UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON	:	
Plaintiff,	:	
v.	:	Civ. No. 1:18-cv-00007-TSC
UNITED STATES DEPARTMENT OF JUSTICE	:	
Defendant.	:	

MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND REPLY MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION.. 1

ARGUMENT... 1

I. OIP's search was adequate and no additional information is required. 1

II. OIP's and OIG's decisions to treat distinct emails and text messages as separate records was consistent with CREW's FOIA request and permissible under FOIA. 3

CONCLUSION 9

INTRODUCTION

In its moving brief, Defendant U.S. Department of Justice ("DOJ") amply explained that its Office of Information Policy ("OIP") and Office of the Inspector General ("OIG") performed adequate searches for records responsive to the underlying requests that Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") filed in this case under the Freedom of Information Act ("FOIA").

In its opposition and cross-motion, CREW claims that OIP must provide additional information about the technical glitch that OIP encountered in searching for responsive email records in this case and asserts that OIP and OIG were required to treat email chains as individual records under FOIA. CREW is incorrect on both points. OIP adequately explained the steps that it took after discovering the technical glitch to ensure that OIP's searches for email records was complete. Further, OIP's and OIG's content-based approach to evaluating whether groupings of unrelated information should be processed as discrete records accorded with the D.C. Circuit's relevant guidance in *American Immigration Lawyers Association v. Executive Office for Immigration Review*, 830 F.3d 667, 678 (D.C. Cir. 2016), as well as DOJ's own FOIA guidance to agencies, and does not conflict with FOIA's requirements.

ARGUMENT

I. OIP's search was adequate and no additional information is required.

OIP performed a search that was reasonably calculated to uncover all responsive records, and sufficiently explained its search in the declarations thus far provided in this case. CREW argues that because OIP admitted that it became aware of a problem with the data on which some of its searches for email records was conducted, *see* Aug. 10, 2018, Decl. of Vanessa R. Brinkmann, ECF No. 15-1, and re-ran its problematic searches after the data was repaired, Oct. 26, 2018, Decl. of Vanessa R. Brinkmann Decl. ¶ 27, ECF No. 25-2, OIP is required to provide

additional information about the scope of the problem before its search can be declared adequate, *see* Pl.'s Br. at 7–8. But this is incorrect. OIP already explained, in detail, that DOJ's Justice Management Division's ("JMD") Office of the Chief Information Officer ("OCIO") informed OIP that some emails were not migrated onto new servers, Aug. 10, 2018, Brinkmann Decl. ¶ 8, and as a result, OCIO conducted some of OIP's FOIA searches against an incomplete collection of some custodians' email records, *id.* OIP also explained that OCIO had been working to repair the data by populating the full collection of custodians' emails in the appropriate records repository. *See id.* ¶ 8; *see also* Defs.' Status Report, ECF No. 18. After that, OIP worked with OCIO to re-run its affected searches on the repaired data, and affirmed that "all files likely to contain relevant documents were searched." Oct. 26, 2018, Brinkmann Decl. ¶ 35. No more is required.

CREW's reliance on *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999), and *Oglesby v. U.S. Dep't of Army*, is misplaced. In *Valencia-Lucena*, the agency informed the requester of a location that was likely to have responsive records, but it did not search that location. 180 F.3d at 327. Here, however, once OIP discovered that some of its email searches were potentially incomplete, it re-ran the searches against the complete set of data. Further, all *Oglesby* requires is for an agency to "show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68. Here, OIP explained that it re-ran its electronic searches for emails and did not attempt to locate additional email records in a haphazard fashion; thus, it employed a "systematic approach to document location." *See Oglesby*, 920 F.2d at 68. OIP's acknowledgement of the problem, and efforts to correct it, undercut any suggestion of bad faith on its part, *see Bigwood v. United States Dep't of Def.*, 132

F. Supp. 3d 124, 140 (D.D.C. 2015); indeed, OIP's proactive approach affirmatively demonstrates its commitment to ensuring complete searches in its cases. CREW offers nothing more than "rank speculation" that OIP's efforts, and explanation of those efforts, were anything less than complete. *See Brustein & Manasevit, PLLC v. United States Dep't of Educ.*, 30 F. Supp. 3d 1, 8 (D.D.C. 2013).

