No. _____

In the Supreme Court of the United States

PETER JANANGELO,
Petitioner,
v.

TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, an agency of the United States,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court of the United States has never addressed the propriety of a Federal Agency invoking the so-called "Glomar Response" to a request for information under the Freedom of Information Act (FOIA). A Glomar Response is an oddity of Federal common law which is nowhere codified in the FOIA statutes. It is where a Federal Agency, the Treasury Inspector General for Tax Administration in this case, responds to a FOIA request by stating that it "can neither confirm nor deny" the existence of information or documents that would be responsive to the request instead of either 1) denying the existence of any responsive documents or 2) identifying responsive information or documents, but withholding them under one of the nine (9) statutory exemptions to disclosure under 5 U.S.C. §552(b).

The questions presented in this case are as follows:

1. If Glomar Responses are permitted should they be limited to instances involving national security, public safety, or public health?

2. Under what circumstances should a Federal Agency be denied use of a Glomar Response in litigation under FOIA and instead be required to provide a *Vaughn* Index and litigate the actual merits of the FOIA exemption it asserts as applicable?

3. Under what circumstances is it an abuse of a District Court's discretion to uphold the use of a Glomar Response instead of utilizing protective orders under Fed. R. Civ. P. 26(c) and *in camera* inspections under 5 U.S.C. §552(a)(4)(B) in

conjunction with, or in addition to, a *Vaughn* Index to perform its *de novo* review of any documents or information sought under FOIA and claimed to be exempt by the Federal Agency?

PARTIES TO THE PROCEEDINGS

1. The Petitioner herein, Peter Janangelo, an individual, was the Plaintiff in the District Court and the Appellant before the Court of Appeals.

2. The Respondent herein, the Treasury Inspector General for Tax Administration is an agency of the United States and was the Defendant in the District Court and the Appellee before the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Peter Janangelo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit (No. 17-15838).

OPINIONS BELOW

The Court of Appeals' memorandum opinion (App. 1-4) is not reported. The District Court's opinion No. 2:16-cv-00906-JCM-GWF (ECF No. 24) (D.Nev. March 29, 2017) (App. 5-14) is not reported. The District Court Judgment is No. 2:16-cv-00906-JCM-GWF (ECF No. 24) (D.Nev. March 29, 2017)(App. 15)

JURISDICTION

The court of appeals entered judgment (No. 17-15838 (9th Cir.)) on June 14, 2018. C.A. Dkt. 28. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

This Petition regards pertinent provisions of the Freedom of Information Act, 5 U.S.C. § 552 which is lengthy and so is set forth in its entirety at Appendix D hereto.

STATEMENT OF THE CASE

I. INTRODUCTION

In this Petition for Writ of Certiorari the Supreme Court of the United States finds itself in position to weigh in, for the very first time, on the propriety of a Federal Agency raising a "Glomar Response" to a request under FOIA. Petitioner's research could not

find a single instance where the Court has had a case dealing with the odd Federal common law doctrine emanating from *Phillippi v. Central Intelligence Agency*, 546 F.2d 1009 (D.C. Cir. 1976). In *Phillippi* the Court of Appeals for the D.C. Circuit held that it was acceptable for the CIA to respond to a FOIA request from a Rolling Stone magazine reporter's request for information regarding a secret government ocean salvage ship called the *Hughes Glomar Explorer* with what has by now become a cliché response,[1] "we can neither confirm nor deny the existence of the documents or information that you seek" (or words to that effect).

Despite the very clear and plain statutory provision of 5 U.S.C. § 552(d) which states in relevant part, "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. …." the use of the "Glomar Response" has spread and to Petitioner's knowledge every circuit court of appeals to consider it has permitted government agencies to invoke the Glomar Response. Most commonly this has been in situations where national security, public health, and public safety have been in potential jeopardy if the mere existence of the information or records sought by FOIA requests was acknowledged.

However, the practice has grown. Press reports and editorial writers criticize the practice alleging that the use of Glomar Responses has increased rapidly since the September 11, 2001 terrorist attacks and is often

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[1] CIA's first tweet on Twitter at 10:49 a.m. on June 6, 2014 was "We can neither confirm nor deny that this is our first tweet."

seriously misused. See e.g. https://www.nytimes.com/2012/04/30/opinion/the-cias-misuse-of-secrecy.html; https://www.newsbud.com/2010/01/10/the-impulse-to-secrecy-the-glomar-response/ A chief criticism is that the practice is invoked more often than not to avoid government transparency. Worse, it is alleged that the government will "leak" information favorable to itself and when reporters attempt to test and confirm the leaked information through the use of FOIA requests they are stonewalled with the Glomar Response. Id. Many see the practice as easily manipulated to avoid transparency. Some national security or law enforcement angle can be played on most any topic and the Glomar Response used to hide unfavorable information and documents.

The practice is also finding its way into state government agency responses under state statutes analogous to FOIA.[2] This Orwellian ritual is reducing government accountability.

Petitioner does not contend that the Glomar Response does not have a place in FOIA jurisprudence in cases where there are legitimate and significant national security, public health, and public safety law enforcement concerns. This case just isn't one of them.

