IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HERITAGE FOUNDATION & MIKE HOWELL *Plaintiffs*, v. U.S. DEPARTMENT OF JUSTICE *Defendant*.	C.A. No. 23-cv-1421 (MN)

PLAINTIFF'S ANSWERING BRIEF TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT
(Oral Argument Requested)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The underlying case is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel the production of records related to Defendant Department of Justice's ("DOJ" or "Department") examination of potential Mann Act violations by Hunter Biden, communications with the United States Probation Office about the Mann Act, and records related to the Department's discharge of its obligations under its applicable statutes. *See* Compl. at ¶ 17 (ECF No. 1). Against this backdrop, Congress and the media have expressed an interest in whether the Justice Department pursued potential Mann Act violations by Hunter Biden over the course of its investigation and complied with its obligations under the Crime Victims' Rights Act, 18 U.S.C. § 3771. *See* Compl. at ¶¶ 12–15, 20. Plaintiffs' FOIA Request ("Request") seeks to learn more about these issues.

Defendant's response is a refusal to confirm or deny the existence of *any* records responsive to the Request. It has issued a *Glomar* response under FOIA Exemption 7(A) (law enforcement exemption) and Exemptions 6 and 7(C) (privacy exemptions). *See* Defendant's Motion for Summary Judgement (May 24, 2024) (ECF No. 17) ("Defendant's Motion" or "Def. Mot."). This is the only question at issue at this stage in the litigation. But as detailed below, Defendant cannot sustain its *Glomar* response. Indeed, Defendant does not even *brief* the basis for its *Glomar* response as to two of the Request's five Specifications. Accordingly, this Court should follow the normal course in FOIA litigation and order Defendant to produce appropriately redacted records with a record-by-record *Vaughn* Index.

BACKGROUND

The Request specifically sought:

1. All communications between the United States Attorney's Office for the District of Delaware and Main Justice regarding potential victims in the investigation of Hunter Biden.
2. All records related to the compilation of potential Mann Act violations related to Robert Hunter Biden referenced at page 155 of the House Committee on Ways and Means' June 1 2023 Transcribed Interview of Joseph Ziegler.
3. All communications with the United States Probation Office relating to Mann Act (18 U.S.C. § 2421 *et seq*.) or related offenses.
4. Records sufficient to show all communications with potential victims concerning disposition of any charges against Robert Hunter Biden.
5. Records sufficient to show which DOJ component was responsible for handling the victims issues related to the investigation of Robert Hunter Biden.

Request at 1. *See also* Declaration of Kara Cain ("Cain Decl.") (ECF No. 17–1) Ex. A at 1.

With respect to Specification 2, Internal Revenue Service ("IRS") Whistleblower Joseph Ziegler testified before the House Committee on Ways and Means that the Justice Department was examining potential Mann Act violations by Hunter Biden as part of their investigation. His testimony was given under penalty of felony and came against the backdrop of significant questions concerning the independence of the U.S. Attorney for the District of Delaware and now Special Counsel David Weiss's ("Weiss") independence prior to his appointment as Special Counsel and his conduct as Special Counsel since his appointment. *See* Compl. at ¶¶ 8–11. Such concerns are further manifested in the widespread Congressional and media interest in potential Mann Act violations brought to light by Mr. Ziegler's testimony. *See* Compl. at ¶¶ 12–15, 20.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, a court will grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A factual dispute is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" only when it involves facts that "might affect the outcome of the suit under the governing law." *Id*.

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Ullah v. CIA.*, 435 F.Supp.3d 177, 181 (D.D.C. 2020) (internal quotation marks omitted). "In considering a motion for summary judgment for the Defendant, the court analyzes all underlying facts and inferences in the light most favorable to the FOIA requester." *Stein v. CIA*, 454 F.Supp.3d 1, 15 (D.D.C. 2020) (citing *Unrow Human Rights Impact Litig. Clinic v. U.S. Dep't of State*, 134 F.Supp.3d 263, 271 (D.D.C. 2015)). "The court will grant summary judgment to the government in a FOIA case only if the agency can prove 'that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.'" *Gatore v. DHS*, 177 F.Supp.3d 46, 50 (D.D.C. 2016) (citing *Friends of Blackwater v. Dep't. of Interior*, 391 F.Supp.2d 115, 119 (D.D.C. 2005)).