II. OIP's and OIG's decisions to treat distinct emails and text messages as separate records was consistent with CREW's FOIA request and permissible under FOIA.

OIP and OIG permissibly determined that individual emails constituted separate agency records under FOIA and processed them accordingly. In doing so, OIP and OIG followed the D.C. Circuit's guidance in *AILA*, 830 F.3d 667, 678 (D.C. Cir. 2016). In that case, the D.C. Circuit recognized that "[t]he practical significance" of its holding that FOIA requires an agency "to disclose a responsive record as a unit (after deletion of exempt information) depends on how one conceives of a 'record.'" *Id.* The court, as it has many times before, noted that "[a]lthough FOIA includes a definitions section, that section provides no definition of the term 'record.'" *Id.* (citing 5 U.S.C. §551); *see also Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 216 (D.C. Cir. 2013). "Under FOIA, agencies instead in effect define a "record" when they undertake the process of identifying records that are responsive to a request." *Id.* (citing 5 U.S.C. § 552(f)(2)). "[T]he dispositive point is that, once an agency *itself* identifies a particular document or collection of material—such as a chain of emails—as a responsive 'record,' the only information the agency may redact from that record is that falling within one of the statutory exemptions." *Id.* at 678–79. While the agency in *AILA* defined a chain of emails as a single record, the court explicitly contemplated that "the government in a different case might undertake to conceive of an individual 'record' more narrowly." *Id.* at 679. The court pointed to

DOJ's guidance on this topic as a useful starting point for agencies in considering how to divide their records. *Id.* at 678.

DOJ updated its guidance in light of the *AILA* decision to explain that "[w]hen documents contain multiple subjects, agencies can review them to determine whether they can be divided into distinct records, based on both the subject of the request and the content of the request." OIP Guidance, "Defining a 'Record'" under FOIA 4, available at https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia (last accessed Dec. 7, 2018). District court decisions in the wake of *AILA* have stressed that the agency's threshold decision about whether to treat information as individual records is consequential, *see Cable News Network, Inc. v. Fed. Bureau of Investigation*, 298 F. Supp. 3d 124, 130–31 (D.D.C. 2018), *appeal dismissed*, 18-5041, 2018 WL 4619108 (D.C. Cir. July 5, 2018), and, if satisfactorily justified, is entitled to a presumption of good faith, *see Shapiro v. Cent. Intelligence Agency*, 247 F. Supp. 3d 53, 75 (D.D.C. 2017). In particular, the district court in *Shapiro* examined the *AILA* decision in depth and applied the "broad principles" contained in the D.C. Circuit's and DOJ's guidance to probe the agency's reasons for dividing a given grouping of information into discrete records. *Shapiro v. Cent. Intelligence Agency*, 247 F. Supp. 3d 53, 74–75 (D.D.C. 2017).

Here, as Defendant explained in its opening brief, OIP and OIG determined that certain individual emails are separate records. These determinations are reasonable in part because CREW's FOIA request only sought communications "concerning the decision to invite reporters to DOJ" on a specific date and for a specific purpose, *see* Waller Decl., Ex. 1 at 2; Brinkmann Decl., Ex. 1 at 2, and many of the email communications that OIP and OIG reviewed were email conversations that veered into unrelated topics. *See* Decl. of Deborah Waller ¶ 12, ECF No. 25-3; Oct. 26, 2018, Brinkmann Decl. ¶ 93. Further, doing so allowed OIP and OIG to efficiently

