IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFREY A. DANIK, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 17-1792 (TSC)

PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Jeffrey A. Danik, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, hereby cross-moves for summary judgment against Defendant U.S. Department of Justice. As grounds therefor, Plaintiff respectfully refers the Court to the accompanying Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment and Plaintiff's Statement of Undisputed Material Facts in Support of its Cross-Motion for Summary Judgment.

Dated: May 29, 2018

Respectfully submitted,

/s/ Michael Bekesha
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFREY A. DANIK,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 17-1792 (TSC)
v.	)	
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Jeffrey A. Danik, by counsel and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, respectfully submits this memorandum of points and authorities in opposition to Defendant U.S. Department of Justice's Motion for Summary Judgment and in support of Plaintiff's Cross-Motion for Summary Judgment. As grounds thereof, Plaintiff states as follows:

I. Introduction.

Defendant fails to demonstrate it conducted an adequate search for all records responsive to Plaintiff's Freedom of Information Act requests. Plaintiff is a retired, supervisory special agent, who worked for the Federal Bureau of Investigation for almost 30 years. Plaintiff understands the FBI's numerous records systems and has working knowledge of how the agency responds to FOIA requests. Based on this experience, he requested the FBI search specific records systems for certain terms.

Plaintiff requested the FBI search two specific email systems and text messages for certain search terms. The FBI however did not fully conduct such searches. First, Defendant does not identify which email systems the FBI searched. The FBI may have searched one, both,

or neither of the systems identified by Plaintiff. Defendant does not explain. Second, the FBI did not search text messages. Nor does Defendant explain why the FBI did not search text messages. Nor does Defendant demonstrate that the FBI was not required to conduct such searches or that it would be burdensome to do so. Third, the FBI did not search for 16 of the 21 search terms because it determined the terms are too broad or too vague. However, Defendant does not explain how the FBI made such a determination. Nor does Defendant demonstrate how the provided search terms resulted in too burdensome results. Nor could it. The FBI never conducted searches. Fourth, the FBI did not search for the terms related to Dr. Jill McCabe because, Defendant argues, any responsive records would be protected by personal privacy protections. However, Defendant does not demonstrate Dr. McCabe's personal privacy remains intact after she personally acknowledged the existence of records in the Washington Post.

In short, Defendant fails to demonstrate the FBI conducted an adequate search for all records responsive to Plaintiff's FOIA requests.[1] Plaintiff therefore requests that Defendant's Motion for Summary Judgment be denied and that Plaintiff's Cross-Motion for Summary Judgment be granted.

II. Factual Background.

Plaintiff does not dispute Defendant's recitation of facts related to the processing of Plaintiff's FOIA requests. *See* Memorandum of Law in Support of Defendant's Motion for Summary Judgment ("Def's Mem.") at 1-6.

[1] Plaintiff no longer challenges Defendant's withholding of information contained within the records responsive to Plaintiff's FOIA requests.

III. Legal Standard.

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the plaintiff. *Weisberg v. U.S. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

IV. Argument.

A. Defendant's search declaration is insufficient.

Defendant has not submitted a "reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Oglesby v. U.S. Department of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). The affidavit "must at least include the agency's 'rationale for searching certain locations and not others.'" *James Madison Project v. U.S. Department of State*, 2017 U.S. Dist. LEXIS 12176, *6 (D.D.C. Jan. 30, 2017) (quoting *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 92 (D.D.C. 2009)). It must also "describe what records were searched, by whom, and through what processes." *Defenders of Wildlife*, 623 F. Supp. 2d at 91. In addition, an affidavit containing nothing more than "[c]onclusory assertions about the agency's thoroughness" is "not sufficient." *James Madison Project*, 2017 U.S. Dist. LEXIS 12176 at *6.

In both of Plaintiff's FOIA requests he sought emails contained in two specific records systems: (1) the FBI's internal unclassified email system known as Intranet; and (2) the FBI's

external unclassified email system known as internet café or IC. *See* Defendant's Statement of Material Facts as to Which There Is No Genuine Issue at ¶ 1 (on page 1) and ¶ 1 (on page 5). Defendant however is silent as to which records systems the FBI searched. David M. Hardy, in his declaration, simply testifies that the FBI "searched electronic communications of FBI custodian former DD McCabe." Declaration of David M. Hardy at ¶ 29. If the FBI only searched one of the two systems or neither of the systems identified by Plaintiff, Defendant also fails to explain the FBI's rationale for searching certain locations and not others. Defendant's declaration is wholly insufficient. Plaintiff respectfully requests the Court order Defendant to identify which email systems the FBI searched and to search any email systems identified by Plaintiff that have not already been searched.

