UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE LARDNER, Plaintiff, v. DEPARTMENT OF JUSTICE, Defendant.	))))))))	Case No. 08-1398 (CKK)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff George Lardner hereby moves for summary judgment on the ground that there is no genuine issue of disputed material fact and that he is entitled to judgment as a matter of law. Specifically, he is entitled to the records withheld in response to his Freedom of Information Act request for the identities of applicants for pardons and applicants for commutations whose applications have been denied since President George W. Bush took office. In support of this motion, plaintiff submits the accompanying memorandum, a statement of material facts as to which there is no genuine dispute, the declaration of George Lardner, and a proposed order.

Dated: November 3, 2008

Respectfully submitted,

/s/

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case arises from a Freedom of Information Act ("FOIA") request submitted by plaintiff George Lardner to the Office of the Pardon Attorney ("OPA") at the Department of Justice ("DOJ"). Mr. Lardner sought records disclosing the identities of pardon applicants and commutation applicants whose applications have been denied since President George W. Bush took office. DOJ denied the request in full, citing FOIA's personal privacy exemptions, 5 U.S.C. §§ 552(b)(6) & (7)(C). However, DOJ's list or database of unsuccessful clemency applicants was not compiled for law enforcement purposes, as required under exemption 7(C). In addition, because clemency applicants have no reasonable expectation of privacy in the fact that they have sought and been denied clemency, 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 Judge Bates held presented "a paradigmatic case for disclosure." *Lardner v. DOJ*, Civ. A. No. 03-0180 (JDB), 2005 WL 758267, *17 (D.D.C. Mar 31, 2005) ("*Lardner I*"). Accordingly, the Court should grant Mr. Lardner's motion for summary judgment.

STATEMENT OF THE CASE

Mr. Lardner, a retired Washington Post reporter, is writing a book on the use of the presidential pardon power. Lardner Decl. ¶ 1. 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 requested under FOIA the "identities of all those denied pardons and, separately, all those denied commutations since President George W. Bush took

office." *Id.*, Exh. A. Mr. Lardner believes that the information is contained in a list or database maintained by OPA that includes the name of each unsuccessful applicant, the offense for which a pardon or commutation was sought, the date of denial, and possibly other information. *Id.* ¶ 7 & Exh. F. His FOIA request explained that, in a prior FOIA case, this 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." *Id.*, Exh. F (quoting *Lardner I* at *17).

By letter dated May 22, 2008, OPA denied Mr. Lardner's FOIA request, citing exemptions 6 and 7(C), and *Judicial Watch v. DOJ*, 365 F.3d 1108, 1124-26 (D.C. Cir. 2004). Lardner Decl., Exh B. 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.*

Mr. Lardner appealed the denial of his FOIA request by letter dated June 9, 2008. *Id.*, Exh. C. 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. After Mr. Lardner filed this case, DOJ informed him that it was closing the appeal file. *Id.*, Exh. D.

ARGUMENT

I. FOIA's Privacy Exemptions, 6 And 7(C), Do Not Justify DOJ's Withholding Of The Names Of Unsuccessful Applicants For Clemency.

OPA asserts that it need not disclose the identities of unsuccessful clemency applicants because the records are exempt from disclosure under exemption 6, which exempts "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), which exempts "records or information compiled for law enforcement purposes . . . [that] could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(C). DOJ bears the burden of showing that one of the exemptions applies. *Id.* § 552(a)(4)(B).

Neither exemption 6 nor exemption 7(C) justifies withholding the records sought by Mr. Lardner. The government's exemption 6 claim has already been litigated and decided against it in prior litigation with Mr. Lardner, and thus the government is collaterally estopped from trying to relitigate the issue. Exemption 7(C) does not apply here because the records at issue were not "compiled for law enforcement purposes." Furthermore, both the exemption 6 and 7(C) claims lack merit for the independent reason that, as this Court has already found, unsuccessful applicants for clemency cannot reasonably have any expectation of privacy in the fact that their applications were denied. 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 Court should therefore grant plaintiff's motion for summary judgment and order OPA to disclose the records listing unsuccessful clemency applicants.

A. DOJ's Exemption 6 Argument Is Barred By Collateral Estoppel.

In *Lardner I*, DOJ argued that exemption 6 justified the redaction of the names of unsuccessful pardon applicants from records produced in response to a FOIA request submitted by Mr. Lardner. This Court rejected that argument, finding that disclosure *would not* reveal private information and *would* serve the public interest. 2005 WL 758267, at *16-18. Indeed, in rejecting DOJ's assertion of exemption 6, the Court called the names of unsuccessful pardon applicants "a paradigmatic case for disclosure." *Id*. at *17. The parties fully litigated this issue; Judge Bates' decision was a final judgment, and neither party appealed.

