UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. UNITED STATES GENERAL SERVICES ADMINISTRATION, Defendant.	)	Civil Action No. 18-377 (CRC)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant United States General Services Administration ("Defendant" or "GSA"), by and through undersigned counsel, respectfully moves the Court to enter summary judgment in its favor in this action brought under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") because there is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law. In support of this motion, Defendant respectfully refers the Court to the accompanying Memorandum of Points

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and Authorities, Statement of Material Facts, and Declaration of Travis Lewis, Director of the FOIA and Records Management Division of the Office of Administrative Services for GSA.

Dated: August 6, 2018

Respectfully submitted,

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CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. UNITED STATES GENERAL SERVICES ADMINISTRATION, Defendant.	)	Civil Action No. 18-377 (CRC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case arises under the Freedom of Information Act, 5 U.S.C. § 522 ("FOIA"), and pertains to a FOIA request submitted by Plaintiff, Citizens for Responsibility and Ethics in Washington ("Plaintiff"), to the United States General Services Administration ("GSA") seeking the following 6 categories of records ("Plaintiff's FOIA Request"):

> (1) copies of all records from January 20, 2017 to the present explaining the decision of GSA, announced on July 11, 2017, to cancel the procurement for the new FBI headquarters consolidation project. This request includes, but is not limited to, records from GSA Public Buildings Service, GSA Office of the Administrator, and the National Capital Region;
>
> (2) copies of communications between GSA Regional Commissioner Mary Gibert and GSA Administrator Tim Horne from January 20, 2017 to the present concerning GSA's decision to cancel the procurement for the new FBI headquarters consolidation project;
>
> (3) copies of email communications between either Mary Gibert and Tim Horne and any individual at the eop.gov domain from January 20, 2017 to the present concerning GSA's decision to cancel the procurement for the new FBI headquarters consolidation project;

(4) copies of communications between FBI officials and GSA concerning GSA's decision to cancel the procurement for the new FBI headquarters consolidation project;

(5) copies of communications between the Office of Management and Budget and GSA concerning GSA's decision to cancel the procurement for the new FBI headquarters consolidation project; and

(6) copies of records sufficient to show the amount of federal funds expended to evaluate the final three locations designated by GSA as possible sites for the new FBI headquarters in Fairfax, Virginia and Prince George's County, Maryland.

See Declaration of Travis Lewis ("Lewis Decl."), Exhibit A.

As detailed in the accompanying Declaration of Travis Lewis, Director of the FOIA and Records Management Division of the Office of Administrative Services for GSA, GSA performed a search which was reasonably calculated to locate responsive records. Lewis Decl. ¶¶ 6-12, 14. GSA performed a line-by-line review of the responsive records to identify information exempt from disclosure and released all reasonably segregable portions of the responsive records to Plaintiff after properly withholding only such information that was subject to a FOIA exemption, including information that is protected by the deliberative process privilege (withheld pursuant to FOIA Exemption 5) and the signatures and cellular phone numbers of agency employees (withheld pursuant to FOIA Exemption 6). *Id*. at ¶¶ 17-21; Ex. D. Thus, as demonstrated below, in the accompanying Statement of Material Facts Not in Genuine Dispute, and the Lewis Declaration, there is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law.

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background is fully set forth in Defendant's Statement of Material Facts and the Declaration of Travis Lewis (filed contemporaneously with this motion) and incorporated by reference herein.

LEGAL STANDARDS

Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment must demonstrate an absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has met its burden, the non-movant "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

"FOIA cases are typically and appropriately decided on motions for summary judgment." *Benjamin v. U.S. Dep't of State*, 178 F. Supp. 3d 1, 3 (D.D.C. 2016), *aff'd*, 2017 WL 160801 (D.C. Cir. Jan. 3, 2017) (quoting *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009)). A defendant is entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, that it has conducted an adequate search for responsive records, and that each responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *See, e.g., Weisberg v. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See, e.g., McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Santana v. Dep't of Justice*, 828 F. Supp. 2d 204, 208 (D.D.C. 2011); *Allen v. U.S. Secret Serv.*, 335 F. Supp. 2d 95, 97 (D.D.C. 2004).