B. The FBI failed to search text messages.

There is no dispute Plaintiff also requested the FBI search the text messages on any official FBI-issued devices. *See* Def's Stmt. at ¶ 1 (on page 1) and ¶ 1 (on page 5). Yet, Hardy's declaration is completely silent with respect to text messages. The only time the term "text" or "texts" appears in the Hardy Declaration is when Hardy testifies about what records Plaintiff requested. Such silence is simply unexplainable.

In addition, text messages exist, and the FBI can search for and produce text messages. In February 2018, Defendant's Office of the Inspector General issued a report entitled "A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe."[2] In the report, the Inspector General explicitly states it reviewed text messages as part of its investigation. IG Report at 1 ("The OIG's misconduct investigation included reviewing all

[2] The report is available at https://oig.justice.gov/reports/2018/o20180413.pdf.

of the INSD investigative materials as well as numerous additional documents, e-mails, ***text messages***, and OIG interview transcripts.") (emphasis added). In addition, throughout the report, the Inspector General cites to and quotes from text messages sent or received by McCabe. *See id.* at 7 ("After these conversations, McCabe sent a text message to Special Counsel stating: 'I spoke to both. Both understand that no decision on recusal will be made until I return and weigh in.'"); 8 ("At approximately 12:06 p.m. on October 27, 2016 . . . McCabe texted Special Counsel asking: 'Are you in with wsj now.'"); 30 ("McCabe's own text messages reflect that McCabe was keenly interested to learn about the results of Special Counsel's calls with Barrett.").

The FBI failed to conduct an adequate search because it did not search for text messages. Defendant also fails to demonstrate the FBI conducted an adequate search because Defendant does not explain or justify why the FBI did not search for text messages even though Plaintiff specifically sought them, and the FBI has the ability to search and produce them. Plaintiff therefore respectfully requests the Court order the FBI to search text messages for records responsive to Plaintiff's FOIA requests.

C. Defendant's assertion that Plaintiff's FOIA requests were too broad and/or too vague is incorrect.

Plaintiff requested the FBI search three, specific records systems for records containing 21 different search terms. Hardy correctly identifies all search terms in the chart in paragraph 29 of his declaration. However, the FBI did not search for 16 of the 21 search terms because it determined the terms to be too broad or too vague. Hardy Decl. at ¶ 30. Defendant's entire explanation as to why the FBI did not search is as follows:

> The FBI determined many of the search terms requested in Plaintiff's second request were too broad or vague. The lack of specificity rendered the request unduly burdensome for the FBI to conduct a search. Even if the FBI were to

> search the requested terms in the custodian's email systems, it would require dozens of work hours to scope through the sheer number of results returned from the searches, and searches beyond what the FBI has already conducted would be unduly burdensome.

Hardy Decl. at ¶ 30. Simply put, this explanation does not satisfy Defendant's burden.

In a recent, unrelated FOIA case, Judge Lamberth addressed this very issue. In *Mattachine Society of Washington v. U.S. Department of Justice*, the FOIA requester sought records containing specific search terms. 267 F. Supp. 3d 218, 226-227 (D.D.C. 2017). Unlike in this case, the FBI searched and located 5,500 records that contained one of the search terms. The FBI subsequently argued that reviewing those records would be overly burdensome. The Court however rejected the argument:

> As evidence of the overly burdensome nature of these terms, the government points to the fact that "the search term 'pervert' alone returned over 5,500 Sentinel ECF hits," and that sifting through these hits to determine which are responsive and which are not would be unduly burdensome. However, the FBI has not reviewed any portion of this search or others like it, offers no projections of what the results might be, and does not estimate the number of additional hours, resources, or funds make these searches rise to level of being an undue burden. The Government provides no context in which to assess the volume of responses as being disproportionately burdensome as compared to similar requests. The FBI is asking the Court to declare that these searches would be unduly burdensome merely because the FBI suspects that they might be so, and that is not sufficient.

