

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

AMERICAN CENTER)
FOR LAW AND JUSTICE,)
)
Plaintiff,)
)
v.)
)
UNITED STATES DEPARTMENT)
OF JUSTICE,)
)
Defendant.)
_____)

Case No. 17-cv-01866 (APM)

**PLAINTIFF’S CROSS MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION
FOR SUMMARY JUDGMENT**

INTRODUCTION

In introducing the predecessor of the bill that was enacted as the federal Freedom of Information Act (“FOIA”), its sponsor, Senator Edward Long, clearly identified the principle necessitating such a law: “Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prolog to a farce or a tragedy or perhaps both.” 111 CONG. REC. 26821 (1965) (quoting James Madison). In direct contravention of this principle, the Federal Bureau of Investigation (FBI) has obstructed Plaintiff’s access to information to which it is entitled – through significant delay (first by a misrepresentation to Plaintiff that no records existed responsive to Plaintiff’s FOIA Request, then by significant delay – more than a year – to produce a mere 29 pages) and then withholding information pursuant to a privilege that clearly does not apply here. Plaintiff ACLJ simply seeks factual information regarding former Attorney General Lynch and former President Bill Clinton’s meeting on a tarmac in Arizona just a few days before the FBI exonerated Hillary Clinton for her treatment of classified information. The FBI, according to its own undisputed facts, demonstrates that (1) its search is, once again, inadequate and (2) its withholdings are unsupported.

STATEMENT OF FACTS

On July 15, 2016, Plaintiff submitted virtually identical FOIA requests to the Department of Justice (DOJ) and FBI seeking information relating to then-Attorney General Lynch’s June 27, 2016 meeting with former President Bill Clinton at Sky Harbor International Airport. Plaintiff’s Statement of Additional Material Facts (hereinafter “Pl. SMF”) at 1. *See e.g.*, Def. SMF, at 1. On October 21, 2016, almost four months after ACLJ issued its FOIA request, the FBI informed Plaintiff that “[n]o records responsive to your request were located.” Def. SMF, at 2.

Approximately eight months later, on or about July 3, 2017, and pursuant to a lawsuit filed by Plaintiff to obtain documents to which it was entitled, the DOJ began producing documents responsive to Plaintiff's FOIA Request. Pl. SMF at 2. Within the documents produced by DOJ were communications involving FBI officials, as well as several privacy redactions specifically designated by the FBI. Pl. SMF, at 3. On August 3, 2017, ACLJ reported to the public its findings regarding the FBI – *i.e.*, that the documents produced by DOJ revealed that the FBI did, in fact, have documents responsive to Plaintiff's FOIA Request and that the FBI was surely aware of this fact in light of its own redactions within those documents. Pl. SMF, at 4. The following day, August 4, 2017, several national media outlets reported ACLJ's findings. Pl. SMF, at 5. On August 9, 2017, ACLJ contacted the Office of Government Information Services ("OGIS") to inquire regarding the FBI's false assertion that it did not possess any documents responsive to Plaintiff's request. Pl. SMF, at 6. On August 15, 2017, Plaintiff received a letter from the FBI, dated August 10, 2017, notifying Plaintiff that its request "has been reopened . . . as the FBI has determined records potentially responsive to your request may exist." Pl. SMF, at 7. The FBI now admits that it first became aware, through consultation with DOJ's Office of Information Policy (OIP), on May 23, 2017, that it may have documents responsive to Plaintiff's request. Pl. SMF, at 8. Nonetheless, it took the FBI another six months following this discovery to produce a mere 29 pages of non-exempt responsive documents. Pl. SMF, at 9. Accordingly, only through two lawsuits, and the passage of more than a year, was Plaintiff able to obtain the documents to which it is entitled.

LEGAL ARGUMENT

I. Summary Judgment Standard

The majority of FOIA cases are resolved on summary judgment. *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 20 F. Supp. 3d 260, 267 (D.D.C. 2014) (quoting *Brayton v. Office of the U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011)). At the summary judgment stage, the agency has the burden of showing that it complied with the FOIA. With regard to the adequacy of its search for requested records, the agency must provide “a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that *all* files likely to contain responsive materials . . . were searched.” *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (emphasis added).

Further, “[w]hen an agency’s response to a FOIA request is to withhold responsive records, either in whole or in part, the agency ‘bears the burden of proving the applicability of claimed exemptions.’” *Judicial Watch*, 20 F. Supp. 3d 267 (quoting *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011)). The government may sustain its burden through the submission of declarations detailing, with specificity, the reason that a FOIA exemption applies, along with an index, as necessary, describing the materials withheld. *Id.* (citations omitted). *See also Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013) (A grant of summary judgment based on agency affidavits is appropriate only “if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.”) (internal citations and quotations omitted). In resolving a summary judgment motion in a FOIA case, however, a court must interpret the statute broadly in favor of public disclosure and construe any exemptions narrowly. *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988).

