UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-0907 (RBW)
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	)	
	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S RENEWED CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for partial summary judgment on its Freedom of Information Act ("FOIA") claim against Defendant U.S. Department of Homeland Security ("DHS") and in opposition to DHS' renewed motion for summary judgment. As grounds therefor, Judicial Watch states as follows:

MEMORANDUM OF LAW

I. Factual Background.

In January 2004, Judicial Watch began investigating the so-called "Temporary Guest Worker" program. In furtherance of its investigation, on February 27, 2004, Judicial Watch sent DHS a FOIA request seeking access to any and all records concerning or relating to the survey conducted by U.S. Border Patrol agents to discover if President George W. Bush's January 7, 2004 speech had any effect on the decision of illegal aliens to cross the U.S. - Mexican border (hereinafter referred to as "Survey). *See* Plaintiff's Statement of Material Facts in Support of Motion for Partial Summary Judgment ("Plaintiff's Statement") at ¶ 2.

On or about March 2, 2004, Judicial Watch received a letter from Ave M. Sloane of the U.S. Citizenship and Immigration Services, Freedom of Information and Privacy Acts Office, acknowledging DHS's receipt of the February 27, 2004 FOIA request. Plaintiff's Statement at ¶ 3. Pursuant to the stautorily-mandated, 20-day deadline, DHS's response to the request was due on March 29, 2004. *Id.* at ¶ 4; 5 U.S.C. § 552(a)(6)(A)(i). However, no responsive records were produced on or before that deadline, nor was Judicial Watch notified that responsive records were being withheld under any claim of exemption. Plaintiff's Statement at ¶ 4. Because it had not received any responsive documents or other substantive response to its February 27, 2004 FOIA request, Judicial Watch sent a letter to Ms. Sloane on May 10, 2004 requesting an update on the status of the FOIA request. *Id.* at ¶ 5.

On or about May 13, 2004, Judicial Watch received a letter from Ms. Sloane stating that Judicial Watch's request was being processed and that it was "currently number 647 on the list of 760 pending cases to be worked." *See* Plaintiff's Statement at ¶ 6. The letter failed to inform Judicial Watch when it could expect to receive a substantive response to its February 27, 2004 FOIA request. *Id.* at ¶ 6. As of June 2, 2004, DHS had failed to respond to Judicial Watch's FOIA request in any substantive manner. Consequently, Judicial Watch filed this lawsuit on the following day. *Id*. at ¶ 7.

On May 6, 2005, DHS finally produced 965 pages of records to Judicial Watch pursuant to the February 27, 2004 FOIA request, including 882 questionnaires labeled with the designation: "Priority Intelligence Report" ("PIR"). Plaintiff's Statement at ¶¶ 8-9. Also included in this production was a January 29, 2004 e-mail referring to 1,711 as the "total number of questionnaires." *Id.* at ¶ 10. Within these 965 pages of responsive documents, Judicial Watch

discovered many troubling inconsistencies as well as missing information. On August 26, 2005, DHS produced additional records including a Microsoft Access spreadsheet containing the results of 2,934 questionnaires. *Id.* at ¶ 11. This additional information did not, however, clarify the inconsistencies, or fill the gaps of missing information.

On November 1, 2005, Judicial Watch filed a motion for partial summary judgment arguing that DHS failed to perform an adequate search. Plaintiff's Statement at ¶ 12 (Docket No. 10). On December 22, 2005, DHS cross-moved. *Id.* (Docket No. 12). In its opposition and reply brief, Judicial Watch made clear that DHS had not conducted an adequate search. *Id.* at ¶ 13 (Docket No. 16). As examples, Judicial Watch highlighted the fact that DHS failed to search specific places likely to have responsive documents, gave inconsistent information about the number of questionnaires at issue, failed to adequately explain missing documents, and otherwise demonstrated a lack of good faith. For relief, Judicial Watch asked the Court to order DHS to conduct a new, appropriate search. *Id.*

In early February 2006, counsel for DHS began discussing the possibility of a 90 stay in order to allow DHS to conduct a new search. Plaintiff's Statement at ¶ 14. Judicial Watch drafted a stipulation that would have stayed this matter for 90 day to allow DHS to conduct a new, court-ordered search, but DHS rejected any stipulation that did not describe the new search as voluntary. *Id.* Having been forced to litigate as a result of DHS' failure to live up to its FOIA obligations in general and to conduct an adequate search in particular, Judicial Watch objected to any stay that was not based upon a new, court-ordered search. *Id.*

