

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. AUSTIN FITTS, :
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 Movant, :
 :
 v. : Misc. No. 98-347 (SS)
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 THE UNITED STATES :
 DEPARTMENT OF HOUSING :
 AND URBAN DEVELOPMENT, :
 :
 Respondent. :
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REPLY TO
MOVANT'S OPPOSITION TO RESPONDENT'S FILING OF PLEADING IN
CAMERA AND MOVANT'S REQUEST THAT IT BE FURNISHED A COPY OF
RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN
OPPOSITION TO C. AUSTIN FITTS' MOTION FOR ORDER PURSUANT TO
CUSTOMER CHALLENGE PROVISIONS OF THE RIGHT TO FINANCIAL
PRIVACY ACT OF 1978

Respondent, the Office of Inspector General ("OIG") of the
United States Department of Housing and Urban Development
("HUD"), by its undersigned counsel, hereby replies to "Movant's
[C. Austin Fitts'] Opposition to Respondent's Filing of Pleading
In Camera and Movant's Request that It Be Furnished a Copy of
Respondent's Memorandum of Points and Authorities in Opposition
to C. Austin Fitts' Motion for Order Pursuant to Customer
Challenge Provisions of the Right to Financial Privacy Act of
1978" ("Movant's Opposition").

Movant argues that "the OIG's asserted justifications for in
camera filing are inadequate" because she has a strong need to

review and reply to the OIG's Opposition to C. Austin Fitts' Motion for Order Pursuant to Customer Challenge Provision of the Right to Financial Privacy Act of 1978 ("OIG's Opposition"), and that the risk that the OIG's investigation will be impaired by such disclosure is minimal. Movant's argument must fail because she measures the OIG's justifications for *in camera* filing and review against a standard that Movant has invented, without precedent, and contrary to the limitations on pleadings and timing parameters of the Right to Financial Privacy Act ("RFPA"). Further, even if Movant were correct in her assertion of the standard under which an *in camera* filing under the RFPA is permitted, Movant has not adequately demonstrated that she is harmed by the *in camera* filing of OIG's Opposition, or that OIG's investigation will not be harmed by disclosure of OIG's Opposition.

ARGUMENT

1. Movant's Argument Is Premised Upon an Unsupported Standard for Permitting In Camera Filings Under the Right to Financial Privacy Act

Pursuant to Section 1110(b) of the Right to Financial Privacy Act of 1978 ("RFPA"), 12 U.S.C. § 3410(b), OIG has sought *in camera* filing and review of its Opposition and supporting pleading in order: (1) to prevent disclosure of the details and strategy of an ongoing criminal investigation to the subjects of the investigation; and (2) to preserve the seal on a related *qui*

tam complaint. Movant argues that, since she has been unable to locate cases that interpret how requests for *in camera* review should be reviewed under the RFPA, this Court should balance the relative interests of the parties like the Court would if it were considering a motion for a protective order under Rule 26(c) of the Federal Rules of Civil Procedure. In support of her position, Movant cites United States ex rel. Mikes v. Straus, 846 F. Supp. 21 (S.D.N.Y. 1994), which considered lifting the seal of a status report filed in a *qui tam* proceeding. Without citing authority, Movant asserts "the RFPA is essentially identical to the Qui Tam statute in the sense that *in camera* submissions are permitted on a discretionary basis." Movant's Opposition at 2.

The RFPA does not contemplate the balancing exercise that Movant would create, and, indeed, such an exercise conflicts with the limitations on pleadings and the timing parameters established by the RFPA. Section 1110(b) of the RFPA states:

If the court finds that the customer has complied with subsection (a) of this section, it shall order the Government authority to file a sworn response, which may be filed in camera if the Government includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct such additional proceedings as it deems appropriate. All such additional proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response.

