

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RICHARD TARZIA, :
 :
 Plaintiff, :

- against - :

HILLARY CLINTON, :
 Secretary, United States Department of State, :
 :
 Defendant. :

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DECISION AND ORDER

10 Civ. 5654 (FM)

FRANK MAAS, United States Magistrate Judge.

This is an action pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Plaintiff Richard Tarzia (“Tarzia”) is an attorney who represents immigrants seeking asylum in the United States. Acting in his personal capacity, Tarzia seeks information from the United States Department of State (“Department”) concerning a report that the Department issued pertaining to hardships faced by asylum seekers from China.¹ The Department has moved for summary judgment on the ground that its search for relevant documents constituted a thorough, reasonable, and adequate response to Tarzia’s FOIA request (“Request”). For the reasons set forth below, the Department’s motion for summary judgment is granted in part and denied in part.

¹ Tarzia filed his original complaint pro se, but has since retained counsel. (See ECF No. 16).

I. Background

A. Department Report

Tarzia's FOIA claim concerns a report issued by the Department in May 2007, entitled, "China: Profile of Asylum Claims and Country Conditions" ("Report"). Specifically, Tarzia seeks information regarding the sources of the material in Part IV of the Report, which discusses "Claims Based on Population Policies." The Department's Office of Multilateral and Global Affairs ("MGA"), which is part of the Bureau of Democracy, Human Rights, and Labor ("DHRL"), drafted the Report. (See ECF No. 33 (Decl. of Margaret P. Grafeld, dated Aug. 25, 2011 ("Grafeld Decl.")), ¶¶ 13-14). MGA is "responsible for coordinating the review by [other offices] of individual claims for asylum in the United States and providing policy oversight to those offices for such reviews; responding on behalf of the [DHRL] to requests for review from the Department of Homeland Security or the Executive Office for Immigration Review; and preparing individual communications for use by Department of Homeland Security and Department of Justice asylum adjudicators." (Id. ¶ 14). In that capacity, MGA periodically drafts reports regarding asylum claims and country conditions. These publications – of which the Report is one – are designed to be used by Department of Homeland Security asylum officers, Immigrations and Customs Enforcement attorneys, and Executive Office for Immigration Review judges. (Id.).

The Report states that it contains information derived from "the most recent Department of State annual Country Reports on Human Rights Practices, International

Religious Freedom Report, and Trafficking in Persons Report, and other publicly available information deemed credible.” (ECF No. 36 (“Pl.’s Mem.”) Ex. A at 1).² However, the Report does not cite any specific sources for the numerous factual assertions set forth therein. (See Pl.’s Mem. Ex. A). Federal appellate courts frequently have relied on the Report in the course of affirming immigration judges’ denials of asylum claims brought by Chinese nationals. See, e.g., Zhang Fang Wang v. Holder, 440 F. App’x 12, 13 (2d Cir. 2011); Yu Xian Weng v. Holder, 360 F. App’x 204, 206 (2d Cir. 2010); Hua Ying Yang v. Holder 345 F. App’x 694, 695-96 (2d Cir. 2009); Shao v. Mukasey, 546 F.3d 138, 166-68 (2d Cir. 2008); see also Lal v. INS, 255 F.3d 998, 1023 (9th Cir. 2001) (describing Department country reports as the “most appropriate” and “perhaps best resource” on country conditions).

B. Request

Tarzia submitted his initial Request to the Department’s Office of Information Programs and Services (“IPS”) on May 14, 2010. (Grafeld Decl. Ex. 1). In that Request, Tarzia sought the following two categories of information:

1. [A]ll documents, research notes, papers, etc., regarding the research, investigation, preparation and publication of Part IV (and all of its subsections) [of the Report].

² Neither party has provided the Court with a copy of the original Report. Tarzia has submitted a version of Part IV of the Report that includes paragraph numbers and footnotes not in the original. (Pl.’s Mem. at 2 n.1 & Ex. A). The Department does not contest the accuracy of Tarzia’s submission, although it notes that the pagination has been altered. (See ECF No. 40 (“Def.’s Reply”) at 5 n.4).

2. [T]he names and titles of the person or persons who is or was responsible and/or assisted in the research, investigation and publication of Part IV (and all of its subsections) [of the Report].

(Id.). Tarzia further indicated that he was willing to pay up to \$250 for the responsive documents and was seeking the information “for personal use and not for commercial use.” (Id.).

Tarzia submitted a second request for the same information on May 16, 2010, and a third request on June 1, 2010. (Id. Exs. 2-3). On August 5, 2010 – ten days after Tarzia commenced this action – the Department notified him that it would “begin the processing” of his Request. (Id. Ex. 4 at 1). By letter dated August 13, 2010, Tarzia then asked the Department to expedite his Request in light of the agency’s failure to respond within twenty days as required by 5 U.S.C. § 552. (Grafeld Decl. Ex. 5 (“August 13 Letter”)). Tarzia also restated his Request “to be very clear about [its] nature,” adding that it was “specifically for all the documents, research methods, notes, [and] writings or electronic communications of any type that were used or relied upon for the statements contained in [Part IV] of the [Report].” (Id.).

Subsequently, after this suit was filed, the United States Attorney’s Office asked Tarzia to clarify his Request. On August 31, 2010, Tarzia responded with a detailed explanation of the information he was seeking. (See Pl.’s Mem. Exs. B (email from Tarzia to Ass’t U.S. Att’y Barcelo, containing a more detailed description “[a]s per

our conversation”), C (attachment to email)).³ On October 14, 2010, the Department denied Tarzia’s request for expedited processing on the ground that he did not meet the requirements of the relevant regulations. (Grafeld Decl. Ex. 6).

