APPENDIX

APPENDIX A

THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5060

SARA DISCEPOLO,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Appellee.

Appeal from the United States District Court for the District of Columbia in No. 16-CV-02351.

OPINION

October 30, 2019

SARA DISCEPOLO, PLAINTIFF - APPELLANT, PRO SE, JACKSONVILLE, FL.

FOR UNITED STATES DEPARTMENT OF JUSTICE, DEFENDANT - APPELLEE: MARSHA WELLKNOWN YEE, ASSISTANT U.S. ATTORNEY, R. CRAIG LAWRENCE, U.S. ATTORNEY'S OFFICE, (USA) CIVIL DIVISION, WASHINGTON, DC

BEFORE: MILLETT, PILLARD, AND WILKINS, *CIRCUIT JUDGES.*

ORDER

Upon consideration of the motion for leave to file a motion to defer appendix, the motion for permission to utilize a deferred appendix, the motion to order Appellee to disclose all prior related cases, the amended motion for summary reversal, the opposition thereto, and the corrected reply; and the motion for summary affirmance, the amended opposition thereto, and the corrected reply, it is

ORDERED that the amended motion for summary reversal be denied and the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297, 260 U.S. App. D.C. 334 (D.C. Cir. 1987) (per curiam). The district court did not abuse its discretion in denying Appellant's discovery motions. *See Baker & Hostetler LLP v. United States DOC*, 473 F.3d 312, 318, 374 U.S. App. D.C. 172 (D.C. Cir. 2006); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200, 288 U.S. App. D.C. 324 (D.C. Cir. 1991). Additionally, the district court correctly determined that the government's searches in response to Appellant's Freedom of Information Act requests were adequate. *See Mobley v. CIA*, 806 F.3d 568, 580-81, 420 U.S. App. D.C. 108 (D.C. Cir. 2015). And despite Appellant's contentions, the district court correctly concluded that the declarations submitted in support of the government's searches were not deficient. *See SafeCard Servs.*, 926 F.2d at 1201; Fed. R. Civ. P. 56(c)(4). It is

FURTHER ORDERED that the motion for leave to file a motion to defer appendix and the motion for permission to utilize a deferred appendix be dismissed as moot. It is

FURTHER ORDERED that the motion to order Appellee to disclose all prior related cases be denied.
Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 16-cv-2351 (DLF/GMH)

SARA DISCEPOLO,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Appellee.

On Summary Judgment II

MEMORANDUM OPINION AND FINAL JUDGMENT

January 18, 2019

Before: DABNEY L. FRIEDRICH, *United States District Judge*

MEMORANDUM OPINION

Before the Court are the defendant's Renewed Motion for Summary Judgment, Dkt. 43, and the plaintiff's Cross-Motion for Summary Judgment, Dkt. 45.[1] On November 15, 2018, Magistrate Judge G. Michael Harvey issued a Report and Recommendation, Dkt. 69, to which the plaintiff filed numerous objections, Dkt. 71. For the reasons that follow, the Court will adopt Judge Harvey's Report and Recommendation in its entirety. The Court will therefore grant the defendant's Renewed Motion for Summary Judgment and deny as moot the plaintiff's Cross-Motion for Summary Judgment.[2]

I. BACKGROUND

Plaintiff Sara Discepolo, proceeding pro se, seeks information from the U.S. Department of Justice pursuant to the *Freedom of Information Act, 5 U.S.C. § 552*, and the

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[1] On May 8, 2018, the Court issued a Memorandum Opinion and Order granting in part and denying in part the defendant's previous Motion for Summary Judgment, Dkt. 16, and denying without prejudice the plaintiff's Cross-Motion for Summary Judgment, Dkt. 18. *See* Dkt. 41 (adopting Judge Harvey's Report and Recommendation, Dkt. 33). The Court also issued a decision on January 18, 2019, Dkt. 74, in which it affirmed Judge Harvey's November 15, 2018 Memorandum Opinion and Order, Dkt. 68, denying the plaintiff's motion for discovery, motion to strike, and motion for sanctions.

[2] Because this disposition constitutes a final, appealable decision under *28 U.S.C. § 1291*, the Court will also deny as moot the plaintiff's pending Motion for Extension of Time to File *28 U.S.C. § 1292(a)(1)* Notice of Appeal or Alternatively Motion for Certification of Final Judgment, Dkt. 47.

Privacy Act, 5 U.S.C. § 552a (collectively, FOIA). On July 17, 2017, Judge Emmet Sullivan referred this matter to a Magistrate Judge for full case management, and Judge Harvey was assigned to this case. Judge Harvey's November 15, 2018 Report and Recommendation provides a thorough summary of the facts and procedural history, which the Court adopts and will not repeat here. *See* Dkt. 69 at 2-5.

