UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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| BUZZFEED, INC., | : | |
| Plaintiff, | : | |
| -against- | : | Case No. 17-cv-07949 |
| U.S. DEPARTMENT OF JUSTICE, | : | |
| Defendant. | : | |

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT**

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Plaintiff BuzzFeed, Inc. ("BuzzFeed") respectfully submits this memorandum of law in opposition to the motion for summary judgment by Defendant U.S. Department of Justice ("DOJ") and in support of its cross-motion for summary judgment on its Complaint brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

**PRELIMINARY STATEMENT**

This case is about the sexual misconduct of high-ranking government employees and how our government investigates it. Against the backdrop of a nationwide reckoning over workplace sexual misconduct, DOJ asks this Court to find that there is "no cognizable public interest"[1] in knowing the details of an investigation into a U.S. Attorney and a subordinate whose "improper" affair "violated Executive branch-wide standards of conduct, federal ethics regulations, and possibly federal regulations and DOJ policy regarding sexual harassment in the workplace."[2] Remarkably, DOJ makes this argument less than a year after its own Inspector General sounded the alarm over "systemic" sexual harassment issues, and at a time when a full one-fifth of its reports relate to such misconduct.[3]

A straightforward application of this Circuit's balancing test makes clear that the public is entitled to details of substantiated findings of serious misconduct. Unsubstantiated allegations should also be disclosed here, where these details would illustrate to the public how DOJ evaluates certain allegations against others and, given its documented troubles in investigating misconduct, whether this approach is satisfactory. Disclosure here would uphold FOIA's core mission of upholding the "citizens' right to be informed about 'what their government is up to.'"[4]

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[1] Dkt. 16 ("DOJ Mem.") at 11.
[2] Statement of Undisputed Material Facts ("SUMF") ¶ 3.
[3] *Id.* ¶¶ 21, 24.
[4] *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

## STATEMENT OF FACTS

### A. DOJ's "Systemic" Problems Handling Sexual Misconduct Allegations

In May 2017, Michael Horowitz, the head of the Office of the Inspector General for the DOJ ("OIG"), sent Deputy Attorney General Rod Rosenstein an alarming memorandum. SUMF ¶ 24. Inspector General Horowitz said his office had identified "systemic issues" in how DOJ's various components handled "sexual harassment and misconduct allegations." *Id.* These were not new developments. Inspector General Horowitz referenced eight reports by OIG dating back to 2001 that detailed mishandling of sexual misconduct claims across DOJ. *Id.* ¶ 22. As he told one newspaper, "We're talking about presidential appointees, political appointees, FBI special agents in charge, U.S. attorneys, wardens, a chief deputy U.S. marshal, a U.S. marshal assistant director, a deputy assistant attorney general." *Id.* ¶ 21.

Despite DOJ's "zero tolerance" policy for sexual harassment and misconduct in the workplace, between 2012 and 2016, a full one-fifth of the reports coming out of Inspector General Horowitz's office related to the mishandling of such allegations. *Id.* ¶ 24. And, although OIG spent the last sixteen years investigating sexual harassment and misconduct allegations, as of 2017, it continued to "consistently identif[y] potentially significant and recurring issues concerning the [DOJ] components' handling of sexual harassment and misconduct allegations and their enforcement of the Department's zero tolerance policy." *Id.* In the memorandum, Inspector General Horowitz even questioned the effectiveness of OIG in investigating such claims. *Id.* ¶¶ 23, 25. According to him, OIG often was not made aware of claims when they first occurred as required. *Id.* ¶ 25. Moreover, he alleged, when it did make findings of wrongdoing, DOJ personnel "were not disciplined appropriately" by DOJ "and in some cases were later given awards or bonuses." *Id.* In response to the memorandum, Rosenstein issued a statement representing that DOJ would "review the Inspector General's recommendations and consider whether additional

guidance is required to ensure that all misconduct allegations are handled appropriately, in support of our goal of a workplace in which everyone is treated fairly." *Id.* ¶ 26.

**B. OIG Investigative Summaries**

OIG has the authority to investigate employee misconduct, *see* 5 U.S.C. App § 8E(b)(2), and DOJ employees have a duty to report "criminal or serious administrative misconduct" to OIG, *see* 28 C.F.R. § 45.11(b). After investigating a report of wrongdoing, OIG issues a report of investigation, explaining its factual findings and conclusions, that is in turn referred to the appropriate DOJ component for disciplinary action. SUMF ¶ 14.

In January 2010, "in response to a standing request from certain members of Congress," OIG began providing "the requesting members summaries of closed cases involving as subjects members of the Senior Executive Service and employees at the GS-15 grade level or above, and Assistant U.S. Attorneys, in which the OIG found misconduct and no prosecution resulted." *Id.* ¶ 15. Beginning in June 2015, OIG then began posting one-page, nameless "summaries of [its] investigative findings in cases involving administrative misconduct" to its website, so long as they concerned a high-ranking government employee or a high profile investigation. *Id.* ¶¶ 16-17. Consistent with its years-long focus on how DOJ components address sexual misconduct in the workplace, these summaries often, although not always, relate to sexual misconduct by government employees and officials. *Id.* ¶ 18.