C. Department’s Search and Production

The Department processed Tarzia’s Request using its standard procedures. (See id. ¶ 11). Thus, IPS first evaluated the Request to determine which Department components might have responsive documents. (Id.). Because Tarzia requested information specifically from DHRL, IPS “tasked” that bureau with responding to Tarzia’s Request. (Id. ¶ 12). “As a courtesy,” the Department also searched its Central Foreign Policy Files (“Central File”) for responsive documents. (Id.). The Central File is

³ The bulk of the clarifying document consists of passages reproduced from the Report, followed by a description of the information that Tarzia hoped to obtain. The following excerpt is representative:

Page 22, 1st paragraph [of the Report:]

“While central government policy prohibits the use of physical coercion to compel persons to submit to abortion or sterilization, there have been continuing reports of physical coercion to meet birth targets in some areas.”

[1] Identify the author of this statement, including his name, title, employer at the time of the statement and name and location of current employer.

[2] Identify and provide a copy of the source of the information used to make this statement.

[3] Provide copies of the “continued reports.”

(Pl.’s Mem. Ex. C at 3).

“the Department’s centralized records system and contains over 30 million documents of a substantive nature that establish, discuss, or define foreign policy, set precedents, or require action or use by more than one office.” (Id. ¶ 20). Among the documents in the Central File are copies of incoming and outgoing telegrams, diplomatic notes, correspondence between the Department and Congress or other agencies, position papers and reports, and various memoranda. (Id.).

1. DHRL

DHRL took the following steps in an attempt to locate documents responsive to the Request:

First, two DHRL employees with knowledge of its organization and records systems were assigned to the search. These individuals were (a) DHRL’s current “Asylum Coordinator,” who began working for DHRL in 2008, the year after the issuance of the Report; and (b) a retired Foreign Affairs Officer working part-time for DHRL who had been at DHRL when the Report was drafted. (Id. ¶ 15).⁴ The two began by searching for matters related to China in the archived emails of the Asylum Coordinator who had held that position while the Report was being drafted. (Id. ¶ 16). Next, the Foreign Affairs Officer checked his email for any emails received from the drafter of the Report. (Id.). DHRL determined that it no longer maintained emails from the Report’s drafter. (Id.).

⁴ In one instance, the Department refers to the second individual as a “Foreign Service Officer.” (Id.).

The DHRL personnel then searched “all classified and unclassified paper and electronic files that were reasonably likely to contain responsive records.” (Id. ¶ 17). These files included DHRL’s “China” country file, and files relating to a number of high profile asylum claims. (Id.). The DHRL personnel searched for – but did not locate – a specific subject matter file for the Report. (Id.).

Finally, the DHRL personnel searched “retired file manifests” that “serve as an index of the contents of retired paper files [] and are used to direct a researcher to particular file folders or documents in retired file boxes.” (Id. ¶ 18). “No manifests from the time period of the [R]equest were found.” (Id.).

DHRL’s search resulted in the retrieval of thirteen documents responsive to the Request. The Department reviewed those documents and determined that one of the documents could be released in full, four could be released with excisions, and one had to be withheld in full. (Id. Ex. 7 at 1). The Department based its withholding of some or all of the documents on FOIA exemptions 1, 5 and 6, 5 U.S.C. §§ 552(b)(1), (b)(5), (b)(6). Since the remaining seven documents allegedly originated outside DHRL, the Department informed Tarzia that the second office would review the documents and respond to Tarzia directly. (Id.).

2. Central File

In addition to the DHRL search, an IPS researcher familiar with Tarzia’s Request searched the Central File for responsive documents. (Id. ¶ 21). Such Central File searches are conducted through an automated interface known as the State Archiving

System (“SAS”), “which searches the full text of millions of telegrams and other substantive correspondence documents in the Central File.” (Id. ¶ 20). For documents in the Central File that are not “full-text searchable,” SAS searches a “customized index reference” that directs the searcher to those documents. The SAS thus searches all documents in the Central File. (Id.). The search terms used by the IPS researcher were limited to the title of the Report – in the form, “China* Profile of Asylum Claims and Country Conditions”⁵ – and the titles of several subsections of the Report, including “Claims Based on Population Policies” and “National Law on Population and Birth Planning.” (Id. ¶ 22). These Central File searches failed to locate any responsive documents. (Id. ¶ 23).

The IPS researcher also contacted the original drafter of the Report. The drafter told the researcher that he had relied on several publicly-available documents,

⁵ According to the Grafeld Declaration, use of an asterisk in the full title search “act[ed] as a wildcard, [so that the] search would include misspellings of the title of the [R]eport.” (Grafeld Decl. ¶ 22). Tarzia disputes that assertion, contending that the asterisk would act only as a single-character wildcard, so the search would return results if “China” were followed by either a colon or a hyphen (for example), but not if other words in the title were misspelled. (Pl.’s Mem. at 15 n.7). Tarzia further contends that the Department’s counsel has confirmed that his interpretation is correct. (Id.)

including the 2005 version of the Report.⁶ The IPS researcher then provided these publicly-available documents to Tarzia. (Id. ¶ 24).

D. This Action

Tarzia commenced this action on July 26, 2010. (See ECF No. 1). On September 15 and October 8, 2010, Tarzia filed motions seeking leave to amend his complaint. (See ECF Nos. 5, 13). On May 27, 2011, Judge Koeltl, to whom the case then was assigned, issued an order in which he noted that “[t]he parties agree that the operative complaint is the plaintiff’s Second Amended Complaint[.]” (ECF No. 26; see also ECF No. 13 Ex. 1 (“Second Am. Compl.”)).

