UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, Defendant.	Civil Action No. 1:19-cv-03544-APM

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Court should grant Defendant's motion for summary judgment. Plaintiff does not offer any arguments that refute the basis for Defendants' motion.

First, Defendant has demonstrated that the Department of Homeland Security ("DHS") conducted a reasonably calculated search to uncover responsive records.

Second, Defendant appropriately applied the Freedom of Information Act ("FOIA") exemptions to the responsive records.

For these reasons, as further explained in Defendant's motion for summary judgment and below, the Court should conclude Defendant conducted a reasonable search and properly withheld exempt information and grant summary judgment in Defendant's favor.

ARGUMENT

A. DHS Conducted Searches Reasonably Calculated to Uncover Responsive Records

As the government has explained, Defendant conducted reasonable searches. *See* Mem. In Supp. of Mot. for Summ. J. (hereinafter, "Br."), at 5–10, ECF No. 15-1. Plaintiff makes three arguments in response. *See* Pl.'s Mem. of P. & A. in Opp'n to Def.'s Mot. for Summ. J. (hereinafter, "Opp'n"), at 5–14, ECF No. 25-1. Each fails.

1. Defendant conducted a reasonable search for records relevant to the 2017 review of the CVE program

Plaintiff argues, "DHS's search simply overlooked" Plaintiff's request for "documents reflecting DHS' 2017 review of the CVE program ordered by Secretary Kelly" Opp'n, at 5, and DHS was required to search outside of the Office of Public Engagement ("OPE") and the Office of Community Partnerships ("OCP"), *id.*, at 8–9. *See also, id.*, at 5–12. Plaintiff's argument is unpersuasive.

Defendant conducted a reasonable search for the relevant documents. FOIA requires agencies to undertake searches that are "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). DHS searched the e-mail records for 24 individuals in the Office of Public Engagement ("OPE") and the Office of Community Partnerships ("OCP"). Decl. of James V.M.L. Holzer (July 17, 2020) ¶ 11 (hereinafter, "Holzer Decl."), ECF No. 18-3. DHS conducted the search of these offices and these individuals because "the FOIA Division worked closely with the staff responsible for the CVE program to identify a list of agency staff members involved with the program or who made decisions relating to the program." *Id.*; *see Schrecker v. DOJ*, 349 F.3d 657, 662 (D.C. Cir. 2003) (concluding the process of conducting an adequate search for documents requires "both systemic

and case-specific exercises of discretion and administrative judgment and expertise," and it is "hardly an area in which the courts should attempt to micromanage the executive branch.") (internal quotation marks and citation omitted). Thus, Defendant's search was reasonably calculated to uncover all relevant documents. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) ("An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents.") (internal quotations and citation omitted).

Plaintiff's assertion that Defendant's search was inadequate because DHS did not search outside the OPE and OCP is unpersuasive. Opp'n, at 8–12. The FOIA does not require that an agency search every division or field office on its own initiative in response to a FOIA request if responsive documents are likely to be located in a particular place. *Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996); *Marks v. Department of Justice*, 578 F.2d 261, 263 (9th Cir. 1978). As Defendant's declarant notes: "DHS has previously reviewed all of Secretary Kelly's emails during the course of another FOIA litigation matter, and while drafting this declaration, FOIA staff reviewed those releases and did not find any emails relating to this review." Decl. of James V.M.L. Holzer (Sep. 28, 2020) ¶ 8 (hereinafter, "Holzer II Decl.") (attached hereto as Ex. A). Moreover, Defendant properly elected not to search the Office of the Secretary "because any communications with the Office of the Secretary and these programs and any final decisions made by the Secretary would be captured through a searched of OPE (including TCTP) and OCP." Holzer II Decl. ¶ 7. Lastly, Defendant evaluated the records that had been returned by the searches, Holzer Decl. ¶ 13, and if during the review of those records there had been indicia that records exist that were not returned by the initial search, then the Office would have undertaken an additional search. *Id.* ¶ 11. But there were no such indicia. *Id.* ¶ 11; *see SafeCard Servs., Inc. v.*

SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991) ("Agency affidavits are accorded a presumption of good faith.") (citation omitted). Thus, Plaintiff fails to demonstrate Defendant's search was inadequate.