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[2] See press reports, e.g. Maine https://www.muckrock.com/news/archives/2016/nov/09/msp-glomar/; New Jersey https://observer.com/2016/09/new-jersey-appeals-court-condones-glomar-responses-under-opra/; New York https://www.rcfp.org/browse-media-law-resources/news/trial-court-allows-police-use-glomar-response-deny-records-requests

II. PROCEDURAL HISTORY

In this case Peter Janangelo brought an action with a single claim seeking disclosure and copies of records from the Treasury Inspector General for Tax Administration ("TIGTA"). The records pertained to an investigation that TIGTA had conducted regarding a Congressional Inquiry from Congressman Joe Heck of Nevada after Mr. Janangelo had brought to the Congressman's attention certain questionable activities being engaged in by an manager at the Internal Revenue Service.

The Parties filed cross-motions for summary judgment. The District Court denied Mr. Janangelo's motion and granted TIGTA's motion for summary judgment and dismissed the action on March 29, 2017. (Appendix B, App. 5-14)

Mr. Janangelo appealed contending that TIGTA'S motion for summary judgment should have been denied and his cross-motion should have been granted. In the alternative there are disputed issues of material fact in this case. The District Court erred in not properly applying the summary judgment standard on TIGTA's Motion for Summary Judgment in that it failed to view the evidence in the light most favorable to Mr. Janangelo, failed to draw all reasonable inferences in Mr. Janangelo's favor, and impermissibly weighed the evidence and made improper credibility determinations. Mr. Janangelo sought reversal by the Court of Appeals and remand back to the District Court to either 1) grant Mr. Janangelo's cross-motion, or 2) to conduct further proceedings including ordering that a *Vaughn* index be produced by TIGTA. The Court of

Appeals affirmed the District Court on June 14, 2018 (Appendix A, App. 1-4)

III. FACTUAL BACKGROUND

A. Jurisdictional Facts and Statutory Requirements of FOIA

The District Court had jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA citizen suit provision) and 28 U.S.C. § 1331 (federal question). Venue in the District Court, and in the unofficial Southern Nevada division of the court, was proper, as at all times relevant herein, Plaintiff's residence was, and is, in Clark County, Nevada. 5 U.S.C. § 552(a)(4)(B); 28 U.S.C. § 1391(e).

Plaintiff Peter Janangelo is an individual who, at all times relevant herein, has resided in Clark County, Nevada. Defendant Treasury Inspector General for Tax Administration is an agency of the United States, and as such, is subject to FOIA pursuant to 5 U.S.C. § 552(f).

FOIA requires, *inter alia*, that all federal agencies must promptly provide copies of all non-exempt agency records to those persons who make a request for records that reasonably describes the nature of the records sought, and which conforms with agency regulations and procedures in requesting such records. 5 U.S.C. § 552(a)(3)(A).

FOIA requires federal agencies to make a final determination on all FOIA requests that it receives within twenty days (except Saturdays, Sundays, and legal public holidays) after the receipt of such request, unless the agency expressly provides notice to the

requester of "unusual circumstances" meriting additional time for responding to a FOIA request. 5 U.S.C. § 552(a)(6)(A)(I).

FOIA also requires federal agencies to make a final determination on FOIA administrative appeals that it receives within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal, unless the agency expressly provides notice to the requester of "unusual circumstances" meriting additional time for responding to a FOIA request. 5 U.S.C. § 552(a)(6)(A)(ii).

FOIA expressly provides that a person shall be deemed to have constructively exhausted their administrative remedies if the agency fails to comply with the applicable time limitations provided by 5 U.S.C. § 552(a)(6)(A)(I) – (ii). *See* 5 U.S.C. § 552(a)(6)(c).

FOIA provides that any person who has not been provided the records requested pursuant to FOIA, after exhausting their administrative remedies, may seek legal redress from the federal district court to "enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

Under FOIA, the federal agency has the burden to sustain its actions. 5 U.S.C. § 552(a)(4)(B).

Pursuant to FOIA, the courts may assess attorney fees and litigation costs against the United States if a plaintiff prevails in the action. 5 U.S.C. § 552(a)(4)(E).

B. Factual Allegations for Plaintiff's FOIA Claim

On or about November 3, 2015, Mr. Janangelo sent a FOIA request to the Treasury Inspector General for Tax Administration, via US mail, requesting that the agency provide to him "a copy of the TIGTA Report concerning … TIGTA Complaint # 55-1409-0099-C." TIGTA Complaint # 55-1409-0099-C concerns the TIGTA investigation of Internal Revenue Service (IRS) employee Debra W. Thompson (SBSE Territory Manager-Las Vegas, NVPOD) which was done in response to a Congressional Inquiry. Mr. Janangelo informed U.S. Representative Joe Heck of Nevada about abusive and improper conduct of Thompson in her job at IRS, which apparently triggered the Congressional Inquiry into Thompson's alleged misconduct. On January 21, 2015 Mr. Janangelo was interviewed by TIGTA Special Agents Ronald Moller and Jacqueline Siegel pursuant to the TIGTA investigation of Ms. Thompson. Thereafter, Thompson retaliated against Plaintiff by issuing a July 13, 2015 proposal to terminate Mr. Janangelo's employment with the IRS. Mr. Janangelo had a compelling need to obtain a copy of TIGTA's Report of TIGTA Complaint # 55-1409-0099-C to defend himself against Debra W. Thompson's retaliatory attempts to terminate him from his job at IRS.[3] This is evident from a review of the narrative portion of Mr. Janangelo's April 5, 2016 Oral and Written Reply to the July 13, 2015 Letter.

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[3] By way of update, Mr. Janangelo's employment issue were resolved through a settlement with IRS at the Merit System Protection Board (MSPB) and Mr. Janangelo is still employed at IRS.

