UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER B. *
*
Plaintiff, *
*
v. * Civil Action No. 06-1652 (RWR)
*
CENTRAL INTELLIGENCE AGENCY *
et al. *
*
Defendants. *
* * * * * * * * * * * *

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS[1]

Plaintiff Peter B., previously worked for the defendants in a covert capacity from approximately the early 1990s to 2003, when he was summarily terminated for no apparent reason. There is no dispute surrounding the acknowledged working relationship between the plaintiff and the defendants, although the specific status that Peter B. held during different time periods is in dispute and relevant to this case.

The thrust of the defendants Central Intelligence Agency and its Director General Michael V. Hayden's (collectively referred to as "CIA") main argument is that it can legally do whatever it wants, whenever it wants, to whomever it wants, absent certain – narrow - constitutional limitations. To some that would appear more reminiscent of societies our country went to war against than the democratic one we presumably still

[1] This document has been submitted to and reviewed by the defendant Central Intelligence Agency ("CIA") for classification purposes. As a result it has been approved for public filing in its present form. To the extent any information has been redacted as "classified", the filing of this document does not denote Peter B.'s, or his counsel's, agreement with any classification decisions and he reserves the right to challenge said decisions at the appropriate time. Moreover, depending upon the extent of information redacted, this Court may wish – and certainly has the explicit authority – and likely should review an unredacted version in order to ensure Peter B. receives full due process during these proceedings.

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live in. Nevertheless, in light of the specific factual circumstances of this case, this Court should reject the CIA's motion at this early stage and allow discovery to proceed. Whether the CIA's arguments will prevail at a later stage, particularly on the merits, is something that can be determined at that time.

FACTUAL BACKGROUND

In the early 1990s, Peter B. entered into a covert operational relationship with the CIA. The exact nature of his employment status in this relationship is in dispute. First Amended Complaint at ¶7 (dated January 7, 2007)("FAC"). Peter B. asserts that at a certain point in the 1990s he became a full staff employee possessive of all constitutional, statutory and regulatory rights as is any other CIA employee. This would include, among other things, the usual rights, privileges and benefits that are accorded federal employees. Id. at ¶8.

The CIA asserts Peter B. was some sort of independent contractor whose relationship with the government can be terminated at its convenience. It further claims documentation is in its possession that supports its position but it refuses to reveal the information. Id. at ¶9. During the course of his relationship with the CIA, Peter B. incurred approximately $30,000 - $40,000 worth of operational expenses for which he was never reimbursed. These expenses were incurred under specific instructions of the CIA and proper receipts were submitted. Id. at ¶10.

On or about October 3, 2002, Peter B.'s relationship was formally terminated by the CIA. At no time, despite multiple requests, has he ever been told the reason(s) for his termination other than for the "convenience of the government." Id. at ¶11. Defendants Margaret Peggy Lyons and Does #1-#10 took steps based on their own personal reasons

to unlawfully and/or unethically ensure Peter B.'s relationship with the CIA was terminated. This included, but was not limited to, the dissemination of false information concerning Peter B. Id. at ¶12

As a result of the CIA's actions Peter B. was abandoned at his domestic post, where he had been required to live by the CIA in order to receive a specific assignment, and forced to incur significant expenses that exceeded $15,000. Id. at ¶13. Additionally, Peter B.'s CIA sponsored health insurance and Cobra was terminated by the CIA in or around September 2002, even though he continued payment of his premiums. Id. at ¶14.

The actions that led to the circumstance above were undertaken by the CIA through the conduct of Lyons and Does #1-#10. These actions were of a personal nature, unlawful and/or retaliatory. Id. at ¶15. Peter B. was never provided any administrative remedies to challenge the CIA's actions to terminate his employment which, as a federal employee, he was entitled to pursue. This included, but was not limited to, the ability to appeal the CIA's decision to the Personnel Evaluation Board. Alternatively, even as a contractor, Peter B. was entitled to have the CIA follow specific regulations governing termination. Id. at ¶ 16.

Up to the date of the filing of this case and continuing, Peter B. has made numerous efforts to administratively resolve these disputes. In attempting to do so he has incurred more than $35,000 in out-of-pocket expenses that he otherwise would not be responsible for had the CIA acted lawfully. Id. at ¶17. Peter B. has been provided one or more offers of employment with government contractors involved in business operations with the CIA. The work Peter B. was to perform required a security clearance. At the time Peter B. had been terminated by the CIA he possessed a TS/SCI clearance that was still active.

During 2001 – 2006, he was repeatedly informed by CIA representatives that there were no security clearance issues or concerns within his CIA files. These CIA representatives were either unaware of false and inaccurate derogatory information within Peter B.'s files or they lied to him or the CIA has lied to government contractors inquiring about Peter B. Id. at ¶18.

One or more of the government contractors attempted to have the CIA transfer or renew Peter B.'s security clearance. Upon information and belief, the CIA disseminated false and defamatory information concerning Peter B. to the government contractors for the purpose of causing the potential employer to never provide Peter B. with an offer of employment or withdraw any such offer that had been provided. Id. at ¶19.

ARGUMENT

The CIA has moved to dismiss this case pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Neither attempt should succeed at this juncture.

A motion for dismissal under "Rule 12(b)(1) [of the Federal Rules of Civil Procedure] presents a threshold challenge to the court's jurisdiction ...." Haase v. Sessions, 835 F.2d 902, 906 (D.C. Cir. 1987)(citations omitted). Specifically, Rule 12(b)(1) permits dismissal of a complaint if the court "lacks jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). The "plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." Amer. Farm Bureau v. EPA, 121 F. Supp. 2d 84, 90 (D.D.C. 2000). In evaluating whether it has subject matter jurisdiction, the court must construe the complaint liberally, and give the plaintiff the benefit of all reasonable inferences. See Tozzi v. EPA, 148 F. Supp.2d 35, 41 (D.D.C. 2001), citing Scheuer v. Rhodes, 416 U.S. 232 (1974). The court must view the

allegations as a whole, and a conclusory averment of subject matter jurisdiction negated by other allegations in the pleading should result in dismissal. Tozzi, 148 F.Supp.2d at 41 (citation omitted).