2. DHS properly withheld e-mail attachments

Plaintiff speculates that DHS improperly withheld non-relevant e-mail attachments. Opp'n, at 12–14. Plaintiff's argument is misplaced.

Defendant properly withheld any attachments to electronic mail ("e-mail") messages. An agency may evaluate the responsiveness of an attachment to an electronic mail message. *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 678–79 (D.C. Cir. 2016) (declining to define "record"; observing that under FOIA, agencies effectively define what a record is when "undertak[ing] the process of identifying records that are responsive to a request"; and deferring to the agency's own understanding of the term). Here, Defendants separately evaluated each e-mail message and any attachments to determine whether each was responsive to Plaintiff's request. Holzer Decl. ¶ 13. Plaintiff speculates that because an e-mail message references a purported attachment, Defendant improperly withheld e-mail attachments. Opp'n, at 13. However, as Defendant's declarant explained it is "possible for a responsive email to have attachments that are deemed non responsive or duplicative by [Defendant's] FOIA Analyst," Holzer II Decl. ¶ 9. Thus, Plaintiff has not demonstrated that Defendant improperly withheld the attachments to e-mail messages.

3. Defendant did not fail to disclose final press reports

Plaintiff argues that Defendant did not disclose any "final statements in response to the press inquiries." Opp'n, at 14. Plaintiff's argument is without merit.

Defendant conducted a reasonable search for responsive records. A plaintiff's "mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *Steinberg v. U.S. DOJ*, 23 F.3d 548, 552 (D.C. Cir. 1994). Here, Plaintiff speculates, "DHS *appears* to have redacted draft answers to [inquiries]," which "*suggests*" "DHS made final statements in response to the press inquiries." Opp'n at 14 (emphasis added). Defendant conducted a reasonable search conducted for responsive records, *see* Br. at 8–10, submitting a detailed affidavit describing the search, *see* Holzer Decl. ¶¶ 9–12. "Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc.*, 926 F.2d at 1200 (internal quotations and citation omitted). Therefore, Defendant's search was reasonably calculated to uncover all relevant documents.

B. DHS Properly Applied FOIA Exemptions To Withhold Limited Records

As the government has explained, Defendant properly applied the FOIA Exemptions. *See* Br., at 10–20. Plaintiff makes four arguments in response. See Opp'n, at 14–29. For the reasons below, Plaintiff's first two arguments fail, and Defendant has already addressed the other two.

1. DHS properly withheld documents related to John Barsa[1]

Plaintiff argues DHS cannot claim Exemption 5 over "records and e-mail chains received, reviewed, or responded to [or] by John Barsa" because Mr. Barsa may have been a member of

[1] Plaintiff presents a novel argument that the government may not protect pre-decisional, deliberative records exchanged between a member of a presidential transition team and an executive agency. Opp'n, at 14–25. Defendant's undisputed fact that Mr. Barsa was an employee during the relevant time-period moots Plaintiff's argument. Thus, without waiving any arguments to the contrary, Defendant does not respond to Plaintiff's argument. If the Court disagrees that Plaintiff's argument is moot, Defendant asks that the Court provide Defendant an opportunity to submit supplemental briefing on the issue. Defendant further notes that another court in this district has indicated that the government may be able to protect records exchanged between a

President Trump's transition team during a portion of the relevant time-period. Opp'n, at 14–25. Plaintiff's argument is without merit.

During the relevant time-period, John Barsa was a government employee. Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Here, Mr. Basra was "from January 21, 2017 to June 10, 2019, . . . an employee of the Department of Homeland Security." Holzer II Decl. ¶ 10 (delineating the dates of Mr. Barsa's service as an employee of the DHS and as a member of the DHS Transition Team for the Trump Administration). For any documents withheld under Exemption 5, the dates of the documents are after January 21, 2017 and before June 10, 2019. *See* Holzer Decl., Ex 5 Vaughn Index (noting the date of the first claim of Exemption 5 as February 2, 2017 and the date of the second claim as Exemption 5 as August 14, 2017). Thus, the records reflect intra-agency discussions because Mr. Basra was an employee of DHS when he received, reviewed, or responded to the records. Therefore, Defendant's claim of Exemption 5 was proper.

