UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-5235
(C.A. No. 04-0814)

ACCURACY IN MEDIA, INC., Appellant,

v.

CENTRAL INTELLIGENCE AGENCY, Appellee.

REPLY IN FURTHER SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE

Appellee Central Intelligence Agency ("Agency"), by and through undersigned counsel, respectfully submits this reply in further support of the Agency's motion for summary affirmance of the Honorable Royce C. Lamberth's July 7, 2022, Memorandum Opinion and Order (R.385, R.386), granting the Agency's motion for summary judgment on its search of operational records and denying plaintiff Accuracy in Media's ("Appellant") cross-motion for summary judgment. Accuracy in Media's opposition offers no compelling reason to deny the Agency's motion, as the Agency conducted a thorough and reasonable search of its operational files as directed by the District Court.

ARGUMENT

I. The Agency's Search was Adequate.

Appellant's opposition is filled with a "plethora" of purported "examples of operations, events and activities" that it believes "surely generated relevant records."

Opp'n at 3. But the required search of the Agency's operational files—which are generally exempt from search and disclosure under the Freedom of Information Act ("FOIA"), 50 U.S.C. § 3141(a)—was limited to a specific set of documents: "1,400 live sighting reports that were reportedly displayed at Congressional briefings attended by [Agency] employees, as well as records of imagery and reconnaissance and rescue operations." R.345. As explained in the Agency's motion for summary affirmance, Mot. at 10-12, the Agency adequately searched its operational files for those records.

This Circuit applies a reasonableness standard to determine whether an agency performed an adequate search. *Mobley v. CIA*, 806 F. 3d. 568, 580 (D.C. Cir. 2015). A search only has to be reasonable; it does not have to be exhaustive. *Nat'l Cable Television Ass'n v. FCC*, 479 F. 2d 183, 186 (D.C. Cir. 1973); *see also DiBacco v. U.S. Army*, 795 F.3d 178, 194 (D.C. Cir. 2015). ("A search need not be perfect, only adequate, and adequacy is measured by reasonableness of the effort in light of the specific request.") (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986). Importantly, the Court's inquiry turns on methods used to perform the search, not the results. *Iturralde v. Comptroller of Currency*, 315 F. 3d 311, 315 (D.C. Cir. 2003); *see also SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). Further, affidavits submitted by the agency are accorded a presumption of good faith "which cannot be rebutted by purely speculative claims about the

existence and discoverability of other documents." *Mobley*, 806 F.3d at 581 (D.C. Cir. 2015).

The two declarations submitted by the Agency clearly satisfy the standards necessary for summary judgment in this FOIA matter and refute Appellant's claims set forth in the opposition. Agency information management professionals searched Agency records in operational file systems. R.376-3 at 4. The Agency states that this was "an exhaustive electronic and hard copy search of Agency records." *Id.* The Agency searched "all relevant office databases likely to contain responsive records." *Id.* The Agency, in its search, "cast a deliberately wide net for the requested records by employing broad search terms" in various combinations. *Id.* The Agency summarized its search as follows: "[Agency] personnel conducted a thorough search of all relevant records systems that were reasonably calculated to uncover responsive records. The Agency did not locate records responsive to the request, despite the Agency's exhaustive search." R.376-3 at 5.

After Accuracy in Media opposed the Agency's motion for summary judgment, the Agency filed a supplemental declaration. R.383-2. This supplemental declaration further stated that "the [Agency] searched centralized internal databases containing Agency-wide operational files, including cables, intelligence reports and other records. Aged operational files, originally maintained in hard copy form, were digitized and made a part of these databases." *Id*. at 2-3. As a final summary of the

search, the Agency's declarant stated: "[a]ny database where operational files related to Plaintiff's request could reasonably have been located were searched in the course of this review." *Id*. at 3.

The two declarations submitted by the Agency clearly demonstrate that it discharged its FOIA duties to undertake reasonable search efforts of its operational files.

Appellant argues in its opposition that documents exist that should have been located, and that there are "positive indications of overlooked materials." Opp'n at 2-3. But this argument is based on the "plethora" of purported operations that Appellant attributes to the Agency and believes "surely generated records," Opp'n at 3–10, not on the limited set of requested records for which the Agency was ordered to search its operational files. In any event, the District Court properly rejected the purported evidence of overlooked materials offered by the plaintiff below because "files once displayed to plaintiffs' declarants need not exist thirty to fifty years later." R.385 at 8; *see also Iturralde*, 315 F.3d at 315 (observing that "particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them"). Appellant's assertion of overlooked materials is undermined by their failure to account for the age of the purported "indications" of such materials that they touted to the District Court.

Appellant also misplaces its reliance on *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999). Indeed, the distinction between that case and this one highlights the propriety of the Agency's search. The Court in *Valencia-Lucena* concluded that the search for a logbook from a Coast Guard cutter that had seized drugs was inadequate because the record *created by the Coast Guard* revealed positive indications of overlooked materials. *Id*. at 392. First, according to the Coast Guard declaration, the locations that it searched were not the only ones likely to contain the requested information. *Id*. The Coast Guard indicated that the requested record could be at the federal records center in Georgia but declined to search there. *Id*. Thus, the Coast Guard's "failure to search the center it had identified as a likely place where the requested documents might be located clearly raises a genuine issue of material fact as to the adequacy of the Coast Guard's search." *Id*. Second, the Coast Guard did not contact the captain of the Coast Guard cutter to inquire as to the missing logbook, and he was a source likely to have the requested information. *Id*. at 392-93. Finally, the Coast Guard argued in its declaration that records are routinely destroyed after two years. *Id*. at 393. However, a Coast Guard regulation in effect at the time prohibited destruction of logs which contained information of historical or continuing interest. The court was not satisfied as to whether the requested logbook might fall within this exception. *Id*.

