IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAUSE OF ACTION, Plaintiff, v. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, Defendant.	Case No.: 1:13-cv-1225-ABJ

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In its Reply and Opposition,[1] Defendant raises three main counter-arguments to Plaintiff's Cross-Motion: (1) that Defendant has properly issued a *Glomar* response in refusing to confirm or deny the existence of records pertaining to Defendant's investigations into the unauthorized disclosures of confidential taxpayer information to the Executive Office of the President (EOP); (2) that the existence or non-existence of responsive records is protected by Section 6103 of the Internal Revenue Code (IRC) and cannot be subject to waiver; and (3) that Plaintiff has failed to offer a compelling public interest in the disclosure of the existence or non-existence of responsive records. These arguments are meritless.

First, the existence or non-existence of records of investigations into unauthorized disclosure of confidential taxpayer information is not a fact that constitutes "return information."

[1] Reply Brief in Support of Motion for Summary Judgment by Treasury Inspector General for Tax Administration and Response in Opposition to Plaintiff's Cross-Motion for Summary Judgment (ECF No. 30).

Specifically, confirming or denying the existence of such records in this case would not violate Section 6103 because it would not implicate the privacy interests of any identifiable taxpayer and it does not constitute data with respect to the determination of potential tax liability. Indeed, the confirmation or denial of the existence of an investigation can only be construed as return information under Defendant's overbroad interpretation of Section 6103.

Second, Plaintiff seeks information that is clearly in the public domain and therefore not subject to Section 6103 or any Freedom of Information Act (FOIA) exemption. While Defendant claims that certain publicly disclosed information differs from the information Plaintiff seeks, Defendant interprets Plaintiff's FOIA request too narrowly and consequently excludes records pertaining to the pre-investigatory review of allegations of unauthorized disclosures to EOP.

Third, Plaintiff has articulated a significant public interest in the existence or non-existence of records of Defendant's investigations, namely, possible malfeasance at the highest levels of government—a public interest that undermines Defendant's *Glomar* response, even if the *content* of those records might otherwise be exempt.[2]

In sum, Defendant has failed to meet its burden to demonstrate that its *Glomar* response is warranted. For the foregoing reasons, Plaintiff requests that this Court dismiss Defendant's Motion for Summary Judgment and grant Plaintiff's Cross-Motion for Summary Judgment.

[2] Whether the records requested in this case, if any exist, are exempt from disclosure is not yet an issue before this Court. *See Marino v. DEA*, 685 F.3d 1076, 1082 (D.C. Cir. 2012); *North v. U.S. Department of Justice*, 810 F. Supp. 2d 205, 208 (D.D.C. 2011).

ARGUMENT

I. The Existence or Non-Existence of Records of Investigations into Unauthorized Disclosures Is Not "Return Information," and Acknowledging the Existence or Non-Existence of Such Records Would Not Violate Section 6103.

While Section 6103 protects taxpayer returns and return information as confidential, I.R.C. § 6103(a), not all tax-related information collected or obtained by the Internal Revenue Service (IRS) or Defendant falls within the ambit of Section 6103, and, in turn, Exemption 3. *Church of Scientology v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986) ("Congress would not have adopted such a detailed definition of return information in Section 6103 if it had simply intended the term to cover all information in IRS files[.]"); *see also* Pl.'s Opp'n & Cross-Mot. (ECF No. 23) at 15 n.9. Here, Defendant incorrectly asserts that, as a general matter, the "discrete decision" to proceed or not proceed with investigations is protected return information. Def.'s Reply & Opp'n (ECF No. 30) at 6-7. Defendant stretches the reach of Section 6103 far beyond what Congress intended.