2. Defendant demonstrated foreseeable harm

Plaintiff argues that Defendant did not demonstrate the foreseeable harm standard. Opp'n, at 25–28. Plaintiff's argument is without merit.

Defendant has met the heightened standard of foreseeable harm. "An agency shall withhold information under this section only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b)." 5 U.S.C. § 552(a)(8)(A)(i)(I). Here, Defendant's declarant stated that disclosure of the records withheld

member of a presidential transition team and an executive agency. *See Protect Democracy Project, Inc. v. United States DOE*, 330 F. Supp. 3d 515, 526–27 (D.D.C. 2018).

under Exemption 5—focusing on the type of records withheld—could lead to concrete, reasonably foreseeable harms, ranging from discouragement of free exchange of views within and between agencies and an accordant diminution of the quality of governmental decisions, to harassment or even physical harm effected upon agency personnel who played a role in the sensitive, controversial Countering *Violent* Extremism program. Holzer Decl. ¶ 25 (emphasis added). This statement meets the heightened standard. *See Amadis v. United States Dep't of State*, 971 F.3d 364 (2020) (concluding that a declaration that "focused on the information at issue" was sufficient to meet the heightened standard) (internal quotations omitted). In a misplaced attempt to demonstrate otherwise, Plaintiff creates his own sub-categories of records related to the CVE program. Opp'n, at 27–28. But, Plaintiff's strawman glosses over the withheld records—which all are pre-decisional, deliberative records about the CVE program and DHS' administration of the program. That a record may only relate to a facet of the CVE program does not defeat the "foreseeable harm" of the release of pre-decisional, deliberative records, which if released (1) "would severely hamper the efficient day-to-day workings of the Department," Holzer Decl. ¶ 24; and (2) would result in "a concrete and foreseeable harm . . . [the] diminished inter- and intra-agency candor and capacity to engage in thoughtful, uninhibited, and occasionally contentious consideration and debate of at times opposing internal viewpoints before a final decision is reached," about the CVE program, *id*., ¶ 25, and, thus, the release would adversely affect DHS' ability to administer the CVE program. Therefore, Defendant has demonstrated the foreseeable harm in the release of the records withheld under FOIA Exemption 5, and Defendant's claim of Exemption 5 was proper.

3. Defendant did not improperly scope non-responsive information

Plaintiff argues that Defendant improperly scoped non-responsive information. Opp'n, at 28–29. Defendant has addressed this issue. In July 2020, Defendant completed a supplemental release, removing any redactions marked as non-responsive. Holzer Decl., Ex. E, Vaughn Index.

4. Defendant properly applied Exemption 6 to official's names

Plaintiff argues DHS on a number of occasions DHS "redacted the names of higher-level government employees." Opp'n, at 28. Defendant has addressed this issue. Subsequent to Plaintiff's filing of its opposition, Defendant reviewed the records listed in Table 6 of the Gutman Declaration. Holzer II Decl. ¶ 11. Defendant determined that Defendant should not have redacted the names, and, thus, made a supplemental release to Plaintiff on September 28, 2020. *Id*. However, Defendant avers that all other information withheld under Exemption 6 related to the names, phone numbers, and e-mail addresses of employees was proper. *See* Br. 14–18.

CONCLUSION

For the reasons explained in Defendant's motion and further discussed above, the Court should grant summary judgment in Defendant's favor.

Dated: September 28, 2020

Respectfully Submitted,

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON,	)	
Plaintiff,	)	
v.	)	Case No. 1:19-cv-3544 (APM)
UNITED STATES DEPARTMENT OF HOMELAND SECURITY,	)	
Defendant.	)	

SECOND DECLARATION OF JAMES V.M.L. HOLZER

I, James V.M.L. Holzer, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Deputy Chief Freedom of Information Act ("FOIA") Officer for the Department of Homeland Security ("DHS") Privacy Office ("Privacy Office").

2. In this capacity, I am the DHS official responsible for implementing FOIA policy across DHS and responding to requests for records under the FOIA, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and other applicable records access provisions. I have been employed by the DHS Privacy Office in this capacity since May 2016. I previously served as the Director of the Office of Government Information Services within the National Archives and Records Administration, and prior to that I served as the Senior Director of FOIA Operations for DHS.

