UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUZZFEED, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

No. 17 Civ. 7949 (VSB)

MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

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Defendant Department of Justice ("DOJ" or the "Government"), by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this memorandum in support of its motion for summary judgment in this case, which arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq.

PRELIMINARY STATEMENT

The DOJ Office of Inspector General ("OIG") report of investigation ("Report") at issue in this case concerns an improper, consensual affair between a former U.S. Attorney and a supervisory Assistant U.S. Attorney in the same U.S. Attorney's Office. All of the information in the Report about the affair has been disclosed, except for the names and other identifying information of the individuals referenced in the report. Plaintiff asks the Court to reveal not only the names of the former U.S. Attorney and the supervisory Assistant U.S. Attorney, but also information in the Report concerning allegations of misconduct that the investigators determined were not supported by evidence. The Court should not do so.

FOIA protections for individual privacy are broad. In the context of investigatory reports like the OIG report at issue here, disclosure of personally identifying information turns largely on the nature and degree of the misconduct found to have occurred. The substantiated misconduct here is of a personal nature, unrelated to a core job function. It does not rise to the level of criminality or corruption that the Second and D.C. Circuits have found necessary in prior cases to warrant invading the privacy of the individuals involved. Moreover, disclosure of the identities of the individuals involved, and information related to unsubstantiated allegations, serves no public interest cognizable under FOIA. None of the information Plaintiff seeks furthers FOIA's core mission of letting the public know "what their government is up to." *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

That goal has already been satisfied by the OIG's release of information in the Report about the affair. Instead, further disclosure would only embarrass the individuals involved. In this case, FOIA does not compel disclosure; it demands the privacy of the individuals involved be protected.

The redactions in the Report reflect a proper balancing of the public and privacy interests, and the Court should grant the Government's motion for summary judgment.

BACKGROUND

On May 16, 2017, DOJ's Office of the Inspector General received a FOIA request from Plaintiff. In the request, Plaintiff sought "access to and/or copies of the full report by the Office of the Inspector General related to the Investigative Summary published on OIG's website on May 16, 2017, entitled: 'Findings of Misconduct by a Former United States Attorney for Having an Inappropriate Relationship with a Subordinate.'" Specifically, Plaintiff requested the "full report that was provided by OIG to the relevant Justice Department components." Decl. of Deborah M. Waller ("Waller Decl.") ¶ 5.

On June 12, 2017, the OIG responded to Plaintiff's request, releasing the Report of Investigation consisting of 12 pages, which was redacted in part pursuant to 5 U.S.C. § 552(b)(6) and (b)(7)(C) ("Exemptions 6 and 7(C)," respectively). On March 7, 2018, the Government supplemented that release by producing two pages consisting of a list of exhibits to the Report, which were also redacted in part pursuant to the same FOIA exemptions. *Id.* ¶ 9. After reviewing the Report and performing the requisite balancing of interests, the OIG redacted five categories of information: (1) the identity and any identifying information of the former United States Attorney, who is the primary subject of the Report; (2) the identity and identifying information of the subordinate Supervisory Assistant U.S. Attorney ("Supervisory AUSA") with

whom the U.S. Attorney engaged in an intimate personal relationship; (3) the names and identifying information of third parties, including witnesses; (4) all informational content, including but not limited to the name and identifying information of an additional subject of the investigation, related to allegations the OIG investigation determined were not supported by evidence and were without merit; and (5) the names of non-supervisory law enforcement agent involved in the OIG investigation. *Id.* ¶¶ 9-10, 14-18.

On June 28, 2017, Plaintiff appealed the OIG's June 12, 2017, determination regarding the Report. *See* Compl. ¶ 20, Ex. C. On September 15, 2017, the Department of Justice's Office of Information Policy upheld the OIG's determination regarding the Report. *Id.* ¶ 22, Ex. E. On October 16, 2017, Plaintiff initiated the current action by filing its complaint with this Court.

