IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER,	)	
Plaintiff,	)	Civil Action No. 1:15-cv-667 (CRC)
v.	)	
UNITED STATES DRUG ENFORCEMENT ADMINISTRATION,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Electronic Privacy Information Center ("EPIC" or "Plaintiff") has not presented any valid reason to deny the motion for summary judgment filed by defendant the Drug Enforcement Administration ("DEA" or "Defendant"). Plaintiff fails to undermine the reasonableness of the search that DEA conducted for records responsive to Part 1 of Plaintiff's request, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, which sought final DEA Privacy Impact Assessments ("PIAs") that were not already posted on DEA's website. The fact that DEA searched its record systems for PIAs instead of asking DEA employees if they knew "how many" such PIAs there were—information Plaintiff did not request—certainly presents no reason to question the adequacy of the search. And DEA's use of the term "final" to narrow the results of electronic searches for "Privacy Impact Assessment" or "PIA" was a reasonable means of identifying final versions of those documents. Finally, Plaintiff has presented no "clear evidence" that there exist additional final DEA PIAs in some other location within DEA, and DEA had no obligation to ask officials in other agencies or Department of Justice ("DOJ") components where additional final DEA PIAs might be found.

In regard to Part 2 of Plaintiff's request, which sought additional, more preliminary privacy documentation, Plaintiff agreed to accept the Office of Privacy and Civil Liberties ("OPCL") determination letters that DEA had found in its search after DEA explained that it found no final versions of the records that Plaintiff had requested. Plaintiff made no suggestion at the time that it expected DEA to conduct a new search for all determination letters, which were not the subject of Plaintiff's FOIA request. Plaintiff now suggests for the first time, in its brief in opposition to DEA's motion, that DEA should have conducted an additional search for all determination letters after Plaintiff agreed to accept the determination letters that had already

been found. Under these circumstances, the fact that DEA did not conduct or describe such a search in support of its motion has no bearing on DEA's entitlement to summary judgment. In any event, DEA has now conducted a search for determination letters but found no letters other than those that were already provided. Because DEA has satisfied its obligations under FOIA, its motion for summary judgment should be granted, and Plaintiff's cross-motion should be denied.

ARGUMENT[1]

I. EPIC DOES NOT PRESENT ANY GOOD REASON TO DOUBT THE ADEQUACY OF DEA'S SEARCH FOR RECORDS RESPONSIVE TO PART 1 OF PLAINTIFF'S FOIA REQUEST

In DEA's opening summary judgment brief and the accompanying Declaration of Katherine L. Myrick, DEA provided detailed information demonstrating that it conducted a thorough search responsive to Part 1 of Plaintiff's FOIA request, which sought final versions of any DEA PIAs that were not already publicly available on DEA's website. DEA's FOIA unit tasked DEA's Chief Information Officer Support Unit ("CIOSU"), the unit most familiar with PIAs and the process of their creation, to conduct a search for the requested records, and the CIOSU conducted both electronic and manual searches of the record systems that it identified, based on its familiarity with those systems, as likely to contain PIAs. In conducting the electronic searches, the CIOSU employed the search terms that it identified as likely to locate final DEA PIAs within the record systems that were searched, as well as additional search terms that—although not deemed likely to locate additional responsive records—were derived from the body of Plaintiff's FOIA request and from Plaintiff's later request for a supplemental search.

The details of DEA's search as described by DEA's declarant Ms. Myrick demonstrate that the search was "reasonably calculated to uncover all" records responsive to Plaintiff's

[1] Defendant hereby incorporates its Memorandum in Support of Motion for Summary Judgment in opposition to Plaintiff's Cross-Motion.

request, and thus satisfies the FOIA's adequate search requirement. *See Freedom Watch, Inc. v. Nat'l Sec. Agency*, 49 F. Supp. 3d 1, 5-6 (D.D.C. 2014) (quoting *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)), *aff'd and remanded by* 783 F.3d 1340 (D.C. Cir. 2015). In its attempt to contradict this conclusion, Plaintiff makes three arguments that, it claims, show that the DEA's search was inadequate. However, none of these arguments undermines the reasonableness of DEA's search for the final DEA PIAs that Plaintiff requested in Part 1 of its FOIA request.