A. Defendant Relies on an Overly Broad Definition of Return Information.

Section 6103 defines return information, in relevant part, as including "data . . . received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . of any person under [the IRC]." I.R.C. § 6103(b)(2)(A). Whether Defendant has undertaken any investigations into unauthorized disclosures of confidential return information is irrelevant to determining an individual taxpayer's liability. Moreover, the confirmation or denial of responsive records does not constitute "data" compiled as part of an investigation. Rather, such a confirmation or denial is a form of aggregate information that is typically exempt from Section 6103 under the so-called "Haskell Amendment" as "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." I.R.C. § 6103(b)(2).

In *Davis Cowell & Bowe, LLP v. Social Security Administration*, No. C-01-4021, 2002 U.S. Dist. LEXIS 9548, at *24 (N.D. Cal. May 16, 2002), *vacated as moot*, 281 F. Supp. 2d 1154 (N.D. Cal. 2003), the court held that for information "[t]o fall within the Haskell Amendment there must be some reformulation, not mere restatement or transfer of individualized information onto another form." Here, acknowledging the existence or non-existence of records of investigations into unauthorized disclosures of taxpayer information would not reveal specific taxpayer information but would more closely approximate a "statistical study or composite product." *Id.* In fact, Defendant regularly releases the annual number of its investigations into the unauthorized access and disclosure of return information. Pl.'s SUMF ¶ 10, Ex. 4 (ECF No. 25). Plaintiff seeks this same information in relation to investigations involving EOP.

Because Plaintiff's request does not involve any named individuals, Defendant should have conducted a search, as the IRS did in *Landmark Legal Foundation v. Internal Revenue Service*, 267 F.3d 1132 (D.C. Cir. 2001). In *Landmark*, a FOIA requester sought records evincing requests by third parties for audits or investigations of tax-exempt 501(c)(3) organizations. *Id.* at 1134. Although the IRS relied on Exemption 3 and Section 6103, it nevertheless conducted a search and released several hundred pages of documents. *Id.* The IRS therefore acknowledged that requests for audits or investigations were made without compromising the identity of the requester or the third-party 501(c)(3) organizations.

The information that Defendant seeks to include within the definition of "return information" is completely unlike other "data" that courts have considered to be "data with respect to a determination of liability," like memoranda reflecting the direction and scope of investigations, interviews with specific witnesses, draft affidavits of confidential informants, and correspondence with law enforcement agencies and third parties that reveal particulars of an

investigation. *See Currie v. IRS*, 704 F.2d 523, 531 (11th Cir. 1983); *see also Radcliffe v. IRS*, 536 F. Supp. 2d 423, 430, 436 (S.D.N.Y. 2008); *Carp v. IRS*, 2002 U.S. Dist. LEXIS 2921, at **1-2, 9-10 (D.N.J. Jan. 28. 2002). As Defendant has explained, this type of information would typically be contained in an investigative file. *See* Silvis Decl. ¶ 5 (ECF No. 30-2). However, Plaintiff seeks information regarding whether Defendant has ever conducted investigations. Confirming or denying the existence or non-existence of an investigation is vastly different than disclosing the contents of the investigatory file.

B. Defendant Cites Inapposite Case Law.

Nearly all of the case law Defendant cites as authority involves requests for information pertaining to a *named* taxpayer. *Judicial Watch v. U.S. Dep't of Justice*, 306 F. Supp. 2d 58, 61 (D.D.C. 2004) (seeking records relating to Enron and Mr. Lay); *Life Extension Found., v. IRS*, 915 F. Supp. 2d 174, 181 (D.D.C. 2013) (seeking the actual returns of third-party taxpayers); *Lehrfeld v. Richardson*, 954 F. Supp. 9, 10 (D.D.C. 1996) (seeking records pertaining to a particular organization's application for tax-exempt status); *Hull v. IRS*, 656 F.3d 1174, 1175-76 (10th Cir. 2011) (seeking a particular company's submission to an IRS compliance program). However, none of these cases involved a *Glomar* response, which is at the heart of the present dispute. Instead, the courts addressed whether a requester could obtain the *actual contents* of confidential records.