**C. The Request**

At issue here is one such summary: specifically, a Report of Investigation ("Report") into wrongdoing by an unnamed U.S. Attorney and an unnamed Supervisory Assistant U.S. Attorney. On May 16, 2017, based on an investigative summary published to OIG's website, Zoe Tillman, a reporter for BuzzFeed News, submitted to OIG a FOIA request for:

A copy of the full report that was provided by the Agency to the relevant Justice

> Department components related to an Investigative Summary published by the Agency on its website entitled, "Finding of Misconduct by a Former United States Attorney for Having an Inappropriate Relationship With a Subordinate."

SUMF ¶ 1. The Finding of Misconduct provided a summary of the Report:

> The Department of Justice (DOJ) Office of the Inspector General (OIG) initiated an investigation upon receipt of information from the Executive Office for United States Attorneys (EOUSA) alleging that a United States Attorney (USA), now retired, engaged in misconduct by engaging in an intimate personal relationship with a high-level, but subordinate, supervisor in the Office (Supervisory AUSA).
>
> The OIG substantiated the allegations, and the former USA admitted to the OIG to having engaged in the relationship. The OIG found that the USA's misconduct gave the appearance of partiality, created a difficult work environment, and violated Executive branch-wide standards of conduct, federal ethics regulations, and possibly federal regulations and DOJ policy regarding sexual harassment in the workplace.
>
> Other allegations against the former USA were not substantiated. The USA retired from federal service following the initiation of the OIG's investigation.
>
> During the investigation, the OIG also determined that the Supervisory AUSA inadvertently failed to report spousal stock trades completely and accurately on required financial disclosure forms.
>
> The OIG has completed its investigation and provided its reports to EOUSA and the Office of the Deputy Attorney General.

*Id.* ¶ 2 (attaching the Finding of Misconduct summary).

**D. The Disclosure of the Redacted Report of Investigation**

On June 12, 2017, DOJ released to Ms. Tillman twelve of the fourteen pages of the Report with redactions pursuant to 5 U.S.C. § 552(b)(6) and (7)(C). SUMF ¶ 3. The unredacted portion of the Report, dated May 1, 2017, recounted a complaint that a years-long extramarital affair between the U.S. Attorney and Supervisory AUSA created an "unbearable atmosphere" in the U.S. Attorney's office. *Id.* ¶¶ 3-4. It further explained that subsequent to the initial report of wrongdoing, OIG was provided with additional information indicating that the affair caused "disparate treatment [REDACTED] regarding bonuses and disciplinary actions." *Id.* ¶ 4(b).

As a result of the allegations, OIG interviewed seventeen personnel in the unidentified U.S. Attorney's office. *Id.* ¶ 3 (attaching redacted Report). According to those interviews and a review of documents, the affair was "obvious." *Id.* Several employees said the affair created a "hostile work environment," because employees could not report issues with the Supervisory AUSA to management. *Id.* ¶ 4(m). The affair was so open and ongoing that eventually "rumors were being discussed by special agents and members of the federal court" regarding the affair. *Id.* ¶ 4(o).

Several parts of the Report were, however, subject to varying degrees of redactions. The redactions to the Report can be sorted into two broad categories. First, OIG redacted the identities of the U.S. Attorney and Supervisory AUSA found to have engaged in wrongdoing and various passages contained within the discussion of those substantiated allegations. *Id.* ¶ 3. As such, the Report as released does not disclose who was found to be engaged in misconduct or what U.S. Attorney's office was involved. Second, OIG redacted various passages contained within the discussion of unsubstantiated allegations relating to the U.S. Attorney and Supervisory AUSA and another individual against whom allegations of misconduct were made but not substantiated. *Id.* As such, the Report does not disclose why those allegations were not substantiated in light of the substantiated allegations.

On June 28, 2017, BuzzFeed appealed the redactions to the Report, arguing that "the Agency's decision should be reversed and the Request should be granted in full," because FOIA did not permit DOJ "to keep from the public the names of high-ranking government officials (one, a political appointee) despite findings of wrongdoing on the part of each." *Id.* ¶ 5. On September 18, 2017, DOJ affirmed the denial based on 5 U.S.C. § 552(b)(6) and (7)(C) without further reasoning. *Id.* ¶ 6.

**E. BuzzFeed Narrows the Request and DOJ Produces Two Additional Pages of the Report**

On October 16, 2017, BuzzFeed brought this lawsuit against DOJ. Dkt. 1 ("Compl."). The parties then conferred as to the scope of redactions BuzzFeed sought to have disclosed. SUMF ¶ 8. BuzzFeed indicated that it did not seek the identities of any third party witnesses to the investigation. *Id.* ¶ 9. Similarly, BuzzFeed explained that it did not seek the identity of the Special Agent who compiled the Report. *Id.*

Nevertheless, BuzzFeed explained that it sought to have the identities of the U.S. Attorney and Supervisory AUSA disclosed, as well as the substance of the redacted Report disclosed on pages 1, 4-5, 7-12, including redactions relating to both substantiated and unsubstantiated allegations. *Id.* ¶ 10. Similarly, BuzzFeed sought to have the additional subjects on page 3 be disclosed and further that pages 13 and 14 be disclosed in full, as those pages of the Report were not previously disclosed in response to Ms. Tillman's request.[5] *Id.* ¶¶ 11-12.