Because the applicability of exemption 6 to this information has previously been litigated and decided between the two parties to this suit, collateral estoppel requires that this issue be decided for Mr. Lardner here. *See Stonehill v. IRS*, 534 F. Supp. 2d 1, 6 (D.D.C. 2008) (applying collateral estoppel against the government in a FOIA case). As the D.C. Circuit has held, when a district court in a FOIA case decides an issue against the defendant agency and the agency does not appeal, issue preclusion "bars the relitigation of specific issues decided in a prior proceeding between the same parties." *Cotton v. Heyman*, 63 F.3d 1115, 1119 (D.C. Cir. 1995).

B. Exemption 7(C) Does Not Apply Here Because The Records Were Not "Compiled For Law Enforcement Purposes."

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, accordingly, exemption 7(C) does not justify OPA's denial of Mr. Lardner's FOIA request.

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) 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, for two reasons.

1. "[T]he statutory scheme of the FOIA very clearly indicates that exemptions from disclosure apply only to documents, and not to the use of the information contained in such documents." *Abramson v. FBI*, 658 F.2d 806, 813 (D.C. Cir. 1980). "[W]hen information has been recompiled in a new document for a new purpose, the new document must qualify independently

for any exemptions from disclosure under the FOIA." *Id*. Thus, in *Abramson*, although the underlying FBI files used to prepare summaries for the White House were exempt from disclosure under exemption 7(C), the D.C. Circuit held that the summaries were not exempt under 7(C) because they were not "investigatory record[s] compiled for law enforcement purposes." *Id*. at 814; *see also Schoenmann v. FBI*, __ F. Supp. 2d __, 2008 WL 4053457, at *22 (D.D.C. Sept. 1, 2008) (inquiry under 7(C) looks to "how and under what circumstances the requested files were compiled") (citing *Jefferson*, 284 F.3d at 176-77) (internal quotation marks omitted).

Similarly, here, 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, is not compiled for a "law enforcement" purpose. Indeed, 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 not compiled for a "law enforcement" purpose, but for historical record-keeping.[1] Accordingly, DOJ's exemption 7(C) claim fails at the threshold.

2. In addition, although OPA "investigates" 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,

[1]As an administrative matter, OPA's creation of lists or databases documenting clemency denials may assist OPA in identifying individuals who are applying for clemency for a second time. *See* DOJ, Pardon Information and Instructions, *available at* http://www.usdoj.gov/pardon/pardon_instructions.htm (individual denied clemency may submit new application two years from date of denial). That function cannot properly be characterized as a law enforcement purpose.

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.[2] Thus, 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." *Pratt*, 673 F.2d 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.[3]

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. Although, as in *Binion*, the file on any particular applicant will likely include records from a criminal investigation, OPA's investigation itself is not such an investigation, as the Standards for Consideration of Clemency Petitions make clear. *See supra* note 2. In addition, the Privacy Act language on which *Binion* relies does not provide that the activities of pardon authorities are

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

[3]Notably, in *Lardner I*, DOJ did not even 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); *cf. 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).

undertaken for "law enforcement purposes," as required under exemption 7(C), but rather that their activities "pertain" to "enforcement of criminal laws."[4] OPA's work may "pertain" to "enforcement of the criminal laws," in that it "has a connection with or reference to" the criminal conviction underlying the individual's application. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001) (defining "relate to" under ERISA) (citation omitted); *see Black's Law Dictionary* (8th ed. 2004) (defining "pertain" as "to relate to, to concern"). However, OPA's work is not for the "purpose" of law enforcement, as discussed above. And as the Privacy Act further provides, if a record is not exempt under FOIA, it cannot be withheld from a FOIA requester based on the Privacy Act. 5 U.S.C. § 552a(t)(2).

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

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[4]The Privacy Act provides that the head of an agency may exempt a system of records from disclosure if the system of records is

> maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

5 U.S.C. § 552a(j)(2).

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 the D.C. Circuit has explained, material that was not compiled for a law enforcement purpose, and thus 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)). Finally, 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 those files were "compiled for law enforcement purposes," the records sought by Mr. Lardner are of an entirely different nature. He seeks an OPA list or database of unsuccessful applicants, which exists independently of the clemency file on any applicant.

