UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Allison M. Zieve
(DC Bar No. 424786)
Adina H. Rosenbaum
(DC Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff George Lardner

December 1, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Authorities on which we chiefly rely are marked with asterisks.

STATUTES

REGULATORY MATERIALS

MISCELLANEOUS

*Authorities on which we chiefly rely are marked with asterisks.

*Authorities on which we chiefly rely are marked with asterisks.

INTRODUCTION

This case concerns a Freedom of Information Act ("FOIA") request submitted by George Lardner to the Office of the Pardon Attorney ("OPA") at the Department of Justice ("DOJ"). On November 3, 2008, each party moved for summary judgment. Because Mr. Lardner's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's SJ Memo") addresses many of the arguments made in DOJ's motion papers, this opposition refers frequently to Plaintiff's SJ Memo, rather than repeating arguments already briefed to the Court.

Since the parties filed their summary judgment motions, they have resolved their dispute about segregability and the disclosure of information other than the names of unsuccessful applicants for clemency. The sole issue remaining in the case is whether the names of unsuccessful clemency applicants are protected from disclosure by FOIA exemption 6 or 7(C), 5 U.S.C. § 552(b)(6) & (7)(C).

STATEMENT OF FACTS

Mr. Lardner's statement of facts is set forth in Plaintiff's SJ Memo.

ARGUMENT

I. DOJ Is Barred By Collateral Estoppel From Relying On Exemption 6 In This Case.

In *Lardner v. DOJ*, No. 03-0180 (JDB), 2005 WL 758267 (D.D.C. Mar. 31 , 2005) ("*Lardner I*"), the Court rejected OPA's claim that exemption 6 justified withholding the names of unsuccessful pardon applicants and deemed the issue a "paradigmatic case for disclosure." *Id.* at *17. Remarkably, DOJ mentions *Lardner I* only once, in a footnote discussing exemption 7(C). But in making its exemption 6 argument, DOJ does not cite the case and does not mention that it litigated and lost this same issue in a case against this same plaintiff. As explained in Plaintiff's SJ Memo

(at 4), the exemption 6 issue presented here was litigated by these same parties and decided in *Lardner I* , and thus DOJ is collaterally estopped from prevailing on its exemption 6 claim here.

The Bollwerk Declaration acknowledges *Lardner I*, but suggests that the decision is not significant here because other issues were involved in the suit and because "the parties did not devote extended attention to this issue in their briefings to the Court." Bollwerk Decl. ¶ 30. These statements are inadequate to avoid the collateral estoppel effect of *Lardner I*. Whether or not she approves of DOJ's litigation effort in *Lardner I*, Ms. Bollwerk concedes that the issue was litigated and decided in the prior case.

In a footnote discussing exemption 7(C), DOJ states (at 12 n.5) that in *Lardner I* "the information sought was more limited" than here, but it does not explain what the limitations were or why they would help DOJ to avoid collateral estoppel. *Lardner I* did involve fewer names than are at issue in this case, but that difference is irrelevant to collateral estoppel. DOJ's footnote also states that the names of the unsuccessful applicants "were deemed to be related to the individuals' records in whose files they were found, and the record support for the agencies' analysis was not as detailed or focused as is the record before this Court." Again, DOJ does not explain how its assertions help it to avoid collateral estoppel. The first assertion does not alter the privacy/public interest balancing reflected in the Court's decision. The second suggests regret with DOJ's approach to litigating *Lardner I*. Although Mr. Lardner disagrees that DOJ did not defend this issue vigorously in *Lardner I*, that disagreement is irrelevant to the operation of collateral estoppel. No matter how DOJ chose to litigate the prior case, the issue presented here was litigated between these same parties and decided by the Court. That decision is final, and DOJ cannot relitigate the issue here.

II. The Requested Records Were Not "Compiled For Law Enforcement Purposes," As Required Under Exemption 7(C).

As explained in Plaintiff's SJ Memo (at 10), exemption 6 and exemption 7(C) both permit withholding where privacy interests outweigh public interests. However, exemption 7(C) applies to the narrower category of 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). DOJ has failed to meet that burden here.

