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

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| ELECTRONIC PRIVACY INFORMATION CENTER, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civ. No. 1:13-cv-0345 (GK) |
| U.S. DEPARTMENT OF EDUCATION, | ) | |
| Defendant. | ) | |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

The United States Department of Education ("Department") respectfully submits this Memorandum of Points and Authorities in Support of its Motion for Summary Judgment.

## INTRODUCTION

Plaintiff, Electronic Privacy Information Center ("EPIC"), filed this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, regarding a FOIA request it submitted to the Department by letter dated September 20, 2012. Specifically, Plaintiff requested:

1. The most currently updated version of the "PCA Procedures Manual" that the Department publishes as guidance for its debt-collection contractors. The 2009 version of this manual was prepared by the Federal Student Aid Operation Services Processing Division.

2. All "Certification of Privacy Act Training" forms, "Quality Control Reports," and "Security Awareness and Privacy Act Training Reports" submitted by private debt-collection firms to the Department of Education during the last three years.

The Department responded to Plaintiff's FOIA request on May 1 and May 31, 2013, and September 26, 2013, releasing certain information and withholding other information pursuant to the FOIA. Plaintiff does not challenge the scope or adequacy of the Department's search, nor does it challenge information withheld from the "Certification of Privacy Act Training" forms

and the "Security Awareness and Privacy Act Training Reports" pursuant to Exemption 4. Thus, the only two questions for the Court to resolve are (1) whether the Department lawfully withheld certain information in the PCA Procedures Manual pursuant to FOIA Exemption 7(E); and (2) whether the Department lawfully withheld certain information in the Quality Control Reports pursuant to FOIA Exemption 4. For the reasons set forth below, the information withheld is exempt from disclosure under the FOIA. There is no material fact in dispute, and the Department is entitled to judgment as a matter of law.

## BACKGROUND

The Department's Statement of Material Facts ("SOMF") is incorporated herein by reference.

### I. The Department's Office for Federal Student Aid and Its Mission

The Department's Office for Federal Student Aid ("FSA") is a principal office of the Department devoted to insuring that all eligible students can benefit from federal financial assistance for education or training beyond high school. See Declaration of Ann Marie Pedersen, attached at Attachment 1 (hereafter, "Pedersen Decl.") at ¶ 9. Under the Higher Education Act Amendments of 1998, FSA became the government's first Performance-Based Organization to enhance its services through increased flexibility and performance incentives in exchange for greater accountability and results. Id. FSA provides student financial assistance in the form of grants, loans, and campus-based programs. Id. In FY 2012, FSA provided approximately $142 billion in financial aid to 15 million students at 6,300 postsecondary institutions. Id. FSA's 1,200 employees operate out of offices in Washington, DC, and in ten regional offices across the United States. Id.

FSA has the responsibility to effect the repayment of these loans in order to recoup the taxpayers' substantial investment in the higher education of student loan borrowers. Id. at ¶ 10. Loans in repayment are handled by servicers incentivized to work with borrowers to keep them in a regular payment pattern and to prevent borrowers from going into default. Id. To this end, there are many Title IV benefits, flexibilities, and entitlements available to a borrower, such as deferments, forbearances, and a variety of repayment plans, including ones based on the borrower's income. Id.

For a borrower to default on a student loan, the borrower must be 360 days delinquent on the loan. Id. at ¶ 12. Once an account goes into default, it enters the default system for collections, the borrower loses all Title IV benefits and, pursuant to the terms of the promissory note signed by every borrower, the total amount of the loan, plus interest, becomes immediately due and payable. Id. All resolutions of defaulted student loan accounts other than immediate payment in full are compromise settlements agreed to at the discretion of FSA's Default Division. Id.

FSA's Default Division is responsible for FSA's student loan default portfolio which totals more than $52 billion in loans made to more than four million borrowers. Id. at ¶ 14. The Default Division manages the Department's program to collect on defaulted student loans, and is responsible for review and oversight of FSA debt collection policies and procedures to ensure their compliance with applicable laws and regulations. Id. The Default Division also conducts required reviews to ensure that testing is completed on all new functions being added to the Debt Management and Collections System (DMCS). Id. The DCMS allows FSA staff to manage more than four million borrower accounts through the default collection processes and to report out the status of a borrower based on federal regulations. Id.