II. The FBI Has Failed to Demonstrate Beyond Material Doubt That It Conducted An Adequate Search.

An agency is required to perform more than a perfunctory search in response to a FOIA request. *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). Defendant must “demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover **all** relevant documents.’” *Id.* (quoting *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (emphasis added)). See *Chambers v. Dep't of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009) (explaining that the agency must be able to aver that **all** files likely to contain responsive materials were searched). The FBI’s declaration detailing its search falls short of this standard. First, the Hardy Declaration is devoid of any such statement of assurance – *i.e.* that *all* files likely to contain responsive materials were searched. See *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 313-14 (D.C. Cir. 2003) (“In response to a challenge of the adequacy of the search, the agency may meet its burden by providing “a reasonably detailed affidavit . . . averring that all files likely to contain responsive materials . . . were searched.”) (citations omitted) (emphasis added). Second, the search described by the FBI admittedly excluded its largest database, the Central Records System (CRS). Hardy Decl. at ¶ 17 (explaining that despite the FBI’s general practice in searching the CRS because it is an extensive system of records using an index search methodology, it did not conduct a search of the CRS here). While Hardy asserts that the terms “Clinton” and “Lynch” would not be likely to return results within the CRS, *id.* at ¶¶17-19, he provides no explanation why¹ and/or why these would be the only relevant search terms. Third, while the FBI identifies three offices for which a search for records would be appropriate – the FBI’s Security Division, Critical Incident Response Group (CIRG) and the Operational

¹ Such an explanation is also puzzling given that, according to Mr. Hardy, the FBI records index terms in files within the CRS that may be useful for future retrieval purposes, including “**names of individuals**, organizations . . . [and] activities.” *Id.* (emphasis added).

Technology Division (OTD) – it fails to provide any description of the search (i.e. what search terms were used). Further the FBI seemingly failed to search the unclassified and classified email systems within those three offices. *See* Hardy Decl. at ¶¶ 19-20 (identifying these three offices and indicating a search for records was conducted, but asserting it “did not conduct a search of its unclassified and classified email systems).

Fourth, as to the limited records actually searched by the FBI, it is unclear which custodians the FBI searched for responsive records. The FBI asserts that it “searched electronic communications of FBI custodians identified in DOJ OIP’s records.” The agency fails to specify whether the search included *all* FBI custodians identified in DOJ OIP’s records, or select ones. *See* Def.’s Statement of Material Facts (Doc. 14-1) (hereinafter “Def. SMF”) at ¶ 4 (simply asserting “the FBI searched electronic communications of FBI custodians identified in the records (some of whose names were redacted)).” In the DOJ OIP’s production, only four FBI officials/employees are identified as custodians (a sender or recipient of the communication(s)): Richard Quinn, Micahel Kortan, and two unidentified FBI employees. Southerland Decl., at ¶ 3. However, additional FBI officials or employees are identified in the body of these e-mail communications as individuals who may have communicated and/or have records regarding Lynch’ meeting, including James Rybicki. *Id.*

Finally, search terms actually utilized by the FBI in searching the e-mail accounts are unlikely to yield all responsive records. *See* Def. SMF, ¶ 4 (explaining that searches using search terms including “Lynch AND tarmac,” and “Clinton AND tarmac” were used), Government officials regularly referred to Attorney General Lynch as “AG” during her time in office, *see* Def. Ex. H (Doc. 15-1) (referring regularly to the former Attorney General simply as “AG”); Southerland Decl. at ¶ 2 (providing several examples), and former President Bill Clinton by his

initials “WJC.” Southerland Decl., at ¶ 2. Pursuant to the search conducted by the Department, no documents simply referencing the “AG” and her meeting with Clinton or “WJC” would have been discovered, even if the record also included the term “airport.”² An adequate and reasonable search, given the brief date range utilized for the search (June 13, 2016 -August 9, 2016), would necessarily require these additional search terms and associated phrases (*i.e.* “AG AND Clinton,” “AG AND airport,” and “Clinton AND airport”).