The central issue in this case is whether Defendant must confirm or deny the existence or non-existence of records. *See Marino v. DEA*, 685 F.3d 1076, 1082 (D.C. Cir. 2012) (finding that the agency waived its ability to assert *Glomar*). This does not implicate the actual content of any record constituting return information, nor can it reasonably be considered independently as return information.

In discussing *First Heights Bank v. United States*, 46 Fed. Cl. 827 (2000), Defendant says the court considered whether "revenue estimates prepared . . . in connection with . . . proposed change[s] to certain deductions" constituted return information. Def.'s Reply & Opp'n at 8-9. Defendant, however, omits the court's holding, which decidedly undercuts Defendant's position. The court in *First Heights* determined that Treasury revenue estimates were return information only "to the extent that they identif[ied] *particular* amounts of revenue that could potentially be collected from *particular* taxpayers." 46 Fed. Cl. at 832 (emphasis added). Moreover, the court found that "aggregate numbers representing the total estimated revenue that could potentially be collected from taxpayers within a particular group" were not included within the ambit of Section 6103 because they could not identify particular taxpayers and were therefore properly left unredacted. *Id.* Similarly, the existence or non-existence or records of investigations is not "return information" because it does not implicate the identity of any particular taxpayer. The disclosure of aggregate, non-taxpayer specific information cannot violate Section 6103.

Likewise, Defendant's reliance on *Currie v. IRS*, 704 F.2d 523 (11th Cir. 1983), is misplaced. Indeed, *Currie* supports Plaintiff's position. Def.'s Reply & Opp'n at 17-18. In *Currie*, taxpayers who were under investigation by the IRS for certain tax liabilities submitted a FOIA request seeking documents related to their investigation. *Currie*, 704 F.2d at 525. The Court of Appeals for the Eleventh Circuit affirmed that the records were "return information" because they constituted, in part, "internal agency memoranda reflecting the direction and scope of the investigations of the *appellant's* tax liability." *Id.* at 531 (emphasis added). By contrast, in the instant case, the mere fact of the existence or non-existence of an investigation into unauthorized disclosures would not, by itself, reveal information that could be attributed to an identifiable taxpayer, such as the requesters in *Currie*, or any other requester in the numerous

cases cited by Defendant in its Reply and Opposition and previous filings. The abstract acknowledgement of investigations is not return information because it is not data compiled or obtained with respect to the concrete determination of the potential liability of an identified—or identifiable—taxpayer.

C. Defendant's Interpretation Is Inconsistent and Provides No Principled Limit to the Scope of Section 6103.

Defendant's interpretation of Section 6103 is also improper because it is both inconsistent and places no principled limit on the type of data that can be considered "return information." As this Circuit has stated, "Congress would not have adopted such a detailed definition of return information in Section 6103 if it had simply intended the term to cover all information in IRS files." *Church of Scientology v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986).

Church of Scientology is sound authority, for the scope of Section 6103 is narrower than Defendant would have this Court believe. Congress enacted Section 6103 to instill public trust in the confidentiality of tax returns after many citizens expressed concern that the IRS was acting as a "lending library" of return information for other agencies. 122 Cong. Rec. 24,013 (1976) (remarks of Sen. Weicker). It sought to prevent "highly publicized attempts to use the [IRS] for political purposes," especially when such efforts involved the delivery of tax returns to the White House. 122 Cong. Rec. 24,013 (1976) (remarks of Sen. Dole). In other words, Congress intended to curtail abusive disclosure practices, *not* to prevent FOIA requesters like Plaintiff from exposing potential malfeasance in the federal government.