To show that the 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"). 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).

1. In support of its claim that the records at issue were "compiled for law enforcement purposes," DOJ offers one sentence of argument and a few citations. First, DOJ (at 9) declares that the records at issue were compiled "in conducting investigations into the clemency requests of all applicants over the past eight years," and DOJ cites paragraph 26 of the Bollwerk Declaration, which

states that OPA would extract the requested information from records compiled for law enforcement purposes. However, "the 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*, 573 F. Supp. 2d 119, 146 (D.D.C. 2008) (inquiry under 7(C) looks to "'how and under what circumstances the requested files were compiled and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding") (quoting *Jefferson*, 284 F.3d at 176-77) (internal quotation marks omitted).

Here, whether or not Ms. Bollwerk is correct to characterize "clemency assessments" as being carried out for "law enforcement purposes," OPA does not need to extract the information from the clemency files to fulfill Mr. Lardner's request. Rather, OPA already maintains lists 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. As DOJ agrees (Bollwerk Decl. ¶ 6), such lists reflect decisions that were made, not by OPA, but by the President, and that were made months or more after OPA's consideration of each application concluded. Those lists were not compiled for a "law enforcement" purpose, but for historical record-keeping.

Second, DOJ cites *Binion v. DOJ*, 695 F.2d 1189 (9th Cir. 1983), which held that records maintained by OPA can be termed "information compiled for the purpose of a criminal investigation" for Privacy Act purposes. *Id*. at 1193. However, as DOJ's Standards for Consideration of Clemency Petitions make clear, OPA's evaluation of clemency applications cannot properly be termed a "criminal investigation." *See* DOJ, Standards for Consideration of Clemency Petitions § 1-2.112, *available at* http://www.usdoj.gov/pardon/petitions.htm; *see also* DOJ, Pardon Information and Instructions, "Scope of investigation," *available at* http://www.usdoj.gov/pardon/pardon_instructions.htm. (*Binion* is discussed in more detail Plaintiff's SJ Memo at 7-9.)[1]

As discussed more fully in Plaintiff's SJ Memo (at 6-7), although OPA "investigates" to decide whether to advise the President to grant or deny clemency to an individual applicant, the 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, OPA's consideration is triggered by a request from the applicant himself, asking to be investigated, not by a concern that the law has been broken or an effort to apprehend a criminal.

2. In addition, even if information gathered by OPA in connection with a clemency application were considered information "compiled for law enforcement purposes," DOJ's papers are unclear about "the type or extent of the investigative steps taken by OPA in a given case," Bollwerk Decl. ¶ 4, 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

---

[1]DOJ also cites *Associated Press v. DOJ*, No. 06-1758, 2007 WL 737476 (S.D.N.Y. 2007). That case involved a FOIA request for pardon applications of John Walker Lindh. Relying on the Privacy Act and *Binion*, the court held that exemption 7(C) applied. The discussion of *Binion* in Plaintiff's SJ Memo responds to *Associated Press* as well.

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. 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." For this reason as well, DOJ has thus failed to show that the exemption 7(C) threshold is met here.

III. Neither The Exemption 6 Nor The Exemption 7(C) Balancing Test Justifies Withholding The Requested Records.

Even if the Court were to reach the exemption 6 or 7(C) balancing test, neither exemption should protect the requested records from disclosure. As explained in Plaintiff's SJ Memo, for 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) (citation omitted); *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 v. DOJ*, 365 F.3d 1108, 1125 (D.C. Cir. 2004)). "[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 v. Horner*, 879 F.2d 873, 877 (D.C. Cir. 1989)).[2] In this case, the government has failed to meet its burden of showing that disclosure would satisfy this test.