In response to that narrowing, DOJ produced pages 13 and 14 to BuzzFeed. *Id.* ¶ 13. Those additional pages were a "List of Exhibits" to the Report on which the Report was based. *Id.* After reviewing the List of Exhibits, counsel for BuzzFeed conferred with counsel for DOJ to determine whether it was DOJ's position that exhibits to the Report were not responsive to Ms. Tillman's request. *Id.* DOJ confirmed the same. *Id.* While BuzzFeed disagreed with that position, it informed DOJ that it would not, at this time, seek access to the exhibits to the Report but reserved the right to do so based on the outcome of this case.[6] *Id.*

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[5] DOJ erroneously states that BuzzFeed seeks no information from page 3 of the Report. *See* SUMF ¶ 11.

[6] BuzzFeed notes that the Report is fourteen pages long, as evidenced by the pagination on that report. *See id.* ¶ 12. DOJ's declarant seems to suggest that the list of exhibits—which on its face was pages 13 and 14 of the Report—were not responsive to Ms. Tillman's request for the "full report." Dkt. 17 ("Declaration of Deborah M. Waller") ¶ 9. This position is clearly untenable.

## ARGUMENT

FOIA is a disclosure statute "enacted to facilitate public access to Government documents." *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). Under the statute, there is a "'strong presumption in favor of disclosure [that] places the burden on the agency to justify the withholding of any requested documents.'" *Assoc. Press v. Dep't of Defense*, 554 F.3d 274, 283 (2d Cir. 2009) (quoting *Ray*, 502 U.S. at 173). Thus, when considering the propriety of an agency's withholding, "all doubts [are] resolved in favor of disclosure." *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988) (citation omitted).

FOIA's mandate of full disclosure is limited only by nine "narrow" exemptions. *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *see also Assoc. Press*, 554 F.3d at 283 ("FOIA exemptions are to be construed narrowly."). If a record does not fall within one of these exemptions, it must be disclosed. *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976)). An agency's decision that responsive records should be withheld is not entitled to deference. *Reporters Comm.*, 489 U.S. at 755 ("Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action.'"). Rather, a district court decides *de novo* whether the information can be withheld. 5 U.S.C. § 552(a)(4)(B).

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*Am. Immigration Lawyers Assoc. v. Exec. Office for Immigration Review*, 830 F.3d 667, 676-79 (D.C. Cir. 2016) (holding that even non-responsive information otherwise included in a "record" must be disclosed). BuzzFeed further notes that DOJ produced only the first twelve pages of the Report despite conceding that the Report *and* Exhibits were provided to at least *some* of DOJ components, making them responsive to Ms. Tillman's request for the "full report" as provided to "the relevant [DOJ] components." Waller Decl. ¶ 9 (noting only that the exhibits were "not provided by OIG to *all* of the relevant DOJ components" (emphasis added)).

Because no exemption properly applies to this case, the Court should order the release of redacted information. The significant public interest in this information outweighs any countervailing privacy interests here.

## I.
## THE PUBLIC INTEREST IN THIS CASE IS OBVIOUS AND RELATES DIRECTLY TO PUBLIC OVERSIGHT OF AGENCY ACTION

The premise of DOJ's memorandum is that there is no public interest to be served by disclosure of the names or other information redacted from the Report. DOJ Mem. at 11. But this frame ignores the last six months of national dialogue surrounding sexual misconduct in the workplace. DOJ attempts to sidestep this reckoning by asserting that the actions in the Report relate only to matters that are "personal and intimate [in] nature." *Id.* at 10. This misdirection (one in direct conflict with the OIG Report's findings) ignores that a central debate of this country's ongoing dialogue is how powerful public and private institutions around the country respond to allegations of sexual misconduct in the workplace. SUMF ¶¶ 27-30. That is exactly what this case is about.

This should come as no surprise to DOJ. Its own Inspector General warned months ago that it has "systemic" issues dealing with sexual harassment in the workplace. *Id.* ¶ 24. The IG's Office has gone as far as to call into question its own ability to ferret out issues of sexual harassment in the workplace because of DOJ's internal failings in tracking, investigating, and meting out punishment for wrongdoing. *Id.* ¶¶ 23, 25. It is difficult to understand how this case—where OIG found violations of ethics rules and possible violations of DOJ's "policy against sexual harassment"—does not concern the public interest. Even setting aside the last sixth months, courts have repeatedly found that there is a public interest in understanding how agencies police their own. *See Perlman v. Dep't of Justice*, 380 F.3d 110, 111 (2d Cir. 2004) (describing the "the substantial public interest in disclosure of" the name of a high-ranking official subject of an OIG

report); *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984) (the public has "an interest in knowing that a government investigation itself is comprehensive" and "that any disciplinary measures imposed are adequate"); *Eberg v. Dep't of Defense*, 193 F.Supp.3d 95, 117 (D. Conn. 2016) (noting "the importance of 'public understanding' concerning 'the prevalence of and response to sexual assault and its associated psychological fallout in the U.S. military'" (citation omitted)). The public interest in the redacted material is clear.

