

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
NBC 7 SAN DIEGO, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	Civil Action No. 19-1146 (RBW)
UNITED STATES DEPARTMENT OF)	
HOMELAND SECURITY, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

**MEMORANUDM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

April 20, 2020

Respectfully submitted,

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Undersigned counsel, on behalf of Defendant U.S. Department of Homeland Security (“DHS”) and DHS’s component-agencies, Defendant U.S. Customs and Border Protection (“CBP”), and Defendant U.S. Citizenship and Immigration Services (“USCIS”), respectfully submits this Memorandum in Support of DHS’s Motion for Summary Judgment and CBP’s and USCIS’s Motion for Partial Summary Judgment. For the reasons stated below: (1) DHS has fulfilled its obligations under the Freedom of Information Act (“FOIA”) with respect to the FOIA request submitted by Plaintiff Tom Jones on behalf of himself and Plaintiff NBC 7 San Diego (“NBC 7 Request”), and Plaintiff Reporters Committee For Freedom in the Press (“RCFP Request” and, together with the NBC 7 Request, “FOIA Requests”); (2) USCIS has fulfilled its obligations under FOIA with respect to Item 10 of the RCFP Request (“USCIS Search”); and (3) CBP has fulfilled its obligations under FOIA with respect to certain aspects of its search for records responsive to Item 9 of the RCFP Request and Items 3 and 4 of the NBC 7 Request (“CBP Searches”), as set forth more fully below. Judgment should be entered in favor of DHS pursuant to Federal Rules of Civil Procedure (“Rule”) 56. Judgment should also be entered in favor of USCIS and CBP pursuant to Rule 56 with respect the USCIS Search and CBP Searches.

BACKGROUND

Defendants DHS, CBP, and USCIS (“Defendants”) respectfully refers the Court to the accompanying Statement Of Undisputed Material Facts (“SUMF”) for a complete statement of the factual background of this matter.

In sum, at this stage of the above-captioned litigation, Defendant DHS has completed its searches for documents responsive to the FOIA Requests and that the search did not locate any responsive records. SUMF ¶ 23. Defendants CBP and USCIS have conducted searches designed to identify records potentially responsive to certain items from the FOIA Requests and have

some OR all? wtf is this?

determined that some or all of the records returned by the searches and subsequently processed were not responsive to the FOIA Requests. SUMF ¶¶ 8, 16.

Plaintiffs Tom Jones, NBC 7 San Diego, and RCFP (“Plaintiffs”) have disputed Defendants’ determination that records identified as potentially responsive to various items in the FOIA Requests after hitting on various search terms were not, in fact, responsive to the requests. See ECF No. 21 at 4-5, 7-9. The parties have agreed to submit the issue of whether Defendants

have the discretion to determine the responsiveness of records hitting on search terms to the Court in this motion. See *id.* interesting phrasing. find cases limiting agencies’ discretion in this sense

LEGAL STANDARD

I. Summary Judgment Under Rule 56 In FOIA Cases

Summary judgment is appropriate when the pleadings and evidence “show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). It is up to the party moving for summary judgment to demonstrate the absence of a genuine issue of material fact. See *Celotex*, 477 U.S. at 323. A genuine issue is one that “might affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party “may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Id.*

“[T]he vast majority of FOIA cases can be resolved on summary judgment.” *Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); see also *Media Research Ctr. v. U.S. Dep’t of Justice*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) (“FOIA cases typically and appropriately are decided on motions for summary judgment.”) (quoting *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009)). A government agency may obtain

summary judgment in a FOIA case by relying on “relatively detailed” and “nonconclusory” declarations. *McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983). “[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe ‘the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007) (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). Once the court determines that an agency has released all non-exempt material, it has no further judicial function to perform under FOIA and the FOIA claim is moot. *See Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982).

II. Reasonable Search For Responsive Records

“The 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) (citations and internal quotation marks omitted). An agency “fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents.” *Ancient Coin Collectors Guild v. U.S. Dep’t of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) (citations and internal quotation marks omitted). A search need not be exhaustive, *see Miller v. U.S. Dep’t of State*, 779 F.2d 1378, 1383 (8th Cir. 1995), and it need not be perfect, *see DiBacco v. U.S. Army*, 795 F.3d 178, 191 (D.C. Cir. 2015) (“[A]dequacy – not perfection – is the standard that FOIA sets.”).