In his Second Amended Complaint, Tarzia contends that he “made a lawful FOIA request to challenge the allegations in the State Department reports in support of pending Asylum cases where clients are being unreasonably ordered removed to a country where they will likely face persecution.” (Second Am. Compl. ¶ 7). Tarzia further contends that the Department has “unreasonably failed to complete this request.” (Id. ¶ 8). In particular, Tarzia maintains that the Department failed to conduct an adequate search to uncover documents responsive to his Request, and improperly withheld documents and portions thereof pursuant to the FOIA exemptions. The

⁶ The Grafeld Declaration is ambiguous as to whether the drafter represented that he relied only on publicly-available documents, or whether he relied on publicly-available documents in addition to other sources. Tarzia contends that the Department’s counsel informed him that the drafter stated that he relied “solely” on publicly-available documents. (Pl.’s Mem. at 12 n.5). Although the Department refutes this assertion, (see Def.’s Reply at 3 & n.3), as discussed below, the record suggests that the drafter did not rely solely on publicly-available sources.

Department filed its answer to the Second Amended Complaint on October 15, 2010. (ECF No. 15).

E. Procedural History

On June 30, 2011, the parties consented to my exercise of jurisdiction over this case for all purposes pursuant to 28 U.S.C. § 636(c). (ECF No. 29). On August 25, 2011, the Department filed its motion for summary judgment, (ECF No. 31), arguing that it has complied fully with its obligations under FOIA. After Tarzia filed opposition papers on September 26, 2011, (ECF No. 36), the Department filed reply papers on October 11, 2011 (ECF Nos. 40-41). The motion therefore is fully submitted.

II. FOIA

Through its enactment of FOIA, Congress endorsed “a general philosophy of full agency disclosure.” Dep’t of Air Force v. Rose, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 89-813, at 3 (1965)). “[FOIA] seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.” Env’tl. Prot. Agency v. Mink, 410 U.S. 73, 80 (1973). Under the statute, agencies must disclose their records upon request unless they can show that the requested records fall within at least one of nine enumerated exemptions. See 5 U.S.C. § 552(b) (listing exemptions); Mink, 410 U.S. at 79. Additionally, a citizen may file a challenge to an agency response to a FOIA request in a district court, which “shall determine the matter de novo [with] the burden . . . on the agency to sustain its action.” 5 U.S.C. § 552(a)(4).

Summary judgment is the preferred vehicle for resolving FOIA cases. “In order to prevail on a motion for summary judgment in a FOIA case, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption to the FOIA.” Carney v. U.S. Dep’t of Justice, 19 F.3d 807, 812 (2d Cir. 1994); see also Ramstack v. Dep’t of Army, 607 F. Supp. 2d 94, 105 (D.D.C. 2009) (quoting Nation Magazine v. U.S. Customs Serv., 71 F.3d 885, 890 (D.C. Cir. 1995)) (“agency must demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents”). The agency’s search must be conducted in good faith “using methods that are reasonably expected to produce the requested information.” Ramstack, 607 F. Supp. 2d at 105. The agency is not required, however, to “search every record in the system or conduct a perfect search.” Id. (citing SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991)).

Thus, when a plaintiff challenges the adequacy of an agency’s search, “the factual question it raises is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.” Grand Cent. P’ship, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) (quoting SafeCard Servs., 926 F.2d at 1201); see also Weisberg v. U.S. Dep’t of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (reasonableness of agency’s search “depends, not surprisingly, upon the facts of each case”). A review of an agency’s search therefore should not focus on the results, but on the search itself. See Ramstack, 607 F. Supp. 2d at 105-06; Hornbostel v. U.S.

Dep't of Interior, 305 F. Supp. 2d 21, 28 (D.D.C. 2003), aff'd, 2004 WL 1900562 (D.C. Cir. 2004).

To show that its efforts to locate responsive information complied with FOIA, an agency must set forth a reasonably detailed description of its search in affidavits or declarations. See Grand Cent. P'ship, 166 F.3d at 478 (affidavits must “contain reasonable specificity of detail rather than merely conclusory statements”) (quoting Gallant v. NLRB, 26 F.3d 168, 171 (D.C. Cir. 1994) (emphasis in Grand Cent. P'ship). Such sworn statements are “accorded a presumption of good faith” and “cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.” Id. at 489 (internal quotation marks and citations omitted). The presumption may be rebutted, however, if the plaintiff shows that the agency acted in bad faith. Carney, 19 F.3d at 812. “If the record raises substantial doubts regarding the agency’s efforts, ‘particularly in view of well defined requests and positive indications of overlooked materials,’ summary judgment is not appropriate.” Ramstack, 607 F. Supp. 2d at 106 (quoting Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326 (D.C. Cir. 1999)).

III. Discussion

A. Agency Declarations

As an initial matter, the Department has provided a detailed declaration, made under penalty of perjury, by the agency employee who supervised the document searches and production undertaken in response to Tarzia’s Request. (See Grafeld Decl.

¶ 1). The declaration includes a narrative Vaughn Index.⁷ (Id. ¶¶ 40-43). Because Ms. Grafeld oversaw the Department’s response to Tarzia’s Request, her declaration is sufficient for summary judgment purposes. See Carney, 19 F.3d at 814 (“affidavit from an agency employee responsible for supervising a FOIA search is all that is needed to satisfy Rule 56(e)”). Additionally, the Department has submitted a supplemental declaration by Ms. Grafeld with its Reply. (ECF No. 41 (“Suppl. Decl.” or “Supplemental Declaration”)).