There is a public interest in this information, aside from Mr. Janangelo's personal interest in defending himself, and that is that these documents will expose violations of Federal law including nepotism, retaliation for whistle blowing, and discrimination in favor of certain employees with personal or sexual relationships with their superiors at the IRS which is a scandal worthy of public exposure. The actions of the IRS and its management that the TIGTA Report of Investigation on Complaint # 55-1409-0099-C will expose are of public concern because they will show official misconduct by the IRS through the vindictive and retaliatory actions of its manager in taking an official prohibited personnel practice (PPP) in violation of, *inter alia*, 5 U.S.C. § 2302(b)(6)(7)(8)(9) and (10). Such unlawful discrimination and retaliation based upon Mr. Janangelo's whistle blowing activity is official misconduct of the IRS and its manager(s) and is of public interest and newsworthy.

On or about December 9, 2015, TIGTA's Disclosure Officer Amy P. Jones, by and through Government Information Specialist Monica Frye, sent Mr. Janangelo a letter indicating that Mr. Janangelo's FOIA request of November 3, 2015 was received on November 10, 2015. TIGTA's response was that it neither admitted or denied that any responsive records existed. (Id.) However, TIGTA did say, "Your request seeks access to the types of documents for which there is no public interest that outweighs the privacy interests of established and protected by the FOIA (5 U.S.C. §§ 552(b)(7)(C) and (b)(6)). This response should not be taken as an indication that such records exist; ***rather it is our standard response*** to requesters seeking records on third parties." (Id.)

(emphasis added) This response makes clear that TIGTA did not even attempt to locate and review the records requested and give the request proper consideration by engaging in a proper balancing of the interests called for in FOIA.

On or about December 29, 2015, Mr. Janangelo sent a timely administrative appeal of the TIGTA December 9, 2015 decision denying his November 3, FOIA request to the TIGTA Office of Chief Counsel in accordance with the instructions he had been given. The appeal properly pointed out that TIGTA had no basis to withhold the records under 5 U.S.C. §§ 552(b)(7)(C) because "This provision of federal statutory law applies to TIGTA's withholding of 'records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ……..could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" (Id.) First, TIGTA did not even review the documents according to its December 9, 2015 decision so it would have no basis to say that disclosure would result in an unwarranted invasion of personal privacy. Second, because the records requested bear on Thompson's alleged official acts of malfeasance in her job at IRS and her motive for retaliation against the Mr. Janangelo, any possible personal privacy implications would be far outweighed by the public interest in exposing the official malfeasance, improper behavior, and abuse of position by a U.S. Government public employee *manager*.[4] As to 5 U.S.C. § 552(b)(6) "This provision of federal

[4] By way of update, Debra Thompson has retired from the IRS.

statutory law applies to TIGTA's withholding of personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Again, because the records requested bear on Thompson's alleged official malfeasance in her job at IRS and her motive for retaliatory personnel action against the Mr. Janangelo for his protected activity of whistle blowing, any possible personal privacy implications would be far outweighed by the public interest in exposing the official malfeasance, improper behavior, and abuse of position by a U.S. Government public employee manager. TIGTA's cited reasons for withholding records that it admits that it did not actually review are without merit and the records should have been disclosed pursuant to FOIA.

On or about February 5, 2016, Mr. Janangelo was sent a response on his FOIA Appeal from Thomas E. Carter, Deputy Chief Counsel TIGTA, indicating that "TIGTA affirms the response offered in the Disclosure Officer's December 9, 2015 response." Mr. Janangelo was instructed that the February 5, 2016 letter constituted a final decision with respect to his FOIA appeal (# 002E) and he was advised that any further consideration of the matter would be by seeking judicial remedies afforded by FOIA, to wit: the filing of a court Complaint in the United States District Court for the district in which Mr. Janangelo resides, etc. Mr. Janangelo has properly exhausted all administrative and statutory prerequisites and timely and properly sought judicial review of this decision in an appropriate United States District Court in Accordance with 5 U.S.C. § 552(a)(4)(B).

To date, Mr. Janangelo has still not received any records from TIGTA that are responsive to his November 3, 2015 FOIA request.

TIGTA's Glomar Response, saying that it can neither confirm nor deny the existence of the requested documents, is an Orwellian sham. The existence of these documents was already acknowledged to Mr. Janangelo by TIGTA Special Agent Ronald R. Moller in an email dated March 6, 2015 (7:46 p.m.). Moreover, Mr. Janangelo participated in the investigation and met with TIGTA Special Agents Ronald Moller and Jacqueline Siegel who interviewed Mr. Janangelo regarding the Congressional inquiry of Congressman Heck. Thus, Mr. Janangelo is intimately familiar with what took place and knows that the documents exist. TIGTA's Glomar Response is ridiculous in light of the facts of this case. It is one thing for the government to use a Glomar Response toward a complete stranger third-party request, but when it is made to a person who was involved in the investigation, such as Mr. Janangelo, the issuance of a Glomar Response is pure mendacity and a lack of government transparency. In such a case, the government agency should not play Glomar games, but should identify the documents that would be responsive in a *Vaughn* index and let the claimed substantive exemptions be litigated on their merits. (*See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) A *Vaughn* Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995))