Significant material doubt exists regarding the adequacy of Defendant’s search. Accordingly, Defendant cannot prevail on its motion for summary judgment and should be required to (1) conduct a search of the CRS using appropriate search terms; (2) provide a detailed explanation regarding the search conducted within the Security Division, CIRG and OTD, and conduct a search of all unclassified and classified e-mail systems within those offices; and (3) conduct a search for records of all FBI employees identified in records produced by DOJ OIP and the FBI using the additional search terms including “AG AND airport,” “AG AND Clinton,” and “Clinton AND airport.”

III. The FBI Fails To Meet Its Burden To Support Certain Withholdings Under Exemptions 5 and 6.

Plaintiff challenges two of the FBI’s withholdings under Exemptions 6 and 7, *see* FBI-7 (Doc. 15-1, at 73) and FBI-12 (Doc. 15-1, at 78), and four under Exemption 5. *See* FBI-2 and FBI-3 (Doc. 15-1, at 68-69), and FBI-23 and FBI-24 (Doc. 15-1, at 89-90). As Plaintiff details below, the FBI fails to meet its burden to show that the withholdings are proper.

² *See* Hardy Decl. at ¶ 21 (explaining that the search terms, “tarmac” and “Phoenix” were used but not “airport”). Given that there was only one meeting between the AG and Clinton at an airport during the time prescribed by the search, a search for involving some combination of “AG,” “Clinton,” and “airport” would likely yield only responsive documents and very few unresponsive documents, if any.

A. Exemption 6 and 7 withholdings.³

Exemption 6 permits an agency to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6).” *Henderson v. U.S. Dep’t of Justice*, 157 F. Supp. 3d 42, 50 (D.D.C. 2006). “Similarly, Exemption 7(C) permits an agency to withhold ‘records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.’” *Rosenberg v. U.S. Dep’t of Immigration & Customs Enforcement*, 13 F. Supp. 3d 92, 106 (D.D.C. 2014). Exemption 7(C), which requires the government to prove that disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy” is ‘somewhat broader’ than Exemption 6, which requires proof of a ‘clearly unwarranted invasion of privacy.’” *Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1173 (D.C. Cir. 2011) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989)). Thus, if the information is proven to be “compiled for law enforcement purposes,” as required under Exemption 7, there is no need to consider Exemption 6 separately. *Roth*, 642 F.3d at 1173.

Defendant fails in this instance to demonstrate that the information withheld – emails exchanged between FBI and DOJ officials and/or employees regarding Lynch’s meeting on the tarmac and the media’s reporting on that meeting – was compiled for law enforcement purposes. In fact, the Hardy Declaration is entirely silent on this issue. As the D.C. Circuit has noted, “FBI records are not law enforcement records simply by virtue of the function that the FBI serves.” *Id.* (quoting *Vymetalik v. FBI*, 785 F.2d 1090, 1095 (D.C. Cir. 1986)). The records sought to be protected must relate to something “fairly characterized as an enforcement proceeding.” *See*

³ Plaintiff does not challenge any of the information withheld pursuant to (b)(6)-2 and (b)(7)(C)-2.

Concepcion v. FBI, 606 F. Supp. 2d 14, 36-37 (2009) (quoting *Jefferson v. U.S. Dep't of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002)). Here, the FBI provides absolutely no explanation as to why or how e-mails with DOJ officials flagging news stories amid the media firestorm following the AG's meeting would be related to any enforcement proceeding. Nor has it presented this Court with any legal precedent that would support such an assertion even had it been made.

Because the FBI has failed to demonstrate a proper withholding under Exemption 7, this Court must evaluate the FBI's withholdings under Exemption 6. First, the information withheld must include "personnel and medical files or similar files." Here, the information the FBI seeks to withhold includes one or more names of FBI employees who participated in e-mail communications with high level FBI or DOJ officials regarding the former Attorney General's highly suspect meeting. *See* FBI-7 (email from Michael Kortan to several FBI officials including Andrew McCabe and James Rybicki); FBI-12 (email from Shirlethia Franklin with the Office of the Attorney General to three FBI employees (identities withheld by the FBI) regarding "Fwd: Bill Clinton meeting?"). In support of all of its withholdings under Exemption 6, the FBI describes a *general* policy or practice of the agency in protecting the names and identifying information of lower level employees and special agents – essentially asserting that such information is and should always be protected under Exemption 6, regardless of the specific considerations normally evaluated by a court. Importantly, the FBI fails to specify whether any of the information withheld in the instant case, including the names appearing on FBI-7 and FBI-12 are, in fact, those of lower level employees or whether these employees are still with the agency (an important factor in determining whether any of the parade of potential dangers listed in the Hardy Declaration are realistic concerns here).