ARGUMENT

I. GSA CONDUCTED A REASONABLE AND ADEQUATE SEARCH FOR RESPONSIVE RECORDS

Under FOIA, an agency is obligated to conduct a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency must 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."); *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 137 (D.D.C. 2011). A reasonable search is one that covers those locations where responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. To satisfy its obligation, "the agency must 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." *Id.* An agency is not required to answer questions framed as requests for documents. *See, e.g., Judicial Watch, Inc. v. Dep't of State*, 177 F. Supp. 3d 450, 455-56 (D.D.C. 2016), *aff'd*, Dkt. No. 16-5170 (D.C. Cir. Feb. 24, 2017) (per curiam) ("A question is not a request for records under FOIA and an agency has no duty to answer a question posed as a FOIA request.").

A search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *see also Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 135 (D.D.C. 2015) ("[T]he agency's search for records need not be exhaustive, but merely reasonable. The proper inquiry is not whether there might exist additional documents possibly responsive to a request, but whether the agency conducted a search reasonably calculated to uncover relevant documents."); *Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) ("Perfection is not the standard by which the reasonableness of

a FOIA search is measured."). A search is inadequate only if the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby*, 920 F.2d at 68 (noting that an agency need not search every record system, but only those which it believes are likely to hold responsive records). Accordingly, for a court evaluating an agency's search, the fundamental question is "whether the search for those documents was adequate," not "whether there might exist any other documents responsive to the request." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)); *see also Weisberg*, 705 F.2d at 1351 ("[T]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate.") (quoting *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982)). The court's inquiry, therefore, should focus on the method of the search, not its results. *See, e.g., Bigwood*, 132 F. Supp. 3d at 135 (explaining that the adequacy of the search is judged by appropriateness of the methods used to carry out the search rather than by fruits of the search); *Boggs v. United States*, 987 F. Supp. 11, 20 (D.D.C. 1997) (noting that the court's role is to determine the reasonableness of the search, "not whether the fruits of the search met plaintiff's aspirations").

The agency bears the burden of demonstrating the adequacy of its search by providing a declaration setting forth the search terms and type of search performed, "and averring that all files likely to contain responsive materials . . . were searched." *Elliott v. Nat'l Archives & Records Admin.*, Civ. A. No. 06-1246 (JDB), 2006 WL 3783409, at *2 (D.D.C. Dec. 21, 2006) (quoting *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 313-14 (D.C. Cir. 2003)). "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., 926 F.2d at 1200 (internal quotation marks omitted); *West v. Spellings*, 539 F. Supp. 2d 55, 60 (D.D.C. 2008). Once an agency has met its burden of demonstrating the adequacy of its search, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith." *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993); *Elliott*, 2006 WL 3783409, at *3 (explaining that to satisfy his evidentiary burden, the plaintiff "must present evidence rebutting the agency's initial showing of a good faith search"). Speculative or hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of an agency's search. *See, e.g.*, *Lasko v. U.S. Dep't of Justice*, Appeal No. 10-5068, 2010 WL 3521595, at *1 (D.C. Cir. Sept. 3, 2010) (per curiam) (explaining that the adequacy of the search is not undermined by mere speculation that additional documents might exist); *Oglesby*, 920 F.2d at 67 n.13; *Elliott*, 2006 WL 3783409, at *3 (noting that speculative claims about the existence of other documents cannot rebut the presumption of good faith accorded to agency declarations). Here, the Lewis Declaration establishes that GSA's search method was reasonably calculated to uncover records in its possession responsive to Plaintiff's FOIA Request.