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." *Schoenmann*, 2008 WL 4053457, at *22 (quoting *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." 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.

C. If The Court Reached The Exemption 6 And 7(C) Balancing Test, The Exemptions Would Not Justify Withholding The Names Of Unsuccessful Clemency Applicants.

Because collateral estoppel precludes DOJ from relitigating its exemption 6 claim, and because the names of unsuccessful clemency applicants fail to satisfy exemption 7(C)'s threshold inquiry, the Court need not undertake a balancing of public and private interests. However, if the Court were to reach the balancing, neither exemption would protect the requested records from disclosure because disclosure would not constitute an "unwarranted" or "clearly unwarranted" invasion of privacy.

1. Disclosing The Identities Of Unsuccessful Clemency Applicants Does Not Implicate A Privacy Interest Under Exemption 6 Or 7(C).

For either exemption 6 or 7(C) 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 Ag.*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (discussing standard under exemption 6) (quoting *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)); *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). "[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).[5]

[5]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. *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773 (1989). However, "the (continued...)

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. First, "[i]t is . . . difficult to understand . . . how the mere fact that an individual has sought a pardon reveals 'sensitive personal information' about the individual." *Lardner I*, 2005 WL 758267, at *16 (quoting *Judicial Watch*, 365 F.3d at 1126; *Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991)). In denying the FOIA request, OPA cited *Judicial Watch*, 365 F.3d 1108. There, however, the requester sought pardon files themselves, which contained "non-public personal information about the applicants and their lives before and after their convictions and personal information about third parties." *Id*. at 1124. In contrast, Mr. Lardner has not requested the files. In fact, producing the requested information would not require the Pardon Attorney to open any individual's file. Notably, as this Court observed the last time that OPA cited this case to try to justify withholding the names of unsuccessful clemency applicants, "[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." *Lardner I*, 2005 WL 758267, at *16 (emphasis in original).[6]

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[5](...continued)
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. Federal Labor Relations Auth*., 510 U.S. 487, 496 n.6 (1994).

[6]If OPA's list or database included some information as to which applicants had a reasonable expectation of privacy, that information could be redacted. *See infra* pages 17-18 . However, Mr. Lardner does not believe that the list contains private information. *See* Lardner Decl., Exh. F.

Second, there is no reasonable possibility that the disclosure of the information requested will have ramifications for the unsuccessful pardon 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.

Id. at *17 (footnotes omitted). Moreover, President Bush has granted clemency so few times that no stigma is attached to having been denied. As the Pardon Attorney stated in a recent letter denying 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. D. Thus, even if some stigma existed, this "asserted stigma of rejection is significantly diluted when shared among" hundreds or thousands (*see id.*, Exh. F) of denied applicants. *Physicians Comm. for Responsible Med. v. Glickman*, 117 F. Supp. 2d 1, 6 (D.D.C. 2000) (CV's of nominees not selected for USDA advisory committee not exempt under exemption 6); s*ee also Kurzon v. Dep't of Health & Human Servs*., 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").

Third, applicants know from the start that OPA gives no assurance of confidentiality, and thus they cannot have any reasonable expectation of privacy. DOJ's clemency regulations warn 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. Clemency applicants "could hardly read [the] regulation as a firm promise of anonymity." *Lardner I*, 2005 WL 758267, at *16. *Cf. Physicians Comm. for Responsible Med.*, 117 F. Supp. 2d at 6 (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").

Indeed, on a page entitled "IMPORTANT NOTICE To Applicants for Pardon," OPA informs clemency applicants that:

> 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* http://www.usdoj.gov/pardon/privacy_statement_pardon.htm (emphasis added). This practice follows from DOJ's published order addressing routine uses of various records systems, which states:

> Disclosure of records in the clemency file of an individual who has applied for . . . clemency, and information contained in such documents, may be made to the following parties when it has been determined by OPA that such a need exists:
> . . . .
> (l) A member of the public who has requested information concerning a specific named person, provided that such disclosure shall be limited to: whether a clemency application has been filed, and if so, the date on which it was filed, . . . the decision of the President to grant or deny clemency and the date of that decision, the administrative closure of a clemency request and the date of such closure.