FOIA requires federal agencies to make records available to the public upon receipt of a request. *Milner v. Dep't of Navy*, 562 U.S. 562, 564 (2011). "[D]isclosure, not secrecy, is the dominant objective of" FOIA. *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). An agency must disclose its documents unless they fall within one of nine enumerated exceptions. 5 U.S.C. 552(b); *United States Fish & Wildlife Service v. Sierra Club, Inc.*, 592 U.S. 261, 267 (2021).

A *Glomar* response is "'an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information.'" *Wadhwa v. Sec'y U.S. Dep't of Veterans Affs.*, 707 F. App'x 61, 64 (3d Cir. 2017) (quoting *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178

(D.C. Cir. 2011)). "The response is permitted only when 'to answer the FOIA inquiry would cause harm cognizable under' an applicable statutory exemption." *Wadhwa,* 707 F. App'x 61 at 64 (quoting *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007)). "The agency must demonstrate that acknowledging the mere existence of responsive records would disclose exempt information." *Wadhwa* at 64. To sustain a *Glomar* response, the Government must show that "'the existence or nonexistence of the requested records' is *itself* information protected by Exemption 6 or 7(C)." *Bartko v. DOJ*, 898 F.3d 51, 64 (D.C. Cir. 2018) (quoting *Roth*, 642 F.3d at 1178 (internal alteration omitted)) (emphasis added).

As to categorical treatment, it "may be used '[o]nly when the range of circumstances included in the category 'characteristically support[s] an inference' that the statutory requirements for exemption are satisfied.'" *CREW v. DOJ ("CREW III")*, 746 F.3d 1082, 1088–89 (D.C. Cir. 2014) (quoting *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 893 (D.C. Cir. 1995) (internal citation omitted)). "Because the myriad of considerations involved in the Exemption 7(C) balance defy rigid compartmentalization, *per se* rules of nondisclosure based upon the type of document requested, the type of individual involved; or the type of activity inquired into, are generally disfavored." *CREW v. DOJ* (*"CREW IV")*, 854 F.3d 675, 683 (D.C. Cir. 2017).

Glomar responses can be challenged in "two distinct but related ways." *Agility Pub. Warehousing Co. K.S.C. v. NSA*, 113 F.Supp.3d 313, 326 (D.D.C. 2015). First, a FOIA requester "can challenge the agency's assertion that confirming or denying the existence of records would cause harm under the FOIA exemption invoked by the agency. *James Madison Project v. DOJ*, 436 F.Supp.3d 195, 204 (D.D.C. 2020). Second, the requester can acknowledge that the agency has "officially acknowledged" the fact that the requested record exists. *Id*.

ARGUMENT

I. DEFENDANT WAIVED ITS ARGUMENTS AS TO SPECIFICATIONS 4 AND 5

Defendant does not address Specifications 4 and 5 of the Request *at all*. Its discussion of how the Request implicates the Mann Act and any potential investigation into Hunter Biden for potentially violating that statute is supported only by conclusory statements in the Cain Decl. about how the release of responsive records would potentially hinder law enforcement functions (*see* Cain Decl. at ¶¶ 10–14) or invade Hunter Biden's privacy (*see* Cain Decl. at ¶¶ 19, 22, Def. Mot. 10–14.).

Specification 4. Specification 4 does not seek records related to a specific crime, nor does it solicit the identities of potential victims. The only mention of victims in Defendant's papers is a conclusory statement about potential victim intimidation or harassment in the Cain Decl. at ¶¶ 12, 13. It gives no basis for those conclusions.

Specification 5. This Specification seeks to solicit information about the allocation of authority and resources within the Department. Records responsive to Specification 5 cannot seriously hamper the investigation into Hunter Biden and nothing in Defendant's papers addresses this Specification. Defendant's papers simply fail to address this issue.

Defendant fails to account for the logical possibility that other records responsive for the Request are not law enforcement records. For example, a memorandum of understanding between the Delaware U.S. Attorney's office and the Probation Office relating generally to the Mann Act, would undoubtedly be responsive to Specification 3 but not be a law enforcement record. Defendant's failure to address Specifications 4 and 5 or account for other possibilities is fatal. *See Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 186 (3d Cir. 2007); *Bartko*

v. DOJ, 898 F.3d 51, 65 (D.C. Cir. 2018); *Prop. of the People v. DOJ*, 310 F.Supp.3d 57, 66 (D.D.C. 2018).