If this Court were now to adopt Defendant's overly-broad construction of Section 6103, contrary to Congressional intent and controlling authorities, then the public would *never* have an ability to determine whether Defendant was properly performing its duties. Furthermore, Defendant's proposed construction of Section 6103 is inconsistent with its own practices. In its

September 28, 2010 letter to Senator Grassley, Defendant clearly reveals that it planned to review the allegations involving Chairman Goolsbee. Pl.'s Opp'n & Cross Mot. at 7; Pl.'s SUMF ¶ 8, Ex. 2. However, under Defendant's proposed construction, Defendant would be prohibited from disclosing the existence of any review because it is "data with respect to the determination of liability" and a "discrete decision" involving the first step in determining whether an individual violated the IRC.

II. Defendant Waived *Glomar* by Confirming the Existence of Responsive Records in the Public Domain.

Defendant waived *Glomar* by publicly confirming investigations into unauthorized disclosures to EOP in a letter to Senator Grassley and in an e-mail to Koch Industries. Pl.'s Opp'n & Cross Mot. at 5-8. Thus, even if the confirmation or denial of the existence of an investigation could constitute "return information," Plaintiff has met its burden to establish waiver.

It is well settled in the D.C. Circuit that "in the context of a *Glomar* response, 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 v. DEA*, 685 F.3d 1076, 1081 (D.C. Cir. 2012); *see also Students Against Genocide v. U.S. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001). The availability of information in the public domain, regardless of its original character, vitiates the very purpose of the FOIA exemptions. *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999). Indeed, privacy interests in sensitive information "fade when the information involved already appears on the public record." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975). Therefore, when the

"specific information sought [by a FOIA requester]" has already been "'disclosed and preserved in a permanent record,'" it cannot be withheld. *Students Against Genocide*, 257 F.3d at 836.[3]

While Defendant claims that Section 6103 can never be waived, Def.'s Reply & Opp'n at 3-5, multiple courts have found that Section 6103 is subject to the public domain doctrine just as any other statute or FOIA exemption. *See Lampert v. United States*, 854 F.2d 335, 337-38 (9th Cir. 1988) (holding that Section 6103(a) does not bar disclosure of matters of public record); *see also Schrambling Accountancy Corp. v. United States*, 937 F.2d 1485, 1489-90 (9th Cir. 1991) (holding that tax return information included in notices of federal tax liens and bankruptcy petitions lose their confidentiality and can be disclosed outside of court, notwithstanding Section 6103); *accord Rowley v. United States*, 76 F.3d 796, 801 (6th Cir. 1996) (adopting the Ninth Circuit's approach that prior, authorized disclosure placed Section 6103-protected information in the public domain, thereby destroying its confidentiality).[4] While these cases may not involve

[3] The requester bears the burden of identifying "specific information in the public domain that duplicates that being withheld." *Public Citizen v. Dep't of State*, 11 F.3d 198, 201 (D.C. Cir. 1993). For *Glomar*-related exceptions, the FOIA requester must point to the agency's authorized and official acknowledgment of the existence or non-existence of the requested records in the public domain.

[4] *But see Johnson v. Sawyer*, 120 F.3d 1307, 1318-19 (5th Cir. 1997); *Rodgers v. Hyatt*, 697 F.2d 899, 906 (10th Cir. 1983); *Mallas v. United States*, 993 F.2d 1111, 1120-21 (4th Cir. 1983), all of which held that the disclosure of return information in a judicial record does not waive the protections of 6103. Interestingly, the IRS in *Mallas* argued that the "Tenth Circuit erred" in *Hyatt* and that "the Ninth Circuit's [*Schrambling*] analysis," which Plaintiff urges this court to adopt, "strikes a better balance between the Government's legitimate interests in disclosing return information to administer the tax laws and a taxpayer's reasonable expectations of privacy." 993 F.2d at 1121. Thus, it appears that when the government faces liability for violating I.R.C. § 7431(a)(1), and the prospect of paying monetary damages to a taxpayer, it argues for a more flexible interpretation of Section 6103. In the instant case, however, where no identifiable taxpayer is implicated, Defendant applies a strict interpretation by arguing that disclosure is permitted only pursuant to the enumerated statutory exceptions. Def.'s Reply & Opp'n at 5.