On February 9, 2006, the Court granted the 90 day stay and ordered DHS to conduct a new search by May 10, 2006. Plaintiff's Statement at ¶ 15 (Docket No. 21). The Court also

made note of Judicial Watch's "lack of confidence" in DHS and put DHS on notice that unreasonable delays or evidence of bad faith would compel the Court to take "appropriate actions." *Id.* Pursuant to the Court's subsequent May 22, 2006 order, DHS produced an additional 125 pages of responsive documents to Judicial Watch, a supplemental *Vaughn* index describing the redactions of the newly produced records, and the declarations of Shari Suzuki, John H. Block, Daniel Hiebert and Cynthia Atwood. *Id.* at ¶ 16 (Docket No. 28). The declarations purport to describe the second search performed by DHS and its findings. *Id.*

On July 21, 2007, Judicial Watch filed its second motion for partial summary judgment arguing that, in addition to the inadequacy of DHS' first search, DHS' second search was also inadequate. Plaintiff's Statement at ¶ 17 (Docket No. 31). DHS cross-moved on August 21, 2006. *Id.* In its opposition and reply brief, Judicial Watch demonstrated that neither search by DHS satisfied its statutory obligation to conduct a reasonable search. *Id.* (Docket Nos. 34, 35). As examples, Judicial Watch highlighted the fact that DHS failed to adequately explain missing documents, gave inconsistent information about the number of questionnaires at issue and submitted unreliable agency declarations.

On August 10, 2007, the Court denied both parties' motions for summary judgment. Plaintiff's Statement at ¶ 18. In denying the motions, the Court held that DHS had failed to demonstrate the adequacy of its first search and issued an order requiring dispositive motions "addressing the adequacy of the totality of the defendant's efforts, taken together, to respond to the plaintiff's FOIA request." *Id., see* August 10, 2007 Order, Walton, J., at 12 (Docket No. 37).

Pursuant to an amended joint briefing schedule, DHS filed its renewed motion for summary judgment on October 30, 2007. Plaintiff's Statement at ¶ 19 (Docket No. 41).

Attached to DHS' motion are ten agency declarations, including two new declarations and the unsworn August 24, 2005 declaration of Walter E. Kittle, III. DHS did not include with its renewed motion a statement of material facts as to which there is no genuine issue. *Id.* (Docket No. 41), *see also* LCvR 7(h) and LCvR 56.1.

On November 14, 2007, without leave from the Court or meeting and conferring with opposing counsel, DHS filed an errata. Plaintiff's Statement at ¶ 20 (Docket No. 43). DHS claims that the errata is simply a corrected copy of DHS' renewed motion for summary judgment filed for "clarification as certain typographical and formatting issues were noted after the original filing was submitted." *Id., see* DHS' Errata. Contrary to DHS' representations, the corrected brief changes are more than typographical and formatting errors and instead make substantive changes.[1] Plaintiff's Statement at ¶ 20.

Judicial Watch now respectfully requests the court grant summary judgment in its favor.

II. Argument.

A. DHS' Renewed Motion For Summary Judgment Should Be Denied For Failing to Comply With Local Rules.

Local Civil Rules 7(h) and 56.1 require each motion for summary judgment to include a statement of material facts as to which there is no genuine dispute. *See* LCvR 7(h) and LCvR

[1] DHS asserts that no substantive changes to its renewed motion for summary judgment have been made in the corrected version. Upon comparison, it is clear that substantive changes have been made, including new factual statements (*see e.g.*, pp. 14-15; "OINT was not one of the offices originally requested to search for responsive documents."), a plethora of declaration citations (*see e.g.*, p. 8; eight new citations to Shari Suzuki's First Declaration) and grammatical changes. These types of changes are not simply "typographical or formatting issues." Therefore, DHS' corrected brief should not be considered. However, in order to expose the Court to the least amount of confusion, Judicial Watch will refer back to the corrected brief as Defendant's Renewed Motion For Summary Judgment ("Def's Corrected Mem.").

56.1. Local Rules 7(h) and 56.1 state:

> Each motion for summary judgment ***shall*** be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support that statement.

Id. (emphasis added).

The D.C. Circuit has been very clear on the importance of a statement of material facts and similarly clear that the absence of one may be fatal. *See Jackson v. Finnegan*, 101 F.3d 145, 150-51 (D.C. Cir. 1996) This Court has "strictly adher[ed]" to the text of LCvR 7(h), *Shays v. Federal Election Comm.*, 337 F. Supp. 2d 28, 36 (D.D.C. 2004), and has denied motions for summary judgment as a result of a missing statement of material facts. *See Gaylor v. Dep't of Justice*, 496 F. Supp. 2d 110, 114 (D.D.C. 2007).