Id. at 227 (internal citations omitted). The same reasoning can be applied here.

First, the FBI did not conduct any searches. It simply asserts that the search terms provided by Plaintiff were too broad or vague. Second, the FBI does not offer any projections or estimates of what the results would be if it conducted the searches. Third, it does not estimate the number of hours, employees, or resources it would take to review any results. Fourth, the FBI provides no framework or guidelines as to what volume results in a request being an undue

burden. The FBI provides no specificity whatsoever. "The FBI is asking the Court to declare that these searches would be unduly burdensome merely because the FBI suspects that they might be so, and that is not sufficient." *Id.* Plaintiff therefore respectfully requests the Court order the FBI to conduct searches using the 16 search terms identified by Plaintiff that the FBI refused to search.[3]

D. Defendant's Glomar assertion is improper.

Defendant also did not search for the search term "Dr. Jill McCabe" and its variants. Defendant asserts it was not required to search for such terms pursuant to FOIA Exemptions 6 and 7, which are generally known as the personal privacy exemptions.[4] Such an assertion is improper, however.

Under Exemption 7(C), an agency may withhold "investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would … constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). More succinctly, an agency may withhold responsive records if an individual's privacy interest outweighs the public's interest in disclosure. *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 893 (D.C. Cir. 1995) (*citing United States Department of Justice v. Reporters Committee for*

[3] Of course, if the volume is substantial and truly overly burdensome, the FBI could confer with Plaintiff to determine if there is any way to narrow his requests to limit the number of hits that need to be reviewed.

[4] Plaintiff challenges both the claims of Exemption 6 and Exemption 7(C). Because the analyses under Exemptions 6 and 7(C) are very similar, Defendant considers them together. Therefore, Plaintiff also considers them together when demonstrating Defendant has failed to satisfy its burdens under FOIA.

Freedom of the Press, 489 U.S. 749, 779 (1989) and *Davis v. United States Department of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992)).

Under Exemption 7(C), "a Glomar response may be issued in place of a statement acknowledging the existence of responsive records but withholding them, if confirming or denying the existence of the records ***would associate the individual named in the request with criminal activity***." *Nation Magazine*, 71 F.3d at 893 (emphasis added); *see also Pugh v. Federal Bureau of Investigation*, 793 F. Supp. 2d 226, 232 (D.D.C. 2011); *Scales v. Executive Office of the United States Attorneys*, 59 F. Supp. 2d 87, 90 (D.D.C. 2009). In other words, a Glomar response under Exemption 7(C) is only proper if a substantive response to the FOIA request would, for the first time, associate an individual with criminal activity.

First, Plaintiff has not requested records that would associate Dr. McCabe with criminal activity. He has asked for records related to what action Dr. McCabe's husband took with respect to a potential conflict of interest between her candidacy and her husband's work on the FBI's investigation of former Secretary of State Hillary Clinton's use of a non-state.gov email account. *See* Julia Manchester, *FBI ruled McCabe had no conflict of interest in Clinton probe: docs*, The Hill (Jan. 5, 2018, available at http://thehill.com/blogs/blog-briefing-room/news/367701-fbi-ruled-mccabe-had-no-conflict-of-interest-in-clinton-probe). The fact that the records would not associate Dr. McCabe with criminal activity is also confirmed by Defendant's evidence. Hardy testified the FBI did not search the Central Records System, which houses investigative files. *See* Hardy Decl. at ¶¶ 27 and 28.

Second, the FBI already confirms records related to the subject matter at issue in Plaintiff's FOIA requests exist. On its FOIA website, the FBI posted records that explicitly

reference Dr. McCabe. *See Deputy Director McCabe Ethical Guidance and Recusal Part 01 of 01* (available at https://vault.fbi.gov/deputy-director-mccabe-ethical-guidance-and-recusal/deputy-director-mccabe-ethical-guidance-and-recusal-part-01-of-01/view).

