UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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

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Plaintiff George Lardner and defendant Department of Justice ("DOJ") each have filed a motion for summary judgment. Because the motions address the same issues and the briefing on the motions is proceeding concurrently, Mr. Lardner will not repeat here arguments made in his December 1 opposition to DOJ's motion. As discussed in that opposition, the memorandum in support of Plaintiff's motion for summary judgment, and this reply, neither exemption 6 nor exemption 7(C) justifies withholding of records requested in Mr. Lardner's April 10, 2008 Freedom of Information Act ("FOIA") request to the Office of the Pardon Attorney ("OPA"). Mr. Lardner's motion for summary judgment should be granted.

I. DOJ's Exemption 6 Claim Is Barred By Collateral Estoppel.

DOJ contends that collateral estoppel does not apply here for several reasons. First, DOJ argues that *Lardner v. DOJ*, Civ. A. No. 03-0180, 2005 WL 758267, at *17 (D.D.C. Mar. 31, 2005) ("*Lardner I*") presented a different issue because, there, the names of unsuccessful applicants appeared in the files of other individuals, whereas, here, Mr. Lardner's FOIA request seeks a list of names without regard to whether the names are in the file of any other applicant. This argument, which is apparently meant to suggest that facts on the public interest side of the balancing test have changed, cannot avoid *Lardner I*'s collateral estoppel effect because it is based on incorrect factual assumptions and selective reading of *Lardner I*.

The exemption 6 issue in *Lardner I* involved nine records, including records that, like the records at issue here, listed many individuals whose clemency applications were denied and whose names just happened to be on copies of lists in the files of the particular applicants at whom Mr. Lardner's request was directed. More specifically, DOJ had redacted the names of "third-party clemency applicants" from two documents described as memoranda from the Counsel to the President to the Pardon Attorney, notifying the Pardon Attorney that the President had denied several

clemency applications. Zieve Decl., Exh. A (*Lardner I*'s *Vaughn* index ## 40 & 90). Although these two documents were identified by OPA in response to a FOIA request for documents concerning specific pardon applicants, the exemption 6 balancing for the records withheld in this case would be precisely the same as for those two records because they are precisely the same sort of documents. For example, Exhibit F to Mr. Lardner's declaration in this case is an email forwarding an email from Associate Counsel to the President Kenneth Lee to the Pardon Attorney and attaching a heavily redacted list of clemency denials. Although this record was released to Mr. Lardner in response to his request for the file of a specific applicant, Chibueze Okorie, because the record was contained in Mr. Okorie's file, the record would also be responsive to Mr. Lardner's request for the names of unsuccessful pardon applicants. And aside from its date, that memo from the Okorie file fits to a tee the *Vaughn* index description of the two documents from the prior case—documents as to which the parties litigated and the court decided that exemption 6 did not justify non-disclosure of the names listed. An additional four records of the nine at issue in *Lardner I* were "transmittal memorand[a] forwarding several letters of advice" (that is, OPA's recommendations about whether to grant or deny clemency) to the Deputy Attorney General or to the White House. *See* Zieve Decl., Exh. A (## 89, 193, 195, 196). Disclosure of the names of applicants listed on these four cover memos also presented the same private/public balancing as does disclosure of the lists or database of names at issue here.

Although DOJ highlights that the names at issue in *Lardner I* were contained in the files of applicants whose records Mr. Lardner had requested by name, the decision in *Lardner I* does not emphasize that point. Rather, the opinion introduces this issue as whether "defendant improperly redacted the names of 141 unsuccessful pardon applicants from records in the files of other applicants *in which they happened to appear*." 2005 WL 758267, at *16 (emphasis added). And

the statement that "[a] comparison of successful and unsuccessful applicants would illuminate—indeed, a claim could be made that it is essential to an understanding of—the circumstances in which the executive chooses to grant or deny a pardon and the factors that bear on that decision," *id*. at *17, was not tied to the fact that the names appeared in other applicants' files. Rather, the opinion states that this finding is "all the more true" because "the names of the applicants in this case actually appear in the files of other pardon applicants," *id*.—a statement which has as its premise that the finding is true even absent that circumstance.

