



Last month, a D.C. federal judge [ordered](#) the Department of Justice to turn over the names of prospective monitors nominated to oversee the corporate compliance programs of fifteen companies found to be in violation of the Foreign Corrupt Practices Act (FCPA).



While recognizing that these individuals have "more than a *de minimis* privacy interest in their anonymity," the court found that any such privacy interest was outweighed by the public's interest in learning their identities. In April 2015, journalist Dylan Tokar filed a FOIA request seeking records related to the review and selection of corporate compliance monitors in FCPA settlement agreements between DOJ and fifteen corporate defendants. Tokar, a reporter for the trade publication *Just Anti-Corruption*, hoped these records would shed light on the monitor selection process, including whether DOJ had been abiding by the guidelines for monitor selection set forth in its 2008 [Morford Memorandum](#). The Memorandum, which establishes several principles to avoid potential and actual conflicts of interest and address concerns of cronyism, prescribes the consideration of "at least three qualified monitor candidates" whenever practicable. Accordingly, Tokar requested the names of the three monitor candidates and their associated firms for fifteen cases. More than eighteen months later, DOJ provided Tokar with a table purportedly responding to his request, but redacted the names of the monitor candidates who were nominated but not selected, as well as their affiliated firms in some cases. DOJ asserted that these redactions were necessary and justified under [FOIA Exemptions 6](#) and [7\(C\)](#), which exempt from disclosure certain information that would constitute an "unwarranted invasion of personal privacy." After both parties cross-moved for summary judgment, the court concluded that the redactions were improper and ordered DOJ to release the candidates' names. It found that while DOJ had demonstrated sufficient privacy interests to warrant coverage under Exemptions 6 and 7(C)—as it was "plausible that these individuals would prefer to have their consideration and ultimate[] non-selection withheld from the public's view"—these interests were outweighed by the public's interest in disclosure. The court agreed with Tokar that without disclosure of the candidates' names, it would be "difficult (if not impossible) to know whether either the government or the corporate entity under investigation is taking advantage of the selection process in a manner that undermines the objectives of the DPA" and the principles delineated in the Morford Memorandum. The court's order in *Tokar* cracks open—however slightly—the closed door that has traditionally shielded the process by which corporate compliance monitors are selected in actual cases. This process, which often occurs outside the supervision of courts or other judicial oversight, has been subject to recent controversy. For example, in fall 2016, a federal district court in the Southern District of New York [appointed its own monitor](#), rejecting the three candidates proposed by the government and the defendant company. The court concluded that two of the three candidates were under-qualified and had not been fully vetted (one was a full-time law student), leaving only one viable candidate (which, of course, was the government and defendant's first choice). The *Tokar* court cited the SDNY case in support of Tokar's position that potential manipulation of the system may only be ferreted out when the full spate of potential candidates is known. The court's decision threatens to invite a possible influx of FOIA requests into federal monitorships—both past and present—as courts continue to grapple with the proper balance between privacy interests of entities and individuals involved in the selection of a monitor, and the public's interest in gaining transparency into that process.

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