

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

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NATIONAL SECURITY COUNSELORS)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:11-cv-00442 (RMC)
)	
CENTRAL INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE)	
)	
Defendants.)	
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**DEFENDANT CENTRAL INTELLIGENCE AGENCY’S REPLY MEMORANDUM IN
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON COUNTS 1 AND 2 OF
PLAINTIFF’S FIRST AMENDED COMPLAINT**

PRELIMINARY STATEMENT

In opposing Defendant CIA’s motion for summary judgment on Count 1 of Plaintiff’s First Amended Complaint, Plaintiff raises a number of arguments based on its assumptions about how the CIA operates and what documents the agency should have identified as responsive to its request for “all current [CIA] regulations, policy statements, guidelines, memoranda, training materials, handbooks, manuals, checklists, worksheets, instructions, and similar documents on the topic of Mandatory Declassification Review (“MDR”).” Declaration of Martha Lutz (“Lutz Decl.”) at Ex. A. None of these arguments has merit, however, or undermines the CIA’s position that it has conducted a reasonable search in response to Plaintiff’s request for records and produced in full the responsive document that it located. Moreover, with respect to the CIA’s motion for summary judgment on Count 2, Plaintiff’s opposition rests entirely on its attempt to read ambiguity into the declaration submitted by the agency. The declaration speaks for itself, though, and establishes that the CIA is entitled to summary judgment on Count 2 of Plaintiff’s First Amended Complaint.

ARGUMENT

I. THE CIA HAS ESTABLISHED THAT IT CONDUCTED A REASONABLE SEARCH FOR RECORDS RESPONSIVE TO THE FOIA REQUEST AT ISSUE IN COUNT 1.

As described in Defendant CIA's initial memorandum in support of its motion for summary judgment and the accompanying declaration by Martha Lutz [Dkt. No. 22 & 22-1], the CIA satisfied its obligations with respect to Plaintiff's request for current CIA documents on the topic of Mandatory Declassification Review by making "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. U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). Plaintiff makes three arguments against this conclusion, each of which fails.

A. The CIA Reasonably Interpreted the Word "Current" in Plaintiff's Request.

First, Plaintiff contends that the CIA's search was inadequate because the agency limited the scope of its search based on a narrow interpretation of the word "current." See Pl's Opp. at 2-3 [Dkt. No. 24]. Specifically, Plaintiff takes issue with Ms. Lutz's explanation that (1) "MDR provisions are derived from the controlling Executive Order which sets forth a uniform system for classification;" (2) at the time of Plaintiff's request, "MDR provisions were set forth in Executive Order 13292;" and (3) "[o]nly documents used under the MDR provisions of Executive Order 13292 would have been 'in current use . . .'" Lutz Decl. ¶ 28.

When a FOIA plaintiff challenges how an agency construed its request, courts determine whether the agency's interpretation was reasonable. See, e.g., Larson v. Dep't of State, 565 F.3d 857, 869 (D.C. Cir. 2009); Jarvik v. CIA, 741 F. Supp. 2d 106, 116 (D.D.C. 2010) (finding, in the course of holding that the agency's search for records was adequate, that the agency reasonably interpreted the plaintiff's request for "CIA reports" as a request for "records that originate with the

CIA” and not for all agency records on a particular topic); Wilson v. U.S. Dep’t of Transp., 730 F. Supp. 2d 140, 154 (D.D.C. 2010) (“An agency may decide to limit the scope of an ambiguous request as long as the narrowed scope is a reasonable interpretation of what the request seeks.”). The CIA’s interpretation of Plaintiff’s FOIA request amply satisfies this standard. Far from being a “strained definition of the term ‘current,’” see Pl.’s Opp. at 2, it was entirely reasonable for the agency—in responding to Plaintiff’s request for current CIA documents on the topic of MDR—to determine that any documents on that topic that were not used under the controlling Executive Order were not current and were therefore unresponsive to Plaintiff’s request.

Against this conclusion, Plaintiff asserts that the agency’s construction is unreasonable because the MDR provisions of Executive Order 13292 did not change substantially from the MDR provisions of the prior order. See Pl.’s Opp. at 3. Yet, isolating only the MDR provisions for comparison is misleading because the MDR provisions are part of the “uniform system for classification” set out in the Executive Order. Lutz Decl. ¶ 28. Indeed, the MDR provisions explicitly rely on other provisions of the Executive Order. For example, Section 3.5(c) of Executive Order 13292 specified that “[a]gencies conducting a mandatory review for declassification shall declassify information that no longer meets the standards for classification under this order,” 68 Fed. Reg. 15,315, 15,324–25 (Mar. 28, 2003), requiring an agency employee conducting mandatory declassification review to make a determination about how the current classification standards, which are set forth in other provisions of the controlling Executive Order, apply to a particular document. The extent to which the MDR provisions are intertwined with other provisions of the Executive Order thus helps to explain why only documents on the topic of MDR that were used under the controlling Executive Order would be current.