A. DEA Was Not Required to Ask OPCL or CIOSU Employees to Identify How Many PIAs There Are

Plaintiff first suggests that DEA used an "incomplete search methodology" because, according to Plaintiff, DEA ignored "the most obvious source of information about the number of PIAs completed: the CIOSU and OPCL offices themselves." Pl. Opp. at 7, 8. According to Plaintiff, DEA should simply have "ask[ed] the responsible officials in possession of the relevant records how many there are." *Id.* at 8. This argument is flawed for several reasons. For one thing, Part 1 of Plaintiff's FOIA request did not ask for records identifying how many PIAs there are. Instead, it requested that DEA provide all final DEA PIAs that are not publicly available on DEA's website. *See* Declaration of Katherine L. Myrick ("Myrick Decl.," ECF No. 17-3) ¶ 7 & ex. A (ECF No. 17-4), at 8. DEA thus reasonably embarked on a search for records responsive to that request. *Id.* ¶¶ 10-22. Plaintiff contends that it was "obvious" that DEA should have asked how many PIAs there were, Pl. Opp. at 8, but fails to explain why that was necessary or why DEA's more straightforward approach of searching for the PIAs themselves was somehow inadequate or unreasonable.

Plaintiff's suggestion also misrepresents the nature of DEA's FOIA search obligation in other respects. Plaintiff argues that DEA's inquiry into "how many" PIAs "there are" should

have been directed to "responsible officials" in OPCL as well as DEA. Pl. Opp. at 8. However, it is well established that DEA had no obligation to attempt to involve OPCL in a search for records responsive to a FOIA request directed solely to DEA. OPCL is not a component of DEA; rather, OPCL is a separate office within the Department of Justice, and FOIA requests to OPCL must be directed to the Department's Office of Information Policy. *See* http://www.justice.gov/opcl/opcl-freedome-information-act.

Here, Plaintiff did not submit a FOIA request to OPCL. Instead, the only FOIA request at issue in this case was directed to DEA, and DEA is the only defendant in this litigation. Courts have repeatedly recognized that one Department of Justice component in receipt of a FOIA request is not required to search record systems in other Department of Justice components with separate FOIA offices. *Campbell v. U.S. Dep't of Justice*, -- F. Supp. 3d --, No. CV 14-1350 (RJL), 2015 WL 5695208, at *4 (D.D.C. Sept. 28, 2015) (holding DEA and EOUSA record systems need not be searched where plaintiff's FOIA request was submitted to Criminal Division); *Ellis v. U.S. Dep't of Justice*, 110 F. Supp. 3d 99, 106 (D.D.C. 2015) (similar); *see also* 28 C.F.R. § 16.3(a)(1) ("The Department has a decentralized system for responding to FOIA requests, with each component designating a FOIA office to process records from that component. . . . To make a request for records of the Department, a requester should write directly to the FOIA office of the component that maintains the records being sought.").

DEA was also not obligated to ask "responsible officials" at the CIOSU "how many" PIAs there are. DEA did rely on the knowledge of CIOSU personnel in conducting its search. As DEA's declarant Ms. Myrick has explained, CIOSU personnel were tasked with conducting the search precisely because the CIOSU coordinates DEA's compliance with PIA requirements and thus "knows the locations where responsive [PIAs] are likely to be found." Myrick Dec. ¶ 10. By

searching such locations, DEA, through the CIOSU, did exactly what FOIA requires—searching "those systems of records likely to possess the requested records." *Pinson v. U.S. Dep't of Justice*, -- F. Supp. 3d --, No. 12-01872, 2016 WL 614364, at *7 (D.D.C. Feb. 16, 2016) (internal quotation omitted). Ms. Myrick further explained that, "[b]ecause the CIOSU is familiar with and oversees DEA's compliance with th[e] [PIA online] posting requirement, it did not expect a search to locate many final DEA P[IAs] that were not publicly available on DEA's website." Myrick Decl. ¶ 18. Nevertheless, rather than relying on any preconceived assumptions, CIOSU personnel proceeded to conduct a search, which Ms. Myrick described in detail in her declaration. *See id.* ¶¶ 18-19. Given that process, the only information material to the adequacy of DEA's search is information about the search that the CIOSU actually conducted. Indeed, the answer to the question, "how many PIAs are there?" would not identify locations where records responsive to Part 1 of Plaintiff's FOIA request would likely be found.

Moreover, to the extent Plaintiff seeks to suggest that CIOSU personnel should simply have relied on their own memories regarding the locations of responsive records, notwithstanding the possibility of employee turnover or imperfect recollections, such a notion flies in the face of an agency's obligation to conduct a reasonable search by searching—where available—record systems where responsive records are likely to be found. Plaintiff cites no precedent for holding an agency's search unreasonable on the basis that it searched its record systems rather than simply asking current employees for information. Such a holding would turn FOIA requirements on their head.