The Department’s declarations describe step-by-step the process it used to search for, identify, and retrieve the records responsive to the Request. (See, e.g., Grafeld Decl. ¶¶ 11-24). Additionally, the Department’s submissions provide “reasonable specificity of detail” about the manner in which it responded to the Request. See Grand Cent. P’ship, 166 F.3d at 478. The Court therefore may rely on the Department’s declarations to determine whether the Department conducted a reasonable search.

B. Adequacy of the Department’s Search

In his opposition papers, Tarzia challenges the adequacy of the Department’s search on five grounds. First, Tarzia contends that the Department unduly

⁷ In Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973), the Court of Appeals for the District of Columbia Circuit concluded that the government could meet its obligations under FOIA by submitting an index containing detailed descriptions of any documents redacted or withheld. In doing so, the court relied on the Supreme Court’s suggestion in Mink, 410 U.S. at 73, that in camera review of documents withheld pursuant to FOIA is not necessary in every instance. See id. at 93 (“Plainly, in some situations, in camera inspection will be necessary and appropriate. But it need not be automatic.”) (emphasis added).

narrowed the scope of its search based on his August 13 Letter. (Pl.’s Mem. at 7-11). Next, Tarzia contends that even if the scope of the search was proper, the search nevertheless was inadequate because the Department (1) submitted declarations that are “internally inconsistent,” (2) used inappropriate search terms to search the Central File, (3) improperly refused to produce documents relating to the “second half” of the Request, and (4) did not produce documents that the Report itself “indicated would be present.” (Id. at 11). Tarzia further argues that the Department improperly withheld responsive information. (Id. at 17-21). As set forth below, some, but not all, of these claims are meritorious.

1. Scope of the Search

Tarzia first takes issue with the scope of the Department’s search for responsive documents. Specifically, Tarzia contends that the Department restricted its search on the basis of his August 13 Letter, which emphasized that his Request was “specifically for all the documents, research methods, notes, [and] writings or electronic communications of any type that were used or relied upon for the statements contained in [Part IV] of the [Report].” (Grafeld Decl. Ex. 5) (emphasis added). Tarzia claims that the Department searched only for documents that the drafter of the Report actually had “used or relied upon,” without extending its search to capture documents responsive to the broader language contained in his original Request. Tarzia further maintains that the Department thus ignored his clarifying statements on August 31, 2010, which clearly

requested information beyond the documents relied upon by the drafter. (Pl.'s Mem. at 7-11).

This claim is unavailing. Although there certainly are some semantic differences among the various iterations of Tarzia's Request, the Department's declarations suggest that its search was, in fact, based on the broadest reasonable interpretation of the Request. DHRL thus searched its files and emails for all documents relating to the Report, not just those relied upon by the drafter. In particular, DHRL personnel searched all of the Asylum Coordinator's emails relating to China, DHRL's "China" country folder, and the case files of several "high-profile asylum claims." (Grafeld Decl. ¶¶ 16-17). None of these searches were limited to documents relied upon or used by the drafter of the Report. Although the Department's search did not succeed in locating as many documents as Tarzia would have liked, the Grafeld Declaration describes a comprehensive search of the DHRL files for any document remotely related to the Report. The Department's search therefore was not unduly narrow. To the contrary, the Department complied with Tarzia's original Request and searched the DHRL files for "all documents, research notes, papers, etc., regarding the research, investigation, preparation and publication of Part IV [of the Report]." (Id. Ex. 1 at 1).

In light of the breadth of the Department's search, the fact that it actually turned up only a few documents "is not enough to render its search inadequate, even supposing that any reasonable observer would find this result unexpected." See Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 514 (D.C. Cir. 2011).

2. Consistency of the Department's Declarations

Next, Tarzia contends that inconsistencies in the Department's declarations expose inadequacies in the Department's search. Specifically, Tarzia suggests that the drafter of the Report has made inconsistent statements concerning the nature of the sources upon which he relied for the factual assertions in the Report. Tarzia expresses concern that the Department thus may have taken an unjustifiably narrow view of what those sources were. (Pl.'s Mem. at 12-14).

As noted previously, the IPS researcher "reached out" to the drafter of the Report in the course of responding to Tarzia's Request. (Grafeld Decl. ¶ 24). During their discussions, the drafter indicated that he had "relied upon several publicly available documents, including the 2005 China Asylum Profile. Accordingly, the IPS researcher located each of th[ose] publicly available documents and provided them to [Tarzia]." (Id.). Because the Grafeld Declaration says nothing further concerning the researcher's conversation with the drafter, it is unclear whether the drafter relied solely on publicly-available sources or utilized other sources as well. If the drafter did consult other sources, the Grafeld Declaration is silent as to what those sources were and whether they remain in the possession of the Department. The Declaration also fails to indicate the identity of the drafter or whether he is still employed by DHRL or any other branch of the Department.

The Supplemental Declaration clears up some of the ambiguity of the original Grafeld Declaration, but also casts doubt on the adequacy of the Department's search with respect to the information gleaned from the Report's drafter. In an effort to

justify the withholding of certain records pursuant to a FOIA exemption, the Supplemental Declaration notes that the drafter considered a 2006 email exchange containing “candid discussion of reports of family planning practices received through hearsay.” (Suppl. Decl. ¶ 5). If so, the drafter apparently relied on at least one nonpublic document in addition to those that were publicly available.