12 U.S.C. § 3410(b) (emphasis added). By specifying that *in camera* filing and review is permissible where the Government

includes "appropriate" reasons in its response, Congress effectively precluded the possibility that questions about *in camera* filing and review would become an area of contention and delay in customer challenges. Section 1110(b) creates a procedure whereby the customer is not privy to the reasons that the Government cites as justification for *in camera* review. The Government's reasons are set forth in the exact document that the Government seeks to file and have reviewed *in camera*: the Government's opposition to the customer challenge.¹

Moreover, the drafters of section 1110 apparently did not view the customer's ability to reply--the ability that Movant argues that the OIG seeks to foreclose--to the Government's opposition as being as crucial as Movant suggests. Section 1110(b) requires the filing of the Government's response only upon an order of the reviewing court; does not expressly permit any filings in addition to the challenge and the Government's response, except by order of the court; and provides that all post-response proceedings must be completed in seven calendar days. Thus, absent further order of this Court, which would have had to have been issued prior to the seventh day following the filing of OIG's Opposition, Movant would not have been permitted

¹ Here, Movant learned of and has objected to the reasons for *in camera* filing and review as a result of OIG's compliance with a local procedural rule that requires that OIG notify Movant of all *in camera* filings.

by section 1110(b) to file a reply to OIG's Opposition in the first place.² The seventh calendar day has long since elapsed in this proceeding.

In addition, Movant's reliance on United States ex rel. Mikes is misplaced because--even if there were some valid reason to conclude that a *qui tam* case is helpful in analyzing the RFPA --the case is distinguishable. United States ex rel. Mikes arose in the context of a situation where the United States had investigated the merits of a *qui tam* action, decided not to intervene, and the parties had agreed to unseal all records except for one status report. See United States ex rel. Mikes, 846 F. Supp. at 23. Here, the government has not completed its investigation, the United States has not determined whether to intervene in the related *qui tam* proceeding, and more than a status report is at issue. The court in United States ex rel. Mikes stated:

In camera examination shows that the Status Report describes routine investigative procedures which anyone with rudimentary knowledge of investigative processes would assume would be utilized in the regular course of business. It contains no information about specific techniques such as what items might be looked for in an audit, what employees of an entity should be contacted and how, what laboratory tests might be utilized, or the like.

² The Supreme Court has noted that the RFPA was "drafted in a fashion that minimizes the risk that customers' objections will delay or frustrate agency investigations." S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735, 745-46 (1984).

Id. (emphasis added). Here, as this Court is aware from OIG's Opposition and supporting pleading, the OIG has disclosed more than "routine investigative procedures." OIG's Opposition and supporting pleading contain details concerning both the OIG's investigative strategy in this matter, the matters that serve as the focus of the investigation, and some preliminary findings. In order to safeguard the confidentiality of the OIG's criminal investigation--a concern that was not before the court in United States ex rel. Mikes--in camera review is appropriate and should be permitted.

2. Movant Has Not Demonstrated a Sufficiently Strong Need to Review the Materials that the OIG Filed In Camera in This Proceeding

Although Movant has already presented to this Court sworn arguments addressing the issues relevant to this proceeding (i.e., (1) whether Movant's records are sought in connection with a law enforcement investigation; (2) whether Movant's records are relevant to the investigation; and (3) whether the OIG has complied with the notice requirements of the RFPA, see 12 U.S.C. § 3410(a)(2)), Movant alleges that she "has a strong need to review and reply to OIG's Memorandum in Opposition." Movant's Opposition at 2. Foremost, Movant is incorrect because the RFPA does not expressly permit her, without first obtaining an order of this Court, to file any reply. See 12 U.S.C. § 3410(b). Movant has not sought nor obtained such an order of the Court, and Movant clearly cannot have a need for information that Movant

is precluded from using in this proceeding.