A. Privacy Interest

Briefly addressing the privacy interests implicated by disclosure of the identities of unsuccessful clemency applicants, DOJ declares that disclosure would effect a "double stigma of both the fact of an individual's federal criminal conviction (recognized as significant in *Reporters Comm*.), and the fact that the individual applied for clemency *and was deemed unworthy of clemency*." DOJ Memo 7-8 (emphasis in original). To begin with, the question whether denial of clemency stigmatizes an applicant has already been litigated between these parties and decided by the Court, which held that "denial of a pardon application 'is not so rare an occurrence as to stigmatize the [unsuccessful] applicant.'" *Lardner I*, 2005 WL 758267, * 17 n.29 (case citation omitted; citing DOJ website); *see also* Plaintiff's SJ Memo 12 ("Presidents have granted very few

[2]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 the Press*, 489 U.S. 749, 773 (1989). 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. Federal Labor Relations Auth*., 510 U.S. 487, 496 n.6 (1994).

pardons in recent times, and the decision in your case does not reflect adversely on the progress you have made toward rehabilitation since your conviction.") (quoting Lardner Decl., Exh. D (OPA letter to unsuccessful applicant)).

Moreover, as discussed in Plaintiff's SJ Memo (at 11-15), clemency applicants cannot reasonably expect that OPA will not disclose these facts. Indeed, DOJ concedes that all applicants are informed that "*[u]pon request, we advise anyone who asks whether a named person has been granted or denied clemency*." DOJ Exh. E ("IMPORTANT NOTICE To Applicants for Pardon") (italics in original) (also available at DOJ, Privacy Statement for Pardons, http://www.usdoj.gov/pardon/privacy_statement_pardon.htm). "In addition, the pendency of an application is confirmed *to anyone who asks*, unless extraordinary considerations of privacy are presented in a particular case . . . ." *Id*. (emphasis added). Accordingly, DOJ informs each prospective applicant that, if such extraordinary privacy considerations are present, the applicant "should so inform us in writing when [he or she] submits the application." *Id*.

In addition to the "IMPORTANT NOTICE" from DOJ to applicants, and as discussed at greater length in Plaintiff's SJ Memo, DOJ's clemency regulations warn applicants that clemency petitions and other clemency records may not be kept confidential. *See* Rules Governing Petitions for Executive Clemency, 28 C.F.R. § 1.5 (DOJ Exh. A). As the Court stated in *Lardner I*, clemency applicants "could hardly read [the] regulation as a firm promise of anonymity." *Lardner I*, 2005 WL 758267, at *16. And DOJ's order addressing routine uses of various records systems further makes clear that applicants should have no expectation of privacy in the information sought by Mr. Lardner. *See* Plaintiff's SJ Memo 13 (quoting 67 Fed. Reg. 66417, 66417-18 (2002) (AAG/A Order No. 295-2002) (also reproduced as DOJ Exh. D)).

Finally, and as discussed in Plaintiff's SJ Memo, the identities of successful applicants are routinely disclosed to the public. *See* "IMPORTANT NOTICE," DOJ Exh. E (also quoted in Plaintiff's SJ Memo 14 n.8); *e.g.*, D. Riechmann, *Bush pardons 14 and commutes 2 prison sentences*, Associated Press, Nov. 24, 2008 (listing names); DOJ, Clemency Recipients, http://www.usdoj.gov/pardon/recipients.htm (DOJ website listing pardons granted from 1989-2008). 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).

The Bollwerk Declaration only highlights that an applicant has no expectation that the fact that he or she has applied and the outcome of the application will be kept confidential. Her declaration explains that applicants sometimes raise privacy concerns, and some even withdraw their applications rather than risk disclosure. Bollwerk Decl. ¶ 24. However, "most clemency applicants who raise privacy concerns choose to pursue their requests for relief after being advised of OPA's disclosure practices." *Id*. ¶ 25. In other words, each applicant is someone who chose to pursue clemency after being informed by OPA that the fact of the application may be disclosed "to anyone who asks" and will certainly be disclosed if the application is successful.

Although Ms. Bollwerk acknowledges that OPA informs each applicant that he or she must make a showing that, in light of "extraordinary circumstances" present in his or her case, privacy interests "outweigh the public interest in having access to [the] information" whether a person has been granted or denied clemency, Bollwerk Decl. ¶ 20 (quoting OPA's Privacy Statement), notably absent from her declaration is any suggestion that any applicant denied clemency during the period identified in the FOIA request made such a showing. If an applicant did, that person's identity might

be protected from disclosure under exemption 6, but OPA's own Privacy Statement suggests that, in most circumstances, and outside the context of this litigation, OPA agrees that privacy interests do not outweigh the public interest in access to the names and application status of clemency applicants.