DOJ's specific arguments along these lines fare no better. First, it asserts that the disclosure of the identities of the individuals involved in the extramarital affair would not add to the public's understanding in light of what has already been released. DOJ Mem. at 10. The Second Circuit clearly rejected this argument in *Perlman*, however, when it ordered the release of the name of the "former INS general counsel and the role he played in administering the [agency] program." *Perlman v. Dep't of Justice*, 312 F.3d 100, 107 (2d Cir. 2002) (quoting 5 U.S.C. § 552(b)(6)-(7)), *vacated by* 541 U.S. 970 (2004), *reinstated by* 380 F.3d 110. Even in *Stern v. FBI*, on which DOJ relies, the D.C. Circuit made clear that although *only* interest at stake in that case was knowing the identity of the government wrongdoer, the public interest in that alone required disclosure. 737 F.2d at 92 (discussing "the public interest in the disclosure of the identities of the censured employees").[7]

In short, names matter. It is one thing, for example, to know that sexual harassment is present in Congress; it is another for the public to know that Rep. John Conyers was involved in that wrongdoing. *See, e.g.*, Paul McLeod & Lissandra Villa, *She Said A Powerful Congressman*

[7] Citing *Stern*, DOJ seems to suggest that the only public interest in this case is knowing *who* committed wrongdoing. DOJ Mem. at 7-8. In *Stern*, that may well have been the case because the requester sought *only* "the names of the three FBI employees whose censure was described by the Report." *See* 737 F.2d at 87. Here, however, BuzzFeed seeks *all* redacted information relating to the substantiated allegations of misconduct—not just the identities of the wrongdoers.

*Harassed Her. Here's Why You Didn't Hear Her Story*, BuzzFeed News (Nov. 20, 2017), https://www.buzzfeed.com/paulmcleod/she-complained-that-a-powerful-congressman-harassed-her. The former led to no action, the latter resulted in an early departure from Congress as a result of the public scrutiny surrounding Rep. Conyers' actions.

Second, DOJ asserts, relying on *National Archive and Records Administration v. Favish*, that there is no public interest in disclosure because BuzzFeed has not produced any evidence of wrongdoing. DOJ Mem. at 7, 12 (citing 541 U.S. 157, 175 (2003)). The Second Circuit, however, has held that *Favish* is inapplicable to requests like BuzzFeed's. Indeed, after the Second Circuit issued its opinion in *Perlman*, the Supreme Court vacated it and remanded the case back to the Second Circuit to consider it in light of *Favish*. In an opinion reinstating the ruling, the Second Circuit explained:

> The rule announced in *Favish* does not affect the conclusion we previously reached in this case. It goes without saying that the graphic photographs at issue in *Favish* are far different from the [Inspector General Report of Investigation] sought by Perlman. Further, the ROI details improper conduct by INS officials in the operation of certain visa programs, whereas Favish speculated that the pictures would in some way suggest some investigative impropriety. Thus, Perlman's request was not based on a mere suspicion of governmental impropriety; instead, he sought a report which substantiated his allegations.

*Perlman*, 380 F.3d at 111. DOJ's retreat to *Favish* is unpersuasive.

Third, DOJ contends that disclosure would fail "to protect 'innocent third parties from being implicated.'" DOJ Mem. at 12. As explained in BuzzFeed's administrative appeal, the only information known regarding the identity of the U.S. Attorney who committed misconduct is that he retired after the investigation began and prior to its conclusion. SUMF ¶ 5. On appeal, BuzzFeed pointed out that multiple U.S. Attorneys retired during that time period. *Id.* By withholding the identity of the U.S. Attorney, entirely innocent U.S. Attorneys are potentially implicated unfairly in wrongdoing. *See Chang v. Dep't of Navy*, 314 F.Supp.2d 35, 43-44 (D.D.C.

2004) (noting that the public has an interest "in knowing the identities of disciplined government officials 'in order to hold the governors accountable to the governed' (citation omitted)). Although DOJ contends that there is no public interest in knowing which U.S. Attorneys did *not* engage in the misconduct, *see* DOJ Mem. at 12-13, that cannot be the case. Of course there is a public interest in such information.

For all these reasons, DOJ's argument that there is no public interest in information relating to findings of substantiated misconduct against a high-ranking government official is without basis.

## II.
## INFORMATION IN THE REPORT RELATING TO SUBSTANTIATED ALLEGATIONS OF MISCONDUCT MUST BE DISCLOSED

Exemptions 6 and 7(C) protect privacy interests threatened by the disclosure of agency records. Exemption 6 applies to "'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,'" while Exemption 7(C) applies to "'records or information compiled for law enforcement purposes, but only to the extent the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" *Perlman*, 312 F.3d at 105. Where both exemptions are asserted, a court need only evaluate withholding under the Exemption 7(C). *Id.* at 106. Even under the more protective standard of Exemption 7(C), disclosure is warranted here.

To determine the propriety of withholding information related to findings of government wrongdoing, the Second Circuit applies a multi-factor test established in *Perlman*:

> (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.