In support of her assertion of her "strong need to review and reply to OIG's Memorandum in Opposition," the Movant: (1) reminds this Court of her firms' (i.e., The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc.) refusal to fully respond to OIG subpoenas issued in connection with a legitimate law enforcement investigation,³ and concludes that "[n]ow, apparently, OIG will seek to drain all of Hamilton employees' personal resources" (Movant's Opposition at 3); and (2) argues that the Attorney General has violated 31 U.S.C. § 3233(a)(2)(G), thus "the OIG's investigation lacks proper legal foundation," and its subpoenas are void. Opposition at 4. Both arguments are baseless.⁴

Morgan Guaranty Trust Company's compliance with the OIG's subpoena for Movant's account records will not cost Movant

³ In a related proceeding, Gaffney v. The Hamilton Securities Group, Inc., et al., Misc. No. 98-92 (SS), the OIG is seeking enforcement of these subpoenas.

⁴ The OIG addresses Movant's assertion that the OIG is attempting to drain the resources of her firms' employees only to the extent that the assertion relates to Movant because at this point the OIG has not sought the bank records of any other employees of her firms, and Movant would, in any event, lack standing to assert the rights of third parties. See Craig v. Boren, 429 U.S. 190, 193 (1976); see also U.S. v. Theron, 116 F.R.D. 58, 62-63 (D. Kan. 1987) (RFPA does not grant third parties standing to move to quash release of bank records of other bank customers). Moreover, HUD's termination of its contracts with Movant's businesses derive from HUD's discovery of an error in their performance that resulted in losses to HUD, which Movant's own businesses estimated to be approximately \$3,000,000, and the award of HUD notes to the wrong bidders.

anything. Morgan Guaranty Trust Company, the recipient of the subpoena, will bear costs associated with the subpoena, and may seek reimbursement of production costs from OIG. See 12 U.S.C. § 3415. Further, expenses experienced by Movant in connection with the subpoena are the result of a conscious decision by Movant: the decision to file a customer challenge.⁵ Filing a customer challenge is Movant's right under section 1110 of the RFPA, but Movant should not be heard to argue that the OIG has placed a financial burden upon her when she exercises her right.

Regarding Movant's allegation that the Attorney General violated 31 U.S.C. § 3733(a)(2)(G) by requesting assistance from the Office of Inspector General to investigate the allegations in the *qui tam* complaint, Movant relies on the fact that the OIG has advised that it commenced the underlying investigation following a receipt of a request from the Civil Division of the United States Attorney's Office for assistance in investigating a *qui tam* action.⁶ Movant adds that the Attorney General cannot delegate her authority under 31 U.S.C. § 3733(a)(2)(G), concludes that the request for assistance thus violates section

⁵ We do not know if the expenses of representation are being borne by Movant or her insurer.

⁶ Movant claims she only recently learned of this information. In fact, this information was detailed in the Memorandum of Points and Authorities filed by the Government in support of its Petition for Summary Enforcement of Administrative Subpoenas on March 3, 1998, in the related proceeding, Gaffney v. The Hamilton Securities Group, Inc., et al., Misc. No. 98-92 (SS).

3733(a)(2)(G), and argues that the Inspector General's subpoena for her financial records is thus invalid. Movant's argument is based upon a misreading of the law and her erroneous marshalling of the facts.

Movant wrongly construes 31 U.S.C. § 3733(a)(2)(G) as constituting the Attorney General's authority to investigate the allegations made in *qui tam* complaints. On the contrary, 31 U.S.C. § 3733, which is entitled "Civil investigative demands," authorizes and explains the Attorney General's authority to make civil investigative demands. See 31 U.S.C. § 3733(a) ("The Attorney General may not delegate the authority to issue civil investigative demands under this subsection"). Further, the particular subparagraph upon which Movant relies, 31 U.S.C. § 3733(a)(2)(G), states "[t]he Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph," and merely precludes the Attorney General from delegating authority under that subparagraph to issue more than one civil investigative demand for oral testimony. In any event, the OIG did not issue a civil investigative demand for documents or testimony. It issued an administrative subpoena to Morgan Guaranty Trust Company pursuant to the Inspector General Act, 5 U.S.C. App. 3 § 6(a)(4).

