IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *Plaintiff*, v. U.S. DEPARTMENT OF JUSTICE, *Defendant*.	Case No. 1:24-cv-02416-AHA

PLAINTIFF'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

In this Freedom of Information Act ("FOIA") suit, Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") challenges the sweeping withholding of information relating to reported misconduct by former Assistant United States Attorney ("AUSA") Terra Morehead, with Defendant United States Department of Justice ("DOJ") refusing to even confirm or deny the existence of responsive records under FOIA Exemptions 6 and 7(C).

The DOJ's opposition to CREW's cross-motion for summary judgment misses the mark by confusing the legal doctrines of *Glomar* and categorical withholding, and its rebuttal fails on both fronts. Waving away well-publicized testimonies and court rulings addressing allegations against Morehead, it asks the Court to accept that the mere fact of responsive record's existence must be kept secret. It then blithely downplays the severity of her misconduct that implicated the entire U.S. Attorney's Office of Kansas, and relies heavily on Morehead's status as a "line-prosecutor" in categorically concealing any existing records, despite that being only one factor in the Exemptions 6 and 7(C) balancing tests, and in any case insufficient to justify categorical withholding.

The Court should grant CREW's cross-motion, and order disclosure of the withheld records to CREW.

ARGUMENT

According to the DOJ, "CREW argues . . . that the Department must search for and produce responsive records (if any exist) because Ms. Morehead's privacy interests are minimal, specifically because allegations of her misconduct are public." Def.'s Reply Further Supp. Mot. Summ. J. & Opp'n Pl.'s Cross-Mot. Summ. J. ("Def.'s Opp'n"), ECF No. 15, at 1. But that characterization conflates two distinct legal doctrines: *Glomar* and categorical withholding.

As the D.C. Circuit explained in the context of Rep. Tom DeLay's investigative records, a *Glomar* response concerns the withholding of "the *fact* that [DeLay] was under investigation," while a categorical withholding concerns withholding "the *contents* of the investigative files." *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.,* 746 F.3d 1082, 1092 (D.C. Cir. 2014) (*CREW I*) (emphasis original). CREW's position, and what D.C. Circuit case law instructs, is then a two-fold claim that the DOJ has lumped together: (1) the DOJ must *confirm existence of responsive records* because allegations of Morehead's misconduct are public; and (2) the DOJ must search for and produce responsive records (if they exist) *because the balancing of privacy and public interest must be done on a case-by-case basis instead of categorically so*. In other words, the former concerns the DOJ's improper invocation of a *Glomar* response refusing to confirm or deny the existence of records, and the latter concerns the impropriety of categorically withholding records that exist without any case-by-case determination. Because the DOJ refused to even confirm or deny the existence of records, the former alone warrants the grant of CREW's cross-motion for summary judgment; but CREW succeeds on both, and the DOJ failed to rebut

either. The DOJ must confirm that records exist, and process and produce non-exempt portions thereof.

I. The DOJ fails to justify its *Glomar* response, in face of well-publicized testimonies by the agency and court rulings addressing allegations against Morehead.

As a threshold matter, the DOJ's sweeping *Glomar* response to (and categorical withholding of) all responsive records must be held to Exemption 6's "heightened requirements" for a "stronger demonstration of a privacy interest than Exemption 7(C)," *Bartko v. U.S. Dep't of Just.*, 898 F.3d 51, 67 (D.C. Cir. 2018), because not all responsive records would be law enforcement records protected by Exemption 7(C). *See* Mem. P. & A. Supp. Pl.'s Cross-Mot. Summ. J. ("Pl.'s Mem."), ECF No. 12, at 10-13. The DOJ takes "not all" to mean that "Plaintiff concedes that some of the requested records (if they exist) are appropriately classified as law enforcement records." Def.'s Opp'n at 2. But the point is simply that, as *Bartko* held, Exemption 7(C) cannot protect *all* responsive records unless the DOJ can establish that *all* of them are law enforcement records. *See Bartko*, 898 F.3d at 65 (rejecting *Glomar* on the basis of Exemption 7(C) because "[t]he government has not come close to showing that all records . . . involving misconduct allegations against [AUSA] Wheeler would have been compiled for law enforcement purposes"); *id.* at 68 (rejecting withholding of all documents on the basis of Exemption 7(C) because OPR could not establish beyond the "ephemeral" that "all of its [AUSA] Wheeler records qualify as law-enforcement records"). That "at least some" records are law enforcement records, Def.'s Opp'n at 2, means the DOJ may invoke Exemption 7(C) with more particularity, and does not justify complete withholding on that basis.