312 F.3d at 107. "The factors are not all inclusive, and no one factor is dispositive." *Id.* And although government officials who are subjects of investigations retain some scope of a privacy interest (albeit a "diminished" one, *see id.*), the Second Circuit has found that when government misconduct is present the public "possesses a strong interest and 'right to be informed about what their government is up to.'" *Id.* (quoting *Reporters Comm.*, 489 U.S. at 773).

**1. Each *Perlman* Factor Weighs In Favor Of Disclosure**

Applying these factors to the present case, each and every one weighs decidedly in favor of disclosure. For its part, DOJ admits the first factor weighs in favor of disclosure as to information concerning the U.S. Attorney, DOJ Mem. at 13, and makes no showing at all as to the third factor, *id.* Still, it asserts that the remaining factors, the "second, fourth, and fifth *Perlman* factors[,] weigh heavily in favor of non-disclosure." *Id.* The government is wrong.

**(1) DOJ admits that both subjects are high-ranking.** The rank and "'level of responsibility held by a federal employee'" is an "'appropriate consideration'" in determining whether the public interest outweighs any privacy interests. *Perlman*, 312 F.3d at 107 (quoting *Stern*, 737 F.2d at 92). The higher ranking the employee the more strongly this factor weighs in favor of disclosure. *Id.* at 107-09 (INS general counsel is a "high rank[ing]" employee); *Stern*, 737 F.2d at 93-94 (FBI Special Agent-in-Charge was "high-level"); *Eberg*, 193 F.Supp.3d at 118 (colonel in the U.S. military is a "high-ranking officer"); *McMichael v. Dep't of Defense*, 910 F.Supp.2d 47, 54 (D.D.C. 2012) (rank of Captain and Director of Logistics, U.S. Strategic Command weighed in favor of disclosure); *see also Seife v. Nat'l Inst. of Health*, 874 F.Supp.2d 248, 259 (S.D.N.Y. 2012) (finding employee positions that were not high-ranking favors disclosure where the position was "essential" to agency operation). As one court explained, there

is a difference between "political appointee[s] or senior manager[s]" and mere "staff-level career civil servant[s]." *Bartko v. Dep't of Justice*, 128 F.Supp.3d 62, 71 (D.D.C. 2015).

BuzzFeed seeks information relating to an investigation of substantiated wrongdoing by a U.S. Attorney and a Supervisory AUSA. U.S. Attorneys are, of course, high-ranking officials, and DOJ admits that this factor—at least as to the U.S. Attorney—"weighs in favor of release" because of "his high rank." DOJ Mem. at 13; *see also* Waller Decl. ¶ 16 (describing the U.S. Attorney as a "high-ranking official"); United States Attorneys' Manual § 3-1.30 (2018) ("The United States Attorneys serve as the chief federal law enforcement officers in their judicial districts."); 28 U.S.C. § 541(b)-(c) (noting that U.S. Attorneys appointed by the President to their posts, enjoy four-year terms, and may only be removed from office by the President); *id.* § 547 (listing the powers of U.S. Attorneys). Presented with officials with substantially less power than U.S. Attorneys, the Second Circuit has concluded that even positions junior to a U.S. Attorney weighed "strongly in favor of disclosure." *See, e.g.*, *Perlman*, 312 F.3d at 107.

Similarly, the Supervisory AUSA is sufficiently high-ranking that this factor weighs in favor of disclosure. Unlike AUSAs, Supervisory AUSAs have been given "temporary promotions" and are assessed a salary increase commensurate with that promotion. *See* United States Attorneys' Manual § 3-4.534 (2018). In that capacity, Supervisory AUSAs are not considered line AUSAs because they have managerial duties. *Id.*; *see also, e.g.*, *id.* § 9-27.300 ("To ensure consistency and accountability, charging and plea agreement decisions must be reviewed by a supervisory attorney."). As courts have found that line AUSA's "fall[] between a staff-level career civil servant and a political appointee or senior manager," *see Bartko*, 128 F.Supp.3d at 71, Supervisory AUSAs, given their superior rank, must fall closer to a "senior manager" on the continuum, *see Stern*, 737 F.2d at 93-94 (making similar distinction between line

FBI agents and a "higher-level official," a Special Agent in Charge). DOJ admits as much, noting that the Supervisory AUSA's rank favors of disclosure. DOJ Mem. at 14; *see also* SUMF ¶ 2 (OIG admitting that the Supervisory AUSA here was "high-level"); *id.* ¶ 3 (allegation in Report about her "tremendous power" in the U.S. Attorney's Office). As such, as to information relating to the Supervisory AUSA, this too weighs in favor of disclosure.

**(2) Degree of the wrongdoing is high and the evidence is clear.** Substantiated allegations of serious misconduct should be disclosed. *Perlman*, 312 F.3d at 107-08. "This factor requires a court to examine the degree of wrongdoing allegedly committed by the employee and the strength of the evidence." *Id.* As to the degree of wrongdoing, such a showing may be made by demonstrating that an employee or official "'deliberately and knowingly'" participated in wrongdoing, *see id.* (citing *Stern*, 737 F.2d at 94), although there is no such requirement for this factor to weigh in favor of disclosure, *see, e.g.*, *Cowdery, Ecker, Murphy, LLC v. Dep't of Interior*, 511 F.Supp.2d 215, 218 (D. Conn. 2007) (alleged wrongdoing related to whether proper administrative appointment procedures were followed was "fairly serious"). As to the strength of the evidence, an inspector general's report of investigation substantiating the alleged wrongdoing constitutes "a substantial amount of evidence" warranting disclosure. *Perlman*, 312 F.3d at 107.

