

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
RICHARD TARZIA,

Plaintiff,

v.

HILLARY CLINTON, Secretary, United States
Department of State,

Defendant.
-----X

No. 10-cv-5654 (FM)

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Defendant Hillary Clinton, Secretary of the United States Department of State (the “State Department” or the “Government”), respectfully submits this reply memorandum of law in further support of her motion for summary judgment.¹

The declaration of Margaret P. Grafeld, which was submitted with the Government’s moving brief, demonstrates the Government’s adherence to all obligations under FOIA, and Plaintiff presents no facts to the contrary. Instead, in an attempt to argue that the State Department conducted its search in bad faith, Plaintiff essentially suggests that the State Department should have either expanded its search exponentially beyond the scope of the FOIA request, or not attempted to engage Plaintiff in a dialogue to clarify his FOIA request. In support, Plaintiff selectively ignores language in the Grafeld Declaration and misunderstands an agency’s obligations under FOIA. None of Plaintiff’s arguments undermines the State Department’s good faith effort to find responsive documents.² As Plaintiff has not raised factual issues concerning whether the State Department conducted a reasonable and adequate search in good faith, or whether the State Department properly withheld certain information pursuant to FOIA exemptions, summary judgment should be granted dismissing his complaint.

ARGUMENT

I. THE STATE DEPARTMENT’S SEARCH FOR RESPONSIVE RECORDS WAS ADEQUATE

The Department’s search for records responsive to Plaintiff’s Request was “reasonably calculated to discover the requested documents.” *Grand Cent. P’ship v. Cuomo*, 166 F.3d 473,

¹ This reply brief employs the abbreviations used in the Government’s Memorandum of Law in Support of Its Motion for Summary Judgment.

² To further demonstrate that it properly redacted and withheld certain information pursuant to FOIA Exemptions b(1) and b(5), the State Department has provided a supplemental declaration by Ms. Grafeld, dated October 7, 2011 (the “Suppl. Grafeld Decl.”).

489 (2d Cir. 1999). Plaintiff now argues that the Grafeld Declaration is inconsistent and that the State Department should have searched for and found additional documents; neither argument undermines the reasonableness of the State Department's search.

A. The State Department Conducted a Reasonable Search

Plaintiff's FOIA Request specifically asked that the State Department search the files of one of its components, DRL, for documents regarding the May 2007 Report. *See* Grafeld Decl., Exhibit 1. Accordingly, the State Department searched DRL's files, first, by identifying the office within DRL which was responsible for drafting the May 2007 Report – DRL/MLGA; and second, by identifying two individuals within DRL/MLGA with relevant knowledge to conduct the search. *See id.* at ¶¶ 14-15. Third, those two individuals searched emails, paper files and electronic files within DRL/MLGA, including both classified and unclassified documents, and an archived email folder. *See id.* at ¶¶ 16-18. Fourth, a State Department researcher within the Office of Information Programs and Services reviewed indexes of archived DRL/MLGA files. *See id.* at ¶ 18.

Not only did the State Department search DRL's files, but it also expanded its search beyond the parameters of Plaintiff's FOIA Request. Specifically, a State Department researcher contacted the drafter of the May 2007 Report, and asked the drafter to identify the documents relied upon in drafting the May 2007 Report. *See id.* at ¶ 24. The drafter identified several publicly available documents, all of which were provided to Plaintiff. *See id.* In addition, the State Department searched its Central File, which houses millions of pages of documents. *See id.* at ¶¶ 20-23. Those searches were "reasonably calculated to discover the requested documents," and the State Department need do no more. *Grand Cent. P'ship*, 166 F.3d at 489.

B. Plaintiff Misreads the Grafeld Declaration

Plaintiff mischaracterizes the Grafeld Declaration when he argues that it offers conflicting descriptions regarding what the drafter of the May 2007 Report relied upon when drafting the report. Plaintiff argues that, according to the Grafeld Declaration, “when asked about what records he relied upon when writing the [May 2007 Report], the author stated that he solely relied on the five publicly available documents that were released to Plaintiff.” Plaintiff’s Memorandum of Law in Opposition to the Government’s Motion for Summary Judgment (“Pl. Br.”), at 12. Plaintiff asserts that this cannot be true if, as the Grafeld Declaration also provides, Document D4 – a non-publicly available document – was pre-decisional, and therefore also relied upon by the drafter of the May 2007 Report.