Glomar, they nevertheless rebut Defendant's sweeping assertion that Section 6103 can *never* be waived. *See* Def.'s Reply & Opp'n at 3-5.

Defendant dismisses the relevance of Inspector General George's September 28, 2010 letter to Senator Grassley by claiming it only reveals that a "review" of allegations occurred, which Defendant states is distinct from a statement that Defendant would conduct an "investigation." Def.'s Reply & Opp'n at 11. Defendant misinterprets Plaintiff's FOIA request. Plaintiff's FOIA request encompasses information pertaining to *both* reviews and investigations, since both procedures involve Defendant's response to allegations of wrongdoing.[5] *See* Silvis Decl. ¶¶ 3-5. When Plaintiff submitted its FOIA request, it was unaware of Defendant's distinction between an "investigation" and the pre-investigatory review of allegations of improper access to or disclosures of returns or return information. *See id.* Plaintiff reasonably understood the term "investigation" in a more general sense to include the review of allegations before formal proceedings. Thus, while Plaintiff would have been able to distinguish an investigation, as commonly understood, from an audit, it had no knowledge of Defendant's procedural distinctions. *See LaCedra v. Exec. Office for U.S. Attorneys*, 317 F.3d 345, 347-48 (D.C. Cir. 2003) (holding that an agency has a duty to construe a FOIA request "liberally"); *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985) (stating that an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester").

[5] The term "investigate" would likely encompass the fact-finding processes of both a review and an investigation. Merriam-Webster defines "investigate" as follows: "[T]o try to find out the facts about (something, such as a crime or an accident) in order to learn how it happened, who did it, etc.; to try to get information about (someone who may have done something illegal." MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/investigate (last visited Mar. 11, 2014).

Furthermore, TIGTA Special Agent Carney's e-mail to Koch Industries specifically mentioned an "investigation." Pl.'s Opp'n & Cross Mot. at 7; Pl.'s SUMF ¶ 9, Ex. 3. This e-mail was a public disclosure as it was released without any restrictions on further dissemination. *Id.* The content of that e-mail was quoted by the media and remains available to the public online.[6] Therefore, the information is "truly public." *See Cottone v. Reno*, 193 F.3d 550, 555 (D.C. Cir. 1999); *Wolf v. CIA*, 473 F.3d 370, 378-79 (D.C. Cir. 2007) (finding waiver after agency officially acknowledged existence of records in congressional testimony); *North v. U.S. Dep't of Justice*, 892 F. Supp. 2d 297, 302 (D.D.C. 2012) (finding a waiver when information was disclosed during a criminal trial).[7]

Carney's willingness to share his knowledge of an investigation belies Defendant's contention that even confirming or denying the existence of investigations would violate Section 6103. *See Lawyers Comm. for Human Rights v. INS*, 721 F. Supp. 552, 569 (S.D.N.Y. 1989) (upholding waiver of Exemption 1 to certain records that had been released to the press, since if such information were a matter of national security it would not have been released at all). Indeed, the voluntary and authorized disclosure of what Defendant contends is confidential return information—acknowledging the existence or non-existence of an investigation of unauthorized disclosure—waives any future reliance on Section 6103 and the FOIA exemptions

---

[6] *See, e.g.*, Eliana Johnson, *The Missing Koch Report*, NAT'L REV. (Aug. 20, 2013), http://www.nationalreview.com/article/356260/missing-koch-report-eliana-johnson; John Sexton, *Release the IG Report on Austan Goolsbee*, BREITBART (May 24, 2013), http://www.breitbart.com/InstaBlog/2013/05/24/Release-the-IG-Report-on-Austan-Goolsbee.