B. DEA Reasonably Used the Term "Final" to Narrow the Results of Certain Electronic Searches, and Conducted Other Searches that Did Not Use the Term "Final" to Narrow the Results

Plaintiff next suggests that DEA "unnecessarily limited the scope of its search" by narrowing the results of certain searches of electronic systems using the term "final." Pl. Opp. at 7, 8. Plaintiff criticizes this attempt to narrow search results because, it contends, "[Plaintiff] did not seek only the PIAs with the word 'final' in a message containing a DEA PIA." Pl. Opp. at 9.

However, Plaintiff acknowledges that its FOIA request for PIAs "sought only final DEA PIAs." *See* Defendant's Statement of Material Facts (ECF No. 17-2) ¶ 4; Plaintiff's Statement of Material Facts (ECF No. 18-5) ¶ 1 (agreeing that this fact is not in dispute). DEA has explained that it used the term "final" to narrow the results after conducting electronic searches using the terms "Privacy Impact Assessment" and "PIA." Myrick Dec. ¶ 19. Such an initial search would likely locate every draft PIA, in addition to final PIAs, as well as records that simply contained the term "Privacy Impact Assessment" or "PIA." In the Second Declaration of Katherine L. Myrick, attached hereto, DEA elaborates that, pursuant to customary practice, the electronic file names of final DEA PIAs stored in the CIOSU Share Drive and SharePoint site would contain the word "final," and electronic mail messages transmitting a final PIA would also contain the word "final." Second Declaration of Katherine L. Myrick ("Second Myrick Decl.") ¶ 5. "A narrowing search using the term 'final' would locate final PIAs even though the final PIA itself did not contain the word 'final.'" *Id.*

In sum, the CIOSU determined that the term "final" should be used to narrow the initial search results because the word "final" would likely appear in the subject line or body of an e-mail message transmitting a final PIA, as well as in the electronic file names of final DEA PIAs located in DEA's Share Drive or SharePoint systems. *Id.* DEA's search for records

responsive to Part 1 of Plaintiff's request using the terms "Privacy Impact Assessment" and "PIA," and then narrowing the results using the term "final," was therefore reasonably calculated to locate all responsive records.

Moreover, separate from that search, DEA also searched the same record systems using specific search terms drawn from the letter accompanying Plaintiff's FOIA request, as well as from the e-mail in which Plaintiff, through counsel, requested a supplemental search. *See* Myrick Decl. ¶ 19 (identifying these additional search terms as Hemisphere, National License Plate Reader Initiative, LPR, DEA Internet Connectivity Endeavor, DICE, Special Operations Division, SOD, telecommunications metadata, telecommunications, and metadata); ¶ 33 (identifying additional search terms as USTO, Cellsite Simulator, Cell-site Simulator, phone data). DEA did not use the word "final" to narrow the results of those searches. Myrick Decl. ¶ 33; Second Myrick Decl. ¶ 5. DEA also conducted a manual search of its paper files, which did not rely on electronic means of narrowing initial electronic search results. *See* Myrick Decl. ¶ 19(a). Again, the manual search did not yield any additional responsive records. *Id.*

C. Plaintiff Has Not Provided "Clear Evidence" that Additional PIAs Must Exist, Nor Would Such Evidence Undermine the Reasonableness of DEA's Search

Plaintiff's last argument against the adequacy of DEA's search is that there is "clear evidence that additional PIAs must exist." Pl. Br. at 11. The "evidence" that Plaintiff cites consists of statements in some of the OPCL determination letters that DEA voluntarily provided to Plaintiff. Specifically, Plaintiff refers to four determination letters in which OPCL indicated that a DEA PIA is required for a particular application. *See* Pl. Br. at 10.[2]

[2] It should be noted that Plaintiff does not even identify these applications by name in either its brief or its Statement of Material Facts. *Compare* ECF No. 19-4, at 3, 4, 12, and 13 (addressing applications LIMS, DrugSTAR, NVNS, and WebOCTS), *with* Pl. Opp (ECF No. 19) & Pl.