In addition, the FBI fails to provide an explanation as to whether the individuals took part in any criminal or other investigation relating to the information produced, and/or what unwarranted harm or invasion of personal privacy would “clearly” result from disclosure. *See* Hardy Decl. ¶¶ 30-33 (explaining a general policy and providing a laundry list of potential reasons for withholding the information, but failing to explain which, if any, might apply in the instant case). Notably, these two withholdings do not present a situation where the information withheld includes “private information” such as a personal address, cell phone number, social security number or email address, information of a third party, or information relating to a criminal prosecution. *See Blackwell v. FBI*, 646 F.3d 37, 41 (D.C. Cir. 2011) (recognizing privacy interests of third parties, especially in relation to a criminal prosecution); *Coleman v. Lappin*, 607 F. Supp. 2d 15, 22 (D.D.C. 2009) (holding individuals’ Social Security numbers and dates of birth were properly withheld under Exemption 6). Nor is this an instance involving a top secret investigation or operation where concealment of the FBI agents’ involvement or a confidential informant’s identity is necessary. Again, the FBI fails to present this Court with any legal precedent to support the position that the information withheld here and challenged by Plaintiff properly falls under Exemption 6. As the D.C. Circuit has clarified, Congress’s “clearly unwarranted” requirement in Exemption 6 creates a heavy burden for the government, yet, it is one upon which Congress insisted and which “instructs [courts] to tilt the balance . . . in favor of disclosure.” *Washington Post Co. v. U.S. Dep’t of Health & Human Serv.*, 690 F.2d 252, 260 (D.C. Cir. 1982) (quoting *Ditlow v. Shultz*, 517 F.2d 166, 169 (D.C. Cir. 1975)). In fact, the D.C. Circuit has explained, Congress insisted upon the “clearly unwarranted” standard “despite repeated objections by government witnesses to the heavy burden it creates,” *Washington Post Co.*, 690 F.2d at 262, such

that “the presumption in favor of disclosure [under Exemption 6] is as strong as can be found anywhere in the Act.” *Id.*

Finally, the public interest in the information outweighs any speculative privacy interest here. *See Henderson*, 157 F. Supp. 2d at 50 (explaining that the second inquiry for an Exemption 6 withholding requires the Court “to balance the privacy interest that would be compromised by disclosure against any public interest in the requested information”). “FOIA’s central purpose is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny.” *Reporters Comm. for Freedom of Press*, 489 U.S. at 774. The information Plaintiff seeks involves the events surrounding former Attorney General Lynch’s decision to meet with former President Clinton amid the criminal investigation into Hillary Clinton’s use of a private email server. This information remains a matter of significant public interest, even today. *See, e.g., Head of the Snake: How Obama Made Sure Hillary Was Not Indicted in Email Scandal*, THE DAILY WIRE (Jan. 25, 2018), <https://www.dailywire.com/news/26320/head-snake-how-obama-made-sure-hillary-was-not-ryan-saavedra> (digesting newly released text messages involving FBI investigator Strzok who participated in the investigation into Hillary’s use of a private email server). This meeting – as even the former AG has admitted – cast a formidable shadow on the investigation. *See, Loretta Lynch to Accept F.B.I. Recommendations in Clinton Email Inquiry*, THE NEW YORK TIMES (July 2, 2016), <https://www.nytimes.com/2016/07/02/us/politics/loretta-lynch-hillary-clinton-email-server.html>. The identities of the individuals who participated in the FBI communications produced are undoubtedly important information to which the public, including Plaintiff, is entitled.

Keeping in mind that the dominant objective of FOIA is disclosure, not secrecy, *see Washington Post Co.*, 690 F.2d at 260 (citing *Department of the Air Force v. Rose*, 425 U.S. 352,

361 (1976)), and that all exemptions to the normal disclosure rule must be construed narrowly, *id.*, the information challenged by Plaintiff and withheld by the FBI on pages FBI-7 and FBI-12 must be disclosed.

B. Exemption 5 Withholdings

Case law regarding the proper application of Exemption 5 and the deliberative process privilege is clear. The withheld information must be *both* pre-decisional *and* deliberative. *Judicial Watch, Inc.*, 20 F. Supp. 3d at 269. Importantly, under the deliberative process privilege, factual information generally must be disclosed. Only materials embodying officials' *opinions* are ordinarily exempt. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (citing *EPA v. Mink*, 410 U.S. 73, 87-91 (1973) (noting that the Supreme Court has considered the privilege on several occasions and established the principle that "the privilege applies only to the 'opinion' or 'recommendatory' portion of the report, not to factual information which is contained in the document")).