In any case, the DOJ cannot meet Exemption 7(C)'s requisite demonstration of a privacy interest, and consequently also fails to meet that of Exemption 6. *Glomar* responses are improper *either* (1) where the agency has already officially acknowledged existence of the records, i.e., the

public domain exception, *or* (2) where confirming or denying the existence of records would not cause harm under FOIA exemptions. Pl.'s Mem. at 14 (citing *Am. C.L. Union v. Cent. Intel. Agency*, 710 F.3d 422, 426-27 (D.C. Cir. 2013) (*ACLU v. CIA*) & *CREW I*, 746 F.3d at 1092). CREW argued, and continues to maintain, that the DOJ's *Glomar* response is improper for both reasons. Pl.'s Mem. at 13-20.

(1) Public Domain. The DOJ is correct that "to overcome an agency's *Glomar* response based on an official acknowledgement, the requesting plaintiff must pinpoint an agency record that both matches the plaintiff's request and has been publicly and officially acknowledged by the agency." *Moore v. Cent. Intel. Agency*, 666 F.3d 1330, 1333 (D.C. Cir. 2011) (citing *Wolf v. Cent. Intel. Agency*, 473 F.3d 370, 378-79 (D.C. Cir. 2007)). In the *Glomar* context, however, "if the prior disclosure establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information." *Wolf v. Cent. Intel. Agency*, 473 F.3d 370, 379 (D.C. Cir. 2007). *Wolf*, for example, involved records about a former Colombian presidential candidate, and the Court rejected the CIA's *Glomar* response: "[b]ecause the '*specific information at issue*,' is the existence *vel non* of 'records about Jorge Eliecer Gaitan,' [CIA Director] Hillenkoetter's testimony confirmed the existence thereof." *Id.* (emphasis original) (citations omitted).

The DOJ vainly denies that the testimony by then-Acting U.S. Attorney Slinkard—which came from a direct examination under oath that is entirely about Morehead's untruthfulness and misconduct, *see* Pl.'s Mem. Ex. H—constitutes acknowledgement of existence of responsive records. Contrary to the DOJ's cherry-picking, Slinkard did not merely say "he 'think[s]' there were allegations made against Ms. Morehead and that he is 'not aware' of any discipline." Def.'s

Opp'n at 13 (alteration original). Rather, Slinkard explicitly stated he was "*aware* that there have been allegations of" *Brady* and *Giglio* violations by Morehead "from time to time." Pl.'s Mem. at 16 (quoting Pl.'s Mem. Ex. H at 347:22- 348:4) (emphasis added); *see also, e.g.*, Pl.'s Mem. Ex. H at 346:1-346:3 ("Q. You're aware that the allegations that she coerced false testimony in that case are recent allegations? A. Yes."); *id.* at 342:6-342:19 ("Q. Are you aware of a series of cases where Ms. Morehead was criticized by the district court for repeatedly misrepresenting the substance of plea agreement waivers? . . . . [A.] I recall there was a criticism on one or more occasions related to an argument made I believe in termination of supervised release context."). Slinkard also admitted that Judge Crabtree at the United States District Court for the District of Kansas found that Morehead had failed to be truthful and that amounted to misconduct. Pl.'s Mem. at 15 (citing Pl.'s Mem. Ex. H at 338:17-339:9). Unless the DOJ contends that records related to that judicial finding by Judge Crabtree do not even amount to "alleged violations by AUSA Morehead of any provisions of law or constitution" or ethical obligations, Pl.'s Mem. Ex. A at 1-2, it is baffling how the DOJ can maintain that the public domain exception does not apply here. *See Marino v. Drug Enforcement Admin.*, 685 F.3d 1076, 1082 (D.C. Cir. 2012) ("[A] federal prosecutor's decision to release information at trial is enough to trigger the public domain exception where the FOIA request is directed to another component *within* the Department of Justice.").

