

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PUBLIC RECORD MEDIA,)	
)	
Plaintiff,)	
)	
v.)	
)	Case No. 12-1225- MJD
UNITED STATES DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
)	

DEFENDANT’S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT

INTRODUCTION

Defendant Department of Justice (“DOJ”) has fully complied with its obligations in this matter under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. In response to a FOIA request from Plaintiff Public Record Media (“PRM”), DOJ conducted a reasonable search for responsive documents and responded comprehensively and accurately to Plaintiff’s original request by indicating that all responsive documents must be withheld in full. In response to the narrowed request pursued on administrative appeal and in this litigation, DOJ has confirmed repeatedly that there are no documents responsive to the narrowed request. Plaintiff has raised no objection to the search either in its complaint or otherwise, and has articulated no relief to which it might be entitled. There is no remaining dispute for the Court to resolve. Accordingly, DOJ has fully complied with its FOIA obligations and is entitled to summary judgment.

BACKGROUND

By letter dated October 11, 2011, Matt Ehling submitted a FOIA request to DOJ Office of Legal Counsel (“OLC”) on behalf of PRM. PRM sought three categories of documents:

1. Any and all legal opinions and/or memoranda produced by [OLC] between January 1, 2007 and October 1, 2011, that deal with the use of lethal force by the United States against United States person “Anwar al-Awlaki” . . . ;

2. Any and all legal opinions and/or memoranda produced by [OLC] between January 1, 2001 and October 1, 2011, that deal with the use of lethal force . . . by the United States against United States persons physically located outside . . . the United States

3. Any and all legal opinions and/or memoranda produced by [OLC] between January 1, 2001 and October 1, 2011, that deal with the use of lethal force by the United States via the use of [unmanned aerial vehicles], against any person physically located within . . . the United States

See Declaration of John Bies, dated September 21, 2012 (“Bies Decl.”), ¶ 2, Ex. A.

OLC responded comprehensively to this request by letter dated November 3, 2011. In its response, OLC treated item one – the request related to Anwar al-Aulaqi – separately from the remainder of the request. With respect to item one, OLC issued what is known as a “Glomar response” and stated that it could neither confirm nor deny the existence of responsive records pursuant to FOIA Exemptions One, Three and Five, *see* 5 U.S.C. § 552(b)(1), (3), (5). *See* Bies Decl. ¶3, Ex. B. This item was treated separately from the remainder of the request because OLC only issues a Glomar response when revealing the existence or non-existence of responsive documents would itself reveal

information protected by an exemption.¹ Plaintiff has not administratively challenged that response.

With respect to the remainder of the request, OLC grouped items two and three together, in accordance with its usual practice of treating a request as a whole to the extent possible, rather than identifying individual sub-categories of the request to which documents are responsive. Bies Decl. ¶ 3. OLC indicated that there were responsive documents to the remainder of the request but that all documents were being withheld in full pursuant to FOIA Exemptions 1, 3, and 5 because any responsive documents were currently and properly classified and protected by the attorney-client and deliberative process privileges. *See id.*, Ex. B. Plaintiff has not challenged this response insofar as it applies to item 2.

By letter dated December 29, 2011, PRM appealed the FOIA determination, narrowing the appeal to pursue only item three of its request. *See* Bies Decl. Ex. C (“For the purposes of this appeal, I wish to set aside matters relating to Item 1 (and also Item 2) of my request, and only pursue review of matters that relate to exemptions claimed for Item 3.”).²

¹ This type of response to a FOIA request is called a “Glomar response” after the CIA’s refusal to confirm or deny the existence of records regarding a ship named the Glomar Explorer in *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976); *see, e.g., Gavin v. SEC*, 2007 WL 2454156, 1 (D. Minn. 2007).

² This letter was not received in the DOJ Office of Information and Policy (“OIP”) until April 24, 2012; OIP nonetheless treated it as timely filed.

DOJ had not yet ruled on this appeal at the time this lawsuit was filed. *See* Bies Decl. ¶ 5, Ex. D; *see* 28 C.F.R. § 16.9(a)(3) (automatically terminating appeals when a lawsuit is filed). Like the administrative appeal, the complaint is limited to item 3 of the original FOIA request. *See generally* Complaint, Docket No. 1. Thereafter, in light of the narrowed request, DOJ confirmed to PRM both orally and in writing that there are no documents responsive to Item 3; rather, any responsive documents related to Item 2, read broadly. *See* Bies Decl. ¶¶ 6-7, Ex. F.