In order to carry out its statutory and regulatory responsibilities to collect on defaulted student loans, FSA contracts with Private Collection Agencies (PCAs), operating under a performance-based contract that facilitates competition among PCAs and rewards those PCAs that can meet FSA priorities and goals (i.e., demonstration of respect for borrowers and achieving increased collection rates even as the default portfolio increases). Id. at ¶ 15. FSA's PCAs are only compensated on collections received. FSA has worked over the past 15 years to develop procedures intended both to allow necessary FSA oversight of these contractors and to permit each PCA the flexibility needed to customize its collection work to achieve maximum recoupment of the defaulted loans owed to the taxpayers in accordance with all applicable laws. Id. These procedures and other PCA requirements are detailed in the PCA Procedures Manual. Id.

## II. Plaintiff's FOIA Request and the Department's Response

By letter dated September 20, 2012, Plaintiff, the Electronic Privacy Information Center (Plaintiff or EPIC), submitted the FOIA request at issue in this litigation. The Department administratively denominated EPIC's request FOIA Request No. 12-02019-F and assigned the request to the office Communications Office for the Office of Federal Student Aid for processing because it sought the following FSA records:

> 3. The most currently updated version of the "PCA Procedures Manual" that the Department publishes as guidance for its debt-collection contractors. The 2009 version of this manual was prepared by the Federal Student Aid Operation Services Processing Division.
>
> 4. All "Certification of Privacy Act Training" forms, "Quality Control Reports," and "Security Awareness and Privacy Act Training Reports" submitted by private debt-collection firms to the Department of Education during the last three years.

See Pedersen Decl. at ¶ 4.

The Department identified a total of 2,832 pages of FSA records as responsive to EPIC's FOIA request. Id. at ¶ 5. The scope of Plaintiff's FOIA request is undisputed and Plaintiff does not challenge the adequacy of FSA's search for records responsive to the request. Id. at ¶ 5; see also EPIC v. Dep't of Education, Civil Action No. 13-345-GK, ECF No. 17 (Status Report by the Parties) at 1.

By letter dated November 1, 2012, Plaintiff filed an administrative appeal under the FOIA for the Department's failure to respond to EPIC's FOIA request. See Pedersen Decl. at ¶ 6. On March 15, 2013, Plaintiff filed this FOIA lawsuit claiming that the Department had improperly denied access to the records responsive to its request. Id. at ¶ 7.

By letters dated May 1, 2013, May 31, 2013 and September 26, 2013, the Department released to Plaintiff a total of 2,832 pages of records responsive to EPIC's FOIA request. However, the Department withheld 2,690 pages, or portions of pages, of responsive records, on the grounds that the information contained therein was exempt from disclosure pursuant to 5 U.S.C. §§ 552(b)(4) and/or (7)(E) (respectively, FOIA Exemptions 4 and 7(E)). Id. at ¶ 8.

After narrowing the issues for resolution, the parties proposed a briefing schedule for motions for summary judgment. EPIC v. Dep't of Education, Civil Action No. 13-345-GK, ECF No. 17 (Status Report by the Parties) at 2, which the Court adopted in an Order dated August 20, 2013. ECF No. 18.

## LEGAL STANDARD

Courts generally and appropriately resolve FOIA cases on motions for summary judgment. Customs & Int'l Trade Newsletter v. U.S. Customs & Border Prot., 588 F. Supp. 2d 51, 54 (D.D.C. 2008); Russell v. FBI, No. 03-0611, 2004 WL 5574164, at *2 (D.D.C. Jan. 9, 2004); see also Wheeler v. U.S. Dep't of Justice, 403 F. Supp. 2d 1, 5 (D.D.C. 2005) ("Summary

judgment is the routine vehicle by which most FOIA actions are resolved."). Summary judgment should be granted 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),(c). A material fact is any fact that "might affect the outcome of the suit." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In FOIA cases, "the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable or is wholly exempt from the [FOIA's] inspection requirements." Weisberg v. U.S. Dep't of Justice, 627 F.2d 365 (D.C. Cir. 1980) (quoting Nat'l Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)). A defendant may rely on affidavits or declarations to meet its burden. Hayden v. Nat'l Sec. Agency Cent. Sec. Serv., 608 F.2d 1381, 1384 (D.C. Cir. 1979); Russell, 2004 WL 5574164, at *2. As long as the declarations contain reasonably detailed and non-conclusory information, a court may grant summary judgment. See Wolf v. CIA, 473 F.3d 370, 374-75 (D.C. Cir. 2007) ("Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible'"). See also Judicial Watch, Inc. v. U.S. Dep't of Def., 715 F.3d 937, 940-41 (D.C. Cir. 2013) ("[s]o long as [the declaration] 'describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith, . . . summary judgment is warranted on the basis of the affidavit alone.'" (quoting ACLU v. U.S. Dep't of Def., 628 F.3d 612, 619 (D.C. Cir. 2011))).