67 Fed. Reg. 66417, 66417-18 (2002) (AAG/A Order No. 295-2002).

OPA's stated policy of 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 opposed to the application. Yet because there is no obvious distinction in terms of privacy interests between disclosing that one *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.[7]

Finally, the identities of successful applicants are routinely disclosed to the public. *See* DOJ, Privacy Statement for Pardons, *supra* page 13;[8] *e.g.*, DOJ, Clemency Recipients, http://www.usdoj.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

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[7]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. While 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." DOJ, Privacy Statement for Pardons, *supra* page 13. Moreover, OPA regulations provide that, in some cases, DOJ will contact victims of the offense for which clemency is sought to inform them that the clemency application is pending. 28 C.F.R. § 1.6(b). And clemency applications must include three character references from non-family members, whom OPA does not require to make any promise of confidentiality. DOJ, Pardon Information and Instructions, *supra* note 1, at "Character references."

[8]"[A]fter the President has taken final action on an application, a public affairs notice is prepared describing each grant of clemency (and may be prepared for a denial of clemency in cases of substantial public interest). A copy of each warrant of clemency is maintained in this office as a public and official record. Copies of the public affairs notices, clemency warrants, and lists of recent clemency recipients are routinely made available to the public upon request."

clemency was granted, the district where each was convicted, the year in which the person was sentenced, and a description of the offense. *See* DOJ, Pardons Granted by President George W. Bush, http://www.usdoj.gov/pardon/bushpardon-grants.htm. It is not clear "what it is about the names of unsuccessful applicants that," in contrast to successful applicants, "uniquely implicates personal information sensitive enough to bring the records within" exemption 6 or 7(C). *Lardner I*, 2005 WL 758267, at *17 (discussing exemption 6); *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. There is an obvious public element to the process and the results, as recognized in the NIH practice of releasing both the applications and identities of funded grant applicants.").

Because clemency applicants have no reasonable expectation of privacy in the fact that they were denied clemency, the exemption 6 and 7(C) inquiry is at an end. *See Nat'l Archives and 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"). Neither exemption applies here.

2. The Public Interest In Disclosure Outweighs Any Privacy Interest Here.

If the Court were to find that applicants have a non-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)). Where a privacy interest is shown, a FOIA requester must "show that the public interest sought to be

advanced is a significant one," and that "the information is likely to advance that interest." *Boyd v. Criminal Div. of DOJ*, 475 F.3d 381, 387 (D.C. Cir. 2007) (quoting *Favish*, 541 U.S. at 172). "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." *Multi AG Media*, 515 F.3d at 1231 (alterations in original) (quoting *Reporters Comm.*, 489 U.S. at 773).

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 explained: "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 *Reporters Comm.*, 489 U.S. at 773). As held in *Lardner I*, for purposes of exemption 6, this public interest outweighs any minimal privacy interest in the requested records.

With respect to exemption 7(C), in *SafeCard Services v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), the court of appeals stated 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"). However,

the Supreme Court's opinion in *Favish*, 541 U.S. 157, reflects a broader view of the public interest necessary to satisfy exemption 7(C). In *Favish*, the Court recognized 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 the Court's decision suggests 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, the D.C. Circuit has also 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*, 475 F.3d at 387 ("*If* the public interest is government wrongdoing, ...") (emphasis added). Because a categorical rule seems inconsistent with these descriptions of the 7(C) framework, and because the names at issue here appear in records very different from the law enforcement records at issue in cases such as *SafeCard Services*, such a rule should not constrain the exemption 7(C) balancing here, assuming that the Court finds a privacy interest that necessitates a balancing at all. In this case, the strong public interest recognized in *Lardner I* requires release of the requested records.

II. Even If An Exemption Applied, DOJ Has Not Released Segregable Portions Of The Withheld Records.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Therefore, "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions." *Mead Data Central, Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir.1977); *Gutman v. DOJ*, 238 F.3d 284 (D.D.C. 2003) (FOIA's segregability requirement applies to all documents and all exemptions).

Where exemption 6 or 7(C) applies, it protects from disclosure only the specific information covered by the exemption, that is, names, addresses, and other identifying information. *Maydak v. DOJ*, 254 F. Supp. 2d 23, 43 (D.D.C. 2003) (quoting *Mays v. DEA*, 234 F.3d 1324, 1327 (D.C. Cir. 2000)). Here, DOJ has not released any portion of any record in response to Mr. Lardner's request. Mr. Lardner believes that DOJ maintains a list or database of pardon applicants and commutation applicants whose applications have been denied. Lardner Decl. ¶ 7. In fact, a document released in response to another FOIA request (for the file of a specific applicant whose pardon was denied) consists of a list of names, file numbers (which appear to indicate the year in which the application was submitted), the offense for which clemency was sought, and the type of clemency sought. *See id*., Exh. F. Just as DOJ did with that document, so too here, DOJ could have redacted the names and released the non-exempt portions of the database print-out or list, even if the names were protected from disclosure by exemption 6 or 7(C). These exemptions do not even arguably justify withholding information on these lists that does not identify an individual.

