IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACCURACY IN MEDIA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 14-1589 (EGS)
	)	
UNITED STATES DEPARTMENT OF DEFENSE, *et al.*	)	
	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO PROPOUND DISCOVERY AGAINST DEFENDANT UNITED STATES DEPARTMENT OF DEFENSE

INTRODUCTION

Plaintiffs in this Freedom of Information Act ("FOIA") case have filed a brief opposing Defendants' summary judgment motion and cross-moving for summary judgment. Yet, despite their summary judgment filing, they simultaneously urge this Court to grant them leave to serve discovery on Defendant United States Department of Defense ("DOD"), claiming that they are "unable to oppose [Defendants'] motion without" the discovery they request. Pls.' Opp'n to Defs.' Mot. for Summ. J., Cross-Mot. for Summ. J. at 33, ECF No. 71 ("Pls.' Opp'n Br."). Of course, as demonstrated by their filing, Plaintiffs have opposed Defendants' motion for summary judgment and cross-moved for summary judgment and managed to do so without the discovery that they now seek. Their ability to oppose Defendants' summary judgment motion without discovery is sufficient basis to deny this motion.

Plaintiffs' request to conduct discovery, moreover, does not seek to resolve any factual dispute concerning DOD's processing of this particular request, as Federal Rule of Civil Procedure 56(d) requires. Instead, Plaintiffs' proposed interrogatory seeks to "discover the facts of when, and by what means, communications with assets were first made," *see* Pls.' Opp'n Br. at 33, which is simply another formulation of the FOIA request to which DOD has already responded. Because discovery in FOIA cases is rare, Plaintiffs should not be able to use the extraordinary procedure of FOIA discovery to obtain from DOD that which they are not entitled to under FOIA itself. To that point, as set forth in Defendants' opening brief, *see* Defs.' Mem. of Law in Support of Defs.' Mot. for Summ. J. ("Defs.' Br."), ECF No. 68-2, and explained more fully in the Declaration of Mark H. Herrington, Associate Deputy General Counsel in DOD's Office of General Counsel ("Herrington Decl."), ECF No. 68-4, Plaintiffs have received the records responsive to their request as a direct result of DOD's search, which was reasonable, adequate, and conducted in good faith. Because that is all that FOIA requires of DOD, Defendants respectfully request that the Court deny Plaintiffs' motion.

ARGUMENT

In this Circuit, it is well-settled that "[d]iscovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." *Long v. Immigration & Customs Enf't*, 149 F. Supp. 3d 39, 58-59 (D.D.C. 2015) (internal quotations and citation omitted). Such is the case here. Plaintiffs' discovery motion merits dismissal because the Herrington Declaration details the nature and scope of DOD's search for records responsive to

Plaintiffs' request for initial orders and communications and describes the agency's release of over 70 pages of non-exempt records (or the portions thereof) responsive to the same.

Largely ignoring the detail set forth in the Herrington Declaration and the "'presumption of good faith'" to which it is entitled, *see* Defs.' Br. at 10 (quoting *Meeropol v. Meese*, 790 F.2d 942, 952 (D.C. Cir. 1986)), Plaintiffs insist that they need discovery to oppose DOD's summary judgment motion because there is a disputed issue of fact regarding "when, and by what means, communications with assets were first made" in response to the September 2012 attack. Pls.' Opp'n Br. at 33. In support of their argument, Plaintiffs claim that the over 70 pages of records that DOD released in response to the challenged FOIA request "beg[] the production of the corroborating records sought [through discovery]," *see id.* at 33-34. Plaintiffs are wrong.

I. Plaintiffs Have Not Shown That There Is Any Issue of Disputed Fact That Would Be Resolved By Plaintiffs' Proposed Interrogatory.

As noted above, in this Circuit, summary judgment may be granted on the basis of agency affidavits in FOIA cases, and it is only in the "rare[]" FOIA case that courts will find that summary judgment is precluded "on the basis of competing affidavits." *Scudder v. CIA*, 25 F. Supp. 3d 19, 28-29 (D.D.C. 2014) (citing, among other cases, *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 18-19 (D.C. Cir. 1999)). Indeed, "in the FOIA context, courts have permitted discovery only in exceptional circumstances where a plaintiff raises a sufficient question as to the agency's good faith in searching for, or processing documents." *Cole v. Rochford*, 285 F. Supp. 3d 73, 76 (D.D.C. 2018); *see also Thomas v. United States Dep't of Health & Human Servs.*, 587 F. Supp. 2d 114, 115 n.2 (D.D.C. 2008) ("discovery is an extraordinary procedure in a FOIA action").