In support of this motion, the Department submits the declaration of Ann Marie Pedersen, Director of the Correspondence Services Unit, within the Department's Office for Federal Student Aid ("FSA"), attached at Attachment 1 (hereafter, "Pedersen Decl."). This declaration

establishes that the Department appropriately withheld the redacted information pursuant to FOIA Exemptions 7(E) and 4.

## ARGUMENT

FOIA requires executive branch agencies to make their records available "to any person" upon request, but contains nine exemptions from that disclosure requirement. 5 U.S.C. § 552(a)(3)(A), (b). One of those exemptions, Exemption 7(E), applies to the information the Department redacted from the PCA Procedures Manual. See 5 U.S.C. § 552(b)(7)(E). Another of those exemptions, Exemption 4, applies to the information the Department redacted from the Quality Control Reports. See 5 U.S.C. § 552(b)(4).

### I. The Department Properly Redacted Information From the PCA Procedures Manual Under Exemption 7(E)

Exemption 7(E) of the FOIA protects all information compiled for law enforcement purposes when its release "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). The Court of Appeals for the District of Columbia Circuit "sets a relatively low bar for the agency to justify withholding" information under Exemption 7(E). Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011). In explaining the broad nature of the exemption, the Court of Appeals has noted that it allows for withholding information "not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk." Mayer Brown LLP v. IRS, 562 F.3d 1190, 1193 (D.C. Cir. 2009).

Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. 1071, et seq., authorizes FSA to perform collection and administrative resolution activities with respect to debts resulting from non-payment of student loans and grant overpayments made under the various Title IV student aid programs, in compliance with other statutes generally governing debt collection activities. See Pedersen Decl. ¶ 25. FSA contracts with PCAs to collect on defaulted student loans. Id. at ¶¶ 15, 26. Over the years, FSA's Default Division has developed the PCA Procedures Manual to instruct PCAs on their interactions with FSA's Default Division and borrowers, in order to ensure consistency in their collection practices and compliance with operational requirements. Id. at ¶¶ 17, 18. Accordingly, the PCA Procedures Manual – which governs FSA's collection and administrative activities vis-à-vis the PCAs – is clearly "compiled for law enforcement purposes." Id. at ¶ 26. See also Pub. Emps. for Envtl Responsibility v. U.S. Section Intn'l Boundary and Water Comm'n, 839 F. Supp. 2d 304, 324-25 (D.D.C. 2012) (finding that although FOIA requester "vigorously dispute[d]" it, the agency sufficiently established "some nexus" between the compilation of the information at issue and a legitimate law enforcement purpose).

The PCA Procedures Manual is kept confidential and only distributed to the 21 PCAs with which FSA has contracted to collect on defaulted student loans, consistent with FSA's responsibilities under the Higher Education Act. See Pedersen Decl. ¶¶ 20, 27. Certain information contained in the PCA Procedures Manual, including collection objectives, negotiating tools, settlement strategies, and compromise guidelines, ranges and criteria, if published, could reasonably be expected to circumvent or risk circumvention of the law. Id. at ¶¶ 29, 30. Specifically, disclosure of this information could reasonably be expected to: (a) lead student loan borrowers who have defaulted to seek to avoid the legal consequences of defaulting

on their contractual obligations to repay the full amount owed to the Government; and (b) permit potential defaulters who are otherwise able to repay their student loan debts to avoid doing so. Id. at ¶¶ 29, 30. In addition, the disclosure of this information could reasonably be expected to accord student loan borrowers an unfair advantage in the default negotiation process, to the detriment of the public fisc. Id. at ¶ 30. Moreover, disclosure could reasonably be expected to risk circumvention of the law by commercial entities marketing debt-related services to borrowers who possess the resources and motivation to manipulate the collection procedures to avoid their obligation to repay the debt they owe the taxpayers.[1] Id.

The D.C. Circuit Court of Appeal's decision in Mayer Brown is determinative in this case. 562 F.3d 1190 (D.C. Cir. 2009). In Mayer Brown, the FOIA requester sought information from the IRS regarding the agency's "settlement strategies and objectives, assessments of litigating hazards, and acceptable ranges of percentages for settlement[]" in cases in which the agency determined taxable entities unlawfully took deductions under lease-in/lease-out arrangements. Id. at 251-52 (internal citation omitted). This is similar to the information withheld from the PCA Procedures Manual. See Pedersen Decl. ¶ 29 (explaining that the manual contains guidelines for PCAs, including "collection objectives, negotiating tools, settlement strategies, and compromise guidelines, ranges and criteria").

The Court of Appeals in Mayer Brown first concluded that for purposes of Exemption 7(E), the agency does not need to prove circumvention of the law will result from disclosure.