DHS' renewed motion for summary judgment did not include a statement of material facts as to which there is no genuine issue. Despite its motion listing a statement "in support," none was filed. Without a statement of material facts, DHS has presented no facts on which to base its renewed motion for summary judgment. As such, DHS' renewed motion for summary judgment should be denied outright.

B. DHS Has Not Complied With FOIA, Therefore, Summary Judgment Should Be Granted in Judicial Watch's Favor.

1. Summary Judgment Standard.

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Where the non-moving party has the burden of proof on an issue, the moving party is entitled to summary judgment if it shows the absence of evidence to support the non-moving party's claim or defense

on which it has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326-327 (1986). In addition:

> [I]n cases in which the nonmoving party will bear the burden of proof at trial, the movant can seek summary judgment by establishing that the opposing party has insufficient evidence to prevail as a matter of law, thereby forcing the opposing party to come forward with some evidence or risk having judgment entered against him.

10A Charles Alan Wright, Arthur Miller, & Mary Kay Kane, *Federal Practice And Procedure* § 2727, n.41 (3rd ed. 2001).

In a FOIA case, the government has the burden of proving compliance by showing that it produced responsive records on time, that the records do not exist, or that an exemption from disclosure applies on the facts. 5 U.S.C. § 552(a)(4)(B); *Kronberg v. United States Dep't of Justice*, 875 F. Supp. 861, 865 (D.D.C. 1995). Thus, the Court should grant summary judgment in favor of a FOIA requestor unless an agency proves that it produced all responsive records in a timely manner or demonstrated facts showing that the responsive records at issue were exempt from disclosure.

2. <u>The Reasonable Search Standard</u>.

The only FOIA issue in this case is whether DHS' searches, in their totality, comply with its statutory obligation to conduct a reasonable search. The law of this Circuit regarding the reasonableness of agency FOIA searches is clear. In responding to a FOIA request, an agency is required to show that it made "a good faith effort to conduct a search for the requested records, using methods that can be reasonably expected to produce the information requested." *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting *Oglesby v. United States Dept. of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). An agency is not required

to search every record system, but it "cannot limit its search to only one record system if there are others likely to turn up the information requested." *Campbell v. United States Dept. of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998); *Oglesby*, 920 F.2d at 68.

The burden of persuasion as to the reasonableness of a search falls on the agency. *McGhee v. CIA*, 697 F.2d 1095, 1101 (D.C. Cir. 1983). Any affidavit(s) submitted by the agency describing its search for documents must be "relatively detailed and non-conclusory, and . . . submitted in good faith." *Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)). At the very least, the affidavit must denote which files the agency searched, and must explain in a systematic way how the agency's documents were located in order to enable the Plaintiff to challenge the procedures utilized during the search. *Oglesby*, 920 F.2d at 68. The agency also must explain why conducting a more thorough investigation would have been unduly burdensome. *McGhee*, 697 F.2d at 1102. Additionally, if the reasonableness of the search is challenged, as it is in this case, the agency must "demonstrate 'beyond a material doubt' that the search was reasonable." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (*quoting Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

It is clear that DHS' good faith effort cannot rest solely on an agency's contention that it is not generally required to locate all responsive records or search every division or field office. Def's Corrected Mem. 826-27. DHS cannot artificially limit its search. *See Campbell*, 164 F.3d at 28; *see also Oglesby*, 920 F.2d at 68. Additionally, an agency's determination of whether other systems would likely turn up requested information must be based on the information the agency had at the conclusion of the search, not the inception of the search. *Campbell*, 164 F.3d

at 28. In other words, if either of DHS' searches revealed an additional location where responsive records would likely exist, it was DHS' statutory obligation to search that new location. By employing common sense and prohibiting government agencies from ignoring "what it cannot help but know," the Court is simply furthering Congress' intent to provide the maximum amount of disclosure through FOIA. *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996).[2]

3. The Totality of DHS' Searches Did Not Produce an Adequate Overall Search.

DHS' first search was clearly inadequate. As noted by the Court, DHS' request to undertake a second search "is at least some indication that the agency considered its first search to be insufficient." August 10, 2007 Order, Walton, J. at 11. Also indicative of the inadequacy of DHS' first search is the fact that the Department of Justice issued a memorandum requiring each office within the Customs and Border Patrol to conduct a new search. This memorandum includes very specific instructions as to how the search was to be conducted and what types of information each office was to provide upon completion of the new search. *See* Declaration of