II. DEFENDANT'S GLOMAR RESPONSE UNDER EXEMPTION 7(A) IS IMPROPER

FOIA Exemption 7(A) permits the government to withhold records that are "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 interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). "To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm." *Manna v. DOJ*, 51 F.3d 1158, 1164 (3d Cir. 1995). "The Court reviews the agency claims of exemption *de novo*." *OSHA Data/CIH Inc. v. United States Dep't of Labor,* 220 F.3d 153, 160 (3d Cir. 2000).

A. Defendant Has Not Shown The Release of the Requested Information Could Reasonably Be Expected to Cause Articulable Harm.

Defendant has failed to show that the release of records responsive to the Request could "reasonably be expected to interfere with a law enforcement proceeding." 5 U.S.C. § 552(b)(7)(A). Defendant's sole support for this proposition is the Cain Declaration. Defendant's papers assert a generic approach to identifying potential harms of the release of responsive records by grouping them into categories to include: (1) tipping off subjects of investigating interest thereby giving them the opportunity take defensive actions to conceal their criminal activities, prepare defenses, or suppress and/or fabricate evidence (*see* Cain Decl. at ¶ 11; Def. Mot. at 8); (2) witness safety in light of a highly publicized subject matter (*see* Cain Decl. at ¶ 12; Def. Mot. at 8); (3) witness tampering, or the risk of witness cooperation (*see* Cain Decl. at ¶ 13; Def. Mot. at 8) and (4) the need to assert a *Glomar* response even if there is no

pending investigation (*see* Cain Decl. at ¶ 14; Def. Mot. at 9.). Defendant's generic concerns are deficient and cannot stand on this unusual record.

The record in this case differs from that of most Exemption 7(A) cases. First, an overwhelming amount of evidence is *already public from Hunter Biden's own laptop*. Second, Congress has released detailed evidence from two IRS criminal investigators that worked on the Hunter Biden investigation that goes directly to the substance of the Request.

Exemption 7(A) requires the government to show *how* disclosure of records would interfere with a law enforcement proceeding. *CREW III*, 746 F.3d at1098 (D.C. Cir. 2014) ("it is not sufficient for the agency to simply assert that disclosure will interfere with enforcement proceedings; 'it must rather demonstrate how disclosure' will do so" (internal citations omitted)); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1114 (D.C. Cir. 2007); *Campbell v. HHS*, 682 F.2d 256, 259 (D.C. Cir. 1982) (holding that the government must show "how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding").

Courts have held assertions of Exemption 7(A) improper when the target of the investigation has possession of, or has submitted, the information in question or the agency has made it public. *See Chesapeake Bay Found., Inc. v. Army Corps of Eng'rs*, 677 F.Supp.2d 101, 108 (D.D.C. 2009) (finding that the agency did not explain "how its investigation will be impaired by the release of information that the targets of the investigation already possess"); *Scheer v. DOJ*, 35 F.Supp.2d 9, 14 (D.D.C. 1999) (declaring that agency assertions of harm "cannot stand as an adequate basis for nondisclosure" when the agency itself disclosed information to target).

With respect to the documents at issue in this case, the information containing potential Mann Act violations are contained on Hunter Biden's laptop. The laptop contains significant evidence of potential Mann Act violations, including receipts of transporting women across state lines to engage in prostitution with Hunter Biden, graphic images of Mr. Biden's sexual encounters, drug use with those women, and more. The laptop contains ample evidence for the Justice Department to fulfill its obligations under the Crime Victims' Rights Act. The Justice Department entered the laptop into evidence in the gun case and the government's witness, a Federal Bureau of Investigation ("FBI") special agent testified that the FBI used "forensic tools to extract data from the laptop" and confirmed its authenticity. *See* Exhibit 1 to the Declaration of Julianne E. Murray ("Murray Decl.") at ¶ 396–400:1–13 (Ex. 1). Hunter Biden's lawyers did not object to the admission of the laptop into evidence. *Id*. By entering the contents of the laptop into evidence in the case, the Justice Department has disclosed the relevant information to the Court and the target of the investigation, Mr. Biden, of the contents of his own laptop. The contents of the laptop have also been available on the internet for years. The Cain Declaration makes no mention of this pertinent fact.