However, these letters do not qualify as "clear evidence" that final DEA PIAs exist for the four applications referenced in the letters (much less for other supposed DEA applications), nor do they provide a "lead" regarding the location of additional responsive records, or how to find them. In order to warrant further search efforts by an agency, "[a] 'lead' must be 'both clear and certain' and 'so apparent that the [agency] cannot in good faith fail to pursue it.'" *Mobley v. CIA*, 806 F.3d 568, 582 (D.C. Cir. 2015) (quoting *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996)). Courts have found clear references in agency records to "undiscovered responsive records located in other record systems" to be leads requiring the agency to search those other record systems. *See id.*

Here, in contrast, the determination letters themselves make clear that no final DEA PIAs had been completed, at the time the letters were issued, for the four referenced applications. *See* ECF No. 19-4, at 3, 4, 12, and 13. Nor do the letters identify a different DEA record system as containing final DEA PIAs. Instead, the letters merely document OPCL's determination that, should DEA go forward with the application, a PIA will be required. There are many possible reasons that DEA's reasonable search did not locate final PIAs for these particular applications. It is possible that DEA did not in fact go forward with the identified applications. It is also possible that no final PIA has yet been approved. It is also possible that a final DEA PIA was

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Statement of Material Facts ¶¶ 20-22 (ECF No. 19-5) (containing no mention of these applications by name). Nor does Plaintiff advance any argument specific to those applications. Rather, Plaintiff appears to argue that because DEA did not find final DEA PIAs relating to those applications, there "must" exist final DEA PIAs relating to other, alleged DEA applications that Plaintiff did mention by name in its FOIA request, Myrick Decl. ex. A (ECF No. 17-4) and in its Statement of Material Facts, *see* Pl. Statement of Material Facts, ECF No. 19-5, ¶¶ 20-22 (referencing supposed DEA applications that were not identified in any determination letter provided to Plaintiff). Such an argument rests on a chain of unsupported inferences that amounts to nothing but speculation and does not undermine the adequacy of DEA's search. Indeed, DEA has already explained in other litigation that one of these programs, Hemisphere, "is not a DEA program." *EPIC v. DEA*, No. 14-cv-317, Def.'s Mem. in Opp. to Pl.'s Mot. for Summary Judgment and Reply Mem. in Support of Def.'s Mot. for Summary Judgment, ECF No. 20, at 5 (D.D.C. filed Dec. 22, 2014).

completed but was lost, misfiled, or destroyed. None of these possibilities undermines the adequacy of DEA's search, nor is DEA obligated to investigate and explain whether any of these, or some other possibility, is in fact the case. Indeed, courts have repeatedly rejected the notion that an agency must explain *why* it did not find a record that a plaintiff believes "must exist," instead holding that "FOIA does not require [an agency] to account for [records that it did not find], so long as it reasonably attempted to locate them." *West v. Spellings*, 539 F. Supp. 2d 55, 62 (D.D.C. 2008); *see also Whitaker v. CIA*, 31 F. Supp. 3d 23, 46 (D.D.C. 2014) ("Nothing in the law requires the agency to document the fate of documents it cannot find. If a reasonable search fails to unearth a document, then it makes no difference whether the document was lost, destroyed, stolen, or simply overlooked." (internal quotation omitted)); *Nance v. FBI*, 845 F. Supp. 2d 197, 203 (D.D.C. 2012) ("[T]he FOIA does not require agencies to create documents, answer questions, or explain what may have happened to documents that may have existed at one point but are no longer in the agency's possession.").

Plaintiff suggests that the four determination letters that it references should somehow have led DEA to "revise its search methodology" by "consult[ing] with the relevant administrators at OPCL and OMB and the DEA's SCOP [(Senior Component Official for Privacy)] about potential locations of PIAs." Pl. Opp. at 11. This suggestion should be rejected. Indeed, in making this suggestion, Plaintiff essentially acknowledges that the determination letters themselves fail to provide any lead regarding a location where additional final DEA PIAs would likely be found. In the absence of such a lead, DEA was under no obligation to go on the wild goose chase that Plaintiff proposes. For one thing, as explained above, DEA is not required to undertake a search beyond its own record systems. *See McGhee v. CIA*, 697 F.2d 1095, 1109 (D.C. Cir. 1983) (only "records in an agency's possession" qualify as "agency records" subject to

FOIA); *Ryan v. FBI*, 113 F. Supp. 3d 356, 364 (D.D.C. 2015) (an "affirmative obligation to search for records in [other] agencies . . . does not exist under FOIA"). The notion that DEA would consult with OMB (another agency) or OPCL (another DOJ component) goes far beyond the scope of the reasonable search that the FOIA requires.