Plaintiff, however, misreads the Grafeld Declaration. While the Grafeld Declaration states that the drafter of the May 2007 Report “relied upon several publicly available documents,” at ¶ 24, it does not assert that the drafter relied “solely” upon publicly available documents.³ Indeed, as further explained in the Supplemental Grafeld Declaration, the drafter also relied upon non-publicly available information. *See* Suppl. Grafeld Decl. at ¶ 5. Accordingly, the State Department searched for and provided documents identified by the drafter of the May 2007 Report, some of which were publicly-available and some of which were not.

C. Regardless of the Results of the Search, the Search Should Be Deemed Adequate Because It Was Reasonably Conducted

³ Plaintiff acknowledges this flaw in his argument in a footnote, but claims it was his understanding, based on a conversation with Government counsel, that the drafter in fact only relied upon publicly available documents. This apparent misunderstanding, however, is irrelevant. Ultimately, in making its determination regarding the adequacy of the search, the Court should rely upon the statements the Grafeld Declaration. *See Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994) (noting that “[i]n order to prevail on a motion for summary judgment in a FOIA case,” the defending agency may rely on “affidavits or declarations supplying facts indicating that the agency has conducted a thorough search”).

Plaintiff's argument that the State Department's search was flawed because it failed to uncover records relating to overseas reviews of the May 2007 Report is also unavailing. As Plaintiff concedes, *see* Pl. Br. at 14, the relevant question is not whether the search "actually uncovered every document extant," but rather whether the search was reasonable. *Grand Cent. P'ship*, 166 F.3d at 489; *see also Hornbostel v. United States Dep't of the Interior*, 305 F. Supp. 2d 21, 28 (D.D.C. 2003) ("the focus of the adequacy inquiry is not on the results"), *aff'd*, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); *Ramstack v. Dep't of the Army*, 607 F. Supp. 2d 94, 105 (D.D.C. 2009). The State Department conducted a search reasonably designed to uncover responsive documents, and did in fact uncover responsive documents. The possibility that some responsive documents were not successfully captured in the State Department's search is thus irrelevant, as a good faith search under FOIA does not demand perfection. *See, e.g., Adamowicz v. IRS*, 552 F. Supp. 2d 355, 361 (S.D.N.Y. 2008) (under FOIA an agency must make "a good faith effort to search for the requested documents," but "[t]his standard does not demand perfection . . . thus failure to return all responsive documents is not necessarily inconsistent with reasonableness").

D. FOIA Does Not Obligate an Agency to Answer Questions

Plaintiff argues that the State Department was also required to respond to the second part of the FOIA Request, which asked the State Department to identify "the names and titles of the person or persons who is or was responsible and/or assisted in the research, investigation and publication" of the May 2007 Report. Grafeld Decl., Exhibit 1. But as Plaintiff further concedes, *see* Pl. Br. at 10, "FOIA is a mechanism to obtain access to records, not answers to questions." *Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435 (LAP), 2008 WL 2519908, at *13 (S.D.N.Y. June 19, 2008) (citing *Landmark Legal Foundation v. E.P.A.*, 272 F. Supp. 2d 59, 64

(D.D.C. 2003) (an agency is not required to “answer questions disguised as a FOIA request”) (citation omitted)). Regardless of whether Plaintiff’s request is styled as a question or a statement, it still seeks information rather than documents, and thus is an inappropriate FOIA Request. *See, e.g., Landmark*, 272 F. Supp. 2d at 64.

E. The Search of the Central File Was Sufficiently Tailored to Find Responsive Documents

Plaintiff further argues that the State Department’s search of its Central File was inadequate and “nonsensical,” Pl. Br. at 15, but he misconstrues the nature of the electronic search. Because the drafter of the May 2007 Report stated that he relied upon previous versions of the report, including the 2005 version (the “2005 China Asylum Profile”), the State Department searched its Central File for cables referencing the May 2007 Report and its previous versions. As discussed below (*see* Section F), Plaintiff sought information specifically contained in pages 20 through 30 of the May 2007 Report. *See* Pl. Br., Exhibit C. Those pages appear under the subsections, “Claims Based on Population Policies” and “National Law on Population and Birth Planning.” *See* Pl. Br., Exhibit A.⁴ The 2005 China Asylum Profile contained the exact same subsection headings; accordingly, the State Department searched for documents referencing those subsections.⁵ Thus, to the extent that State Department officials commented on those sections in either the 2005 or 2007 Report, the electronic search could reasonably be expected to capture such communications. The fact that the search did not yield results that were satisfactory to Plaintiff is irrelevant. *See, e.g., Amnesty International USA v. C.I.A.*, 728 F. Supp. 2d 479, 500 (S.D.N.Y. 2010) (“[T]he CIA searched through the appropriate databases using

⁴ As indicated in Plaintiff’s opposition brief, *see* Pl. Br. at 2, the page numbers reflected on Exhibit A are not the original page numbers.