Two IRS criminal investigators that worked on the Hunter Biden investigation testified before Congress under pain of felony about potential Mann Act violations by Hunter Biden. IRS Special Agent Joseph Ziegler recounted efforts by the Justice Department to assess potential Mann Act violations by Hunter Biden:

> Mr. Ziegler: So Lunden Roberts, she was on his payroll. She was not working. She was actually living in Arkansas pregnant with his child, and she was on his payroll. There were expenditures for one of -- he called it his West Coast assistant, but we knew her to also be in the prostitution world or believed to be in the prostitution world. And he deducted expenses related to her. She relates to the sex club issue. And then there were -- and I know that my counsel brought this up earlier. There were some flying people across State lines, paying for their travel, paying for their hotels. They were what we call Mann Act violations.

> Q Where he was paying for the travel of an individual to fly out to California or wherever?
>
> A Or Boston or wherever he was at. D.C. I think one of them -- he flew someone for the night. So, yeah, there were situations like that as well.
>
> Q And were those Mann Act violations referred to the Justice Department?
>
> A I know that they were compiling them together. I don't know what they ended up doing with them. I know there was an effort at some point to compile them, but I don't know what ultimately happened with them.

Murray Decl. Ex. 2 at 155. Supervisory Special Agent Gary Shapley, another IRS criminal investigator working on the Hunter Biden investigation, also testified about how Hunter Biden expensed prostitutes. Murray Decl. Ex. 3 at 97. The Cain Declaration is silent on these facts.

Potential Mann Act violations by Hunter Biden are the subject of Congressional oversight into the Department's conduct. *See* Request at App. A. In a June 25, 2023, letter from Rep. James Comer, Chairman of the Committee on Oversight and Accountability and Rep. Marjorie Taylor Greene to two Department officials, the members noted "the prosecution team identified and interviewed women to whom Hunter Biden paid to have sex and may have facilitated their travel in interstate commerce to commit an illegal act, potentially in violation of the Mann Act. . ." App. A at 4. Again, the Cain Declaration does not address these facts.

On this record the Cain Declaration is woefully deficient. Nothing in it adequately explains *how* the potential parade of horribles would manifest should records responsive to the Request be released given all of the information that is *already* in the public domain. *See* Cain Decl. at ¶¶ 11–14. Defendant's papers merely state those potential outcomes as if they are self-evident and simply concludes that there is harm without explaining *how*. For example, the names of Hunter Biden's victims have already been published. Murray Decl. Ex. 4. The Cain Decl. simply does not address this wealth of existing material. But it must to meet the

Government's burden The Government cannot simply claim harm without *accounting* for it on the applicable facts. The Cain Declaration is deficient; the 7(A) Glomar falls.

III. DEFENDANT'S *GLOMAR* RESPONSE UNDER EXEMPTIONS 6 AND 7(C) IS UNLAWFUL

FOIA Exemptions 6 and 7(C) implicate the personal privacy interests of individuals and balances their interests against the public interest in disclosure. Exemption 6 exempts from disclosure information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) exempts from disclosure "records or information compiled for a 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." 5 U.S.C. 552(b)(7)(C). The scope of Exemption 7(C) ("could reasonably be expected to constitute an unwarranted invasion of personal privacy) is "somewhat broader" than Exemption 6 (which requires proof of a "clearly unwarranted invasion of personal privacy"). *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). If the FOIA request covers information covered entirely under Exemption 7(C), the reviewing court "would have no need to consider Exemption 6 separately because all information that would fall within the scope of Exemption 6 would also be immune from disclosure under Exemption 7(C)." *Roth*, 642 F.3d at 1173.

"Exemption 7(C)'s protection of personal privacy is not absolute." *Lame v. DOJ*, 654 F.2d 917, 923 (3d Cir. 1981). "[T]he proper approach to [analyzing a FOIA] request under a privacy-based exemption such as § 7(C) is *de novo* balancing, weighing the privacy interest and the extent to which it is invaded, on the one hand, against the public benefit that would result from disclosure on, on the other. *Id.*; s*ee also McDonnell v. U.S.*, 4 F.3d 1227, 1254 (3d Cir.

1993); *Ferri v. Bell*, 645 F.2d 1213, 1213 (3d Cir 1981). Exemption 6 and 7(C) are "simply not well-suited to categorical determinations." *CREW IV*, 854 F.3d at 683. Courts have instructed that the analysis of privacy under either Exemption 6 or 7(C) takes place in three parts.