In addition, Ms. Bollwerk (at ¶ 25) notes concern that disclosure of the requested records would run afoul of the Privacy Act. That concern is unwarranted because the Privacy Act expressly provides that, 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).

DOJ's memorandum devotes 2½ of its 13 pages to a quotation from *Judicial Watch*, 365 F.3d at 1124-26. As the lengthy quotation itself makes clear, the records that were held exempt under exemption 6 in *Judicial Watch* were very different from those at issue here. The plaintiff there sought individual pardon applications, which included not only information such as "name, home address, social security number, citizenship, and physical characteristics," but also "a detailed account of [the applicant's] criminal history, substance abuse, occupational licensing history, and such personal biographical matters as family history, marital status, and the names, birth dates, custody, and location of the applicant's children. Information must also be provided on residences, employment history, military record, financial status, and medical history." *Id*. at 1125. The court further noted that "[a]pplicants generally also include a description of their lives since conviction, their mental and physical well-being, and emotional pleas for pardons, including letters from friends, family members, employers, and attorneys." *Id*. Mr. Lardner's request does not seek any such "detailed," "personal" information. Notably, DOJ does not offer a single sentence to explain how *Judicial Watch* bolsters its exemption 6 claim here. As Judge Bates stated in *Lardner I*, "[a]t no

point" in *Judicial Watch* "did the court even suggest that disclosure of the fact that an individual filed a petition for pardon, instead of the contents of the petition itself, amounts to an unwarranted invasion of the privacy of the applicant." 2005 WL 758267, * 16.

Similarly, DOJ is wrong to equate the records sought here with the rap sheet at issue in *Reporters Committee*. In holding that rap sheets are exempt from disclosure under exemption 7(C), the Supreme Court relied on "the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole." 489 U.S. at 764. *See also id.* at 765 (noting evidence of congressional "recognition of the power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within"). As observed in *Lardner I*, "[i]t would stretch *Reporters Comm*. well past recognition to apply it to a case where information is sought that does not *compile* sensitive information, but might only *remind* one of public but sensitive information." 2005 WL 758267, 17 n.30 (emphasis in original). Moreover, "defendant's reasoning would apply with equal force to successful pardon applicants," *id*., and yet DOJ always discloses the names of successful applicants. DOJ, Privacy Statement for Pardons, *supra* p.8; e.g. DOJ, Clemency Recipients, http://www.usdoj.gov/pardon/recipients.htm.

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").

B. Public Interest

Plaintiff's SJ Memo (at 15-16) discussed the public interest favoring disclosure, which outweighs any privacy interest present here. For its part, DOJ offers the conclusory sentence that disclosure of the names would shed no light on the agency's work, which "could only be adequately examined with the consideration of the details of each case." Def Memo 8 (citing Bollwerk Decl.). To begin with, this Court has already held that release of the names of unsuccessful pardon applicants presents "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.'" *Lardner I*, 2005 WL 758267, * 17.

Moreover, DOJ contradicts its own conclusion. Specifically, DOJ offers as an undisputed fact the statement that disclosure of the offense, sentence, date of sentencing, and date of the denial of clemency for unsuccessful applicants *would* "inform the public in a meaningful way about OPA's actions in processing clemency applications and assisting the President in the exercise of his constitutional authority." Statement of Material Facts ¶ 19. Although such information is no longer at issue in this case, *see* Stipulation, filed Nov. 20, 2008, DOJ's statement is nonetheless a concession that the "details of each case" are not necessary to provide "meaningful insight."

