

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

NATIONAL SECURITY COUNSELORS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:11-cv-00443 (BAH)
	)	
CENTRAL INTELLIGENCE AGENCY,	)	
	)	
Defendant.	)	
	)	

**DEFENDANT’S OPPOSITION TO PLAINTIFF’S MOTION  
FOR A SUPPLEMENTAL STATUS CONFERENCE**

Plaintiff National Security Counselors (“NSC”) has filed a motion for a supplemental status conference regarding Defendant Central Intelligence Agency’s (“CIA”) decision to provide NSC with records responsive to its Freedom of Information Act (“FOIA”) request in paper, rather than electronic, form. Because the CIA has submitted two declarations conclusively establishing that the records responsive to NSC request are not readily reproducible in electronic format, a supplemental status conference is unnecessary, and NSC’s motion should be denied.

The FOIA instructs courts to “accord substantial weight to an affidavit of an agency concerning the agency’s determination as to ... reproducibility under paragraph (3)(B).” 5 U.S.C. § 552(a)(4)(B). NSC devotes its motion for a supplemental status conference to quibbling with the wording of the CIA’s declarations and attempting to manufacture ambiguity and controversy. But NSC’s arguments are both misplaced and inconsistent with the substantial weight the CIA’s declarations should be accorded.

NSC begins its motion by taking issue with the CIA's use of the term "system of records," claiming that the Agency argued in another case that "the term 'system of records,' when used in a FOIA request, was ambiguous and confusing because the only definition for that term was in the Privacy Act." Dkt. No. 22, p.1. But NSC's characterization of the CIA's argument in *James Madison Project v. CIA*, 08-1323 (E.D. Va.), is incomplete and misleading. In *James Madison Project*, the CIA argued that the term "system of records" was ambiguous and confusing because of the way it was used in a poorly drafted FOIA request. The request asked for "all internal [CIA] documents pertaining to . . . the indexing and organizational structure of all CIA Systems of Records subject to FOIA, especially with respect to which Systems of Records are held by which CIA components (excluding the Privacy Act Systems of Records, detailed in 22 July 2005 Federal Register)." Dkt. No. 22-1, p. 9. The CIA argued in that case that it was unclear from the request whether the requester intended to use the term "system of records" generally or to give it the more narrow definition provided by the Privacy Act, which the requester specifically cited in its request. *Id.* In her Supplemental Declaration in this case, Ms. Viscuso did not indicate that she intended to limit the term "system of records" to the narrow definition provided in the Privacy Act, and NSC's attempts to conjure up ambiguity where none exists should be rejected.

NSC then argues that the CIA's declarations are somehow misleading because the Agency has produced, in response to FOIA requests outside of this litigation, records, like court decisions and federal regulations, that are publically available Dkt. No. 22, p. 3-4. Ms. Viscuso stated multiple times in her Supplemental Declaration that the CIA stores unclassified documents and processes them for release under the FOIA on the classified system. Dkt. No. 21-1, ¶¶ 3-5.

It should hardly be surprising that some of the unclassified documents that the CIA stores and processes on its classified system are publically available. NSC also seems to argue that the CIA should be required to keep certain types of documents on its unclassified system. Dkt. No. 22 (providing a list of “[o]ther examples of files that have no business being only located on the classified system”). A similar argument was raised and soundly rejected in *Landmark v. E.P.A.*, 272 F.Supp.2d 59 (D.D.C 2003). In *Landmark*, the plaintiff argued that Section 552(a)(3)(B) required “the agency to maintain a central electronic file containing [an individual’s] emails.” *Id.* at 63. The Court disagreed: “FOIA does not require an agency to reorganize its files in anticipation of or in response to a FOIA request. Rather, the agency may keep its files in a manner best designed to suit its internal needs.” *Id.* (citation omitted). Ms. Viscuso’s two declarations explain that the CIA stores documents and processes FOIA requests in a manner designed to suit the Agency’s specific internal needs. NSC’s suggestion that the FOIA requires the Agency to reorganize its files and store certain documents on its unclassified system is baseless and should be flatly rejected.

