UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FLETA CHRISTINA C. SABRA, Plaintiff, v. U.S. CUSTOMS AND BORDER PROTECTION, Defendant.	)	Civil Action No. 20-0681 (CKK)

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Court should grant Defendant U.S. Customs and Border Protection's ("CBP" or "Agency") motion for summary judgment. Plaintiff does not offer any arguments that refute the basis for Defendant's motion.

This case involves a Freedom of Information Act ("FOIA") request Plaintiff Fleta Christina C. Sabra ("Plaintiff") made for records about an encounter between her and CBP. As the records demonstrate, CBP undertook appropriate efforts to search for the responsive records about Plaintiff, withholding 395 pages, 3 audio files, and 8 video files in part under FOIA Exemptions 6, 7(C), 7(D), 7(E), and 7(F) and withholding 11 pages in full under FOIA Exemption 5. As explained herein, CBP is entitled to judgment as a matter of law.

Therefore, for these reasons, as further explained below and in Defendant's motion, the Court should grant summary judgment in favor of Defendant.

ARGUMENT

A. CBP Conducted Searches Reasonably Calculated to Uncover Responsive Records

As Defendant explained, "there is no material doubt that the searches performed were reasonable." Def.'s Mem. of P. & A. In Support of Def.'s Mot for Summ. J. (hereinafter, "Mem"), at 6; *see id*., at 4–6. Plaintiff offers several arguments in response. Each fail.

First, Plaintiff asserts that Defendant's statement of material facts fails to comply with Local Civil Rule 7(h)(1). Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. (hereinafter, "Opp'n"), at 2–4, ECF No. 28. Plaintiff's argument misapprehends what the Court must resolve to determine whether the Agency's search was adequate, which is a mixed question of fact and law. Here, Defendant's statement of material facts contains the sole germane material fact—that the Agency conducted a search, citing to the paragraph in the Agency's declaration that describes the search.

See Def.'s Statement of Material Facts Not In Genuine Dispute (hereinafter, "Def.'s SMF"), at 1 ("In response to Plaintiff's request, CBP conducted a search for responsive records.") (citing Decl. of Patrick A. Howard (Mar. 9, 2021) (hereinafter, "Howard Decl.") ¶ 7, ECF No. 24-3)), ECF No. 24-2. Indeed, Plaintiff does not dispute this material fact. *See* Pl.'s LCvR 7(h)(2) Statement, at 1, ECF No. 28-1. And, the record, namely the Agency's declaration, demonstrates that the search was adequate by referring to the search methodology utilized by the Agency. *See* Mem., at 6 (arguing the adequacy of the search based on the description contained in the Howard Decl. ¶ 7). Moreover, Plaintiff's reliance on *Robertson v. American Airlines*, 239 F. Supp. 2d 5 (D.D.C. 2002), is misplaced. Defendant clearly cites to the portions of the record it relies upon for support, *see* Def.'s SMF, and, the record here is not extensive—a 17 page declaration—and does not require the Court or Plaintiff to "sift through hundreds of pages of depositions, affidavits, and interrogatories," *Robertson*, 239 F. Supp. 2d at 7.

Second, Plaintiff asserts that the agency's declarant fails to "allege personal knowledge about the records and offices in question in this case." Opp'n, at 4. Plaintiff's argument is meritless. A FOIA declarant may satisfy that Rule 56's personal knowledge requirement "'if in his declaration, [he] attest[s] to his personal knowledge of the procedures used in handling [a FOIA] request and his familiarity with the documents in question.'" *Madison Mech., Inc. v. NASA*, Civ A. No. 99-2854 (EGS), 2003 WL 1477014, at *6 (D.D.C. Mar. 20, 2003) (quoting *Spannaus v. Dep't of Just.*, 813 F.2d 1285, 1289 (4th Cir. 1987)). Here, the agency's declarant states,

> I am familiar with CBP's procedures for responding to FOIA requests. I provide technical and administrative supervision and direction to a group of Government Information Specialists responsible for processing requests for release of CBP documents and information, assist with FOIA litigation matters, and I am personally familiar with the processing of FOIA responses, including, at times, by directly reviewing for adequacy and compliance with federal laws and regulations.
>
> All information contained [in the declaration] is based upon information furnished to me in my official capacity, and the statements I make in this declaration are based

> on my personal knowledge, which includes knowledge acquired through, and agency files reviewed in, the course of my official duties as Branch Chief in CBP's FOIA Division.