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[2] DHS belatedly asserts that it was not required to search outside its Washington, D.C. office. Def's Corrected Mem. at 27. DHS' reliance on *Kowalczyk* and *Maydak v. Dep't of Justice*, 254 F. Supp. 2d 23 (D.D.C. 2003) is misplaced. In *Kowalczyk*, the Court held that because the requestor failed to specifically identify a particular field office, it would not require agencies to speculate about what locations a requestor wanted searched if it was not clear. *Kowalczyk*, 73 F.3d at 389. However, the Court qualified this statement by also declaring that an agency could not use this as a means of ignoring obvious or apparent leads. *Id.* In *Maydak*, the Court held that because the requestor failed to write directly to the field office, despite being informed by the FBI of this requirement, the Court did not find evidence of bad faith on the part of the FBI. *Maydak*, 254 F. Supp. 2d at 44. In this case, DHS never informed Judicial Watch that it purportedly misdirected its FOIA request. Additionally, DHS forwarded Judicial Watch's FOIA request on its own, not pursuant to a request made by Judicial Watch. Once the request was forwarded, it became DHS' obligation to perform an adequate search.

Shari Suzuki ("First Suzuki Decl.") at ¶ 6; Exhibit 1 to Suzuki Decl., attached to Def's Corrected Mem. DHS produced no similar memorandum from the first search. The absence of a similar memorandum for the first search and the specificity with which the memorandum for the second search is described suggests that DHS did not believe its first search was adequate.

DHS' renewed motion does not address the adequacy of its first search per se, but it does refer to the second search as a "comprehensive second search," suggesting that the first search was not comprehensive. Def's Corrected Mem. at 27. And while DHS' second search searched more locations, including at least two locations where responsive records would likely exist, the second search did not repair several of the inadequacies identified in the first search, and, in fact, added new inadequacies. Similarly, DHS' renewed motion does not alter or repair these inadequacies, and like its predecessor, actually reveals new inadequacies.

a. Inconsistent/Erroneous Agency Statements.

First, DHS asserts in its renewed motion, as well as in the first Declaration of Shari Suzuki, that "every office within CBP conducted a search for responsive records." Def's Corrected Mem. at 6-7; First Suzuki Decl. at ¶ 7. However, within the descriptions of the individual office searches it is clear that at least four offices did not perform a second search. Def's Corrected Mem. at 16-18.[3] The Office of Training and Development, Office of Finance, Office of Human Resources Management and Office of the Special Assistant to the Commissioner for EEO did not perform the second search pursuant to the DOJ memorandum based on their statements that the requested records were "beyond the scope of" the office or

[3] DHS admits that the International Trade Litigation Field office within the Office of Chief Counsel did not perform a search. Def's Corrected Mem. at 11.

program. *Id.* Whether the records were indeed beyond the scope is immaterial. The fact remains that DHS has presented the Court and Judicial Watch with inconsistent or erroneous agency statements. Even more troubling is the fact that these inconsistent or erroneous agency statements also are found in the sworn Declaration of Shari Suzuki. First Suzuki Decl. at ¶¶ 7, 25-28.

Second, DHS asserts in its renewed motion that "none of the components searched in response to Plaintiff's FOIA request (other than the CBP Commissioner's Executive Secretariat) maintains a centralized file system." Def's Corrected Mem. at 25. DHS' own statements suggest otherwise. In its renewed motion and within the description of the "component" office searches, the offices which provided a detailed review of the search did in fact include what type of centralized file system the office used. For example, the Office of Field Operations utilizes a compute mainframe and the Treasury Enforcement Communications System. *Id.* at 7. The Office of Congressional Affairs maintains and uses a "controlled correspondence database." *Id.* at 8. The Office of Chief Counsel uses the Office of Chief Counsel Case Management System and the Office of Regulations and Rulings uses the ORR Legal Case Inventory System. *Id.* at 12-13. The Office of Management Inspections and Integrity Assurance maintains and uses the Joint Integrity Case Management System and the Office of Anti-Terrorism uses the Electronic Program Management Office files. *Id.* at 13-14. While not an exhaustive list, these examples demonstrate that many of the agency component offices do in fact maintain and use centralized file systems.

Third, DHS asserts in its renewed motion, as well as in the second Declaration of Shari Suzuki, that "the documents that were released to Plaintiff as a result of the February 2006 search

only included those responsive documents that were not previously released to Plaintiff." Def's Corrected Mem. at 20, Second Suzuki Decl. at ¶ 8. However, a comparison of the two productions reveal that DHS did in fact reproduce documents previously produced to Judicial Watch. Exhibit A, attached to the Affidavit of Meredith L. Di Liberto ("Di Liberto Affidavit"), shows several examples of duplicate documents. *See* Exhibit 1 (Di Liberto Affidavit) attached. The first part of Exhibit A represents documents produced to Judicial Watch on May 6, 2006. The second part of Exhibit A represents documents produced to Judicial Watch on May 24, 2007. These documents are identical and are duplicates. This is important as it further indicates the inconsistent or erroneous statements of DHS.