Like these other types of information, names themselves also can provide "meaningful insight." For example, in December 2007, DOJ's Office of the Inspector General ("OIG") completed a report on then-current Pardon Attorney Roger Adams, who had been Pardon Attorney since June 1998. Second Lardner Decl., Exh. G. That report stated that Mr. Adams had made "highly inappropriate" racial remarks about a Nigerian applicant named Chibueze Okorie. In discussing the comment with the OIG, Mr. Adams 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*. (OIG Report at 4). 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*. (OIG Report at 6-7). 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.[3] 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. Woodward* "suggests that using race or national origin as a basis for denying clemency would be unconstitutional." *Id*. (OIG Report at 5) (citing 523 U.S. 272, 289 (1998) (plurality), & *id*. at 292 (Stevens, J., concurring in part and dissenting in part)). Disclosure of the names of applicants would help to elucidate the extent to which this inappropriate consideration infected the pardon process in recent years.

DOJ relies on *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), to support withholding the names under a categorical rule providing that names of private individuals appearing in files compiled for law enforcement purposes are exempt under exemption 7(C) unless disclosure is necessary to confirm or refute compelling evidence of agency wrongdoing. *Id*. at 1206. This case is discussed in Plaintiff's SJ Memo at 16-17, which explains that the rule stated in *SafeCard Services* seems inconsistent with later descriptions of the 7(C) framework and that the records at issue here are very different from those at issue in that case. Furthermore, even assuming that the list of names

[3]The name "Chibueze" is an Igbo word, and Igbo is a language spoken primarily in south-eastern Nigeria. *See* http://www.behindthename.com/name/chibueze; http://www.uiowa.edu/~afric art/toc/people/Igbo.htm. "Okorie" is a common Nigerian surname.

is a record compiled for law enforcement purposes, and even assuming that the *SafeCard Services* rule applies, the OIG report provides evidence of wrongdoing by the Pardon Attorney, and disclosure of the requested records would shed further light on this "highly inappropriate" and arguably "unconstitutional" approach to processing clemency applications. To the extent that *SafeCard Services* applies here, its rule is satisfied by the OIG report.

In addition, the names would also 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*, Los Angeles Times, Apr. 2, 2001, at E1. As this Court has 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." *Lardner I*, 2005 WL 758267, at *17. Particularly in light of the OIG report, this information is of significant public interest. *Cf. Summers v. DOJ*, 517 F. Supp. 2d 231, 240 (D.D.C. 2007), *cited in* Def. Memo 11-12 (FOIA requester offered no reason why disclosure of names of FBI agents would shed light on agency's performance of its duties).

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiff's SJ Memo, defendant DOJ's motion for judgment on the pleadings or, in the alternative, for summary judgment, should be denied.

Dated: December 1, 2008

Respectfully submitted,

/s/

Allison M. Zieve
(DC Bar No. 424786)
Adina H. Rosenbaum
(DC Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff George Lardner

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S STATEMENT OF GENUINE ISSUES AND RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Plaintiff does not believe that there exist genuine issues of material fact that are necessary to be litigated in this case. Plaintiff believes that the case can be decided based on the facts set forth in his own statement of material facts, filed on November 3, 2008, and the cases and argument set forth in the Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's SJ Memo") and in Plaintiff's Opposition to Defendant's Motion ("Plaintiff's Opp.").

Plaintiff responds to the statement of material facts filed by defendant Department of Justice ("DOJ") as follows:

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.
6. Undisputed.
7. Undisputed.

8. Plaintiff agrees that the Bollwerk Declaration discusses the topic described in ¶ 8 of DOJ's Statement of Material Facts but disputes that Ms. Bollwerk's description is accurate. *See Lardner v. DOJ*, No. 03-0180 (JDB), 2005 WL 758267, at *17 (D.D.C. Mar. 31 , 2005); Plaintiff's SJ Memo 10-17, and cases and other material cited therein; Second Lardner Decl., Exh. G. In addition, Ms. Bollwerk's description, as characterized in DOJ's ¶ 8, sets forth a position on the disputed legal issue in the case, not a statement of fact.

9. Plaintiff disputes that disclosure of the names of unsuccessful clemency applicants "raises particularly troubling privacy issues and in effect constitutes a double stigma." *See* Plaintiff's SJ Memo 10-17, and cases and other materials cited therein; *Lardner v. DOJ*, 2005 WL 758267, at *17 n.29. Plaintiff agrees that disclosure would confirm that the applicant has a federal conviction and that the President has decided not to grant clemency to that applicant. In addition, DOJ's paragraph 9 reflects opinion and/or legal conclusions, not factual matters.