The Government now moves for summary judgment upholding the OIG's redactions in the Report.

ARGUMENT

The only issue in this case is whether the Government properly withheld portions of the Report to protect personal privacy pursuant to FOIA Exemptions 6 and 7(C). Plaintiff challenges the withholding of the names and identifying information of the former U.S. Attorney and Supervisory AUSA, who are referenced in the Report, and the portions of the Report that address unsubstantiated allegations (Report at 1, 4-5, 7-12).[1] As discussed below, the redactions at issue are proper, and thus the Government is entitled to summary judgment.

[1] By agreement of the parties, Plaintiff does not challenge the adequacy of the search or the remainder of the redactions, which withhold names and identifying information of witnesses and third parties mentioned in the report, as well as the name of the law enforcement agent who prepared the report.

I. FOIA and Summary Judgment

FOIA is designed to aid the public's understanding of "what their government is up to," *Reporters Comm.*, 489 U.S. at 773, and represents a balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. No. 89-1497 at 6, 89th Cong., 2d Sess. (1966)); *Associated Press v. DOJ*, 549 F.3d 62, 64 (2d Cir. 2008); *New York Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012). Thus, FOIA mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions." *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001) (citations omitted); *see also John Doe Agency*, 493 U.S. at 152 (FOIA exemptions are "intended to have meaningful reach and application"); *Martin v. DOJ*, 488 F.3d 446, 453 (D.C. Cir. 2007) ("Recognizing, however, that the public's right to information was not absolute and that disclosure of certain information may harm legitimate governmental or private interests, Congress created several exemptions to FOIA disclosure requirements." (internal quotations omitted).

Most FOIA actions are resolved by summary judgment. *See, e.g., Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When an agency's withholdings have been challenged, the Court determines whether the government has properly withheld records or information under any of FOIA's exemptions. *See* 5 U.S.C. § 552(a)(4)(B). "Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's

burden." *Carney*, 19 F.3d at 812 (footnote omitted). An agency's declarations in support of its determination are "accorded a presumption of good faith." *Id.* (quotation marks omitted).[2]

II. Balancing of Privacy and Public Interests Under Exemptions 6 and 7(C)

Exemption 6 exempts from disclosure information from personnel, medical, or other similar files, the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). The statutory language concerning files "similar" to personnel or medical files has been read broadly by the Supreme Court to encompass any "information which applies to a particular individual . . . sought from Government records." *Id.* at 602; *see also Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 174 (2d Cir. 2014). The privacy interest in Exemption 6 "belongs to the individual, not the agency." *Amuso v. DOJ*, 600 F. Supp. 2d 78, 93 (D.D.C. 2009). The Report at issue in this case concerns an investigation of a DOJ employee (the former U.S. Attorney) conducted by the OIG, and plainly contains information applying that employee as well as other individuals mentioned in the Report. It therefore constitutes a "personnel" or "similar file." Walter Decl. ¶ 13.

FOIA Exemption 7(C) exempts from disclosure records or information compiled for law enforcement purposes, to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) "is more protective of privacy than

[2] In FOIA cases, the Court accepts agency affidavits in lieu of the Statement of Material Facts required by Local Civil Rule 56.1." *Nat'l Immigration Project v. U.S. DHS*, No. 11 Civ. 3235 (JSR), 2014 WL 6850977, at *1 n.1 (S.D.N.Y. Dec. 3, 2014); *see also, e.g., N.Y. Times Co. v. U.S. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012).

Exemption 6, because [Exemption 7(C)] applies to any disclosure that could reasonably be expected to constitute an invasion of privacy that is unwarranted." *Associated Press v. DOJ*, No. 06 Civ. 1758 (LAP), 2007 WL 737476, at *4 (S.D.N.Y. Mar. 7, 2007). Here, the Report consists of information compiled for law enforcement purposes, and thus the more protective standard in Exemption 7(C) applies to the redactions at issue. *See* Waller Decl. ¶ 14.

