IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 2

I. EPIC's FOIA request and DEA's response 2

II. Proceedings in this action 4

ARGUMENT 5

I. Statutory background and standard of review 5

II. DEA conducted a reasonable search for responsive records 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Brayton v. Office of the U.S. Trade Representative, 641 F.3d 521 (D.C. Cir. 2011) 6

Coleman v. DEA, No. 1:14-CV-00315, 2015 WL 5730707 (D.D.C. Sept. 29, 2015) 5

Cunningham v. U.S. Dep't of Justice, 40 F. Supp. 3d 71 (D.D.C. 2014) 5

Defenders of Wildlife v. U.S. Border Patrol, 623 F. Supp. 2d 83 (D.D.C. 2009) 6

Dorsey v. Executive Office for U.S. Attorneys, 926 F. Supp. 2d 253 (D.D.C. 2013) 5

Freedom Watch, Inc. v. Nat'l Sec. Agency, 49 F. Supp. 3d 1 (D.D.C. 2014),
aff'd and remanded by 783 F.3d 1340 (D.C. Cir. 2015) 5, 6, 8

Iturralde v. Comptroller of Currency, 315 F.3d 311 (D.C. Cir. 2003)... 5

Judicial Watch v. Export–Import Bank, 108 F. Supp. 2d 19 (D.D.C. 2000) 6

Judicial Watch, Inc. v. Dep't of the Navy, 971 F. Supp. 2d 1 (D.D.C. 2013) 6

Milner v. Dep't of the Navy, 562 U.S. 562 (2011) 5

Nation Magazine v. U.S. Customs Serv., 71 F.3d 885 (D.C. Cir. 1995)... 8

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 5

Oglesby v. U.S. Dep't of the Army, 920 F.2d 57 (D.C. Cir. 1990) 8

Perry v. Block, 684 F.2d 121 (D.C. Cir. 1982) 6

SafeCard Servs., Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991) 6

Steinberg v. Dep't of Justice, 23 F.3d 548 (D.C. Cir. 1994) 6

Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344 (D.C. Cir. 1983)... 5

Wilbur v. CIA, 355 F.3d 675 (D.C. Cir. 2004) (per curiam) 5

Statutes

Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 ....*passim*

E-Government Act of 2002, Pub. L. 107-347, § 208, 116 Stat. 2899, 2921 (2002) 2

INTRODUCTION

In this case, Plaintiff Electronic Privacy Information Center ("Plaintiff" or "EPIC") challenges the adequacy of the search conducted by Defendant the Drug Enforcement Administration ("Defendant" or "DEA") for records responsive to Plaintiff's request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for certain DEA privacy documentation—namely, documents referred to as Privacy Impact Assessments ("PIAs"), Initial Privacy Assessments ("IPAs"), and Privacy Threshold Analyses ("PTAs"). In response to Plaintiff's request and clarification that it sought only final versions of these documents, DEA conducted a thorough search of the locations where responsive records were likely to be found and located a number of final DEA PIAs, all but one of which were already publicly available on DEA's website. DEA also determined, as a result of its search, that the process of preparing IPAs, or their predecessors, PTAs, did not result in final DEA IPA or PTA documents. Instead, a determination letter, prepared by the U.S. Department of Justice's Office of Privacy and Civil Liberties ("OPCL"), was the final document that emerged from this process. Plaintiff agreed to accept the thirteen determination letters that DEA located in its search in lieu of the IPAs and PTAs that it had sought in its FOIA request. Plaintiff received the PIA that was not already on DEA's website, as well as the thirteen determination letters with minimal redactions that are not in dispute. Because DEA's search was reasonably calculated to locate all records responsive to Plaintiff's FOIA request, the Court should grant summary judgment in favor of DEA.

BACKGROUND

I. EPIC's FOIA request and DEA's response

Plaintiff's FOIA request, dated February 20, 2015, sought two categories of records from DEA. Part 1 of its request sought "All P[IAs] the DEA has conducted that are not publicly available at http://www.dea.gov/FOIA/PIA.shtml." Declaration of Katherine L. Myrick ("Myrick Dec.," attached hereto) ¶ 7 & ex. A. Part 2 of its request sought "All P[TA] documents and I[PAs] the DEA has conducted since 2007 to present." *Id.*

Documents known as PIAs relate to requirements set forth in the E-Government Act of 2002, Pub. L. 107-347, § 208, 116 Stat. 2899, 2921 (2002) ("Section 208"). Among other things, Section 208 requires agencies to make PIAs publicly available, if practicable, once they have been finalized. *Id.* § 208(B)(1)(b)(iii). The IPA form (previously known as a PTA form) relates to a process developed by OPCL as part of the Department of Justice's privacy compliance process. As described in the Declaration of Katherine L. Myrick, DEA's Chief Information Officer Support Unit ("CIOSU"), within its Office of Information Systems, is the component of DEA that ensures and manages DEA's compliance with Section 208 and its interaction with OPCL. Myrick Dec. ¶¶ 10, 14, 17. DEA therefore identified the CIOSU as the DEA component best equipped to lead a search for the records identified in Plaintiff's FOIA request and tasked the CIOSU with carrying out such a search. *Id.* ¶ 10.

