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 MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The remaining issue in this case concerns the adequacy of a records search conducted by Defendant the Drug Enforcement Administration ("Defendant" or "DEA") pursuant to a request by Plaintiff Electronic Privacy Information Center ("Plaintiff" or "EPIC") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff sought certain DEA privacy documentation, including any final Privacy Impact Assessments ("PIAs") that were not already posted on DEA's website. After receiving DEA's response to its request, Plaintiff challenged only the adequacy of DEA's search, and the parties cross-moved for summary judgment on that issue. In its Memorandum Opinion of September 13, 2016 (ECF 24), the Court granted in part and denied in part DEA's motion, and denied in part and reserved judgment in part on Plaintiff's cross-motion. The Court held that DEA's initial searches were reasonable but directed DEA to conduct a limited additional search for final PIAs for four specific DEA applications based on information that appeared in determination letters issued by the Department of Justice's Office of Privacy and Civil Liberties ("OPCL") for those applications.

DEA has now conducted the additional searches identified by the Court. DEA's searches did not locate any final PIAs other than those that had been found in DEA's original searches. These searches also failed to reveal any leads suggesting other locations where final PIAs for the four applications would likely be found. DEA therefore renews its motion for summary judgment with respect to the adequacy of DEA's search for the DEA PIAs that Plaintiff requested. DEA's supplemental search was reasonably calculated to locate any additional responsive DEA PIAs that were not identified in DEA's original search. Accordingly, the Court should grant judgment in favor of DEA.

RELEVANT BACKGROUND AND PROCEDURAL HISTORY

The Court set forth the background of this case in its Memorandum Opinion of September 13, 2016. *See* ECF 24; *see also* Defendant's Memorandum in Support of Motion for Summary Judgment, ECF 17-1, at 2-4. The description here focuses on background relevant to the remaining issue in the case.

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 ("First Myrick Dec.," ECF 17-3) ¶ 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. No. 107-347, § 208, 116 Stat. 2899, 2921 (2002) ("Section 208"). At the U.S. Department of Justice, the determination of whether a PIA is required for a particular application is made by OPCL, based on an interactive exchange with the agency. First Myrick Dec. ¶¶ 10, 25. OPCL also provides final approval of PIAs. *Id.* ¶ 10. Where a PIA is required, agencies must make it publicly available, if practicable, once it has been finalized. Pub. L. No. 107-347, § 208(B)(1)(b)(iii).

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, including the requirement that PIAs be publicly posted, as well as DEA's interaction with OPCL in regard to privacy documentation. First Myrick Dec. ¶¶ 10, 14, 17; Second Declaration of Katherine L. Myrick ("Second Myrick Dec.," ECF 21-1) ¶ 6. The CIOSU

"is the DEA's point-of-contact for the OPCL and acts as a liaison between the OPCL and the DEA's Senior Component Official for Privacy ("SCOP")." Mem. Op. of Sept. 13, 2016, at 3.

The CIOSU "manages the PIA process tightly." Third Declaration of Katherine L. Myrick ("Third Myrick Dec.," attached hereto) ¶ 12. Indeed, "when OPCL has provided final approval of a DEA PIA, it has transmitted this approval directly to CIOSU." *Id.* The CIOSU then sends the PIA to the SCOP for signature but closely monitors its status and makes sure to track down a PIA if the SCOP has not signed it within a reasonable period of time. *Id.* ¶ 13.

In light of the CIOSU's role, DEA identified the CIOSU as the DEA office best equipped to lead a search for the records that Plaintiff sought and tasked the CIOSU with carrying out such a search. First Myrick Dec. ¶ 10. After confirming, through counsel, that Plaintiff sought only final DEA PIAs, the CIOSU "crafted a search tailored to [Plaintiff's] request" by searching its paper files, its SharePoint site, its Share Drive, and e-mail accounts of the CIOSU Chief and staff whose official duties include working on privacy documentation. *See* Mem. Op. of Sept. 13, 2016, at 3; First Myrick Dec. ¶¶ 18-19.

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. First Myrick Dec. ¶¶ 19-21. The PIA that was not already publicly available related to an application that DEA no longer uses. *Id.* ¶ 20.

In regard to Part 2 of Plaintiff's request, Plaintiff agreed to accept OPCL determination letters, which the CIOSU had located during its search, in lieu of PTAs and IPAs. Mem. Op. of Sept. 13, 2016, at 4. DEA sent these determination letters to OPCL for review and release, and OPCL released 13 minimally redacted determination letters to Plaintiff in August 2015. *Id.* Four of these determination letters—regarding DEA applications called Laboratory Information

Management System ("LIMS"), DrugStar, the Nationwide Video Network System ("NVNS"), and the Web OPR Case Tracking System ("WebOCTS")—indicated OPCL's determination that DEA should complete a PIA for those applications. *See* ex.3 to Plaintiff's cross-motion., ECF 18-4, at 3 (LIMS), 4 (DrugStar), 12 (NVNS), 13 (WebOCTS). While Plaintiff requested a supplemental search based in part on these four determination letters, DEA was unable to identify from Plaintiff's correspondence or from the determination letters any additional search method that would be likely to locate final DEA PIAs for the four applications. First Myrick Dec. ¶ 33; Third Myrick Dec. ¶¶ 6-7, 12-13, 15.

II. Prior Summary Judgment Proceedings and the Court's Memorandum Opinion of September 13, 2016

Plaintiff filed its Complaint in this case on May 1, 2015. ECF 1. DEA filed its Answer on June 24, 2015. ECF 11. DEA filed a motion for summary judgment on December 22, 2015, ECF 17, and Plaintiff cross-moved for summary judgment on January 22, 2016, ECF 18. The sole issue in dispute was the adequacy of DEA's search for responsive records.

On September 13, 2016, the Court issued a Memorandum Opinion granting in part and denying in part DEA's motion, and denying in part and reserving judgment in part on Plaintiff's cross-motion. Mem. Op. of Sept. 13, 2016, at 11. In its decision, the Court upheld as reasonable DEA's initial search, rejecting Plaintiff's arguments that DEA should have "spoken with OPCL, CIOSU, and SCOP employees to determine the number and location of completed PIAs," and that DEA should not have used the word "final" as a narrowing term in its electronic searches. *Id.* at 7-8.

However, the Court held that the four OPCL determination letters that directed DEA to prepare PIAs for four specific DEA applications qualified as leads that DEA should have followed. *Id.* at 9-10. The Court recognized that "the DEA is not required to account for specific

records," but emphasized that DEA must "'reasonably attempt[] to locate them.'" *Id.* at 10 (quoting *West v. Spellings*, 539 F. Supp. 2d 55, 62 (D.D.C. 2008)). The Court identified two additional searches that appeared to be warranted based on the record before it. First, the Court observed that "the CIOSU apparently did not run any independent searches using the [four application] names as search terms—as it did with earlier searches." *Id.* Second, the Court observed that "the OPCL letters were directed to the SCOP, but no efforts were made to search the SCOP's records." *Id.* Given that the SCOP "reviews, approves, and signs final PIAs," the Court reasoned that "[i]f the SCOP had reviewed and approved a final PIA without returning it to the CIOSU, a final version of the PIA might remain with the SCOP," and that the CIOSU "did not explain why searching the SCOP, once [Plaintiff] presented evidence of potential additive PIAs, was not likely to uncover responsive records." *Id.* The Court therefore ordered DEA "either to conduct a supplemental search consistent with [the Court's] opinion or explain in a supplemental declaration why such a search would not be likely to uncover the remaining records in question." *Id.*

III. DEA's Further Explanations and Searches in Response to the Court's Order

Pursuant to the Court's order, DEA conducted additional searches and also provided further explanations, as described in the Third Declaration of Katherine L. Myrick, attached hereto. With respect to the Court's direction that DEA either conduct independent searches using the four application names identified in OPCL determination letters, or explain why such searches would not be likely to uncover responsive records, Ms. Myrick explains that DEA did not consider such searches likely to locate final PIAs for those applications because its original search of the Share Drive, using the terms "final," "Privacy Impact Assessment," and "PIA," should have identified all final DEA PIAs in DEA files and did in fact locate all final DEA PIAs

that were previously found. Third Myrick Dec. ¶ 6. Moreover, the fact that determination letters for those applications were located during previous searches indicated that DEA had already searched the locations where privacy documentation relating to those applications would likely be found. *Id.* ¶ 7. However, in light of the Court's order, the CIOSU did conduct additional searches of the records locations previously described—the CIOSU's paper files, its Share Drive, its SharePoint site, and the electronic mail of the CIOSU Chief and staff whose official duties including working on privacy documentation—using as search terms the names of the four applications that OPCL determination letters had indicated would require PIAs. *Id.* ¶¶ 8-10. These searches did not identify any additional final DEA PIAs, including PIAs for the four applications. *Id.* ¶¶ 8, 10. Nor did these searches uncover any leads suggesting where additional final DEA PIAs would likely be found. *Id.*

With respect to the Court's direction that DEA either search the SCOP's records or explain why such searches would not be likely to uncover responsive records, Ms. Myrick explains that the SCOP has not received final PIAs directly from OPCL; rather, OPCL has transmitted its final approval directly to the CIOSU. Third Myrick Dec. ¶¶ 12, 15. The CIOSU then sends the PIA to the SCOP but closely monitors the PIA's location and tracks it down if the SCOP fails to sign it within a reasonable time. *Id.* ¶ 13. The SCOP does not retain final PIAs and has no file for this purpose; rather, the SCOP has the CIOSU keep all PIA-related files. *Id.* ¶ 15.

In light of the Court's order, Ms. Myrick met with the SCOP. *Id.* ¶ 14. The SCOP advised that his e-mail was unlikely to contain final DEA PIAs, but it was the only location he could identify with even a remote possibility of containing such records. *Id.* ¶ 15. The SCOP conducted a search of his e-mail using the terms "Privacy Impact Assessment" and "PIA" as search terms. *Id.* ¶ 16. He then visually reviewed the results in order to identify any results relating to the four

applications mentioned in the OPCL determination letters or containing attachments that could be PIAs. *Id.* ¶ 17. The SCOP also conducted a separate search using the four application names—specifically, using the terms "Laboratory Information Management System," "LIMS," "DrugSTAR," "National Video Network System," "NVNS," "Web OPR Case Tracking System," and WebOCTS." *Id.* ¶ 18. These searches did not locate any final DEA PIA in the SCOP's e-mail, including final DEA PIAs for the four applications mentioned in the OPCL determination letters. *Id.* Nor did these searches uncover any leads suggesting where additional final DEA PIAs would likely be found. *Id.*

Ms. Myrick concluded 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." *Id.* ¶ 19.

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*, 134 F. Supp. 3d 294, 304 (D.D.C. 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 the requested DEA PIAs

DEA's search for the documents sought by EPIC's FOIA request was reasonably calculated to uncover all documents responsive to the request. The Court has previously upheld DEA's initial search as reasonable and granted summary judgment to DEA on that issue. Mem. Op. of Sept. 13, 2016, at 10-11. In addition, as explained above and as set forth in detail in the attached Third Declaration of Katherine L. Myrick, DEA has now fully responded to the questions that the Court identified in its Memorandum Opinion of September 13, 2016. In particular, Ms. Myrick has provided further detail in order to explain that the additional searches identified by the Court would be unlikely to locate additional responsive records. Third Myrick Dec. ¶¶ 6-7, 12-15. Nevertheless, DEA proceeded to conduct those searches. *Id.* ¶¶ 8-10, 14-18. The Court should therefore grant summary judgment to DEA on the single remaining issue regarding the adequacy of DEA's supplemental search.

Ms. Myrick's Third 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. Although the additional searches pursuant to the Court's September 13, 2016 order did not identify final DEA PIAs for the four applications identified in the OPCL determination letters, the failure to find specific documents does not undermine the reasonableness of DEA's search. *Wilbur*, 355 F.3d at 678. Ms. Myrick attests that the additional searches did not identify further leads regarding the likely location of final DEA PIAs for the four applications, and 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." Third Myrick Dec. ¶¶ 8, 10, 18, 19. As explained in prior briefing, there are numerous possible explanations for why final DEA PIAs for these programs were not located. *See* Reply, at 8-9. Indeed, the OPCL determination letters themselves do not establish that final DEA PIAs for those applications actually exist. It is possible that DEA did not proceed with the applications that those determination letters were addressing and thus did not proceed with finalizing an associated PIA, or that approval of a final PIA is still pending. It is also possible that a final DEA PIA was 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. This Court has already recognized the well-established principle that agencies need not explain *why* they did not find a specific record. *See* Mem. Op. of Sept. 13, 2016, at 10; *see also West*, 539 F. Supp. 2d at 62 ("FOIA does not require [an agency] to account for [records that it did not find], so long as it reasonably attempted to locate them."); *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.").

Here, DEA has again "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.

October 27, 2016

Respectfully submitted,

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