First. The Government must demonstrate that a privacy interest protected by a privacy exemption is "present." *Favish v. Nat. Archives & Rec. Admin.*, 541 U.S. 157, 172 (2004).

Second. But even when disclosure implicates private interests, the government may be required to disclose documents if the individual seeking the information demonstrates:

> a public interest in the information that is sufficient to overcome the privacy interest at issue. In order to trigger the balancing of public interests against private interests, a FOIA requester must (1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest. If the public interest is government wrongdoing, then the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.

Boyd v. Crim. Div. of U.S. Dep't of Just., 475 F.3d 381, 386–87 (D.C. Cir. 2007) (internal quotation marks and citations omitted). Here, the burden is on the *requester*.

The Supreme Court has explained, that for the purpose of determining what constitutes a "public interest" in the privacy context, the "purposes for which the request for information is made" are irrelevant. *Reporters Comm. For Freedom of Press*, 489 U.S. 749 at 771. The inquiry "turn[s] on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Id.* at 772 (*Rose*, 425 U.S. at 372). That purpose includes the fact "the Act was designed to create a broad right of access to 'official information'" *Id.* (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973)), that is to say "citizens' right to be informed about 'what their government is up to.'" *Id.* at 773 (quoting *Rose*, 425 U.S. at 360–61).

Third. Here, the *Government* bears "the burden of making an across-the-board showing that the privacy interest the government asserts categorically outweighs any public interest in disclosure." *Bartko*, 898 F.3d at 64; *see also CREW III*, 746 F.3d at 1096.

A. Hunter Biden's Privacy Interest is at an Ebb.

Plaintiffs do not dispute that there is a sufficient privacy interest to clear the low bar of a privacy interest cognizable under Exemption 6 and 7(C). But the presence of *some* privacy interest sufficient to invoke an exception says nothing about the *weight* of that privacy interest which is critical to the required balancing of the privacy interest and public interest in disclosure. *See, e.g.*, *Samahon v. FBI*, 40 F.Supp.3d 498, 517 (E.D. Penn. 2014) ("But to say that prior disclosure of information does not automatically terminate privacy interests is not to suggest that prior disclosure is irrelevant to the inquiry. On the contrary, the extent to which a fact is already public affects the significance of the privacy rights at stake."). Defendant's Motion misses this point entirely. *See* Def. Mot. at 12 (inaccurately describing the Request as "specifically seek[ing] records related to an investigation of Mr. Biden for Mann Act violations. . .").

Hunter Biden's privacy interest in this case is at an ebb because: (1) a great deal of information regarding potential Mann Act violations by Hunter Biden is already public; and (2) Hunter Biden has a diminished privacy interest as a public figure.

1. A Great Deal of Information Regarding Potential Mann Act Violations by Hunter Biden is Already Public.

A great deal of information regarding Hunter Biden and potential Mann Act violations is widely publicly known.

First. Two IRS career criminal investigators that worked on the Hunter Biden investigation testified to Congress about the Department's assessing of potential Mann Act

violations by Hunter Biden. The transcripts of those interviews have been publicly available for approximately one year.

Second. Potential Mann Act violations by Hunter Biden are the subject of Congressional oversight into the Department's conduct for nearly one year. *See* Request at App. A.

Third, both Hunter Biden and the Department have made public evidence related to the Department's analysis of potential Mann Act violations. In the trial before the Court, the Justice Department entered into evidence Hunter Biden's laptop, which contains detailed evidence of payments for the transportation of women for the purposes of prostitution and graphic images of sexual encounters and drug use with those women.

2. Hunter Biden Has a Diminished Privacy Interest as a Public Figure.

Hunter Biden's status as a public figure is indisputable. There is extraordinary controversy surrounding his international business dealings and well-founded allegations that the federal law enforcement investigation into those business dealings has been tainted by improper political influence. Indeed, the House of Representatives has initiated an impeachment inquiry into President Biden *because* of Hunter Biden's business dealings and because it appears the Justice Department pulled punches in its investigation.

Courts have long held when assessing exemptions asserted under Exemption 6 and 7(C), that this type of status as public figure diminishes the asserted privacy interest. *See, e.g.*, *Crew III*, 746 F.3d at 1096; *Nation Magazine,* 71 F.3d 885, 894, n.9; *James Madison Project*, at 205; *Iowa Citizens for Cmty. Improvement v. U.S. Dep't. of Agric.*, 256 F.Supp.2d 946, 954–56 (S.D. Iowa 2002).