Attempting to distinguish *ACLU v. CIA*, the DOJ noted that *Glomar* was improper in that case because "numerous government officials made statements acknowledging the government's use of drone strikes." Def.'s Opp'n at 12-13. But the government in that case, as here, made similar arguments challenging the significance of the officials' statements, insisting that no official "has specifically stated that the CIA has *documents* relating to drone strikes, as compared

to an *interest* in such strikes." *ACLU v. CIA,* 710 F.3d 422 at 430. The D.C. Circuit held that prior acknowledgments do not need to specifically confess the existence of documents: "Unless we are to believe that the [CIA] Director was able to 'assure' his audience that drone strikes are 'very precise and . . . very limited in terms of collateral damage' without having examined a single document in his agency's possession, those statements are tantamount to an acknowledgment that the CIA has documents on the subject." *Id.* at 431 (alteration original). The same should be said of documents here—while Slinkard "did not say that the [DOJ] possesses responsive documents, what [he] did say makes it neither 'logical' nor 'plausible' to maintain that the Agency does not have any documents" related to alleged misconduct by Morehead. *Id.*

(2) No further harm. Separately from the public domain doctrine, the DOJ's arguments about further harm to Morehead if it were to confirm the existence of records is even more baffling. In addition to the finding by Judge Crabtree acknowledged by Slinkard, CREW identified three other judicial opinions that identified AUSA Morehead *by name* for what the courts found to be prosecutorial misconduct. Pl.'s Mem. at 17-18; *see also infra* at 10 (listing cases from the Tenth Circuit discussing the misconduct by USAO Kansas). "Any interest [Morehead] might have had in keeping [her] name in the free-and-clear has already largely evaporated." Pl.'s Mem. at 19 (quoting *Bartko*, 898 F.3d at 69).

The DOJ argued summarily that, "in *Bartko* . . . the Fourth Circuit and the U.S. Attorney publicly announced that the matter was being referred to OPR," whereas "[i]n the instant case, there is no such public announcement, and, thus, Ms. Morehead would be harmed." Def.'s Opp'n at 13. But *Bartko* specifically noted two sources of publicity in that case—"allegations of misconduct during the Bartko trial are already a matter of public record, as is the referral to OPR published in the Fourth Circuit's decision." Pl.'s Mem. at 19 (quoting *Bartko*, 898 F.3d at 69).

Admittedly, there is no judicially acknowledged *referral* to OPR here; but as in *Bartko*, CREW's "request was not even limited to records resulting from OPR *investigations*, but included any records addressing alleged . . . misconduct." *Bartko*, 898 F.3d at 65. That much the world already knows about. *Cf. United States v. Zubaydah*, 595 U.S. 195, 258-59 (2022) (Gorsuch, J., dissenting) ("[N]othing in the record of this case suggests that requiring the government to acknowledge what the world already knows to be true would invite a reasonable danger of additional harm . . ."). Refusing an official acknowledgement that such records exist does no more than "shield the government from some further modest measure of embarrassment," *id.* at 238, and it safeguards no secret that the DOJ is entitled to withhold.

The DOJ has failed to heed the clear instructions of the D.C. Circuit regarding *Glomar* responses, thwarting CREW's FOIA rights yet again. *See, e.g.*, *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, No. 24-cv-1497 (LLA), 2025 WL 879664, at *8-10 (D.D.C. Mar. 21, 2025) (holding that the DOJ's multiple *Glomar* responses to CREW regarding "publicly disclosed investigation of a third party," including that concerning Morehead, plausibly suggest a policy or practice of FOIA violations). The *Glomar* response here is improper, and the cross-motion for summary judgment is warranted on that ground alone.

II. Morehead's status as a "line-prosecutor" does not justify categorical withholding, in view of the allegations of severe and systemic misconduct.

If responsive records exist, the DOJ also cannot categorically withhold those records without a case-by-case determination and particularized showing of privacy interests. The DOJ's confusion of the *Glomar* and categorical withholding doctrines is further demonstrated by its attempt to assert that *CREW I* is "not even remotely relevant," arguing that Rep. Tom DeLay "affirmatively made public statements confirming that the FBI investigated him" while "there is no evidence of Ms. Morehead making public statements about an investigation." Def.'s Opp'n at

9-10, 13. But that part of *CREW I* concerns *Glomar* responses, which were improper for a reason not applicable here. *CREW I*, 746 F.3d at 1092 ("Because DeLay's public statements confirmed he had been under investigation, the FBI's acknowledgment that it had responsive records would not itself cause harm by confirming that fact, rendering a *Glomar* response inappropriate."). Instead, for CREW's purposes, *CREW I* is relevant here because it provides the rule that categorical withholding of records relating to investigations of government officials is inappropriate, as "the balance does not characteristically tip in favor of non-disclosure" in such cases. Pl.'s Mem. at 22 (quoting *CREW I*, 746 F.3d at 1096).

