely to bring about any adverse

consequences for the applicants. Any privacy interest is "limited and minimal." Opinion 15 (App. 153).

First, the privacy interest asserted by DOJ derives from three pieces of information: that an individual was convicted of a crime, applied for clemency, and was denied clemency. In light of OPA's own policies and practices, applicants cannot have any reasonable expectation of privacy in these facts.

OPA informs all applicants *before they apply* that OPA does not assure confidentiality. Specifically, in an "IMPORTANT NOTICE To Applicants for Pardon," "which is part of the clemency application form provided to and filled out by all applicants," *id*. at 17 (App. 155); *see* Bollwerk Decl. ¶ 20 (App. 61), OPA states:

> *Upon specific request, we advise anyone who asks whether a named person has been granted or denied clemency*. In addition, the pendency of an application is confirmed to anyone who asks, unless extraordinary considerations of privacy are presented in a particular case that outweigh the public interest in having access to this information. If you believe such privacy considerations are present in your case, you should so inform us in writing when you submit the application.

DOJ, Privacy Statement for Pardons, *available at* www.justice.gov/pardon/privacy_statement_pardon.htm (App. 89) (emphasis in original); *see* DOJ, Privacy Statement for Commutation of Sentence, *available at* www.justice.gov/pardon/privacy_statement_commutation.htm (App. 91) (stating identical sentence).

OPA telling "anyone who asks" whether a clemency application has been filed and its status makes sense because a third party—such as a neighbor of the applicant or a victim of the offense for which the pardon is sought—may want to submit a letter in support of or in opposition to the application or find out whether the application was successful. Yet because there is no obvious distinction in terms of the privacy interests of a given individual between disclosing that a *specific* individual has been denied clemency and disclosing *each* individual who has been denied clemency, OPA's practice severely undermines its claim that unsuccessful applicants have any expectation of privacy in the fact that their applications were denied. DOJ suggests that individual inquiries are likely to be from people who are aware of the prior conviction, whereas the list will disclose the fact of a prior conviction to people who do not know it. However, people with no concern about particular individuals are unlikely to seek out and peruse a list of 9,200 unsuccessful applicants (including 1,535 pardon applicants), *see* Bollwerk Decl. ¶ 15 (App. 58), to see if they recognize any names. And the list will not enable specific identification of many or even most of the individuals, which will not include state of residence, social security numbers, or other such information. The length of the list itself preserves the "practical obscurity" that DOJ (at 13, 22, 23) emphasizes.

In addition, before submitting their applications, applicants are informed that, in the course of the OPA investigation, "neighbors, former and present employers, associates, and other individuals who may be able to provide relevant information concerning you may be interviewed." DOJ, Privacy Statement for Pardons, *supra* (App. 89). OPA further advises them that, "[w]hile such inquiries are made discreetly and a reasonable effort is made not to disclose the underlying nature of the investigation, we cannot assure you that the reason for the inquiry will not become known to some or all of the persons interviewed." *Id*.

Likewise, DOJ's clemency regulations advise applicants that clemency petitions and other clemency records may not be kept confidential: The regulations provide that although the Department will not "generally" disclose communications in connection with a clemency petition, "they may be made available for inspection, in whole or in part, when in the judgment of the Attorney General their disclosure is required by law or the ends of justice." Rules Governing Petitions for Executive Clemency, 28 C.F.R. § 1.5 (App. 70). As two district courts have observed, clemency applicants "could hardly read this regulation as a firm promise of anonymity." Opinion 17 (App. 155) (quoting *Lardner I*, 2005 WL 758267, at *16); *cf. Physicians Comm. for Responsible Med. v. Glickman*, 117 F. Supp. 2d 1, 6 (D.D.C. 2000) (privacy interests in the CVs of rejected applicants is minimal because "[n]either the applicants nor their nominators

were given assurances of confidentiality" and "[t]he notice in the Federal Register did not promise anonymity").

To the contrary, the OPA statements, regulations, and declarations in this case "serve only to highlight that clemency applicants have no reasonable expectation" that the existence and outcome of their applications will not be disclosed. Opinion 17 (App. 155). As the Bollwerk declaration confirms, potential applicants are advised *before applying* that their convictions may become public as a result of their applying for clemency. Bollwerk Decl. ¶ 24 (App. 64). Although the possibility causes some applicants "discomfort," *id*. (App. 63-64), each person who was denied clemency by President Bush (and whose name would therefore be listed) chose to apply anyway.