Moreover, the Attorney General's authority and

responsibility to investigate allegations in *qui tam* complaints is codified at 31 U.S.C. § 3730(a), which in relevant part states "[t]he Attorney General diligently shall investigate a violation under section 3729," and which does not prohibit the Attorney General from seeking assistance from cognizant agencies. See 31 U.S.C. § 3730(a). Indeed, it is quite common for Inspectors General, which already have statutory authority to investigate fraud within their agencies, see 5 U.S.C. App. 3 §§ 2, 4, to lead or assist such investigations. See, e.g., United States ex rel. Berge v. Bd. of Trustees of Univ. of Alabama, 104 F.3d 1453, 1456 (4th Cir. 1997) (HHS-OIG conducted false claims investigation). In fact, it is the established policy of the Department of Justice to coordinate civil, criminal and administrative proceedings relating to false claims against the government under 31 U.S.C. §§ 3729-3733, to obtain documents relevant to such claims, where possible, by means other than grand jury subpoenas, and to use Inspector General subpoenas where an Inspector General has determined that such use is appropriate. U.S. Department of Justice, United States Attorney's Manual, § 9-42.010, "Coordination of Criminal and Civil Fraud Against the Government Cases," § 9-42.440, "Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act," § 9-42.500, "Referral Procedures -- Relationship and Coordination with the Statutory Inspector Generals" (October 1997) (attached). There is no statutory requirement anywhere that provides that the only means

the Department of Justice can employ to investigate a *qui tam* complaint, and obtain relevant records, is a civil investigative demand.

Moreover, Movant incorporates an incorrect understanding of the relevant facts into her analysis. Movant incorrectly suggests that the OIG is investigating only the allegations contained in a *qui tam* complaint, and that the Inspector General's subpoena was thus issued only to develop evidence relating to that complaint. In support of her assertion, Movant on page 4 of her pleading partially quotes a statement contained on the third page of OIG's Response in Opposition to Movants', The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc., Motion for Leave to Conduct Discovery. The second sentence quoted by Movant clearly states that OIG is investigating more than just the allegations in a *qui tam* complaint: "the OIG commenced an investigation of the allegations in both the Bivens Complaint and the qui tam action." Further, emphasizing that the scope of the OIG's investigation goes beyond the allegations of a *qui tam* complaint, OIG's Response in Opposition to Movants', The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc., Motion for Leave to Conduct Discovery goes on to state:

Over the course of the last 26 months, the OIG, in coordination with the United States Attorney's Office and other law enforcement agencies, has conducted an extensive investigation in an effort to explore methodically the many.

complex allegations in both the Bivens Complaint and the qui tam action, as well as many related allegations that have arisen in the course of the investigation. [Emphasis added.]

It is clear that the scope of the OIG's investigation is broader than the allegations in the *qui tam* complaint, and, thus, acceptance of Movant's argument would be tantamount to holding that whenever the Attorney General is obligated to investigate allegations contained in a *qui tam* complaint, it is prohibited from coordinating such an investigation with a criminal, civil or administrative investigation of allegations that may touch upon, relate to, or intersect with it.

In addition, *in camera* filing and review does not deprive Movant of any right provided by the RFPA. The RFPA merely requires that the customer be given notice of the nature of the law enforcement inquiry. See 12 U.S.C. § 3405(2). The RFPA was not intended to provide a customer with "specific information as to the times and places at which an offense is alleged to have occurred." See McGloshen v. United States Dep't of Agric., 480 F. Supp. 247, 248 (W.D. Ky. 1979). Here, Movant was provided reasonable notice of the nature of the OIG's investigation, and she is entitled to nothing more.⁷