The DOJ undermines its own claim to categorical withholding by attempting to distinguish *CREW I* from the case at hand through the factors considered in the case-by-case framework. *See* Def.'s Opp'n at 8-10. Precisely because "the rank of the public official involved and the seriousness of the misconduct alleged" matter, a "case-by-case balancing approach" like that in *Kimberlin*, instead of a sweeping categorical rule, is appropriate when it comes to the files of government officials' proven or alleged misconduct. *See CREW I*, 746 F.3d at 1095-96 (quoting *Kimberlin v. Dep't of Just.*, 139 F.3d 944, 948-49 (D.C. Cir. 1998)). By making arguments about fact-specific balancing while arguing in broad strokes and producing neither documents nor a *Vaughn* index, the DOJ puts the cart before the horse. *See Kimberlin v. Dep't of Just.*, 139 F.3d 944, 950 (D.C. Cir. 1998) (ordering "the district court to determine whether any of the withheld documents contains material that can be segregated and disclosed without unwarrantably impinging upon anyone's privacy"). Documents can be withheld categorically if, like in *Reporter's Committee*, the nature of the documents suggests only an attenuated relationship to the purposes of FOIA. *See* Pl.'s Mem. at 22 (citing *U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. 749 (1989)). But here, when it comes to systemic

misconduct of public officials—as in *CREW I*, *Kimberlin*, and *Bartko*—the particularized weighing of public and privacy interest does matter, and for that reason individual consideration is necessary. *See* Pl.'s Mem. at 24-25. Whether Morehead has stronger privacy interests than prominent politicians must be assessed in relation to specific documents and not categorically. *See Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 854 F.3d 675, 682-83 (D.C. Cir. 2017) (*CREW II*) ("Because the myriad of considerations involved in the Exemption 7(C) balance defy rigid compartmentalization, per se rules of nondisclosure based upon the type of document requested, the type of individual involved; or the type of activity inquired into, are generally disfavored.").

The DOJ's attempt to distinguish the present case from *Bartko* also relies on downplaying the severity of Morehead's misconduct as an AUSA and the impact of her abuse of power on behalf of the government, as well as overemphasizing the nondispositive factor of the prosecutor's seniority.

The DOJ first argues that the public's interest in *Bartko* derives from "the U.S. Attorney's Office being admonished by a Circuit Court," but that "in this case, that type of judicial reaction simply does not exist. At most, CREW musters together two cases that 'touched' on Ms. Morehead's alleged misconduct and 'implicated' the entire United States Attorney's Office." Def.'s Opp'n at 7. However, Morehead's allegedly repeated and egregious misconduct—and more importantly, how the DOJ addressed it at a systemic level—directly implicates the enhanced public interest in knowing if the government took adequate remedial measures to address any ongoing harm. *See* Pl.'s Mem. at 4-5, 17-18, 25-26. The fact that the public interest in *Bartko* may have been heightened by the Fourth Circuit's attention and the US

Attorney's office's response to misconduct, *see* Def.'s Opp'n at 6, is sufficient but not necessary to imbue public interest in the first place.

Further, it is unclear whether the DOJ is insinuating that admonishments by the United States District Court of Kansas are too inconsequential compared to a Court of Appeals, or that having two cases of prosecutorial misconduct that implicate the entire U.S. Attorney's Office of Kansas is too trivial for a scandal. Regardless, as a matter of fact, the Tenth Circuit did affirm the District Court's finding of a constitutional violation by Morehead in *United States v. Orozco*, *see* 916 F.3d 919, 924 (10th Cir. 2019) (noting that "the government did not deny the occurrence or content of Ms. Morehead's comments to" the attorney of the defense witness who alleged witness intimidation).

Nor was the systemic misconduct just "two cases." Def.'s Opp'n at 7. The Tenth Circuit, hearing an appeal of *CCA Recordings 2255 Litig. v. United States*, 2021 WL 5833911 (D. Kan. Dec. 9, 2021) en banc, noted that the court has "dealt with *batches* of similar appeals from CoreCivic detainees that emanate from the Kansas USAO's mishandling of attorney-client communications," in some of which Morehead was the "lead prosecutor." *United States v. Hohn*, 123 F.4th 1084, 1087-88 (10th Cir. 2024) (en banc) (emphasis added) (citing *United States v. Spaeth*, 69 F.4th 1190 (10th Cir. 2023); *United States v. Orduno-Ramirez*, 61 F.4th 1263 (10th Cir. 2023)); *see also United States v. Orduno-Ramirez*, 61 F.4th 1263, 1267 (10th Cir. 2023) ("[T]he district court found that the USAO [Kansas] intruded into a large number of defendants' communications with their attorneys, with no legitimate law-enforcement purpose, and later tried to conceal these actions. As the district court put it, the USAO committed 'systemic prosecutorial misconduct' with 'far reaching implications in scores of pending cases,' and exacerbated the harm by 'delaying and obfuscating the investigation' into its misconduct." (cleaned up)). The

recalcitrant DOJ maintains this is but a "single line-prosecutor who allegedly engaged in ethical misconduct" over which FOIA does not bat an eye, Def.'s Opp'n at 8, but the record reflects more than two isolated incidents of misconduct that it would have this Court believe.