In determining whether personal information is exempt from disclosure under Exemptions 6 or 7(C), the Court must balance the public's need for the information against the individual's privacy interest. *See Wood v. FBI*, 432 F.3d 78, 86 (2d Cir. 2005). The first step in that process is to identify the applicable, countervailing public and privacy interests.

"The privacy side of the balancing test is broad and encompasses all interests involving the individual's control of information concerning his or her person." *Id.* at 88; *see also Associated Press v. DOJ*, 549 F.3d at 65. Any privacy interest that is more than *de minimis* triggers a balancing analysis. *See Associated Press v. DOD*, 554 F.3d 274, 285 (2d Cir. 2009) ("Thus, once a more than *de minimis* privacy interest is implicated the competing interests at stake must be balanced in order to decide whether disclosure is permitted under FOIA.").

On the other hand, the "only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contribut[ing] significantly to public understanding *of the operations or activities of the government*." *DOD v. FLRA*, 510 U.S. 487, 495 (1994) (emphasis and alteration in original) (internal quotations omitted); *see also Hopkins v. HUD*, 929 F.2d 81, 88 (2d Cir. 1991). This purpose is not furthered by disclosure of information that "reveals little or nothing about an agency's own conduct." *Reporters Comm.*, 489 U.S. at 773. "The requesting party bears the burden of establishing that disclosure of personal information would serve a public interest

cognizable under FOIA." *Associated Press*, 549 F.3d at 66. A mere desire to obtain information about whether an agency has properly conducted an investigation is accorded no weight, unless the requestor produces "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Nat'l Archive and Records Admin. v. Favish*, 541 U.S. 157, 175 (2003).

While FOIA recognizes that the public may have greater interest in the activities of federal employees than those of private individuals, federal employees do not surrender their privacy rights, even with respect to the discharge of their official duties. *See Perlman v. DOJ*, 312 F.3d 100, 107 (2d Cir. 2002), *vacated by*, 541 U.S. 970 (2004), *reaff'd on remand*, 380 F.3d 110 (2d Cir. 2004) (*per curiam*); *Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998); *Dunkelberger v. DOJ*, 906 F.2d 779, 781 (D.C. Cir. 1990); *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984). Courts have acknowledged that federal employees have substantial privacy interests in nondisclosure of their employment history, not only in avoiding the potential embarrassment or stigma arising from negative disclosures but also in nondisclosure of "bits and pieces of information" that the government had compiled. *Stern*, 737 F.2d at 91; *see also Dunkelberger*, 906 F.2d at 781.

The D.C. Circuit in *Stern* addressed whether it was appropriate to release the names of Federal Bureau of Investigation ("FBI") employees contained in an investigatory report after the facts substantiated by the investigation were made public. The *Stern* court considered whether the names of three FBI employees, who had been investigated and censured for negligent job performance in connection with a possible cover-up of FBI surveillance activities, could be withheld from disclosure under Exemptions 6 or 7(C) of FOIA. *Stern*, 737 F.2d at 86. Because the facts of the investigation had been released, the *Stern* court found that the only relevant

public interest was "in knowing *who* the public servants are that were involved in the governmental wrongdoing." *Id.* at 92 (emphasis in original). The court distinguished the public "interest in knowing the identity of disciplined employees" from "other public interests that may arise in requests for disclosure of government investigatory records," such as "that the report of an investigation released publicly is accurate, that any disciplinary measures imposed are adequate, and that those who are accountable are dealt with in an appropriate manner." *Id.* Such general public interests in the conduct of government investigations, the court concluded, are not present or "satiated in any way by the release of the names of the censured employees." *Id.*

The *Stern* court ruled, however, that the name of a high-ranking FBI official should be released because that official had knowingly participated in the cover-up. *Id.* at 94. Because the official had engaged in knowing criminal acts, the public had an interest in his identity independent from the facts already released. Based on the nature and degree of that misconduct, the *Stern* court held the public interest was "not outweighed by [the official's] own interest in personal privacy." *Id.*