Although FOIA does not demand that the Department “conduct a perfect search” for responsive records, see Ramstack, 607 F. Supp. 2d at 105, it does require that the Department conduct a search that is “reasonably calculated to uncover all relevant documents.” Id. at 107. Here, it appears that the Department may have failed to perform a search “reasonably calculated” to uncover any nonpublic documents relied upon by the drafter of the Report. While the Grafeld Declaration indicates that the drafter told the IPS researcher that he relied on publicly -available documents, the Supplemental Declaration establishes that he also relied on at least one confidential, nonpublic document. Missing from both declarations is any evidence that the Department undertook the obvious next step in a reasonable investigation – namely, determining what, if any, additional nonpublic documents the drafter may have relied upon in preparing the Report. “When [a FOIA] request demands all agency records on a given subject then the agency is obliged to pursue any ‘clear and certain’ lead it cannot in good faith ignore.” Halpern v. FBI, 181 F.3d 279, 289 (quoting Kowalczyk v. Dep’t of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996)). The fact that the Department was aware that the drafter relied upon at least one nonpublic

source is a “clear and certain” lead that obligated it to ascertain from the drafter whether there are other nonpublic documents responsive to Tarzia’s Request.

It is possible that this further effort will not yield any additional documents, either because the drafter consulted only a single nonpublic source that is subject to a FOIA exemption, or because the other nonpublic documents that he used are no longer in the possession of the Department. See Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 150 (1980) (“[FOIA] does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained.”). Nevertheless, determining whether the drafter relied on other nonpublic documents and, if so, attempting to locate them, are steps that the Department had to take in order to conduct an adequate search for documents responsive to Tarzia’s Request. Accordingly, the Department will be required to do so within thirty days.

3. Central File Search

The Department also failed to conduct an adequate search of the Central File. As a preliminary matter, it bears mention that the Department’s search of the Central File was not merely a “courtesy” as the Department represents. (See, e.g., Grafeld Decl. ¶ 10 (noting that the Central File search was not “originally requested” by Tarzia, but nevertheless was “done as a courtesy”)). Although Tarzia specifically identified DHRL as the bureau possessing documents responsive to his Request, an agency “cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” Oglesby v. U.S. Dep’t of Army, 920 F.2d 57, 68

(D.C. Cir. 1990). Inasmuch as the Central File “is the Department’s centralized records system and contains over 30 million documents of a substantive nature,” the Department would have failed in its obligation to conduct an adequate search had it not queried the Central File. (Grafeld Decl. ¶ 20; see also id. (“Because the Central File is the Department’s most comprehensive and authoritative compilation of documents, it is by far the record system most frequently searched in response to FOIA requests.”)).

As part of its Central File search, the Department looked only for the full titles of the Report and each subsection comprising Part IV of the Report. The Department indicates that it chose these search terms “[b]ecause the drafter of the [Report] stated that he relied upon previous versions of the [R]eport, including the 2005 version[.]” (Def.’s Reply at 5). According to the Department, the 2005 version of the Report bore the same title and subsection headings. The Department therefore concluded that, “to the extent that [] Department officials commented on those sections in either the 2005 or 2007 Report, [its full-title] electronic search could reasonably be expected to capture such communications.” (Id.).

Concerned that the Department’s search failed to uncover any responsive documents, Tarzia requested that the Department adopt instead “a simple search strategy using the ‘AND’ modifier but not entire phrases[.]” (Pl.’s Mem. at 16). The Department declined to conduct such a search, claiming that doing so “would transform the search into one far more expansive than the original FOIA Request.” As the Department explained, the requested search “would return any cables that mention anything related to

China and population planning, not just documents related to the . . . Report.” (Def.’s Reply at 6). To further support its contention that there is no duty to undertake such a search, the Department cites cases holding that requesters may not expand the scope of their requests after an agency has responded and during the pendency of litigation. See, e.g., Thomas v. Office of the U.S. Att’y for E.D.N.Y., 171 F.R.D. 53, 55 (E.D.N.Y. 1997); Gilllin v. IRS, 980 F.2d 819, 823 n.3 (1st Cir. 1992).

Although a requester may not be able to broaden a request while a search is underway, “[a] FOIA request and appropriate search terms . . . will rarely be coterminous.” Fox News v. U.S. Dep’t of the Treasury, 678 F. Supp. 2d 162, 166 (S.D.N.Y. 2009). Accordingly, although Tarzia’s Request refers specifically to the titles of the Report and specific subsections, it does not follow that every document responsive to his Request necessarily will contain the exact title of the Report or a subsection thereof. Furthermore, the fact that a broader search might produce documents unrelated to Tarzia’s Request is irrelevant. The only pertinent question is whether broadening the search terms would result in a search “that plainly is unduly burdensome.” Halpern, 181 F.3d at 288. If conducting a more thorough search would not result in an undue burden, the agency must conduct the search. See Amnesty Int’l U.S.A. v. CIA, No. 07 Civ. 5435 (LAP), 2008 WL 2519908, at *12 (S.D.N.Y. June 19, 2008) (“federal agencies should go as far as they reasonably can to ensure that they include what requesters want to have included within the scopes of their FOIA requests”) (quoting Department of Justice, Office of Information Privacy, OIP Guidance: Determining the Scope of a FOIA Request,

FOIA Update, Vol. XVI, No. 3, at 4 (1995), available at <http://www.usdoj.gov/oip/foi-upd.htm>)). The Department has failed to demonstrate that conducting a broader search of the Central File would be unduly burdensome, and therefore has failed to show that it has performed an adequate search of that repository.