Second, DOJ contends that, since its exemption 6 argument was rejected in *Lardner I*, "the landscape has changed by virtue of the publication in 2002 of OPA's expressed intention to disclose the status of clemency requests in limited circumstances, such as where a 'member of the public . . . has requested information concerning a specific named person.'" DOJ Opp. 4. In reality, the October 2002 document on which DOJ relies did not make a substantive change. As early as 1981, DOJ's Privacy Act notice advised that "[e]xecutive clemency files are used . . . upon specific request, to advise the requestor whether a named person has applied for, been granted or denied clemency, the date thereof and the nature of the clemency granted or denied." 46 Fed. Reg. 60289, 60335 (1981); *see* 51 Fed. Reg. 3664, 3675 (1986); 53 Fed. Reg. 13001, 13002 (1988); 58 Fed. Reg. 6979, 6980 (1993). Moreover, prior to the October 2002 Federal Register notice on which DOJ relies, DOJ's website contained the same "Privacy Statement for Pardons" as it does today. *See* Zieve Decl., Exh. B (printout of page from DOJ website, "last updated July 18, 2002").[1] Thus, the Privacy Act notice does not constitute a "change" in "the landscape" that can enable it to avoid collateral estoppel.[2]

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[1]This version of the webpage was the earliest that we were able to locate.

[2]The Privacy Act notice on which DOJ relies also advises applicants that "a public affairs (continued...)

In addition, DOJ's argument—even if it affected collateral estoppel—would only apply to denials of applications submitted either after October 31, 2002, or after January 31, 2003, when the October 31, 2002, proposal was finalized, but not to denials during the first two years covered by the FOIA request.

Third, DOJ looks to the 1986 FOIA amendments that broadened the meaning of "compiled for law enforcement purposes" under exemption 7, and suggests that these amendments increased clemency applicants' expectation of privacy in a way that is relevant for exemption 6 purposes, whether or not exemption 7 applies. DOJ's attempt to bootstrap an exemption 7 theory as support for its independent assertion of exemption 6 should be rejected. Indeed, DOJ conspicuously fails to articulate how the modification to exemption 7 law would affect an exemption 6 analysis. In citing the amendment to exemption 7, DOJ seems to assume both that exemption 7 applies here (which is a contested issue) and that, beginning in 1987, clemency applicants would have reasonably relied on the exemption 7 amendment to justify an expectation that the fact and status of their applications would fall within the scope of exemption 6 (which is illogical). Even if this bootstrapping made sense, to the extent that clemency applicants were following developments in FOIA law, the most pertinent development would be the March 2005 decision addressing exemption 6 in *Lardner I*. Most importantly, even if DOJ had articulated an argument on this point, that argument would not enable it to distinguish *Lardner I*, or to avoid its preclusive effect, because one-third of the relevant records at issue there *post-dated* 1986. *See* Zieve Decl., Exh. A (*Vaughn* index

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[2](...continued)
notice" may be prepared for clemency denials "in cases of substantial public interest." Bollwerk Decl., Exh. E. Substantially similar statements appeared in DOJ's 1981, 1983, 1986, and 1993 Privacy Act statements. And the 1981-1993 notices, as well as the October 2002 notice, all advise that certain information from clemency files may be released to the news media, upon request.

193, 195, 196, dated 1990). Thus, this point cannot be used to avoid collateral estoppel here because it was available to DOJ when it litigated and lost this same issue in a prior case against this same plaintiff.