Subsequently, in *Perlman*, the Second Circuit considered whether to release information in an OIG investigatory report about the conduct of the former general counsel of the Immigration and Naturalization Service ("INS"). *Perlman*, 312 F.3d at 103. The OIG's investigation had determined that the former general counsel had abused his position to give preferential treatment to companies that employed certain former INS employees. *Id.* at 103-104. After identifying the relevant public and privacy interests in play, the Second Circuit enumerated a series of factors to be considered in the balancing of those interests:

> (1) the government employee's rank; (2) the degree of wrongdoing and strength of evidence against the employee; (3) whether there are other ways to obtain the information; (4) whether the information sought sheds light on a government activity; and (5)

> whether the information sought is related to job function or is of a personal nature.

Perlman, 312 F.3d at 107. None of the enumerated factors is dispositive, nor is the list of factors exhaustive. *Id.* The Second Circuit then applied the factors and ordered the release of information about the former general counsel because he was engaged in classic official misconduct: directly using his position to improperly favor and enrich individuals who did business with the government. *Id.* at 107-09. The court held, however, that the identifying information of witnesses and other third parties identified in the Report was protected by Exemptions 6 and 7(C). *Id*. at 106 (holding that "the strong public interest in encouraging witnesses to participate in future government investigations offsets the weak public interest in learning witness and third party identities").

In determining whether the public's interest in disclosure outweighs the applicable privacy interests, the nature and degree of the substantiated misconduct are crucial. In both *Perlman* and *Stern*, the courts upheld the redaction of identifying information of lower level government employees, even where, as in *Stern*, those employees may have been connected to the misconduct but were not as culpable as the key government official. *See Stern*, 737 F.2d at 93 (holding that without evidence of intentional criminal activity, release of an employee's name "is grounded only in a general notion of public servant accountability, [and] the employees' privacy interest in nondisclosure is paramount and protects their identities from being revealed"); *Perlman*, 312 F.3d at 106 (protecting witness and other third-party identities). Indeed, the D.C. Circuit has upheld the withholding of records in full under Exemptions 6 and 7(C) where there was no evidence of misconduct other than unsubstantiated allegations, *see Dunkelberger*, 906 F.2d at 781 (affirming withholding of all responsive records in response to request for FBI agent's disciplinary file, when there was no evidence of specific misconduct), or where the

misconduct at issue did not rise to the level of criminality or corruption, *Kimberlin*, 139 F.3d at 949 (affirming withholding of all information regarding an investigation of "a staff-level government lawyer in connection with the possibly unauthorized and perhaps illegal release of information to the press").

III. The Redactions to the Report Reflect a Proper Balancing of the Privacy and Public Interests

The Government properly balanced the privacy and public interests when it redacted the Report. The Government produced the facts that the OIG's investigation found to be substantiated, and thereby let the public know what "what their government [was] up to." *Reporters Comm.*, 489 U.S. at 773. Because those facts involved inappropriate behavior of a personal and intimate nature, the Government released a full accounting of the substantiated actions of the government employees involved, while withholding their identities (as well as the identities of witnesses and other third parties). Waller Decl. ¶¶ 9-10. The Government also withheld the portions of the Report that concern separate allegations that were found to be unsubstantiated and meritless. *Id.* ¶¶ 10, 20. The Government drew a proper line between the interests of the public and the privacy of the individuals named in the Report. Thus, the Court should uphold the OIG's redactions, and grant the Government's motion.

A. The Names of the U.S. Attorney and Supervisory AUSA Were Properly Withheld under Exemptions 6 and 7(C)

The Government properly withheld the names of the former U.S. Attorney and Supervisory AUSA under Exemptions 6 and 7(C) because their privacy interests, and those of third parties identified in the Report, outweigh the public's interest in disclosure. Releasing the names of the former U.S. Attorney and Supervisory AUSA would not serve the overall purpose of FOIA because it would not illuminate anything more about the actions of the government, nor does the misconduct rise to the level of seriousness that would warrant disclosing the names.