4. Identity of the Drafter(s)

In addition to information relating to the source material for factual assertions made in the Report, Tarzia also requested that the Department provide “the names and titles of the person or persons who is or was responsible and/or assisted in the research, investigation and publication of Part IV [of the Report].” (Grafeld Decl. Ex 1 at 1). Citing Amnesty International, the Department refused to search for documents responsive to this request on the grounds that “the obligations of an agency in responding to a FOIA request do not include responding to questions outside of the request for documents.” (ECF No. 32 (Def.’s Mem.) at 10 n.5 (citing Amnesty Int’l, 2008 WL 2519908, at *13)).

The Department’s reliance on Amnesty International is misplaced. In that case, the plaintiffs requested that several agencies provide the names of individuals who had been detained after September 11, 2001, “by or with the involvement of the United States and about whom the United States has not provided public information.” Amnesty Int’l, 2008 WL 2519908, at *1. Each agency component charged with searching for the responsive materials made extensive efforts to locate relevant documents. Id. at *1-7. Their searches included numerous queries of electronic databases using wide-ranging

combinations of search terms. Id. Despite those efforts, however, only a few responsive documents were located. Id. at *3, 6.

In evaluating the adequacy of the agency searches, Judge Preska noted that an agency is not “required to create a document in response to a request, or answer questions disguised as a FOIA request.” Id. at *12 (internal quotation marks and citations omitted). The court further found that the searches were adequate, and that the government was not “required to compile a list of individuals it determined were subject to ‘secret detention[,]’” or “answer [] the question: ‘Who are the subjects of your secret detention program?’” Id. at *13.

By comparison, in this case there is absolutely no evidence that the Department engaged in any search in an effort to locate documents responsive to Tarzia’s request for identifying information. Indeed, neither of the Department’s declarations even mention that request. While the Department need not compile a list of contributors to the Report or answer a question regarding the Report’s authorship, that does not mean the Department is relieved of its obligation to conduct a search for pre-existing documents in the Department’s possession that may provide that information. Certainly, Amnesty International does not so hold. The Department therefore has failed to show that it conducted an adequate search for documents responsive to this portion of Tarzia’s Request.⁸

⁸ It is, of course, possible that any responsive documents containing such identifying information are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(6).

(continued...)

5. Documents Referenced in the Report But Not Produced

Tarzia also challenges the adequacy of the Department's search based upon its failure to produce documents that the Report itself allegedly "indicated would be present." As noted previously, the Report states that it was "reviewed by overseas posts and within the Department." (Pl.'s Mem. at 14). Focusing on this statement, Tarzia contends that "it is highly unlikely (though not impossible) that there would be no record of such review." (Id.). Once again, however, the fact that the Department's search did not uncover certain documents "is not enough to render [the] search inadequate, even supposing that any reasonable observer would find this result unexpected." Ancient Coin Collectors, 641 F.3d at 514; see also SafeCard Servs., 926 F.2d at 1201 ("Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them."); Gearbulk, Ltd. v. U.S. Customs Serv., No. 90 Civ. 4443 (RPP), 1991 WL 719, at *1 (S.D.N.Y., Jan. 2, 1991) ("Mere assertions that certain other documents 'must' exist do not raise a genuine issue of material fact and the agency is not required to prove beyond any doubt that a specific file or document does not exist.").

Furthermore, Tarzia's focus on the results of the Department's search misses the point. See Hornbostel, 305 F. Supp. 2d at 28 ("the focus of the adequacy inquiry is not on the results"). The narrow focus of this Court's inquiry necessarily must

⁸(...continued)

Nevertheless, even if the documents may ultimately be withheld, the Department is obligated to conduct the search. See 5 U.S.C. § 552(a)(4)(B).

be the reasonableness of the Department's search. See Grand Cent. P'ship, 166 F.3d at 489. Thus, an agency's search may be sufficient under FOIA even if it does not uncover every record that a plaintiff believes is relevant and likely to exist in the agency's files. See Ramstack, 607 F. Supp. 2d at 106-08 (agency search was reasonable even though it yielded no responsive records); Hornbostel, 305 F. Supp. 2d at 28 (agency's failure to produce documents cited in responsive records insufficient to establish inadequacy of search). Tarzia's belief that additional responsive records exist – even if correct – therefore does not render the Department's search inadequate.

C. Withheld Documents

Finally, Tarzia contends that the Department improperly withheld responsive information in two documents – Documents D4 and D7 – pursuant to 5 U.S.C. §§ 552(b)(1) (“Exemption 1”) and 552(b)(5) (“Exemption 5”). Tarzia's specific claims are that the Department (1) improperly relied on boilerplate language in the Grafeld Declaration to justify the withholding of portions of Document D7 pursuant to Exemption 1, and (2) improperly withheld Document D4 under Exemption 5.

1. Exemption 1

Exemption 1 permits an agency to withhold records that are: “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) . . . in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1). In an effort to justify its reliance on Exemption 1, the Department cites Executive Order 13,526, which permits the classification of records relating to, inter alia, “foreign government information” and “foreign relations or foreign activities of the United States, including confidential sources.” Exec. Order No. 13,526 (“Executive Order 13,526”) §§ 1.4(b) and (d) (Dec. 29, 2009). In that Order, “foreign government information” is defined, in pertinent part, as “information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence.” Id. § 6.1(s).

Under Executive Order 13,526, an agency may classify information, including foreign government information and information regarding the foreign relations of the United States, when it “determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, . . . and the original classification authority is able to identify or describe the damages.” Id. § 1.1(a)(4). Executive Order 13,526 further provides that “[i]n no case shall information be classified . . . in order to: [a] conceal violations of law, inefficiency, or administrative

error; [b] prevent embarrassment to a person, organization, or agency; [c] restrain competition; or [d] prevent or delay the release of information that does not require protection in the interest of the national security.” Id. § 1.7(a).

