

in camera filing are inadequate, and the issues raised by Ms. Fitts' Motion for Order should be resolved by this Court only after Ms. Fitts has had a full and fair opportunity to respond to the OIG's stated justification for obtaining her private personal financial records.

ARGUMENT

Pursuant to 12 U.S.C. § 3410 (b) of the Right to Financial Privacy Act (RFPA), the government's response to a customer's challenge "may be filed *in camera* if the Government includes in its response the reasons which make *in camera* review appropriate." No cases were found which interpret this section of the RFPA. However, the RFPA is essentially identical to the Qui Tam statute in the sense that *in camera* submissions are permitted on a discretionary basis, *see* 31 U.S.C. § 3730, and the same judicial analysis of attempted *in camera* submissions should therefore apply:

In permitting *in camera* submissions, the statute necessarily invests the court with authority to preserve secrecy of such items or make them available to the parties. Such decisions may be characterized as discovery matters either directly under, or closely analogous to those considered under, Fed. R. Civ. P. 26(c), which authorizes protective orders for protection of trade secrets and similar information. Resolution of disputes under 26(c) is based on a pragmatic balancing of the need for and harm risked by, disclosures sought.

United States ex rel. Mikes v. Straus, 846 F. Supp. 21, 23 (S.D.N.Y. 1994). In accordance with this standard, Ms. Fitts' need for access to the Memorandum in Opposition will be analyzed, as will be the OIG's claimed risks of harm. When these respective considerations are balanced, it will be clear that *in camera* submission should not be permitted.

A. Ms. Fitts Has a Strong Need to Review and Reply to the OIG's Memorandum in Opposition.

In deciding whether to quash a subpoena under the RFPA, there are three relevant questions: "(1) Is there a legitimate law enforcement inquiry; (2) are the subpoenaed bank records relevant to the inquiry; and (3) has the government agency complied with the requirements of the RFPA?" In Re Blunden, 896 F. Supp. 996, 999 (C.D. Cal. 1995) (citation omitted). Although Ms. Fitts has

challenged the OIG's subpoena on all three of these grounds, she has not been informed of the basis of the OIG's presumed disagreement in any of these respects, and thus she not been given an opportunity to respond. In the context of a dispute as contentious as the present one has been, this disadvantage utterly eviscerates Ms. Fitts' attempt to defend her privacy.²

To fully appreciate Ms. Fitts' predicament and strongly-felt need to be heard, a brief review of the history of the OIG's investigation may be necessary. For the first two years or so of the investigation, the OIG subpoenae were directed to the businesses with which Ms. Fitts was affiliated: The Hamilton Securities Group, Inc., and Hamilton Securities Advisory Services, Inc. (collectively "Hamilton"). Fitts Affidavit, at 2. The cost of compliance was steep: hundreds of thousands of dollars were spent responding to the subpoenae, Hamilton was forced to terminated all of its employees, and the company is now no longer actively conducting business. *Id.* at 2-3. Now, despite the lack of any formal accusation of wrongdoing against Hamilton, the focus of the most recent OIG subpoenae have turned to Ms. Fitts' private and personal affairs. From Ms. Fitts' perspective, the financial ruin suffered by Hamilton now awaits her individually: "Now, apparently, OIG will seek to drain all of Hamilton employees' personal resources." *Id.* at 3. The RFPA, which "was enacted in response to a pattern of government abuse in the area of individual privacy," Anderson v. La Junta State Bank, 115 F.3d 756, 758 (10th Cir. 1997), offered a ray of hope to Ms. Fitts. But the OIG, by filing its response *in camera*, has effectively immunized itself from Ms. Fitts' dissention, and has crippled Ms. Fitts' ability to seek the protection of the statute.

² Perhaps the handicap is most debilitating insofar as it pertains to the first basis of Ms. Fitts' challenge, that the OIG's investigation lacks legitimacy. With the luxury of *in camera* submissions and without the risk of contradiction, a "demonstrable reason to believe that the law enforcement inquiry is legitimate," 12 U.S.C. § 3410(c), could be contrived by even the most well-motivated of governmental authorities in the most ill-conceived of investigations.

The extreme importance of this matter is also underscored by recent disclosures by the OIG which call the legitimacy of its investigation into serious question in an altogether new respect. In a pleading served on September 24, 1998, the OIG stated as follows:

In early July 1996, the Civil Division of the United States Attorney's Office contacted the HUD OIG, advised OIG of the existence of the qui tam action, and requested the OIG's assistance in investigating the allegations in the qui tam action. . . . Thereafter, the OIG commenced an investigation of the allegations contained in both the Bivens Complaint and the qui tam action.

Petitioner's Response in Opposition to [Hamilton's] Motion for Leave to Conduct Discovery, at 3. What is significant here is that the Attorney General's request to the OIG for assistance in the investigation of a qui tam suit is *expressly prohibited by statute*. See 31 U.S.C. § 3733(a)(2)(G) ("The 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"); see also *id.* at § 3733(a)(1). That the Attorney General would wish to enlist the OIG to conduct its *qui tam* investigation is unsurprising: under § 3733, the ability of the Attorney General to investigate *qui tam* suits is strictly circumscribed, while the OIG's subpoena power under 5 U.S.C. App. 3, § 6(a)(4) is virtually unchecked. By conducting its *qui tam* investigations through the OIG, the Attorney General is able to obtain indirectly that which she cannot obtain directly. Congress, however, perhaps in recognition of this risk, rendered such delegations of investigative authority impermissible. Since the OIG's investigation lacks proper legal foundation, its issuance of subpoenas to Ms. Fitts and Hamilton exceed its statutory authority, and are therefore void.³

³ Hamilton will expound on this argument in greater detail in its Reply to OIG's Opposition to Hamilton's Motion to Open Discovery.