Second, the records at issue here are not analogous to the records at issue in *Judicial Watch*, on which DOJ so heavily relies. There, the requester sought pardon files themselves, which contained a "broad range of detailed and highly personal information," including "non-public personal information about the applicants and their lives before and after their convictions and personal information about third parties." 365 F.3d at 1125. Mr. Lardner has not requested applicants' files, and producing the requested information would not require the Pardon Attorney even to open any individual's file. As the district courts noted both below and in *Lardner I*, "[a]t no point" did the court in *Judicial Watch* "even suggest that disclosure of the fact that

an individual filed a petition for a pardon, instead of the contents of the petition itself, amounts to an unwarranted invasion of the privacy of the applicant." Opinion 21 (App. 159) (quoting *Lardner I*, 2005 WL 758267, at *16) (emphasis in original); *see Lardner I*, 2005 WL 758267, at *16 ("It is . . . difficult to understand . . . how the mere fact that an individual has sought a pardon reveals 'sensitive personal information' about the individual.") (quoting *Judicial Watch*, 365 F.3d at 1126; *Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991)).

Nonetheless, DOJ theorizes that because the applicants' names appeared in the files requested in *Judicial Watch* and this Court had a duty to consider segregability sua sponte, the Court necessarily made a "drive-by" segregability ruling, implicitly holding that the names fell within the scope of exemption 6 and could not be segregated and released. Yet neither the decision of this Court nor that of the district court suggests that either court considered release of the names alone or that plaintiff Judicial Watch argued for or was interested in obtaining the names without the files. To read the parties' and the Court's silence as establishing a "controlling" (DOJ Br. 26) precedent would be a large and unwarranted leap. *See Webster v. Fall*, 266 U.S. 507, 511 (1924) ("The most that can be said is that the point was in the cases if any one had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been

so decided as to constitute precedents."); *cf. LaShawn A. v. Barry*, 87 F.3d 1389, 1395 n.6 (D.C. Cir. 1996) (courts are not "bound by decisions on questions of jurisdiction made *sub silentio* in previous cases 'when a subsequent case finally brings the jurisdictional issue' to the Court") (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984)).

Moreover, this leap is not called for by the case on which DOJ relies, *Trans-Pacific Policing Agreement v. U.S. Customs Service*, 177 F.3d 1022 (D.C. Cir. 1999). There, this Court considered whether a FOIA requester had waived the argument that its request included segregable non-exempt material by not raising segregability in the district court. Holding that the issue had been waived, the Court stated that the district court "had an affirmative duty to consider the segregability issue sua sponte." *Id*. at 1028. The Court further noted, however, that although it had "remanded in numerous cases in which the district court failed to make such a finding," it had "never squarely held that the court must make a segregability finding even if the issue has not been specifically raised by the FOIA plaintiff." *Id.* The Court then remanded to the district court, as it had in prior cases, for consideration of segregability. *Id.* at 1029-30. Thus, *Trans- Pacific Policing Agreement* does not stand for the proposition that when a court is silent on an issue that no party raised but that it should have considered sua sponte, that silence implies a holding. If it did, then a

remand would have been unnecessary because the district court's silence on segregability, coupled with its ruling for the government, would have constituted a finding that the records contained no segregable, non-exempt information. Yet this Court held the opposite—that is, that the silence was not a holding, but simply a failure to address the issue—and therefore remanded so that the district court could consider the issue in the first instance.

In addition, *Judicial Watch* cannot possibly be "dispositive" (DOJ Br. 15) on the issue presented in this case because the pardon records sought in *Judicial Watch* included the files of people who had already been granted pardons, and so whose names had already been disclosed as pardon applicants. *See* 365 F.3d at 1110 n.2 (describing records requested). The Court in *Judicial Watch* nonetheless did not order that the names of those successful applicants be segregated and released. Therefore, accepting DOJ's argument that every bit of information in the application files was necessarily held by the Court to be exempt would require the Court to read into its opinion a holding that exemption 6 protects from disclosure the names of people who have been granted pardons, although their names have already been publicly announced and posted online by DOJ. Such a holding would have no basis in the text of the opinion or, indeed, in the law.

Third, contrary to DOJ's argument, disclosure of the fact that clemency was denied for a prior conviction does not stigmatize the unsuccessful applicant. As the court in *Lardner I* explained:

> The applicant is petitioning the government for the performance of a public act; this is not a situation where he is a third-party who finds himself in government records through no action of his own. The conviction that the pardon applicant is seeking to annul was itself public, and it cannot be thought that the information that the individual later was denied a pardon application adds much additional embarrassment beyond the original conviction.