“In reviewing an agency’s assertion of a withholding under Exemption 1, a court must ‘accord substantial weight to an agency’s affidavit concerning the details of the classified status of the disputed record, albeit without relinquishing [the court’s] independent responsibility’ to review those determinations de novo.” Associated Press v. U.S. Dep’t of Def., 498 F. Supp. 2d 707, 710 (S.D.N.Y. 2007) (quoting Goldberg v. U.S. Dep’t of State, 818 F.2d 71, 77 (D.C. Cir. 1987)). Therefore, “while the burden is with the agency to justify nondisclosure, a court must accord substantial deference to agency affidavits that implicate national security.” Id. (quotation marks and internal citation omitted).

Document D7, for which Exemption 1 is claimed, is described as a four-page telegram “from Embassy Beijing to the Department,” portions of which were redacted. According to the Department, “[m]ost of the redacted portions of this telegram report a candid briefing by a Chinese official on a sensitive, ongoing topic of concern to the U.S. government given in the expectation of privacy.” (Grafeld Decl. ¶ 43). The Department contends that releasing this information “would have a damaging effect on future exchanges on this and other sensitive topics between U.S. officials and Chinese officials.” (Id.)

Tarzia counters that the “vague and conclusory language of the Grafeld Declaration” is insufficient to demonstrate that the information received from the Chinese official was obtained in confidence.⁹ (Pl.’s Mem. at 20). The crux of Tarzia’s argument is that the Grafeld Declaration relies on the same “boilerplate” language used by the Department in other FOIA cases. (*Id.* at 21-26 (citing Darui v. U.S. Dep’t of State, No. 09-02093 (ABJ), 2011 WL 2678715 (D.D.C. July 11, 2011); Gov’t Accountability Proj. v. U.S. Dep’t of State, 699 F. Supp. 2d 97 (D.D.C. 2010); Ancient Coin Collectors Guild v. U.S. Dep’t of State, 673 F. Supp. 2d 1 (D.D.C. 2009), aff’d in part, rev’d in part, 641 F.3d 504 (D.C. Cir. 2011); Miller v. U.S. Dep’t of Justice, 562 F. Supp. 2d 82 (D.D.C. 2008); and El Badrawi v. U.S. Dep’t of Homeland Sec., 583 F. Supp. 2d 285 (D. Conn. 2008))).

Tarzia’s argument is substantially undercut by the fact that in all but one of the cases he cites, courts have upheld the sufficiency of the Department’s declarations justifying the withholding of information pursuant to Exemption 1. *See Darui*, 2011 WL 2678715, at *6-8; Ancient Coin Collectors, 641 F.3d at 509-10 (affirming district court’s decision with respect to information withheld under Exemption 1); Gov’t Accountability Proj., 699 F. Supp. 2d at 101-02; Miller, 562 F. Supp. 2d at 106. *But see El Badrawi*, 583 F. Supp. 2d at 314 (noting that the declaration “does not provide sufficiently detailed and

⁹ Tarzia does not challenge the Department’s decision to redact certain identifying information in Document D7 pursuant to Exemption 6, 5 U.S.C. § 552(b)(6), (*see* Pl.’s Mem. at 19 n.8), nor does he challenge the last paragraph of the material redacted pursuant to Exemption 1 (*see id.* at 20 n.9).

specific information as to why the information would hinder the ability to obtain such information in the future or why such secrecy is allowed by the terms of the executive order”).

More importantly, even if this Court were to accept Tarzia’s contention, the Supplemental Declaration, which elaborates on the issue of confidentiality with respect to Document D7, explains that:

[Document D7] contains information a Chinese government official provided about the Chinese government’s response to the Linyi Abuses¹⁰ 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 the government’s ability to assess reports of Chinese family planning practices.

(Suppl. Decl. ¶ 6). The Department concludes that “[the] withheld information is therefore currently and properly classified under Sections 1.4(b) and (d) of [Executive Order] 13526” and thus exempt from release under Exemption 1. (Id.).

An agency properly justifies invoking Exemption 1 by “provid[ing] detailed and specific information demonstrating both why the material has been kept secret and why such secrecy is allowed by the terms of an existing executive order.” N.Y. Times Co. v. Dep’t of Defense, 499 F. Supp. 2d 501, 510 (S.D.N.Y. 2007) (quoting ACLU v.

¹⁰ The “Linyi Abuses” reference is likely to forced abortions and sterilizations that allegedly occurred in the Chinese city of Linyi as recently as 2005. In 2006, Chinese authorities arrested an activist who publicized the abuses. The activist was subsequently sentenced to more than four years in prison. See Joseph Kahn, Chinese Peasants’ Advocate Sentenced to 51 Months in Jail, N.Y. Times, Aug. 25, 2006, at A3.

Dep't of Justice, 265 F. Supp. 2d 20, 27 (D.D.C. 2003)). Here, the Supplemental Declaration describes in detail why releasing the information to Tarzia would jeopardize a valuable source within the Chinese government, and further shows that the document is properly classified pursuant to Executive Order 13,526, because it contains “information provided to the United States Government by a foreign government . . . with the expectation that the information, the source of the information, or both, are to be held in confidence.” Id. § 6.1(s). Therefore, the Department’s redactions of Document D7 were proper under Exemption 1.

2. Exemption 5

Exemption 5 protects “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.” 5 U.S.C. § 552(b)(5). “To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.” Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001). By incorporating the second requirement, Congress evinced its intention that Exemption 5 be coterminous with traditional discovery privileges. Id. (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975)). Relying on Exemption 5, the Department has withheld Document D4 in its entirety, citing the deliberative process privilege.