Nor can Plaintiff persuasively argue that the agency misconstrued its request for current CIA

documents on the topic of MDR simply by assuming that there must be “checklists, worksheets, and similar reference or training documents” on the topic of MDR that were used by CIA analysts when processing MDR requests before the issuance of Executive Order 13292 in March 2003 and that were still being used by CIA analysts at the time of Plaintiff’s FOIA request. See Pl.’s Opp. at 3. Such speculation about the existence of agency records is insufficient to defeat the agency’s well supported motion for summary judgment. See Oglesby, 920 F.2d at 67 n.13 (“[H]ypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of the agency’s search.”). Moreover, even assuming, for the purposes of argument only, that an individual CIA analyst happened to consult a document addressing MDR that was based on an outdated Executive Order, such consultation would not alone turn the hypothetical record into a current CIA document on the topic of MDR. Instead, as the CIA reasonably determined, “[o]nly documents used under the MDR provisions of Executive Order 13292” were responsive to Plaintiff’s request for current CIA records on the topic of MDR. See Lutz Decl. ¶ 28.¹

B. The Reasonableness of the CIA’s Search Is Not Judged By Its Results.

Plaintiff’s second argument as to why the CIA should not receive summary judgment on Count 1 of Plaintiff’s First Amended Complaint is that the agency’s search failed to produce a particular record—namely, the CIA’s declassification guide, which the agency stated was being updated in its FY 2006 Declassification Plan. See Pl.’s Opp. at 3–5. Yet, “it is long settled that the

¹ In a footnote, Plaintiff suggests an alternative definition of “current,” proposing “that a reasonable definition of ‘current’ for this request is ‘records that are not retired to the [Agency Archive and Records Center].’” Pl.’s Opp. at 7 n.8. Thus, instead of using a definition of “current” that logically turns on whether the document was used under the Executive Order that governed at the time of Plaintiff’s request, Plaintiff would have the agency conduct a new search using a definition of “current” that turns on the agency’s records management system. Given that the agency searched for records based on its reasonable interpretation of Plaintiff’s request, Plaintiff should not be allowed to effectively rewrite its request at this juncture.

failure of an agency to turn up one specific document in its search does not alone render a search inadequate.” Iturralde v. Comptroller of Currency, 315 F.3d 311, 315 (D.C. Cir. 2003).

Moreover, it is far from clear that the record to which Plaintiff refers would be responsive to its request. The CIA’s FY 2006 Declassification Plan, from which Plaintiff quotes to support its proposition that the CIA publicly acknowledged creating a declassification guide, was designed to “provide[] updates to its yearly plan for compliance with the automatic declassification provisions of EO 12958, as Amended.” FY 2006 CIA Declassification Plan 1 (Apr. 15, 2006) (emphasis added), available at http://www.foia.cia.gov/docs/DOC_0001492381/DOC_0001492381.pdf, suggesting that the declassification guide may also be tailored to implementing the automatic declassification program required by Section 3.3 of Executive Order 13292. Indeed, Section 3.3(d)(1) of Executive Order 13292 contemplated that agencies would use “a declassification guide” as a way to notify the Director of the Information Security Oversight Office (“ISOO”) of “any specific information . . . that the agency proposes to exempt from automatic declassification.” See 68 Fed. Reg. at 15,321. Similarly, 32 C.F.R. § 2001.32—the ISOO regulation on declassification guides that Plaintiff cites in its brief—repeatedly cites to the Executive Order’s automatic declassification provisions and makes clear that such guides are used in connection with automatic declassification. See, e.g., 32 C.F.R. § 2001.32(b)(3) (specifying that declassification guides shall, inter alia, “[s]tate precisely the information that the agency proposes to exempt from automatic declassification”).

In short, Plaintiff cannot merely note the CIA’s acknowledgment that it has created a “declassification guide” as a way to defeat the CIA’s motion for summary judgment, given that it is not clear the declassification guide would even be responsive to Plaintiff’s request and, regardless, given that an “agency’s failure to turn up a particular document . . . does not undermine the

determination that the agency conducted an adequate search for the requested records.” Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004). Instead, the CIA is entitled to summary judgment because it conducted a reasonable search, as measured by the “appropriateness of the methods used” to execute it. Iturralde, 315 F.3d at 315. Following the agency’s standard procedures for processing FOIA requests, CIA personnel determined that the Director’s Area was the only one of the agency’s five directorates that was reasonably likely to possess responsive records and then conducted a search of the relevant Director’s Area records systems. Lutz Decl. ¶¶ 24–29. Specifically, staff in the Director’s Area searched a records system that contains “all internal Agency-wide regulatory issuances,” “as well as other IMS records systems that might contain” responsive records. Id. ¶ 30. The CIA thus satisfied its FOIA obligations by making “a good faith effort” to search for the records requested by Plaintiff, using methods that were reasonably calculated to produce the information requested. See Oglesby, 920 F.2d at 68.