As for DEA's SCOP, the four determination letters contain no suggestion that additional final DEA PIAs could be found by "consult[ing] with. . . the DEA's SCOP," Pl. Br. at 11. Moreover, as explained in the Second Declaration of Katherine L. Myrick, DEA's SCOP has "delegated the day-to-day creation, coordination, and completion of privacy documentation, including PIAs," to the CIOSU, the office that conducted DEA's search. Second Myrick Decl. ¶ 6. There is no reason to think that the CIOSU would be able to find additional final DEA PIAs by consulting with DEA's SCOP. *See id.*

Ultimately, Plaintiff has not provided a clear "lead" pointing to other locations within DEA as likely to contain additional final DEA PIAs. Absent such a showing, Plaintiff's contention that other PIAs "must exist," Pl. Opp. at 11, is mere speculation. The D.C. Circuit has established that a FOIA search should be evaluated based on whether the agency used reasonable search methods, not on whether those methods yielded the results that the FOIA requestor had hoped for. *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) (adequacy of the search is "generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search"); *see also EPIC v. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100, 107–08 & n.3 (D.D.C. 2005) (rejecting the plaintiff's argument that the agency's search should be held inadequate because the search did not locate documents the plaintiff believed to exist). Thus, even when a plaintiff conclusively proves that the agency at one time possessed an additional document that would fall within its request—which Plaintiff has not

done here—that is not a basis for holding the agency's search inadequate. *See, e.g.*, *Iturralde*, 315 F.3d at 315 ("[T]he failure of an agency to turn up one specific document in its search does not alone render a search inadequate."); *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) ("That [the Department of] State's search turned up only a few emails [responsive to the request] is not enough to render its search inadequate, even supposing that any reasonable observer would find this result unexpected."); *see also Freedom Watch, Inc.*, 49 F. Supp. 3d at 5-6 (agency "is not required to prove that it discovered every possibly relevant document, but simply must demonstrate a good faith effort.", *aff'd and remanded*, 783 F.3d 1340 (D.C. Cir. 2015).

Because DEA has met its burden to show that it conducted a search reasonably calculated to find all records responsive to Part 1 of Plaintiff's request, it should be granted summary judgment on this issue.

II. DEA WAS NOT OBLIGATED TO CONDUCT A SEARCH FOR DETERMINATION LETTERS

Plaintiff acknowledges that it agreed to accept the thirteen OPCL determination letters that DEA found when searching for records responsive to Part 2 of Plaintiff's request, after DEA explained that there were no final versions of the documents that Plaintiff had requested. *See* Defendant's Statement of Material Facts ¶ 11; Plaintiff's Statement of Material Facts ¶ 4 (agreeing that the facts set forth in ¶ 11 of Defendant's Statement were not in dispute). However, Plaintiff now contends that, after reaching this agreement, DEA should have searched for *all* determination letters. Pl. Opp. at 12. Plaintiff made no such suggestion when it agreed to accept the thirteen determination letters that had already been found in place of records responsive to Part 2 of its request. Nor does Plaintiff provide any support for this suggestion now. Given that Plaintiff failed to indicate at the time it agreed to accept the thirteen determination letters that it

had any expectation that an additional search for all determination letters would take place, DEA had no reason to conduct an additional search. Indeed, at the time of the parties' agreement, DEA had already conducted a search reasonably calculated to locate records responsive to Part 2 of Plaintiff's request. *See* Myrick Decl. ¶¶ 22-27. DEA's failure to conduct an additional search for records that Plaintiff's FOIA request did not seek cannot undermine Defendant's entitlement to summary judgment.

In any event, as a gesture of good faith, the DEA has now conducted a thorough search for determination letters. Second Myrick Decl. ¶ 7. Its search consisted of manually reviewing every electronic file contained in a Determinations Letters folder in the CIOSU Share Drive, where all determination letters received from OPCL are stored, and conducting a manual search of the CIOSU's paper files. *Id.* That search did not locate any additional determination letters that had not already been located and provided to Plaintiff. *See id.* Accordingly, the Court should grant summary judgment in favor of Defendant on this issue.

CONCLUSION

For the reasons set forth above and in Defendant's opening brief, the Court should grant summary judgment to Defendant and deny Plaintiff's cross-motion for summary judgment.

March 9, 2016

Respectfully submitted,

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