> Rather than requiring the IRS to prove a risk of circumvention, the statute exempts information that would "be expected to risk circumvention of the law. . . . Risk of circumvention is not required – only an expectation of such risk. Moreover, this expectation of a risk of circumvention need not be undeniable or universal; the risk need only be "reasonably" expected. . . . Adding a final strike

[1] In addition, certain information, if disclosed, could put at risk the student loan repayment system's security protocols. Id. at Ex. F (Vaughn index for PCA Procedures Manual).

> against a rigidly narrow interpretation, the exemption does not force the IRS to show this reasonably expected risk with certainty – only that disclosure "could reasonably be expected" to create such a risk.

Id. at 253 (emphasis in original).

The Court of Appeals then went on to analyze the risks implicated by disclosure of the IRS's settlement practices sought in Mayer Brown, and that analysis applies with equal force to the PCA Procedures Manual.

> Although the settlement guidelines requested are not 'how to' manuals for law-breakers, the exemption is broader than that. Exemption 7(E) clearly protects information that would train potential violators to evade the law or instruct them how to break the law. But it goes further. It exempts from disclosure information that could increase the risks that a law will be violated or that past violators will escape legal consequences. Though the information here does not necessarily provide a blueprint for tax shelter schemes, it could encourage decisions to violate the law or evade punishment.
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> Tax evasion (like many crimes, to varying degrees) involves a cost-benefit analysis on the part of the law-breaker. Information about acceptable settlement ranges quite clearly affects the cost-benefit analysis of potential evaders because it informs their economic calculus. …
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> Similar reasoning applies to other categories of information at issue. Litigation hazards may include types of illegal tax shelters the IRS does not have the resources to pursue, situations which make witnesses unsympathetic or hard to find, or practical complications for investigating certain types of schemes. … Knowing how to evade in a way the IRS deems more difficult to detect or prosecute also enters into the cost-benefit analysis of a potential evader; a person with such knowledge may feel emboldened because she believes she can execute a scheme the IRS will be loathe to prosecute.

Id. at 253-54 (emphasis in original).

In this case, the Department has clearly demonstrated that disclosure of the withheld information in the PCA Procedures Manual "could reasonably be expected" to risk circumvention of the law. By the time a borrower is in default, he or she has already been delinquent for at least 360 days and has had numerous opportunities – such as forbearance,

deferment, or a repayment plan – to become compliant. See Pedersen Decl. ¶ 11, 12. It is reasonable to expect that defaulted borrowers could use the information in the PCA Procedures Manual to avoid paying all or some of the money they owe, and that the withheld information, if disclosed, would offer them a blueprint and inform a borrower's cost-benefit analysis as to whether and how to negotiate a settlement with FSA. See Pedersen Decl. ¶ 30. Moreover, as stated above, disclosure of this information could also reasonably be expected to risk circumvention of the law by commercial entities marketing debt-related services to borrowers with the resources and motivation to manipulate the collection procedures, at the expense of the taxpayers. Id.

Ultimately, the Court of Appeals in Mayer Brown held that "[w]hile there may be some legitimate uses of the requested information, the potential for misuse amply supports the IRS's argument for exemption." Id. at 256. For the same reasons, the information in the PCA Procedures Manual that the Department withheld is exempt from disclosure under Exemption 7(E) of the FOIA, and the Department is entitled to summary judgment with respect to Plaintiff's challenge to those withholdings.

## II. The Department Properly Redacted Information Under Exemption 4

### A. The Withheld Information In the Quality Control Reports Meets the Standard for Withholding Under Exemption 4

The Department withheld certain information contained in the "Quality Control Reports" requested by Plaintiff, pursuant to Exemption 4 of the FOIA, which exempts from disclosure "[1] trade secrets and commercial or financial information [2] obtained from a person and [3] privileged or confidential." 5 U.S.C. § 552(b)(4) (bracketed material added); Pedersen Decl., ¶¶ 32, 36 and Ex. G (Vaughn Index for Quality Control Reports). As explained below, the withheld records meet each of these criteria.

First, the information contained in the documents was obtained "from a person," which is defined as "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). The withheld information was provided to the Department by corporations – specifically Private Collection Agencies – which qualify as "person[s]" under FOIA. Pub. Citizen Health Res. Gp. v. NIH, 209 F. Supp. 2d 37, 44 (D.D.C. 2002) ("There is no doubt that a corporation may be considered a 'person' for purposes of exemption 4.").