Here, the FBI defends the withholding of final talking points made by the DOJ OIP as to the documents identified as FBI-2-FBI-3 and FBI-23-FBI-24. The context of these talking points is important in determining whether the withholding is properly supported and is discussed in great detail in Plaintiff's FOIA case against the DOJ. *See* Plaintiff's Cross Motion for Summary Judgment, *American Center for Law and Justice v. U.S. Dep't of Justice*, No. 1:16-cv-2188 (Dec. 12, 2017), ECF No. 23, at 6-9. *See e.g.*, Plaintiff's Reply in Support of Cross Motion (January 26, 2018), ECF No. 26, at 4-8, incorporated by reference herein. Not only does Mr. Hardy lack the requisite personal knowledge to attest to the contents of talking points drafted by the DOJ and the deliberations allegedly contained therein, Mr. Hardy's declaration is woefully deficient in describing the information actually withheld by DOJ OIP. As Plaintiff explains more fully in its cross motion in its case against the DOJ, the talking points circulated to the FBI do not contain

deliberations,⁴ and, by DOJ's own admission, contain factual information relating to the former Attorney General's meeting with former President Bill Clinton.⁵ *Id.* These talking points do not represent preliminary assessments, and case law does not support the legal argument presented by the DOJ, and now the FBI, that all talking points and e-mails concerning them are exempt from disclosure under FOIA Exemption 5.

As courts have made clear time and again, talking points and press statements which contain factual information must be released. In *Judicial Watch, Inc. v. Dep't of Treasury*, 802 F. Supp. 2d 185, 194-95 (D.D.C. 2011), the court found that portions of a draft talking points document contained reasonably segregable material and should have been released. In *Trea Senior Citizens League v. Dep't of State*, 923 F. Supp. 2d 55, 69 (D.D.C. 2013), the court denied the State Department's motion for summary judgment as to its Exemption 5 withholding of draft talking points. *See also Judicial Watch, Inc. v. Dep't of Energy*, 310 F. Supp. 2d 271, 318 (D.D.C. 2004) (finding the agency failed to adequately support its withholding of talking points under Exemption 5); *News-Press v. Dep't of Homeland Sec.*, 2005 U.S. Dist. LEXIS 27492 (M.D. Fla. Nov. 4, 2005) (reviewing *in camera* certain talking points withheld under Exemption 5 and concluding that the talking points were neither pre-decisional nor deliberative). In yet another case, the D.C Circuit held, following *in camera* review, that the DOJ's redactions fell beyond the scope of the privilege

⁴ *See* Plaintiff's Cross Motion (Doc. 23) at 6-7 (detailing circulation of these talking points to the Attorney General as the "final version," and the DOJ's circulation of these final "talkers" to numerous government officials in the following days), incorporated by reference herein.

⁵ *Id.* at 8 (noting that "[s]everal of these documents admittedly contain 'facts,' Brinkmann Decl., at ¶ 16, rather than opinions. *See e.g., id.* at ¶ 17 (noting that the withholdings contain a "selection of facts and source material"); ¶ 18 (affirming that facts are contained within the withheld material). . . Only materials embodying officials' *opinions* are exempt. *In re Sealed Case*, 121 F.3d 729,737 (D.C. Cir. 1997) ("The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made or protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations."). *Id.* (ordering the White House to produce all materials containing wholly factual and segregable factual assertions)."

where only the first sentence and footnotes contained opinion and the rest consisted of factual information. The court ordered that the report, with the exception of the first sentence and footnotes, be produced without redaction, finding that any “relation to any . . . deliberations [was] simply too attenuated to be protected by the deliberative process privilege.” *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1539-40 (D.C. Cir. 1993).

Here, the DOJ has withheld these talking points from Plaintiff and the public on the grounds that, because it chose not to reveal facts contained within those talking points to the public last year, it should not be required to do so now. The DOJ and FBI’s position is not only unsupported by the law; it is antithetical to the FOIA and defies Congress’s intent to confine Exemption 5 narrowly and in favor of complete disclosure. *See Senate of Puerto Rico ex rel. Judiciary Comm. v. Dep’t of Justice*, 823 F.3d 574 (D.C. Cir. 1987).

CONCLUSION

The primary objective of the FOIA is disclosure, not secrecy, and it should never be used to shield information regarding governmental operations that do not warrant protection from disclosure. For the foregoing reasons, Defendant FBI falls significantly short of meeting its burden to obtain a grant of summary judgment. This Court should deny Defendant’s motion supporting and grant Plaintiff’s cross-motion for summary judgment, and order that Defendant conduct an adequate search for documents and produce the challenged withholdings in full.

