

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CABLE NEWS NETWORK, INC.,)
)
Plaintiff,)

v.)

Civil Action No. 17-1167-JEB

FEDERAL BUREAU OF INVESTIGATION,)
)
Defendant.)

GANNETT SATELLITE INFORMATION)
NETWORK, LLC, d/b/a USA TODAY, *et al.*)
)
Plaintiffs,)

Civil Action No. 17-1175-JEB

v.)

DEPARTMENT OF JUSTICE,)
)
Defendant.)

JUDICIAL WATCH, INC.,)
)
Plaintiff,)

Civil Action No. 17-1189-JEB

v.)

UNITED STATES DEPARTMENT OF JUSTICE,)
)
Defendant.)

FREEDOM WATCH, INC.,)
)
Plaintiff,)

Civil Action No. 17-1212-JEB

v.)

UNITED STATES DEPARTMENT OF JUSTICE)
and FEDERAL BUREAU OF INVESTIGATION,)
)
Defendants.)

THE DAILY CALLER NEWS)	
FOUNDATION,)	
)	
<i>Plaintiff,</i>)	
)	Civil Action No. 17-1830-JEB
v.)	
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
<i>Defendant.</i>)	

THE DAILY CALLER NEWS FOUNDATION’S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Defendants’ opposition and supplemental declaration generally fail to clarify or remedy their initial insufficiencies with respect to the adequacy of their search for responsive records and to the claim that all Comey Memos are properly being withheld pursuant to Exemption 7(A).¹ Defendants still have not provided sufficient evidence for the Court to conduct its *de novo* review or for Plaintiff The Daily Caller News Foundation to engage in effective advocacy. *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*, 955 F. Supp. 2d 4, 13 (D.D.C. 2013). For this reason alone, DCNF’s Cross-Motion for Summary Judgment should be granted and Defendants should be ordered to produce all Comey Memos to DCNF.²

1. Defendants have not demonstrated the search was adequate.

Defendants continue to argue they conducted an adequate search for all records responsive to DCNF’s FOIA request. Their evidence? Nothing more than “because we say so.”

¹ Defendants have now demonstrated information contained within one or more memos was classified according to the proper procedure.

² To be clear, DCNF does not challenge the withholdings pursuant to Exemptions 1, 3, 6, 7(C), and 7(E) to the extent they are limited to select information as described in the Hardy Declaration.

Second Declaration of David M. Hardy at ¶ 4 (“The FBI is confident that it has identified and located the entire collection of documents comprising the ‘Comey Memos.’”). Such “evidence” is insufficient. *Hayden v. National Security Agency*, 608 F.2d 1381, 1384 (D.C. Cir. 1979) (A declaration “will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping.”).

Defendants also complain that “there is no evidence of bad faith or missed documents here.” Defs’ Opp. at 9. We do not know that. Based on former Director Comey’s testimony, there are at least five – and as many as nine – records responsive to DCNF’s request. For the Court and DCNF to know whether there is bad faith or missed records, Defendants must identify the number of records they located and are withholding.³ Without such a showing, the Court and DCNF must rely on nothing more than Defendants’ “because we say so” statements.

2. The Comey Memos were not compiled for law enforcement purposes.

Defendants concede the Comey Memos were not originally compiled for law enforcement purposes. *See* Defs’ Opp. at 10-11. They also shift their justification for withholding the records. Defendants now argue the records are being properly withheld because they are “in the Special Counsel’s files.” *Id.* at 11. Such a claim is not supported by either the facts or the law.

First, it is indisputable that Director Comey authored the records not for law enforcement purposes but for administrative and institutional purposes. He testified, “I knew that there might come a day when I would need a record of what happened, not just to defend myself, but to

³ At a minimum, the Court should review the Comey Memos *in camera* to determine whether all responsive records have been located. This can be easily accomplished by comparing the memos to the very public testimony of Director Comey.

defend the FBI and – and our integrity as an institution and the independence of our investigation.” Exhibit B to DCNF’s Mem. at 33.