Lardner I, 2005 WL 758267, at *17 (footnotes omitted). Moreover, President Bush granted clemency so few times that no stigma is attached to having been denied. As the Pardon Attorney stated in a letter notifying an applicant of the denial of a pardon application: "I would like to take this opportunity to emphasize that Presidents have granted very few pardons in recent times, and that the decision in your case does not reflect adversely on the progress you have made toward rehabilitation since your conviction." Lardner Decl., Exh. E (App. 35). Thus, even if real, the "asserted stigma of rejection [would be] significantly diluted when shared among" thousands of denied applicants. *Physicians Comm. for Responsible Med.*, 117 F. Supp. 2d at 6 (CVs of nominees not selected for USDA advisory committee not exempt under exemption 6); *see also Kurzon v. HHS*, 649 F.2d 65, 69 (1st Cir. 1981) (identities of grant applicants not funded by NIH not exempt from disclosure where "[r]ejection . . . is not so rare an

occurrence as to stigmatize the unfunded applicant"). Accordingly, the district court rightly rejected the suggestion that "disclosure of the President's decision to deny clemency will 'reflect poorly upon [an individual applicant's] current level of rehabilitation and good character.'" Opinion 16 (App. 154) (quoting Bollwerk Decl. ¶ 27 (App. 66)).

Moreover, not all clemency applications are denied because "the President has determined that the applicant is not worthy of his mercy." Second Bollwerk Decl. ¶ 10 (App. 125). A commutation application may be denied because there is little time left on the applicant's sentence by the time that the application is processed, and a pardon application may be denied because insufficient time has passed since the conviction to assess the applicant's conduct. Other applications may be denied because of political considerations or for other reasons that do not, or should not, reflect on the merit of the application. *See*, *e.g.*, Second Lardner Decl., Exh. G (App. 112-13) (OIG reporting that former Pardon Attorney used ethnicity as a factor in making recommendations for clemency).

DOJ's purported concern that pardon applicants will be fired because disclosure of the requested information will lead employers to learn about employees' criminal convictions is entirely speculative, and the declaration on which DOJ relies does not cite any evidence or purport to rely on first-hand information. *See* Bollwerk Decl.

¶¶ 24, 27 (App. 63-64, 65-66). In any event, before applying, potential applicants are informed that OPA may interview "former and present employers," and that OPA provides no assurance "that the reason for the inquiry may not become known to some or all of the persons interviewed." DOJ, Privacy Statement for Pardons, *supra* (App. 89).

Furthermore, many employers ask job applicants about criminal convictions or perform criminal background checks before hiring. *See*, *e.g.*, U.S. Census Bureau, Application (at questions 28-31) & Background Check FAQs, http://2010.census.gov/2010censusjobs/application-material/. Indeed, employers may face potential liability for not doing a criminal background check on new employees. *See*, *e.g.*, *Blair v. Defender Servs., Inc.*, 386 F.3d 623, 629 (4th Cir. 2004) (permitting a negligent hiring claim to survive summary judgment because jury may find employer negligent for failing to run criminal background check of employee). Employers (or neighbors or anyone) interested in finding out whether someone has been incarcerated in a federal prison since 1982 can also do a quick search on the Federal Bureau of Prisons website, www.bop.gov/iloc2/LocateInmate.jsp. For individuals released before 1982, the website provides instructions for submitting written requests, which require no explanation of why the information is requested. *See* www.bop.gov/inmate_locator/inmates_b4_1982.jsp. With easy access to information about prior convictions, the notion that employers will turn instead to a lengthy list of names (without ages, places of

residence, or social security numbers) of people who have been denied clemency as a source of information about their employees is far-fetched.

Making a related point with regard to applicants for commutation, DOJ asserts that some applicants are concerned that disclosure of their cooperation with prosecutors or Bureau of Prison personnel will become known through the clemency process. DOJ Br. 31. The declaration on which DOJ relies, however, makes clear that this concern is directed to disclosure of "the allegations they have made in their commutation petitions or documents they have submitted in support of their applications." Bollwerk Decl. ¶ 22 (App. 62). The records at issue in this case do not involve disclosure of any such allegations or documents. Thus, this concern is not apposite here.

Finally, the identities of successful applicants are routinely disclosed to the public. *See* DOJ, Privacy Statement for Pardons, *supra* (App. 90); *e.g.*, DOJ, Clemency Recipients, www.justice.gov/pardon/recipients.htm (DOJ website listing pardons granted from 1989-2008). For example, DOJ's website lists pardons granted by President Bush and states the name of the person to whom clemency was granted, the city and state of his or her residence, the district where each was convicted, the year in which the person was sentenced, and a description of the offense. *See* Bollwerk Decl. ¶ 17 (App. 59); DOJ, Pardons Granted by President George W. Bush, www.justice.gov/pardon/bushpardon-grants.htm. It is not clear "what it is about the

names of unsuccessful applicants," in contrast to the names (and locations, offenses, and years of conviction) of successful applicants, that "uniquely implicates personal information sensitive enough to bring the records within" exemption 6. *Lardner I*, 2005 WL 758267, at *17; *cf. Kurzon*, 649 F.2d at 69 (unsuccessful applicants for federal grants have only minimal privacy interest in part because they "cannot reasonably expect that their efforts to secure government funds . . . will remain purely private matters.").

