

Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—D.D.C.: Court thwarts DOJ FOIA arguments, (Aug. 6, 2014)

By Amanda Maine, J.D.

A federal court rejected most of the arguments by the Department of Justice to prevent the release of certain documents under the Freedom of Information Act. The DOJ's Office of Professional Responsibility and the FBI sought to utilize FOIA exemptions to prevent the release of documents relating to the prosecution of a securities fraud case ([*Bartko v. U.S. Dep't. of Justice*](#), August 5, 2014, Boasberg, J.).

Background. Gregory Bartko was convicted of conspiracy, mail fraud, and selling unregistered securities and received a 23-year prison sentence for his alleged crimes in 2010. Assistant U.S. Attorney Clay Wheeler was in charge of prosecuting Bartko. Following his imprisonment, Bartko sought to gain access to documents demonstrating that Wheeler withheld evidence crucial to Bartko's defense and engaged in a pattern of "tainted prosecutions." Bartko sent FOIA requests to several federal agencies, including the Department of Justice's Office of Professional Responsibility (OPR) and the FBI, for documents concerning Wheeler or that would otherwise be relevant to his case. OPR and the FBI filed a motion for summary judgment, arguing that privacy concerns relating to Wheeler and others justified their refusal to produce the documents sought by Bartko.

***Glomar* response.** Under FOIA, an agency that withholds documents subject to a FOIA request must explain what has been withheld and why. However, if revealing even the very existence of certain records would cause harm, the government is allowed to refuse to confirm or deny the existence of such records, known as a *Glomar* response. A *Glomar* response is used in cases where merely acknowledging that such records exist would compromise the privacy of individuals such as government informants or trial witnesses.

OPR. OPR, in refusing to confirm or deny the existence of any documents relating to investigations of Assistant U.S. Attorney Wheeler, identified Wheeler's personal privacy interest in not having it known that he has been the subject of an OPR investigation. However, the court noted that Thomas Walker, U.S. Attorney for the Eastern District of North Carolina, has publicly acknowledged that he referred Wheeler's conduct to OPR and that this information was, therefore, in the public domain. OPR argued that Walker's comments did not constitute an "official" public acknowledgement. The court found this argument unpersuasive, noting that "a statement to the media made by a person authorized to speak for the agency" suffices for the public domain exception. The court held that Bartko is entitled to a substantive response regarding information about OPR's inquiry into Wheeler's conduct during his trial.

FBI. Bartko also requested from the FBI records concerning himself, five companies, and four other individuals, including three of his co-conspirators who served as witnesses during his criminal trial. The FBI withheld many of these records pursuant to various FOIA exceptions. The FBI had refused on privacy grounds to even search for documents relating to the co-conspirators. The court agreed with Bartko that such a categorical denial was impermissible. The court did not order the FBI to produce the documents; however, it did order that the FBI at least search for the documents and either release them or provide an appropriate *Vaughn* index of the documents.

The court also rejected the FBI's contention that it could withhold documents under a statutory exemption for protecting "techniques and procedures" of law enforcement. The government's outline of the documents allegedly protected under this exemption did not mention how the disclosure of the "bare data" requested by Bartko would reveal any technique or technological method employed by the FBI. In addition, the court expressed disbelief at the FBI's assertion that records residing on two CDs and a thumb drive were not "records" for FOIA purposes.

However, the court did agree with the government that it should not be required to produce documents relating to disclosures made before the grand jury. The court noted that the withheld documents contain information about the names of recipients of grand

jury subpoenas, identify specific records subpoenaed by the grand jury, and contain copies of specific records provided to the federal grand jury in response to subpoenas.

The case is [No. 13-CV-01135\(JEB\)](#).

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