Defendant has also failed to consider the import of Congressional oversight of the Hunter Biden investigation and the subject matter of the Request. Hunter Biden's conduct has been

repeatedly and publicly discussed as part of widely publicized Congressional oversight conducted by the House Committees on Judiciary, Oversight and Accountability, and Ways and Means in the 118th Congress. Thus, it is entirely unclear how merely acknowledging records that a criminal investigator on the Hunter Biden case told Congress under penalty of felony exist would convey more information than is already public. In such an unusual situation, Hunter Biden's general privacy interest in the *Glomar* is extraordinarily attenuated (record by record balancing is obviously a different question). *See Judicial Watch v. DOJ*, 394 F.Supp.3d 111, 118 (D.D.C. 2019)("[Christopher] Steele is not presently unknown to the world—or anywhere close to it.").

Hunter Biden is a public figure with a well-known association for the acts implicated in the Request. The evidence of such actions was saved on his own laptop. The Department has entered that laptop into evidence in its prosecution before the Court. A criminal investigator working on the Hunter Biden investigation testified to Congress under pain of felony that records responsive to the Request exist. And finally, the House of Representatives has initiated an impeachment inquiry against Hunter Biden's father because of Hunter Biden's conduct. The Court should not sustain Defendant's *Glomar*.

B. There Is a Clear Public Interest in the Requested Information,

1. The Record "would warrant a belief by a reasonable person that the alleged government impropriety might have occurred" under *Favish*.

As to the question of possible agency misconduct, there is no dispute between the parties as to the applicable standard. Plaintiffs accept Defendant's statement that "[t]o assert a public interest, Plaintiffs would need to 'produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Def. Mot. at 16 (quoting

Favish, 541 U.S. at 174). The dispute focuses on how that standard has been construed and the application of law to fact.

Start with *Favish*. There, the record established that "plaintiff's accusations were wholly unfounded and had been refuted by five separate government investigations." *Aguirre v. SEC*, 551 F.Supp.2d 33, 57 (D.D.C. 2008). *Favish* itself is clear that its standard requires more than "bare suspicion," but in light of "FOIA's prodisclosure purpose" the *Favish* standard is "*less* stringent" than that required to rebut the presumption of regularity. 541 U.S. at 174 (emphasis added). Accordingly, Defendant's invocation of that presumption, Def. Mot at 16–18, is misplaced.

In applying *Favish*, courts have repeatedly emphasized that a circumstantial showing of *possible* misconduct or *possible* negligence is sufficient. *See Rojas v. Fed. Aviation Admin*., 941 F.3d 392, 398–400, 406–07 (9th Cir. 2019); *Union Leader Corp. v. U.S. Dep't of Homeland Sec.*, 749 F.3d 45, 54–56 (1st Cir. 2014); *Roth* at 1180; *James v. Dep't of Def.*, No. 3:18-cv-28 (JWS), 2018 WL 4926302, at *4 (D. Alaska Oct. 10, 2018); *Aguirre*, 551 F.Supp.2d at 56.

Plaintiffs easily clear the *Favish* bar. Plaintiffs' complaint lays out in exhaustive detail the multiple contradictory statements that the Attorney General and Weiss himself made with respect to Weiss's authority prior to Weiss's appointment as Special Counsel. *See* Compl. at ¶¶ 8–11. Indeed, the Court is aware of widespread concerns with Weiss's independence as Plaintiffs submitted an *amicus* brief opposing the proposed plea deal to resolve Case No. 23-cr-061 and Case. No. 23-mj-274 last year. *See* Murray Decl. Ex. 5. In that filing, Plaintiffs discussed at length the multiple contradictory statements concerning Weiss's authority made by the Attorney General, Weiss himself, and the testimonies of IRS Agents Shapley and Ziegler concerning Weiss's authority. The Court's rejection of that plea deal served, at a minimum, as

an implicit acknowledgment of concerns about the administration of justice because the parties could not articulate to the Court the scope of their agreement. *See* Murray Decl. Ex. 6 at ¶ 54:1–25; 551–25.

