

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendants.

Civil Case No. 17-cv-1039-DLF

**PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiff Electronic Frontier Foundation (“EFF”) respectfully submits this Notice to alert the Court to the United States District Court for the District of Columbia’s recent decision in *Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation*, No. 17-701-RC (D.D.C. March 1, 2019) (“*Reporters Committee*”), which is relevant to Plaintiff’s and Defendant United States Department of Justice’s cross-motions for summary judgment pending before this Court. (Dkt. Nos. 13-14, 19, 21). A copy of the opinion is attached to this Notice.

In *Reporters Committee*, the court rejected the Federal Bureau of Investigation’s claim that it could rely on Exemption 7(E) of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(7)(E), to refuse to confirm or deny the existence of certain records that would disclose whether the Bureau had impersonated documentary filmmakers and film crews. Slip Op. at 1-2. The plaintiff sought records about the Bureau’s impersonation of documentary filmmakers as part of its investigation into rancher Cliven Bundy, as well as records that document the Bureau’s impersonation of filmmakers in other cases. *Id.* at 5-7.

The Bureau refused to process portions of the plaintiff's request that went beyond its investigation into Mr. Bundy and his associates. *Id.* at 7. Instead, the Bureau issued a so-called *Glomar* response in which it refused to confirm or deny the existence of such records based on its argument that acknowledging the existence of additional records concerning its impersonation of documentary filmmakers would reduce the effectiveness of the technique. *Id.* at 9-10.

The *Reporters Committee* court rejected the Bureau's Exemption 7(E) *Glomar* claim. *Id.* at 14-20. It first held that the Bureau's impersonation of documentary filmmakers was a well-known law enforcement technique, largely because of the media attention and public scrutiny surrounding the FBI's impersonation of filmmakers in its investigation of Mr. Bundy. *Id.* at 16 ("What other situations the technique may have been used in is still a secret, but the fact that it is a technique law enforcement uses is not, and Defendants accordingly cannot justify the FBI's *Glomar* response on the grounds that revealing whether documents exist would disclose an unknown law enforcement technique.").

The court next held that disclosing the mere existence of other records documenting when the Bureau's impersonated filmmakers in other investigations would not reduce or nullify the effectiveness of the technique. *Id.* at 18 ("Simply revealing that the FBI has any such records would not allow criminals to discern whether or not the FBI has used the technique to investigate their own, specific criminal activity, because all a criminal would know is the existence of an unquantified number of records.").

In rejecting the Bureau's *Glomar* response, the court acknowledged that the Bureau could still make specific claims to withhold or to redact certain records or information under FOIA, but that the "determination of whether disclosure of any information in the documents sought could cause harm must be made utilizing the standard FOIA tools applied on a document-by-document

basis.” *Id.* at 20. It also distinguished the Bureau’s reliance on *Petrucelli v. DOJ*, 51 F. Supp. 3d 142 (D.D.C. 2014), holding that it did not permit the Bureau to provide a *Glomar* response and instead merely permitted the withholding of particular documents under Exemption 7(E) that the agency had actually searched for and processed in response to a FOIA request. Slip Op. at 20.

Similar to *Reporters Committee*, the Bureau in this case has provided a *Glomar* response under Exemption 7(E), arguing that it cannot produce any records concerning its use of informants at computer repair facilities in any other context or in any other cases outside of what has been disclosed in one criminal prosecution: *United States v. Rettenmaier*, No. 14-cr-188 (C.D. Cal.). Defendant’s Motion for Summary Judgment (“Def. Mot.”) at 13-17 (Dkt. No. 13-2). Defendant argues that to even acknowledge whether such records exist would disclose non-public law enforcement techniques and create a risk that criminals could evade its use of informants at computer repair facilities. *Id.* at 15-16. The Bureau, like it did in *Reporters Committee*, relies on *Petrucelli* in support of its *Glomar* argument. Defendant’s Opposition to Plaintiff’s Cross-Motion for Summary Judgment (“Def. Opp.”) at 4 (Dkt. No. 19).

Like the court in *Reporters Committee* held, Plaintiff here has shown that the FBI cannot use a *Glomar* response in light of the fact that it is generally well known that law enforcement rely on cooperating computer repair technicians in criminal investigations. Plaintiff’s Opposition to Defendant’s Motion for Summary Judgement and Cross-Motion for Summary Judgement (“Pl. Mot.”) at 11-12 (Dkt. No. 14). Plaintiff demonstrated that the widespread reporting and public attention directed toward the FBI’s use of computer repair technicians as informants in the *Rettenmaier* investigation rendered the FBI’s *Glomar* response inappropriate. *Id.*

Plaintiff has also shown, like the *Reporters Committee* court, that cases such as *Petrucelli* do not permit the Bureau to provide a *Glomar* response and refuse to respond to parts of

Plaintiff's FOIA request. Plaintiff's Reply in Support of Cross-Motion for Summary Judgment at 2-3 (Dkt. No. 21). Instead, the Bureau must search for records and process any it finds, as it would nonetheless still be able to make any exemption claims regarding specific documents or information contained within them. Pl. Mot. at 12-13 (arguing that "any legitimate concerns can be easily addressed through an instrument less blunt than its Glomar claim").

Dated: March 5, 2019

Respectfully Submitted,

/s/ David L. Sobel  
DAVID L. SOBEL  
D.C. Bar No. 360418  
Electronic Frontier Foundation  
5335 Wisconsin Avenue, N.W.  
Suite 640  
Washington, DC 20015  
(202) 246-6180

AARON MACKEY  
D.C. Bar No. 1017004  
Electronic Frontier Foundation  
815 Eddy Street  
San Francisco, CA 94109  
(415) 436-9333

*Attorneys for Plaintiff*  
ELECTRONIC FRONTIER FOUNDATION