Responding to the district court's determination that applicants have a minimal privacy interest in the requested information, DOJ relies heavily on *Reporters Committee*, 489 U.S. 749. As the court below explained, "*Reporters Committee* differs from this case" in "important ways." First, unlike the rap sheets at issue in *Reporters Committee*, the records sought here contain no "significant, detailed personal information." Opinion 20 (App. 158). In addition, rap sheets are controlled by a "web of federal statutory and regulatory provisions" that prevent public disclosure and bring rap sheets within the definition of private information. *Id.* (quoting *Reporters Committee*, 489 U.S. at 764-65 (defining privacy as related to information restricted to "use of a particular person or group or class of persons")). By contrast, here, the information sought is available "*[u]pon specific request . . . [to] anyone who asks*." DOJ, Privacy Statement for Pardons, *supra* (emphasis in original)

(App. 89). And whereas individuals would prefer the government not even to possess the information contained in rap sheets, individuals appearing on the list at issue here do so "solely as a result of the applicant's own voluntary decision to petition . . . for clemency, which is itself a public act." Opinion 20 (App. 158). Unlike in *Reporters Committee*, "the information requested is drawn from reports of and reflects the official actions of a Governmental official—that is, the executive and his exercise of the clemency power." *Id*. at 26 (App. 164).

At bottom, DOJ's reliance on *Reporters Committee* seems to be based on the simplistic notion that a list of applicant names is comparable to a rap sheet because both can be characterized as a "compilation." DOJ Br. 24. Yet invoking the word "compilation" does not support DOJ's theory. As *Reporters Committee* makes very clear, a rap sheet is a compilation of detailed personal information, sometimes incorrect, about a particular individual. 489 U.S. at 752. Here, the "compilation" contains no more personal information about a particular person than DOJ would freely disclose upon specific request. And unlike a rap sheet, the compilation does not focus on a single individual, but keeps the individual within the "practical obscurity" of thousands of names, without identifying information such as age, race, or state of residence.

DOJ's reliance on *Consumers' Checkbook Center for the Study of Servs. v. HHS*, 554 F.3d 1046 (D.C. Cir. 2009), is equally misplaced. DOJ quotes out of context from this Court's decision, stating that this Court has held that "individuals have 'a substantial privacy interest in their names,' particularly when the names are combined with other sensitive information." DOJ Br. 26 (quoting *Consumers' Checkbook*, 554 F.3d at 1050). What the Court actually stated was that, in a prior decision, the Court had "found that contractors on federal construction projects had a substantial privacy interest in their names, addresses, hourly pay, hours worked and wages." *Consumers' Checkbook*, 554 F.3d at 1050 (citing *Painting & Drywall Work Pres. Fund, Inc. v. HUD*, 936 F.2d 1300, 1301-02 (D.C. Cir. 1991)). In *Painting & Drywall*, HUD had redacted names, social security numbers, and home addresses because that information, coupled with the additional information that had been disclosed, "would have enabled the [plaintiff] to determine the earnings and work hours of individual employees." As the opinion makes clear, it was the disclosure of the wages of identified individuals that the Court sought to protect. *See id.* at 1302 ("[T]he records at issue here involve not merely names, addresses, and the characteristic that defines the list (such as employment status, or employment on a particular construction project), but also a full weekly accounting of hourly wages,

hours worked, deductions, and net pay."). DOJ's suggestion that this case shows that the Court has recognized a privacy interest in names themselves is not accurate.

Because clemency applicants have at best a de minimis privacy interest in the fact that they were denied clemency, the exemption 6 inquiry is at an end. *See Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) ("person requesting the information [is required] to establish a sufficient reason for the disclosure" only "[w]here the privacy concerns addressed by Exemption 7(C) are present"). The exemption does not apply here.

B. The Public Interest In Disclosure Outweighs Any Privacy Interest.

If the Court were to find that applicants have more than a de minimis expectation of privacy in the fact that they were denied clemency by President Bush, that finding would "not conclude the inquiry; it [would] only move[] it along to the point where we can 'address the question whether the public interest in disclosure outweighs the individual privacy concerns.'" *Multi AG Media*, 515 F.3d at 1230 (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002)). "Because the 'basic purpose of [FOIA] . . . focuses on the citizens' right to be informed about 'what their government is up to,' information that 'sheds light on an agency's performance of its statutory duties' is in the public interest." *Id*. at 1231 (alterations in original) (quoting *Reporters Comm*., 489 U.S. at 773).

Here, disclosure of the identity of unsuccessful clemency applicants would "'shed light' on the exercise of the pardon power in important ways." *Lardner I*, 2005 WL 758267, at *17 (quoting *Reporters Comm.*, 489 U.S. at 773). Indeed, the court in *Lardner I*, addressing this same issue, called it "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*. The court below agreed, stating that "it is readily apparent that the public has an interest in laying open the executive's exercise of his clemency power to public scrutiny." Opinion 22 (App. 160).

