

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DEMOCRACY FORWARD
FOUNDATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

CASE NO.: 1:17-CV-1877-EGS

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

This action arises from a Freedom of Information Act (“FOIA”) request from Plaintiff Democracy Forward Foundation submitted to the Department of Justice, Executive Office for United States Attorneys (“EOUSA”), seeking records of communications between EOUSA and President Trump’s Transition Team (“Transition Team”). Although it only uncovered one responsive record, EOUSA’s search was thorough and complete. Plaintiff’s belief that there must be more cannot overcome EOUSA’s sworn declarations which describe a search that was reasonably calculated to discover all responsive records. EOUSA has satisfied its obligations under FOIA and is entitled to summary judgment.

BACKGROUND

On June 2, 2017, Plaintiff Democracy Forward Foundation submitted a Freedom of Information Act (“FOIA”) request to EOUSA. Declaration of Vinay J. Jolly (“Jolly Decl.”) ¶ 4 & Ex. A at 1-2. Plaintiff sought the production of:

- (1) All communications, including any attachments, sent to or from the “Chair” of the Presidential Transition Team, Mike Pence.
- (2) All communications, including any attachments, sent to or from any “Vice Chair” of the Presidential Transition Team, including: Marsha Blackburn, Chris Christie, Mary Fallin, Michael Flynn, Newt Gingrich, Rudy Giuliani, Cynthia Lummis, Kathleen Troia “KT” McFarland, Cathy McMorris Rodgers, Jeff Sessions, or Tim Scott.
- (3) All communications, including any attachments, sent to or from any member of the “Executive Committee” of the Presidential Transition Team, including: Lou Barletta, Pam Bondi, Chris Collins, Sean Duffy, Trey Gowdy, Jared Kushner, Tom Marino, Rebekah Mercer, Steven Mnuchin, Devin Nunes, Anthony Scaramucci, Kiron Skinner, Peter Thiel, Donald Trump Jr., Eric Trump, Ivanka Trump, Reince Priebus, Stephen Bannon, Amata Coleman Radewagen, Safra Catz, Tom Dadey, Nick Langworthy, Mike McCormack, Joe Mondello, or John Sweeney.
- (4) All communications, including any attachments, sent to or from any staff member or representative of the Presidential Transition Team, including but

not limited to: Aaron Chang, Steven Cheung, AJ Delgado, Jeff DeWit, Jessica Ditto, George Gigicos, Michael Glassner, Stephanie Grisham, Katrina Pierson, Sean Spicer, Nick Ayers, Kellyanne Conway, David Bossie, Aaron Chang, Steven Cheung, AJ Delgado, Jeff DeWit, Jessica Ditto, George Gigicos, Michael Glassner, Stephanie Grisham, Hope Hicks, Don McGahn, Jason Miller, Stephen Miller, Katrina Pierson, Josh Pitcock, Dan Scavino, Marc Short, or Katie Walsh.

Id. Plaintiff specified a time frame for this request of November 9, 2016 through January 21, 2017. Jolly Decl. ¶ 4 & Ex. A at 2. Plaintiff also sought a waiver of both search and duplication fees, contending that Democracy Forward Foundation sought this disclosure “in the public interest.” Jolly Decl. ¶ 4 & Ex. A at 3 (citing 5 U.S.C. § 552(a)(4)(A)). By email dated June 7, 2017, EOUSA acknowledged the receipt of Plaintiff’s FOIA request. Jolly Decl. ¶ 5 & Ex. B. Plaintiff filed the instant lawsuit on September 13, 2017, challenging EOUSA’s failure to respond to their request. *See* Compl. for Injunctive Relief, ECF No. 1.

On October 13, 2017, EOUSA, through counsel, released to Plaintiff 129 pages in full and 20 pages in part of a responsive record called “Briefing Book Transition Team 2016-2017.” Jolly Decl. ¶¶ 6, 7 & Ex. C. After conducting further searches for responsive records, EOUSA determined that there were no additional responsive records. Jolly Decl. ¶¶ 8, 9. The parties conferred following EOUSA’s final production, Defendant provided Plaintiff with information about the scope and method of its search, and Plaintiff indicated that it is only challenging the adequacy of EOUSA’s search for responsive records and not the withholding of any information from the records pursuant to FOIA exemptions.