Under the FOIA, the agency search process includes a determination regarding the responsiveness of the located records. *See* 5 U.S.C. § 552(a)(3)(D) (“For purposes of this paragraph, the term ‘search’ means to review, manually or by automated means, agency records

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for the purpose of locating those records which are responsive to a request.”). Judicial review of an agency’s response can therefore address its assessment of responsiveness. *See Larson v. Dep’t of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) (reviewing the agency’s assessment of the scope of the request). The Court’s review must determine whether the search for documents was adequate, “and adequacy is measured by the reasonableness of the effort in light of the specific request.” *Larson*, 565 F. 3d at 869 (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C.Cir.1986)).

In general, “a FOIA petitioner cannot dictate the search terms for his or her FOIA request.” *Bigwood v. United States Dep’t of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) (citing *Physicians for Human Rights v. U.S. Dep’t of Def.*, 675 F. Supp. 2d 149, 164 (D.D.C. 2009)). “Federal agencies have discretion in crafting a list of search terms that ‘they believe to be reasonably tailored to uncover documents responsive to the FOIA request.’” *Agility Pub. Warehousing Co. K.S.C. v. Nat’l Sec. Agency*, 113 F. Supp. 3d 313, 339 (D.D.C. 2015) (quoting *Physicians for Human Rights*, 675 F. Supp. 2d at 164) (alteration adopted). “[T]here is no bright-line rule requiring agencies to use the search terms proposed in a FOIA request.” *Physicians for Human Rights*, 675 F. Supp. 2d at 164; *see also Nielsen v. U.S. Bureau of Land Management*, 252 F.R.D. 499, 514 (D.Minn.2008) (finding that there was no support “for the proposition that a FOIA claimant can dictate the search terms to be used as the benchmark for determining whether an agency's search is reasonable”).¹

Where the search terms are reasonably calculated to lead to responsive documents, the Court should not “micro manage” the agency's search. *Agility Pub. Warehousing Co. K.S.C. v. Nat’l Sec. Agency*, 113 F. Supp. 3d 313, 339 (D.D.C. 2015); *see also Johnson v. Executive Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C.Cir.2002) (“FOIA, requiring as it does both systemic

¹ “The plaintiff's insistence on its own preferred search terms does not undermine the reasonableness of the NSA's search terms.” *Agility Pub. Warehousing*, 113 F. Supp. 3d at 339.

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records that contain the term “ILU-OASSIS-OMEGA” and were dated January 1, 2017, through approximately August 28, 2019. SUMF ¶¶ 9-10. This search was broader than the parameters specified by Items 3 and 4 of the NBC 7 Request and Item 9 of the RCFP Request taken by themselves but CBP determined that this was a search reasonably calculated to discover records responsive to those items. *See id.* ¶¶ 9-11. Because the search was broader than any one of these request items, CBP’s FOIA office began manually reviewing the records returned by the search for responsiveness to the FOIA requests. *Id.* ¶ 11.

In general terms, the CBP FOIA office interpreted the NBC 7 Request and the RCFP Request as seeking records maintained by CBP that relate to CBP’s interaction with and treatment of the media while executing CBP’s law enforcement and border security responsibilities, as more specifically described in the individual categories set forth in each request. *Id.* ¶ 12. The FOIA Requests did not specifically request records that were generated in the course of processing request themselves and CBP’s FOIA Office did not interpret their scope to include such documents. *Id.* ¶ 13. CBP FOIA has made five releases to date in this matter. *Id.* ¶ 16. All of the email records processed by the CBP FOIA office to date—a total of 2,459 pages—were initially identified through the electronic keyword search described above and in SUMF ¶ 10. SUMF ¶ 16. The CBP FOIA office found these records to be non-responsive, and the vast majority (conservatively estimated at 98%) were non-responsive because they relate to the initial processing of the FOIA Requests and the instant litigation, rather than the underlying subject matter that is identified in the requests. SUMF ¶ 16.

CBP developed a search that was reasonably calculated to discover records responsive to Items 3 and 4 of the NBC 7 Request and Item 9 of the RCFP Request. The search term (“ILU-OASSIS-OMEGA”) made the search broader than each of the individual FOIA Request items and

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