None of the foregoing considerations are present in this case. Here, the District Court ordered a specific search of the Agency's operational files. And the Agency searched those files thoroughly, in "relevant systems of operational records that were reasonably calculated to find documents" amounting to "all relevant office databases likely to contain responsive records." R.376-3 at 4. There is therefore no basis to contend that the Agency should have searched some other location. The search by the Coast Guard in *Valencia-Lucena* was inadequate. The search by the Agency here was reasonable and adequate. Moreover, "[a] search is not unreasonable because it fails to produce all relevant material." *Meeropol*, 790 F.2d. at 952-53. The inquiry is not what the search turned up or failed to turn up, but rather whether the methods used during the search were appropriate. *Iturralde*, 315 F.3d at 315. Here, the Agency searched high and low for responsive records in its operational files and found none.

In sum, the District Court ordered the Agency to perform a specific search of its operational files. The Agency performed the search and found no responsive records. The District Court correctly concluded that "plaintiff's evidence is simply too attenuated to sufficiently overcome the [Agency's] adequate affidavit." R.385 at 8 (citing *Iturralde*, 315 F.3d at 315). This Court should reach a similar conclusion.

II. The Agency Adequately Described the Search and Used Proper Search Terms

Appellant incorrectly argues in its opposition that the Agency did not use proper search terms and that it did not adequately describe the search. Opp'n at 10-15. The Agency's operational files are typically exempt from search, review, and disclosure under the National Security Act of 1947. 50 U.S.C. § 3141(a); *see also Morley*, 508 F.3d at 1116. The Agency nonetheless searched the sensitive operational files as ordered by the District Court.

In this Circuit, a reasonably detailed affidavit which sets forth the search terms used is sufficient for summary judgment. *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). A search for records under FOIA is adequate if it is "reasonably calculated to uncover all relevant documents," and an agency may demonstrate the adequacy of its search by submitting 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 (if such records exist) were searched." *Chambers v. Dep't of Interior*, 568 F.3d 998, 1003 (D.C. Cir. 2009).

The Agency satisfied the above standards and fulfilled its obligation to search for operational records by using proper search terms in response to the District Court's order. The Agency's declarations set forth the details of the search, including the search terms used. Agency information management professionals searched Agency records in operational file systems using broad terms. R.376-3 at 4-5. The Agency declarations describe who conducted the search (Agency

information management professionals), and that all relevant repositories were searched. *Id.* at 4. Both electronic and hard copy files were searched across Agency wide operational file systems. R.376-3 at 4-5, R.383-2 at 2-3. The Agency searched "[a]ny database where operational files related to Plaintiffs' request could reasonably have been located were searched in the course of this review." R.383-2 at 3. The Agency "searched centralized internal databases containing Agency-wide operational files, including cables, intelligence reports and other records. Aged operational files, originally maintained in hard copy form, were digitized and made a part of these databases. Any database where operational files related to Plaintiff's request could reasonably have been located were searched[.]" *Id*. at 2-3. Appellant's opposition does not counter these facts. Finally, for records "hit" by the search, the Agency individually reviewed them, at two levels, for responsiveness. R.376-3 at 4-5.

With respect to the search terms used, the Agency explained that "[o]ut of an abundance of caution, a broad search method was employed to properly capture all documents potentially responsive to Plaintiffs' request." R.383-2 at 3. The Agency "cast a deliberately wide net for the requested records by employing broad search terms such as "POWs," "prisoners of war," "MIA," "missing in action," "Vietnam," "task force," "House Special POW," "image," and different combinations and variations of those search terms." R.376-3 at 4-5. The Agency used a plain reading

of the request to inform its responsiveness calls. *Id*. at 4-5. "In sum, [Agency] personnel conducted a thorough search of all relevant records systems that were reasonably calculated to uncover responsive records. The Agency did not locate records responsive to the request, despite the Agency's exhaustive search." *Id* at 5.

The District Court reviewed the declarations and the controlling case law and correctly determined that the Agency's search was adequate (R.385 at 5-9), the search terms the Agency used were appropriate and reasonably likely to locate the records if they were in the operational files (*id*. at 9), and that the Agency's description of its search was proper, particularly given the sensitive nature of operational records (*id*. at 10-12).[1]

* * *

[1] Appellant's final argument is that the District Court did not give "due weight to the [Agency's] motives to withhold its records that were generated after Operation Homecoming in 1973." Opp'n at 16. Appellant intimates that the government has knowingly abandoned its citizens and committed an "enormous crime" and that the Agency's declarations should be viewed "in the greater context of the matter." Opp'n at 16-17. Appellant cites no authority that would have required the District Court to make such an analysis. Rather, this appeal is limited to an inquiry as to whether the Agency conducted a reasonable search of its operational records.

CONCLUSION

For the foregoing reasons, and those stated in the Agency's motion, the Court should summarily affirm the District Court's entry of summary judgment in favor of the Agency.

Dated: August 18, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August, 2023, I caused a true and correct copy of the foregoing Appellee's Motion for Summary Affirmance to be served on Appellant's counsel through the Court's ECF system.

/s/ Thomas W. Duffey
THOMAS W. DUFFEY
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE
(Circuit Rule 27)

I HEREBY CERTIFY that the foregoing Appellee's Reply in Further Support of Motion for Summary Affirmance was prepared using a 14-point Times New Roman font and contains 2219 words as counted by counsel's word processing software (Microsoft Word 2016).

/s/ Thomas W. Duffey
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