This rule also imposes "an affirmative obligation [on the Court] to ensure that it is acting within the scope of its jurisdictional authority ... [and for this] reason, the 'plaintiff's factual allegations in the complaint ... will bear closer scrutiny in resolving a 12(b)(1) motion' than on a 12(b)(6) motion for failure to state a claim." Fowler v. D. C., 122 F. Supp. 2d 37, 40 (D.D.C. 2000)(citations omitted).

A Court is therefore permitted to rely on documents beyond the pleadings to assure itself that it possesses jurisdiction. See Land v. Dollar, 330 U.S. 731, 735 n. 4 (1947); Coalition for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003); EEOC v. St. Francis Xavier Parochial School, 117 F.3d 621, 624-25 n.3 (D.C. Cir. 1997); Hohri v. United States, 782 F.2d 227, 241 (D.C. Cir. 1986); Artis v. Greenspan, 223 F. Supp. 2d 149, 152 (D.D.C. 2002). By considering documents outside the pleadings to resolve a challenge to the Court's subject matter jurisdiction the Court does not convert the motion into one for summary judgment; "the plain language of Rule 12(b) permits only a 12(b)(6) motion to be converted into a motion for summary judgment." Haase, 835 F.2d at 905 (emphasis in original). However, an independent inquiry may be undertaken by the Court to assure itself of its own subject matter jurisdiction without triggering *unnecessary* discovery. Id. at 907-08.

However, just because the Court has the power to go beyond the pleadings, it remains "settled law [that] the District Court may in appropriate cases dispose of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P12(b)(1) on the

complaint standing alone." Herbert v. Nat'l Acad. of Science, 974 F.2d 192, 197 (D.C. Cir. 1992). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) should not prevail "unless plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." Kowal v. MCI Commun. Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994); Beverly Enters., Inc. v. Herman, 50 F. Supp. 2d 7, 11 (D.D.C. 1999).

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face, testing whether a plaintiff has properly stated a claim. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The district court must treat the complaint's factual allegations -- including mixed questions of law and fact -- as true and draw all reasonable inferences therefrom in the plaintiff's favor. Macharia v. United States, 334 F.3d 61, 64, 67 (D.C. Cir. 2003); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 165 (D.C. Cir. 2003).

The court need not, however, accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002). In deciding a 12(b)(6) motion, district courts may typically consider only "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." Gustave-Schmidt v. Chao, 226 F. Supp. 2d 191, 196 (D.D.C. 2002)(citation omitted). However, the court may, in its discretion, consider matters outside the pleadings and thereby convert a Rule 12(b)(6) motion into a motion for

summary judgment under Rule 56. See Yates v. District of Columbia, 324 F.3d 724, 725 (D.C. Cir. 2003)

I. PETER B. HAS BEEN DEPRIVED OF PROTECTED LIBERTY INTERESTS IN RELATION TO HIS TERMINATION AND HIS ATTEMPTS TO OBTAIN SUBSEQUENT EMPLOYMENT[2]

In its Motion to Dismiss the CIA argues that the four due process claims raised in Peter B.'s complaint should be dismissed due to lack of a protected liberty interest. Defendants' Memorandum in Support of Motion to Dismiss at 12 ("CIA Memo").

It is undisputed that to state a Fifth Amendment due process claim, a plaintiff must show that he was deprived of a protected liberty interest. See Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569-570 (1972); M.K. v. Tenet, 196 F. Supp. 2d 8, 15 (D.D.C. 2001). It is similarly undisputed that to establish a deprivation of a liberty interest in the employment context, a plaintiff must show both that the government negatively altered his status and that the government:

> stigmatizes the employee or impugns his reputation so as to either (1) seriously damage his standing and associations in his community ("reputation-plus"), or (2) forecloses his freedom to take advantage of other employment opportunities by either (a) automatically excluding him from a definite range of employment opportunities within the government or (b) broadly precluding him from continuing his chosen career ("stigma or disability").

Id.

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[2] The CIA argues that Peter B's claims set forth under the Administrative Procedure Act ("APA") are precluded by the Civil Service Reform Act. CIA Memo at 5-8. It would appear that if his APA claims were solely to enforce CIA regulations this might be the case. However, the APA also addresses constitutional claims. Thus, the types of claims sought for review by Peter B. under the APA, such as the existing CIA regulations that applied to his case, would still be relevant to any determination of whether his liberty interests were violated. It would appear to make sense, if discovery is to be permitted, to delay ruling on these claims until the facts – especially Peter B.'s employment status with the CIA – are clarified.

For purposes of responding to the CIA's Motion, Peter B. can demonstrate, simply through his FAC, that he has been deprived of a protected liberty interest in regards to the circumstances surrounding the termination of his employment at CIA as well as the statements made to, and interference with, the contractors. Thus, the CIA's Motion should be denied (at least until after discovery is completed).

A. Peter B. Has Been Deprived Of A Protected Liberty Interest In Relation To The Derogatory Comments Made Within CIA That Served As The Proximate Cause For His Termination

It is undisputed that to fit within the "reputation plus" prong, a plaintiff must demonstrate not only that the agency negatively altered his employment status, but also that the agency made "public accusations that will damage [the plaintiff's] standing and association in the community," in connection with the change in employment status. Doe v. Cheney, 885 F.2d 898, 910 (D.C. Cir. 1999).

The CIA concedes that Peter B. can show a change in employment status by way of the termination of his employment. CIA Memo at 15. However, the CIA contends that he cannot demonstrate that the CIA made any public accusations about him in connection with the termination. Id. at 15 n.4. To support this assertion the CIA relies on Cheney wherein disclosure of information by the National Security Agency ("NSA") to other federal agencies regarding the NSA's decision to terminate a federal employee was held not to constitute a public accusation. Therefore, the employee's liberty interest was not infringed. Cheney, 885 F.2d at 910.

The instant case is distinguishable from Cheney, particularly because a more thorough reading of Cheney reveals that the employee in question *consented* to the NSA disseminating the information and the dissemination was conducted with clear limits on

further distribution. Id. at 910. In contrast, in this case, Peter B. neither consented to the dissemination by the CIA of any inaccurate and/or derogatory information in question within various divisions of the CIA nor are there any identifiable known clear limits on the distribution of the information.