LEGAL STANDARD

“FOIA cases typically and appropriately are decided on motions for summary judgment.” *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (citations omitted). “A court may grant summary judgment . . . if there is ‘no genuine dispute as to any material fact

and the movant is entitled to judgment as a matter of law.” *Aguiar v. DEA*, 865 F.3d 730, 734 (D.C. Cir. 2017) (quoting Fed. R. Civ. P. 56(a)). To obtain summary judgment in a FOIA case on the issue of the adequacy of the agency’s search, the agency must show that “it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (collecting cases). “An agency may prove the reasonableness of its search by a declaration by responsible agency officials, so long as the declaration is reasonably detailed and not controverted by contrary evidence or evidence of bad faith.” *Light v. DOJ*, 968 F. Supp. 2d 11, 23 (D.D.C. 2013); *see also Defs. of Wildlife*, 623 F. Supp. 2d at 87 (“Factual assertions in the moving party’s affidavits or declarations may be accepted as true unless the opposing party submits its own affidavits or declarations or documentary evidence to the contrary.” (citing *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992))). Moreover, the non-moving party cannot rebut the presumption of good faith “by purely speculative claims about the existence and discoverability of other documents.” *Light*, 968 F. Supp. 2d at 23 (quoting *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

ARGUMENT

EOUSA’S SEARCH WAS ADEQUATE

Plaintiff has received records responsive to its request from EOUSA as well as a description of the search that resulted in no additional responsive records. EOUSA has now formalized its explanation in reasonably specific affidavits from agency officials, which are entitled to a presumption of good faith. Accordingly, the Court should enter summary judgment in favor of EOUSA.

On motion for summary judgment, “the agency must demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents.” *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (citation omitted). It is well established that “the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.” *Id.* (citation omitted); *see also SafeCard Servs.*, 926 F.2d at 1201 (“Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.” (citations omitted)). The adequacy of the search “is judged by a standard of reasonableness and depends . . . upon the facts of each case.” *Weisberg*, 745 F.2d at 1485 (citation omitted). Particularly because FOIA requires “both systemic and case-specific exercises of discretion and administrative judgment and expertise,” the D.C. Circuit counsels that it “is hardly an area in which the courts should attempt to micro manage the executive branch.” *Schrecker v. DOJ*, 349 F.3d 657, 662 (D.C. Cir. 2003) (quoting *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002)).

EOUSA’s declarations demonstrate that EOUSA conducted a search reasonably calculated to uncover all relevant documents. Upon reviewing the request, EOUSA realized that it was already aware of one responsive document from prior FOIA record searches, called “2016-2017 Briefing Book Transition Team.” Jolly Decl. ¶ 7. EOUSA prepared the Briefing Book for a December 2, 2016 meeting attended by EOUSA Director Monty Wilkinson; two Deputy Directors, Norman Wong and Suzanne L. Bell, and EOUSA Chief Financial Officer Jonathan Pelletier, along with three members of the Transition Team—Zina Bash, Ronald Tenpas, and Brian Benzckowski. Declaration of Norman Wong (“Wong Decl.”) ¶ 4. EOUSA released the Briefing Book to Plaintiff without further delay, as it was clear that the Briefing Book was responsive to Plaintiff’s request. *See* Jolly Decl. ¶ 7.

EOUSA then undertook a thorough search for any additional responsive records. The FOIA unit considered the nature of the request, which sought communications between EOUSA employees and the Trump Transition Team, and thoughtfully reflected on where such records might be located. *See id.* at ¶ 8. The FOIA unit determined that individuals in the Director’s Office would be the only individuals who had authority to communicate with the Transition Team. *Id.* No other employees had authority to communicate with the Transition Team, *see* Wong Decl. ¶ 4, and, based on his nine years of experience as an Attorney Advisor in the FOIA/PA Unit, Mr. Jolly determined that no other EOUSA component would be likely to have responsive records. Jolly Decl. ¶ 8.

Accordingly, the FOIA unit tasked the Director’s Office with conducting a search for responsive records. Deputy Director Wong, who attended the meeting for which the Briefing Book was prepared, conducted the search for responsive records in the Director’s Office. Mr. Wong is the Deputy Director and Counsel to the Director in EOUSA’s Office of the Director. He oversees the staff that is responsible for promoting and coordinating legal programs and initiatives in the U.S. Attorneys’ offices. Mr. Wong determined that only he, Ms. Bell, and Mr. Wilkinson—the most senior employees in the Director’s Office—would have communicated with the Transition Team. Wong Decl. ¶4. Direct communication with the Transition Team was closely coordinated through the Department of Justice’s Justice Management Division (“JMD”). *Id.* JMD set up the December 2, 2016 meeting; the EOUSA officials who attended the meeting had no direct contact with the Transition Team in setting up the meeting; and these officials handed the Briefing Book out at the meeting and did not send it to anyone on the Transition Team in advance of the meeting. With the one exception of inviting Mr. Pelletier to participate in the December 2, 2016 meeting, Mr. Wong, Ms. Bell, and Mr. Wilkinson never delegated the authority to communicate with the

Transition Team to any other EOUSA employees. *Id.* In addition, Mr. Wong himself was unaware of any contact between EOUSA leadership (or anyone else at EOUSA) and any Transition Team member during the time frame of the request, other than the December 2 meeting. *Id.* For these reasons, Mr. Wong determined that he, Ms. Bell, Mr. Wilkinson, and Mr. Pelletier were the only custodians reasonably likely to have responsive records. *Id.* ¶¶ 4-5.