B. The OIG's Claimed Risks of Harm Are Minimal.

The OIG's first asserted ground for filing its response *in camera*, that doing so will "preserve the seal" on a "related" *qui tam* suit, is highly misleading and ultimately insufficient. The OIG ignores its own previously statements that its investigation is "related" to another suit, Ervin and Associates, Inc. v. Helen Dunlap, U.S. Department of Housing and Urban Development, et al., Civ. No. 1:96-CV-1253 (the "Bivens Complaint"), which was filed one day before the *qui tam* suit. See Attachment to Notice of Filing (letter dated 9/30/98), at 2-4. Ms. Fitts believes that the two suits were brought by the same party, and contain essentially the same factual allegations. Discussion in the OIG's Memorandum in Opposition of facts which can be found in both the *qui tam* suit and in the Bivens Complaint does not, then, jeopardize the *qui tam* seal, because the allegations which form the basis of the *qui tam* suit are already accessible to the public through the Bivens Complaint. The factual allegations in an unsealed civil suit do not magically become non-public simply because they are repeated in a *qui tam* suit. Moreover, even if certain facts discussed in the OIG's Memorandum are unique to the *qui tam* suit,⁴ this Court should require the OIG to submit a redacted version of its Memorandum to Ms. Fitts, omitting only those portions which are legitimately sealed and not otherwise publicly available. This is the only solution which would properly account for Ms. Fitts' significant interest in defending her privacy.

The OIG's second justification for *in camera* filing is an oblique reference to an unspecified risk that investigation details and strategy might be disclosed. Here, too, the OIG fails to demonstrate any real risk of harm, because it has failed to properly assert the "qualified common-law privilege" that covers "law enforcement investigatory files" pursuant to Fed. R. Civ. P. 26. Friedman v.

⁴ Ms. Fitts has not been allowed the opportunity to view the *qui tam* suit, and therefore cannot state with certainty that all factual allegations in that suit are duplicated in substance in the Bivens Complaint.

Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984); see Straus, 846 F. Supp. 21, 23. The OIG, as the party claiming the privilege, has the burden to establish its existence on these facts. Friedman, 738 F.2d at 1341-42. The law enforcement investigatory files privilege “will not be considered unless presented in a deliberate, considered and reasonably specific manner.” Id. at 1342; see Kerr v. United States Dist. Ct. for North. Dist. of Cal., 511 F.2d 192, 198 (9th Cir. 1975). In Friedman, the court of appeals overturned the district court’s order enforcing the CFTC’s assertion of such a privilege where the CFTC made only a “generalized claim” that the requested documents were protected by a law enforcement investigatory privilege. 738 F.2d at 1342. Here, the OIG’s showing is even less: it claims, without specificity, only that its response “contain[s] details concerning . . . the Government’s investigative strategy in this matter.” Under Friedman, this will not suffice.

Even if the OIG could establish the existence of such a conditional privilege, “there is a need to balance the public interest in nondisclosure against the need of the particular litigant for access to the privileged information.” Id. at 1341. In this regard, courts have been hesitant to deny access to the opposing party of documents submitted *in camera* where the disclosed investigatory processes are routine and nonspecific. As in Straus, where the document described “routine investigative procedures which anyone with rudimentary knowledge of investigative processes would assume would be utilized in the regular course of business,” there was “no ground” for retaining the document *in camera*. 846 F. Supp. at 23; see United States v. CACI International Inc., 885 F. Supp. 80, 83 (S.D.N.Y. 1995). Should the Court nonetheless conclude that the OIG’s asserted privilege is legitimate, the preferable resolution would be allow access to Ms. Fitts after redacting from the OIG’s response any reference to investigatory procedures or details for which there is a genuine public interest in nondisclosure.

That the OIG should not be allowed to file its response *in camera* is further emphasized by its inability to meet its burden of establishing any relevance of Ms. Fitts' personal banking records to the government's investigation. After repeated requests by Ms. Fitts' counsel, on September 30, 1998 the OIG provided its statement as to the subject matter of its investigation. See attached letter of September 30, 1998 from Judith Hetheron, counsel to the Inspector General to Michael J. McManus, counsel for Ms. Fitts and Hamilton Securities. Nowhere in the OIG's statement of the purported nature of its investigation is Ms. Fitts mentioned, nor is it suggested that she obtained any personal financial gain as a result of any of the activities alleged in the Bivens or *qui tam* lawsuits. If such allegations are made in the OIG's *in camera* statement, it is hard to understand or imagine why they would not have been included in Ms. Hetheron's September 30, 1998 letter -- unless, of course, the allegations are so conclusory and unsupported by credible evidence that even the OIG is embarrassed to make them public. This demonstrates the danger and unfairness in allowing the OIG to present its response *in camera*. There is simply no legitimate need for the OIG to be examining Ms. Fitts' current financial records as part of its investigation as to whether or not HUD officials engaged in wrongful acts four or five years ago.

In addition to the substantive reasons why this subpoena should be quashed, the OIG failed to undertake the proper procedure as it relates to the subpoena. Sections 3405 and 3407 of the RFOIA require that the government may obtain financial records only if the records are relevant and the subpoena has been served on the customer on or before the date the subpoena was served on the financial institution. In an affidavit recently filed by the 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. Thus, the government's own information demonstrates that it has not complied with the law.

CONCLUSION

A consideration of the above factors demonstrates that Ms. Fitts' need for access to the OIG's response outweighs the purported risks that would accompany such access.

WHEREFORE, your Movant respectfully requests that this Court order the OIG to provide her with a copy of its responsive pleadings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I have mailed or delivered a copy of this Opposition to the following on October 6, 1998:

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