2. There is a Public Interest in Understanding the Exercise of Discretion in a High-Profile Case

Courts have "repeatedly recognized a public interest in the manner in which the DOJ carries out substantive law enforcement policy." *CREW III*, 746 F.3d at 1093. As the D.C. Circuit has explained, relevant to that interest (in the context of a specific criminal investigation) is "the diligence of the FBI's investigation and the DOJ's exercise of its prosecutorial discretion: whether the government had the evidence but nevertheless pulled its punches." *Id.*; *accord id.* at 1093–94 (collecting authorities); *CREW IV*, 854 F.3d at 682 (same).

Necessarily, that interest is applicable even to a specific case, especially a high-profile one. *See CREW III*, 746 F.3d at 1094; *CREW IV*, 854 F.3d at 679; *see also Ocasio v. DOJ*, 70 F.Supp.3d 469, 482–83 (D.D.C. 2014). There is no dispute the investigation of Hunter Biden is high profile.

Plaintiffs have shown that public interest. There are significant questions surrounding Weiss's independence prior to his appointment as Special Counsel. Indeed, the Attorney General himself acknowledged at least the appearance of a lack of independence with Weiss, or else he would not have appointed him Special Counsel over the Hunter Biden investigation in the first place. As Plaintiffs catalogued in the Complaint, Weiss's independence has been consistently debated in the halls of Congress and the press and has been subject of contradictory statements from the Attorney General, and Weiss himself. Compl. at ¶¶ 8–11.

C. Plaintiffs' Interests in Obtaining the Records Sought Outweigh Hunter Biden's Privacy Interests.

1. The Cain Declaration Does Not Support Defendant's *Glomar*.

The Cain Declaration is inadequate to support Defendant's *Glomar* response. It contains, at most, passing references that downplay Plaintiffs' and the public's interest in obtaining the requested information. It is a halfhearted exercise running through the *Favish* standards. With respect to Hunter Biden's privacy interests the Cain Declaration provides two conclusory statements that Hunter Biden's privacy interests would be damaged by the release of responsive records. *See* Cain Decl at ¶¶ 19, 22. Anyone who was in this Court's courtroom for the recent trial knows that Hunter Biden is the proverbial "libel proof" individual. To take one example, the revelation that Hunter engaged in a romantic relationship with his brother's widow and got her addicted to crack cocaine mere *months* after his brother's passing is far more damaging to Mr. Biden's reputation than any record possibly released in this case. *See* Murray Decl. Ex. 7 at 825:1-11. Hunter Biden simply *has* no public reputation.

The Cain Declaration fairs no better in its discussion of the public interest in the records, stating just "[t]here has been no demonstration that the public interest outweighs Mr. Biden's right to personal privacy." Cain Decl. at ¶ 23. On the weighing of the interests, the Cain Declaration is equally conclusory. *See* Cain Decl. at ¶ 24.

The Cain Declaration repeatedly fails to discharge the basic requirements of the balancing of interests. *See Cabezas v. Fed. Bureau of Prisons*, 2023 WL 6312349 at *2 (D.D.C. 2023) (discussing the requirements of a declaration to sustain a *Glomar* and rejecting a declaration that offered "nothing more than conclusory claims regarding the public interest.") That failure is fatal to sustain a *Glomar* response to all records responsive to the Request.

2. The Balance of Interests Favors Disclosure.

Even setting aside the multitude of infirmities in the justification for Defendant's *Glomar* response, the significant public interests present here outweigh Hunter Biden's privacy interests. Recall that the burden here is on *Defendant* and that at the end of the day, FOIA's "strong presumption in favor of disclosure," *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), is a "kicker" in terms of resolving close issues in favor of disclosure. *See Rojas*, 941 F.3d at 406.

a. Privacy Interests

As an initial matter, Defendant offers no information about how Specifications 4 and 5 of the Request implicate Hunter Biden's privacy interests. With respect to the rest of the Request, since the public is already aware through multiple sources of Hunter Biden's potential Mann Act violations and the Department's interest in those activities, Hunter Biden's privacy interests in those topics are attenuated. *See, e.g.*, *Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998); *Nation Mag.*, 71 F.3d at 896; *DBW Partners v. U.S. Postal Servs. et al*, 2019 WL 5549623, at *5 (D.D.C. Oct. 28, 2019). The requested information is also "largely publicly available" through a multitude of sources. *Samahon*, 40 F.Supp.3d at 516; *Sheppard v. DOJ*, 2021 WL 4304217, at *11 (W.D. Mo. Sept. 21, 2021).