ARGUMENT

I. BECAUSE A REASONABLE SEARCH REVEALED NO RESPONSIVE RECORDS, THE CASE SHOULD BE DISMISSED AS MOOT

Jurisdiction exists under FOIA only where an agency has (1) improperly (2) withheld (3) agency records. 5 U.S.C. § 552(a)(4)(B); *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). A FOIA request becomes moot once it is answered or no responsive records are located following a reasonable search. *Carter v. Veterans Admin.*, 780 F.2d 1479, 1481 (9th Cir. 1986) (affirming summary judgment because agency's compliance with plaintiff's FOIA request mooted action); *see also Urban v. US*, 72 F.3d 94, 95 (8th Cir. 1995) ("In FOIA cases, mootness occurs when requested documents have already been produced."); *see generally Preiser v. Newkirk*, 422 U.S. 395, 401 (explaining that a case becomes moot and must be dismissed when it

no longer presents a case or controversy); *Ringo v. Lombardi*, 677 F.3d 793 (8th Cir. 2012) (same).³

When there is a dispute as to whether responsive documents exist, the government must show that it “conduct[ed] a search reasonably calculated to uncover all relevant documents.” *See Urban*, 72 F.3d at 95; *see also Miller v. U.S. Dept. of State*, 779 F.2d 1378, 1383 (8th Cir. 1985) (quoting *Weisberg v. U.S. Dept. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). “But the search need only be reasonable; it does not have to be exhaustive.” *See Miller*, 779 F.2d at 1383; *Nielsen v. Bureau of Land Mgmt*, 252 F.R.D. 499, 512 (D. Minn. 2008). In general, the sufficiency of a search is determined by the “appropriateness of the methods” used to carry out the search, “not by the fruits of the search.” *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Accordingly, the failure of an agency “to turn up a particular document, or mere speculation that yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested record.” *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004). In the absence of “countervailing evidence” or “substantial doubt,” agency affidavits or declarations describing a

³ To the extent Plaintiff raises a challenge to any of the *Kissinger* prongs, there could be a live controversy, but Defendant is entitled to summary judgment. *See, e.g., Urban v. US*, 72 F.3d at 95 (finding a dispute as to whether responsive documents existed); *Mace v. EEOC*, 37 F. Supp. 2d 1144 (1999) (explaining that FOIA cases are usually resolved on summary judgment rather than motions for lack of subject matter jurisdiction.) Here, however, Plaintiff has not articulated in the Complaint or elsewhere any challenge to any of the *Kissinger* factors and has articulated no relief to which it is entitled. Accordingly, the Court should dismiss for lack of subject matter jurisdiction. If Plaintiff does appropriately raise some challenge to one of those factors, the government is nonetheless entitled to summary judgment because it conducted a reasonable search and there are no responsive documents.

reasonable and adequate search are sufficient to demonstrate an agency's compliance with FOIA. *See Iturralde*, 315 F.3d at 314 (citations omitted); *see also Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (noting that, with a properly-detailed agency declaration, summary judgment remains appropriate unless "a review of the record raises substantial doubt" about the adequacy of the agency search for records) (citation omitted).

In order to meet its burden, an agency may "prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith...." *Miller*, 779 F.2d at 1382-83; *Nielsen*, 252 F.R.D. at 512. Upon such a showing, the burden shifts to the requestor to show that the search was not in good faith. *See Nielsen*, 252 F.R.D. at 517; *see also SafeCard Servs, Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (speculative claims about existence of other documents cannot rebut presumption of good faith afforded agency affidavits). As with any agency action, the agency is entitled to a presumption of good faith and regularity. *See id.*; *Averianova v. Holder*, 592 F.3d 931 (8th Cir. 2010) (agency action is entitled to presumption of regularity).

In the present case, Plaintiff has not alleged that the search was inadequate, nor stated any basis for continuing to believe that responsive documents exist, nor articulated any additional relief to which Plaintiff might be entitled. Accordingly, the case should be dismissed as moot.