Howard Decl. ¶¶ 2, 3. As this Circuit has stated this meets the requirements of Rule 56. *See, e.g., Citizens for Responsibility & Ethics in Wash. v. Dep't of Just.*, Civ. A. No. 19-1552 (ABJ), 2021 U.S. Dist. LEXIS 83948, at * 9 (D.D.C. May 3, 2021) ("The D.C. Circuit long ago recognized the validity of the affidavit of an individual who supervised a search for records even though the affiant has not conducted the search himself as sufficient for a declarant in a FOIA action.") (citing *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir. 1986)). Indeed, in the case cited by Plaintiff in support of his argument, *Wisdom v. United States Trustee Program*, 232 F. Supp. 3d 97, 115 (D.D.C. 2017), the court found similar language "presents a sufficient approximation to satisfy Rule 56's requirements[.]" *Id.* Further, Plaintiff does not present any evidence that contradicts the Agency's declaration or any evidence of bad faith. *See Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013) ("[S]ummary judgment may be granted on the basis of agency affidavits" in FOIA cases, when those affidavits "contain reasonable specificity of detail rather than merely conclusory statements," and when "they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.") (internal quotations and citation omitted).

Third, Plaintiff argues that the agency fails to establish that its search was reasonable. Opp'n, at 5. Plaintiff's argument is not persuasive. The agency need only demonstrate "that its search was reasonably calculated to uncover all relevant documents." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (internal quotation marks and citation omitted). Additionally, FOIA does not require that an agency search every division or field office on its own initiative in response to a FOIA request if responsive documents are likely to be located in a particular place. *Kowalczyk v. Dep't of Just.*, 73 F.3d 386, 388 (D.C. Cir. 1996); *Marks v. Dep't*

of Just., 578 F.2d 261, 263 (9th Cir. 1978). Here, the Agency searched the electronic mail accounts of the five relevant custodians identified in a report of investigation prepared in response to Plaintiff's complaint to CBP, applying a date range that began on the date of the encounter to six months later and search terms calculated to identify records related to Plaintiff, and searched the relevant information systems. *See* Mem., at 6; *see also* Decl. of Patrick A. Howard (May 5, 2021) (hereinafter, "Howard II Decl.") ¶ 8 (attached hereto as Ex. A).

Plaintiff asserts that the Agency's declarant "fails to explain why, within each of the five offices CBP FOIA identified for search, only the databases listed were tasked with searches . . . as opposed to emails, hard files, or other systems of records." Opp'n, at 5. However, Plaintiff makes no claim that a search outside of these databases would uncover responsive records. *See Steinberg v. Dep't of Just.*, 23 F.3d 548, 552 (D.C. Cir. 1994) (concluding a plaintiff's "mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them"). And, Plaintiff muddles CBP's actions, which was to have the office with cognizance over the database to conduct the search. *See* Howard Decl. ¶ 7b–f (stating the name of the office that conducted the database search). Moreover, the search was clearly calculated to locate records responsive to Plaintiff's request, which sought:

> All agency records, including, but not limited to, video, database entries, photographs, communications (including emails, letters, faxes, phone logs, and text messages), memoranda, investigative reports, and other things relating to the encounter between requestor and U.S. Customs and Border Protection officials on or about September 11, 2015 - September 12, 2015 at the Otay Mesa OR San Isidro ports-of-entry. Please search specifically for use of force reports, internal affairs complaints and responses, internal investigations, professional responsibility investigations and interviews, video and photographic evidence gathered in response to her complaints, and all other records in the possession, custody, or control of CBP. To assist in the agency's search, I am providing as attachment the agency's response to her request, which indicated she was seeking records regarding her encounter at San Isidro, but which produced records regarding an encounter at the Otay Mesa POE. She filed a complaint with DHS CRCL on September 23,

> 2015, and was interviewed by officials she believes worked for CBP regarding that complaint on or about December 21, 2015 in North Carolina.