In no uncertain terms, the wrongdoing here is serious and substantiated, infecting all parts of the office environment in the unidentified United States Attorney's office:

- Affair "created an 'unbearable atmosphere' in the U.S. Attorney's Office;"
- Apparent USAO employee reporting that "affair caused disparate treatment regarding bonuses and disciplinary actions;"
- Allegation that subjects "flirted with each other frequently during the day in the office, which was embarrassing and distracting for other employees;"

- "Several employees even labeled the [REDACTED] USAO to be a 'hostile work environment';"
- Relaying allegations that employees felt without a "viable reporting option against [REDACTED]';"
- "[R]umors were being discussed by special agents and members of the federal court;"
- "Some employees also expressed feeling awkward around [REDACTED] in the same room;"
- "Many employees felt extremely stressed, powerless and avoided [REDACTED] and [REDACTED] at any cost;"
- "Several employees also expressed concerns regarding [REDACTED] and [REDACTED] ability to remain impartial regarding office management;"
- "Several staff members even feared retaliation for their cooperation with the OIG investigation;" and
- "Despite their personal relationship, [REDACTED] was the reviewing official on [REDACTED'S compensation] appraisals from 2011 through 2014."

*See* SUMF ¶ 4. In light of this, the DOJ cannot credibly assert that the degree of wrongdoing is anything but serious. Even the subject of the investigation recognized that "he knew EOUSA would have asked for his resignation if they discovered the affair." *Id.* ¶ 4(q). Because these serious allegations were substantiated, this factor weighs strongly in favor of disclosure. *Perlman*, 312 F.3d at 107.

To avoid this conclusion, DOJ tries to recast the conduct in the Report as nothing more than an "improper, consensual relationship," DOJ Mem. at 14, that "did not involve criminal acts

or corruption relating [to] the U.S. Attorney's core job functions." Waller Decl. ¶ 16. This is wrong on both counts. As an initial matter, although DOJ repeatedly characterizes this conduct as nothing more than a "consensual affair," *see* DOJ Mem. at 1, 14, OIG's findings contradict this claim: the subjects' "respective professional positions undermine the consensual nature of an unacknowledged personal relationship," *see* SUMF ¶ 4(d). Moreover, OIG's own findings demonstrate that the misconduct was much more than a "consensual affair;" it related to the U.S. Attorney's core job function. SUMF ¶ 4.

Second, as a matter of law, there is no requirement that the wrongdoing be criminal acts or corruption for this factor to weigh against disclosure. *See Cowdery, Ecker, Murphy, LLC*, 511 F.Supp.2d at 218 (allegations that agency "did not follow certain requisite procedures" in appointing the nominal Associate Deputy Secretary of the Department of the Interior "constitute[d] fairly serious wrongdoing"). And as OIG itself noted, the wrongdoing here violated multiple DOJ guidelines and possibly even regulations against sexual harassment in the workplace. SUMF ¶ 3. Courts in this Circuit have characterized allegations of sexual harassment in the workplace as "fairly serious, and thus weigh[ing] in favor of disclosure," as well. *Eberg*, 193 F.Supp.3d at 118. Thus, DOJ's attempt to minimize the wrongdoing here is misplaced.[8]

**(3) There are no other avenues to the information.** BuzzFeed seeks an unredacted copy of the Report of Investigation in the exclusive control of the OIG. This factor, which DOJ never

[8] DOJ argues in passing that the Superivsory AUSA "was not found culpable for misconduct in the Report," tipping this factor in favor of withholding. DOJ Mem. at 14. As an initial matter, that is incorrect. "During the investigation, the OIG also determined that the Supervisory AUSA inadvertently failed to report spousal stock trades completely and accurately on required financial disclosure forms." SUMF ¶ 2. As to the relationship itself, while there may be no formal finding as to the Supervisory AUSA, it is clear that the Supervisory AUSA is not without responsibility for what the government calls "collateral effects on the work environment" caused by the affair. DOJ Mem. at 14.

mentions, accordingly leans toward disclosure. *Perlman*, 312 F.3d at 107-08 (where government has "exclusive access" to a report of investigation, this factor weighs in favor of disclosure); *see also Eberg*, 193 F.Supp.3d at 118 (same).

**(4) The information sought sheds light on government activity.** The principle interest in disclosure of records under FOIA is to "'open[] agency action to the light of public scrutiny.'" *Perlman*, 312 F.3d at 108 (quoting *Rose*, 425 U.S. at 372). As the Supreme Court put it in *Reporters Committee*, "Official information that sheds light on an agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose." *See* 489 U.S. at 773; *see also Perlman*, 312 F.3d at 108 (citing same). The more the responsive information furthers that purpose, the more heavily this factor will weigh in favor of disclosure. *Perlman*, 312 F.3d at 108.