⁷ Movant also claims that the OIG violated the RFPA by not serving a copy of the subpoena on her until after the financial institution was served. She states that "[i]n an affidavit recently filed by OIG in these matters, Mr. Jack Rogers, an OIG investigator, asserted that on July 15 he mailed a copy of the July 13 subpoena for her records to Ms. Fitts, the customer." Movant wrongly insinuates that Mr. Roger's affidavit somehow shows that

3. Revealing the Contents of the OIG's Opposition at This Juncture Could Impair OIG's Investigation

As set forth in OIG's Notice of Filing Pursuant to the Supplement to Local Rules Ch. II(I)2, permitting the *in camera* filing of OIG's Opposition and supporting pleading protects against disclosure of information that would reveal the OIG's investigative strategy and assists in preserving the seal on a related *qui tam* complaint. This Court is referred to the OIG's Opposition and supporting pleading with respect to such information. Disclosure of this information to Movant, prior to the enforcement of all subpoenas issued to Movant and her businesses and the conclusion of the OIG's investigation could impair the investigation. Further, as discussed above, the

the OIG violated the RFPFA. In relevant part, section 1105(2) of the RFPFA states:

A Government authority may obtain financial records . . . pursuant to an administrative subpoena . . . if-

(2) a copy of the subpoena . . . has been served upon the customer or mailed to his last known address on or before the date on which the subpoena . . . was served on the financial institution

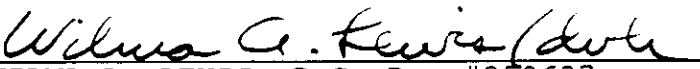
12 U.S.C. § 3405(2) (emphasis added). Movant has presented no evidence indicating that the subpoena was actually served upon Morgan Guaranty Trust Company of New York prior to July 15, 1998, and she cannot. The OIG, in compliance with section 1105(2) of the RFPFA, forwarded the subpoena by certified mail to Morgan Guaranty Trust Company on July 15, 1998 (see *in camera* submission). On the same day, July 15, 1998, the OIG forwarded a copy of the subpoena by certified mail to Movant's last known address. The OIG refers this Court to OIG's Opposition and supporting pleading for a complete briefing of this matter.

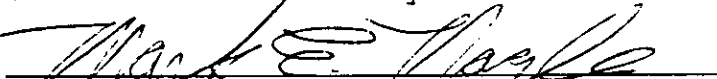
standards controlling in camera filing and review of Government pleadings filed in response to customer challenges is controlled by section 1110 of the RFPA, 12 U.S.C. § 3410, and is not governed by a balancing of interests under Rule 26 of the Federal Rules of Civil Procedure or the demonstration of a discovery privilege. The OIG, in its Notice of Filing Pursuant to the Supplement to Local Rules Ch. II(I)2, adequately demonstrated reasons, pursuant to section 1110(b) of the RFPA, justifying in camera filing and review of OIG's Opposition and supporting pleading.

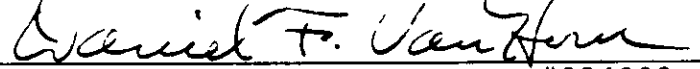
CONCLUSION

Accordingly, for the foregoing reasons and to preserve the integrity of the investigation, as well as preserve the seal on a related *qui tam* complaint, the OIG respectfully requests that the Court grant its Notice of Filing Pursuant to the Supplement to Local Rules Ch. II(I) (2).

Respectfully submitted,


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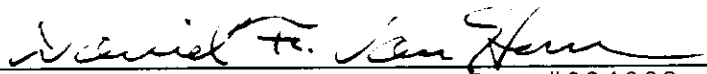
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply to Movant's Opposition to Respondent's Filing of Pleading *In Camera* and Movant's Request that it Be Furnished a Copy of Respondent's Memorandum of Points and Authorities in Opposition to C. Austin Fitts' Motion for Order Pursuant to Customer Challenge Provisions of the Right to Financial Privacy Act of 1978, was served by first class mail on October 19, 1998, addressed to Movant's counsel at the following address:

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