UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF OHIO
WESTERN DIVISON

DAVID ESRATI *pro se*	•	Case No. 3:21-CV-218
	•	District Judge Michael J. Newman
Plaintiff,	•	
	•	
v.)	•	
	•	
U.S. DEPARTMENT OF JUSTICE *et al.*	•	
	•	
	•	
Defendants.	•	

Plaintiff's Opposition To FBI Motion for Summary Judgement

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1. The Plaintiff 's last filing, September 14, 2021 urged the court to act swiftly. Instead, the government took its time to deliver a motion for summary judgement on Feb 25, 2022- 164 days later. As a pro se activist who has had his case dismissed over a filing that was calculated to be a

single day late after 30 days, I'm asking why my government isn't held to the same standard? On these grounds alone, their motion for summary judgement should be dismissed, and the court should demand the immediate production of the documents/tapes in question.

2. The plaintiff acknowledges that the legal profession is the only one that rewards plagiarism (they call them "citations") in evaluating the quality of their work product. The defendants cite all kinds of FOIA exemptions and their right to issue a *Glomar* response, without a single mention of the law that the plaintiff cited in the original filing that debunks their arguments for the rights to hide the evidence presented in a grand jury when it comes to public officials engaged in criminal behavior: ***Senate of Puerto Rico v. Department of Justice,* 823 F.2d 574 (D.C. Cir. 1987).**

3. The use of Glomar in this case is pure idiocy, and its usefulness as a "Defense" needs to be reevaluated in the information age. This isn't the movie "Men in Black" with comedians in black suits and sunglasses trying to suggest some sort of primacy on information about dangerous aliens- it's Dayton Ohio where there are 1.2 degrees of separation between people. The FBI and the DOJ have proven to be itinerant interlopers attempting to investigate a swamp that's been festering for decades in Dayton. These government agents, if put in charge of fielding a sports team, couldn't spell the names of the players right, never mind put the lineup together or figure

out who was fielding the opposing team- or even what sport was being played. It may explain why they bumbled like amateurs and only indicted Black people in an already extremely racially divided community. They did more harm to their own reputation than they did to those charged and convicted.

4. Glomar started over the building of a "secret ship" by the government to search for a sunken Russian nuclear submarine. In 2022, that work would more likely be carried out by a private firm, with well-funded explorers, with high tech equipment of their own. But, knowing that a ship was being built? Any kid with a $400 drone could take photos, videos, and it might even show up on Google Earth views. Glomar is a relic from the past. And, there is no "national security" issue at stake. This case is about local 2-bit politicians who've grown too big for their britches because they've been left to run a small American town like a mobster's clubhouse. The FBI is so late to this party that it's embarrassing. Their coverup of their incompetence is now what is at question.

5. At this point, the plaintiff requests the court to review the agency decision de novo and examine withheld records in camera to assess whether nondisclosure is justified (see Department of Air Force v. Rose, 425 U.S. 352 (1976)), and that the defendant be forced to supply a Vaughn index, describing the contents of each withheld document and explaining the

statutory justification for its exemption. The tapes were played in the Grand Jury, documents were presented, and since this is not a matter of National Security, Glomar, more properly now known as *"neither confirm nor deny"* (NCND), is not relevant to this case. Once a Vaughn index is supplied, they must fully justify every part of their NCND- for each document. It's not a safety blanket exemption or "Get Smart's" "Cones of silence." "Plaintiffs challenge whether, indeed, there are no "meaningful, reasonably segregable" portions of the documents. If there are, those portions must be produced. See 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.")."

6. Typically, Glomar (NCND) only has 3 defenses, national security, privacy and protecting confidential informants. In the case of Nan Whaley, there is no issue of national security, privacy isn't pertinent to the actions of a public official in relationship to crimes committed pursuant to her public office- so the only remaining excuse is that she's a confidential informant, working to somehow absolve herself the way Joey Williams did. Yet, the government didn't claim an exemption under 7(F). In which case, the defendants are failing to report a crime against the public and perpetrating a fraud against voters by allowing her to campaign and collect donations

despite her being unfit for office. Moreover, E.O. 12958 § 1.4 1995

> Information may not be classified to "conceal violations of law," to "prevent embarrassment," or to prevent or delay release of information "that does not require protection":
> Sec. 1.7. Classification Prohibitions and Limitations.
> (a) In no case shall information be classified in order to:
> (1) conceal violations of law, inefficiency, or administrative error;
> (2) prevent embarrassment to a person, organization, or agency;
> (3) restrain competition; or
> (4) prevent or delay the release of information that does not require protection in the interest of the national security.

The danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods, especially in this case, where it seems their methods only work to indict Black people.

7. The argument of protecting Ms. Whaley's privacy is not a blanket exemption. In National Archives and Records Administration v. Favish, 541 U.S. 157 (2004) the clarification was made:

> "Thus, where there is a privacy interest protected by Exemption 7(C) and the public interest asserted is to show that responsible officials acted negligently or otherwise improperly in performing their duties, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred. When the presumption of legitimacy accorded to the Government's official conduct is applicable, clear evidence is usually required to displace it."