Compl. ¶ 75; *see Meeropol*, 790 F.2d at 956 (concluding the agency is obligated to perform a "reasonable" search in response to the request framed by the requestor.). As the Agency's declarant stated, the respective offices searched the *relevant* information systems that would contain responsive documents: the Secured Integrated Government Mainframe Access (SIGMA) database; Enforcement Action Statistical Analysis and Reporting System (E-STAR); Joint Integrity Case Management System (JICMS), Chief Counsel Tracking System (CCTS). *See* Howard Decl. ¶ 7b–f; Howard II Decl. ¶ 8.

Plaintiff further asserts that the Agency's declarant "fails to explain why CBP did not conduct an iterative search of the emails from other CBP officials sent to or received from the five employees listed in Sabra's original complaint." Opp'n, at 6. Plaintiff points to a record indicating "far more than five CBP officials exchanged at least one responsive email with one or more of the five CBP officers whose emails [the Agency] searched." Opp'n, at 6. However, the Agency is not required to search every single individual who may be on an electronic mail message. *See SafeCard Servs., Inc., v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) ("When a plaintiff questions the adequacy of the search an agency made in order to satisfy its FOIA request, the factual question it raises is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant."); *Media Rsch. Ctr. v. Dep't of Just.*, 818 F. Supp. 2d 131, 138 (D.D.C. 2011) (concluding that search was reasonably calculated because search terms would uncover responsive email documents, even if all possible email accounts were not searched). And, the Agency searched the five employees electronic mail associated with the investigation related to her complaint to the CBP. *Compare* Compl ¶ 75 (describing request: "Please search specifically for use of force reports, internal affairs complaints and responses,

internal investigations, professional responsibility investigations and interviews . . . [Plaintiff] filed a complaint with DHS CRCL on September 23, 2015, and was interviewed by officials she believes worked for CBP regarding that complaint on or about December 21, 2015 in North Carolina.") *with* Howard Decl. ¶ 7a ("[CBP] conducted a search of the e-mail accounts of five CBP employees identified as potential witnesses to the encounter between Plaintiff and CBP. The five employees were identified based on a review of the report of investigation prepared in response to Plaintiff's complaint to CBP."); *see Meeropol*, 790 F.2d at 956 (concluding the agency is obligated to perform a "reasonable" search in response to the request framed by the requestor.); *cf. Adamowicz v. IRS*, 402 F. App'x 648, 651 (2d Cir. 2010) (finding agency's search for records with "'sole employee'" who conducted investigation was "'reasonably calculated to discover the requested documents'") (citing *Grand Cent. P'ship Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999)).

Therefore, as discussed in Defendant's motion and above, the Court should grant summary judgment in favor of Defendant on the sufficiency of the search.

B. CBP Properly Applied FOIA Exemptions to Withhold Limited Records

As Defendant explained, CBP properly relied on FOIA Exemptions 5, 6, 7(C), 7(E), and 7(F). Mem., at 7; *see id*., at 7–15. Plaintiff offers one argument in response: "the agency's failure to conduct an adequate search has improperly cut off access to responsive records she and the Court would use to ascertain whether the public interest in disclosure. The Court cannot conduct its statutorily required, independent inquiry into the propriety of the agency's withholdings, and balance the public interest in disclosure of records, if it lacks the entire universe of documents." Opp'n, at 7–8. Plaintiff's argument is nonsensical and not persuasive.

Even were Plaintiff correct that the Agency's search was inadequate and additional records might be identified through supplemental searches, Plaintiff does not explain how the current record is inadequate or creates a genuine issue that the existing withholdings are improper. Indeed, Plaintiff does not even speculate what records may exist to support her argument. *See id.*; Fed. R. Civ. P. 56(d) (requiring a nonmovant to show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition"). Moreover, as explained in Defendant's motion and above, Defendant's search was adequate. *See* Mem., at 4–6; *supra* § B. Further, to the extent Plaintiff's public interest relates to the purported misconduct of law enforcement officers, *see* Opp'n, at 8 (explaining that the public interest in determining whether CBP officer's committed misconduct), Defendant has released the "89-page Report of Investigation (ROI) with evidentiary exhibits, including three recorded interviews, as well as audio and video recordings of the encounter [between Plaintiff and CBP officers] at the port of entry." Howard Decl. ¶ 7e. Yet, despite having the Agency's investigation and the video and audio recordings of the encounter, Plaintiff cites to none of these records to support her bald assertion that she is unable to demonstrate "public interest."