In its August 10, 2007 order, the Court noted the importance of DHS qualifying its second production. Instead, DHS has provided claims and a sworn declaration that are inconsistent with the documents themselves. This inconsistency places the reliability of the entire second search in question.

Lastly, DHS continues to describe the Survey as "informal and ad hoc." *See e.g.,* Def's Corrected Mem. at 4, 5, 28, 30. However, this description is inconsistent with the actual description used by DHS when it tasked its agents with conducting the Survey. For example, Document No. 44 in the second production, which is described as a "Temporary Guest Worker Questionnaire Fact Sheet," states that the "Office of Border Control Field Intelligence Center located in El Paso, Texas was **tasked with** collecting and analyzing the results of the Priority Intelligence Requirement." (Emphasis added). *See* Di Liberto Affidavit, Exhibit B. Additionally, many of the reproduced questionnaires state that the "Office of Border Patrol Intelligence is **requiring** that the below questionnaire be completed for aliens of all countries on

a random basis. ... The minimum collection **requirement** is five aliens per twenty four-hour period. ... Each shift will be **required** to submit two completed PIR forms each day." (Emphasis added). *See e.g.,* Di Liberto Affidavit, Exhibit A, Bates Nos. 169, 170. Contrary to DHS' claim, the fact that the Survey was conducted randomly does not in any way imply it was "informal."

b. Inadequate Agency Declarations.

As demonstrated above, DHS has submitted and relied on agency declarations that contain inconsistent or erroneous statements. *See supra* § B.3.a. This is not, however, the only evidence demonstrating the inadequacies of DHS' agency declaration.

First, the CBP Commissioner's February 2006 tasking memorandum very clearly laid out what information each CBP component office's search results should contain. This information included such things as "how the relevant agency files are kept," "where these files are located," and "where in your office [you] looked for responsive records," as well as, who looked, when they looked and what search terms were employed. *See* First Suzuki Decl., Exhibit 1. These agency requirements largely mirror the legal requirements. *See Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 891 (D.C. Cir. 1995), *McGehee*, 697 F.2d at 1102, *Oglesby*, 920 F.2d at 68, *Weisberg*, 627 F.2d at 371. DHS' declarations do not include much of this required information. For example, the search performed by Office of International Affairs does not describe who directed the search, how the files are kept, where the relevant files are located, where the office looked for responsive records, when the search took place or what search terms were used. First Suzuki Decl. at ¶ 11. Neither search of the Office of Commissioner describes how its files are kept or where the office looked for responsive records. First Suzuki Decl. at ¶13, Declaration of Magda Ortiz at 6. The search performed by the Office of Intelligence fails to

describe who directed the search, how the files are kept, where the relevant files are located or what search terms were used. First Suzuki Decl. at ¶ 22.

This is not an exhaustive list, rather examples to help demonstrate that many of the agency declarations relied on by DHS are incomplete and inadequate as a matter of law.

Second, DHS continues to rely on the unsworn declaration of Walter E. Kittle, III. Attached to Def's Corrected Mem. The unsworn declaration of Mr. Kittle fails to satisfy the requirements of 28 U.S.C. § 1746 and must be disregarded in its entirety as inadmissible hearsay. *See Commercial Drapery Contractors, Inc. v. United States*, 133 F.3d 1, 6 (D.C. Cir. 1998) (holding that "an affidavit . . . consisting entirely of inadmissible hearsay[] is not sufficient to survive summary judgment"); *see also* Fed. R. Civ. P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). Therefore, any reliance by DHS on Mr. Kittle's unsworn declaration, including the reference to it in the Declaration of Johnny Meadors, is misplaced.[4] *See* Declaration of Johnny Meadors, attached to Def's Corrected Mem.

Lastly, despite Judicial Watch having raised the issue of the adequacy of DHS' agency declarations in previous motions for summary judgment, DHS' renewed motion fails to address these concerns at all. DHS refers merely to the legal standard for agency affidavits and refers to a handful of declaration citations. Def's Corrected Mem. at 23. The issue regarding the legal adequacy of the actual declarations is not addressed.

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[4] In the more than two years that have passed since DHS first filed Mr. Kittle's unsworn declaration, DHS has not attempted to file a properly sworn declaration.