Meanwhile, the former U.S. Attorney and the Supervisory AUSA, and others identified in the Report, have significant privacy interests in nondisclosure.

1. No Cognizable Public Interest Is Served By Disclosure of the Names and Other Identifying Information

There can be no genuine dispute that the former U.S. Attorney and Supervisory AUSA have significant privacy interests in not being publicly identified as having been engaged in an affair. Waller Decl. ¶¶ 16-17. Importantly, the privacy interests of witnesses and other employees referenced in the Report would also be adversely affected by the release of the former U.S. Attorney's or the Supervisory AUSA's names. *Id.* ¶ 18. If either name is released, it will greatly increase the likelihood that both the public and those close to the situation will be able to identify others referenced in the Report. *Id.* ¶¶ 16-18. The privacy of third parties is therefore intertwined with the identity of the former U.S. Attorney and Supervisory AUSA. *Id.* Those third-party individuals have a strong interest in not being identified or associated with the events in the Report, and the public and OIG have an interest in protecting those individuals' identities to encourage witness cooperation. *Id.* ¶ 18; *see Perlman*, 312 F.3d at 106; *Stern*, 737 F.2d at 93.

On the other hand, the public has no cognizable interest in the identity of the U.S. Attorney or Supervisory AUSA. Plaintiff has identified three interests purportedly served by the disclosure of that information: (1) "the public has an interest in knowing how (or if at all) the individuals involved in this investigation were [engaged in misconduct];" (2) "the public has a real interest that the OIG carried out its investigatory function even handedly;" and (3) "the public has an interest in knowing who the USA in question to prevent innocent parties from being implicated." *See* Compl. Ex. D at 4. But none of these is relevant under FOIA or served by the release of the identities of the former U.S. Attorney and Supervisory AUSA.

First, the Government has already released the substantiated facts developed through the OIG investigation in the unredacted portions of the Report. *See* Waller Decl. ¶¶ 9-10. The release of the former U.S. Attorney's or the Supervisory AUSA's identities will not reveal further information "how" the individuals involved were engaged in misconduct because the facts of the underlying misconduct have been fully revealed. *Stern*, 737 F.2d at 92. That question has already been answered by the OIG's release.

Likewise, the public already has the information necessary to assess the OIG's investigation in the unredacted portions of the Report. The OIG's release provides a complete accounting of the OIG's investigative findings regarding the allegation that the former U.S. Attorney and Supervisory AUSA were engaged in an inappropriate relationship. *See* Waller Decl. ¶¶ 9-10. Revealing their names and identifying information in the Report would not provide any further information regarding the OIG's performance of its investigatory function. *Stern*, 737 F.2d at 92 (an "interest in knowing that a government investigation itself is comprehensive . . . would not be satiated in any way by the release of the names"). In any event, given that Plaintiff has adduce no evidence to suggest any malfeasance by the OIG, a general public interest in ensuring the adequacy (or even-handedness) of the OIG's investigation is insufficient. *See Favish*, 541 U.S. at 175.

Nor is it necessary to release the identities of the former U.S. Attorney and Supervisory AUSA to protect "innocent parties from being implicated." Plaintiff appears to suggest that if the former U.S. Attorney who is the subject of the Report is not identified by the OIG, any former U.S. Attorneys may be implicated as potential wrongdoers. *See* Compl. Ex. D at 4 (identifying the former U.S. Attorney in the Report would "dispense with any suspicion that perfectly innocent parties were involved in wrongdoing"); *id.* at 4 n.1 (listing former U.S.