Moreover, TIGTA's concerns about personal privacy and not embarrassing any third parties are matters that are routinely addressed in litigation in the Federal courts by use of protective orders under FRCP Rule 26(c) or under the court's inherent power to control litigation through use of its power of contempt. In other words the District Court can fashion a protective order, under pain of civil or criminal contempt, to protect the privacy or other interests of third-parties while the issue of FOIA disclosure is litigated in the court. That is the fundamental philosophy behind the *Vaughn* index procedure. Examples would include *in camera* review of any disputed records and/or "quick peek" procedures whereby counsel could briefly examine any disputed records in order to better assess the merits of the case and determine whether or not the matter should continue to be pursued. "Attorneys Eyes Only" orders are quite commonly used in this circuit in similar situations. *See, e.g., St. Jude Medical SC, Inc. v. Janssen-Counotte*, 104 F. Supp. 3d 1150 (D. Or. 2015). They have also been used in cases where FOIA exemptions may apply. *See, e.g., Federal Deposit Insurance Company v. Faigin*, No. 12-CV-03448-DDP-CW (C.D. Cal. Nov. 25, 2013).

Mr. Janangelo's June 11, 2014 letter to Congressman Heck includes an allegation that IRS Territory Manager Debra Thompson was engaging in "(1) abusive behavior towards subordinates (2) ***the waste of government funds*** and (3) the advancing her career by providing sexual services to an IRS employee while she was married to another man." (emphasis added) The allegations including the "waste of government funds," which presumably was investigated and information about it included in the

records sought under FOIA in this case, is a matter of public concern to citizens and the public interest in this information is not outweighed by any alleged privacy interest that Thompson may have in the information and records.

Finally, TIGTA admits to the existence of responsive documents in the public record. In the Declaration of Daphne S. Levitas TIGTA states as follows: "I am assigned to the litigation in which this declaration is being filed and ***am familiar with the document plaintiff seeks*** and issues in this lawsuit." (Emphasis added)

REASONS FOR GRANTING THE PETITION

The Court should constrain the Glomar Response to cases where agencies are truly justified by threats to national security, public health, or public safety and not just trying to avoid embarrassment. This case presents the Court with the opportunity to correct an obvious abuse of power by Federal agencies. The Glomar Response circumvents FOIA in ways that Congress never intended. Let Congress amend the statute if it determines more exemptions are necessary or that it needs to codify the Glomar Response for anything other than national security, public health, or public safety. The Court should reverse the Court of Appeals and the District Court. Either summary judgment should be granted to Mr. Janangelo and the records he seeks provided to him, or there should be further proceedings including either TIGTA providing

a *Vaughn* index[5] so that its FOIA exception arguments can be adequately analyzed or a trial should be held on any material facts in dispute.

The Glomar Response made by TIGTA is improper. A government agency should not be permitted to abuse the Glomar Response in a case not involving national security or safety. FOIA contains its own exemptions, which TIGTA raises in a hypothetical manner, and in order for FOIA to function as designed, an agency such as TIGTA should have to at least provide a *Vaughn* index that would permit the claimed exceptions to be fairly analyzed by the courts and Mr. Janangelo to test the applicability of the exemptions raised by the government. In this case the government is saying, "you just have to trust us that the exemption applies." This lack of transparency is troubling. This permits the government to eviscerate FOIA, a statute designed to hold government accountable. In a case where there are no concerns over public or personal safety or national security, the *Vaughn* index procedure should be followed. Additionally, the District Court has other

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[5] A "*Vaughn* index" is a device that was first recognized in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) whereby an agency is required to provide an index listing all materials that are being withheld with specific and detailed reasons why any of the nine statutory exemptions from disclosure under FOIA apply, including why or why not the records may or may not be redacted to allow for non-exempt parts to be disclosed and exempt parts protected. "We have observed repeatedly that the *Vaughn* index is critical to effective enforcement of FOIA. Without such an index neither reviewing courts nor individuals seeking agency records can evaluate an agency's response to a request for government records." *Founding Church of Scientology of Washington, D.C., Inc. v. Bell*, 603 F.2d 945, 947 (D.C. Cir. 1979)(citation omitted).

tools at its disposal. To the extent that TIGTA argues that even acknowledging that the records exist could be harmful to the subject of the records, the District Court can enter appropriate protective orders under FRCP Rule 26(c) and its inherent authority to control the litigation. This would permit Mr. Janangelo's counsel to pursue his client's interests while balancing the interests of the government and third parties in the determination of whether the records must be provided to Mr. Janangelo under FOIA.

I. SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED TO TIGTA.

TIGTA claims that it is not required to provide the requested Report of Investigation (ROI) for TIGTA Complaint # 55-1409-0099-C on the basis of 1) its improper Glomar Response; 2) its unfounded claim that, although it apparently never reviewed the documents because it does not acknowledge their existence, providing Mr. Janangelo with the ROI would require a "clearly unwarranted invasion of personal privacy" under 5 U.S.C. §§ 552(b)(6); and 3) its unfounded claim that disclosure of the ROI "could reasonably be expected to constitute an unwarranted invasion of personal privacy" under 5 U.S.C. §§ 552(b)(7)(C). Because TIGTA has not met its burden to establish any of its claimed exemptions, or the propriety of its Glomar Response, its Motion for Summary Judgment should have been denied.