The deliberative process privilege applies to materials that are part and parcel of the process of internal agency decisionmaking. See Sears, Roebuck & Co., 421 U.S. at 150 (protects documents comprising part of a process by which policies are formulated). The main purpose of this privilege is to promote better policymaking by encouraging candor in internal deliberations. Accordingly, the privilege typically protects memoranda, drafts, recommendations, proposals, and other documents that reflect the opinions of their authors, rather than those of the agency. See Tigue v. U.S. Dep't. of Justice, 312 F.3d 70, 76 (2d Cir. 2002) (opinions, recommendations, and deliberations); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (“recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer”). To fall within the deliberative process exception, however, a document must be both “predecisional” and “deliberative.” Grand Cent. P'ship, 166 F.3d at 482.

“A document is predecisional when it is prepared in order to assist an agency decisionmaker in arriving at his decision.” Tigue, 312 F.3d at 80 (quoting Grand Cent. P'ship, 166 F.3d at 482) (internal quotation marks omitted). Although an agency need not “pinpoint” an exact decision made in reliance on the document, it must show, ex ante, that the document “related to a specific decision facing the agency.” Id. This test is designed to distinguish predecisional documents from those that are “merely part of a routine and ongoing process of agency self-evaluation.” Id. (internal quotation marks and

citations omitted); cf. E.B. v. N.Y.C. Bd. of Educ., 233 F.R.D. 289, 293 (E.D.N.Y. 2005) (distinguishing “policy oriented judgments” from “routine operating decisions”).

To be deliberative, a document must actually be “related to the process by which policies are formulated.” Grand Cent. P’ship, 166 F.3d at 482. Among the factors that courts have considered in this regard are whether the document forms an essential link in a specific consultative process, whether it reflects the personal opinion of the writer rather than the policy of the agency, and whether, if released, it would inaccurately reflect or prematurely disclose the views of the agency. Id. Thus, the Department must actually identify and explain the role that a given document has played in the decisionmaking process. See, e.g., Coastal States, 617 F.2d at 868 (“agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process”). Because deliberative documents reflect the “give-and-take” of agency decisionmaking, id. at 866, factual material is not covered by the deliberative process privilege, Mink, 410 U.S. at 91. Purely factual material that is severable “without compromising the private remainder of the documents” consequently must be released. Id.

The Department initially described Document D4, which it seeks to withhold under Exemption 5, as an email containing “a candid discussion between two Department officials involved in the policy-planning process regarding the plausibility and weight to be given to reports of family planning practices received through hearsay.” (Grafeld Decl. ¶ 41). The Department did not delineate the “policy-planning process” in

which the officials allegedly were involved, nor did it state whether the drafter of the Report relied on the document.

The Supplemental Declaration addresses the document more thoroughly. It adds to the description above that, “[s]ince [Document D4] predates the publication of the [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.” (Suppl. Decl. ¶ 5 (emphasis added)). In addition to asserting that the document is therefore exempt from disclosure under Exemption 5, the Department now states that “[t]here is no non-exempt information that [may be] segregated and released.” (Id.).

To the extent the email exchange consists of “a candid discussion” between or among government officials regarding the “plausability and weight to be given” certain factual reports, the information was properly withheld under Exemption 5. Such a discussion is clearly deliberative, and it is predecisional because it was relied upon by the drafter of the Report. See Grand Cent. P’ship, 166 F.3d at 482.

The Department’s declarations are insufficient, however, to meet its burden with respect to the issue of segregability. Both declarations refer to emails concerning “reports of family planning practices received through hearsay.” (Suppl. Decl. ¶ 5; see Grafeld Decl. ¶ 41). The Department’s single, conclusory statement that “[t]here is no non-exempt information that [may be] segregated and released” is insufficient to establish that these emails do not contain severable factual information. See Judicial Watch, Inc. v.

Dep't of Treasury, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (“Conclusory language in agency declarations that does not provide a specific basis for segregability findings by a district court may be found inadequate.”) (citing Animal Legal Def. Fund, Inc. v. Dep't of Air Force, 44 F. Supp. 2d 295, 301 (D.D.C. 1999); Wilderness Soc'y v. Dep't of Interior, 344 F. Supp. 2d 1, 19 (D.D.C. 2004) (“[A] blanket declaration that all facts are so intertwined to prevent disclosure under the FOIA does not constitute a sufficient explanation of non-segregability.”). Therefore, to the extent that the emails include purely factual information regarding these “family planning practices” that is severable “without compromising the private remainder of the documents,” they must be released. Mink, 410 U.S. at 91.¹¹

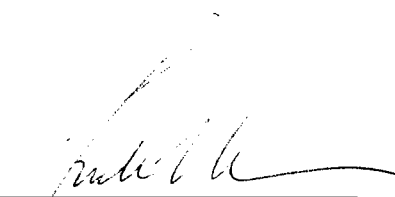
¹¹ The Court further notes that the Department may have now waived its right to withhold such severable factual information on the basis of any FOIA exemption. See Senate of P.R. v. Dep't of Justice, 823 F.2d 574, 580 (D.C. Cir. 1987) (citing Holy Spirit Assoc. v. CIA, 636 F.2d 838, 846 (D.C. Cir. 1980)).

IV. Conclusion

For the foregoing reasons, the Department's motion for summary judgment is granted in part and denied in part. The Court will hold a telephone conference on February 16, 2012, at 2 p.m., to determine whether anything further is required before this case is closed. Mr. McClanahan should initiate that call.

SO ORDERED.

Dated: New York, New York
January 30, 2012



FRANK MAAS
United States Magistrate Judge

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