Attorneys, but disclaiming that Plaintiff is suggesting that any of them is the subject of the Report). This subtle threat serves no end of FOIA, and the Court should accord it no weight. Plaintiff makes no attempt to explain how the interests of those other former U.S. Attorneys are relevant to the *public* interest, except to say that without this information the public is left to guess at the identity of the former U.S. Attorney in the Report. *Id.* But the same could often be said when identifying information is withheld under Exemption 6 or 7(C). FOIA does not require disclosure of private information to prevent public speculation.

In short, Plaintiff identifies no cognizable public interest in disclosure of the identities of the former U.S. Attorney and the Supervisory AUSA, and thus the Court need not proceed to the next step of the analysis and balance the private and public interests. *See Favish*, 541 U.S. at 175.

2. The *Perlman* Factors Weigh in Favor of Not Disclosing the Names

If the Court proceeds to balance the private and public interests, the *Perlman* factors weigh heavily against release of either name. In the case of the former U.S. Attorney, the only factor that weighs in favor of release is his high rank. *See* Waller Decl. ¶ 16. But this factor alone is not dispositive, and the second, fourth, and fifth *Perlman* factors weigh heavily in favor of nondisclosure. *Perlman*, 312 F.3d at 107 ("(2) the degree of wrongdoing and strength of evidence against the employee; . . . (4) whether the information sought sheds light on a government activity; and (5) whether the information sought is related to job function or is of a personal nature."). While the OIG found evidence of misconduct (which is revealed in the publicly released version of the Report), the wrongdoing does not approach the nature or degree of misconduct that that the courts found warranted release of personal information in *Stern* or *Perlman*. Release of the former U.S. Attorney's name and identifying information would only

reveal who had an affair with whom, and tell the public nothing more about what the government is up to. *See* Waller Decl. ¶¶ 16-17. The unredacted portions of the Report concern an improper, consensual relationship at the workplace, and while such a relationship may have had collateral effects on the work environment, it is primarily a personal matter, the disclosure of which serves no purpose other than to embarrass those involved. *See id.* The misconduct is of a "personal nature," unrelated to any core "job function," and in light of the information already released, disclosure of the identities of the U.S. Attorney and Supervisory AUSA would "shed [no] light of any government activity." *Perlman*, 312 F.3d at 107. The balance of the factors therefore weighs strongly in favor of maintaining the confidentiality of the U.S. Attorney's name even when only his privacy interests are taken into account.

The *Perlman* factors weigh even more heavily in support of withholding the Supervisory AUSA's name. *Id.* ¶ 17. All the same considerations that apply to the former U.S. Attorney apply with even greater force to the Supervisory AUSA, who was not a subject of the investigation and was not found culpable for misconduct in the Report. *Id.* Revealing her name would be personally embarrassing without serving any countervailing public purpose recognized under FOIA. *See Perlman*, 312 F.3d at 106; *Stern*, 737 F.2d at 92-93. In short, there is no reason, other than possibly her supervisory rank, to release the Supervisory AUSA's name. *See id.* ¶ 17. Without much more, the Supervisory AUSA's rank is not enough to justify disclosing her name. *See Perlman*, 312 F.3d at 107.

Finally, to properly conduct the relevant balancing of interests, the interests of all of the individuals referenced in the Report should be considered alongside those of the former U.S. Attorney and the Supervisory AUSA, and those interests strongly support continued nondisclosure. Others referenced in the report have an interest in continued protection of the

identities of the former U.S. Attorney and Supervisory AUSA because revealing either name would have a cascading effect on those other individuals' privacy. Waller Decl. ¶ 18. Knowing either name will reveal the specific office and time frames involved in the Report, which in turn will assist in identifying everyone referenced in the Report. *Id.* This would undermine their privacy interests as well as the public interest in fostering witness cooperation in these investigations. *See Perlman*, 312 F.3d 106; *Stern*, 737 F.2d 93; Waller Decl. ¶ 18.

Thus, the names of the former U.S. Attorney and Supervisory AUSA were properly redacted pursuant to Exemptions 6 and 7(C), and the Court should uphold the OIG's redactions.