Of particular note is the lack of a *Vaughn* index from which the Plaintiff and the District Court could assess the merits of the exemptions claimed under (b)(6) and (b)(7)(C) of FOIA. The District Court should have denied summary judgment to the Defendant,

particularly to the Glomar Response, and should have required a *Vaughn* index to be prepared and submitted by TIGTA. The Glomar Response is easily disposed of because the existence of responsive records or information has been acknowledged by TIGTA both to Mr. Janangelo by Special Agent Ronald Moller in a March 6, 2015 email, and in the public record by the Declaration of Daphne S. Levitas wherein she states that she is "…***familiar with the document plaintiff seeks***…." (Emphasis added)

Moreover, the District Court can enter a protective order under FRCP Rule 26(c) including an "Attorneys Eyes Only" provision so that records may be reviewed and analyzed. The briefing could then be filed under seal. There is no national security concern or any other reason to permit a government agency to hide behind an abusive Glomar Response. FOIA has its exemptions and a process. Glomar Responses are not part of the process, rather it was a common law device crafted by courts to address potential national security threats inherent in abusive FOIA requests seeking secrets from the CIA or the NSA, or some other agency charged with protecting our nation's interests or enforcing public health and safety laws. Records regarding an investigation into Debra Thompson's malfeasance in her management job at the IRS is not something that a Glomar Response was invented to address. The exemptions should be litigated. That is what the law requires.

A. TIGTA's Glomar Response is inappropriate under the circumstances presented by this case and TIGTA should be required to, at a minimum, produce a *Vaughn* index.

TIGTA's Glomar Response is an Orwellian sham. It is a farce. Mr. Janangelo participated in the investigation of TIGTA Complaint # 55-1409-0099-C. Special Agent Ronald R. Moller's March 6, 2015 (7:46 p.m.) email to Mr. Janangelo acknowledges the existence of the ROI and records and information responsive to the FOIA request. This is not an issue of national security or homeland security. The issue here is malfeasance by a Territory Manager at the IRS. If the Court upholds the use of the Glomar Response by TIGTA in this case it is unnecessarily endorsing mendacity by the Federal Government. This the Court should not do.

A Glomar Response is not upheld where the existence, or non-existence, of responsive records or information has already been disclosed by the agency. *Marino v. Drug Enforcement Admin.*, 685 F.3d 1076 (D.C. Cir. 2012); *Wolf v. Cent. Intelligence Agency*, 473 F.3d 370, 379 (D.C. Cir. 2007). In this case Special Agent Moller acknowledged that the records and information existed and informed Mr. Janangelo that he would need to file a FOIA requests to obtain copies of them. Further, TIGTA has disclosed the existence of responsive records or information in the public record by the Declaration of Daphne S. Levitas wherein she states that she is "…***familiar with the document plaintiff seeks***…." (Emphasis added) There is at least a genuine issue of material fact as to the existence of

the responsive records and information that precluded summary judgment in favor of TIGTA in this case. *Id*.; *North v. US Dept. of Justice*, 892 F. Supp. 2d 297, 300-301 (D.C. 2012). Here, Mr. Janangelo has established that TIGTA, by and through its Special Agent Ronald Moller and its attorney Ms. Levitas, has acknowledged the existence of responsive records, presumably the ROI. This at least raises a genuine issue of material fact as to the Glomar Response and the existence, or non-existence, of responsive records or information:

> "In the *Glomar* context," it is not "the contents of a particular record" that is at issue "but rather the existence *vel non* of any records responsive to the FOIA request." *ACLU,* 710 F.3d at 427 (internal quotation marks omitted). Therefore, "the public domain exception is triggered when 'the prior disclosure establishes the existence (or not) of records responsive to the FOIA request,' regardless whether the contents of the records have been disclosed." *Marino,* 685 F.3d at 1081 (quoting *Wolf v. CIA,* 473 F.3d 370, 379 (D.C. Cir. 2007)). To prevail on summary judgment then, the plaintiff must show only "that the agency has already disclosed the fact of the existence (or nonexistence) of responsive records, since that is the purported exempt information that a *Glomar* response is designed to protect." *ACLU,* 710 F.3d at 427. If the plaintiff is successful, the agency is not automatically required to disclose the record. Rather, the agency "would be required to confirm that responsive records exist, then either release them or establish that they are exempt from disclosure." *Marino,* 685 F.3d at 1082. *See*

> *ACLU,* 710 F.3d at 432-34 (explaining why "[t]he collapse of the CIA's *Glomar* response does not mark the end of this case" and remanding to the district court to determine whether the contents of any responsive documents are protected from disclosure);

Dean v. US Department of Justice, Civil No. 1: 14-cv-00715 (APM) (D.C. Apr. 10, 2015).

Mr. Janangelo submitted sufficient evidence that the records or information regarding the TIGTA ROI or other documents for TIGTA Complaint # 55-1409-0099-C do exist based on both his own personal knowledge having been interviewed by the TIGTA Special Agents and Special Agent Moller's acknowledgement of the existence of the records or information in his March 6, 2015 email as well as TIGTA's admission in the public record. Defendant's Motion for Summary Judgment should have been denied by the District Court as to the Glomar Response.