The CIA further contends that even if this dissemination constitutes a public accusation, the allegation cannot create a protected liberty interest because it challenges the basis for termination. CIA Memo at 15-16. The CIA incorrectly claims that the M.K. Court explicitly found that termination of employment does not sufficiently damage a plaintiff's reputation to create a protectable interest. Id. at 16, quoting M.K., 196 F. Supp. 2d at 15.

To the contrary, M.K. merely reiterated the concept that "termination of employment does not [sufficiently] damage a plaintiff's reputation *without* public accusations that will damage the plaintiff's standing and associations in the community." M.K., 196 F. Supp. 2d at 15 (emphasis added). In M.K., the plaintiffs did not allege that any public accusations had been made in connection with the decisions to terminate their employment. Id. In contrast, in the instant case, Peter B. has emphatically alleged that Defendants Lyons and Does #1-#10 disseminated inaccurate and/or derogatory information throughout the CIA that unlawfully and unethically caused his employment with the CIA to be terminated. FAC at ¶63.

The D.C. Circuit has endorsed a plaintiff's right to demonstrate to the Court, obviously after discovery had taken place, to what extent the stigmatizing reasons for discharge have been disseminated. Doe v. United States Dep't of Justice, 753 F.2d 1092, 1113 (D.C. Cir. 1985). In any event, the public disclosure requirement is met because the

CIA has placed negative information within Peter B.'s files which is "available, even on a limited basis, to prospective employers or government officials." Id. See e.g. Kartseva v. Dep't of State, 37 F.3d 1524, 1528 (D.C. Cir. 1994)(availability of unfavorable information to future potential government employers constitutes status change of due process import).[3]

Accordingly, the CIA's argument that Peter B. cannot demonstrate a deprivation of a protected liberty interest under the "reputation-plus" prong is without merit.

B. Peter B. Has Been Deprived Of A Protected Liberty Interest Under The "Stigma" Prong In Relation To The Defamatory Information Disseminated To The Contractors.

The basis of a claim under the "stigma" prong is the combination of an adverse official action and "a stigma or other disability that foreclose[s] [the plaintiff's] freedom to take advantage of other employment opportunities." O'Donnell v. Barry, 148 F.3d

[3] See also Brandt v. Board of Co-Op. Educational Services, 820 F.2d 41, 45 (2d Cir. 1987)(presence of charges in personnel file has damaging effect on future job opportunities); Hogue v. Clinton, 791 F.2d 1318, 1322 n.7 (8th Cir.)(1986)(personnel file replete with wrongdoing sufficient publication if file made available to prospective employers); Bailey v. Kirk, 777 F.2d 567, 580 n.18 (10th Cir. 1985)(presence of false and defamatory information in personnel file may constitute publication if not restricted to internal use); Burris v. Willis Indep. School Dist., Inc., 713 F.2d 1087, 1092 (5th Cir. 1983)(evidentiary hearing required where information contained in files clearly false and possibility exists that information will not be kept confidential); Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953, 966 (D.C.Cir. 1980)(liberty interest claim exists due to debarment when government agency made written finding and placed it in permanent file accessed by future government decision-makers); Larry v. Lawler, 605 F.2d 954, 958 (7th Cir. 1978)(government stigmatized plaintiff throughout federal government by making information available in files); Velger v. Cawley, 525 F.2d 334, 336 (2d Cir. 1975)(charges entered in personnel file amounted to publication given that "New York City ... grants ready access to its confidential personnel files to all governmental police agencies"), rev'd on other grounds sub nom, Codd v. Velger, 429 U.S. 624 (1977); Ervin and Assoc. et al. v. Dunlap et al., 33 F.Supp.2d 1, 10 (D.D.C. 1997)(allegations that government officials made disparaging and defamatory statements that effectively barred plaintiff from future contracts with defendant sufficient to overcome motion to dismiss).

1126, 1140 (D.C. Cir.1998), quoting Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972) (modifications in original). The CIA contends that Peter B. cannot demonstrate a deprivation of a protected liberty interest under the "stigma" prong in relation to any statements made or information disseminated by the CIA to contractors as the statements were not made in connection with the termination decision. Rather, the statements were made in relation to Peter B.'s subsequent applications for employment with the contractors, and he had no protected right to a security clearance or to employment in the national security arena. CIA Memo at 16-17, 19.

First, the CIA asserts that defamation alone, absent any connection to an alteration in Peter B.'s employment status, is not sufficient to implicate a liberty interest, even if it precludes future employment. Id. at 17; see Siegert v. Gilley, 500 U.S. 226, 233-34 (1991); O'Donnell, 148 F.3d at 1140. The CIA, however, has misconstrued the limitations described in Siegert, and then clarified in O'Donnell. Although the O'Donnell Court identified an adverse employment action as one *possible* change in status that would suffice to implicate a liberty interest, it continued to state that all that what was necessary was "some tangible change in status." Id. 148 F.3d at 1141 (emphasis added).

Courts in this Circuit have subsequently adhered to the policy that "there are several ways in which the government may cause a change in status, including discharging the employee, *foreclosing the employee's future employment opportunities*, or reducing the employee's rank or pay." Ranger v. Tenet, 274 F. Supp. 2d 1, 7 (D.D.C. 2003), quoting Doe v. Casey, 796 F.2d 1508, 1523 (D.C. Cir. 1986)(emphasis added). See also Mosrie v. Barry, 718 F.2d 1151, 1161 (D.C. Cir. 1983)(finding that "foreclosure of a right to be

considered for government contracts in common with all other persons" sufficed as a change in status).

Thus, a negative change in a plaintiff's status adequate to implicate a liberty interest can be found where a federal agency's conduct has the "broad effect of precluding [the employee] from pursuing [their] chosen career." Kartseva, 37 F.3d at 1528. In Kartseva, a Russian language translator was dismissed from work with a government contractor due to an unfavorable background investigation by the State Department ("DOS"). Id. at 1525. The only information provided to explain the unfavorable determination by DOS was that there were several "counterintelligence concerns." Id. The D.C. Circuit in Kartseva upheld the notion that DOS's decision to declare Kartseva as ineligible for assignment on DOS projects due to the unexplained "counterintelligence concerns" had sufficiently changed her status and had the broad effect of precluding Kartseva from her chosen career without affording her any due process. Id. at 1529. See also Greene v. McElroy, 360 U.S. 474, 492 (1959)("Revocation of a security clearance possibly implicates a Fifth Amendment liberty interest where action has seriously affected, if not destroyed, plaintiff's ability to obtain employment [in his chosen career.]"). In the instant case, Peter B.'s status, like that of Kartseva, was adequately altered, as he has been broadly precluded from work in his chosen career due to the inaccurate and/or derogatory statements made by the CIA to contractors concerning him.[4] See Declaration of Mark S.