3. Through the exercise of my official duties, I have become familiar with the handling of Plaintiff's FOIA request, and I have also become familiar with the background of this litigation. I have read a copy of the Complaint filed by Plaintiffs on November 25, 2019. I make the statements herein based on my personal knowledge, as well as on information that I acquired while performing my official duties. This is my second declaration associated with this litigation.

4. Plaintiff's request is set out in full in my first declaration. In sum, Plaintiff's four-part request sought information and records relating to former DHS Advisor for Policy Katharine Gorka's involvement in the decision to revoke grants to combat white supremacy and white nationalism, specifically: (1) Katherine Gorka's calendars; (2) documents reflecting Ms. Gorka's "responsibilities and duties" as Adviser to the DHS Office of Policy and Adviser to the DHS Chief of Staff; (3) communications between Ms. Gorka and George Salem and David Gersten; and (4) documents reflecting DHS' 2017 review of the Countering Violent Extremism (CVE) program ordered by then-DHS Secretary John Kelly in January 2017, and any documents reflecting the decision to revoke CVE grant funding from Life After Hate and the University of North Carolina at Chapel Hill. The time frame for these searches was between January 20, 2017, and August 18, 2017, the date of Plaintiff's request.

5. DHS' search was reasonably calculated to produce the records requested by Plaintiff. As I explained in great detail in my first declaration, based on the FOIA Division's expertise with DHS's file system and records, its professional understanding of how to search effectively, and its analysis of how best to locate the records requested, DHS made the decision to task the Office of the Chief Information Officer (OCIO) KMD to conduct back-end searches of all DHS Headquarters email accounts using a journaling server or similar email storage system because this system captures and stores every email sent or received by any DHS Headquarters email account and OCIO has maintained such a system at all times relevant to Plaintiff's FOIA request thus making it likely that if records responsive to Plaintiff's request did exist a search of OCIO KMD would likely produce them. Again, for part one of Plaintiff's request, OCIO conducted a search for Outlook Calendar Items using the names Katie Gorka and Katharine Gorka between January 20, 2017, and August 18, 2017. For part two of Plaintiff's request, OCHCO was

tasked with searching for records concerning Ms. Gorka's responsibilities and duties. OCIO was not tasked with this search, because it was narrow enough for OCHCO itself to do a targeted search for the information. The search of OCHCO located copies of the position descriptions for the two positions Ms. Gorka held: Advisor to the Secretary, and Advisor to the Assistant Secretary for Policy. For part three of Plaintiff's request, OCIO searched, using a date range of January 20, 2017, to August 18, 2017, for any and all emails between Katharine (or Katie) Gorka, George Selim, and/or David Gersten by searching those individuals' email accounts and using the search terms: "Gorka" and "Selim" or "Gersten." For part four of Plaintiff's request OCIO searched, using a date range of January 20, 2017, to August 18, 2017 and the search terms (and variations thereof) "Life After Hate" and "Univ. North Carolina at Chapel Hill", the emails of the 24 individual DHS employees within what is now known as the Office of Public Engagement (OPE) and the Office of Community Partnerships ("OCP")) who had been involved with the CVE grants.

6. The Privacy Office's choice of what offices to search was reasonable and appropriate given their knowledge of the mission and internal workings of the Department and the offices within it. As previously explained, the FOIA Division made the informed decision to task the Office of Public Engagement (OPE), previously the Office for Targeted Violence and Terrorism Prevention ("TVTP"), because the date range associated with Plaintiff's request included both offices. DHS also chose to conduct a search of the Office of Community Partnerships ("OCP") based on an understanding that this office also had been involved with the CVE grants of interest to Plaintiff. DHS made the decision to task only these offices and did not conduct a search of the Office of the Secretary because any communications with the Office of the Secretary and these programs and any final decisions made by the Secretary would be captured through a

searched of OPE (including TVTP) and OCP. DHS also did not choose to conduct a search of the "press office", the Office of Public Affairs (OPA), because OPA would not have been involved in any decisions to award or rescind CVE grants. OPE and OCP were the offices that made and communicated those decisions.