Defendant's reliance on *Codrea v. ATF*, No. CV 21-2201 (RC), 2022 WL 4182189 (D.D.C. Sept. 13, 2022) misses the mark for several reasons. *See* Def. Mot. at 13–15. First, the court in *Codrea* stated that news articles about the Delaware State Police's investigation into Hunter Biden and Hunter Biden's general statements incriminating himself in his memoir did not reduce in Hunter Biden's privacy interest in whether the ATF was investigating him. 2022 WL 2184189 at *7. Here, there is much more evidence beyond news articles confirming that *Defendant* possesses records responsive to the Request. Second, Plaintiffs' FOIA request—on its face—requests records that do not implicate Hunter Biden's privacy interests *at all*. *See*

Request Specifications 4 and 5. Finally, the court in *Codrea* ruled before the widespread public controversy on how the Justice Department investigated and prosecuted the President's son. *Id.*. The facts surrounding Hunter Biden's status as a public figure are simply more profound in this case than when the court ruled in *Codrea*.

b. Public Interests

Turn to the public interests. There are several factors that bolster it in this case.

1. That Plaintiffs carried their burden under *Favish* to show probable misconduct or negligence carries significant weight of its own accord. It is the most compelling of interests in favor of disclosure. *See, e.g.*, *Reporters Comm. for Freedom for the Press v. USCIS*, 567 F.Supp.3d 97, 126 (D.D.C. 2021) ("whether agency 'acted negligently or otherwise improperly in the performance of [its] duties' is a significant public interest under Exemption 7(C)" (quoting *Favish*, 541 U.S. at 173)) .

2. Because this is an extraordinarily high-profile case, the salience of the public interests at play are significantly increased. *See CREW III*, 746 F.3d at 1092–94; *Bast v. DOJ*, 665 F.2d 1251, 1255 (D.C. Cir (1981) ("important public interest" in declination to prosecute in high-profile case); *CREW v. DOJ ("CREW II")*, 978 F.Supp.2d 1, 13 (D.D.C. 2013); *CREW v. DOJ ("CREW I")*, 846 F.Supp.2d 63, 73–74 (D.D.C. 2012).

3. The extensive reporting on Plaintiffs' precise questions—whether there was in fact misconduct or negligence and whether an examination of the Department's exercise of discretion in this case will reveal it "pulled its punches" for the President's son—also adds weight to the public interest. *Roth*, 642 F.3d. at 1176 (deeming interest in "potential innocence" of death row inmates substantial in part based on fact that "this interest has manifested itself in several media, including newspaper articles, editorials, journalistic exposés, novels, and plays.");

CREW II, 978 F.Supp.2d at 13 ("widespread media attention" "contribute[s] to the public interest in disclosure"); *Codrea*, 2022 WL 4182189 at *9.

4. Congressional interest—and the on-going policy debate—also strengthen the weight of the asserted interest. *See, e.g.*, *CREW II*, 978 F.Supp.2d at 13 ("ongoing public policy discussion" "contribute[s] to the public's interest in disclosure").

5. Since there does not appear to be another way to obtain the information—in other words the information sought goes directly to the point at issue—further strengthens the interest in disclosure. *See, e.g.*, *Aguirre*, 551 F.Supp.2d at 55, 58; *cf. Bast*, 665 F.2d at 1255; *Reporters Comm.*, 567 F.Supp.3d at 126.

Plaintiffs understand Congressional inquiries on this subject to date have been stymied. The privacy side of the scale is diminished on multiple fronts. The public interest coincides with every factor Courts have held strengthens the public interest. And the kicker—as always—favors disclosure. Disclosure is required.

IV. THE COURT SHOULD ORDER DEFENDANT TO SEGREGATE AND PRODUCE NON-EXEMPT RECORDS AND SUPPLY A *VAUGHN* INDEX EXPLAINING THE BASIS FOR WITHHELD RECORDS

The Cain Decl. contains conclusory, ambiguous, and circular arguments about the potential harms that will flow from the release of the information. *See* Cain Decl. at ¶¶ 10–14. Therefore, the Court should reject Defendant's categorical *Glomar* response and order Defendant to produce all segregable, non-exempt records with a *Vaughn* index explaining the basis for withheld records.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Defendant's motion for summary judgment and grant Plaintiff's cross-motion for summary judgment.

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Respectfully submitted,

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