[4] One such example of the preclusion that the CIA has caused led to Peter B's termination from an employment contractor with a major defense contractor doing business with the CIA. See Exhibit "1". While the e-mail messages are cryptic, which should not be surprising given the context, the "customer" is the CIA and Peter B. was informed in other conversations that statements made by the CIA were responsible for the sudden sea change. Discovery will, of course, flesh out these facts.

Zaid, Esq. at ¶¶8-10 (dated June 17, 2007)("Zaid Decl."), attached at Exhibit "2". As a result, the CIA has caused a status change adequate to implicate a liberty interest.

In response to this anticipated argument the CIA counters that Peter B.'s characterization of the statements as inaccurate and/or derogatory is flawed as it ignores the classified nature of his employment with the CIA. The CIA apparently relies upon a Glomar response to support their decision to refuse to confirm or deny plaintiff's "true identity as a CIA employee or the extent to which he possesses security clearances." CIA Memo at 18.[5] This is an intentionally misleading argument, both factually and legally, particularly because the revelation of the "covert" relationship between Peter B. and the specific contractors is not at issue. In fact, the contractors involved in this dispute, who most likely themselves held TS/SCI clearances, were fully aware of the pre-existing relationship due to prior dealings with Peter B. It should come as no surprise that many employees of contractors are former CIA employees themselves. See Zaid Decl. at ¶8. The prior covert relationship between Peter B. and the contractors was irrelevant and not,

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[5] Exactly what the CIA is seeking to accomplish by invoking Glomar is unknown. A Glomar response, which is derived from Phillippi v. CIA, 546 F.2d 1009, 1013 (D.C. Cir. 1974), is a term utilized in Freedom of Information Act cases. In fact, not one case such as the instant matter has been identified, and the CIA certainly cites to none, outside of the FOIA context where a court permitted a Glomar response. In any event, even in FOIA cases in which the CIA has legitimately utilized the Glomar response the courts have held that CIA still must "provide a public affidavit explaining in as much detail as possible the basis for its claim." Wheeler v. CIA, 271 F. Supp. 2d 132, 139 (D.D.C. 2003), quoting Phillippi, 546 F.2d at 1013. Furthermore, appropriate discovery is permitted "when necessary to clarify the Agency's position or to identify the procedures by which that position was established." Wheeler, 271 F. Supp. 2d at 139; Cf. Judicial Watch, Inc. v. Export-Import Bank, 108 F. Supp. 2d 19, 25 (D.D.C. 2000)(finding that discovery can be appropriate when the plaintiff can raise sufficient question as to the agency's good faith). The CIA has not provided any affidavit or similar explanation to justify the basis for its decision to terminate his employment other than that it was for the "convenience of the government."

to Peter B.'s knowledge, a factor in any of the decisions that led to the constitutional violations in this case. Thus, there is no classified or Glomar dispute in this case.

The CIA also claims that even to the extent it disseminated inaccurate and/or derogatory statements that broadly precluded Peter B. from his career and sufficiently changed his status he still cannot establish a liberty interest because he has no right to employment in the national security arena or to a security clearance. But see Zaid Decl. at ¶¶9-10. To support its assertion, the CIA – beyond the fact that it is twisting Peter B.'s claims into arguments that are not being proffered – incorrectly relies on two cases for the premise that "no one has a right to a security clearance." CIA Memo at 19 citing Dep't of Navy v. Egan, 484 U.S. 518, 528 (1988); Cheney, 885 F.2d at 909-10.[6] The Courts in Egan and Cheney opined that individuals do not have a right to a security clearance *only* in the context of that clearance constituting a protected property interest. Egan, 484 U.S. at 528; Cheney, 885 F.2d at 909.[7]

Peter B. has not claimed he has a protected property interest in his security clearance. Rather, he has argued that the CIA's conduct in disseminating defamatory information concerning his past employment status, and the extent to which he validly possesses (or

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[6] The CIA also references Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990), but this case conflicts with D.C. precedent as set forth in Kartseva.

[7] Egan, which is always held out by the government in any case where a plaintiff even raises a mere mention of a security clearance, is continually misconstrued by courts as far more expansive than its precedental value. While there is certainly dicta within the decision that is helpful to the government, the case itself merely addresses the breadth of the statutory jurisdiction of the Merit Systems Protection Board in matters involving clearance challenges. Id. 484 U.S. at 520 ("The *narrow question* presented by this case is whether the Merit Systems Protection Board (Board) has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action.")(emphasis added).

possessed) a security clearance has broadly precluded him from his chosen career and therefore implicated a protected liberty interest.

Lastly, the CIA argues that even if all of Peter B.'s arguments above are found to be true, there is simply no legal basis for the relief sought, i.e., namely to rescind the termination decision. CIA Memo at 20. However, the CIA has misinterpreted Peter B.'s Prayer for Relief. Peter B. is not seeking to have the Court overturn the CIA's authority, even if discretionary, and reinstate his employment, but to require either the CIA to afford him proper internal due process or a name-clearing hearing. FAC, at Prayer for Relief. As stated by the Supreme Court, if a protected liberty interest is found to have been infringed upon, the aggrieved individual must be afforded an opportunity to refute the charges and clear his name. Codd, 429 U.S. at 627; Ranger, 274 F. Supp. 2d at 9. No such opportunity has been afforded to Peter B. at any point since his termination.

Accordingly, the CIA's argument that Peter B. cannot demonstrate a deprivation of a protected liberty interest under the "stigma" prong is without merit.