As the district court noted, the practice of routinely releasing, via a press release, the names of applicants who are granted clemency "confirms the public's interest in opening up the clemency process and in ensuring that the exercise of the executive's clemency power is not veiled in a cloak of secrecy." *Id.* at 23 (App. 161). And disclosing the names of unsuccessful applicants increases the public value of disclosing the names of successful applicants. *Id*. "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." *Id.* (quoting *Lardner I*, 2005 WL 758267, at *17). The list of names is itself a record of official governmental action, directly reflecting "what the government is up to." *Reporters*

Committee, 489 U.S. at 780. Thus, As the court below held, the information sought here "falls squarely within FOIA's statutory purpose." Opinion 26 (App. 164).

Notwithstanding the opinions of two district courts, DOJ professes still to be unsure how disclosure will shed light on the exercise of executive clemency or the work of OPA. A report by DOJ's Office of Inspector General (OIG) provides an example. In December 2007, OIG completed a report on then-current Pardon Attorney Roger Adams, who had been Pardon Attorney since June 1998. Second Lardner Decl., Exh. G (App. 107). That report stated that Mr. Adams had made "inappropriate" racial remarks about a Nigerian applicant named Chibueze Okorie. *Id*. (App. 112). In discussing the comment with the OIG, the Pardon Attorney said that the comment was "a legitimate comment to make in the course of my work," and that a "person's ethnic background and the way a commutation, a pardon in his case, is going to be perceived in the community, that's an important consideration." *Id*. at 4 (App. 110). The OIG concluded by stating that it was "extremely troubled by Adams's belief that an applicant's 'ethnic background' was something that should be an 'important consideration' in a pardon decision." *Id*. at 6-7 (App. 112-13). Although names are not unambiguous evidence of an individual's national origin, they can provide insight into national

origin. For example, Chibueze Okorie is a Nigerian name.[2] Names may thus help to shed light on the degree to which different types of people were treated differently in the clemency process. As explained in the OIG report, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), "suggests that using race or national origin as a basis for denying clemency would be unconstitutional." Second Lardner Decl., Exh. G at 5 (citing 523 U.S. at 289 (plurality opinion) & *id*. at 292 (Stevens, J., concurring in part and dissenting in part)) (App. 111). Disclosure of the names would help to elucidate the extent to which this inappropriate consideration infected the pardon process in recent years.

Similarly, while most people on the list would not be traceable from their names, well-known people—or the lack thereof—would stand out. In this way, the list would show whether well-known applicants were treated differently from lesser-known applicants. This possibility has been suggested by former Pardon Attorney Margaret Love, who stated that, during her tenure from 1992 to 1997, "she was discouraged from urging commutation for anyone who did not have high-powered support." L. Richardson, *A Prisoner's Plea to a President*, L.A. Times, Apr. 2, 2001,

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[2]The name "Chibueze" is an Igbo word, and Igbo is a language spoken primarily in southeastern Nigeria. *See* www.behindthename.com/name/chibueze; www.uiowa.edu/~africart/toc/people/Igbo.html. "Okorie" is a common Nigerian surname.

at E1. Particularly in light of the OIG report, the information sought is of significant public interest.[3]

Accordingly, for purposes of exemption 6, the public interest, recognized in strongly worded opinions of Judge Kollar-Kotelly below and of Judge Bates in *Lardner I*, outweighs any minimal privacy interest in the requested records.

II. Exemption 7(C) Does Not Apply Here.

Although exemption 6 and exemption 7(C) both permit withholding where privacy interests outweigh public interests, exemption 7(C) applies to a narrower category of records—records "compiled for law enforcement purposes." DOJ bears the burden of establishing that the records at issue fall into this category. *Jefferson v. DOJ, Office of Prof'l Resp.*, 284 F.3d 172, 178 (D.C. Cir. 2002). Here, the records sought were not "compiled for law enforcement purposes," and, therefore, exemption

[3]DOJ's argument that the interest in rehabilitating offenders establishes a public interest in non-disclosure simply restates its stigma argument, which is addressed in section I.A., above.

7(C) does not justify OPA's denial of Mr. Lardner's FOIA request.[4] In any event, the public-private balancing would require disclosure here.