Last, DOJ argues that to preclude it from relitigating the exemption 6 issue here would be unfair because—even if the same issue was raised, litigated, and decided in previous litigation between the same parties—*Lardner I* involved additional issues and fewer names, and DOJ may not have put as much effort into litigating this issue in 2004 as it could have. None of these arguments suggests a "basic unfairness" to DOJ. That *Lardner I* involved additional issues did not affect the parties' ability to brief the issue—and they did brief the issue—whether exemption 6 justified redacting the names of unsuccessful pardon applicants. The court's decision also took the issue seriously, devoting five pages to it. And DOJ's suggestion that the age of the documents may have affected Judge Bates's assessment of the private and public interests is belied by the opinion itself. There, in the line cited by DOJ, the court's opinion notes that the documents are all from prior administrations only to make the point that, because the names are not those of individuals with pending applications, "the Court is not concerned . . . with any impact of disclosure on ongoing presidential consideration." *Lardner I*, 2005 WL 758267, at *18. The same is true here. DOJ's regret that it did not try harder is an insufficient basis for avoiding the preclusive effect of the prior litigation.

II. The Records Requested Were Not "Compiled For Law Enforcement Purposes."

On the question whether the records sought by Mr. Lardner were "compiled for law enforcement purposes," DOJ points to *Binion v. DOJ*, 695 F.2d 1189, 1194 (9th Cir. 1983), but attempts only a cursory response to Mr. Lardner's discussion of the case. For the reasons explained in Plaintiff's memorandum in support of his motion for summary judgment (at 7-9) and Plaintiff's

memorandum in opposition to DOJ's motion (at 5), *Binion* does not support the application of exemption 7(C) here. DOJ also cites *Associated Press v. DOJ*, No. 07-1384, 2008 WL 5047793 (2d Cir. Dec. 1, 2008), for the proposition that a clemency petition for commutation falls under exemptions 6 and 7(C). However, the appellant-requester there conceded that the records at issue were "compiled for law enforcement purposes," *id*. at *2, and thus that issue was not before the court. Moreover, Mr. Lardner is not seeking a copy of any petition, but a list of names that does not encompass any of the personal information contained in an application for commutation or pardon. *See*, *e.g.*, *Judicial Watch v. DOJ*, 365 F.3d 1108, 1124 (D.C. Cir. 2004) (pardon applications contain "non-public personal information about the applicants and their lives before and after their convictions and personal information about third parties").

DOJ contends that one purpose of a clemency investigation is to assess whether the applicant has ceased criminal activity. Whether or not this is so, DOJ does not respond to the point that OPA's receipt and retention of lists of applicants who were denied clemency—lists prepared after the investigation is completed and after the President has made his decision—are *not* law enforcement activities. *See* Plaintiff's SJ Memo 5-6. Furthermore, as discussed in Mr. Lardner's December 1 opposition memorandum (at 5-6), DOJ's papers suggest that it does not undertake an investigation in response to every application received, at least not as to every commutation application.

Moreover, even if OPA assesses whether an applicant is engaging in current criminal activity during its evaluation of an applicant's worthiness for clemency, OPA is not "focus[ing] directly on specific alleged illegal acts [that] could result in civil or criminal sanctions." *Schoenman v. FBI*, 573 F. Supp. 2d 119, 147 (D.D.C. 2008) (quoting *Jefferson v. DOJ, Office of Prof'l Resp.*, 284 F.3d 172, 177 (D.C. Cir. 2002)); *Pratt v. Webster*, 673 F.2d 408, 420 (D.C. Cir. 1982) (exemption 7(C) distinguishes between activities in which "the agency acted within its principal function of law

enforcement, rather than merely engaging in a general monitoring of private individuals' activities").[3] Material compiled for a purpose other than law enforcement does not come within the exemption 7 threshold, "even though it might reveal evidence that later could give rise to a law enforcement investigation." *Kimberlin v. DOJ*, 139 F.3d 944, 947 (D.C. Cir. 1998). OPA does not, of course, contest that its consideration is triggered by the applicant him or herself, not by concern about specific criminal activity.