The CIOSU initially sought clarification from Plaintiff regarding whether Plaintiff intended to request only final DEA PIAs, IPAs, and PTAs or intended to include within the scope of its request all draft versions of such documents. *Id.* ¶ 11. Plaintiff clarified, through communication with undersigned counsel for Defendant, that it sought only final documents. *See id.*; Joint Status Report at 1, ECF No. 16. The CIOSU then searched for all records responsive to

Part 1 or Part 2 of Plaintiff's request, as described in detail in Ms. Myrick's declaration. *See* Myrick Dec. ¶¶ 18-19, 24. While the CIOSU identified its Share Drive—a set of internal network drives that serves as the primary location where the CIOSU stores privacy documentation—as the location most likely to contain any responsive records, it also searched additional locations. *Id.* Specifically, the CIOSU searched its paper files, Share Drive, SharePoint site, and relevant staff email, using search terms likely to identify responsive records, as detailed in Ms. Myrick's declaration. *Id.*

The CIOSU's search for records responsive to Part 1 of Plaintiff's request yielded a number of PIAs, but all but one of these were already publicly available on DEA's website, pursuant to the requirements of Section 208. *Id.* ¶¶ 19-21. The PIA that was not already publicly available related to an application that DEA no longer uses. *Id.* ¶ 20. The CIOSU's search for records responsive to Part 2 of Plaintiff's request did not locate any records that qualified as final versions of DEA IPA or PTA documents. *Id.* ¶¶ 24-25. Rather, the CIOSU concluded as a result of its search that the DEA IPA or PTA documents that it located were essentially working drafts that were used as part of an ongoing discussion with OPCL, and that the final document that emerged from this process was a determination letter issued by OPCL. *Id.* ¶ 25. The CIOSU found thirteen such determination letters during its search. *Id.* ¶¶ 24-25. Through undersigned counsel, DEA proposed to Plaintiff that it would provide the thirteen determination letters, redacted in accord with any applicable exemptions under § 552(b), in lieu of the IPAs and PTAs that Plaintiff had sought in Part 2 of its request. Myrick Dec. ¶ 26. Plaintiff accepted that proposal. *Id.*; *see also* Joint Status Report at 1, ECF No. 16.

DEA then sent Plaintiff the PIA that it had located that was not publicly available on DEA's website. *Id.* ¶ 28. In addition, in accord with Plaintiff's agreement to accept the thirteen

determination letters in lieu of the records identified in Part 2 of its FOIA request, DEA referred the thirteen determination letters to DOJ's Office of Information Policy ("OIP"), which processes FOIA requests for OPCL records, for processing and direct response to Plaintiff. *Id.* ¶¶ 29-30. By letter dated August 27, 2015, OIP sent the thirteen determination letters to Plaintiff. *Id.* ¶ 31. The letters contained redactions pursuant to FOIA's Exemption 6, 5 U.S.C. § 552(b)(6). Myrick Dec. ex. D, at 1.

After Plaintiff received the releases from DEA and OIP, it requested, through counsel, that DEA perform a supplemental search for PIAs. *See id.* ¶ 32. DEA was unable to identify in Plaintiff's request any other location where additional PIAs would likely be found, or any other search terms that would be likely to identify additional PIAs. *Id.* ¶ 33. However, because Plaintiff's request for a supplemental search identified two supposed DEA "programs" that it had not identified in its original FOIA request, the CIOSU conducted an additional search using search terms derived from Plaintiff's description of those supposed "programs" as detailed in Ms. Myrick's declaration. *Id.* The use of those terms did not yield any additional responsive records. *Id.* In addition, in order to verify that its original search had located all PIAs, DEA conducted the same search described above a second time. *Id.* This search did not locate any additional PIAs responsive to Plaintiff's request. *Id.* ¶¶ 33-34.

II. Proceedings in this action

Plaintiff filed its Complaint in this case on May 1, 2015. ECF No. 1. DEA filed its Answer on June 24, 2015. ECF No. 11. Plaintiff has informed DEA, through counsel, that it intends to challenge the sufficiency of DEA's search but does not intend to challenge any redactions in the thirteen determination letters that were released to Plaintiff. Joint Status Report at 1, ECF No. 16.

ARGUMENT

I. Statutory background and standard of review

The FOIA, 5 U.S.C. § 552, generally mandates disclosure, upon request, of government records held by an agency of the federal government except to the extent such records are protected from disclosure by one of nine exemptions. *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). At the same time, "FOIA 'was not intended to reduce government agencies to full-time investigators on behalf of requesters.'" *Cunningham v. U.S. Dep't of Justice*, 40 F. Supp. 3d 71, 84 (D.D.C. 2014) (quoting *Judicial Watch v. Export–Import Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000)).