A. The Records At Issue Are Not Law Enforcement Records.

To show that records were "compiled for law enforcement purposes," DOJ must show that "two critical conditions" are met. *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982). "First, the agency's investigatory activities that give rise to the documents sought must be related to the enforcement of federal laws or to the maintenance of national security." *Id*. To satisfy this requirement, the agency must identify an individual or incident that was the object of an investigation for which the records were compiled, and it must show a "connection between that individual or incident and a possible security risk or violation of federal law." *Id.*; *see Jefferson*, 284 F.3d at 177 ("law enforcement purpose" exists where files were compiled "in connection with investigations that focus directly on specific alleged illegal acts which could result in civil or criminal sanctions"). This requirement ensures that exemption 7(C)

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[4]Below, OPA did not argue "that it is a law enforcement agency whose decision on the law enforcement nature of the records at issue is entitled to deference." Opinion 29 (App. 167). On appeal, DOJ does not contest that finding. Notably, in *Lardner I*, DOJ did not claim that exemption 7(C) applied to the names of unsuccessful pardon applicants. *See* 2005 WL 758267, at *18 (DOJ claimed exemption 6, but not exemption 7(C), applied to release of names of unsuccessful applicants); *see also Judicial Watch*, 365 F.3d at 1125 (DOJ claimed exemption 6, but not 7(C), applied to privacy interests implicated by release of pardon applications and letters from applicants' counsel and supporters).

is not expanded beyond its intended scope to include "investigatory activities wholly unrelated to law enforcement agencies' legislated functions of preventing risks to national security and violations of the criminal laws and of apprehending those who do violate the laws." *Pratt*, 673 F.2d at 420. Second, there must be "a rational nexus between the investigation at issue and the agency's law enforcement duty." *Jefferson*, 284 F.3d at 177 (quoting *Pratt*, 673 F.2d at 421). In this case, the second condition does not come into play because the first is not satisfied, and DOJ's exemption 7(C) claim fails at the threshold.

1. A list or database of individuals whose applications were denied by the President, along with the offenses at issue and the dates of denial, *see*, *e.g.*, Lardner Decl. ¶ 8 & Exh. F (App. 57-58), is not compiled for a "law enforcement" purpose. The list reflects decisions that were not made by OPA (but rather by the President) and were made months or more after OPA's consideration of each application concluded. Such a list is compiled to memorialize a governmental decision that OPA implements by informing the applicant of the decision and for historical record-keeping. The list is not based on OPA's having performed an investigation, but based on the applicant having sought clemency and the White House having denied it.

Although OPA may "investigate" (*but see infra* page 30) to decide whether to advise the President to grant or deny clemency to an individual applicant, the

investigation is not in connection with "a possible security risk or violation of federal law." *Pratt*, 673 F.2d at 420. An actual violation of federal law was established in the past, when the applicant was convicted of the offense for which clemency is sought. However, OPA does not investigate whether the underlying crime occurred, and the investigation has neither the purpose nor the effect of *enforcing* federal law. Instead, OPA's consideration is undertaken only to enable it to make a recommendation about clemency, and that recommendation is based on "*post*-conviction conduct, character, and reputation," the "seriousness and relative recentness of the offense," the applicant's "acceptance of responsibility, remorse, and atonement," the "need for relief" (that is, the reason why the applicant wants clemency), and the views of officials such as the prosecuting attorney and judge.[5] As the Standards for Consideration of Clemency make clear, OPA's "investigation" is intended neither to "prevent[] risks to national security and violations of the criminal laws," nor to "apprehend[] those who do violate the laws." *Id*. at 420. In fact, the event that triggers OPA's consideration is a request from an individual asking to be investigated—hardly how "law enforcement" is effectuated.

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[5]DOJ, Standards for Consideration of Clemency Petitions § 1-2.112, *available at* www.justice.gov/pardon/petitions.htm (emphasis added); *see* DOJ, Pardon Information and Instructions, at "Scope of investigation," *available at* www.justice.gov/pardon/pardon_instructions.htm.

For this reason, the decision in *Binion v. DOJ*, 695 F.2d 1189 (9th Cir. 1983), which held that OPA's investigation of a pardon application can be termed "information compiled for the purpose of a criminal investigation" for Privacy Act purposes, *id*. at 1193, does not support DOJ here. The file on any particular applicant will likely include records from a prior criminal investigation, but OPA, again, does not perform a criminal investigation.

In fact, DOJ's papers are unclear about "the type or extent of the investigative steps taken by OPA in a given case," Bollwerk Decl. ¶ 4 (App. 50), suggesting that, at least in commutation cases, OPA gathers no information apart from what is submitted by the applicant. The wording of the Bollwerk Declaration is vague about how often OPA requests input from "officials or other persons connected with the case," *see id.* ("*when* OPA has requested the views of various officials ...") (emphasis added), and how often OPA asks the FBI to conduct a background check, *see id.* ("in cases in which OPA has asked the [FBI] to conduct a background investigation ..."). Similarly, Ms. Bollwerk states that when an applicant seeks commutation, the warden where the applicant is incarcerated "sometimes forwards" with the application "copies of the judgment of conviction, the presentence report, and the applicant's most recent prison progress report." *Id*. ¶ 9 (App. 53). The declaration then states that, "in many cases," when the warden has not sent these documents, OPA will ask the warden for them.