Here, Plaintiffs have failed to demonstrate that there are "exceptional circumstances" that raise questions regarding the adequacy of the search that DOD conducted. *See, e g.*, *Cole*, 285 F. Supp. 3d at 76-77 ("Discovery in FOIA cases is the exception, and it is generally limited to cases in which factual disputes persist—for example, where 'the adequacy of the [agency's] search remains in doubt.'" (internal citation omitted)). As an initial matter, Plaintiffs do not purport to "dispute the particulars of the DOD's search." Pls.' Opp'n Br. at 4. Instead, having reviewed the "70 pages of" initial communications and orders and the OPREP-3 PINNACLE report that DOD released in response to their request, Plaintiffs complain that they cannot oppose Defendants' summary judgment motion without first "discover[ing] the facts of when, and by what means, communications with assets were first made." *Id.* at 5, 33. Accordingly, Plaintiffs seek to have DOD:

> State the times of all electronic, verbal, and written[] communications, from 3:32 p.m., through 3:00 a.m., by and among all DOD components, the total number of individuals on the communication, their titles and locations, and the substance of that communication. Include in your answer a description of all records, in any form, containing, reflecting, or otherwise corroborating, that communication.

Id. at 35.

Of course, one of the fatal flaws in Plaintiffs' discovery motion is that Plaintiffs have both opposed Defendants' summary judgment motion and cross-moved for summary judgment, and they did so without the discovery they claim to need. *See id.* (requesting that the Court, *inter alia*, grant "summary judgment in their favor"). On this basis along, the Court should deny Plaintiffs' motion. *See, e.g.*, *Martin v. Rubalcava*, Civ. No. 12-2232-EFB, 2014 WL 794342, at *5 (E.D. Cal. Feb. 27, 2014) (denying plaintiff's motion for leave to conduct discovery because, among other reasons, plaintiff had opposed

defendant's summary judgment motion and cross-moved for summary judgment, the latter of which "suggests that the matter is ripe for summary judgment, apparently without a need for further discovery").

Even if Plaintiffs had already not opposed and cross-moved for summary judgment, Plaintiffs' discovery request still merits dismissal because it does not seek to resolve a disputed issue of fact related to the conduct of DOD's search. *See Weisberg v. Dep't of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980) (observing that discovery may be appropriate if agency declarations "do not provide information specific enough to enable [plaintiffs] to challenge the procedures [used in the search]"). To the contrary, by its express terms, Plaintiffs' proposed interrogatory seeks additional information with which to re-litigate the timeline of events that compromised the September 2012 attack on the United States mission in Benghazi, Libya, a topic that has itself been the subject of numerous congressional hearings. Put another way, it is undisputed that Plaintiffs received the records that are responsive to their FOIA request. Under these circumstances, Plaintiffs should not be able to use Rule 56(d) to "discover[]" information not found in the records that DOD released in response to Plaintiffs' FOIA request. *Cf. Wilson v. United States Dep't of Transp.*, 730 F. Supp. 2d 140, 150 (D.D.C. 2010) ("FOIA does not require agencies to create . . . documents."), *aff'd* No. 10-5295, 2010 WL 579580 (D.C. Cir. Dec. 30, 2010).

II. DOD's Search For Responsive Records Was Reasonable and Not Conducted In Bad Faith.

Nor have Plaintiffs shown that DOD conducted its search for responsive records in bad faith. As detailed in the Herrington Declaration, each DOD component that received Plaintiffs' FOIA request identified additional offices and directorates likely to have

responsive records and directed those particular entities to conduct searches of their paper and electronic files. *See* Herrington Decl. ¶¶ 8-9, 10-11, 12-13, 14-15. In turn, those entities identified additional offices and personnel reasonably likely to have responsive records and tasked them with searching for the same. *See id.* ¶¶ 8-24. Among other things, the Herrington Declaration delineates the search terms used to search electronic media, *see, e.g.*, *id.* ¶¶ 9, 11, the fact that classified and unclassified record systems were searched, *see id.* ¶¶ 13, and that DOD's search for records responsive to the challenged FOIA request was in fact fruitful, *see id.* ¶ 16-18, 24-25.

To this latter point, as Plaintiffs acknowledge, DOD released, among other records: (1) a redacted copy of the Execution Order ("EXORD"), the first written order directing EUCOM to execute an action in response to the September 11, 2012 attack on the United States mission in Benghazi, Libya; and (2) Fragmentary Orders, which are the written orders issued after the initial EXORD. *See* Herrington Decl. ¶¶ 16-18; *see also* Pls.' Counter-Statement of Material Facts As to Which There Is a Genuine Issue ¶¶ 24-25, ECF No. 71-5 ("Pls.' Counter-Statement of Material Facts") (admitting that DOD produced a redacted copy of EXORD); *see also* Pls.' Opp'n Br. at 5 (acknowledging that DOD released an EXORD and "around 70 pages of corresponding FRAGORD, or fragmentary, follow-up[] orders"). Moreover, although it was under no obligation to do so, DOD also provided Plaintiffs with a two-page timeline of DOD actions taken in response to the September 2012 attack on the United States mission in Benghazi, Libya, in an effort to assuage Plaintiffs' concerns that there must be earlier written orders that DOD failed to release. *See* Herrington Decl. ¶ 18 (explaining that DOD produced a two-page timeline of DOD actions on September 11-12, 2012, "which was prepared [for] and provided to