The Agency's withholdings under Exemptions 5, 6, 7(C), 7(E), and 7(F) are legally sound and fully supported by the existing record. Mem., at 7–15. The Agency withheld under Exemption 5 information protected from disclosure under the attorney work product privilege. *Id.*, at 7–8. The Agency withheld under Exemptions 6 and 7(C) personally identifiable information of third parties that are the subject of a CBP law enforcement record, and third parties mentioned in, but not the subject of a CBP law enforcement record. *Id.*, at 10. Under Exemption 7(E), the Agency withheld (1) information that would reveal the subjects of specific law enforcement interest; (2) information regarding specific law enforcement techniques and operational

vulnerabilities; (3) information that, in the aggregate, reveals trends and/or specific law enforcement capabilities and techniques employed in particular operational locations, which can reveal the likelihood of CBP utilizing certain inspection techniques in specific operational locations; and (4) computer codes and other information that can expose CBP computer systems to a risk of unauthorized access or navigation. *Id.*, at 14. And the Agency withheld under Exemption 7(F) information related to a third party's asylum claim. *Id.*, at 15.

All these withholdings were made under straightforward applications of FOIA's exemptions, and Plaintiff fails to identify any genuine issue with any of them. Moreover, to the extent Plaintiff's public interest relates to the purported misconduct of law enforcement officers, *see* Opp'n, at 8 (explaining that the public interest in determining whether CBP officer's committed misconduct), Plaintiff cannot present any public interest that would favor the release of any of the aforementioned information. Therefore, as discussed in Defendant's motion and above, the Court should grant summary judgment in favor of Defendant on whether CBP properly withheld information under FOIA Exemptions 5, 6, 7(C), 7(E), and 7(F).

C. CBP Properly Conducted a Segregability Analysis

As Defendant explained, CBP "fulfilled its segregability responsibility" under the FOIA. Mem., at 16; *see id.*, at 15–16. Plaintiff offers one argument in response—namely, a recycled version of its search argument. It too fails.

Plaintiff asserts that Defendant's statement of material facts fails to comply with Local Civil Rule 7(h)(1). Opp'n at 2–4. As discussed above, Plaintiff's argument misapprehends what the Court must resolve to determine whether the Agency's search was adequate, which is a mixed question of fact and law. Here, Defendant's statement of material facts contains the sole germane material fact—that the Agency conducted a segregability analysis, citing to the paragraph in the

Agency's declaration that describes the analysis. *See* Def.'s SMF, at 2 ("CBP conducted a segregability analysis, releasing all reasonably segregable, non-exempt responsive records to Plaintiff.") (citing Howard Decl. ¶ 39). Plaintiff does not dispute this material fact. *See* Pl.'s LCvR 7(h)(2) Statement, at 1 ("Undisputed that CBP conducted a segregability analysis."). And, the record, namely the Agency's declaration, demonstrates that the Agency released all segregable, non-exempt responsive records. *See* Mem., at 24 (arguing the Agency released all segregable, non-exempt responsive records based on the statements contained in the Howard Decl. ¶¶ 14, 22, 36, 38–40). Moreover, Plaintiff presents no evidence that the Agency failed to disclose reasonably segregable material. *See generally* Opp'n; *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) ("Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester.).

Therefore, as discussed in Defendant's motion and above, the Court should grant summary judgment in favor of Defendant on whether CBP has conducted a sufficient segregability analysis.

* * *

CONCLUSION

For the reasons set forth in Defendant's motion and above, Defendant respectfully requests that this Court grant summary judgment in favor of Defendant.

Dated: May 5, 2021

Respectfully Submitted,

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