⁵ Similarly, both the 2005 China Asylum Profile and the May 2007 Report are entitled “China: Profile of Asylum Claims and Country Conditions.” Therefore, the asterisk next to “China” would return results containing that title regardless of the punctuation following “China.”

different variations of the term ‘waterboard.’ The fact that this search did not produce what Plaintiffs consider an appropriate number of documents is irrelevant to the adequacy inquiry.”).

Moreover, inserting “and” in-between select words of various subsections, as Plaintiff suggests, would transform the search into one far more expansive than the original FOIA Request – it would return any cables that mention anything related to China and population planning, not just documents related to the May 2007 Report, the subject of the FOIA request. This would dramatically expand the scope of the FOIA Request. *See Thomas v. Office of the U.S. Attorney for E.D.N.Y.*, 171 F.R.D. 53, 55 (E.D.N.Y. 1997) (noting that a FOIA requester cannot add to or enlarge underlying FOIA request during pendency of request or litigation). Indeed, courts have found it “impermissible” for a FOIA requester “to expand a FOIA request after the agency has responded and litigation has commenced.” *Gillin v. IRS*, 980 F.2d 819, 823 n.3 (1st Cir. 1992); *see also Pray v. DOJ*, 902 F. Supp. 1, 2-3 (D.D.C. 1995), *aff’d in part & rev’d in part on other grounds*, No. 95-5383, 1996 WL 734142, at *1 (D.C. Cir. Nov. 20, 1996).

F. Plaintiff’s August 31, 2010 Letter Sought Information Not Available Pursuant to FOIA

Plaintiff argues that the State Department either ignored his August 31, 2010 letter allegedly clarifying his FOIA Request, or interpreted that letter in as narrow a way as possible. Neither statement is accurate.

When Plaintiff was proceeding *pro se*, the Government’s counsel requested that Plaintiff clarify his FOIA Request because the request was so vague. *See, e.g.*, Pl. Br. at 7 (acknowledging that the FOIA Request “would cover all drafts, all notes, all correspondence, all meetings, all reviews, all comments, etc., even *remotely* related to the [May 2007 Report]”) (emphasis added). The clarification Plaintiff provided, however, did little to spell out his request, and instead, requested information that is not available pursuant to FOIA. Plaintiff

propounded eighty-eight questions, preceded by a “Definitions” section, which correlated to various sentences in the May 2007 Report. *See* Pl. Br., Exhibit C. Plaintiff also listed four questions under the heading, “General information requested under FOIA,” which requested that the State Department identify, *inter alia*, the dates on which the drafting of the May 2007 Report began and was completed, the author of a subsection and his/her current employment position, and “copies of all documents and/or statements to and/or from the FPBPC⁶ and Respondent, received or sent in the last 5 years.” *Id.* As noted above, FOIA is not a mechanism for propounding interrogatories. *See, e.g., Amnesty Int’l*, 2008 WL 2519908, at *13. Simply put, FOIA does not require the State Department to answer ninety-two interrogatories styled as a “clarification” of a FOIA Request. *See, e.g., Di Viaio v. Kelley*, 571 F.2d 538, 542-543 (10th Cir. 1978) (“[I]t is clear that nothing in the Act requires ‘answers to interrogatories’ but rather and only disclosure of documentary matters which are not exempt.”).

But even assuming, *arguendo*, that Plaintiff’s letter had properly clarified his FOIA Request, Plaintiff misconstrues an agency’s obligation to respond to such a clarification. The State Department is under no “obligation to search anew based upon a subsequent clarification.” *Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C.Cir. 1996). “It would be untenable to hold that, as the litigation proceeds, a plaintiff, by continually adding new requests . . . could command a priority based on the date of the initial requests.” *Amnesty Int’l*, 2008 WL 2519908, at *13 (quoting *Biberman v. FBI*, 528 F. Supp. 1140, 1144 (S.D.N.Y. 1982)). The State Department’s only obligation is to pursue “a lead so apparent that [it] cannot in good faith fail to pursue it.” *Halpern v. F.B.I.*, 181 F.3d 279, 288 (2d Cir. 1999). A lead, however, must be a “lead to the location of responsive documents,” *Kowalczyk*, 73 F.3d at 389, not, as Plaintiff would have it, a series of ninety-two questions.

