United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5347 **September Term, 2019**

FILED ON: MARCH 13, 2020

HOWARD BLOOMGARDEN,
APPELLANT

v.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-02675)

Before: TATEL and PILLARD, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The court has afforded the issues full consideration and determined they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is hereby

ORDERED AND ADJUDGED that the judgment of the district court be **AFFIRMED IN PART** and **REVERSED IN PART**.

In this sequel to *Bloomgarden v. U.S. Dep't of Justice* (*DOJ*), 874 F.3d 757 (D.C. Cir. 2017) (*Bloomgarden I*), Howard Bloomgarden, who is serving a sentence of life imprisonment without parole in California, *see id*. at 758, seeks further details under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, about the for-cause termination of the Assistant U.S. Attorney (AUSA) who initially participated in the federal-state investigation that led to Bloomgarden's conviction. In *Bloomgarden I*, we affirmed DOJ's withholding under FOIA Exemption 6 of a "proposed discipline letter" regarding the AUSA. 874 F.3d at 761 (applying 5 U.S.C. § 552(b)(6)). Bloomgarden now seeks from the National Archives and Records Administration (National Archives, or the Archives) two later letters: (1) the final decision letter to the AUSA from DOJ on

the "proposed discipline letter" at issue in *Bloomgarden I*, and (2) a letter from the AUSA following receipt of the final decision letter. We call the first letter the Corrigan Letter—referring to the letter's author, Dennis Corrigan, then the Executive Assistant and Counsel to the Deputy Attorney General—and the second letter the AUSA Response.

In response to Bloomgarden's FOIA request, a then-new archivist identified the Corrigan Letter and the AUSA Response. The archivist then informed Bloomgarden's counsel that copies of those letters would be sent to him. Several days later, the archivist's supervisor determined that the Archives would withhold both letters under FOIA Exemption 6. "Exemption 6 of FOIA allows the government to withhold 'personnel . . . files the disclosure of which would constitute a *clearly* unwarranted invasion of personal privacy.'" *Id*. at 759 (alterations in original) (quoting 5 U.S.C. § 552(b)(6)).

After exhausting his FOIA claim within the National Archives, Bloomgarden sued under 5 U.S.C. § 552(a)(4)(B) to challenge application of Exemption 6, and the parties cross-moved for summary judgment. *See Bloomgarden v. Nat'l Archives*, 344 F. Supp. 3d 66, 71 (D.D.C. 2018). After reviewing the Corrigan Letter and the AUSA Response *in camera*, *see id*. at 73, the district court granted summary judgment to the Archives and denied Bloomgarden's cross-motion, concluding that the AUSA's "strong privacy interest in the information contained in his termination letters" outweighs the "relatively low" public interest in their disclosure, *id*. at 76.

We review *de novo* the district court's order on summary judgment, including its application of FOIA Exemption 6 to the Corrigan Letter and AUSA Response. *See Bloomgarden I*, 874 F.3d at 759. The government bears the burden to establish that any material it withholds under Exemption 6 satisfies the statutory requirements for withholding. *See Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016).

Bloomgarden does not appear to contest that the Corrigan Letter and AUSA Response are "'personnel' files that satisfy the threshold requirement of Exemption 6," *Bloomgarden*, 344 F. Supp. 3d at 74 (quoting 5 U.S.C. § 552(b)(6)), so we need only decide whether disclosure of those letters "would rise to the level of a 'clearly unwarranted invasion of personal privacy,'" *Am. Immigration*, 830 F.3d at 673 (quoting 5 U.S.C. § 552(b)(6)). To do so, "we follow a[] two-step process." *Id*. First, we must determine whether disclosure "'would compromise a substantial, as opposed to *de minimis*, privacy interest,' because 'if no significant privacy interest is implicated'" and no other exemption is at issue, "FOIA demands disclosure." *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (alteration omitted) (quoting *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989)). Second, if we determine that a "substantial privacy interest" exists, we must further inquire "whether the public interest in disclosure outweighs the individual privacy concerns" so as to justify disclosure. *Id*. at 1230 (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002)).

