

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

JUDICIAL WATCH, INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 17-cv-00029 (DLF)

ORDER

On June 6, 2018 the Court held a hearing to address the United States Department of Justice's Motion for Summary Judgment, Dkt. 16, and Judicial Watch's Cross-Motion for Summary Judgment, Dkt. 18. The parties' arguments during that hearing focused on a declaration submitted by Office of Information Policy Senior Counsel Vanessa R. Brinkmann, the agency official responsible for supervising the Department of Justice's response to Judicial Watch's FOIA requests. During the hearing, counsel for the Department of Justice stated that the Brinkmann declaration contains all of the representations that Peter Kadzik, former Assistant Attorney General for Legislative Affairs, made relevant to the pending motions, but counsel also referred to representations that are not evident from the face of the Brinkmann declaration. The Court does not believe that counsel for the Department of Justice made any intentional misrepresentations; however, based on a close review of the hearing transcript and the Brinkmann declaration, it appears that the Brinkmann declaration is incomplete in several respects. For example, counsel for the Department of Justice stated during the hearing that Mr. Kadzik represented that he had no agency records in his personal Gmail account. *See* Unofficial

Tr. 10, June 7, 2018 (“At a minimum we had the obligation . . . to ask Mr. Kadzik whether . . . he had any agency records in this personal e-mail account that wouldn’t be captured in official records systems. And once we asked him and *he represented that he did not*, I don’t think we had any further legal obligations.” (emphasis added)); *id.* (“Not only did he make those representations, he actually went and searched.”); *id.* at 11 (“[W]e received the representations from him, not just about the contents of his Gmail account generally but also the results of the specific searches that he ran himself to confirm or support those representations.”); *id.* at 11-12 (“I think when a federal employee, particularly a senior Department of Justice official like Mr. Kadzik, *represents that there are no agency records in his personal Gmail account*, I do think the government is intended to take those representations in good faith, absent some evidence to the contrary.” (emphasis added)); *id.* at 12 (“I think we had the obligation to at least ask Mr. Kadzik about his e-mail practices generally, about whether he used a personal e-mail account for official business, and that particular e-mail in question. I don’t think we were obligated to, you know, distrust the representations that we had received from a senior DOJ official.”); *id.* at 13 (“[W]e took additional steps to request additional specific searches by Mr. Kadzik saying . . . I know you’re a senior DOJ official *who has now reported to us that you did not have any agency records in your Gmail account . . .*.”); *id.* at 30 (“[H]e confirmed that he understood those obligations and *he represented to us that there were no agency records on his Gmail account . . .*” (emphasis added)); *id.* at 62 (“[W]e have essentially that representation in the Brinkmann Declaration.”); *id.* at 69-70 (“*There are clear representations that we are reporting that we got from Mr. Kadzik about his e-mail practices generally and about the one e-mail in particular . . .*” (emphasis added)). While the Brinkmann Declaration comes close, it does not reflect that Mr. Kadzik represented that he had no agency or potential agency records in his

personal Gmail account. According to the declaration, “[Mr. Kadzik] was confident that his personal Gmail *inbox* contained no agency records or potential agency records.” Brinkmann Decl. ¶ 19 (emphasis added), Dkt. 16-3. Although the Brinkmann declaration states that “Mr. Kadzik confirmed that he did not recall ever using his personal Gmail account to send any other similar e-mails to John Podesta, or to anyone else associated with the Clinton campaign,” *id.*, this statement does not cover the full scope of Judicial Watch’s specific FOIA requests, which include: (1) e-mails sent to or received by Mr. Kadzik using the e-mail address peterkadzik@gmail.com in which he conducted official government business, and (2) e-mails to and from Mr. Kadzik’s Gmail address and “any non-government employee” pertaining to “former Secretary of State Hillary Clinton’s use of non-state.gov e-mail to conduct official business.” *Id.*

Counsel for the Department of Justice also indicated during the June 6, 2018 hearing that Mr. Kadzik opened each e-mail and reviewed each e-mail when conducting the manual searches. Unofficial Tr. 10, June 7, 2018 (“[Manual search] *means opening up the e-mails.*” (emphasis added)). But the Brinkmann Declaration does not indicate whether Mr. Kadzik opened and reviewed each e-mail when he conducted the two manual searches, simply reviewed the subject lines of each email, or performed a manual search in a different manner. *See* Brinkmann Decl. ¶ 16 (Mr. Kadzik “performed a manual review (i.e., not using search terms) of the appropriate folders.”). It also is unclear whether Mr. Kadzik’s initial manual review included searches of “the sent, inbox, and trash folders,” *id.*, or simply the sent folder, as counsel for the Department of Justice stated at the hearing, Unofficial Tr. 24, June 7, 2018 (“I think the manual search was limited to the sent folder of his Gmail inbox.”).

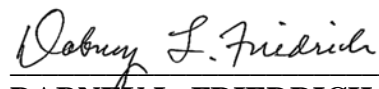
Finally, with respect to the first round of searches that Mr. Kadzik conducted, counsel for the Department of Justice stated at the hearing that “[t]here was actually extensive direction from DOJ, and that’s documented in the declaration.” *Id.* at 21; *see also id.* at 22 (“So even those initial searches, it was not just Mr. Kadzik entirely on his own.”). But the Brinkmann declaration provides few, if any, details regarding the “extensive” direction that the Department of Justice gave Mr. Kadzik.

Accordingly, the Court directs the Department of Justice to submit by June 15, 2018 a supplemental declaration that provides any additional details that the Department of Justice is able to provide regarding the following: (1) Mr. Kadzik’s representations regarding whether his Gmail account contained agency records or potential agency records; and (2) the two manual searches that Mr. Kadzik conducted in this case. In particular, with respect to the manual searches, the supplemental declaration shall indicate, to the extent possible, whether Mr. Kadzik opened and reviewed individual e-mails and which folders Mr. Kadzik reviewed when conducting the manual searches.

The Court also invites the Department of Justice to provide any additional information that it is able to provide regarding other representations that Mr. Kadzik made, including, but not limited to, the term searches he conducted in this case and “his e-mail practices generally and about the one [Podesta] e-mail in particular.” Unofficial Tr. 69-70, June 7, 2018.

SO ORDERED.

June 9, 2018


DABNEY L. FRIEDRICH
United States District Judge