UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACQUELINE STEVENS, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	)	No. 22 C 5072 Judge Kennelly

MEMORANDUM IN SUPPORT OF EOIR'S MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiff Jacqueline Stevens has sued for the release of government records under the Freedom of Information Act, 5 U.S.C. § 552. She says that several federal agencies or components have improperly withheld records in response to 13 of her FOIA requests. One of those agencies, the Executive Office of Immigration Review, is entitled to summary judgment, because it has provided Stevens with the records she requested.

Background

Stevens filed this lawsuit in September 2022, alleging that several federal agencies or components have improperly withheld records in response to 13 of her FOIA requests. Dkt. 1 (Complaint) ¶¶ 20, 25, 29, 36, 41, 47, 54, 71, 75, 81, 86, 93, 97. The agencies are: (1) Department of Health and Human Services, or HHS; (2) Department of Homeland Security, or DHS; (3) Customs and Border Protection, or CBP; (4) Immigration and Customs Enforcement, or ICE; (5) U.S. Citizenship and Immigration Services, or USCIS; and (6) Executive Office for Immigration Review, or EOIR. *Id.* (The Department of Justice is also named as a defendant, but only because

EOIR is one of its components.) Stevens alleges that the agencies did not process her FOIA requests. *Id.* ¶ 1.

EOIR first moved for summary judgment in 2023, arguing that it had produced the records Stevens requested, did not withhold any material from its productions, and that its interpretation of Stevens's requests was reasonable. Dkt. 39-40. In response, Stevens cross-moved for summary judgment against EOIR. Dkt. 42. The court granted summary judgment to EOIR with respect to one of the five FOIA requests Stevens had sent to EOIR (the Rubin request), but the court granted summary judgment to Stevens with respect to the other four requests (the Silvestre, Hoang, Archie, and Charpentier requests). Dkt. 53. The court found that EOIR had erred by producing only the records of proceedings associated with Silvestre, Hoang, Archie, and Charpentier, and the court directed EOIR to search for additional records relating to those four people. *Id.* at 7-11.

Argument

EOIR is entitled to summary judgment because it has conducted an adequate search for responsive records and because the information it has withheld from production is protected from release by one of two exceptions to the FOIA statute. Summary judgment is proper when "there is no genuine issue as to any material fact" and the movant "is entitled to judgment as a matter of law." *Stevens v. DHS*, 2014 WL 5796429, *4 (N.D. Ill. Nov. 4, 2014) (citing Fed. R. Civ. P. 56(a)). FOIA cases are typically resolved on summary judgment because they often hinge on whether an agency's undisputed actions violated FOIA. *E.g.*, *Bassiouni v. CIA*, 2004 WL 1125919, *2 (N.D. Ill. Mar. 31, 2004). The court's review is limited to whether the agency (1) improperly (2) withheld (3) agency records. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) (judicial authority requires violation of all three components). A FOIA defendant's motion should be granted if it provides the court with declarations or other evidence showing that it conducted an adequate search for records and that any responsive records

were produced or are exempt from disclosure. *E.g.*, *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994).

I. Adequate Search for Responsive Records

Stevens's FOIA requests to EOIR that are still relevant sought records regarding four people: Miguel Silvestre, Christopher Archie, Toan Hoang, and Pascal Charpentier. DSOF ¶ 5. EOIR interpreted the requests to be seeking the reports of proceedings for those four people, and EOIR produced those reports. DSOF ¶¶ 6-10. On summary judgment, the court determined that EOIR should not have interpreted the requests as seeking only reports of proceedings and directed EOIR to search for: (1) "all memoranda, notes, reports, [and] email messages" pertaining to Silvestre and "calendar and case note records" including "screen shots of databases from which information on Mr. Silvestre is stored from January 1, 1996, to present"; (2) "all memoranda, notes, reports, email messages," and "calendar and case note records" pertaining to Hoang from January 1, 1996, to present; (3) "memoranda, notes, reports, email messages," and "calendar and case note records" pertaining to Charpentier from January 1, 1972, to August 18, 2022; and (4) "the case management interface outputs" and "any email" pertaining to Archie from January 1, 1980, to present. Dkt. 53 (Mem. Op. and Order) at 11-12.