Public interests under this factor can be varied, and can include the public interest in knowing:

- "that a government investigation itself is comprehensive,"
- "that the report of an investigation released publicly is accurate,"
- "that any disciplinary measures imposed are adequate,"
- "that those who are accountable are dealt with in an appropriate manner," and
- "*who* the public servants are that were involved in the governmental wrongdoing."

*Stern*, 737 F.2d at 92.

All of these public interest factors are served here, where the information sought would shed light both on OIG's investigation and on the misconduct of the government employees who were the subjects of that investigation. As to the OIG investigation itself, "[w]hile assertions of a public interest in 'monitoring' governmental operations 'have not been viewed favorably by the

courts,'" the Second Circuit has "accept[ed] this interest as within the ambit of 'public interests' recognized in *Reporters Committee*." *Hopkins v. Dep't of Housing and Urban Dev.*, 929 F.2d 81, 88 (2d Cir. 1991). Courts in this Circuit have found that requesters' interests in monitoring government conduct can prevail over an asserted privacy interest. *See N.Y. Times v. Dep't of Homeland Sec.*, 959 F.Supp.2d 449, 455 (S.D.N.Y. 2013).

A similar resolution should be reached here. As it stands, the public cannot understand the comprehensiveness of the Report in light of the substantial redactions, its accuracy, or how OIG went about concluding that some allegations were substantiated and some were not. *Eberg*, 193 F.Supp.3d at 117 (noting "the importance of 'public understanding' concerning 'the prevalence of and response to sexual assault and its associated psychological fallout in the U.S. military'" (citation omitted)). This is especially true for the information redacted in the section of the Reprot that contains substantiated allegations. Were the full details of the Report released, the public would be able to assess the quality of the investigation and its outcome in light of this additional information. *Stern*, 737 F.2d at 92. There is a cognizable public interest advanced by disclosure of the redacted portions of the Report relating to substantiated allegations of wrongdoing.

There is yet another distinct public interest in being informed as to the 'who, what, when, where, why' relating to the misconduct underlying the investigation. *See Perlman*, 312 F.3d at 108; *accord Cochran v. United States*, 770 F.2d 949, 956 (11th Cir. 1985) ("courts favor disclosure under the FOIA balancing test when a government official's actions constitute a violation of public trust"); *Columbia Packing Co. v. Dep't of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977) (finding that public had interest in meat inspectors' careers because it had "an interest in whether public servants carry out their duties in an efficient and law-abiding manner"); *Eberg*, 193 F.Supp.3d at 117 (factor weighed "heavily in favor of disclosure" where records "would open the DoD's

handling of sexual misconduct complaints to the light of public scrutiny"); *Chang*, 314 F.Supp.2d at 43 ("The public has a[n] . . . interest . . . in knowing the identities of disciplined government officials 'in order to hold the governors accountable to the governed'"). The Second Circuit explained in *Perlman* that this factor favors disclosure in the contexts of reports of investigation like the one at issue here. *See* 312 F.3d at 108 (finding that contents of inspector general report revealing how "officials were able to obtain preferential treatment, undue access and exercise improper influence" shed light on government activity). As Inspector General Horowitz told the *Washington Post*, "Sexual harassment and misconduct is one of the very important areas we have to focus on and take seriously because of all the reasons the public is seeing now . . . . Our interest is shining light on this kind of activity." SUMF ¶ 21. The public has a compelling interest in the release of this Report as well.

Because the public has an interest in shedding light both on the investigation and the underlying misconduct investigated, this factor weighs in favor of disclosure.

**(5) The wrongdoing is not personal.** All that is required under this factor is that the information sought to be disclosed "relate[s] to the employee's performance of his public duties." *Perlman*, 312 F.3d at 108. Here, although DOJ attempts to argue that the wrongdoing is "primarily a personal matter," even it is forced to admit—as it must in light of OIG's own findings—that the wrongdoing "may have had collateral effects on the work environment." DOJ Mem. at 14. Specifically, and as OIG found, the consequences of the extramarital affair spilled over into the day-to-day functioning of the office. SUMF ¶ 4. In fact, it was alleged that the affair eventually became so well known that "rumors were being discussed by special agents and members of the federal court regarding a possible romantic relationship" between the U.S. Attorney and the Supervisory AUSA, which created an embarrassing professional environment for other members

of the office. *Id.* ¶ 4(o). This misconduct can hardly be defined as the kind of personal conduct unrelated to an official's public duties such that this factor would prevent disclosure.

Beyond its documented workplace impact, the inherent nature of the misconduct is not personal. Although this case has the added complication that the wrongdoing resulted from an extramarital affair, district courts in this Circuit have recognized that "[s]exual harassment by a superior in the workplace is not information of a personal nature, and is most certainly related to that superior's job function." *Eberg*, 193 F.Supp.3d at 118.

Here, each and every *Perlman* factor weighs in favor of disclosure. For all of these reasons, the redacted information relating to substantiated allegations should be disclosed.

## III.
## INFORMATION IN THE REPORT RELATING TO UNSUBSTANTIATED ALLEGATIONS OF MISCONDUCT MUST BE DISCLOSED

BuzzFeed also requests that DOJ be ordered to disclose information in the Report relating to the unsubstantiated allegations. As with the substantiated allegations, the *Perlman* analysis applies and the majority of factors favor of disclosure. *See* DOJ Mem. at 15-17 (applying *Perlman* factors).