10. Disputed. This paragraph sets forth speculation that is not based on the expertise of the cited declarant and that is inconsistent with the Pardon Attorney's statement that denial of a pardon "does not reflect adversely on the progress . . . made toward rehabilitation." *See* Lardner Decl., Exh. E.

11. Plaintiff disputes that this paragraph sets forth a statement material to the disposition of this case. Plaintiff has insufficient information to know whether each applicant is "not well-known . . . but known within the circle of his own community."

12. Disputed. *See Lardner v. DOJ*, 2005 WL 758267, at *17; Plaintiff's SJ Memo 10-15, and cases and material cited therein. Plaintiff further states that this paragraph sets forth speculation that is not based on the expertise of the cited declarant.

13. Disputed. *See Lardner v. DOJ*, 2005 WL 758267, at *17; Plaintiff's SJ Memo 15-17; Plaintiff's Opp. 12-14, and cases and materials cited therein; Second Lardner Decl., Exh. G. Plaintiff further states that this paragraph sets forth opinion that is not within the expertise of the cited declarant. In addition, the question whether disclosure would serve the public interest is an aspect of the disputed legal issue in the case, not a statement of fact.

14. Plaintiff disputes that "[d]isclosure of the names of unsuccessful applicants would shed no meaningful light on DOJ's recommendation process or the President's decision-making in the exercise of the clemency power." *See Lardner v. DOJ*, 2005 WL 758267, at *17; Plaintiff's SJ Memo 16; Plaintiff's Opp. 12-14, and cases and materials cited therein; Second Lardner Decl., Exh. G. Plaintiff does not dispute that, *in this case*, disclosure of the names "has been deemed *by OPA* to constitute a clearly unwarranted invasion of the personal privacy of those applicants" (emphasis added), but he disputes that such disclosure is in fact a clearly unwarranted invasion of personal privacy and that OPA has generally deemed it to be one. *See* Plaintiff's SJ Memo 11-15, and cases and materials cited therein; Plaintiff's Opp. 7-11; Bollwerk Decl ¶ 19. In addition, whether disclosure would constitute a clearly unwarranted invasion of privacy is a disputed legal issue in the case, not a matter of fact.

15. Undisputed.

16. Plaintiff does not dispute that DOJ's advisory process *may* involve analysis of a variety of information. Plaintiff disputes that DOJ has presented evidence that its advisory process always involves such analysis. *See* Plaintiff's Opp. 5-6 (discussing Bollwerk Declaration).

17. Plaintiff agrees that knowing the name of any one unsuccessful clemency applicant *may* not provide insight into why that applicant was denied clemency. Plaintiff disputes that knowing

the name of an unsuccessful clemency applicant can never provide insight into why that individual's application was denied and disputes that knowing the names of all applicants denied clemency since President George W. Bush took office would not provide insight into the functioning of the executive pardon process. *See Lardner v. DOJ*, 2005 WL 758267, at *17; Plaintiff's SJ Memo 16; Plaintiff's Opp. 12-14, and cases and materials cited therein; Second Lardner Decl., Exh. G; *see also* Def's Statement of Mat. Facts ¶ 19.

18. Undisputed.

19. Undisputed.

20. Plaintiff does not dispute that DOJ has concluded that, in this case, the privacy interests of unsuccessful pardon and clemency applicants outweigh the public interest in disclosure of the identities of those applicants. Plaintiff disputes that DOJ's conclusion is correct. *See* Plaintiff's SJ Memo 10-17, and cases and materials cited therein; Lardner Decl., Exh. E; Plaintiff's Opp. 7-14, and cases and materials cited therein; Second Lardner Decl., Exh. G. In addition, the question whether individuals' privacy interests outweigh the public interest in disclosure is a disputed legal issue in the case, not a matter of fact.

Dated: December 1, 2008

Respectfully submitted,

/s/

Allison M. Zieve
(DC Bar No. 424786)
Adina H. Rosenbaum
(DC Bar No. 490928)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Counsel for Plaintiff George Lardner