Next, NSC claims that the CIA is similar to other agencies and makes the erroneous assertion that the Agency “refuses to provide electronic records as a *blanket policy*.” Dkt. No. 22, p. 5 (emphasis in original). In her declarations, Ms. Viscuso does not address in any significant detail the missions or FOIA policies of other agencies, as that subject is not relevant to the CIA’s determination that the responsive records in this case are not readily reproducible in electronic format. In her Initial Declaration, Ms. Viscuso stated that decisions about reproducibility are made on a case-by-case basis and are not based on a blanket policy. Dkt. No. 19-1, ¶¶ 11-12. In fact, Ms. Viscuso explained that “[i]n some limited instances, responsive

records are readily reproducible in electronic format.” Dkt. No. 19-1, ¶ 11. NSC’s assertions about other agencies are irrelevant, and its claim that the CIA has a blanket policy of refusing to provide documents in electronic format is directly refuted by the Agency’s declarations.

Finally, NSC argues that the CIA has improperly interpreted subsection 5 U.S.C. § 552 (a)(3)(B) of the FOIA. Dkt. No. 22, p.5-6. Subsection (a)(3)(B) of the FOIA states:

“In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.”

5 U.S.C. § 552 (a)(3)(B). NSC alleges specifically that the CIA has misinterpreted the term “this section” that appears at the end of the subsection: “Defendant is defining ‘this section’ to mean the entirety of FOIA, while the clear meaning of this term pertains solely to the ‘form or format’ provision.” Dkt. No. 22, p. 6. NSC supports its position by citing to the “Court’s duty to give effect, where possible, to every word of a statute.” *Id.* (citation omitted).

NSC does not, however, address the case the CIA relied on in its Supplemental Memorandum to give meaning to subsection (a)(3)(B): *Landmark*, 272 F.Supp. 2d 59. In *Landmark*, the Court concluded that an agency complied with its obligation under (a)(3)(B) by keeping its records in a form that could be duplicated, even if the records could not be readily reproduced in the format requested by a particular FOIA requester. *Id.* at 63. The *Landmark* Court’s interpretation of subsection (a)(3)(B) gives both provision of the subsection their plain meaning. The first provision requires an agency to provide responsive records in the form or format requested if the records are readily reproducible in that form or format. The second provision requires agencies to make reasonable efforts to maintain their records in forms for formats that can be reproduced. NSC’s attempts to combine the two provisions to create an

requirement that agencies maintain their records in formats that are readily reproducible in the format requested by a particular requester are inconsistent with *Landmark* and the plain meaning of (a)(3)(B).

In addition, NSC's interpretation of (a)(3)(B) is inconsistent with basic principles of statutory construction. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). When Congress wanted to refer to specific provision of the FOIA, it used the terms "subparagraph," *see, e.g.*, (a)(2)(E), "subsection," *see, e.g.*, (a)(3)(A), or "paragraph," *see, e.g.*, (a)(4)(B). When Congress wanted to refer to the Act as a whole, it used the term "this section." *See, e.g.*, (b) (setting forth the exemptions to the FOIA with the introduction, "This section does not apply to matters that are..."); (f) (defining terms that appear in the FOIA with the introduction, "For purposes of this section, the term..."). Congress' use of the terms "subsection," "subparagraph," "paragraph" and "this section" in the FOIA support the CIA's position that the term "this section" in (a)(3)(B) refers to the statute as a whole.

### **CONCLUSION**

The CIA has provided two declarations that conclusively establish that the responsive records in this case are not readily reproducible in electronic format. The Court should accord substantial weight to those declarations and reject NSC's attempts to manufacture ambiguity and controversy. Accordingly, the Court should rule that the CIA correctly determined that the responsive records in this case are not readily reproducible in electronic format and deny NSC's motion for a supplemental status conference.

Dated: January 20, 2012

Respectfully submitted,

TONY WEST  
Assistant Attorney General

ELIZABETH J. SHAPIRO  
Deputy Director

/s/ Ryan Parker  
RYAN PARKER  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Avenue, N.W.  
Washington, DC 20530  
Tel: (202) 514-4336  
Fax: (202) 616-8202  
Attorneys for Defendant