process CREW's FOIA request, without having to review and redact non-responsive emails. *See* Waller Decl. ¶ 12; Oct. 26, 2018, Brinkmann Decl. ¶ 93. OIP and OIG thus adequately explained their decisions to define the scope of a "record" when they undertook "the process of identifying records that are responsive to [CREW's] request." *AILA*, 830 F.3d at 678 (citing § 552(f)(2)); *see also Shapiro v. Cent. Intelligence Agency*, 247 F. Supp. 3d 53, 75 (D.D.C. 2017). It bears noting that agencies have treated individual emails as individual records in other FOIA cases. *See, e.g.*, *Hyatt v. U.S. Patent & Trademark Office*, CV 18-234 (RCL), 2018 WL 4682020, at *1 (D.D.C. Sept. 28, 2018); *Gawker Media, LLC v. United States Dep't of State*, 266 F. Supp. 3d 152, 161 (D.D.C. 2017).

CREW's arguments to the contrary should be rejected. According to CREW, FOIA requires agencies to treat email chains as a single agency record. But this proposition is completely unsupported by FOIA's statutory text and legislative history, as well as by the body of case law interpreting the statute.

As a threshold matter, CREW argues that OIP's and OIG's decisions to treat distinct emails as individual records is subject to *de novo* review and, therefore, is not accorded a presumption of good faith. *See* Pl.'s Br. at 9–11. While an agency's statutory interpretation of FOIA is subject to *de novo* review, an agency's operational reasons for treating a grouping of information as discrete records are indeed entitled to the presumption of good faith, as part and parcel of the agency's "process of identifying records that are responsive to a request." *See AILA*, 830 F.3d at 678; *see also Shapiro*, 247 F. Supp. 3d at 75.

CREW next argues that FOIA's definition of "record" compels agencies to treat all email chains as single records, as a *per se* rule. Pl.'s Br. at 11–16. First, CREW argues that the way that emails are typically stored requires the production of full email chains as a single record. *See id.*

at 13–14. But the fact that a software program presents information in a particular fashion should not alter the definition of what constitutes a "record" for purposes of FOIA. CREW's arguments otherwise are premised upon case law that examines whether agency documents should be *disclosed* under FOIA.[1] *See* Pl.'s Br. at 12 (citing *Judicial Watch*, 726 F.3d at 217). In that context, courts "examine how the agency would treat the records in the normal course of operations" by, for example, looking at whether an agency has "*chosen* to retain possession or control" of the documents. *Judicial Watch*, 726 F.3d at 219. Here, by contrast, the issue is whether a collection of documents can be *divided* into separate records.

Further, CREW's reliance on a 1996 Senate report for the proposition that FOIA "requires that Federal agencies provide records to requesters in any form or format in which the agency maintains those records," is also unavailing. *See* Pls.' Br. at 12 (citing S. Rep. 104-272, 14). That report examined proposed language that never went into effect: specifically, a clause that would have required an agency to, "as requested by any person, provide records in any form or format in which such records are maintained by that agency." S. REP. 104-272, 3. But the FOIA does not contain this requirement; rather, it merely requires that "[i]n making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). An agency must first identify the responsive records at issue before it can determine whether the records are readily reproducible in a particular format; as such, OIG's and OIP's determination of what constitutes an individual record does not conflict with the FOIA.

[1] In fact, depending upon the nature of the program and how it is configured, it may be possible for emails in a chain to be displayed individually.

As OIP has explained, it is important for agencies to adopt "a more fine-tuned, content-based approach" to the definition of a "record"—an approach "which applies irrespective of the physical attributes of a document." *OIP Guidance*, *supra*, p. 4. That is precisely what OIP and OIG did here in consistently treating separate emails as separate records, regardless of where in an email thread they happened to be located. CREW, by contrast, would elevate physical manipulation of documents over an approach that takes appropriate stock of the relevant context. CREW's approach would appear to strip agencies of any flexibility in treating separate emails within an email thread as separate records, no matter how disparate in content, so long as Microsoft Outlook (or any other software program) automatically reproduces non-responsive emails below a lone responsive communication. In rejecting that rule and following the D.C. Circuit's and DOJ's guidance, the agencies took a reasonable approach to their definition of a "record."