While DHS is permitted to rely on affidavits to demonstrate the reasonableness of its search, those affidavits must be "relatively detailed, nonconclusory, and submitted in good faith." *Founding Church of Scientology v. NSA*, 610 F.2d 824, 836 (D.C. Cir. 1979). That reliance is rebutted when the requestor demonstrates instances of countervailing evidence, inconsistency of proof, and "positive indications of overlooked materials," "as well as bad faith." *Perry v. Block*, 684 F.2d 121, 127-28 (D.C. Cir. 1982) (internal citations omitted). The above examples demonstrate countervailing evidence, inconsistency of proof and positive indications of overlooked materials present in DHS' declarations. DHS' declarations are sworn statements from individuals who purport to be knowledgeable about Judicial Watch's FOIA request and the search(es) for responsive documents. It is plain, however, that these declarations contain incorrect statements and fail to provide DHS with sufficient evidence to demonstrate the adequacy of its second search.

c. Missing or Incomplete Records.

DHS has also failed to produce documents regarding the decision to undertake the Survey. Affidavit of Christopher J.Farrell ("First Farrell Affidavit") at ¶ 17-20, attached as Exhibit 2. Such documents would likely serve as justification and/or authorization for funding, developing, implementing, and analyzing the results of the Survey. *Id*. at ¶ 17. In addition, these implementing documents would address staffing needs for the Survey, provide guidance and instructions from headquarters to the agents and offices tasked with implementing the Survey, and as the Survey progressed, modify the questions used in the surveys. *Id*. at ¶ 18-19. Nor has Defendant produced the document that ultimately terminated the PIR and thus ended the Survey. *Id*. at ¶ 20. Despite these missing documents, DHS continues to refer to specific dates during

which the Survey was conducted, including a termination date of January 27, 2004. Def's Corrected Mem. at 5. As the Court noted in its August 10, 2007 order, DHS has not provided support for why the "survey was brought to an end." August 10, 2007 Order, Walton, J., 3, n.2.

Remarkably, DHS' renewed motion still does not contain any support for why the Survey was brought to an end. Rather, DHS relies on its contention that the Survey was "ad hoc and informal." As demonstrated above, the facts simply do not support this contention. *See supra* B.3.a. Additionally, DHS' focus on differentiating the U.S. Border Patrol from the U.S. Army to debunk the meaning of a "Priority Intelligence Requirement" is unavailing. Def's Corrected Mem. at 30-31. As described in the Second Affidavit of Christopher Farrell, the term "Priority Intelligence Requirement" ("PIR") is a designation used by ***all*** members of the Intelligence Community, regardless of affiliation, to reference a particular intelligence need. *See* Second Affidavit of Christopher J. Farrell ("Second Farrell Affidavit"), at ¶ 6, attached as Exhibit 3; *see also* "The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction," Report to the President of the United States (March 31, 2005) at 583-84. *See* Second Farrell Affidavit, Exhibit A.

Both the U.S. Army and the U.S. Department of Homeland Security, of which USBP is a component, Def's Corrected Mem. at 31, are members of the Intelligence Community. *See* "An Overview of the United States Intelligence Community," Published by the Office of the Director of National Intelligence (2007). *See* Di Liberto Affidavit, Exhibit C. As members of the Intelligence Community, it would be necessary to share a common language and terminology.

Second, DHS has failed to produce any records from the Office of Intelligence. In its renewed motion, DHS asserts that no responsive records were found in the Office of Intelligence.

Def's Corrected Mem. at 14. The Office of Intelligence was the tasking office for the January 2004 Survey. As seen in Document No. 44, it was the Office of Border Patrol Intelligence that required the questionnaire be completed and set forth the specific requirements for the individual sectors. *See* Di Liberto Affidavit, Exhibit B. It is highly unlikely that the office that originated the survey and set forth the requirements has no responsive records.

Lastly, DHS produced several documents in its second production which were beyond the scope of Judicial Watch's FOIA request insofar as they were outdated. Documents 4 - 16 are described by DHS as being "inspection summary reports for Otay Mesa Port. *See* Di Liberto Affidavit, Exhibit D. However, the reports are dated January 2005 - January 2006, clearly outside the time period requested in Judicial Watch's FOIA. DHS did not produce, in either production, this responsive information for the time period requested in the FOIA.

Similarly, Documents 17 - 33 present the same problem. DHS described Documents 17 - 33 as 17 "Southwest Border Statistics (weekly reports)." *See* Di Liberto Aff, Exhibit D. Documents 17 - 33 are reports from September 5, 2005 to February 12, 2006. DHS still has not produced this information for January 7, 2004 to February 27, 2004.

III. Conclusion.

For the foregoing reasons, partial summary judgment should be entered now in Plaintiff's favor; this Court should issue a declaratory judgment stating that DHS' first and second search were inadequate; and DHS should be ordered to conduct an appropriate search and produce all non-exempt documents responsive to Plaintiff's February 27, 2004 FOIA request without further delay.