Bloomgarden asks us to proceed straight to weighing the AUSA's privacy interest in the grounds for DOJ's final decision against the public interest favoring disclosure, *see* Appellant's Br. 18-19, thereby implicitly acknowledging that the AUSA has a substantial interest in nondisclosure of the Corrigan Letter, *see* Appellee's Br. 18. Insofar as the AUSA Response simply asks for the AUSA's own records and personal property, Bloomgarden asserts that there cannot be anything sufficiently "embarrassing" to give rise to a privacy interest protected under Exemption 6. Appellant's Br. 17. The Archives contends only that the AUSA Response should remain private because it "discusses the grounds for the former AUSA's removal." Appellee's Br. 23. We reviewed both letters *in camera*, as did the district court, and we see no such discussion in the AUSA Response. Because the Archives offers no viable reason why the AUSA (or anyone else) has a substantial privacy interest in the AUSA Response, "FOIA demands disclosure" regardless whether the public has any identified interest in the letter's contents. *Multi Ag Media*, 515 F.3d at 1229 (quoting *Retired Fed. Emps.*, 879 F.2d at 874).

Turning to the Corrigan Letter and the balancing of public and private interests, most of the factors that justified withholding the proposed discipline letter in *Bloomgarden I* also apply to the final-decision letter. The privacy interest is still significant: The AUSA, who left DOJ decades ago, continues work as "a practicing lawyer who would undoubtedly be quite embarrassed by disclosure" of detailed recitations of "garden-variety incompetence and insubordination" from "many years ago." *Bloomgarden I*, 874 F.3d at 761; *see also Am. Immigration*, 830 F.3d at 675. And any countervailing public interest remains low: The Corrigan Letter "is over twenty years old," addresses a junior, line-level prosecutor, "does not necessarily reveal anything of present personnel policies, and as a piece of history . . . is hardly momentous." *Bloomgarden I*, 874 F.3d at 760; *see also Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998). And, while Bloomgarden is correct that the "presumption in favor of disclosure" under Exemption 6 is particularly "strong," *Bloomgarden I*, 874 F.3d at 760 (quoting *Wash. Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982)), and even assuming that "Justice Department prosecutors are particularly powerful government lawyers" in whose conduct the public may have considerable interest, *id.*, we weighed those same factors in *Bloomgarden I*, and in the context of this appeal they do not change the result. Like the various courts that have reviewed materials related to the termination of this AUSA, *see id.*; *Bloomgarden*, 344 F. Supp. 3d at 75 (Kollar-Kotelly, J.); *Bloomgarden v. DOJ*, Civil Action No. 15-0298, 2016 WL 845299, at *3-4 (D.D.C. Mar. 2, 2016) (Huvelle, J.); *People v. Bloomgarden*, No. B276634, 2019 WL 4950243, at *16-17 (Cal. Ct. App. Oct. 8, 2019), we conclude from our own *in camera* review that the Corrigan Letter's findings do not identify any prosecutorial misconduct affecting the merits of any case or otherwise threatening the integrity of the prosecutorial function, but are limited to instances of incompetence and insubordination. *Cf. Bartko v. DOJ*, 898 F.3d 51, 69-70 (D.C. Cir. 2018).

To be sure, our privacy analysis in *Bloomgarden I* emphasized that the proposed discipline letter "contains mere allegations," 874 F.3d at 761, whereas the Corrigan Letter followed a completed investigation, which included an opportunity for the AUSA to present rebuttal, and reflects DOJ's final decision. That factual distinction makes the Corrigan Letter a closer case for

withholding under Exemption 6. But, given the other factors we considered, that difference does not, in our judgment, overcome the AUSA's continued "privacy interest . . . in avoiding disclosure of the details of the investigation" or "of his misconduct." *Kimberlin*, 139 F.3d at 944. Nor does the fact that the AUSA "continues to tout" his prosecutorial experience by co-signing public letters with dozens of other former AUSAs, Appellant's Br. 19 n.5; *see also* Bloomgarden 28(j) Letter (Feb. 24, 2020), materially change the public-interest analysis. Specifically, the public letters signed by lists of former prosecutors neither create a public misimpression that disclosure of the Corrigan Letter might rectify nor meaningfully enhance the public interest in the AUSA's personnel record.

In addition to challenging the Archives' public-private balancing, Bloomgarden argues that the then-new archivist's initial response anticipating disclosure "creates a genuine issue of fact precluding summary judgment." Appellant's Br. 20. By "fail[ing] to raise" that argument in any discernible way in the district court, however, Bloomgarden "has forfeited" it on appeal. *Mayorga v. Merdon*, 928 F.3d 84, 93 n.3 (D.C. Cir. 2019). Even were the argument preserved, we do not think the then-new archivist's initial response, which her supervisor promptly corrected, bears on any fact material to the Exemption 6 analysis.

In sum, we affirm the judgment of the district court as to the Corrigan Letter but reverse as to the AUSA Response. We remand with instructions that the AUSA Response be released in full.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk