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)

PLAINTIFF'S REPLY IN SUPPORT OF THE CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Electronic Privacy Information Center ("EPIC") submits this Reply in support of the Cross-motion for Summary Judgment. The defendant Drug Enforcement Administration ("DEA") has failed to make a "good faith effort" to search for responsive records as required by the Freedom of Information Act ("FOIA").

ARGUMENT

EPIC has made clear from the outset that it requested: "all of the DEA's privacy assessments not already published online." *See* Def. Mot. Summ. J., Ex. A at 4, ECF No. 17-4. Yet the DEA has failed to produce or even locate several Privacy Impact Assessments ("PIAs") that should be in possession of the agency because it was required to conduct them years ago.

The agency has refused to search where responsive records would likely be found and has used search techniques that would necessarily exclude relevant records. The fact that the agency claims not to know how many PIAs exist or where to find them strains all credibility. Def. Opp'n at 3. The DEA goes so far to imply in its Opposition that the important privacy documents EPIC seeks might have been "lost, misfiled, or destroyed." Def. Opp'n 9. Yet the agency does not

seem at all disturbed by the fact that key privacy assessments, which are required by law to be made public, are missing from the agency's records. The agency is required to use "methods which can be reasonably expected to produce the information requested," *Mobley v. CIA*, 806 F.3d 568, 580 (D.C. Cir. 2015), yet the DEA in this case refuses to consult with the agency officials most likely to know where the records are located. Def. Opp'n 9.

As both EPIC's submissions and the Justice Department letters provide corroborating evidence that the records sought exist, the DEA has failed to conduct a reasonable search for responsive records.[1]

I. The DEA's failure to contact relevant agency officials and insistence on using unnecessary limiting terms in its electronic searches raises substantial doubt as to the sufficiency of the search

The agency argues in its opposition that there is no "good reason to doubt the adequacy of the DEA's search for records," and that the agency was "not required" to contact officials who are in charge of the privacy impact assessments that EPIC requested. Def. Opp'n 2–3. But the agency's arguments miss the mark for four reasons: (1) communicating with relevant agency officials responsible for privacy assessments is a logical step in the search process; (2) a lack of intra-agency communication raises doubt about the sufficiency of the search; (3) using the term "final" to limit the scope of the electronic search was not necessary and likely excluded responsive records; and (4) there is clear evidence on the record that the agency is in possession of the missing PIAs.

The DEA has not demonstrated "beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Higgins v. DOJ*, 919 F. Supp. 2d 131, 139 (D.D.C. 2013) (quoting *Ancient Coin Collectors Guild v. U.S. Dep't of State,* 641 F.3d 504, 514

[1] Because the DEA conducted a supplemental search for determination letters, as explained in the Second Myrick Declaration, EPIC no longer contests the adequacy of the search for additional determination letters.

(D.C. Cir. 2011)). Where, as in this case, the record "leaves substantial doubt as to the sufficiency of the search, summary judgment for the agency is not proper." *Id*. (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). EPIC has shown that the DEA's search did not uncover specific responsive records, and the evidence on the record supports the conclusion that these records must exist in some form.

EPIC is not asking the agency to go on a "wild goose chase," Def. Opp'n 9; EPIC is simply asking the agency to contact the agency officials in possession of the records and to refrain from unnecessarily limiting the scope of electronic searches. None of the cases cited by DEA involved a search so specific and narrow as this one—EPIC has identified a few key documents that are produced and handled by specific offices within the Department of Justice—and no case supports the agency's position that it can rely on a narrow electronic search to conclude that records do not exist when the evidence clearly indicates otherwise. *See, e.g., Mobley v. CIA*, 806 F.3d 568, 573 (D.C. Cir. 2015) (involving a request for "*all records in any way* relating to, pertaining to, or mentioning [plaintiff] by *any and all* persons or entities, including all persons acting on behalf of the United States.") (emphasis added); *Pinson v. U.S. DOJ*, __ F. Supp. 3d __, No. 12-01872, 2016 WL 614364, at *1–4 (D.D.C. Feb. 16, 2016) (involving requests for "*any* correspondence or electronic messages," "records maintained by the [DOJ]" in connection with a European court's ruling, and "*all* information" related to the hiring of government officials) (emphasis added); *Whitaker v. CIA*, 31 F. Supp. 3d 23, 28 (D.D.C. 2014) (involving a request for records "relat[ing] *in any way* to five individuals") (emphasis added).

If the DEA persists in its position that these privacy assessments, required by law, were never conducted, then that would likely be of interest to congressional oversight committees. But

the agency should first undertake a reasonable search before it concludes that no such records exist.

A. The DEA's failure to contact relevant agency officials raises substantial doubt

The DEA argues that it "was not obligated to ask 'responsible officials' at the CIOSU 'how many' PIAs there are" and that it "had no obligation to attempt to involve OPCL" in the search. Def. Opp'n 4. But this mischaracterizes EPIC's argument and misses the point entirely. An agency's search process is "measured by a standard of reasonableness and is dependent on the circumstances of the case." *Higgins*, 919 F. Supp. 2d at 139 (quoting *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). EPIC's argument is simple: it was unreasonable for the agency to conclude the search without contacting the agency officials responsible for authorizing, overseeing, and completing the records sought in EPIC's FOIA Request.

"The agency cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (internal quotations omitted). There are several agency officials who should, by nature of their duties, know whether the responsive records exist. *See* Pl. Cross Mot. Summ. J. at 4, ECF No. 18-1 (describing the responsibilities of OMB and OPCL). Indeed, the DEA Senior Component Official for Privacy ("SCOP") "has overall responsibility for DEA's privacy program and policies." Second Declaration of Katherine L. Myrick ¶ 10, ECF No. 21-1. Additionally, the "SCOP reviews, approves, and signs final PIAs" *Id.* Yet despite the role of the SCOP in overseeing privacy assessments, the DEA never contacted the SCOP or searched their files. *See* Declaration of Katherine L. Myrick ¶ 18, No. 17-3. Given the responsibilities of the SCOP, it was not reasonable to leave them out of the process or to exclude their files and messages from the electronic search. "[C]onsulting with those who have

expertise in where to locate documents" is a best practice for agency searches. *Coleman v. DEA*, --- F. Supp. 3d ---, No. 1:14-cv-00315, 2015 WL 5730707, at *5 (D.D.C. Sept. 29, 2015).

Furthermore, EPIC is not arguing that the DEA was required by law to "search record systems" controlled by other DOJ subcomponents or agencies. Def. Opp'n 4. EPIC is simply arguing that the DEA's failure to contact other relevant agency officials calls into doubt the sufficiency of the agency's search process. The DEA's reliance on *Campbell v. DOJ*, -- F. Supp. 3d --, No. CV 14-1350 (RJL), 2015 WL 5695208 (D.D.C. Sept. 28, 2015), and *Ellis v. DOJ*, 110 F. Supp. 3d 99 (D.D.C. 2015) is misplaced because those cases involved overly broad requests for records and a complaint by the plaintiff that the agency did not search unrelated databases after responsive records were already located in the main agency database. *See Campbell*, 2015 WL 5695208 at *1, *4. Here, unlike in *Campbell* and *Ellis*, the record request is precise and there is no dispute that the other offices have copies of all DEA PIAs.

B. The DEA has not justified the unnecessary narrowing of electronic search results

The DEA argues that its electronic search method was reasonable because it was "customary practice" to include the term "final" in file names on a specific database. Def. Opp'n 6. But the DEA has not provided any evidence to show that it was necessary to narrow the search for responsive records in this way. EPIC has also made clear that this practice would improperly exclude completed PIAs.

The DEA bears the burden of showing that its search methodology was reasonable, *DiBacco v. U.S. Army*, 795 F.3d 178, 188 (D.C. Cir. 2015), and it has not provided support for the proposition that it was reasonable to limit the scope of the search as it did. The DEA states incorrectly that EPIC agreed to limit the search in this way. Agencies traditionally withhold draft versions of documents, and EPIC recognizes that processing numerous drafts of the same

material can cause substantial delays in a FOIA case. But for every official record or assessment, there must be one version that is considered final. Even PIAs that have not been formally signed or published on the DEA website can be "final" if they have been completed and are no longer being actively revised. The DEA concedes as much in its Opposition, where it considers the possibility that "no final PIA has yet been approved" concerning the programs that EPIC highlighted. Def. Opp'n at 8. EPIC agreed to limit its request to final PIAs, not final PIAs that had also been approved for release.

Moreover, the DEA has not explained why it was necessary to narrow the scope of its electronic search—it has not provided any evidence to show, for example, that the search produced too many results to review without using the limiting term. EPIC is not asking the agency to go on a "wild goose chase" in this case. Def. Opp'n 9. Instead, EPIC crafted a narrow request specifically designed to target the most significant privacy reviews that the agency is required by law to complete and publish. This case does not involve an "extremely broad" request like the one at issue in *American Immigration Council v. DHS*, 21 F. Supp. 3d 60, 73 (D.D.C. 2014), yet even in that case the court found that the agency's search was unreasonable where it failed to search additional "offices and sub-offices" identified by the plaintiff. *Id*. at 72.

C. There is "clear evidence" to show that the DEA has conducted the privacy assessments that EPIC seeks here

The agency avers in its opposition that despite the fact OPCL "indicated that a DEA PIA is required for a particular application," there is no "clear evidence" that those PIAs exist. Def. Opp'n 7–8. But the agency itself has acknowledged that some of these programs are ongoing and that a PIA is required pursuant to the OPCL determination letters.

For example, the determination letter for the Laboratory Information Management System ("LIMS") stated that "the DEA must complete a privacy impact assessment (PIA) for

this system." Pl's Ex. 3 at 12, ECF No. 18-4. LIMS was a system that has been in use by the DEA since at least 2004. *See* Follow-up Audit of the Drug Enforcement Administration's Laboratory Operations (Jan. 2004).[2] And LIMS is still in use today. *See* Laboratory Information Management System (Mar. 1, 2016).[3] The fact that the DEA was required to conduct a PIA for LIMS and the system was clearly implemented suggest a PIA exist.

Similarly, the determination letter for the Web OPR Case Tracking System states that a PIA is required for the system. Pl's Ex. 3 at 22. The 2010 determination letter even notes that a draft PIA was received and is currently being reviewed. *Id.* The Web OPR Case Tracking System is currently in use. *See* Web OPR Case Tracking System.[4] Thus, per the determination letter and the requirements of the E-government Act, a PIA exists for the system but the DEA has failed to locate it. Furthermore, the DEA has not denied that the other programs identified by the determination letters exist.

The failure to locate PIAs for these systems creates substantial doubt as to the adequacy of the agency's search methodology. This is not a case, like *Mobley v. CIA*, 806 F.3d 568 (D.C. Cir. 2015), where the agency is being asked to pursue "leads that might be contained in documents released by other agencies where it does not become aware of those documents until after it has completed its search." *Id*. at 582. Here, the agency itself is aware of the PIA obligations outlined in the determination letters, is aware of the current status of these programs, and should be aware of where the relevant assessments are stored.

It is especially troubling that the DEA seeks to justify its failure to produce important privacy assessments on the ground that "the FOIA does not require" it to "account for records that it did not find." Def. Opp'n 9. This is not a case like *West v. Spellings*, 539 F. Supp. 2d 55

[2] https://oig.justice.gov/reports/DEA/a0417/exec.htm.
[3] http://catalog.data.gov/dataset/laboratory-information-management-system-cc6c6.
[4] https://catalog.data.gov/dataset/web-opr-case-tracking-system-05593.

(D.D.C. 2009) where a plaintiff requested records that the agency simply "does not maintain," *id*. at 59. Courts have recognized that in some cases "an agency record contains a lead so apparent that the [agency] cannot in good faith fail to pursue it." *Whitaker v. CIA*, 31 F. Supp. 3d 23, 45 (D.D.C. 2014) (quoting *Kowalcyzk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996)). This is such a case, and the agency should be required to locate and identify all PIAs related to the programs identified in the OPCL Determination Letters.

CONCLUSION

For the foregoing reasons, Court should deny the DEA's Motion for Summary Judgment in part and grant EPIC's Cross-Motion for Summary Judgment in part.

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Respectfully Submitted,

MARC ROTENBERG, D.C. BAR # 422825
EPIC President

ALAN BUTLER, D.C. BAR # 1012128
EPIC Senior Counsel

/s/ Jeramie D. Scott
JERAMIE D. SCOTT, D.C. BAR # 1025909
Electronic Privacy Information Center
1718 Connecticut Ave. NW, Suite 200
Washington, DC 20009
(202) 483-1140
jscott@epic.org

Counsel for Plaintiff