Third, Dr. McCabe herself has discussed the issue publicly. On April 2, 2018, Dr. McCabe wrote an op-ed about the very topic at issue in Plaintiff's FOIA requests. *See* Jill McCabe, *The president attacked my reputation. It's time to set the record straight*, The Washington Post (Apr. 2, 2018, available at https://www.washingtonpost.com/opinions/jill-mccabe-the-president-attacked-my-reputation-its-time-to-set-the-record-straight/2018/04/02/e6bbcf66-366b-11e8-8fd2-49fe3c675a89_story.html). In the piece, she not only explained that her husband "consulted with the ethics experts at the FBI[,]" she also stated that she "want[s] people to know that the whole story that everything is based on is just false and utterly absurd." *Id*. In other words, she has put the whole story in the public sphere. Plaintiff's FOIA requests seek to do what Dr. McCabe wants: bring the whole story to the public. Her Op-ed is also legally significant because "this circuit has held that the third-party's acknowledgment has a substantial effect on" "the private-public interest balancing test underlying" the personal privacy exemptions. *Lindsey v. Federal Bureau of Investigation*, 271 F. Supp. 3d 1, 8 (D.D.C. 2017) (citing *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Justice*, 746 F.3d 1082, 1092 (D.C. Cir. 2014) and *Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 896 (D.C. Cir. 1995)).

Unsurprisingly, Defendant's declaration is silent with respect to the facts that Plaintiff asked for records that would not associate Dr. McCabe with criminal activity, that the FBI has already confirmed records related to Dr. McCabe exist, and that Dr. McCabe herself has made

public statements about the records at issue. *See* Hardy Decl. at ¶ 31. Each of these factors weigh heavily in favor of disclosure. Plaintiff therefore respectfully requests the FBI conduct searches for the term "Dr. Jill McCabe" and its variants.[5]

V. Conclusion.

For the reasons stated above, Plaintiff respectfully requests Defendant's Motion for Summary Judgment be denied and Plaintiff's Cross-Motion for Summary Judgment be granted.

Dated: May 29, 2018

Respectfully submitted,

/s/ Michael Bekesha

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Counsel for Plaintiff

[5] Of course, after conducting such searches, Defendant could withhold records under the personal privacy exemptions, if appropriate.

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Plaintiff,	)	
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	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
_____	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE AND PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Jeffrey A. Danik, by counsel and pursuant to Local Civil Rule 7.1(h), respectfully submits this response to Defendant's Statement of Material Facts as to Which There Is No Genuine Issue and Plaintiff's Statement of Undisputed Material Facts in Support of its Cross-Motion for Summary Judgment:

I. Plaintiff's Response to Defendant's Statement of Material Facts as to Which There Is No Genuine Issue.

October 25, 2016 Freedom of Information Act Request

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

Item One: Request Number NFP-61739/FOIAPA Appeal Number 1377487-000

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed.

6. Undisputed.

7. Undisputed.

8. Undisputed.

9. Undisputed.

Item Two: FOIAPA Request Number 1360635-000

1. Undisputed.

Items Three and Six: FOIAPA Request Number 1360639-000

1. Undisputed.

2. Undisputed.

3. Undisputed.

February 28, 2017 FOIA Request

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

Releases

1. Undisputed.

2. Undisputed.

3. Undisputed.

4. Undisputed.

5. Undisputed.

6. Undisputed.

7. Undisputed.

II. Plaintiff's Statement of Undisputed Material Facts in Support of its Cross-Motion for Summary Judgment.

1. The FBI did not search text messages for records responsive to Plaintiff's FOIA requests.

2. The FBI has possession of text messages.

3. The FBI has the ability to search text messages.

4. The FBI has the ability to produce text messages.

5. In February 2018, Defendant's Office of the Inspector General issued a report entitled "A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe."

6. Plaintiff requested records that would not associate Dr. McCabe with criminal activity.

7. The records "Deputy Director McCabe Ethical Guidance and Recusal Part 01 of 01" are publicly available on the FBI's website.

8. Dr. Jill McCabe published an op-ed in the Washington Post on April 2, 2018 entitled "The president attacked my reputation. It's time to set the record straight."

Dated: May 29, 2018

Respectfully submitted,

/s/ Michael Bekesha
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[PROPOSED] ORDER

Upon consideration of Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment and the entire record herein, it is hereby ORDERED that:

1. Defendant's Motion for Summary Judgment is denied; and

2. Plaintiff's Cross-Motion for Summary Judgment is granted.

SO ORDERED.

DATE:_____

_____
The Hon. Tanya S. Chutkan, U.S.D.J.