C. The CIA Correctly Identified and Searched the Appropriate Record Systems.

Finally, Plaintiff contends that the CIA’s declaration describing the agency’s search for responsive records conflicts with other information it has received regarding the records systems used by the CIA’s Office of Information Management Services (“IMS”). See Pl.’s Opp. at 5–7. Yet, the documents on which Plaintiff relies for this contention, see Pl.’s Opp. at Ex. F & G, fail to demonstrate any inconsistency. The agency therefore stands by the statement in the Lutz Declaration that “[t]he Director’s Area searched [the records system that contains all internal Agency-wide regulatory issuances], as well as other IMS records systems that might contain policies, training materials and similar documents on the topic of the CIA’s Executive Order

Mandatory Declassification Review program.” Lutz Decl. ¶ 30.²

In sum, despite Plaintiff’s arguments to the contrary, the search conducted by the CIA was reasonably calculated to locate “all current [CIA] regulations, policy statements, guidelines, memoranda, training materials, handbooks, manuals, checklists, worksheets, instructions, and similar documents on the topic of [MDR].” Lutz Decl. at Ex. A. The Lutz Declaration submitted in support of the agency’s motion for summary judgment details both (i) how the agency reasonably construed Plaintiff’s request for “current” documents as requesting documents used under the MDR provisions of the Executive Order that was controlling at the time of Plaintiff’s request and (ii) how, with the scope of Plaintiff’s request in mind, staff in the Director’s Area conducted a search of the records systems that would reasonably be expected to contain responsive records. See Lutz Decl. ¶¶ 28–31. What is more, the agency located one responsive record and produced that document to Plaintiff in full. The Court should accordingly grant summary judgment to the CIA on Count 1 of Plaintiff’s First Amended Complaint.

II. THE COURT SHOULD DISREGARD PLAINTIFF’S ATTEMPT TO READ AMBIGUITY INTO THE EXPLANATION PROVIDED IN THE LUTZ DECLARATION AS TO WHY THE AGENCY FOUND NO RECORDS RESPONSIVE TO THE FOIA REQUEST AT ISSUE IN COUNT 2.

The Lutz Declaration also establishes that the CIA satisfied its duty to conduct a reasonable search for records responsive to Plaintiff’s request “for a copy of the ‘special procedures for the [Mandatory Declassification] review of information pertaining to intelligence activities (including special activities), or intelligence sources or methods’ developed by the Director of Central

² Plaintiff also assumes that, because IMS is the only office that performs MDR reviews, MDR materials are not likely to be “Agency-wide regulatory issuances” and were therefore unlikely to be found in the initial records system that the agency searched. See Pl.’s Opp. at 5. This argument lacks merit, as the agency is plainly best positioned to determine the record systems most likely to contain responsive records, and there can surely be no basis for objecting to an allegedly overbroad search.

Intelligence pursuant to Sections 3.6(e) of Executive Order 12,958 and 3.5(e) of Executive Order 13,292.” Lutz Decl. at Ex. F. The declaration details how the Director’s Area was tasked to search for responsive records after it was identified by IMS professionals as the only CIA directorate reasonably likely to possess such records and how “IMS searched relevant record systems containing all files reasonably likely to contain responsive materials.” Lutz Decl. ¶¶ 32–33. In addition, Ms. Lutz further explained that “it became apparent that no search of CIA records would be likely to locate” responsive records “because I learned that no such special procedures were ever developed by the then Director of Central Intelligence under these provisions.” Id. ¶ 34. As Ms. Lutz succinctly explained, “[t]herefore, CIA is not reasonably able to formulate a search strategy that would locate documents that were never created.” Id.

In opposition, Plaintiff contends that the declaration is ambiguous because of Ms. Lutz’s use of the phrase “the then Director of Central Intelligence.” See Pl.’s Opp. at 8. The agency respectfully disagrees and submits that the declaration unambiguously explains that documents responsive to Plaintiff’s request “were never created.” Lutz Decl. ¶ 34. Plaintiff in effect asks the Court to presume that Ms. Lutz used the phrase “the then Director of Central Intelligence” as a way to disguise that the agency had secretly interpreted Plaintiff’s request as only seeking special procedures developed by one prior Director of Central Intelligence. No such distinction was intended. Indeed, such an assumption is not only unwarranted but also flies in the face of the presumption of good faith accorded to agency affidavits. See SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991). The mere fact that the declaration is not worded exactly as Plaintiff would like does not establish a genuine dispute of material fact with respect to whether the CIA adequately searched for records responsive to this FOIA request. The Court should accordingly

grant summary judgment to the CIA on Count 2 of Plaintiff's First Amended Complaint.³

CONCLUSION

For the foregoing reasons, the CIA respectfully requests that its Motion for Summary Judgment on Counts 1 and 2 of Plaintiff's First Amended Complaint be granted.

Dated: October 17, 2011

Respectfully Submitted,

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³ Plaintiff's opposition also requests attorneys' fees for the time spent drafting the portion of the opposition that contends the Lutz Declaration is ambiguous in this regard. See Pl.'s Opp. at 9–10. This request is not only unwarranted but also premature. In the event, however, that the Court should disagree with the CIA and order the agency to provide a supplemental declaration, the CIA will respond to Plaintiff's attorneys' fees request at the appropriate juncture.