November 20, 2007

Respectfully submitted,

JUDICIAL WATCH, INC.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-0907 (RBW)
	)	
UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	)	
	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS IN SUPPORT OF RENEWED CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Judicial Watch, Inc., ("Judicial Watch") by counsel and pursuant to Local Civil Rule 56.1, respectfully submits the following statement of material facts in support of its motion for partial summary judgment:

1. Judicial Watch is a non-profit organization headquartered in Washington, D.C. *See* Plaintiff's Renewed Motion For Partial Summary Judgment, Exhibit 2, Affidavit of Christopher J. Farrell ("First Farrell Affidavit"), at ¶ 2.

2. On February 27, 2004, Judicial Watch, Inc. sent a FOIA request to Defendant Department of Homeland Security ("DHS"), by facsimile and certified U.S. mail, return receipt requested, seeking access to any and all records concerning or relating to the following subjects:

> (1) Any and all records that refer and/or relate to a survey, developed by Border Patrol officials in Washington, of illegal aliens detained at the US-Mexican border, that had sought to establish whether "rumors of amnesty" had influenced their decision to cross into the United States.
>
> (2) Any and all records that refer and/or relate to the number(s) of illegal immigrants entering the United States as a result of the amnesty and/or guest

worker program and/or immigration reforms proposed by President George W. Bush on January 7, 2004.

(3) Any and all records that refer and/or relate to the decision to discontinue the survey on or about January 27, 2004.

(4) Any and all records that refer and/or relate to the results of any survey of illegal immigrants entering the United States as a result of the amnesty and/or guest worker program and/or immigration reforms proposed by President George W. Bush on January 7, 2004.

(5) Any and all records that refer and/or relate to the number of illegal immigrants apprehended in San Diego county from January 7, 2004 to the present.

(6) Any and all records that refer and/or relate to the reported 13 questions contained on said questionnaire(s).

(7) Any and all records that refer and/or relate to the decision to instruct border patrol agents "not to talk about amnesty, an increase in apprehensions, or give comparisons of past immigration reform proposals" when talking with the media.

(8) The "talking points" distributed nationwide in which border agents are "not to talk about amnesty an increase in apprehensions, or give comparisons of past immigration reform proposals."

First Farrell Affidavit at ¶ 5.

3. On or about March 2, 2004, Judicial Watch, Inc. received a letter from Ave M. Sloane of the U.S. Citizenship and Immigration Services, Freedom of Information and Privacy Acts Office acknowledging DHS's receipt of Judicial Watch, Inc.'s February 27, 2004 FOIA request. *Id.* at ¶ 6.

4. Pursuant to the statutorily-mandated, 20-day deadline, DHS's response to the request was due by March 29, 2004. 5 U.S.C. § 552(a)(6)(A)(i). However, no responsive records were produced on or before that deadline, nor was Judicial Watch, Inc. notified that responsive records were being withheld under any claim of exemption. *Id.* at ¶ 7.

5. Because it had not received a single document or other substantive response to its February 27, 2004 FOIA request, Judicial Watch, Inc. sent a letter to Ms. Sloane on May 10, 2004 in which it requested an update on the status of the FOIA request. *Id.* at ¶ 8.

6. On or about May 13, 2004, Judicial Watch, Inc. received a response from Ms. Sloane on behalf of DHS. In its May 13, 2004 letter, DHS stated that Judicial Watch, Inc.'s request was being processed and that it was "currently number 647 on the list of 760 pending cases to be worked." First Farrell Affidavit at ¶ 9. The letter failed to inform Judicial Watch, Inc. when it could expect to receive a substantive response to its February 27, 2004 FOIA request. *Id.*

7. As of June 2, 2004, DHS had failed to respond to Judicial Watch, Inc.'s February 27, 2004 FOIA request in any substantive manner. *Id.* at ¶ 10. Consequently, Judicial Watch, Inc. filed this lawsuit the following day, June 3, 2004. *Id.*

8. On May 6, 2005, DHS produced 965 pages of records to Judicial Watch, Inc. pursuant to the February 27, 2004 FOIA request. *Id.* at ¶ 11. According to these documents, on January 7, 2004, the Office of Border Patrol Intelligence tasked Border Patrol Intelligence Agents in sectors along the U.S.-Mexican border to begin conducting a survey, on a random basis, of aliens of all countries encountered by USBS agents. *Id.*

9. Also included among the documents produced to Judicial Watch, Inc. on May 6, 2005 were copies of PIR survey questionnaires purportedly completed by USBP agents for 882 apprehended aliens who responded to the survey. First Farrell Affidavit at ¶ 13.