Id. Likewise, the declaration states that, with respect to applicants for commutation, OPA "*may* obtain additional information and records,"such as medical and legal records and media reports. *Id*. (emphasis added). The declaration thus leaves open the question whether there are applications, particularly applications for commutation, as to which OPA does not seek any information aside from what is submitted with the application and, if so, how often that happens. If OPA takes no steps to compile records, it cannot credibly claim that its records are "compiled for law enforcement purposes."

Binion also held that exemption 7(C) applied to records compiled as part of FBI investigations into pardon applicants. The Ninth Circuit stated that FBI pardon investigations were undertaken as part of the agency's law enforcement duties because "[o]ne purpose of pardon investigations is to determine whether the applicant is currently engaging in criminal activity and thus should be ineligible for a pardon." 695 F.2d at 1194. This holding is incorrect. Although information showing that the applicant is currently engaged in criminal activity would lead OPA to recommend against granting a pardon, the *purpose* of the pardon investigation is not to uncover criminal activity, as, again, DOJ's clemency standards make clear. Moreover, as this Court has explained, material that was not compiled for a law enforcement purpose, and, therefore, falls outside the scope of exemption 7(C), is not brought within the

scope of the exemption on the theory that the material "might reveal evidence that later could give rise to a law enforcement investigation." *Jefferson*, 284 F.3d at 177 (quoting *Kimberlin v. DOJ*, 139 F.3d 944, 947 (D.C. Cir. 1998)). Further, even if some FBI investigations of pardon applicants were for law enforcement purposes, Mr. Lardner's request does not seek records of any such investigations, and the list of denied applicants does not reflect any FBI investigation. If a person applied and was denied, his name is on the list without regard to whether, in the course of OPA's consideration of whether to recommend clemency, the FBI investigated whether that person was committing any ongoing criminal activity.

In any event, in *Binion*, the information at issue was the names of confidential sources in the file that the FBI had compiled on Mr. Binion. Whether or not that information was "compiled for law enforcement purposes," the records sought by Mr. Lardner are of an entirely different nature. He seeks an OPA list of unsuccessful applicants that exists independently of the clemency file on any applicant and of whether an FBI investigation contributed to the content of the file. Opinion 30 (App. 168).

In short, the investigation triggered by submission of a pardon application does not "focus directly on specific alleged illegal acts which could result in civil or criminal sanctions." *Jefferson*, 284 F.3d at 176-77. The illegal acts at issue are not

"alleged" illegal acts but *proven* ones. The agency's review does not "focus" on those acts, except in the context of assessing the broader question of the applicant's "worthiness for relief." *See* DOJ, Pardon Information and Instructions, *supra*. And the outcome of the process does not result in any "sanction" against the applicant: The applicant either obtains a benefit (clemency) or the status quo continues.

2. DOJ's argument that the list is a law enforcement record is essentially that its conclusion is "self-evident" and "clear beyond peradventure." DOJ Br. 41, 42. Yet its argument does not address the names themselves, but the consequences of a president's decision to grant or deny clemency. DOJ states that "the very records at issue are those accessed to satisfy law enforcement that a conviction stands, permitting an accurate assessment of an offender's present legal disabilities. *Id*. at 41. OPA has offered no evidence, however, that the purpose of the database is to aid law enforcement personnel, even assuming that checking the list to see whether someone had been granted clemency were a law enforcement purpose. In addition, although disclosing the names using the database would be the most efficient way for OPA to respond to Mr. Lardner's FOIA request, those names exist in other records as well, such as, for example, on the lists of denied applications sent from the White House to OPA. *See* Lardner Decl., Exh. F (App. 37-39). DOJ offers no argument that these other records may be used in future law enforcement activities. And "[t]he fact that

OPA freely releases the names of unsuccessful clemency applicants to the general public" upon specific request runs counter to its claim that the records must be withheld "'to prevent premature disclosure of investigatory materials.'" Opinion 33 (App. 171) (quoting *FBI v. Abramson*, 456 U.S. 615, 621 (1982)).

Finally, the "agency's broad claim that its files are law enforcement files—without addressing the particular records at issue—is insufficient to establish that the specific documents in dispute within those files are law enforcement records under FOIA." *Id*. at 29 (App. 167) (citing *Campbell v. DOJ*, 164 F.3d 20, 32 (D.C. Cir. 1998)). "OPA has not provided any meritorious reason why the *actual* records at issue in this litigation . . . should be considered law enforcement records for purposes of FOIA." *Id*. at 33 (App. 171) (emphasis in original).

