

**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

REPLY IN SUPPORT OF DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

This case arises from a FOIA request submitted to Defendant United States Department of Justice, Executive Office for United States Attorneys (EOUSA) by Plaintiff, Democracy Forward Foundation, seeking all communications between EOUSA employees and President Donald J. Trump’s Transition Team (“Transition Team”). EOUSA conducted a reasonable search for all relevant records, and produced over one-hundred pages of responsive material to Plaintiff. Despite EOUSA’s thorough search, set forth in detail through the declarations of Attorney Advisor Vinay Jolly and Deputy Director Norman Wong, Plaintiff challenges the adequacy of EOUSA’s search. However, EOUSA searched all locations reasonably likely to have responsive records – all that FOIA requires – and Plaintiff’s speculation about the existence of other documents does not render EOUSA’s search inadequate.

ARGUMENT

I. EOUSA’S SEARCH WAS ADEQUATE.

When an agency’s FOIA search is challenged, it 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,’ which it can do by submitting ‘[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched.’” *Reporters Comm. for Freedom of Press v. FBI*, 877 F.3d 399, 402 (D.C. Cir. 2017) (quoting *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). Provided that the agency’s declarations “contain reasonable specificity of detail,” and “are not called into question by contradictory evidence in the record or by evidence of agency bad faith,” the declarations are afforded a presumption of good faith. *Judicial Watch v. U.S. Secret Service*, 726 F.3d 208, 215 (D.C. Cir. 2013) (quoting *Consumer Fed’n of Am. v. Dep’t of Agric.*, 455 F.3d 283, 287 (D.C. Cir. 2013)). The reasonableness of the agency’s search “depends on the individual circumstances of each case” and “[t]he question is not whether other responsive records may exist, but whether the search itself was adequate.” *Cunningham v. DOJ*, 961 F. Supp. 2d 226, 236 (D.D.C. 2013). An agency must search all locations reasonably likely to contain responsive records. *See Oglesby*, 920 F.2d at 68.

EOUSA’s search met these standards. As set forth in EOUSA’s opening brief, EOUSA reasonably determined that the Director’s Office was the only EOUSA component where responsive documents were likely to be located, because it was the only component with authority to communicate with the Transition Team. *See* Declaration of Vinay Jolly (“Jolly Decl.”) ¶8, ECF No. 10-3. EOUSA Attorney Advisor Vinay Jolly averred that, based on his “nine years of experience as an Attorney Advisor in the FOIA/PA unit” of EOUSA, no other component “would be likely to have responsive records.” *Id.*¹ The agency also submitted the declaration of Deputy

¹ As the person “in charge of coordinating an agency’s document search efforts in response to a plaintiff’s FOIA request,” Mr. Jolly was the “most appropriate person to provide a comprehensive affidavit” in this litigation. *Light v. DOJ*, 968 F.Supp.2d 11, 23 (D.D.C. 2013).

Director Norman Wong, who detailed his search within the Director's Office. After determining that only a few individuals were authorized to communicate with the Transition Team, Mr. Wong interviewed those individuals to determine whether they possessed any responsive records. *See* Declaration of Norman Wong ("Wong Decl.") ¶4, ECF No. 10-4. Nothing more is required under FOIA.

In opposition, Plaintiff claims that EOUSA's search and declarations are deficient because EOUSA failed to search for incoming communications from the Transition Team, thereby interpreting Plaintiff's FOIA request too narrowly, and should have conducted electronic searches of employees' email accounts. EOUSA did not, however, interpret the request to seek only outgoing communications from EOUSA to the Transition Team. Mr. Wong specifically considered whether the custodians he identified received *incoming* communications from the Transition Team. *See* Wong Decl. ¶ 5 (The individuals interviewed "confirmed" that "they neither sent *nor received* any email or other written correspondence to or from any Transition Team member during the requested timeframe. . .") (emphasis added). EOUSA understood the request to be seeking both incoming and outgoing communications with the Transition Team; it just determined that the only custodians who were reasonably likely to have any such communications were the EOUSA officials who were designated to communicate with the Transition Team.

