



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

April 26, 2024

Submitted via OIP FOIA STAR Portal

Director
Office of Information Policy
U.S. Department of Justice
441 G Street, NW, 6th Floor
Washington, DC 20530

Re: FOIA Appeal – EOUSA-2024-001810

Dear FOIA Officer:

Citizens for Responsibility and Ethics in Washington (“CREW”) submits this appeal of the April 25, 2024 determination of the Executive Officer for the United States Attorneys (“EOUSA”) denying and refusing to process the above-referenced Freedom of Information Act (“FOIA”) request. Because the EOUSA’s denial is improper, the agency should reverse its initial determination and promptly search for and release any responsive records to CREW.

Background

On April 24, 2024, CREW submitted a FOIA request to the EOUSA seeking the following records from January 1, 1994 to April 30, 2024, excluding agency records consisting solely of court filings, news articles, press clippings, and other publicly-available material:

1. All records, relating to former Assistant United States Attorney Terra Morehead (AUSA Morehead) at the Office of the United States Attorney for the District of Kansas (USAO Kansas), that pertain to proven or alleged violations by AUSA Morehead of any provisions of law or constitution, any provisions of the United States Attorneys’ Manual adopted by the Department of Justice, any ethical duties imposed upon AUSA Morehead in her capacity as a government prosecutor as set forth in the Kansas Rules Relating to Discipline of Attorneys, or any other professional misconduct.
2. All records, relating to AUSA Morehead’s conduct as a prosecutor for the State of Kansas or any political subdivisions thereof, that pertain to proven or alleged violations by Morehead of any provisions of law or constitution, any ethical duties imposed upon Morehead in her capacity as a government prosecutor as set

forth in the Kansas Rules Relating to Discipline of Attorneys, or any other professional misconduct.

3. All records relating to any DOJ investigations, actions (including but not limited to case reassignments and disciplinary measures), or decisions not to take action, in regard to AUSA Morehead's conduct as an AUSA or prosecutor for the State of Kansas, including those relating to proven or alleged violations by AUSA Morehead of any provisions of law or constitution, any provisions of the United States Attorneys' Manual adopted by the Department of Justice, any ethical duties imposed upon AUSA Morehead in her capacity as a government prosecutor as set forth in the Kansas Rules Relating to Discipline of Attorneys, or any other professional misconduct.

Attachment 1 & 2.

By letter dated April 25, 2024, the EOUSA refused to conduct a search for the requested records, stating "[t]o the extent that non-public responsive records exist, without consent, proof of death, or an overriding public interest, disclosure of law enforcement records concerning an individual could reasonably be expected to constitute an unwarranted invasion of personal privacy," and that "any nonpublic records responsive to your request would be categorically exempt from disclosure." Attachment 3 (citing 5 U.S.C. § 552(b)(6) & (b)(7)(C)).

CREW now timely appeals the EOUSA's April 25, 2024 determination.

The EOUSA's *Glomar* Response and Refusal to Search is Improper

The EOUSA wrote that "[b]ecause any nonpublic records responsive to your request would be categorically exempt from disclosure, this Office is not required to conduct a search for the requested records," Attachment 3, which effectively constitutes an improper *Glomar* response and refusal to search without justification.

Glomar responses, which neither confirm nor deny the existence of records, are "permitted only when confirming or denying the existence of records would itself 'cause harm cognizable under an FOIA exception.'" *CREW v. DOJ*, 746 F.3d 1082, 1091 (D.C. Cir. 2014). CREW asked broadly for records "that pertain to proven or alleged violations" by AUSA Morehead of laws or professional conduct, as well as "any DOJ investigations, actions (including but not limited to case reassignments and disciplinary measures), or decisions not to take action." As CREW detailed in its fee waiver request, at least four federal courts have found misconduct by AUSA Morehead as prosecutor. Attachment 2. The existence of at least *some* record regarding *alleged* misconduct is therefore already confirmed by public record and not subject to a FOIA exemption, and *Glomar* response is inappropriate.

FOIA places mandatory obligations on agencies to search for documents before claiming exemptions. Upon receiving a request, agencies must promptly make records available as long as the request "(i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." 5 U.S.C. §

552(a)(3)(A). Here, the EOUSA does not claim that CREW's request does not "reasonably describe" the records sought, nor does it claim CREW's request was not "made in accordance with the published rules." *Id.* The EOUSA instead claims that it is "not required to conduct a search for the requested records" because the records are categorically exempt. Attachment 3. But both Exemptions 6 and 7(C) concern the privacy interest in "disclosure" or "production," not processing. 5 U.S.C. § 552(b)(6) and (b)(7)(C). And the D.C. Circuit has held that an agency's determination under FOIA must at least "(i) *gather and review the documents*; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the 'determination' is adverse." *CREW v. FEC*, 711 F.3d 180 (D.C. Cir. 2013) (emphasis added). The EOUSA failed to make that "determination."

The EOUSA is Improperly Withholding Material Under FOIA Exemptions 6 and 7(C)

Even if the EOUSA had processed CREW's initial request, its reliance on Exemptions 6 and 7(C) is misguided. The D.C. Circuit precedent *Bartko v. DOJ*, 898 F.3d 51 (D.C. Cir. 2018) directly controls this case and demonstrates that the EOUSA's invocation of FOIA Exemptions 6 and 7(C) are erroneous.