**(1) The subjects are high-ranking.** As noted above, this factor weighs in favor of disclosure as to the U.S. Attorney and the Supervisory AUSA. *See supra* at 12-13. There is an additional subject implicated in wrongdoing, as well, but against whom those allegations were not established. SUMF ¶ 11. To the extent that this individual is similarly high-ranking, this factor weighs in favor of disclosure as to him as well.

**(2) Degree of the wrongdoing and the evidence.** The redacted Report does not reveal the nature of the unsubstantiated allegations nor the level of evidence collected by OIG about them. Should these allegations involve misconduct similar to what is unredacted, such wrongdoing would be considered "fairly serious." *See supra* at 14-16. On other other hand, OIG did not

substantiate these allegations, which may counsel against disclosure. Thus, this factor is neutral or leans slightly in favor of disclosure. *Cowdery, Ecker, Murphy, LLC*, 511 F.Supp.2d at 218 ("Although stronger evidence would weigh more heavily in favor of disclosure, the degree of wrongdoing weighs towards disclosure.").

**(3) There are no other avenues to the information.** As with the prior analysis, the Report is not available elsewhere, encouraging disclosure. *See supra* at 16-17.

**(4) The information sought sheds light on government activity.** DOJ admits that the "public arguably may have an interest in ensuring the OIG did a proper job in investigating" unsubstantiated allegations of misconduct. DOJ Mem. at 16. Nevertheless it asserts, relying on the Supreme Court's opinion in *Favish*, that where the public interest asserted is to show that officials acted improperly in performing their duties, BuzzFeed must establish more than a bare suspicion of wrongdoing in order to obtain disclosure. *Id.* (citing *Favish*, 541 U.S. at 174). BuzzFeed, however, makes no representation that the interest here is uncovering investigative misconduct: Instead, the public interest asserted here is in the full understanding of the misconduct by and subsequent investigation into two high-ranking government officials. As in *Citizens for Responsibility and Ethics in Washington v. Department of Justice*, BuzzFeed has "nonetheless established a sufficient reason for disclosure independent of any impropriety." 746 F.3d 1082, 1095 (D.C. Cir. 2014) (noting that there is a "weighty public interest in shining a light on the FBI's investigation of major political corruption" ); *see also Am. Civil Liberties Union v. Dep't of Justice*, 655 F.3d 1, 13 (D.C. Cir. 2011) (rejecting "contention that the interest in informing the public discussion is deficient because the plaintiffs have insufficient evidence that disclosure will show government wrongdoing"); *Eberg*, 193 F.Supp.3d at 117 (describing as significant the public interest in learning how agencies "respond" to sexual misconduct).

First, regardless of misconduct, disclosure is in the public interest because the concern with how DOJ deals with sexual harassment—especially in light of the national reckoning with the same—has been the subject of substantial public interest. SUMF ¶¶ 27-30. In fact, IG Horowitz even gave an interview to the *Washington Post* about the problem, explaining that "high level action" was required to solve the "systemic" problem of sexual harassment at DOJ. *Id.* ¶ 21.

Second, disclosure is also in the public interest in light of OIG's own assertions that it is not always alerted to allegations of wrongdoing in a timely manner and often has difficulty in obtaining the access necessary to adequately investigate such claims. *Id.* ¶¶ 23, 25.

Third, this particular Report is especially important as it relates to how OIG administers investigations of workplace sexual misconduct of its highest officials. *See Stern*, 737 F.2d at 92; *Hopkins*, 929 F.2d at 88; *N.Y. Times*, 959 F. Supp. 2d at 455; *McMichael*, 910 F.Supp.2d at 54 (noting "the public interest in information regarding an investigation is strengthened when the subject of the investigation is a federal employee in a leadership position").

Fourth, there is also a public interest in disclosure of the unsubstantiated allegations, because it is impossible without that information for the public to assess the appropriateness of the investigation's conclusions. *Providence Journal Co. v. Dep't of Army*, 981 F.2d 552, 569 (1st Cir. 1992) (ordering release of unsubstantiated allegations in inspector general report in light of countervailing public interest).

For all of these reasons, the public has significant interests in the disclosure of information relating to the unsubstantiated allegations.

**(5) The wrongdoing is not personal.** Where the information is redacted, it is difficult for BuzzFeed to say that the alleged wrongdoing is not wholly personal. If, however, the wrongdoing

is similar to the wrongdoing relating to the substantiated allegations of misconduct, then this factor too would weigh in favor of disclosure. *See supra* at 19-20.

Here, factors one, three, four, and likely five all weigh in favor of disclosure, while factor two is neutral. As the balance of the factors hangs in its favor, BuzzFeed requests disclosure of the information relating to the unsubstantiated allegations as well.

**CONCLUSION**

For the foregoing reasons, BuzzFeed respectfully requests the Court grant its Cross-Motion for Summary Judgment, deny DOJ's Motion for Summary Judgment, and award BuzzFeed fees for substantially prevailing, together with such other and further relief as the Court deems just and appropriate.

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Respectfully Submitted,

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