Even if there is a continuing dispute over the existence of responsive documents, *see Urban*, 72 F.3d at 95, the Government is entitled to summary judgment because the

Bies Declaration establishes that OLC conducted a reasonable search for the records requested in Plaintiff's Complaint and located no responsive records. The Bies Declaration explains that an attorney in OLC initiated a search of the relevant database and any other locations identified as possibly containing potentially responsive documents. Bies Decl. ¶ 13. Because OLC is a small office, it was able to identify the specific individuals, files and databases that might have potentially responsive records. *Id.* ¶¶ 13-15. This initial search revealed that there were no responsive documents to item 3 of the Plaintiff's request –the only subcategory at issue here. *Id.*

The results of this initial search were confirmed by a later, broader search. *Id.* ¶¶ 16-22. An experienced OLC paralegal searched the Isys database for a broad set of keywords. *Id.* ¶ 17. In addition, an OLC attorney discussed with potential custodians whether there were potentially responsive documents located in secure locations, and any such locations were searched. *Id.* ¶ 18. A paralegal also searched those files of departed OLC employees that might contain potentially responsive documents. *Id.* ¶ 19. Additionally, an OLC attorney or paralegal conducted keyword searches of the emails of these potential custodians. *Id.* ¶ 20. Finally, the declarant personally spoke with the four current potential custodians. These searches confirmed that there are no documents responsive to item 3 of Plaintiff's request, seeking legal opinions or memoranda about potential drone strikes in the United States. *Id.* ¶¶ 21-22.

Plaintiff's Complaint raises no doubt whatsoever about the adequacy of this search and should be dismissed. Plaintiff's narrative summary in the 26(f) Report seems to indicate a mistaken belief that, in the original FOIA response, Defendant was admitting

that there are documents responsive specifically to item 3. As explained above, the original response merely grouped the remainder of the request together, responding to items 2 and 3 together, consistent with ordinary OLC practice.⁴ After Plaintiff narrowed its request on appeal and in this litigation, the Department has repeatedly informed Plaintiff that there were no records responsive to its narrowed request.

To the extent Plaintiff challenges the original treatment of items 2 and 3 as a single unit, that challenge is clearly moot because OLC has subsequently explained that there are no documents responsive to item 3. Moreover, the challenge would be ill-founded. There is no requirement in FOIA or the case-law that a FOIA response identify which documents are responsive to which sub-categories of a request so long as the requirements of FOIA are met. To the extent Plaintiff simply chooses not to believe that the original response was intended to respond to the remainder of the request rather than specifically to item 3, the agency's representations and sworn affidavits are entitled to a presumption of good faith that has not been rebutted.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Complaint or enter summary judgment for the Defendant.

⁴ This is ordinary practice at OLC and at many other federal agencies. Plaintiff is a repeat FOIA requestor and should be familiar with this practice. Plaintiff never inquired directly of OLC whether there were any items responsive specifically to subcategory 3 of the request, preferring to pursue appeal and litigation instead. Bies Decl. ¶ 8. Generally, when asked to identify which documents are responsive to which subcategory of the request, OLC will attempt to comply as long as the determination would not be overly burdensome or reveal protected information. *Id.*

Dated: September 21, 2012

Respectfully Submitted,

STUART F. DELERY
Acting Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs
Branch

/s/Amy E. Powell

AMY E. POWELL
Trial Attorney
U.S. Department of Justice, Civil
Division
Federal Programs Branch
20 Massachusetts Ave., N.W., Room
5377
Washington, D.C. 20530
Tel.: [REDACTED]
Fax.: (202) 616-8470
Email: [REDACTED]
Attorneys for Defendant

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the memorandum complies with the limits in LR 7.1(f) and with the type-size limit of LR 7.1(h). According to the word-count function of Microsoft Word 2010, this memorandum contains 2,173 words or 185 lines, including headings, footnotes and quotations (but excluding the caption, the signature block and this certificate).

/s/Amy E. Powell

AMY E. POWELL
Trial Attorney
U.S. Department of Justice, Civil
Division
Federal Programs Branch
20 Massachusetts Ave., N.W., Room
5377
Washington, D.C. 20530
Tel.: [REDACTED]
Fax.: (202) 616-8470
Email: [REDACTED]
Attorneys for Defendant