C. At A Minimum, Peter B. Is Entitled To Discovery On His Fifth Amendment Claim Before The CIA Deserves Dismissal Of This Case

In one of the leading cases in this Circuit involving Fifth Amendment liberty interests and federal employment, it was argued in Kartseva that her discharge from employment as a Russian translator excluded her from future employment in her chosen career thereby implicating her Fifth Amendment liberty interest. 37 F.3d at 1526. The Court of Appeals reversed the District Court's dismissal in order to allow for discovery to take place so that at least three important questions could be resolved:

> (1) the scope of State's express disqualification - in particular, whether State's internal recommendation that Kartseva "no secure a position in support of any Department of State contract," refers only to the Statistica contract from which Kartseva was removed, to all Statistica contracts with State, or, indeed, to *any* State contract; (2) the extent to which

> State's Action as to Kartseva would normally be available to and would legally affect other government agencies or private employers in their decisions whether to employ her or permit her to work on government contracts; and (3) the extent to which the disqualification will affect Kartseva's ability to pursue her vocation as a Russian translator.

Id. at 1530 (emphasis original). See also Orange v. District of Columbia, 59 F.3d 1267, 1275 (D.C.Cir. 1995)(discovery permitted to prove Fifth Amendment Constitutional claims); Hogue v. Clinton, 791 F.2d 1318, 1321 (8th Cir. 1986)(bench trial permitted on plaintiffs' Constitutional claims; Bailey v. Kirk, 777 F.2d 567, 569 (10th Cir. 1985) (depositions permitted on Fifth Amendment claims). These questions are similar, if not identical, to some of those that must be answered in this case: (1) what is the scope of the CIA's dissemination of inaccurate and/or unfavorable information concerning Peter B.?; (2) to what extent is this information available to other government agencies or private employers?; (3) to what extent do the CIA's actions foreclose Peter B. from pursuing his vocation?; and (4) what regulations, rules or policies specifically applied to Peter B.'s situation?[8] Each of these questions are proper for discovery and should be answered prior to any contemplation of dismissal of this action.[9]

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[8] Although the CIA provided copies of regulations it alleged applied to Peter B.'s situation, each of these did not take effect into 2002. While it is true Peter B. was terminated by the CIA in 2003, that does not necessarily mean these regulations applied for his relationship/employment commenced more than ten years earlier and it is not at all clear that these regulations extinguished or superseded any prior regulations that did apply. Moreover, the purported regulation concerning "Contract Employees" is highly redacted presumably due to its alleged CONFIDENTIAL classification status. At the very least Peter B.'s counsel, who has been approved for access to the SECRET level (one above CONFIDENTIAL), should be permitted the opportunity to review an unredacted copy in order to properly address its contents.

[9] Furthermore, both Peter B. and Kartseva named unnamed government employees as defendants. See FAC at *passim*; Kartseva, 37 F.3d at 1530. The Court of Appeals in Kartseva reversed the District Court's dismissal of the Bivens claims against the unnamed defendants because the *threshold* "'essential legal question whether the conduct of which the plaintiff complains violated clearly established law,'" was never decided. Id.

Moreover, to the extent the CIA seeks to dissuade this Court from permitting discovery due to the presumed classification status of the information, the Supreme Court soundly rejected such a premise by the CIA in Webster v. Doe, 486 U.S. 592 (1988), wherein it noted that the "District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof which would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission." Id. at 604.

II. PETER B.'S CLAIMS UNDER THE PRIVACY ACT SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM FOR RELIEF.

In its Motion to Dismiss the CIA contends that the three Privacy Act claims raised in Peter B.'s First Amended Complaint should be dismissed for failure to state a claim for relief. CIA Memo at 20-27. However, Peter B. can demonstrate that he has pled viable claims for relief under subsections (e)(2), (e)(5), and (e)(6) of the Privacy Act and that the CIA's Motion to Dismiss lacks merit and should therefore be denied.

(citation omitted). The Court elaborated that:

> [w]here, as here, the resolution of the threshold question of the existence of a clearly established constitutional right requires information on the nature and effects of the government action that is exclusively within the domain of the government, limited discovery may be appropriate to determine that threshold issue.

Id. Although the issue of the individual named and unnamed defendants are not yet before this Court (as service has been unsuccessful to date for Margaret Peggy Lyons and the unknown defendants remain just that until discovery), discovery against the primary agency defendants would overlap with the individual defendants. Another case from this Circuit that would appear to support Peter B.'s claim for discovery is that of Doe v. United States Dep't of Justice, 753 F.2d 1092 (D.C.Cir. 1985), which survived the government's Motion to Dismiss. Id. at 1102 ("Doe's discharge amidst allegations of unprofessionalism implicates a constitutionally protected liberty interest in reputation and that, if those allegations were publicly disclosed, she is entitled to an opportunity to clear her name."). The Court of Appeals seems to comment in dicta that discovery should have been permitted by the District Court so the record would not be as sparse on appeal. Id. at 1098.

A. Plaintiff's Claims Under Counts VI, VII, and VIII Should Not Be Dismissed For Failure To Sufficiently Plead The Facts.

The CIA claims that Peter B. has failed to provide sufficient factual assertions in his complaint to support a claim for relief under any of the three counts. It argues that Peter B. has not identified "the records which are allegedly inaccurate or to whom and when CIA allegedly disseminated information," as well as "what information was allegedly not collected from him directly or how this purported information is inaccurate." CIA Memo at 22, 24. Of course, a complaint "must at least include some factual assertions to put [the government] on notice of 'the event being sued upon.'" Flowers v. The Exec. Office of the President, 142 F. Supp. 2d 38, 46-47 (D.D.C. 2001). But complaints do not have to "plead law or match facts to every element of a legal theory." Krieger v. Fadely, 211 F.3d 134, 136 (D.C. Cir. 2000); cf., Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979)(holding that courts must construe a complaint in the light most favorable to the plaintiff and grant the plaintiff the benefit of all inferences that can be derived from the facts alleged).

Furthermore, "pleadings on information and belief are permitted when the necessary information lies within defendant's control." Flowers, 142 F. Supp. 2d at 47. The need for this more liberal and elastic construction of the pleading requirement is most evident in cases involving classified information, where the aggrieved individual would obviously "not even know the precise contents of his records because they are classified and he has no access to them." Doe v. Goss, 2007 U.S. Dist. LEXIS 2708, 31 (D.D.C. 2007), attached at Exhibit "3", citing Krieger, 211 F.3d at 136.