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment should be granted.

Dated: November 3, 2008

Respectfully submitted,

/s/

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE LARDNER, Plaintiff,	)	
	)	Case No. 08-1398 (CKK)
v.	)	
DEPARTMENT OF JUSTICE, Defendant.	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

1. George Lardner is writing a book on use of the presidential pardon power. Lardner Decl. ¶ 1.

2. By letter dated April 10, 2008, Mr. Lardner requested from the Office of the Pardon Attorney at the Department of Justice ("DOJ") the identities of pardon applicants and commutation applicants whose applications were denied since President George W. Bush took office. *Id*., Exh, A.

3. By letter dated May 22, 2008, DOJ denied Mr. Lardner's FOIA request and cited exemptions 6 and 7(A) as the basis for withholding all responsive records in their entirety. *Id.*, Exh. B.

4. By letter dated June 9, 2008, Mr. Lardner appealed the denial of his FOIA request. *Id*., Exh. C.

5. DOJ did not substantively respond to the appeal, and, after Mr. Lardner filed this case, it closed the appeal file. *Id*., ¶ 5 & Exh. D.

6. OPA's recommendation whether to gant or deny clemency 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," and the views of officials such as the prosecuting attorney and judge. DOJ, Standards for Consideration of Clemency Petitions § 1-2.112, *available at* http://www.usdoj.gov/pardon/petitions.htm; *see* DOJ, Pardon Information and Instructions, *available at* http://www.usdoj.gov/pardon/pardon_instructions.htm, at "Scope of Investigation."

7. DOJ's clemency 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.

8. OPA informs clemency applicants that:

> 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* http://www.usdoj.gov/pardon/privacy_statement_pardon.htm.

9. DOJ's published order addressing routine uses of various records systems, states:

> Disclosure of records in the clemency file of an individual who has applied for . . . clemency, and information contained in such documents, may be made to the following parties when it has been determined by OPA that such a need exists:
> . . . .
> (l) A member of the public who has requested information concerning a specific named person, provided that such disclosure shall be limited to : whether a clemency application has been filed, and if so, the date on which it was filed, . . . the

> decision of the President to grant or deny clemency and the date of that decision, the administrative closure of a clemency request and the date of such closure.

67 Fed. Reg. 66417, 66417-18 (2002) (AAG/A Order No. 295-2002).

10. OPA's practice has long been to tell a member of the public who calls to ask whether a particular individual has applied for clemency or to ask the status of an application whether or not that individual has applied and the status of the application. Lardner Decl. ¶ 9.

11. The issue whether the names of individuals whose pardon applications were denied by the President are protected from disclosure by FOIA exemption 6 was litigated to a final judgment in *Lardner v. DOJ*, No. Civ.A.03-0180(JDB). *See* 2005 WL 758267 (D.D.C. Mar 31, 2005).

12. The district court in *Lardner v. DOJ*, No. Civ.A.03-0180(JDB), held that exemption 6 does not exempt the names of unsuccessful pardon applicants from disclosure, characterizing the issue as "a paradigmatic case for disclosure." *Id*. at *17.

13. Disclosure of the identity of unsuccessful clemency applicants would "'shed light' on the exercise of the pardon power." *Id*. at *17 (quoting *Reporters Comm*., 489 U.S. at 773).

14. "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 *Reporters Comm*., 489 U.S. at 773).

15. The identities of successful applicants are routinely disclosed to the public. *See* DOJ, Clemency Recipients, www.usdoj.gov/pardon/recipients.htm (DOJ website listing pardons granted from 1989-2008).

16. DOJ's website lists pardons granted by President Bush; the list states the name of the person to whom clemency was granted, the district where each was convicted, the year in which the person was sentenced, and a description of the offense. *See* DOJ, Pardons Granted by President George W. Bush, http://www.usdoj.gov/pardon/bushpardon-grants.htm.

17. OPA maintains lists or databases of clemency applicants whose applications were denied. Lardner Decl. ¶ 7 & Exh. F.

18. OPA maintains a list of unsuccessful clemency applicants that includes the name of the applicant, the file number assigned by OPA, the offense for which clemency was sought, and the type of clemency sought. *Id.*, Exh. F.

Respectfully submitted,

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November 3, 2008