⁶ Plaintiff does not define this acronym.

Plaintiff's reliance on *Halpern* is misplaced. In that case, the Second Circuit found that, had it been timely, Plaintiff's clarification that the FBI search files in one particular database would have constituted a clear and certain lead for responsive documents. *See Halpern*, 181 F.3d at 289. Here, by contrast, Plaintiff's alleged clarification did not provide any such leads, nor did the documents themselves contain any leads. *Cf. Kowalczyk*, 73 F.3d at 389 (noting that "it will be the rare case indeed in which an agency record contains a lead so apparent that the [agency] cannot in good faith fail to pursue it").

Nevertheless, despite its numerous deficiencies, the State Department attempted to consider Plaintiff's alleged clarification. Plaintiff's August 31, 2010 letter indicated that Plaintiff sought documents on which the drafter of the May 2007 Report relied. Accordingly, the State Department searched both for those documents and for any other documents related to the May 2007 Report. Thus, far from "limiting its [search for documents] to the four corners of the version [of Plaintiff's requests] that it can interpret the most narrowly," Pl. Br. at 8, the State Department broadened its search.

The State Department has thus satisfied its burden of showing that it conducted an adequate search by submitting a detailed declaration that was not rebutted by any facts presented by Plaintiff, and is therefore entitled to summary judgment with respect to that search. *See Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994); *Bloomberg L.P. v. Bd. of Governors of the Fed'l Reserve Sys.*, 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009).

II. THE STATE DEPARTMENT PROPERLY WITHHELD INFORMATION PURSUANT TO FOIA EXEMPTIONS SECTIONS 552 b(1) AND b(5)

A. The Agency Properly Redacted Document D7 Pursuant to Exemption b(1)

In order to satisfy its burden of demonstrating that Exemption b(1) applies, "little proof or explanation is required [from the State Department] beyond a plausible assertion that

information is properly classified.” *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). Because assessment of harm to national security is entrusted to the executive branch rather than courts, “the government’s burden is a light one”; “searching judicial review” is inappropriate, and “plausible” and “logical” arguments for nondisclosure will be sustained. *ACLU v. DoD*, 628 F.3d 612, 624 (D.C. Cir. 2011) (citations omitted).

Here, the Grafeld Declaration sufficiently met that burden and demonstrated that Document D7 (and Document D4) was properly classified, and that there is no non-exempt material that could be segregated. However, to further demonstrate that its withholdings were proper, the State Department has now supplemented that showing by submitting a Supplemental Grafeld Declaration. The Supplemental Grafeld Declaration describes Document D7 as a cable containing “information a Chinese government official provided about the Chinese government’s response to the Linyi Abuses in anticipation that such information would be kept confidential.” Suppl. Grafeld Decl. ¶ 7. The Declaration further explains, “Should this information be released, the U.S. government would jeopardize losing a source within the Chinese government to obtain sensitive information about human rights abuses, and therefore hinder this government’s ability to assess reports of Chinese family planning practices.” *Id.* Thus, the Declaration provides “sufficiently detailed and specific information as to why the information would hinder the ability to obtain such information in the future [and] why such secrecy is allowed by the terms of the executive order.” *El Badrawi v. Department of Homeland Sec.*, 583 F. Supp. 2d 285, 314 (D. Conn. 2008).

B. The Agency Properly Withheld Document D4 Pursuant to Exemption b(5)

FOIA Exemption b(5) “is intended to encourage candor in agency decision making,” *Fox News Network, LLC v. U.S. Dept. of the Treasury*, 678 F. Supp. 2d 162, 166 (S.D.N.Y. 2009), and protects documents “that are both ‘predecisional’ and ‘deliberative,’” *Grand Cent. P’ship*,

166 F.3d at 482 (citation omitted). In determining whether a given document is predecisional, courts have considered whether the agency can “pinpoint the specific agency decision to which the document correlates . . . and . . . verify that the document precedes, in temporal sequence, the ‘decision’ to which it relates.” *Grand Cent. P’ship*, 166 F.3d at 482 (citation omitted). The Second Circuit has defined “deliberative” as “indicative of the agency’s thought processes.” *Local 3, Int’l Brotherhood of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988).