[7] Defendant has never denied that Carney was authorized to send, and voluntarily sent, the e-mail to Koch Industries. *See ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 620-21 (D.C. Cir. 2011). There is a strong presumption that government representatives exercise their duties in good faith—including those officials charged with enforcing the IRC. *See Corel Corp. v. United States*, 165 F. Supp. 2d 12, 35 (D.D.C. 2001); *Am-Pro Protective Agency v. United States*, 281 F.3d 1234, 1238-39 (Fed. Cir. 2002); *United States v. Buschman*, 208 F. Supp. 531, 532 (E.D.N.Y. 1962).

in preventing the disclosure of that particular information to third-party requesters. *E.g.*, *Cooper v. IRS*, 450 F. Supp. 752, 755 (D.D.C. 1977) (upholding the waiver doctrine where the IRS "chose" to release confidential taxpayer information during a trial in Tax Court, even though the agency had the "option to keep the documents" secret).

Chairman Goolsbee's comment, Inspector General George's confirmation of a "review," and Special Agent Carney's e-mail regarding the subsequent investigation have all been quoted and discussed in the media.[8] Thus, their content has been revealed by the media to the general public. In this sense, the information is "truly public." Even though the information is "truly public," and may already be available through a mechanism other than FOIA, an agency is still required to admit or deny that responsive records exist. *Judicial Watch v. U.S. Dep't of Def.*, No. 12-cv-49, 2013 U.S. Dist. LEXIS 122482, at *15 (D.D.C. Aug. 28, 2013) (despite the futility of some requests for information in the public domain, "a FOIA requester is nonetheless free to press the point" in pursuing a response). Consequently, Defendant cannot refuse to confirm or deny the existence of responsive records.

III. The Public Interest in Disclosure Outweighs Any Alleged Privacy Concerns Proffered by Defendant and Provides Sufficient Justification for the Acknowledgement of the Existence of Responsive Records.

Defendant suggests that Plaintiff has primarily offered an argument for public interest in the disclosure of "responsive *records*"—ostensibly, the content of Defendant's investigative files, if they should exist—rather than the public interest in "whether any such records *exist*" at all. Def.'s Reply & Opp'n at 13 n.3. Moreover, Defendant suggests that the public interest in whether there is "suspected wrongdoing by government officials and that the proper authorities

[8] *See supra* note 6; *see also Treasury Watchdog Launches Probe into Whether Administration Spied on Conservative Billionaires' Taxes*, FOX NEWS (Oct. 6, 2010), http://www.foxnews.com/politics/2010/10/06/treasury-ig-launches-probe-administration-spied-koch-taxes/.

are responding and holding parties responsible for the breach of public trust," Pl.'s Opp'n & Cross Mot. at 28, "is already well-served by other TIGTA publications, including reports . . . and announcements on its website regarding public information with respect to its investigations." Def.'s Reply & Opp'n at 13-14 n.3. Defendant errs on both points.

First, Plaintiff recognizes that in a *Glomar* case involving Exemptions 6 and 7(C), as here, privacy interests and public interests concern the disclosure of the existence or non-existence of records. *See, e.g., Taplin ex rel. Lacaze v. U.S. Dep't of Justice,* No. 12-1815, 2013 U.S. Dist. LEXIS 128656, at *13 (D.D.C. Sept. 10, 2013). Here, however, there is a significant public interest in learning whether TIGTA has conducted any investigations of unauthorized disclosures to EOP because it would reveal how TIGTA responds to allegations of Section 6103 violations by officials at the highest level of the Executive Branch. FOIA was designed as a "means for citizens to know 'what the Government is up to'" and "defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 162 (2004). Indeed, it plays a necessary role as a "check against corruption," a mechanism by which "the governors [are held] accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Information, no matter how allegedly scant, that pertains to possible malfeasance of government officials at the highest levels of government—indeed, in the White House itself—is so obviously important that "[i]t is difficult to understand how there could not be a substantial public interest in disclosure." *Citizens for Responsibility & Ethics in Washington (CREW) v. U.S. Dep't of Justice*, 840 F. Supp. 2d 226, 234 (D.D.C. 2012) (acknowledging the substantial public interest in records pertaining to how the Department of Justice handled allegations of public corruption involving a congressman).