7. The FOIA Division's search of emails was reasonably calculated to produce records responsive to Plaintiff's request. Although files may initially be drafted and stored on shared drives or individual desktop drives, at DHS such documents are sent electronically via email, and therefore any such documents and communications sent would be captured by DHS' central email system. Because of this, DHS made the informed decision – consistent with their stance in other FOIA litigations - that a search beyond email is unlikely to produce any marginal return of records of interest to any Plaintiff. For example, part one of Plaintiff's request, which sought calendar and meeting entries, were similarly properly addressed by directing OCIO to conduct a search for Outlook Calendar items, because at DHS Outlook Calendar is how calendars are maintained, and it was unlikely that a different search would produce a marginal return.

8. In particular, Plaintiff argues that "DHS did not appear to respond to the first part of CREW's Request 4 – for documents reflecting the Kelly review of the CVE program and only focused on the second part, relating to grants, and narrowed it to the emails of staff-level employees." Plaintiff's argument lies in the false assumption that Secretary Kelly would have communicated his desire for a review of the CVE program through email, rather than during an in-person meeting or over the phone. DHS has previously reviewed all of Secretary Kelly's emails during the course of another FOIA litigation matter, and while drafting this declaration, FOIA staff reviewed those releases and did not find any emails relating to this review.

9. In reviewing the records returned from the search, the FOIA Division considered

each document for responsiveness based on its own contents. As previously explained, any email files loaded into the application initially maintain their parent/child relationship with any attachments they may have contained. Thereafter, the FOIA analyst conducting the responsiveness review evaluates each document, email, and attachment as a separate document. It is therefore possible for a responsive email to have attachments that are deemed non responsive or duplicative by the FOIA Analyst and these non-responsive and duplicative records may be excluded from the record set and therefore not included with the production which is why it may appear to Plaintiff that DHS did not produce all email attachment when, in fact, DHS did.

10. Plaintiff suggests that DHS should have conducted a search of the Office of the Secretary. The Office of the Secretary does not maintain final decisions by the Secretary, this is done through the Office of the Executive Secretariat. And to be clear, in some cases, the agency never reached a final decision or authority to make a decision was delegated. Plaintiff did not specifically request that DHS conduct a search of the Office of the Secretary and DHS made the informed decision that a search of the Office of the Secretary was unlikely to produce the records of interest to Plaintiff. Plaintiff continues to raise questions about whether the "consultant corollary" applies here and whether DHS waived this privilege by including John Barsa in certain communications when Mr. Barsa was not yet a salaried employee of the Department of Homeland Security. In paragraph 26 of my prior declaration, I stated "John Barsa, was at all relevant times either a Department of Homeland Security employee or a member of the DHS Transition Team for the Trump Administration." Upon additional information provided to me by the Office of the Chief Human Capital Officer, I state the following: From January 21, 2017 to May 13 2017, Mr. Barsa was a GS-15, Advisor, first under a provisional appointment to the

Office of the Secretary and Executive Management Executive Secretariat (January 21, 2017 to April 1, 2017) and then under an excepted appointment to the Office of the Assistant Secretary for Policy (April 2, 2017 to May 13, 2017). From May 14, 2017 to June 10, 2019, Mr. Barsa was a non-career SES as the Principal Deputy Assistant Secretary and Chief of Staff. Thus, from January 21, 2017 to June 10, 2019, Mr. Barsa was an employee of the Department of Homeland Security, and prior to January 20, 2017, he was a member of the DHS Transition Team for the Trump Administration.

11. As explained in my first declaration and as listed in DHS's Vaughn Index, DHS applied FOIA Exemption (b)(6) to protect the phone numbers, email addresses, names of lower-level employees, information about personnel matters, and other personally identifiable information of DHS employees. Plaintiff is challenging certain redactions, asks that DHS conduct a second review of the information withheld, and consider making a supplemental production. In response to Plaintiff's challenges, my staff have re-reviewed the redactions on these pages and have determined that on five pages the employees whose names are redacted in the documents are in fact high level employees and therefore the release of these employee names aid the public's understanding of the workings of the Department. DHS will be making a supplemental release of these five pages.

Under penalty of perjury, pursuant to 28 U.S.C. § 1746 I declare the foregoing is true and correct to the best of my knowledge and belief.

Dated the 28th day of September 2020

James V.M.L. Holzer, I

James V.M.L. Holzer
Deputy Chief FOIA Officer
U.S. Department of Homeland Security