As set forth in the Supplemental Grafeld Declaration, Document D4, an email exchange between State Department employees in Beijing and Washington, is predecisional, in that it predates the publication of the May 2007 Report by one year and, as indicated by the drafter of the May 2007 Report himself, was relevant to the preparation of that report. *See* Suppl. Grafeld Decl. at ¶¶ 5-6. Document D4 is also deliberative, in that it reflects candid opinions of the authors. *See id.* at ¶ 5 (“The addressees on the email exchange discussed varying opinions about these hearsay reports and the credibility that could be afforded to them.”); *see also New York Public Interest Research Group v. EPA*, 249 F. Supp. 2d 327, 337 (S.D.N.Y. 2003) (“A record is deliberative when ‘it reflects the give-and-take of the consultative process’”) (citation omitted). This document therefore “reflects the internal decision making process of State Department employees,” Suppl. Grafeld Decl. at ¶ 6, and is properly withheld pursuant to Exemption b(1), *see Tigue v. U.S. Dep’t of Justice*, 312 F.3d 70, 76 (2d Cir. 2002) (“The rationale behind this privilege is ‘the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news’”) (further citations omitted).

CONCLUSION

For all of the foregoing reasons, the Government respectfully requests that the Court grant its motion for summary judgment under Federal Rule of Civil Procedure 56.

Dated: New York, New York
October 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ELLEN BLAIN, an Assistant United States Attorney for the Southern District of New York, hereby certify that on October 11, 2011, I caused a copy of the foregoing Defendant's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment, and the Supplemental Declaration of Margaret P. Grafeld, to be served through the Court's Electronic Filing System upon the following:

Kelly Brian McClanahan, Esq.
National Security Counselors
1200 South Courthouse Road, Suite #124
Arlington, VA 22204
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Dated: New York, New York
October 11, 2011

By: /s/ Ellen Blain
ELLEN BLAIN
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

_____)	
RICHARD TARZIA,)	
)	
Plaintiff,)	
)	
v.)	
)	
HILLARY CLINTON,)	
Secretary, United States Department of)	Civil Action No. 1:10-cv-05654-JGK
State)	
)	
Defendant.)	
_____)	

SUPPLEMENTAL DECLARATION OF MARGARET P. GRAFELD

I, Margaret P. Grafeld, declare and state as follows:

1. I am the same Margaret P. Grafeld who executed a declaration in this case on behalf of the Department of State (“Department”) dated August 25, 2011. I hereby incorporate my previous declaration by reference into this declaration. I make the following statements based upon my personal knowledge, which in turn is based on a personal review of the records in the case files established for the processing of the subject request, and upon information furnished to me in the course of my official duties.

2. The purpose of this declaration is to provide additional information to the Court concerning the Department’s withholding of exempt material from two of the documents at issue in this litigation.

I. ADDITIONAL INFORMATION REGARDING DOCUMENTS D4 AND D7

3. I offer here additional information about two of the documents described in my August 25, 2011 declaration, in an effort to avoid any ambiguity about the applicable FOIA exemptions claimed by the Department.

4. I hereby incorporate by reference all of the information provided in my previous declaration about these documents, and supplement that information with the following.

5. Document No. D4, a May 5, 2006 email exchange between two Department officials, contains a candid discussion of reports of family planning practices received through hearsay. The addressees on the email exchange discussed varying opinions about these hearsay reports and the credibility that could be afforded to them. Since the discussion in May 2006 predates the publication of the Profile report by a year, and since the drafter of the Report considered this document in preparing the Report, this exchange reflects the deliberative exchanges of State Department employees that was relevant to the preparation of the Report. Disclosure of this exchange would have a chilling effect on the willingness of employees to offer their candid opinions and engage in the consultative process in the future. This document is therefore exempt from disclosure under FOIA exemption (b)(5). There is no non-exempt information that maybe segregated and released.

6. Document No. D7, a telegram, contains information a Chinese government official provided about the Chinese government's response to the Linyi Abuses in anticipation that such information would be kept confidential. Should this information be released, the U.S. government would jeopardize losing a source within the Chinese government to obtain sensitive information about human rights abuses, and therefore hinder this government's ability to assess

reports of Chinese family planning practices. The withheld information is therefore currently and properly classified under Sections 1.4(b) and (d) of E.O. 13526 and it is, therefore, exempt from release under FOIA exemption (b)(1). The information withheld in the next-to-last paragraph contains personal information about the source of much of the information in this telegram in this telegram. Its release would be a clearly unwarranted invasion of that person's privacy and might also lead to harassment and serious personal and professional disadvantage. This information is therefore exempt from release under FOIA exemption (b)(6). There is no further non-exempt information that may be segregated and released.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

* * *

Executed this 7th day of October 2011.

A handwritten signature in cursive script, appearing to read "Margaret P. Grafeld", written over a horizontal line.

Margaret P. Grafeld