Finally, DOJ quotes at length from *Banks v. DOJ*, 538 F. Supp. 2d 228, 239-40 (D.D.C. 2008). In *Banks*, the court held that records contained in the U.S. Marshals Service's computerized tracking system can fit within the scope of exemption 7(C), where the system was compiled to assist the Marshals Service in performing activities including "executing arrest warrants" and "investigating fugitives." *Id*. These activities fall comfortably within the scope of "activities related to the enforcement of federal laws," as is required for the records to pass the "law enforcement" threshold of exemption 7(C). *Jefferson*, 284 F.3d at 177; *Pratt*, 673 F.2d at 420. In contrast, DOJ has explained that it maintains a database that states whether each application has been granted or denied (and thus is responsive to Mr. Lardner's FOIA request) and lists or abstracts records originally used for a law enforcement purpose, such as a presentence report. *See* Second Bollwerk Decl. ¶¶ 3, 4. Listing those records in OPA's files does not, however, bring the listing itself within the scope of exemption 7(C) because "when information has been recompiled in a new document for a new purpose, the new document must qualify independently for any exemption from disclosure

[3]Relying on a 1995 district court opinion, DOJ suggests (at 5) that the *Pratt* test is no longer used in the D.C. Circuit. As the D.C. Circuit's 2002 decision in *Jefferson* demonstrates, DOJ is incorrect. *See also Keys v. DOJ*, 830 F.2d 337, 340 (D.C. Cir. 1987) ("As the validity of [the *Pratt*] test does not depend in the slightest upon whether the agency activity in question is an "investigation" or a "compilation," it too remains unaltered by the 1986 amendments.").

under the FOIA." *Abramson v. FBI*, 658 F.2d 806, 813 (D.C. Cir. 1980). Similarly, DOJ suggests that the database may sometimes be consulted to assist law enforcement officials investigating individuals whose files OPA has closed and sent to storage. Second Bollwerk Decl. ¶ 4. Such subsequent use of records by other agencies cannot transform OPA's activity into "law enforcement." Here, as discussed in Mr. Lardner's prior memoranda, OPA's database itself was not compiled for law enforcement purposes, and thus does not come within the scope of exemption 7(C).

Furthermore, OPA's records also include paper lists of the names of unsuccessful applicants, which exist independently of its database. *See*, *e.g.*, Lardner Decl., Exh. F. As Exhibit F suggests, OPA may have taken no action to "compile" those lists, but merely received them, an activity that does not constitute a "law enforcement purpose." *Jefferson*, 284 F.3d at 179. DOJ does not suggest any reason why those lists fall within the scope of exemption 7(C).

III. The Exemption 6 and 7(C) Balancing Tests Support Disclosure Here.

DOJ's opposition memorandum gives short shrift to the privacy/public interest balancing test, which Mr. Lardner discussed at some length in his memorandum in support of summary judgment and his opposition to DOJ's motion for summary judgment. DOJ repeatedly cites paragraph 10 of the Second Bollwerk Declaration, which reiterates Ms. Bollwerk's opinion that disclosing that an individual was denied clemency would stigmatize the individual, but fails to address Mr. Lardner's discussion or even to acknowledge that *Lardner I* expressly rejects that suggestion. *See* 2005 WL 758267, at *17 n.29 ("[D]enial of a pardon application 'is not so rare an occurrence as to stigmatize the [unsuccessful] applicant.'") (citation omitted).[4]

[4]In addition, not all clemency applications are denied because "the President has determined that the applicant is not worthy of his mercy." Second Bollwerk Decl. ¶ 10. A commutation application may be denied because there is little time left on the applicant's sentence by the time the (continued...)

Because DOJ's opposition offers no specific response to Mr. Lardner's arguments on the two sides of the balancing test, Mr. Lardner rests here on his two prior memoranda.

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiff's memorandum in support of motion for summary judgment and Plaintiff's memorandum in opposition to defendant's motion, Plaintiff's motion for summary judgment should be granted.

Dated: December 22, 2008

Respectfully submitted,

/s/

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[4](...continued)
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 (OIG reporting that former Pardon Attorney used ethnicity as a factor in making recommendations for clemency).