A. GSA's Initial Search

As explained in the Lewis Declaration, GSA determined that the Office of the Chief Information Officer ("OCIO") was the office most likely to have records responsive to the first five categories of Plaintiff's FOIA Request. Lewis notes that "OCIO is the office within GSA that has access to all of the agency's electronic records and conducts all of the agency's electronic discovery searches for potential responsive documents to FOIA requests." Lewis Decl. ¶ 6. OCIO conducted its initial search using the following parameters:

Keywords:

- "FBI"
- "FBI Headquarters"
- "FBI Headquarters procurement"
- "Mary Gilbert and Tim Horne and eop.gov"
- "Mary Gilbert and Tim Horne and fbi.gov"
- "Mary Gilbert and Tim Horne and omb.gov"
- "procurement for the new FBI Headquarters consolidation"

Time Frame:

- January 20, 2017 to February 23, 2018

GSA Email Addresses:

- Mary.gilbert@gsa.gov
- Tim.horne@gsa.gov

Id. at ¶ 7.

Lewis further explains that the search captured both paper and electronic files as copies of all agency employee communications and documents are required to be stored in the employee's email or on the agency's shared drive pursuant to GSA's record retention policy. *Id*. at ¶ 9. The search also captured documents concerning the precise word searched as well as any derivatives of those words. By way of example, Lewis explains that a search using the word "procurement" would also produce documents that contain the word "procure." *Id*. No responsive records were located. *Id*. at ¶ 10.

With respect to the sixth category of Plaintiff's FOIA Request, Lewis determined the Public Building Service ("PBS") "was the office within GSA that would have any potentially responsive records. PBS is the office within GSA that specifically acquires space on behalf of the federal government through new construction and leasing, and acts as a caretaker for federal properties across the country." *Id*. at ¶ 11. Therefore, he "directed [the] FOIA analyst to contact the PBS in order to obtain any potentially responsive records to Plaintiff's FOIA request." *Id*. at

¶ 12. PBS located a responsive document, which was produced to Plaintiff on or about March 20, 2018. *Id*. at ¶ 12.

B. GSA's Supplemental Search

Lewis also explains that GSA performed a supplemental search in June 2018. He notes that "[u]pon conducting a secondary further review of this FOIA request as it became the subject of litigation I noted that our office inadvertently used the name 'Mary Gilbert,' as opposed to 'Mary Gibert,' to search for responsive records." *Id*. at ¶ 14. As a result of this discovery, Lewis tasked OCIO to perform a further search using the following terms:

Keywords:

- "FBI"
- "FBI Headquarters"
- "FBI Headquarters procurement"
- "Mary Gibert and Tim Horne and eop.gov"
- "Mary Gibert and Tim Horne and fbi.gov"
- "Mary Gibert and Tim Horne and omb.gov"
- "procurement for the new FBI Headquarters consolidation"

Time Frame:

- January 20, 2017 to February 23, 2018

GSA Email Addresses:

- Mary.gibert@gsa.gov
- Tim.horne@gsa.gov

Id. Twenty-eight pages of responsive records were located and produced to Plaintiff, in whole and in part. *Id*. at ¶ 15.

II. GSA PROPERLY INVOKED EXEMPTIONS 5 AND 6

FOIA does not allow the public to have unfettered access to government files. *McCutchen v. U.S. Dep't of Health & Human Servs.*, 30 F.3d 183, 184 (D.C. Cir. 1994). Although disclosure is the dominant objective of FOIA, there are several exemptions to the

statute's disclosure requirements. *Dep't of Def. v. FLRA*, 510 U.S. 487, 494 (1994). FOIA requires that an agency release all records responsive to a properly submitted request unless such records are protected from disclosure by one or more of the Act's nine exemptions. 5 U.S.C. § 552(b); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). To protect materials from disclosure, the agency must show that they come within one of the FOIA exemptions. *Public Citizen Health Research Grp. v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

A. GSA Properly Applied FOIA Exemption 5 to Protect Information Subject to the Deliberative Process Privilege

Exemption 5 of FOIA exempts from disclosure "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). The Supreme Court has interpreted Exemption 5 as allowing an agency to withhold from the public documents which a private party could not discover in civil litigation with the agency. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799 (1984); *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975). Exemption 5 therefore protects from disclosure documents that "fall within the ambit of a privilege" such that they would not be "routinely or normally" disclosed in civil discovery. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *Fed. Trade Comm'n v. Grolier, Inc.*, 462 U.S. 19, 26-27 (1983); *Martin v. Office of Special Counsel, Merit Sys. Protection Bd.*, 819 F.2d 1181 (D.C. Cir. 1987). Thus, Exemption 5 allows an agency to invoke traditional civil discovery privileges, including the deliberative process privilege, to justify the withholding of documents that are responsive to a FOIA request. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980).