Attempting to respond to the district court's statement that OPA "does not dispute . . . and has therefore conceded" that the requested information "exists independently of the clemency file," *id.* at 30 (App. 168), DOJ asserts (at 42) that the names are part of a "system of records." That assertion is a non sequitur. A system of records, as defined by the Privacy Act, "means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). That the agency can search its

database by individual name does not rebut, or even address, the point that the database is independent of the clemency files. And even if the names exist in a system of records that contains other records compiled for law enforcement purposes, the database or paper lists of names would not thereby be transformed into records compiled for law enforcement purposes. Moreover, the Privacy Act permits disclosure of records in a system of records when required by FOIA or for a "routine use." *Id.* § 552a(b)(2), (3). So if no exemption applies here, FOIA requires, and the Privacy Act permits, disclosure. And consistent with its notices to applicants, policies, and regulations, OPA has expressly stated that one "routine use" of the system of records may be disclosure to "the news media and the public." *See* 67 Fed. Reg. 66,417, 66,418 (2002) (App. 85-86) ("Routine uses of records maintained in the system," at (i) & (*l*)).[6]

B. Even If The Records Could Properly Be Deemed Law Enforcement Records, Exemption 7(C) Would Not Justify Withholding Here.

Like exemption 6, exemption 7(C) permits withholding where privacy interests outweigh public interests. The standard for withholding "is somewhat broader" under exemption 7(C) than under exemption 6 because, under 7(C), a greater public interest is needed to outweigh the privacy interest. *Reporters Comm.*, 489 U.S. at 773.

[6]The system of records notice was amended in 2007, without affecting the pertinent portion.

However, "the difference between the standards for the two exemptions "is of little import" except when analyzing "the magnitude of the public interest that is required to override" the protected privacy interest. *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496 n.6 (1994). If there is no real privacy interest in the first place, that difference never comes into play, and neither exemption applies. *See United Am. Fin., Inc. v. Potter*, 531 F. Supp. 2d 29, 46 (D.D.C. 2008) ("the privacy inquiry of Exemptions 6 and 7(C)" is "essentially the same") (quoting *Judicial Watch*, 365 F.3d at 1125). Thus, the de minimis privacy interest here requires disclosure under exemption 7(C), as well as under exemption 6, even if the records sought had been compiled for law enforcement purposes.

Although DOJ has abandoned the argument on appeal, below it argued briefly that the public interest did not satisfy *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991). *SafeCard* held that "unless access to the names and addresses of private individuals appearing in files within the ambit of exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *Id.* at 1206 (finding "insubstantial" public interest in "names and addresses of potential witnesses or litigants in SEC stock manipulation investigations"). In *Favish*, 541 U.S. 157, the Supreme Court took a broader view of the public interest necessary to satisfy

exemption 7(C), recognizing that the public interest in showing that an "investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties" may satisfy exemption 7(C), *id*. at 173, but suggesting that other public interests may also satisfy this exemption. *Id*. (noting that, in the particular case before it, "the justification *most likely* to satisfy Exemption 7(C)'s public interest requirement" is that the records would show that officials acted negligently or improperly, but not suggesting that 7(C) could not be satisfied by other justifications in other cases) (emphasis added). Since then, this Court also has suggested that the other public interests might satisfy exemption 7(C). *See Sussman v. U.S. Marshals Serv*., 494 F.3d 1106, 1115 (D.C. Cir. 2007) ("Names of private individuals are thus *generally* exempt from disclosure except, *for example*, where they are required to confirm or refute allegations of improper government activity.") (emphasis added); *Boyd v. Criminal Div. of DOJ*, 475 F.3d 381, 387 (D.C. Cir. 2007) ("*If* the public interest is government wrongdoing, ...") (emphasis added). A categorical rule seems inconsistent with these descriptions of the 7(C) framework.

Even assuming that the list of names is a record compiled for law enforcement purposes, and even assuming that the *SafeCard Services* rule applies, the names at issue here appear in records very different from the law enforcement records at issue in *SafeCard Services*. Here, the OIG report provides evidence of wrongdoing, and

disclosure of the requested records would shed further light on this highly "inappropriate" and arguably "unconstitutional" approach to processing clemency applications. Second Lardner Decl. ¶ 6 (App. 111, 112). To the extent that *SafeCard Services* applies, its rule is satisfied by the OIG report.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

/s/

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April 26, 2010

RULE 32(a)(7)(C) CERTIFICATION

Using the word count provided on our word processing system, I hereby certify that the above brief was produced in WordPerfect using 14-point Times New Roman typeface and contains 8,783 words.

/s/
Allison M. Zieve

April 26, 2010

CERTIFICATE OF SERVICE

I, Allison M. Zieve, certify that on this 26th day of April, 2010, I caused a copy of the foregoing brief to be filed electronically with the Court via the Court's CM/ECF system, and caused the original plus eight copies to be delivered to the Clerk of the Court by hand delivery within two business days. Service will be made on all parties required to be served via the Court's CM/ECF system.

/s/

Allison M. Zieve