Second, the Comey Memos were not stored in the Central Records System, which is the system of records that ordinarily and routinely stores investigative files. *See Majid v. Federal Bureau of Investigation*, 2017 U.S. Dist. LEXIS 44929, **12-13 (D.D.C. March 28, 2017). They were stored with archived, administrative files. Hardy Decl. at ¶ 62.

Third, in response to DCNF’s FOIA request, the FBI searched for and located the records in archived, administrative files. *Id.* The Justice Department did not search for and locate them in the Special Counsel’s files. *Id.*

Fourth, Defendants rely exclusively on *Exner v. U.S. Department of Justice*, 902 F. Supp. 240 (D.D.C. 1995) for the proposition that “the fact that copies of the memos are filed in former Director Comey’s files” is irrelevant. *Id.* at 10-11. However, in the *Exner* case, the FOIA requester sought records from the FBI about an investigation. *Exner*, 902 F. Supp. at 241. In addition, “[t]he records were located in an investigatory file, number 92-3267, at the FBI.” *Id.* at 242. *Exner* simply has no bearing on this case whatsoever. The records at issue in this case were located in archived, administrative files.

Simply put, the Comey Memos as requested by DCNF were not compiled or even “re-compiled” for law enforcement purposes. Had DCNF requested the Comey Memos from the Special Counsel’s files, Defendants’ claim would be more plausible. But it did not. Allowing a government agency to withhold a record every time that same record is stored in another

agency's investigative file would cause FOIA to become more "of a withholding statute than a disclosure statute."⁴ *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973).

3. So much information about Comey Memos is already public.

Whether analyzed under a harm analysis or the official acknowledgment doctrine, one fact is clear: Director Comey, the memos' author, has publicly testified about the contents of the records responsive in this case. Defendants do not dispute that. Instead, they argue, "[A]s long as the Comey Memos themselves do not enter the public domain, there will remain much that is uncertain about their exact contents, including the level of detail in the memos, the extent to which they corroborate Mr. Comey's testimony, and the extent to which they contain information that was not the subject of his testimony." Defs' Opp. at 15-16.

However, Director Comey identified the number of records, when the records were created, and why he wrote them. He has also revealed the subject of the records, the content of the records, and even quoted from portions of the records. Very little, if any, information about the Comey Memos and the information contained within them remains secret.

In addition, Defendants still have not disputed, disavowed, or even disagreed with any of Director Comey's testimony. Defendants merely assert a "measure of uncertainty as to the veracity of the information" exists. Defs' Opp. at 16. Yet, they do not demonstrate an uncertainty. Is it their position Director Comey lied under oath? If so, where is the evidence?

Similarly, Defendants argue, "[e]ven where a former government official authored the document in question, that former official has no power to waive any applicable FOIA

⁴ For example, Defendants' position would have allowed the State Department to withhold all former Secretary of State Hillary Clinton's emails in response to hundreds of FOIA requests simply because another agency, the FBI, also possessed all her emails during its investigation into the mishandling of classified information. Tellingly, the State Department, as well as the Justice Department that represented it, did not make such a tenuous argument.

exemption on behalf of the agency.” *Id.* at 20 (citing *Rush v. U.S. Department of State*, 748 F. Supp. 1548, 1556 (S.D. Fla. 1990)). However, in that case, the author of the records sought their disclosure through FOIA and argued he could waive any claims of privilege because he was their author. *Id.* Here, DCNF is not arguing Director Comey waived or sought to waive Exemption 7(A). DCNF is simply arguing, because Director Comey has publicly revealed substantial information about the memos as well as portions of the memos themselves, Director Comey’s testimony is unique. It cannot be compared to cases concerning leaks and unapproved disclosures of information. DCNF’s Mem. at 13.

Since Director Comey testified under oath about actions he took while FBI director, the Court, at a minimum, should compare the information contained within the memos with the written and oral testimony of Director Comey. The Court could then make an informed decision about what, if any, information remains secret and whether such information should be withheld. The Court could then also be in the best position to order the production of the Comey Memos containing the information already in the public domain.

WHEREFORE, DCNF respectfully requests the Court grant its Cross-Motion for Summary Judgment.

Dated: December 21, 2017

Respectfully submitted,

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