With the Glomar Response out of the way, summary judgment to TIGTA should also have been denied without requiring TIGTA to provide a *Vaughn* index. *See Vaughn v. Rosen,* 484 F.2d at 826-28. A *Vaughn* index must identify each document withheld, and provide a particularized explanation of how disclosure would violate an exemption. *Wiener v. FBI,* 943 F.2d 972, 978 (9th Cir. 1991) *Vaughn* indices are sometimes necessary because ordinary rules of discovery cannot be followed in FOIA cases where the issue is whether one party is entitled to non-disclosed documents. *Id.* at 977. The result is that the party seeking disclosure is left in the unfair position of relying on the representations of the agency seeking to withhold the requested

information. *Id.* Thus, courts often require *Vaughn* indices to restore some semblance of the traditional adversary process. *Id.* The Court should do so here and possibly require TIGTA to produce the documents to the District Court for *in camera* review to determine if any parts or all of the documents should be provided pursuant to Mr. Janangelo's FOIA request. This is not necessarily an all or nothing proposition and an analysis should be performed to determine if at least portions of the documents can be released. "It is reversible error for the district court 'to simply approve the withholding of an entire document without entering a finding on segregability, or the lack thereof,' with respect to that document. *Church of Scientology,* 611 F.2d at 744." *Weiner*, 943 F.2d at 988. Of course "*In camera* review may supplement an adequate *Vaughn* index, but may not replace it." *Wiener,* 943 F.2d at 979 so a *Vaughn* index should be ordered to be produced first. Otherwise, as eloquently explained by the Court of Appeals in *Wiener*, Mr. Janangelo is at a totally unfair disadvantage because he has no idea of exactly what information and records are being withheld, whether any of them (or portions thereof) may be disclosed because they are not exempt, whether or not any documents may be redacted to withhold only information that is fairly within an exemption, and whether or not he needs to seek the court's intervention. Again, protective orders for "Attorneys Eyes Only" review of the records under Fed. R. Civ. P. Rule 26(c) or the District Court's inherent authority to control the litigation are also a potential tool that could be employed to ensure that FOIA works as Congress intended. The Supreme Court should provide guidance on how a district court is to exercise its discretion and what actions may constitute an abuse of

that discretion in a FOIA case involving the assertion of a Glomar Response and FOIA exemptions.

The Glomar Response in this case, that does not involve any issues of national security, homeland security, or public health or safety concerns and deals with an investigation in which the Mr. Janangelo took part and was informed that documents exist, thwarts the adversary process and prevents Mr. Janangelo from having information on which to adequately be able to contest the withholding of the information and records and in fact, under *Wiener*, actually prevents the courts from adequately judging the contest. *Id.* TIGTA's Motion for Summary Judgment should have been denied. This Court should issue a Writ of Certiorari.

B. TIGTA's reliance on the FOIA exemption in 5 U.S.C. §§ 552(b)(6) is inappropriate because there is not a "clearly unwarranted invasion of personal privacy."

5 U.S.C. §§ 552(b)(6) exempts from disclosure under FOIA "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Because he does not have the benefit of a *Vaughn* index to better understand TIGTA's (b)(6) exemption contentions, for present purposes the Mr. Janangelo must assume that the records and information that he seeks would qualify as at least "similar files" which has been broadly construed by the Court of Appeals to include any information about workplace impropriety that pertains to specific individuals. *Kowack v. US Forest Service*, 766 F.3d 1130, 1133-35 (9th Cir. 2014); *Forest*

Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1024 (9th Cir. 2008).

In order for the District Court to rule on this matter it needed a proper record and that would include a sufficiently detailed *Vaughn* index. As the Court of Appeals has stated, what is needed is a

> …factual basis for concluding that disclosure of the witness statements would "constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). For, even personal information must be disclosed unless doing so is "clearly unwarranted," and this is true only when the individual's privacy interest outweighs the public interest. *See Yonemoto,* 686 F.3d at 694. The only public interest we consider is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know `what their government is up to.'" *U.S. Dep't of Defense v. Fed. Labor Relations Auth.,* 510 U.S. 487, 497, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994) (quoting *Reporters Comm. for Freedom of the Press,* 489 U.S. at 773, 109 S.Ct. 1468) (alteration in original).

Kowack v. US Forest Service, 766 F.3d 1130, 1133 (9th Cir. 2014)

Thus, the issue is whether or not the disclosure of the requested records which will presumably discuss the allegations of workplace impropriety that Mr. Janangelo has made against IRS Territory Manager Debra Thompson would constitute a "clearly unwarranted invasion of personal privacy" under the

(b)(6) exemption. Without a proper detailed *Vaughn* index it is difficult for Mr. Janangelo or the courts to assess this balancing test. TIGTA argued below that there is no public interest in the records and information but that is not so. Mr. Janangelo's June 11, 2014 letter to Congressman Heck, that led to the Congressional Inquiry and TIGTA Complaint #55-1409-0099-C, alleges the following impropriety: "(1) abusive behavior towards subordinates (2) ***the waste of government funds*** and (3) the advancing her career by providing sexual services to an IRS employee while she was married to another man." (emphasis added) Bullying in the workplace by IRS Managers, waste of government funds, and engaging in *quid pro quo* sexual arrangements with other IRS employees to advance Thompson's career at the IRS are all items in which the public has an interest. It goes to what management at the IRS "is up to." *Kowack v. US Forest Service*, 766 F.3d 1130, 1133 (9th Cir. 2014) These are items of public interest which outweigh the personal interests and so disclosing the records and information sought by Mr. Janangelo's FOIA request are not "clearly unwarranted invasions of personal privacy" under the (b)(6) exemption.