In this case, Peter B. has adequately and sufficiently complied with the pleading requirements. In terms of the inaccurate and/or derogatory information that was used as

the basis for his termination, and which contains inaccuracies due to the CIA's failure to collect information directly from Peter B., Peter B. clearly identified the relevant record as being his own personnel file, particularly the records pertaining to his security clearance. FAC at ¶20. In terms of the inaccurate records which were disseminated, Peter B. identified that all relevant records would be held within an applicable Privacy Act Systems of Records within CIA and that defendants Lyons and Does #1-10 were involved in disseminating inaccurate and/or derogatory information throughout the CIA and to the unspecified contractors, whose identity is known to Plaintiff and would be available within the relevant records. Id. at ¶13, 14, 17, 21, 69.

Accordingly, the CIA's argument that Peter B.'s claims under the Privacy Act have not been sufficiently pled is without merit.

B. Peter B.'s Claim Under Count VI That CIA Violated 5 U.S.C. §552a(e)(2) Should Not Be Dismissed For Failure To State A Claim.

It is undisputed that in order to show a violation of 5 U.S.C. §552a(e)(2), a plaintiff must show that (1) the agency did not collect information to the greatest extent practicable directly from him, (2) as a result it made an adverse determination about him with respect to a right, benefit and privilege under Federal Programs, and (3) the violation was "intentional and willful." Walter v. Thornburgh, 888 F.2d 870, 972 (D.C. Cir. 1989).

In so far as the adverse determination in question is the decision to terminate Peter B.'s employment, the CIA put forth two defenses: (1) that the claim is barred by the statute of limitations; and (2) that the claim seeks to circumvent the CSRA, which was enacted to preclude judicial review of CIA personnel decisions. CIA Memo at 24.

First, the Privacy Act requires that an action to enforce its provisions must be brought "within two years from the date on which the cause of action arises." 5 U.S.C.

§ 552a(g)(5). However, the courts have permitted a more elastic construction of the statute of limitations in cases "in which the agency has materially and willfully misrepresented information that is material to establishing its own liability under the [Privacy] Act." Tijerina v. Walters, 821 F.2d 789, 794 (D.C. Cir. 1987). In such cases, "the action may be brought at any time within two years after discovery by the individual of the misrepresentation" and the "statute of limitations does not begin to run until the plaintiff knows or should know of the alleged violation." Id.; see also, Pope v. Bond, 641 F.Supp. 489, 499-500 (D.D.C. 1986).

In the instant case, due to the CIA's intentional and willful misrepresentation of information concerning Peter B. he did not become aware of the violation until the rescission of the offer of employment from the contractors which occurred as recently as 2006. See Exhibit "1". Therefore, his claim under the Privacy Act is not barred by the statute of limitations.

The CIA's second defense is that Peter B.'s claim under the Privacy Act is barred from review because it would circumvent the preclusive intent of the Civil Service Reform Act ("CSRA") by permitting judicial review of a CIA personnel decision. CIA Memo at 25. The CIA mistakenly relies on case law that deals solely with situations in which the aggrieved individuals were afforded some manner of administrative due process and were seeking to use the Privacy Act as a mechanism for circumventing established regulatory or statutory provisions. See e.g. Kieman v. Dep't of Energy, 956 F.2d 335, 338 (D.C. Cir. 1992)(finding that a federal employee challenging a classification determination, who had submitted and then withdrawn an administrative appeal seeking a classification review, could not circumvent the CSRA's preclusion of

judicial review of classification decisions through the Privacy Act but rather had to utilize the available administrative process); Pellerin v. Veterans Admin., 790 F.2d 1553, 1555 (11th Cir. 1986)(dismissing a veteran's claim under the Privacy Act as an obvious attempt to circumvent established regulatory procedures for challenging an agency determination concerning medical benefits).

In contrast, Peter B. is relying on the constitutional claim that the CIA deprived him of a protected liberty interest by publicly disseminating inaccurate and/or derogatory information that damaged his reputation and resulted in his termination from the CIA. See supra Part I.A. The Supreme Court, for its part, has refused to find that the CSRA or §102(c) of the National Security Act of 1947 ("NSA Act") were designed to preclude colorable constitutional claims from being raised in relation to CIA personnel decisions. Webster, 486 U.S. at 604. Therefore, so long as Peter B. can demonstrate a deprivation of a protected liberty interest, his claim under the Privacy Act is not barred from judicial review.

Even if it is found that colorable constitutional claims are preempted by the CSRA for purposes of the Privacy Act or, alternatively, that Peter B. cannot demonstrate a deprivation of a protected liberty interest, his Privacy Act claim is still not preempted by the CSRA so long as the "harm alleged was actually caused by the alleged violation." Doe, 2007 U.S. Dist. LEXIS at 28, citing Hubbard v. EPA, 809 F.2d 1, 5 (D.C. Cir. 1986). See also Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988)(en banc)(finding that while the CSRA precludes judicial review of prohibited personnel actions, the District Courts retain jurisdiction to award damages for an "adverse personnel action actually caused by an inaccurate or incomplete record"). Put more simply, in this case, so long as

Peter B. has sufficiently alleged that his termination from CIA was caused by the inaccurate information in his records, his Privacy Act claim is not precluded by the CSRA.

Peter B. has alleged that the CIA compiled inaccurate and/or derogatory information that was used as the basis for his termination and that the CIA's failure to seek information from him resulted in the inaccurate and/or derogatory information that was the proximate cause of his termination from CIA. FAC at ¶¶68-104.

Accordingly, the CIA's argument that Peter B. has failed to state a claim for relief under subsection (e)(2) of the Privacy Act is without merit.

C. Peter B.'s Claims Under Counts VII and VIII That CIA Violated 5 U.S.C. §552a(e)(5) and (e)(6) Should Not Be Dismissed For Failure To State A Claim.