EOIR subsequently took screenshots of all the information on Silvestre, Archie, Hoang, and Charpentier contained in the CASE system, which is the electronic case manager for EOIR's immigration courts, appeals board, and support staff. DSOF ¶¶ 12-13. EOIR produced those screenshots, totaling 56 pages. DSOF ¶ 12.

At EOIR, memoranda, notes, and reports are consistently sent using EOIR's internal email system, so EOIR locates such records by sending a request to its IT office, which searches EOIR's email server. DSOF ¶ 14. EOIR has a retention policy of seven years. DSOF ¶ 15. EOIR accordingly asked its IT office to search the emails of all EOIR employees and contractors using

the search terms "Miguel Silvestre," "Christopher Archie," "Toan Hoang," and "Pascal Charpentier," with a date range of August 1, 2017, to August 1, 2022. DSOF ¶ 16.

The IT office searched 13,316 mailboxes and returned 297 items to EOIR's FOIA office. DSOF ¶ 18. After deduplication, 180 items remained. EOIR manually reviewed the 180 items for responsiveness and identified 85 items as responsive. DSOF ¶¶ 19-20. The 85 items totaled 504 pages, which EOIR produced. DSOF ¶ 21.

This search was adequate because EOIR searched the emails of every single one of its employees using the names of the people in question. As mentioned above, memoranda, notes, and reports are consistently emailed at EOIR, so searching for those records via email is an appropriate means of locating them. *DiBacco v. U.S. Army*, 795 F.3d 178, 188 (D.C. Cir. 2015) (agency must make good-faith effort to conduct search using methods that "can reasonably be expected to produce the information requested"). Indeed, EOIR almost certainly went above and beyond the call of duty by searching 13,316 mailboxes, rather than searching only the mailboxes that would actually be reasonably likely to contain responsive records. *Stevens v. State*, 20 F.4th 337, 343 (7th Cir. 2021) (noting with approval that agency's officers "made choices about what to search based on their familiarity with the holdings of the Department's records system") (internal quotation omitted).

II. No Information Improperly Withheld

EOIR has also satisfied the second requirement for summary judgment: it did not improperly withhold records. An agency is entitled to withhold information from public disclosure on the basis of one or more FOIA exemptions. 5 U.S.C. § 552(b); *Stevens v. State*, 20 F.4th 337, 344 (2021) (agency need not release material that "falls under one of the nine FOIA exemptions"). The agency has the burden of showing that the exemption applies. 5 U.S.C. § 552(a)(4)(B); *NRDC v. NRC*, 216 F.3D 1180, 1190 (D.C. Cir. 2000). Here, EOIR withheld material under FOIA

Exemptions 5 and 6. DSOF ¶ 22. And EOIR has adequately described the withheld material and the justifications for nondisclosure. DSOF ¶¶ 23-25; *Vaughn v. Rosen*, 484 F.2d 820, 826-27 (D.C. Cir. 1973); *Stevens v. DHS*, 2014 WL 5796429, *4 (N.D. Ill. Nov. 4, 2014) (summary judgment appropriate if agency affidavits "describe the documents withheld and the justifications for nondisclosure in enough detail and with enough specificity to demonstrate that the material withheld is logically within the domain of the exemption claimed").

A. Exemption 5 (deliberative process)

Exemption 5 protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with an agency." 5 U.S.C. § 552(b)(5). To qualify for this exemption, a document must fall within the ambit of the traditional privileges that the government could assert in civil litigation against a private litigant. *Enviro Tech Int'l, Inc. v. EPA*, 371 F.3d 370, 374 (7th Cir. 2004). Those privileges are the attorney-client, attorney-work-product, and deliberative-process privileges. *Barnes v. IRS*, 60 F.Supp.2d 896, 901 (S.D. Ind. 1998) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)).