Additionally, at the time that Mr. Janangelo made his FOIA request on November 3, 2015, IRS Territory Manager Debra Thompson had engaged in vindictive and malicious retaliatory action against Mr. Janangelo by issuing the July 13, 2015 letter proposing to terminate Peter Janangelo, Jr.'s employment with IRS. That letter specifically addresses the protected activity of Mr. Janangelo's whistle blowing on the management misconduct he had witnessed and suffered at the IRS at the hands of Thompson and her surrogates.

5 U.S.C. § 2302 states in relevant part as follows:

> **(a)**
> **(1)** For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).
> **...**
> **(b)** Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
> **...**
> **(6)** grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;
>
> **(7)** appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;[6]

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[6] Debra Thompson is now married to Mr. Gary Thompson whom Mr. Janangelo's complaint states was the person in a superior position at IRS with whom Debra Thompson had a quid pro quo sexual relationship to advance her career when she was married

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

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to someone else. There is a question of fact as to whether or not any part of this arrangement took place after they were married and, therefore, "relatives" under the law.

> **(9)** take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—
> **(A)** the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—
> **(i)** with regard to remedying a violation of paragraph (8); or
> **(ii)** other than with regard to remedying a violation of paragraph (8);
> **(B)** testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);
> **(C)** cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or
> **(D)** for refusing to obey an order that would require the individual to violate a law;

Debra Thompson's letter threatening to terminate Mr. Janangelo's employment was a Prohibited Personnel Practice under 5 U.S.C. § 2302. If she had actually gone forward and had his employment with IRS terminated, that would have been another violation of the statute. The blatant retaliation that Thompson engaged in is a clear violation of Federal law and such flagrant abuses of power are of public interest. It is what the government is up to. The public interest under these circumstances outweighs any personal privacy interest. The invasion of the personal privacy interest is not "clearly unwarranted" where the records and information that are sought under FOIA will shed

light on Debra Thompson's Prohibited Personnel Practices in violation of 5 U.S.C. § 2302.

TIGTA has not met its burden to show that the records and information sought by Mr. Janangelo's November 3, 2015 FOIA request would constitute a "clearly unwarranted invasion of personal privacy." Therefore, TIGTA's Motion for Summary Judgment should have been denied on its claim to an exemption under 5 U.S.C. § 552(b)(6).

C. TIGTA's reliance on the FOIA exemption in 5 U.S.C. §§ 552(b)(7)(C) is inappropriate because TIGTA's documents were not compiled for law enforcement purposes and/or any privacy interest is far outweighed by the public's interest in knowing what its government is up to.

5 U.S.C. § 552(b)(7)(C) exempts from disclosure under FOIA "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." Courts must engage in a two-step inquiry in determining whether or not a (7)(C) exemption applies. The first step is to determine whether or not the documents were compiled "for law enforcement purposes." The second step, which is reached only if the first inquiry is answered "yes" is to determine whether or not a personal privacy interest is outweighed by a public interest in disclosure of the information or documents.

First, the records in question were not compiled for law enforcement purposes. The June 11, 2014 letter from Mr. Janangelo to Congressman Heck did not necessarily raise violations of law by Debra Thompson, rather it asked for Congressman Heck's help in having the IRS investigate the employment transgressions of Debra Thompson. Although Congressman Heck's Congressional Inquiry went to TIGTA rather than IRS itself, the rationale of cases that hold that personnel investigations by an agency of its own employees are not "for law enforcement purposes" under (7)(C)'s exemption should apply here. *See Kimberlin v. Department of Justice*, 139 F.3d 944, 947 (D.C. Cir. 1998); *Stern v. F.B.I.,* 737 F.2d 84, 89 (1984) (Personnel investigations that constitute managing employees and that are not the type that could lead to criminal or civil sanctions against the person(s) being investigated is not "for law enforcement purposes). TIGTA is engaged to investigate IRS employee wrongdoing, apparently even when there is no specific violation of law alleged, just management misconduct in violation of employment policies or laws, rules, or regulations that do not implicate civil or criminal sanctions to the individual being investigated. The June 11, 2014 letter from Mr. Janangelo to Congressman Heck alleged only "(1) abusive behavior towards subordinates (2) the waste of government funds and (3) the advancing her career by providing sexual services to an IRS employee while she was married to another man." None of these allegations would specifically and necessarily lead to criminal or civil sanctions against Thompson. Mr. Janangelo's letter specifically stated that he wanted Debra Thompson, an IRS Territory Manager, to be fired. The letter does not specifically state that criminal or civil sanctions should be imposed on her at

that time. The letter stated that she should be held accountable and fired for her employment misconduct, not sanctioned for any specified criminal or civil law violations.[7] (Id.)

TIGTA, in its submitted declarations, acknowledges that its investigations are not always for law enforcement purposes as they may lead only to administrative actions taken by the IRS. At least one court has held that TIGTA's investigations are not always conducted for law enforcement purposes as TIGTA acknowledges that it looks into administrative misconduct which the D.C. District Court construed as being employee discipline matters for IRS workplace rule violations. *Goldstein v. Treasury Inspector General for Tax Administration*, Civil No. 14-cv-02189 (APM) (D.C. Mar. 25, 2016). Thus, as in *Goldstein*, TIGTA has failed here to meet its burden to show that it compiled the ROI and any other record(s) for "law enforcement purposes." There is at least a genuine issue of material fact on this issue that should have precluded summary judgment. As long as TIGTA hides behind its bogus Glomar Response and fails to provide a *Vaughn* index, the courts have not been provided with sufficient information to say that TIGTA is entitled to judgment as a matter of law. It was error for the District Court to grant summary judgment to TIGTA and it was error for the Court of Appeals to affirm that judgment.