As to Exemption 7(C), which shields from disclosure "records or information compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy," 5 U.S.C. § (b)(7)(C), the EOUSA "had to make a threshold showing that the FOIA request seeks records compiled for law enforcement purposes," and for their categorical withholding "also bore the burden of making an across-the-board showing that the privacy interest the government asserts categorically outweighs any public interest in disclosure." *Bartko*, 898 F.3d at 64. Neither was met.

First, "[t]o qualify as law-enforcement records, the documents must arise out of investigations which focus directly on specifically alleged illegal acts which could, if proved, result in civil or criminal sanctions. Records documenting only government surveillance or oversight of the performance of duties of its employees do not qualify." *Id.* at 64. The D.C. Circuit squarely held that a FOIA request "broadly worded to include a wide variety of actual or alleged violations by [an AUSA] of the U.S. Attorney's Manual, the North Carolina Code of Professional Conduct, and other ethical and legal obligations" cannot categorically fall under Exemption 7(C), because "while violations of some of those standards could conceivably result in civil or criminal sanctions, many of them would not, and would bear only on internal disciplinary matters." *Id.* at 65 (cleaned up).

Second, the EOUSA "also bore the burden of explaining why disclosure of any records would categorically be reasonably expected to constitute an unwarranted invasion of [AUSA]'s personal privacy, when balanced against the public interest in disclosure." *Id.* at 66. The EOUSA "ignores altogether its obligation to specifically identify the privacy interest at stake, which can vary based on many factors, including frequency, nature, and severity of the allegations." *Id.* Specifically, as CREW argued in its fee waiver, Attachment 1 & 2, "the public has an 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,

and that those who are accountable are dealt with in an appropriate manner. That is how FOIA helps to hold the governors accountable to the governed. That interest crescendos when the misfeasance of a federal prosecutor with the power to employ the full machinery of the state in scrutinizing any given individual is at stake. The public must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.” *Bartko*, 898 F.3d at 69 (cleaned up). On the other hand, because the allegations of AUSA Morehead’s frequent, norm-breaking, and serious allegations of misconduct have appeared in federal courts and news reports, including several articles about her recent disbarment, “[a]ny interest [she] might have had in keeping [her] name in the free-and-clear has already largely evaporated.” *Id.* *Bartko* thus held that “the balance between [AUSA’s] interest in privacy and the public’s interest in how [DOJ] handled a federal appeals court’s concerns about possible prosecutorial misconduct weighs strongly in favor of disclosure.” *Id.* That holding applies directly to the EOUSA’s invocation of Exemption 7(C).

FOIA Exemption 6 separately shields “personnel and medical files and similar files” when their disclosure “would constitute a *clearly* unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6) (emphasis added). “Because Exemption 6 requires an even stronger demonstration of a privacy interest than Exemption 7(C), an agency’s inability to justify withholding the latter often precludes it from satisfying Exemption 6’s heightened requirements.” *Bartko*, 898 F.3d at 67. Thus, the EOUSA’s reliance on Exemption 6 fails for the same reason Exemption 7(C) fails.

The EOUSA Failed to Disclose All Non-Exempt Segregable Portions of the Requested Records

Even if the requested records contain some information that is rightly exempt under exemptions 6 and 7(C), Attachment 3, the EOUSA was required under the FOIA to still disclose all non-exempt, segregable portions of the records. 5 U.S.C. § 552(b); *see also* *CREW v. DOJ*, 746 F.3d at 1096 (that some information in the requested investigatory records may be exempt “does not justify the blanket withholding of all responsive documents”).

“The ‘segregability requirement applies to all . . . documents and all exemptions in the FOIA,’” including those that the EOUSA invokes in its denial. *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992) (quoting *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984)). And while it is not necessary to segregate materials that are, by definition, wholly exempt, *see* *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 371 (D.C. Cir. 2005) (referencing documents that were wholly exempt under the attorney work product exemption), it is the agency’s responsibility to demonstrate that the records are wholly exempt “with reasonable specificity.” *Armstrong v. Exec. Off. of the President*, 97 F.3d 575, 580 (D.C. Cir. 1996).

Here, the EOUSA has all but confirmed that it violated its segregability obligations by refusing even to process CREW’s FOIA request. Its assertion of a blanket withholding without conducting a search and releasing all non-exempt material violates its statutory obligations under the FOIA.

Conclusion

For the foregoing reasons, the EOUSA should reverse its initial determination and promptly search for and release any responsive records to CREW. Please direct any communications about this appeal to me at [REDACTED] and foia@citizensforethics.org or by mail to Chun Hin Jeffrey Tsoi, Citizens for Responsibility and Ethics in Washington, [REDACTED]

Sincerely,



Chun Hin Jeffrey Tsoi
Senior Legal Fellow



Laura Iheanachor
Senior Counsel

Attachments:

1. CREW's April 24, 2024 FOIA Request to EOUSA (webpage FOIA request)
2. CREW's April 24, 2024 FOIA Request to EOUSA (letter format of the request attached to webpage FOIA request)
3. EOUSA's April 25, 2024 Final Determination