FOIA Exemption 5 incorporates the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). This privilege protects the "quality of agency decisions." *Id*. The content or nature of the document is the focus of the inquiry into the privilege as opposed to the manner in which the exemption is raised in a particular situation. *See Dow Jones & Co., Inc. v. Dep't of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990). The policy underlying this privilege is to encourage open, frank discussions of policy matters between government employees, consultants and other officials, to protect against premature disclosure of proposed policies before they become final, and to protect against public confusion by disclosing reasons and rationales that were not in fact the ultimate grounds for the agency's action. *See, e.g., Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States*, 617 F.2d at 866.

To withhold a responsive document under the deliberative process privilege, the agency must demonstrate that the document is "both predecisional and deliberative." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). A communication is predecisional if "it was generated before the adoption of an agency policy," and it is deliberative if "it reflects the give-and-take of the consultative process." *Coastal States*, 617 F.2d at 866. The privilege "covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id*. The deliberative process privilege reflects Congress' judgment that public disclosure of predecisional, deliberative documents would inhibit "the full and frank exchange of ideas on legal policy matters" within an agency. *Mead Data Cent.*, 566 F.2d at 256. The Supreme Court has commented that, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests

to the detriment of the decisionmaking process." *United States v. Nixon*, 418 U.S. 683, 705 (1974).

Here, as detailed in the Lewis Declaration and *Vaughn* index, GSA invoked Exemption 5 to protect portions of interagency communications and "[d]raft documents of communications and talking points for GSA, the White House Office of Management and Budget, and FBI prior to the final determination" to cancel the FBI Headquarters Consolidation Plan that contain "[i]nformation compiled for purposes of the agency's deliberative process prior to the final determination to cancel the FBI Headquarters Consolidation Plan." Lewis Decl. ¶ 19; Ex. D. This is quintessentially the kind of material that falls under the deliberative process privilege and is shielded from disclosure by Exemption 5.

B. GSA Properly Applied FOIA Exemption 6 to Protect Employee Signatures and Cellular Phone Numbers

Exemption 6 permits the withholding of "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The term "similar files" is broadly construed and includes "[g]overnment records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999) ("The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual."); *Govt. Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 97, 105-06 (D.D.C. 2010).

In assessing the applicability of Exemption 6, courts weigh the "privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, the disclosure would work a clearly unwarranted invasion of personal privacy." *Lepelletier*, 164 F.3d at 46. "[T]he only relevant public interest in the FOIA balancing analysis

[is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier*, 164 F.3d at 47 (quoting *U.S. Dep't of Def.*, 510 U.S. at 497) (alterations in original); *Beck v. Dep't of Justice*, 997 F.2d 1489, 1492 (D.C. Cir. 1993) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)). "Information that 'reveals little or nothing about an agency's own conduct' does not further the statutory purpose." *Beck*, 997 F.2d at 1492.

As Travis Lewis explains in his declaration, signatures and cellphone numbers of agency employees were redacted pursuant to Exemption 6. Lewis Decl. ¶ 19; Ex. D. It is well-settled that the privacy interest in such information significantly outweighs any public interest in their release and that signatures and cellphone numbers do not shed any light on the agency's activities. *See, e.g.*, *Talbot v. U.S. Dep't of State*, Civ. A. No. 17-0588 (CRC), 2018 WL 2739921, at *6 (D.D.C. June 7, 2018) (signatures properly withheld); *Parker v. U.S. Dep't of Justice*, 986 F. Supp. 2d 30, 38 (D.D.C. 2013) (signature and phone number properly withheld). Thus, that information was properly protected here.

CONCLUSION

For all of the reasons set forth above and in the Lewis Declaration, Defendant respectfully submits that its motion for summary judgment should be granted.

Dated: August 6, 2018

Respectfully submitted,

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