As to the difference in privacy interest, seniority of an official is merely one factor for consideration under *CREW I*. *See* Pl.'s Mem. at 25 ("But that does not mean supervisors within a U.S. Attorney's office always get scrutinized while line prosecutors always get a pass; the misconduct involved, as well as the scale thereof, matter." (citing *Kimberlin*, 139 F.3d at 949)) The prosecutor in *Bartko* may have had a different title than AUSA Morehead, but that alone does not mean that Morehead then has an overwhelming and unique privacy interest over her official conduct, especially given the publicly acknowledged allegations of her misconduct in numerous judicial opinions.

The DOJ seeks to distinguish *Bartko*, in which the Court found that "OPR failed to 'specifically identify the privacy interests at stake,'" based on the "the explanation that the Department advanced in justifying its response to CREW's FOIA requests here." Def.'s Opp'n at 6, 10-11 (quoting *Bartko*, 898 F.3d at 66). But the DOJ conveniently omits the subsequent phrase in *Bartko* that explained the level of specificity required by the D.C. Circuit: "OPR 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*." *Bartko*, 898 F.3d at 66 (emphasis added). *Bartko* also noted that precedents assessed "whether the misconduct complaints against [an official] were 'substantiated or unsubstantiated,' 'serious,' 'trivial,' or 'repeated[ ],' and whether she had 'been subjected to some type of discipline or ha[d] avoided disciplinary action.'" *Id.* (quoting *Am. Immigr. Lawyers Ass'n v. Exec. Off. for Immig. Rev.*, 830 F.3d 667, 675 (D.C. Cir. 2016)); *see also* Pl.'s Mem. at 26-27 (citing the same). As

here, *Bartko* found inadequate that "OPR just sweepingly asserted that the disclosure of any record regarding any allegation of misconduct would be an unwarranted invasion of [AUSA] Wheeler's privacy." *Id*.

The DOJ addresses none of the factors listed in *Bartko*, even with respect to the judicially-recognized misconduct referenced by CREW, *see* Def.'s Opp'n at 10-11, and perhaps understandably so. In view of what is known from various judicial opinions, each of the factors listed above directly undermine Morehead's privacy interests: the misconduct complaints against her are frequent, of constitutional dimensions, deliberate and systemic, substantiated in federal court rulings, and are serious, non-trivial, and repeated. At the very least, the DOJ needs to make more particularized arguments for Morehead's privacy interests with respect to specific records.

In sum, the comparison of the public and privacy interests here, as in *Bartko* and other precedents, requires a case-by-case consideration inconsistent with the DOJ's categorical withholding of the requested records. The prosecutor's seniority is not dispositive as a matter of determining privacy interest, and the DOJ's public interest argument—that it was the Fourth Circuit's decisions to sanction the prosecutor in *Bartko* that "elevated" the issue to a matter of "substantive lawmaking policy" and imbued the public interest, Def.'s Opp'n at 7—misses the forest for the trees, and overlooks the Tenth Circuit's numerous references to the systemic misconduct at USAO Kansas. Allegations of repeated, systemic prosecutorial misconduct immediately implicates the public interest, because how it is dealt with gives the public valuable insight into how its government is working. The DOJ is unable to make the argument that all potentially responsive documents constitute a genus that, itself, tends toward nondisclosure.

The failure to justify categorical withholding means that even if "it is likely that some of the requested information ultimately will be exempt from disclosure," that "does not justify the

blanket withholding of all responsive documents . . . the DOJ must attempt to make a more particularized showing as to what documents or portions thereof are exempt. The district court must then weigh what information may be withheld under Exemption [6 or] 7(C) and whether any information is reasonably segregable and may be disclosed." *CREW I*, 746 F.3d at 1096. What CREW's cross-motion for summary judgment asks for, ultimately, is precisely the holding by the D.C. Circuit in *CREW I*: not "that the requested information is not exempt under Exemption [6 or] 7(C)," but simply "that a *categorical* rule is inappropriate here." *Id.* (emphasis original).

CONCLUSION

For the foregoing reasons, this Court should grant CREW's cross-motion for summary judgment and order disclosure of the withheld records to CREW.

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Respectfully Submitted,

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