It is undisputed that to state a claim under subsection (e)(5), a plaintiff must demonstrate that (1) he has been aggrieved by an adverse determination, (2) the CIA failed to maintain his records with the degree of accuracy necessary to assure fairness in that determination, (3) that CIA's reliance on the inaccurate records was the proximate cause of the determination, and (4) the CIA acted willfully and intentionally in failing to maintain accurate records. Deters v. United States Parole Comm'n, 85 F.3d 655, 657 (D.C. Cir. 1996). It is similarly undisputed that to state a claim under subsection (e)(6), a plaintiff must show that (1) the agency disclosed records about him to another person other than an agency, (2) the CIA failed to make reasonable efforts to assure that the records are accurate, complete, timely and relevant for agency purposes, (3) he was aggrieved by an adverse determination, (4) the inaccurate determination provided by the CIA was the proximate cause of an adverse determination, and (5) the CIA acted

willfully and intentionally in failing to assure accurate records were disclosed. Logan v. Dep't of Veterans Affairs, 357 F.Supp.2d 149, 154 (D.D.C. 2004).

The CIA's only stated defense is that Peter B.'s depiction of his records being inaccurate is flawed. It argues that Peter B.'s claim ignores the classified nature of his employment with the CIA and that the CIA did not provide "inaccurate information" in refusing to confirm or deny his employment status with CIA or the extent to which he possesses a security clearance. CIA Memo at 23.

First, there is absolutely no exception to the Privacy Act where classified documents (and Peter B. does not concede that all of the relevant records or information would be classified) are concerned. The statute fails to provide such an exception, and neither does any case law.

Second, the contested issue is not that the CIA failed to confirm Peter B.'s prior relationship due to the classified nature. This, as stated earlier, is a complete straw man's argument proffered by the CIA. Peter B.'s prior relationship with the CIA was not an issue. Zaid Decl. at ¶9.

Third, the real issue is the false derogatory and inaccurate information that the CIA provided to third parties, without authorization, in order to harm Peter B.

Moreover, as explained earlier, the Glomar response is not an "absolute shield," and agencies invoking it must still "provide a public affidavit explaining in as much detail as possible the basis for its claim." Supra fn.4 (noting that discovery can be permitted if necessary to clarify the agency's position or if sufficient question has been raised concerning the agency's good faith).

Therefore, given the clear dearth of information from the CIA concerning the reason behind Peter B.'s termination, the apparent contradictions between assurances by CIA officials to him that his file was clear of any security clearance "problems" and the subsequent statements made by the CIA to the defense contractors concerning Peter B.'s file, and the resulting rescission of an offer of employment by the contractors due to security concerns, the CIA is not entitled to dismissal of this claim at this time.

Accordingly, the CIA's argument that Peter B. has failed to state a claim for relief under subsections (e)(5) and (e)(6) of the Privacy Act is without merit.

D. At This Initial Stage, Discovery Is Justified On Peter B.'s Privacy Act Claims

As part of its defense the CIA seeks to proffer factual and legal explanations as to the process that would take place with respect to the dissemination of information concerning Peter B.'s clearance status. CIA Memo at 26. Peter B. disputes these arguments. Zaid Decl. at ¶9. However, this is an area ripe for elaboration through discovery, particularly as it relates to information that would be in the possession of the defendants and not the plaintiff. As is whether or not the CIA acted in an "intentional or willful" manner. CIA Memo at 27.

Courts routinely first permit discovery in Privacy Act cases such as this one before dismissal is contemplated. Even a quick review of decisions within the last few years reveals this to be true. See e.g., Tripp v. DoD, 219 F. Supp. 2d 85, 93-94 (D.D.C. 2002); Murphy v. United States, 167 F. Supp. 2d 94, 97 (D.D.C. 2001); Alexander v. FBI, 194 F.R.D. 316, 319 (D.D.C. 2000); Sirmans v. Caldera, 27 F. Supp. 2d 248, 249 (D.D.C. 1998); Scarborough v. Harvey, 2007 U.S. Dist. LEXIS 36952, *2 (D.D.C. May 22, 2007); Doe v. Goss, 2007 U.S. Dist. LEXIS 2708; Hutchinson v. Tenet, 2003 U.S. Dist.

LEXIS 26182 (D.D.C. August 28, 2003); Melius v. Nat'l Indian Gaming Comm'n, 2000 U.S. Dist. LEXIS 22747, *1 (D.D.C. July 21, 2000).[10]

III. TRANSFER OF THIS CASE IS INAPPROPRIATE AS IT WOULD NEITHER BE CONVENIENT NOR SERVE THE INTERESTS OF JUSTICE

In an action where venue is proper, 28 U.S.C. § 1404(a) nonetheless authorizes a court to transfer a civil action to any other district where it could have been brought "for the convenience of parties and witnesses, in the interest of justice[.]" 28 U.S.C. § 1404(a). Section 1404(a) vests "discretion in the district court to adjudicate motions to transfer according to [an] individualized, case-by-case consideration of convenience and fairness." Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988)(citation omitted). Under this statute, the moving party bears the burden of establishing that transfer is proper. Trout Unlimited v. Dep't of Agric., 944 F. Supp. 13, 16 (D.D.C. 1996).

Accordingly, the CIA must make two showings to justify transfer. First, it must establish that Peter B. originally could have brought the action in the proposed transferee district. Van Dusen v. Barrack, 376 U.S. 612, 622 (1964). Second, it must demonstrate that considerations of convenience and the interest of justice weigh in favor of transfer to that district. Trout Unlimited, 944 F. Supp. at 16.

As to the second showing, the statute calls on the court to weigh a number of case-specific private and public-interest factors. Stewart Org., 487 U.S. at 29. The private-interest considerations include: (1) the plaintiff's choice of forum, unless the balance of convenience is strongly in favor of the defendants; (2) the defendant's choice of forum;

[10] Peter B. would be happy to provide the Court with a proposed discovery plan, as did counsel in Leighton v. CIA, 2007 U.S. Dist. LEXIS 26667, *4-*6 (D.D.C. April 11, 2007), in successfully overcoming the CIA's Motion to Dismiss under Rule 12(b)(6).

(3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the ease of access to sources of proof. Trout Unlimited, 944 F. Supp. at 16, citing Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995). The public-interest considerations include: (1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding local controversies at home. Id.

Analyzing and balancing these factors should persuade this Court that a transfer of venue to the Eastern District of Virginia ("EDVA") is neither appropriate nor necessary.