The Plaintiff has made it abundantly clear 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 that the

information is likely to advance that interest."

8. These files were originally requested on May 28, 2021. The first response denying these documents, claimed "5 U.S.C. § 552(b)(3), which concerns matters specifically exempted from release by statute (in this instance, Rule 6(e) of the Federal Rules of Criminal Procedure." In their motion for summary judgement- they now cite "FOIA Exemptions (b)(3), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E)." In the meantime, the contents of the tapes haven't changed, nor have the circumstances.

9. The tapes of former Dayton Mayor Nan Whaley exist. Whether the defendants can confirm or deny is immaterial. These tapes/records must be released. Again, the FBI and the DOJ think that they are the only ones who know people or what they've been up to. That is an insult to the intelligence of the American public. While the defendants were doing connect the dots with crayons, others with less authority, money and support, have already painted the complete masterpiece, in oil on canvas in a hyperreal image. It's a vast picture of a group of people who select judges for life in secret meetings, allow a sheriff to not only torture citizens in the jail, pepper spraying inmates in restraining chairs who instead of going to prison for crimes worthy of an international tribunal, ends up elected to higher office. The integrity of this local "Monarchy of Montgomery County" has barely been violated despite a multi-year

investigation by these “investigations” and in fact, the investigators have committed more crimes in the process of their shoddy, racist work, than they’ve solved.

10. The FBI is once again involved in a committing a crime, allowing Whaley to run for office. This issue must be addressed because the Feds failing to inform the public, for whom they work, that former Dayton City Commissioner Joey D Williams had committed felony crimes in office- while allowing him to run for office, is a crime as well. It is up to this court to put a stop to this kind of illegal meddling in the integrity of local elections by the Federal Government. Continued coverup of this action must stop.

11. The only plausible excuse for the soft handling of Williams, was that he was making tapes of others involved in the same kind of chicanery that he was, at a higher level. There is no reason that Nan Whaley, Shelley Dickstein and Aaron Sorrell haven’t all been thrown in prison for the waste of taxpayer money, and botched contract with Steve Rauch Inc for the demolition of the former Dayton Daily News and Schwind Buildings on S. Ludlow- or the money that was given to an out of state LLC- Student Suites, that never produced anything but a hole in the ground that later cost the taxpayers millions more to backfill.

12. Although Judge Rose ordered me (and any others) to destroy the Higgins Discovery documents, I can swear in court, that the publication of the FBI

document, where Joey Williams is introduced as a CI on 10/2/2015 is true and accurate: https://esrati.com/and-the-rest-of-the-williams-corruption-story/17659 Everyday this crime is covered up, is another break in the trust of government by the public.

13. The Plaintiff spent a week observing the trial of the DOJ vs Brian Higgins, and wonders how the jury would have decided if the government hadn't been allowed to hide the entire backstory of how their sleezeball confidential informant, Mike Marshall and the defendant Brian Higgins were working together, with now convicted "silent partners" Roshawn Winburn and Joey Williams, to set up a new demolition company, using Higgins' disabled veteran status and minority classification to make millions from the City of Dayton in demolition contracts. Higgins was the conduit that introduced Marshall to both Roshawn Winburn and Joey Williams. Without Higgins' introductions, the cases against Winburn and Williams would never have been filed. Context matters in evidence, yet the FBI and the DOJ carefully tailored the evidence to implicate Higgins in insurance fraud- without the jury understanding the full extent of the criminality and the relationships that they were manipulating.

14. The Plaintiff later requested through the FOIA portal information on multiple players in the City of Dayton corruption scandal. The FBI and the DOJ ignored the request for the most part, except for the records related to Willis Blackshear, which

they denied having any records of. They had to respond because Willis is dead. The problem with their denial of having files is that when the Ohio Capital Journal wrote a story about the unsealing of 2 warrants (previously cited in initial filings) - one was clearly an investigation of Mr. Blackshear. The Federal Government isn't abiding by the law and forgetting that some of their cards are already on the table.

15. Considering the upcoming primary election, which has balloting beginning on April 3rd, I believe it is in the public's right, to have access to these documents now, not later.

Requested Relief

WHEREFORE, plaintiff prays that this Court:

A. Immediately order defendants to disclose the requested records in their entireties and make copies available to plaintiff;

B. ***provide for expeditious proceedings in this action***;

C. award plaintiff its costs and reasonable fees incurred in this action; and

D. grant such other relief as the Court may deem just and proper.

Respectfully Submitted

/s/ David Esrati
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Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2022, this document was served by agreed upon email to the following:

U.S. DEPARTMENT OF JUSTICE
Matthew J. Horwitz
Assistant United States Attorney
U.S. Attorney's Office for the Southern District of Ohio
221 E. Fourth Street, Suite 400
Cincinnati, Ohio 45202

And hand filed in Court- since I am not yet privy to a PACER account. Each time the plaintiff is burdened with a trip to the Courthouse, since I cannot be granted access, I ask that when I prevail, I be reimbursed $325 per filing for my time wasted by your denial of access.