Second, the information is "commercial or financial." The D.C. Circuit has broadly interpreted these terms to mean that records are commercial so long as the submitter has a "commercial interest" in them. Pub. Citizen Health Res. Gp. v. FDA, 704 F.2d 1280, 1290-91 (D.C. Cir. 1983). The information at issue here pertains to proprietary strategies designed, selected and used by the PCAs to maximize and demonstrate contract performance for their commercial clients, including, but not limited to, the Department. See Pedersen Decl. ¶ 36. This information falls squarely within the type of information which the courts have typically regarded as commercial. See, e.g., EPIC v. U.S. Dep't of Homeland Sec., 892 F. Supp. 2d 28, 40-41 (D.D.C. 2012); Allnet Commc'n Servs., Inc. v. FCC, 800 F. Supp. 984, 986-88 (D.D.C. 1992); Durnan v. Dep't of Commerce, 777 F. Supp. 965, 965-67 (D.D.C. 1991).

Third, the information is confidential. As the D.C. Circuit has articulated, whether commercial information should be considered confidential and therefore protected under Exemption 4 is guided by the substantial competitive harm test. National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) ("Nat'l Parks I"), as modified by National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 679 (D.C. Cir. 1976) ("Nat'l Parks II"). This standard remains the definitive measure for evaluating whether information falls

within the scope of Exemption 4 where the materials in question were not volunteered, but required to be provided, to the Government. In National Parks I, the D.C. Circuit held that commercial or financial information qualified as "confidential" if disclosure of the information would likely: (1) "cause substantial harm to the competitive position of the person from whom [it] was obtained," or (2) "impair the Government's ability to obtain necessary information in the future." 498 F.2d at 770.

**B. Disclosure Would Cause Substantial Competitive Harm to the PCAs.**

The D.C. Circuit does not require that a party show "actual competitive harm" in order to make an adequate showing of the likelihood of substantial competitive harm. Pub. Citizen Health Res. Gp., 704 F.2d at 1291 (quoting Gulf & W. Indus., Inc. v. U.S., 615 F.2d 527, 530 (D.C. Cir. 1979)). Rather, "evidence revealing '[a]ctual competition and the likelihood of substantial competitive injury' is sufficient to bring commercial information within the realm of confidentiality." Kahn v. Fed. Motor Carrier Safety Admin., 648 F. Supp. 2d 31, 36 (D.D.C. 2009) (quoting Pub. Citizen, 704 F.2d at 1291). Although conclusory and generalized allegations of substantial competitive harm are insufficient to justify the application of Exemption 4, "the court need not engage in a sophisticated economic analysis to determine whether there is a likelihood of substantial competitive injury." Id.

Here, as set out in the Department's declaration, pursuant to Executive Order 12,600, 3 C.F.R. 235 (1988), reprinted in 5 U.S.C. § 552 note (2006), the Department sought and obtained advice from PCAs concerning the competitive harm likely to result to PCAs if the information submitted was disclosed. Id. at ¶ 37. Based on that advice, the Department confirmed that the information at issue: (a) was designed, created and implemented by the PCAs for their own use as a method of self-monitoring contract performance, not just for the Department but for other

clients as well; and (b) identifies specific data and key elements of contract performance implicating proprietary strategies designed to maximize performance by ensuring contractual compliance, improving productivity and minimizing errors. Id. Furthermore, the Department was informed that disclosure of these proprietary elements in the Quality Control Reports would enable a PCA's competitors to achieve similar high standards and performance, minimizing the competitive advantage gained by the submitter through maintenance of its unique quality control standards, and that such compromise of a PCA's strategic advantage would likely result in substantial revenue loss to the PCA submitter. Id. Finally, disclosure of the methods a PCA has selected to measure and demonstrate the caliber of its contract performance would compromise a PCA's ability to compete against other PCA's for performance-based awards and bonuses, to the detriment of their market positions in a highly competitive commercial environment. Id. at ¶ 38. Therefore, the Department properly withheld the subject records under Exemption 4. See EPIC, 892 F. Supp. 2d at 40-41 (determining that agency had sufficiently shown a risk of competitive harm sufficient to justify Exemption 4 withholding).

Because disclosure of the withheld information would cause substantial competitive harm to the PCAs, the Department properly withheld this information from the Quality Control Reports pursuant to Exemption 4 of the FOIA, and the Department respectfully submits that it is entitled to summary judgment on this issue.

## CONCLUSION

For the reasons discussed above, the Department properly redacted information in the PCA Procedures Manual under FOIA Exemption 7(E) and information from the Quality Control Reports under FOIA Exemption 4. Plaintiff does not dispute the adequacy of the Department's search. No material issues of fact remain in dispute. For all of the foregoing reasons, the

Department respectfully requests that its motion for summary judgment be granted.

Dated: September 27, 2013

Respectfully submitted,

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