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[7] This must be distinguished from the arguments herein that the actions of Debra Thompson in later engaging in malicious and vindictive retaliation against Mr. Janangelo in July 2015 by seeking to have him fired for his whistle blowing make her conduct a subject of public concern and the public's right to know that Thompson is now violating 5 U.S.C. § 2302(b)(6)(7)(8)(9) and (10).

Second, any privacy interest involved in the records and information sought is outweighed by the clear public interest in misconduct by managers at IRS that includes, "the waste of government funds" and "advancing her career by providing sexual services to an IRS employee while she was married to another man." Assuming, because we have no idea what the records and information will show, that the investigation by TIGTA looked into "waste of government funds" and sexual *quid pro quo* activity or using factors other than merit to advance Thompson's career at IRS, these are clearly matters of public concern and outweigh any privacy interests of Thompson, a Territory Manager at IRS. This is all about citizens' ability to "know what their government is up to." *US Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 773, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). The allegation of "waste of government funds" alone raises a genuine issue of material fact that should have precluded the District Court from granting Defendant's Motion for Summary Judgment because that allegation has nothing to do with Thompson's privacy interests and everything to do with citizens' ability to know what their government is up to. This waste of government funds includes allegations set forth in attachments to Mr. Janangelo's June 11, 2014 letter to Congressman Heck. Also, in Mr. Janangelo's Declaration, he identifies that Debra Thompson's mismanagement and abusive tactics toward her subordinates results in many disputes and grievances that ends up adversely affecting employee productivity and results in the loss of money to the government. In Mr. Janangelo's own case $348,000.00 in audit deficiencies have been missed because of Debra Thompson's malfeasance in her IRS Territory Manager

position. The details of this are presumably discussed in the interview notes and information in the ROI prepared by TIGTA that Plaintiff's FOIA request seeks to obtain. There is a weighty public interest compelling disclosure of records which reflect formal and final agency determinations of official misconduct by senior government employees. *See, e.g., Cochran v. United States*, 770 F.2d 949, 957 (11th Cir. 1985) ("information relating to a misappropriation of government funds . . . by a high level government official qualifies as a textbook example of information the FOIA would require to be disclosed"); *Stern v. FBI*, 737 F.2d 84, 93 (D.C. Cir. 1984) (high-level FBI official censured for deliberate misrepresentation); *Sullivan v. Veterans Administration*, 617 F. Supp. 258, 260-61 (D.D.C. 1985) (senior official reprimanded for misuse of government vehicle and failure to report accident). The actions of IRS Territory Manager Debra Thompson are equally of public interest and therefore not covered by the privacy exemption in (7)(C). Any invasion of privacy under such circumstances would be "warranted" and not "unwarranted" because citizens should know what IRS Managers are up to on behalf of the Federal Government.

TIGTA's Motion for Summary Judgment should have been denied because there are genuine issues of material fact and the Defendant was not entitled to judgment as a matter of law under Fed. R. Civ. P. Rule 56.

II. MR. JANANGELO'S CROSS MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED AND THE REQUESTED REPORT OF INVESTIGATION AND ANY OTHER RESPONSIVE DOCUMENTS PROVIDED TO PLAINTIFF FORTHWITH.

The Freedom of Information Act "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *John Doe Agency v. John Doe Corp.,* 493 U.S. 146, 151 (1989) (quoting *EPA v. Mink,* 410 U.S. 73, 80 (1973)). FOIA expresses a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Id.* at 152.

For the reasons set forth above, which are incorporated here by reference, TIGTA has failed to establish, as a matter of law, that it is entitled to withhold records and information, including the ROI "concerning TIGTA Complaint #55-1409-0099-C" which Mr. Janangelo properly requested in his November 3, 2015 FOIA request. The burden to establish a valid exemption is on TIGTA. *Reporters Comm.,* 489 U.S. at 755, 109 S. Ct. 1468. As it has failed to meet its burden, the District Court should have granted summary judgment in favor of Mr. Janangelo and ordered TIGTA to comply with FOIA and provide the requested records and information.

At the very least, the District Court should have granted summary judgment to Plaintiff as to the impropriety of TIGTA's Glomar Response. In this case Special Agent Moller acknowledged that the records

and information existed and informed Mr. Janangelo that he would need to file a FOIA request to obtain copies of them. Further, TIGTA has disclosed the existence of responsive records or information in the public record by the Declaration of Daphne S. Levitas wherein she states that she is "…***familiar with the document plaintiff seeks***…." (Emphasis added) Thus, TIGTA's Glomar Response defense that it can neither confirm nor deny the existence of responsive records is defeated. This Court should instruct the District Court to order TIGTA to prepare and present a *Vaughn* index and then possibly the District Court will need to conduct an *in camera* review of the documents. The District Court should also be reminded that it has tools in its toolbox, including issuing protective orders under Fed. R. Civ. P. Rule 26(c), like an "Attorneys Eyes Only" order.

CONCLUSION

Summary judgment for TIGTA was improper in this case. Mr. Janangelo's cross-motion seeking summary judgment should have been granted. This Court should grant this Petition for Certiorari and use this case to guide the lower courts on the proper adjudication of FOIA cases, especially including the proper limits of a Glomar Response, limiting its use to only the most compelling cases involving national security, public health, or public safety concerns.

Respectfully Submitted,

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