After identifying the custodians, Mr. Wong spoke and exchanged e-mails with each of them about the request and the existence of responsive records. *Id.* at ¶ 5. He discussed the extent of all written and oral communications that each custodian had with the Transition Team, including Ms. Bash, Mr. Tenpas, and Mr. Benzckowski, at any point from its formation until becoming aware of Plaintiff's FOIA request. *Id.* Each custodian confirmed to Mr. Wong that he or she had "no contact with the Transition Team during the requested timeframe" except at the December 2 meeting, that "they neither sent nor received any email or other written correspondence to or from any Transition Team member during the requested timeframe," and that the only responsive record in the Director's Office is the Briefing Book that was provided to the members of the Transition Team at the December 2nd meeting. *Id.* Accordingly, Mr. Wong averred that:

"[a]ny systems of records within the EOUSA Director's Office likely to contain records responsive to this request have been considered. Given the very limited communication that Mr. Wilkinson, Ms. Bell, and I had with the Transition Team, there is no other location in the Director's Office where any other records which might be responsive to this request are likely to be located. I am not aware of any other method or means by which a further search could be conducted, which would likely locate additional responsive records."

Id. at ¶ 6. In light of the "presumption of good faith" accorded to the Jolly and Wong declarations, *see Light*, 968 F. Supp. 2d at 23, and the thoughtful and thorough search explained in those declarations, EOUSA has met its burden of demonstrating that it has conducted a search "reasonably calculated to uncover all relevant documents." *See Weisberg*, 745 F.2d at 1485 (citation omitted). EOUSA's search was adequate and did not require searches of computerized

systems and the use of electronic search terms. FOIA defines the term “search” as meaning “to review, *manually* or by automated means, agency records for the purpose of locating those records which are responsive to a request.” 5 U.S.C. § 552(a)(3)(D) (emphasis added). What renders a search reasonable is based on the facts of the case, *see Weisberg*, 745 F.2d at 1485 (citation omitted), and “[a]lthough a reasonable search of electronic records *may* necessitate the use of search terms in some cases, FOIA does not demand it in all cases[.]” *James Madison Project v. DOJ*, 2017 WL 3172855 at *5, 267 F. Supp. 3d 154 (D.D.C. July 25, 2017). In this case, there were only three people at EOUSA who had the authority to communicate with the Transition Team and they only delegated this authority to one individual for one particular meeting. Because of the unusual nature of these communications, the custodians would have recalled any communications, which would have been very recent, between themselves and the Transition Team. Mr. Wong asked each custodian about their communications with the Transition Team and each custodian confirmed that they had no communications with the Transition Team. Nothing more is required under the FOIA.

The facts of this case are analogous to those at issue in *James Madison Project v. DOJ* 2017 WL 3172855, 267 F. Supp. 3d 154 (D.D.C. July 25, 2017), a recent decision in this district. In *James Madison Project*, the agency confronted a FOIA request seeking records relating to a high-profile book, about the mission that killed Osama Bin Laden. *Id.* To search for responsive records, the agency “identif[ied] the individuals likely to have responsive records and interview[ed] them to determine where all records relevant . . . would be located and then review[ed] each of those records individually.” *Id.* The court held that the agency conducted a reasonable search that satisfied its burden under FOIA, noting that no “particular type of search is required by FOIA.” *Id.* at *5; *see also Oglesby*, 920 F.2d at 68 (“There is no requirement that an

agency search every record system.” (citations omitted)). In *James Madison Project*, “the responsive files were readily identifiable without search terms.” 2017 WL 3172855 at *5. By asking the relevant custodians whether they had any responsive records and then searching the locations they identified, EOUSA satisfied its burden under FOIA.

The only difference between *James Madison Project* and the instant case lies in the results of the inquiries – that is, that Mr. Wong’s discussions with the only relevant custodians revealed that they had no responsive records, thus concluding the search, rather than revealing locations reasonably likely to have responsive records, thus necessitating further searches (as happened in *James Madison Project*). Mr. Wong had no reason to doubt the EOUSA custodians’ representations that they had no responsive records, as the custodians would be expected to remember whether or not they recently communicated with the Transition Team, a significant communication for them to have. Nor were the custodians’ answers to Mr. Wong’s questions equivocal in any way. Under these circumstances, it was not reasonably likely that these custodians’ records systems contained responsive records, and EOUSA was not obligated to search them.

CONCLUSION

Based on the foregoing, the Court should grant summary judgment in favor of Defendant Department of Justice, Executive Office for United States Attorneys.

Dated: January 19, 2018

Respectfully submitted,

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