CREW contends that OIG's and OIP's approach circumvents the D.C. Circuit's holding in *AILA*. *See* Pl.'s Br. at 14, 16. But *AILA* explicitly recognized that the "practical significance" of its holding would depend on how an agency defined a single "record," and specifically contemplated that agencies would, at least in some circumstances, decide to treat emails as separate records. *See AILA*, 830 F.3d at 678 (acknowledging that "email can pose special challenges because it is not unusual for an email chain to traverse a variety of topics having no relationship to the subject of a FOIA request") (internal quotation marks omitted). The court specifically observed that "the government in a different case might undertake to conceive of an individual 'record' more narrowly" than a full email chain. *Id.* at 679. And while the court found it "difficult to believe that any reasonable understanding of a 'record' would permit withholding an individual sentence within a paragraph within an email," *id.*, such surgical line-drawing did not occur here. *See also Shapiro*, 247 F. Supp. 3d at 74 (concluding that the FBI's practice of treating individual pages of memorandums, booklets, handouts, and intelligence information reports as separate records is

permissible under FOIA and *AILA* because the FBI demonstrated a sufficient basis to determine that "it was appropriate to divide a document covering multiple, unrelated topics into discrete records"). Thus, OIP's and OIG's approach conforms with *AILA*'s guidance and does not circumvent its holding.

CREW also argues that allowing agencies to decide whether a document or set of documents constitutes a single record would result in agencies adopting inconsistent approaches, which is purportedly disfavored under FOIA. *See* Pl.'s Br. at 13; *see also id.* at 18. But the issue here is not whether agencies are at risk of withholding responsive information because they are interpreting their responsibilities differently. Rather, the issue is whether agencies, in the course of identifying records that are responsive to the request, can divide particular documents into discrete records and process them accordingly.[2] OIG's and OIP's approach thus does not disturb FOIA's requirement that agencies ensure the "disclosure of a responsive record."[3] *AILA*, 830 F.3d at 667.

Finally, CREW attempts to undermine DOJ's guidance on this topic by rehashing its previous arguments about whether emails can be treated as individual records. *See* Pl.'s Br. at 16–19. CREW's arguments do not undermine the basic utility of DOJ's guidance, for the reasons explained above. And here, both OIG and OIP explained their reasons for treating individual emails as individual records which were consistent with the D.C. Circuit's opinion in *AILA*, which in turn formed the foundation for DOJ's guidance.[4] *See* Waller Decl. ¶ 12; Oct. 26, 2018, Brinkmann Decl. ¶ 93. In

---

[2] Indeed, the court in *AILA* expressly contemplated that agencies would be making the decision as to what constitutes a "record," based on "a number of considerations." 830 F.3d at 678.

[3] And to the extent that email storage systems across different federal agencies store email records differently, either currently or in the future, CREW's approach would not ensure consistency.

[4] In disparaging DOJ's guidance, CREW argues that the guidance both circumvents *AILA*'s holding *and* improperly relies on its guidance in *dicta*. *See* Pl.'s Br. at 16. It is difficult to understand how both could be true.

any event, CREW does not challenge DOJ's guidance under the Administrative Procedure Act or any other potentially applicable statute; rather, CREW merely seeks documents unlawfully withheld from disclosure, *see* First Am. Compl. at 7–8, ECF No. 4, and cannot seek a ruling on the guidance through that claim.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant summary judgment in its favor and deny Plaintiff's motion for summary judgment.

Dated: December 7, 2018

JOSEPH H. HUNT
Assistant Attorney General

MARCIA BERMAN
Assistant Branch Director

/s/ Vinita B. Andrapalliyal
VINITA B. ANDRAPALLIYAL
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Tel.: (202) 305-0845
Fax: (202) 616-8470
Vinita.b.andrapalliyal@usdoj.gov

Counsel for Defendant