Thus, while FOIA generally requires that an agency search for records responsive to a request, "[t]he adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). In other words, the agency should "'conduct[] a search reasonably calculated to uncover all relevant documents.'" *Freedom Watch, Inc. v. Nat'l Sec. Agency*, 49 F. Supp. 3d 1, 5-6 (D.D.C. 2014) (quoting *Weisberg*, 705 F.2d at 1351), *aff'd and remanded by* 783 F.3d 1340 (D.C. Cir. 2015). The adequacy of a search is not undermined by an agency's "failure to turn up a particular document." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam). Rather, under this reasonableness standard, the 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." *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

"FOIA cases typically and appropriately are decided on motions for summary judgment." *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009); *accord Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 527 (D.C. Cir. 2011). In order to prevail on the adequacy of a FOIA search at summary judgment, "the government must demonstrate the absence of a genuine dispute regarding the adequacy of its search for . . . responsive records." *Judicial Watch, Inc. v. Dep't of the Navy*, 971 F. Supp. 2d 1, 2 (D.D.C. 2013). "The Court may grant summary judgment on the basis of agency affidavits and declarations alone when they are 'relatively detailed and non-conclusory.'" *Freedom Watch, Inc.*, 49 F. Supp. 3d at 5-6 (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). "The affidavits need not 'set forth with meticulous documentation the details of an epic search for the requested records[.]'" *Id.* at 6 (quoting *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982)). Rather, an affidavit is sufficiently detailed if it describes "'what records were searched, by whom, and through what processes,'" including the search terms used. *Id.* (quoting *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551–52 (D.C. Cir. 1994); *see also Perry*, 684 F.2d at 127 ("[A]ffidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA.").

A presumption of good faith attaches to an agency's affidavit or declaration, "'which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.'" *Freedom Watch, Inc.*, 49 F. Supp. 3d at 6 (quoting *SafeCard Servs*., 926 F.2d at 1200). "Unless the record leaves 'substantial doubt as to the sufficiency of the search,' summary judgment for the agency is proper." *Coleman v. DEA*, No. 1:14-CV-00315, 2015 WL 5730707, at *6 (D.D.C. Sept. 29, 2015) (quoting *Dorsey v. Executive Office for U.S. Attorneys*, 926 F.

Supp. 2d 253, 256 (D.D.C. 2013)).

II. DEA conducted a reasonable search for responsive records

DEA's search for the documents sought by EPIC's FOIA request was reasonably calculated to uncover all documents responsive to the request. As explained above and, in greater detail, in the Declaration of Katherine L. Myrick, DEA identified one office—the CIOSU—likely to have responsive records and tasked that office with the responsibility to conduct searches for such records. Myrick Dec. ¶ 10. The CIOSU then identified the files likely to have responsive records and conducted a search of those files, which included both paper and electronic files. *Id.* ¶¶ 18-19, 24. In searching electronic files, the CIOSU used search terms, including "Privacy Impact Assessment," "Initial Privacy Assessment," and "Privacy Threshold Analysis," that were likely to identify any records responsive to Plaintiff's request. *Id.*

As a result of these searches, the CIOSU found a number of PIAs, but all but one of these were already publicly available on DEA's website, as required by Section 208. *Id.* ¶¶ 19, 20. DEA provided the one PIA that was not already publicly available—which related to an application no longer in use—to Plaintiff. *Id.* ¶¶ 20, 28. The CIOSU also determined that there were no final DEA IPA or PTA documents, and that OPCL determination letters were actually the final documents that were created through the IPA/PTA process. *Id*. ¶¶ 24-25. Plaintiff agreed to accept the thirteen determination letters that DEA had found in lieu of the IPAs or PTAs identified in its FOIA request. *Id.* ¶ 26; Joint Status Report at 1, ECF No. 16 , DEA referred the determination letters to OIP for processing, and these letters were released to Plaintiff with minor redactions. Myrick Dec. ¶¶ 30-31. Thus, it is only the adequacy of DEA's search for PIAs that is at issue here.

Ms. Myrick's declaration, which is detailed, nonconclusory, and entitled to a presumption

of good faith, demonstrates that DEA conducted a search of its files that was reasonable under the circumstances. *See Freedom Watch, Inc.*, 49 F. Supp. 3d at 5-6. DEA identified responsive documents as a result of its search, and Ms. Myrick also attests that "[t]here is no other location that could be searched, or search method that could be used, that is likely to yield additional responsive records." Myrick Dec. ¶ 35. DEA thus "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 the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). DEA's actions were sufficient to discharge its obligation to conduct an adequate search. *See Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). Accordingly, the Court should grant summary judgment in favor of DEA.

CONCLUSION

Because DEA conducted a reasonable search, the Court should grant summary judgment in favor of DEA.

December 22, 2015

Respectfully submitted,

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