Congress for the multiple [congressional] inquiries into the Benghazi attack"). Finally, the Herrington Declaration explicitly states that the first orders issued in response to the September 2012 attack were conveyed verbally. *See id.* ¶ 19. The EXORD that DOD released in response to Plaintiffs' FOIA request is the first *written* order. *See id.* ¶ 22. There are no other "initial" written orders. *See id.*

Plaintiffs largely do not dispute "the particulars of the DOD's search." Pls.' Opp'n Br. at 4 (citing Pls.' Counter-Statement of Material Facts ¶¶ 11-18, 20-23). Instead, apparently unsatisfied with the records that they received, Plaintiffs argue that DOD has "not been candid," a view that is based solely on their review of excerpted testimony and documents that DOD provided in response to congressional inquiries. *See id.* at 1-24, 34; *see also* Declaration of John H. Clarke, ECF No. 71-1 (attaching exhibits "consisting of (1) a selection of pages from Congressional transcripts, (2) excerpts of a Congressional report, and (3) Executive Branch records").

Plaintiffs' heavy reliance on the excerpted congressional testimony and documents to support their argument that DOD conducted its search for records in bad faith is puzzling given their view that "DOD's responses to congressional inquiries [are] a moving target." Pls.' Opp'n Br. at 5. Indeed, Plaintiffs complaint that "to this day, the DOD has provided only ranges of time within which the order is said to have been given," *see id*., and appear to take issue with the fact that "Congress took the DOD's word" that the EXORD produced to Plaintiffs in this matter is in fact the first written order in response to the September 2012 Benghazi attack. *Id.* at 35. If anything, the cherry-picked congressional testimony and records on which Plaintiffs rely suggest that DOD's response to Plaintiffs' FOIA request

is entirely consistent with the agency's response to congressional inquiries into the Benghazi attack.

In any event, this purported "evidence" falls short of showing that DOD conducted its search for responsive records in bad faith. As courts in this Circuit have stated time and again, "[a]n agency's search 'need not be perfect, only adequate, and adequacy is measure by the reasonableness of the effort in light of the specific request.'" *Judicial Watch, Inc. v. U.S. Dep't of State*, 177 F. Supp. 3d 450, 457 (D.D.C. 2016) (quoting *Meeropol*, 790 F.2d at 956)), *aff'd sub nom Judicial Watch, Inc. v. U.S. Dep't of State*, 681 F. App'x (D.C. Cir. 2017). Indeed, "'it is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate . . . [because] particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them."[1] *Id.* at 458; *see also Freedom Watch, Inc. v. Nat'l Security Agency*, 220 F. Supp. 3d 40, 44 (D.D.C. 2016).

[1] Plaintiffs' remaining arguments are easily dispensed with. First, contrary to Plaintiffs' claim, *see* Pls.' Opp'n Br. at 32, Colonel Linvill conducted a search of his paper records. The Herrington Declaration states that AFRICOM directed Colonel Linvill to search his paper files, *see* Herrington Decl. ¶ 25, which he did. To the extent that is not clear from the declaration, DOD will file a supplemental declaration clarifying this particular point with its reply brief. Equally flawed is Plaintiffs' claim that DOD's search was not reasonable because it failed to identify "the number of responsive hits" Colonel Linvill received in response to his electronic search. Pls.' Opp'n Br. at 32. The adequacy of DOD's search is "determined not by the fruits of the search, but by the [reasonableness] of the methods used to carry out the search." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). In this case, the Herrington Declaration demonstrates the reasonableness "of the methods used to carry out" DOD's search, a search which provided Plaintiffs over 70 responsive records. Nothing more is required. *See id.* Finally, Colonel Linvill's purported failure to use the term "CIA" when conducting his electronic search, *see* Pls.' Opp'n Br. at 32, does not undermine the reasonableness of the search he conducted, nor does it demonstrate any bad faith. "A federal agency has "'discretion in crafting a list of search terms that '[it] believe[s] to be reasonably tailored to uncover documents responsive to the FOIA request.'" *Bigwood v. United States Dep't of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) (internal citation omitted). Where, as here, "the search

CONCLUSION

Accordingly, for the forgoing reasons, the Court should deny Plaintiffs' Motion for Leave to Propound Interrogatory to DOD.

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Respectfully submitted,

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terms are reasonably calculated to lead to responsive documents, a court should neither 'micromanage' nor second guess the agency's search." *Id.*