

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

**CITIZENS FOR RESPONSIBILITY)
AND ETHICS IN WASHINGTON,)**

Plaintiff,)

v.)

U.S. DEPARTMENT OF JUSTICE,)

Defendant.)

Civil Action No. 18-2888 (RBW)

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Defendant, United States Department of Justice, by its undersigned attorneys, respectfully moves the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in favor of defendant on the grounds that no genuine issue as to any material fact exists and defendant is entitled to judgment as a matter of law. In support of this motion, the Court is respectfully referred to defendant’s accompanying declaration and exhibits, the Statement of Material Facts as to Which There is no Genuine Issue, and the Memorandum of Points and Authorities in Support of Defendant’s Motion for Summary Judgment. A proposed order is also attached.

Respectfully submitted,

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**DEFENDANT’S STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Rule 7(h), defendant U.S. Department of Justice (“DOJ”), on behalf of the Federal Bureau of Investigation (“FBI”), submits this statement of material facts as to which there is no genuine issue:

1. By letter dated April 26, 2018, plaintiff requested under the Freedom of Information Act (“FOIA”):

copies of all records pertaining to the FBI’s investigation of the source of the leak of information to Rudolph Giuliani in October 2016 that then-FBI Director James B. Comey was going to reopen the investigation into former Secretary of State Hillary Clinton’s use of a personal email system, which Mr. Comey announced on October 28, 2016.

Declaration of Assistant Section Chief Michael Seidel (“Seidel Decl.”), attached, ¶ 5 & Ex. A.

2. On May 3, 2018, before the Senate Judiciary Committee, former FBI Director Comey stated that he was looking into whether anyone in the FBI had contact with Rudy Giuliani about the FBI’s investigation into former Secretary of State Hillary Clinton’s use of her personal email system. *Id.* at ¶ 9.

3. By letter dated March 14, 2019, the FBI informed plaintiff that it had conducted a search for responsive records and was unable to locate any such records. Id. at ¶ 11 & Ex. C.

4. The FBI performed a search of its Central Records System (“CRS”), using the names “Rudolph Giuliani” and “Rudy Giuliani” and the date range between October 1, 2016 and May 4, 2018, in the FBI file classifications assigned to “leak-related” investigations, which are the FBI file classifications in the CRS most likely to have any records concerning an investigation of a leak of information from any FBI sources. Id. at ¶ 20.

5. No responsive records were located in the CRS. Id.

6. The FBI also performed a search of its Inspection Division (“INSD”), which is the division responsible for, among other things, preserving the integrity of FBI investigations. Id. at ¶ 21.

7. No responsive records were located. Id. at ¶ 21.

8. Additionally, the FBI’s Office of General Counsel spoke to a supervisor in INSD who is familiar with the work of the division and former FBI Director Comey’s comments before the Senate Judiciary Committee on May 3, 2017, and the INSD supervisor confirmed that the INSD was not conducting and had not conducted such an investigation and had no records concerning any FBI investigation of the source of the leak of information to Rudy Giuliani in October 2016. Id. at ¶ 22.

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF DEFENDANT’S MOTION FOR SUMMARY JUDGEMENT**

PRELIMINARY STATEMENT

Plaintiff filed this civil action against defendant U.S. Department of Justice (“DOJ”) alleging that the Federal Bureau of Investigation (“FBI”) violated the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, in connection with a certain request for information made by plaintiff. In particular, plaintiff sought:

copies of all records pertaining to the FBI’s investigation of the source of the leak of information to Rudolph Giuliani in October 2016 that then-FBI Director James B. Comey was going to reopen the investigation into former Secretary of State Hillary Clinton’s use of a personal email system, which Mr. Comey announced on October 28, 2016.

Declaration of Assistant Section Chief Michael Seidel (“Seidel Decl.”), attached, ¶ 5.

The FBI performed a reasonable search in all locations likely to have responsive records. No such records were located. *Id.* at ¶¶ 20-22. Consequently, no responsive records have been withheld from plaintiff under the FOIA.

Therefore, because there are no reasonable disputes of material fact, defendant is entitled to judgment as a matter of law, and its motion for summary judgment should be granted.

ARGUMENT

I. The FBI has Performed an Adequate Search for Responsive Documents.

To prevail in a FOIA case, a requester must show that an agency has "(1) 'improperly' (2) 'withheld' (3) 'agency records.'" Department of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989) (*quoting* Kissinger v. Reporters Comm. For Freedom of Press, 445 U.S. 136, 150 (1980)); *see* 5 U.S.C. § 552(a)(4)(B). The agency must establish that it has conducted a search reasonably calculated to uncover all responsive records. *See, e.g., Baker & Hostetler LLP v. Department of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006); Valencia-Lucena v. United States Coast Guard, 180 F.3d 321, 325-26 (D.C. Cir. 1999); Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990).

Although the adequacy of the search is “measured by a standard of reasonableness, and is dependent upon the circumstances of the case[,]” Truitt, 897 F.2d at 542, 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.” Oglesby v. Department of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Elliott v. U.S. Dep’t of Agriculture, 596 F.3d 842, 851 (D.C. Cir. 2010). In this connection, it is axiomatic that the fundamental question is not “whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.” Steinberg v. Department of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (*quoting* Weisberg v. Department of

Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (emphasis in original)); accord Nation Magazine v. Customs Service, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995).