B. Portions of the Report Which Find Certain Allegations of Misconduct Without Merit Were Properly Withheld under Exemptions 6 and 7(C)

The complaint that prompted the OIG's investigation also alleged misconduct by the former U.S. Attorney beyond his having an inappropriate relationship with the Supervisory AUSA, and the complaint also alleged separate misconduct by an additional subject of the investigation, who remains anonymous. Waller Decl. ¶¶ 10, 20. After the OIG conducted a thorough investigation into the allegations in question, the investigators determined those additional allegations were without merit. *Id.* ¶ 20. The information in the Report generated by the investigation related to those unsubstantiated allegations was properly withheld pursuant to Exemptions 6 and 7(C).

Here, again, the public has no interest in those allegations, whereas the former U.S. Attorney and the additional subject have significant privacy interests in nondisclosure. The former U.S. Attorney and the additional subject have an interest in protecting their reputation from being associated with unsubstantiated allegations of misconduct. *Stern*, 737 F.2d at 92 (disclosure of information about the subjects of an investigation that resulted in no prosecution would "may make those persons the subjects of rumor and innuendo, possibly resulting in

serious damage to their reputations"); *Dunkelberger*, 906 F.2d at 781 (noting that employee had "a particular interest in not being associated unwarrantedly with the misconduct alleged [and] a more general interest in protecting the privacy of his employment records against public disclosure, whether the information contained in them is favorable or unfavorable").

On the other hand, the public's interest is evanescent. At most, the public arguably may have an interest in ensuring the OIG did a proper job in investigating these additional allegations of misconduct. But absent evidence of impropriety by the OIG, the public interest in second-guessing the OIG's investigation is accorded no weight in the balancing of interests under Exemption 7(C). *Favish*, 541 U.S. at 175. When Plaintiff asks whether OIG has conducted its investigation "even handedly," Compl. Ex. D at 4, it questions the OIG's competence and motives in the performance of its duties. As the Supreme Court has recognized, the "presumption of legitimacy accorded to the Government's official conduct" applies under FOIA. *Favish*, 541 U.S. at 174. Allegations of impropriety in the course of an investigation are "easy to allege and hard to disprove," and thus "courts must insist on a meaningful evidentiary showing" supporting such allegations before a FOIA requestor can overcome a privacy interest protected by Exemption 7(C). *Id.* at 175. Plaintiff has no such evidence of impropriety by the OIG in investigating allegations or preparing the Report, and thus, the purported interest in testing the OIG's even-handedness is accorded no weight as a matter of law. As there is no cognizable, countervailing public interest in this information, the Court need not conduct a balancing, and should uphold the redactions.

Nevertheless, the *Perlman* factors, specifically the second, fourth, and fifth factors, weigh in favor of nondisclosure. *See Perlman*, 312 F.3d at 107. First, if unredacted, the information in question would not reveal any wrongdoing on the part of the former U.S. Attorney or the

additional subject, and the strength of the evidence *against* them is nil as the OIG found the allegations unsubstantiated. Waller Decl. ¶ 20. Second, the information sought would not shed any light on government activity because the former U.S. Attorney and additional subject did not engage in the alleged misconduct. *Id.* Finally, the alleged misconduct cannot relate to how either the U.S. Attorney or the additional subject conducted their official duties because the misconduct did not happen. *Id.* The only *Perlman* factor that arguably weighs in favor of the release of information in this portion of the OIG's investigation is the rank of the officials involved, but that one factor should not be dispositive over the factors militating against disclosure. *See Perlman*, 312 F.3d at 107. The additional subject – who the OIG did not find to have engaged in any misconduct – has a particularly strong interest in avoiding disclosure of his relationship to the matters under investigation. *Kimberlin*, 139 F.3d at 949; *Dunkelberger*, 906 F.2d at 781; *Stern*, 737 F.2d at 92.

CONCLUSION

Based on the foregoing, the Court should grant the Government's motion for summary judgment.

Dated: New York, New York
March 21, 2018

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