Here, EOIR withheld drafts of decisions on immigration proceedings and related pre-decisional communications. DSOF ¶¶ 23-24. The material falls squarely within the class of material that Exemption 5 protects from disclosure. *Russell v. Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (deliberative-process privilege applies to documents that "would expose to public view the deliberative process of an agency"); *Jordan v. DOJ*, 592 F.2d 753, 773 (D.C. Cir. 1978) ("officials should be judged by what they decided[,] not for matters they considered before making up their minds") (quotation omitted); *In re Apollo Grp., Inc. Sec. Litig.*, 251 F.R.D. 12, 31 (D.D.C. 2008) (drafts "by their very nature" are "typically predecisional and deliberative" because they reflect "tentative" views "that might be altered or rejected upon further deliberation"); *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F.Supp.2d 284, 303 (D.D.C. 2007) ("drafts are

commonly found exempt under the deliberative process privilege"). Considerable deference should be given to EOIR's judgment about what constitutes the give-and-take of deliberative process, because an agency is best situated "to know what confidentiality is needed 'to prevent the injury to the quality of agency decisions.'" *Chem. Mfs. Ass'n v. Consumer Prod. Safety Comm'n*, 600 F.Supp. 114, 118 (D.D.C. 1984) (quoting *Sears, Roebuck & Co.*, 421 U.S. at 151). EOIR properly withheld this information.

B. Exemption 6

Exemption 6 protects information when its release would be a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); *Lepelletier v. FDIC*, 164 F.3d 37, 46 (D.C. Cir. 1999) (courts broadly interpret Exemption 6 to encompass all information applying to a particular individual). To determine whether releasing information would constitute a "clearly unwarranted invasion of personal privacy," the court balances the interest of protecting a person's private affairs from unnecessary public scrutiny against the public's right to governmental information. 164 F.3d at 46. The *only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure would shed light "on the agency's performance of its statutory duties" or otherwise let citizens know what their government is up to. *Id*.

Here, EOIR redacted personal information such as phone numbers, email addresses, medical information, and similar private information of EOIR employees and non-citizens, on the ground that disclosure would constitute an unwarranted invasion of personal privacy. DSOF ¶ 25. There is no public interest in the redacted information, because the personal information in question would not shed light on how EOIR is performing its operations. *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494-99 (1994) (releasing personal information of third parties and agency employees does not contribute significantly to public understanding of government's operations or activities). The strong privacy interest that counsels against disclosure

is accordingly not outweighed by any countervailing public interest in favor of disclosure. *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (burden is on requester to demonstrate sufficient public interest for disclosure).

III. Exempt Information Reasonably Segregated

EOIR has also fulfilled its obligation to release all reasonably segregable, non-exempt information to Stevens. FOIA directs that any "reasonably segregable" portion of a record must be produced after "deletion of the portions which are exempt." 5 U.S.C. § 552(b). But if the proportion of nonexempt material is "relatively small and is so interspersed with exempt material that separation by the agency and policing of this by the courts would impose an inordinate burden," then the material remains FOIA-protected because, "although not exempt, it is not reasonably segregable." *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979). Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable materials. *Stevens*, 2014 WL 5796429 at *9. The court, nonetheless, must make an express finding on the issue of segregability. *Patterson v. IRS*, 56 F.3d 832, 840 (7th Cir. 1995) (remanding where court made no segregability finding).

Here, EOIR has examined its withholdings and determined that there is no segregable, non-exempt information that could further be released, and that all reasonably segregable portions of the relevant records have been produced. DSOF ¶ 26. In sum, EOIR has met its burden of showing that it did not withhold any non-exempt information that was reasonably segregable. *See Matter of Wade*, 969 F.2d 241, 246 (7th Cir. 1992) (veracity of government's submissions regarding reasons for withholding records should not be questioned without evidence of bad faith).

IV. Effect of Court's October 2, 2023 Decision

As mentioned, in October 2023 the court granted in part Stevens's cross-motion for summary judgment with respect to four of her requests to EOIR (the requests regarding Silvestre,

Hoang, Archie, and Charpentier). Dkt. 53 at 1. To the extent that the court's October 2023 ruling presents any hurdle to the complete entry of summary judgment in EOIR's favor now, the court should construe its partial granting of summary judgment against EOIR as, instead, a granting of a request for injunctive relief against EOIR. (Recall that the upshot of the court's October 2023 ruling was that the court directed EOIR to search for records. Dkt. 53 at 11-12.) Construing the court's prior summary judgment ruling as a preliminary injunction against EOIR would leave no barrier to entering summary judgment in EOIR's favor now.

Alternatively, the court could allow its entry of partial summary judgment against EOIR to stand with respect to the Silvestre, Hoang, Archie, and Charpentier requests. In that instance, the court could resolve EOIR's motion by simply entering an order finding that EOIR has now complied with FOIA.

Conclusion

For the above reasons, the court should enter summary judgment in EOIR's favor.

Respectfully submitted,

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