10. Also included among the documents produced to Judicial Watch, Inc. on May 6, 2005 is an e-mail dated Thursday, January 29, 2004, identifying 1,711 PIR survey questionnaires,

while responses for only 882 persons were provided to Judicial Watch, Inc. First Farrell Affidavit at ¶ 14.

11. On August 26, 2005, DHS produced a Microsoft Access spreadsheet to Judicial Watch, Inc. containing data from what appears to be the results of 2,934 PIR survey questionnaires. *Id.* at ¶ 16.

12. On November 1, 2005, Judicial Watch filed a motion for partial summary judgment arguing that DHS failed to perform an adequate search. *See* Plaintiff's Renewed Motion For Partial Summary Judgment, Exhibit 1, Affidavit of Meredith L. Di Liberto ("Di Liberto Affidavit"), at ¶ 3.(Docket No. 10). And on December 22, 2005, DHS cross-moved. *Id.* (Docket No. 12).

13. In its opposition and reply brief, Judicial Watch made clear that DHS had not conducted an adequate search. *Id.* at ¶ 4 (Docket No. 16). As examples, Judicial Watch highlighted the fact that DHS failed to search specific places likely to have responsive documents, gave inconsistent information about the number of questionnaires at issue, failed to adequately explain missing documents, and otherwise demonstrated a lack of good faith. *Id.* For relief, Judicial Watch asked the Court to order DHS to conduct a new, appropriate search. *Id.*

14. In early February 2006, counsel for DHS began discussing the possibility of a 90 stay in order to allow DHS to conduct a new search. Di Liberto Affidavit at ¶ 5. Judicial Watch drafted a stipulation that would have stayed this matter for 90 day to allow DHS to conduct a new, court-ordered search, but DHS rejected any stipulation that did not describe the new search as voluntary. *Id.* Having been forced to litigate as a result of DHS' failure to live up to its FOIA obligations in general and to conduct an adequate search in particular, Judicial Watch objected to

any stay that is not based upon a new, court-ordered search. *Id.* (Docket No. 20).

15. On February 9, 2006, the Court granted the 90 day stay and ordered DHS to conduct a new search by May 10, 2006. Di Liberto Affidavit at ¶ 6. (Docket No. 21). The Court also made note of Judicial Watch's "lack of confidence" in DHS and put DHS on notice that unreasonable delays or evidence of bad faith would compel the Court to take "appropriate actions." *Id.*

16. Pursuant to the Court's subsequent May 22, 2006 order, DHS produced an additional 125 pages of responsive documents to Judicial Watch, a supplemental *Vaughn* index describing the redactions of the newly produced records, and the declarations of Shari Suzuki, John H. Block, Daniel Hiebert and Cynthia Atwood. Di Liberto Affidavit at ¶ 7. (Docket No. 28). The declarations purport to describe the second search performed by DHS and its findings. *Id.*

17. On July 21, 2007, Judicial Watch filed its second motion for partial summary judgment arguing that, in addition to the inadequacy of DHS' first search, DHS' second search was also inadequate. Di Liberto Affidavit at ¶ 8. (Docket No. 31). DHS cross-moved on August 21, 2006. *Id.* In its opposition and reply brief, Judicial Watch demonstrated that neither search by DHS satisfied its statutory obligation to conduct a reasonable search. (Docket Nos. 34, 35). *Id.* As examples, Judicial Watch highlighted the fact that DHS failed to adequately explain missing documents, gave inconsistent information about the number of questionnaires at issue and submitted unreliable agency declarations. *Id.*

18. On August 10, 2007, the Court denied both parties' motions for summary judgment. Di Liberto Affidavit at ¶ 9. In denying the motions, the Court held that DHS had

failed to demonstrate the adequacy of its first search and issued an order requiring dispositive motions "addressing the adequacy of the totality of the defendant's efforts, taken together, to respond to the plaintiff's FOIA request." *Id.*

19. Pursuant to an amended joint briefing schedule, DHS filed its renewed motion for summary judgment on October 30, 2007. Di Liberto Affidavit at ¶ 10 . Attached to the motion are ten agency declarations, including two new declarations and the unsworn August 24, 2005 declaration of Walter E. Kittle, III. *Id.* DHS did not include with its renewed motion a statement of material facts as to which there is no genuine issue. *Id.* (Docket No. 41).

20. On November 14, 2007, without leave from the Court or meeting and conferring with opposing counsel, DHS filed an errata. Di Liberto Affidavit at ¶ 11 (Docket No. 43). DHS states that the errata is simply a corrected copy of DHS' renewed motion for summary judgment filed for "clarification as certain typographical and formatting issues were noted after the original filing was submitted." *Id.* To the contrary, the corrected brief changes more than typographical and formatting errors and instead makes substantive changes. *Id.*

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Respectfully submitted,

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