The FOIA does not require that an agency search every division or field office on its own initiative in response to a FOIA request when responsive documents are likely to be located in one place. Kowalczyk v. Department of Justice, 73 F.3d 386, 388 (D.C. Cir. 1996). Nor does the FOIA require that an agency search every record system. Oglesby, 920 F.2d at 68; Porter v. CIA, 778 F. Supp.2d 60, 69 (D.D.C. 2011).

The "[f]ailure to turn up [a specified] document does not alone render [a] search inadequate." Nation Magazine, 71 F.3d at 892, n.7. Nor is the issue before the Court "whether there might be any further documents," Kowalczyk, 73 F.3d at 388; rather, it is whether the search was adequate. Weisberg, 745 F.2d at 1485.

In order to prove that its search was reasonable, the agency is entitled to rely upon affidavits, provided that they are relatively detailed, nonconclusory, and submitted in good faith. Id. at 1486; Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982) ("affidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA"). The affidavits must show "that the search method was reasonably calculated to uncover all relevant documents," and should "explain how the search was conducted." Oglesby, 920 F.2d at 68.

As the accompanying Seidel declaration demonstrates, the FBI searched in all locations where responsive records were likely to be located. None were found.

The FBI has a Central Record System ("CRS") that contains numerous types of FBI files, including investigative files. Seidel Decl., ¶ 12. The system contains not only records from the

FBI Headquarters' office but also FBI Field Office records and those of the FBI Legal Attaché Offices worldwide. Id.

Within the CRS, files are organized by subject categories into “classifications.” Id. at ¶ 13. The CRS also contains general indices for locating records. Id. at ¶ 14. The FBI uses its case management system called “Sentinel”, which contains the CRS automated indices. Id. at ¶¶ 16-17. As Mr. Seidel explains,

To locate CRS information, RIDS employs an index search methodology. Index searches of the CRS are reasonably expected to locate responsive material within the vast CRS since the FBI indexes pertinent information into the CRS to facilitate retrieval based on operational necessity. Given the broad range of indexed material in terms of both time frame and subject matter that it can locate in FBI files, the automated indices available through Sentinel is the mechanism RIDS employs to conduct CRS index searches.

Seidel Decl., ¶ 19.

In the instant case, the FBI conducted a CRS index search using Sentinel, of FBI file classifications assigned to “leak investigations,” using the words “Rudolph Giuliani” and “Rudy Giuliani.” These were the file classifications most likely to contain responsive records, if any. The time period encompassed by the search was October 1, 2016 through May 4, 2018. No responsive records were located. Id. at ¶ 20.

Although the FBI could have ended its search efforts there, the FBI went beyond a search of the CRS and searched in the FBI's Inspection Division (“INSD”) as well. INSD is the FBI division that would have investigated any leaks of information pertaining to an FBI investigation. Id. at ¶ 21. Thus, if any FBI investigation existed into a possible leak of investigative information to Mr. Giuliani in October 2016, INSD would be the FBI division most likely to know about such an investigation and to have responsive records. Id.

INSD personnel conducted a search for responsive records “using the terms “Rudolph Giuliani” and “Rudy Giuliani” and a date limitation to search for records created between October 1, 2016 and May 4, 2018.” Seidel Decl., ¶ 22. No responsive records were located. Id.

The FBI could have ended its search efforts there, but the FBI took an additional step to ensure all reasonable efforts had been made in response to plaintiff’s FOIA request. The FBI’s Office of the General Counsel called INSD and spoke to a supervisor familiar both with the work of the division and former Director Comey’s remarks before the Senate Judiciary Committee. The INSD supervisor confirmed that INSD had conducted no investigation, and had no records of an FBI investigation, concerning a leak of FBI information to Mr. Giuliani in October 2016. Id. at ¶ 22.

Plaintiff will undoubtedly try to rely on former Director Comey’s remarks to the Senate Judiciary Committee as evidence that the FBI must have responsive records somewhere within the agency. Former Director Comey’s remarks do not undermine the Seidel Declaration. Mr. Comey was asked about the possibility of a leak to Mr. Giuliani, and when he replied that he did not know of any, Senator Leahy asked “But you are looking into it?” Seidel Decl., ¶ 9. Mr. Comey replied “Correct.” Id. Notably, Mr. Comey did not say that the FBI as an organization was looking into it. Mr. Comey was fired four business days later, on May 9, 2017. See <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html>.

Thus, Mr. Comey’s testimony does not establish that the FBI was investigating a possible leak of information to Mr. Giuliani in October 2016, or that any records concerning such an FBI investigation had been created. What Mr. Comey meant by saying he was looking into the matter can only be cause for speculation, which cannot undermine the concrete information set

forth in the Seidel Declaration. See, e.g., Safeguard Services, Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (“Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.”).

CONCLUSION

Accordingly, for all of the reasons set forth above, and in the accompanying Seidel Declaration, defendant respectfully submits that this motion for summary judgment should be granted.

Respectfully submitted,

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ORDER

Upon consideration of defendant's motion for summary judgment, plaintiff's opposition, and the entire record in this case, the Court finds that there are no issues of material fact and the defendants are entitled to judgment as a matter of law. Therefore, it is hereby

ORDERED that defendant's motion for summary judgment is granted.

This is a final, appealable order.

UNITED STATES DISTRICT JUDGE