A. Peter B. Chose This Forum To Litigate His Claim

Courts must afford substantial deference to a plaintiff's choice of forum. S. Utah Wilderness Alliance v. Norton, 315 F. Supp. 2d 82, 86 (D.D.C. 2004); Greater Yellowstone Coalition v. Bosworth, 180 F. Supp. 2d 124, 128 (D.D.C. 2001). See also Pain v. United Tech. Corp., 637 F.2d 775, 784 (D.C. Cir. 1980)(finding that the moving party "bears a heavy burden of establishing that plaintiff's choice of forum is inappropriate"). That deference is only lessened if the moving party can demonstrate that the forum has "no meaningful ties to the controversy and no particular interest in the parties or subject matter." Greater Yellowstone Coalition, 180 F. Supp. 2d at 128.

The CIA claims that because Peter B. does not reside in the District of Columbia ("D.C.") and the events giving arise to his claims did not occur in D.C., this case has no meaningful ties to DC and transfer is therefore appropriate. This argument is flawed for multiple reasons.

First, Peter B.'s claims have an obvious and significant relation to D.C., namely that the claims involve a federal statute, the Privacy Act, which specifically allows for venue in D.C. 5 U.S.C. §552a(g)(5).

Second, the D.C. Courts have found venue to be appropriate in D.C. in cases involving the CIA due to the extensive amount of work done in DC by the DCI. See Bartman v. Cheney, 827 F. Supp. 1, 2 n.2 (D.D.C. 1993), relying on Doe v. Casey, 601 F. Supp. 581, 584-85 (D.D.C. 1985), rev'd on other grounds, 796 F.2d 1508 (D.C. Cir. 1986). Although the passage of the National Security Intelligence Reform Act of 2004 ("NSIRA"), 50 U.S.C. §§ 402 et seq., transferred significant portions of the DCI's duties to the Director of National Intelligence ("DNI"), no court has yet found any reason to reject the holding in Bartman. The CIA, however, requests that this Court to do just that without providing any factual basis to believe that the DCI does not still conduct extensive amount of work in D.C. If this is an argument that the CIA wishes to pursue, Peter B. should be permitted to conduct discovery on this issue before a determination is reached by the Court.

Third, although the CIA claims that no events arose in D.C., the burden is on the moving party to provide evidence that would disprove assertions that certain activities occurred in the chosen forum. See Greater Yellowstone Coalition, 180 F. Supp. 2d at 128. The CIA maintains several offices in D.C., not only for the DCI but also for its employees, and Peter B. clearly stated that, "upon information and belief, events pertaining to Peter B. took place within this jurisdiction." FAC, at ¶5.

The CIA has failed to provide any evidence that demonstrates that its actions, or that of the individual defendants Lyons and Does #1-10, were not, in fact, undertaken in whole or in part within the geographical confines of the District of Columbia.

B. EDVA Is Not A More Convenient Forum

In terms of pure geographical distance, there is no difference in the convenience for the witnesses or, for that matter, the parties, between the two forums. These are sister jurisdictions. The difference in convenience between the two courthouses is negligible. With the exception of Peter B., who remains abroad for the time being, many of the witnesses and the parties live or work within the greater D.C. Metropolitan Area. In fact, defendant Lyons allegedly currently works for the Director of National Intelligence in Washington, D.C. See "Stay Away From Spooky Women", *Time Magazine*, July 18, 2006 (noting that Lyons is detailed by the CIA to the DNI), available at *http://www.time.com/time/magazine/article/0,9171,1215797,00.html*. Therefore, in terms of parties and witnesses, there is no greater convenience in EDVA as opposed to D.C.[11]

C. The Public Interest Lies With Keeping This Case In The District Of Columbia

Defendants do not make any reference to the public interest factors that can be considered in determining whether a transfer is appropriate, but that does not make them any less valid or significant. The factors for this Court to consider in determining whether it is in the public interest to transfer a case include: (1) the transferee court's familiarity with the governing laws; (2) the relative congestion of the calendars of the transferee and

[11] To the extent the CIA holds any security concerns regarding the classification status of witnesses or information, Peter B. would have no objection to allowing depositions at secure agency facilities outside of this jurisdiction if necessary, even though the mere fact that the presence of these witnesses in D.C. would be unlikely to raise any questions.

transferor courts; and (3) the local interest in deciding local controversies at home. McClamrock v. Eli Lilly & Co., 267 F. Supp. 2d 33, 41 (D.D.C. 2003)(citation omitted). Furthermore, the courts can also consider whether the defendants are forum shopping. Ferens v. John Deere Company, 494 U.S. 516, 527 (1990).

First, due in large part to the specific grant of jurisdiction provided for in the Privacy Act, it goes without saying that the D.C. Courts have considerable familiarity with the governing law. See e.g. Bartman, 827 F. Supp. at 2; Greater Yellowstone Coalition, 180 F. Supp. 2d at 128. Furthermore, there are numerous examples of litigation within D.C. which has involved the CIA as a defendant in which transfer either was never sought or was denied (and the undersigned counsel has handled many of them). See e.g. Ciralsky v. CIA, 355 F.3d 661 (D.C.Cir. 2004); M.K. v. Tenet, 196 F. Supp. 2d 8; Doe v. Goss, 2007 U.S. Dist. LEXIS 2708; Harbury v. Deutch, Civil Action No. 96-00438 (D.D.C.)(CKK). It would seem prudent to ask why Peter B.'s case is any different from other cases where none of the parties reside in D.C. but the claims have been litigated in this jurisdiction.

Second, this is very much a local controversy that should be decided by the D.C. Courts. Considering the substantially larger number of Privacy Act cases brought in DC compared to all other jurisdictions, logic dictates that transfer to another district based largely on technicalities, such as the actual presence of the CIA's primary office in Virginia, is neither sufficient nor adequate standing alone.

Finally, considering the relative expertise of the D.C. Courts in dealing with Privacy Act litigation in comparison with EDVA, as well as the lengthy history of CIA cases that have transpired within D.C. without argument, it begs the question of whether the CIA is

engaging in forum shopping by seeking to transfer the case to a jurisdiction where it knows, due to other cases, Peter B.'s attorney is not licensed to practice. Zaid Decl. at ¶2.

Accordingly, the CIA's Motion to Transfer this case to the EDVA should be denied.

CONCLUSION

Based on the foregoing, the defendants' Motion to Dismiss should be denied without prejudice and the plaintiff should be permitted to conduct discovery.

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Respectfully submitted,

/s/

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