Second, the public interest is not sufficiently "well-served by other TIGTA publications, including reports . . . and [online] announcements." Def.'s Reply & Opp'n at 13-14 n.3. Defendant has previously released a "statistical summary" of investigations closed during the 2012 calendar year. Pl.'s Opp'n & Cross Mot. at 12; Pl.'s SUMF ¶ 10, Ex. 4. This summary indicates that there were 290 investigations into instances of "unauthorized access to tax return information" and 109 investigations into the "unauthorized disclosure" of tax return information. Pl.'s SUMF ¶ 10, Ex. 4. It does not, however, specify any investigations into unauthorized disclosures to EOP. The public interest in knowing about the existence or non-existence of such investigations is significantly greater because it would shed light on how TIGTA handles allegations of misconduct involving officials at the highest level of the federal government. *See CREW*, 840 F. Supp. 2d at 234.

Because Defendant has waived its ability to assert *Glomar*, the Court should order Defendant to conduct a search and produce any responsive records. *See North v. U.S. Department of Justice*, 810 F. Supp. 2d 205, 208 (D.D.C. 2011) (requiring the agency to conduct a search because it publicly disclosed certain responsive records, thereby waiving *Glomar*) *Pickard v. U.S. Dep't of Justice*, 653 F.3d 782, 784 (9th Cir. 2011) (rejecting the agency's *Glomar* response and stating that "the government now should move onto the next step and produce a Vaughn index").

CONCLUSION

Whether records of investigations into unauthorized disclosures of confidential taxpayer information at EOP exist does not constitute "return information." If Defendant were to confirm or deny the existence of such records, this acknowledgement would not violate Section 6103 because it would not implicate the privacy interests of any identifiable taxpayer. Further, such

"data" would not have been obtained or compiled with respect to the determination of potential tax liability, but rather, in response to Plaintiff's FOIA request. There is also significant public interest in disclosure of the existence or non-existence of records of Defendant's investigations—namely, possible malfeasance at the highest levels of government. Thus, Defendant's *Glomar* response cannot stand. At the very least, Defendant should be required to search for records of one investigation that Defendant has already officially acknowledged.

Dated: March 13, 2014

Respectfully submitted,

/s/ Robyn N. Burrows
Robyn N. Burrows (admitted pro hac vice)
Daniel Z. Epstein (D.C. Bar. No. 1009132)
CAUSE OF ACTION
1919 Pennsylvania Ave., N.W.
Suite 650
Washington, D.C. 20006
(202) 499-4232 (telephone)
(202) 330-5842 (fax)
Robyn.Burrows@causeofaction.org
Daniel.Epstein@causeofaction.org

/s/ Reed D. Rubinstein
Reed D. Rubinstein, Partner
D.C. Bar No. 400153
DINSMORE & SHOHL LLP
801 Pennsylvania Ave., N.W.
Suite 610
Washington, D.C. 20004
(202) 372-9120 (telephone)
(202) 372-9141 (fax)
Reed.Rubinstein@dinsmore.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2014, I filed Plaintiff's Reply Brief in Support of Plaintiff's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system, which will serve notice of this filing on all parties registered to receive such notice, including Defendant's counsel.

NORAH E. BRINGER
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 227
Washington, D.C. 20044
(202) 307-6224 (telephone)
(202) 514-6866 (fax)
Norah.E.Bringer@usdoj.gov

/s/ Robyn N. Burrows
Robyn N. Burrows (admitted pro hac vice)
Daniel Z. Epstein (D.C. Bar. No. 1009132)
CAUSE OF ACTION
1919 Pennsylvania Ave., N.W.
Suite 650
Washington, D.C. 20006
(202) 499-4232 (telephone)
(202) 330-5842 (fax)
Robyn.Burrows@causeofaction.org
Daniel.Epstein@causeofaction.org

Attorneys for Plaintiff