Plaintiff questions Mr. Jolly's credibility by arguing that, in his nine years of experience as an attorney specializing in FOIA at EOUSA, it is possible he does not have experience conducting a search identical to the one at issue in this case. Pl.'s Opp'n at 14. Mr. Jolly's involvement with prior presidential transitions is wholly irrelevant to his explanation for limiting EOUSA's search to the Director's Office. As someone with almost a decade of experience at EOUSA, Mr. Jolly knew that the Director's Office was the only component authorized to communicate with the Transition Team, and explained that no other component would be likely to have responsive records.

That determination was eminently reasonable, and, contrary to Plaintiff's argument, the reasons for it were explained in EOUSA's declarations. *See* Pl.'s Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Opp'n") at 12 (claiming that EOUSA's declarations fail "to provide any detail as to why others in the Director's office and/or in EOUSA generally would not have been expected to have received written communications with members of the Transition Team."). The Director's Office was the only component of EOUSA authorized to communicate with the Transition Team. Jolly Decl. ¶ 8. Mr. Wong further explained that "direct communication with the Transition Team was closely coordinated through [the Department of Justice's Justice Management Division (JMD)]," as one would reasonably expect given the nature of such communications; that "JMD served as the intermediary between EOUSA and the Transition Team in setting up the December 2 meeting;" and that, "[o]ther than at that meeting, EOUSA did not communicate directly with the Transition Team." Wong Decl. ¶ 4. There is no reason to doubt the good faith of the EOUSA declarants, nor has Plaintiff provided any reason to believe that the Transition Team communicated with EOUSA employees who were not authorized to do so. Plaintiff's "purely speculative claim[] about the existence and discoverability" of incoming communications from the Transition Team to individuals outside of the Director's Office cannot overcome the presumption of good faith accorded to Mr. Jolly's reasonable decision to limit the search to that component. *See SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)).

Indeed, a search based on Plaintiff's theory, that it is *possible* that any member of the Transition Team could have sent an email to anyone in EOUSA, would necessitate searching the email accounts of every employee of EOUSA. Plaintiff provided no limiting principle for which employees could have received such an email—its factual allegations largely centered on FBI

investigations not involving EOUSA (*see* Pl.’s Opp’n at 3-5)—and its “theoretical possibility” hypothesis certainly provides none. Such a search would be overly burdensome. *See Leopold v. DOJ*, No. 16-1827, 2018 WL 1384124 at *6 (D.D.C. March 19, 2018) (requiring the agency to search every employee’s records would be unduly burdensome).

Moreover, Plaintiff did not provide any email addresses for the individuals listed in its FOIA request. *See* Jolly Decl., Ex. A. Accordingly, the electronic search Plaintiff posits would require EOUSA to use overly broad search terms, such as “Mike Pence” and “Jared Kushner,” which would capture emails that do not constitute communications between the Transition Team and employees of EOUSA. FOIA does not require agencies to conduct such burdensome searches on the mere possibility that a custodian could have a responsive record. *See Oglesby*, 920 F.2d at 68 (An agency must search locations “that are *likely* to turn up the information requested.”) (emphasis added).

Nor was EOUSA required to conduct an electronic search of the records of the custodians it identified as reasonably likely to have responsive records. As set forth in EOUSA’s opening brief, no particular type of search is required by FOIA, courts have found that interviewing custodians to determine whether they have responsive documents can be an acceptable search methodology, and it was an acceptable way to conduct the search here. Def.’s Mot. at 6-8 (citing *James Madison Project v. DOJ*, 267 F. Supp. 3d 154 (D.D.C. 2017)). Plaintiff’s response to this is to try to distinguish *James Madison Project* on the grounds that the records there pertained to a particular book, as opposed to communications. Pl.’s Opp’n at 13. But the salient point is that here Plaintiff did not request any run-of-the-mill communications that an employee might not remember or be able to locate manually, but rather very recent communications with the

Presidential Transition Team—something that it is just as likely that employees would remember and be able to locate without an electronic search as records about a particular book.

Because EOUSA conducted a search reasonably calculated to locate all relevant documents, it is entitled to summary judgment.

CONCLUSION

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

Dated: March 22, 2018

Respectfully submitted,

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