In brief, the plaintiff submitted two FOIA requests to the U.S. Attorney's Office for the District of Massachusetts (USAO-MA) and one FOIA request to the U.S. Attorney's Office for the District of Connecticut (USAO-CT) on April 17, 2017. *See* Dkt. 41 at 1-2. The Court previously described those requests as follows:

> First, the plaintiff requested that USAO-MA produce all documents related to (1) "[a]ny criminal investigation of [the plaintiff] from January 1, 2000 through December 31, 2000 or until said investigation terminated"; (2) any "mention of [the plaintiff's] name in any criminal investigation of any other person from January 1, 2000 through December 31, 2000 or until said investigation terminated"; (3) "[i]nformation reflecting that [the plaintiff] was the subject or the target of any criminal activities occurring from anytime from January 1, 2000 through December 31, 2000"; and (4) the plaintiff's "report in August 2000 of having seen Whitey Bulger in person." Dkt. 18-4 at 7.
>
> Second, the plaintiff requested that USAO-MA produce all documents related to "[a]ny criminal investigation of [the plaintiff] (or the mention of [the plaintiff's] name in any criminal investigation of any

> other person) from January 1, 2012 through the present." Dkt. 18-4 at 9.
>
> Third, the plaintiff requested that USAO-CT produce information related to her communications with an Assistant United States Attorney, David X. Sullivan. The plaintiff requested "all documents in [USAO-CT's] possession relating in any way" to (1) the plaintiff's "report to Assistant United States Attorney David X. Sullivan in August of 2000 that [the plaintiff] was the target of criminal activities in South Boston, Massachusetts"; and (2) the plaintiff's "report to Assistant United States Attorney David X. Sullivan sometime in August of 2000 that [the plaintiff] had seen Whitey Bulger in person in South Boston, Newton, or the Greater Boston area." Dkt. 18-4 at 12.

Id. at 2. On May 8, 2018, the Court—adopting Judge Harvey's previous Report and Recommendation in its entirety—granted in part and denied in part the defendant's motion for summary judgment.[3] *Id.* at 15. Specifically, the Court granted summary judgment for the defendant with respect to the requests submitted to USAO-MA, but it denied summary judgment without prejudice with respect to the request submitted to USAO-CT. *Id.*

Regarding the request to USAO-CT, the Court reasoned that the office's search of its "CaseView" system might not have identified responsive material because the reports

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[3] It did so after considering the plaintiff's 37-page filing raising numerous objections to Judge Harvey's report and recommendation, *see* Dkt. 36, and her reply, Dkt. 40, and after granting the plaintiff's motion to submit additional evidence, Dkt. 37, and motion to correct her objections, Dkt. 38.

referenced by Discepolo "were not strictly case-related." *Id.* at 12. The Court noted that AUSA Sullivan's email would be a "reasonable place to search for responsive documents." *Id.* (quoting Dkt. 33 at 22). Thus, the Court adopted Judge Harvey's recommendation that "USAO-CT be instructed to supplement its declaration to fill" a single "gap in its demonstration of the adequacy of its search, either by searching AUSA Sullivan's email or by explaining why such a search is unnecessary." *Id.* (quoting Dkt. 33 at 22).

Following this instruction, the defendant filed a Renewed Motion for Summary Judgment, Dkt. 43, which it supported with a declaration from AUSA Sullivan describing a search of his email for responsive documents, including the terms used and the email systems searched, *see* Dkt. 43-2, ¶¶ 7-9. The plaintiff filed an opposition and Cross-Motion for Summary Judgment, Dkt. 45, on July 26, 2018, in which she raised various objections to the adequacy and reasonableness of the agency's search. That same day, the plaintiff also filed a Motion to Take Discovery, Dkt. 44. On September 19, 2018, the defendant filed its reply, Dkt. 59, which included supplemental declarations from David Luczynski, an Attorney Advisor to the Executive Office for U.S. Attorneys (EOUSA), Dkt. 59-3, and Elisha Biega, a legal assistant to USAO-CT, Dkt. 59-2. The plaintiff then sought and was granted leave to file a surreply. *See* Dkts. 57, 58. On October 19, 2018, the plaintiff filed her surreply, Dkt. 62, along with a motion to strike the supplemental declarations attached to the defendant's reply and a request that the defendant be sanctioned for filing the declarations, Dkt. 61.

On November 15, 2018, Judge Harvey issued a 15-page Memorandum Opinion and Order, Dkt. 68, denying the

plaintiff's motion to take discovery, her motion to strike, and her motion for sanctions. On November 29, 2018, the plaintiff timely filed 34 objections to Judge Harvey's decision. Dkt. 70. On January 18, 2019, the Court resolved those objections and affirmed Judge Harvey's decision in its entirety. Dkt. 74.

Also on November 15, 2018, Judge Harvey issued a 19-page Report and Recommendation regarding the defendant's Renewed Motion for Summary Judgment and the plaintiff's Cross-Motion for Summary Judgment. Dkt. 69. On November 29, 2018, the plaintiff timely filed 38 objections to Judge Harvey's Report and Recommendation. Dkt. 71.

As the procedural history makes clear, the plaintiff has received extensive judicial process since filing this action in 2016. Her numerous objections—72 in total—to Judge Harvey's November 15, 2018 opinions mark the latest development in that process.

II. LEGAL STANDARDS

Under Local Civil Rule 72.3(b), "[a]ny party may file for consideration by the district judge written objections to the magistrate judge's proposed findings and recommendations . . . within 14 days." Local Civ. R. 72.3(b). Proper objections "shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for the objection." *Id.* Pursuant to Local Civil Rule 72.3(c), "a district judge shall make a de novo determination of those portions of a magistrate judge's findings and recommendations to which

objection is made." Local Civ. R. 72.3(c); *see also* *Means v. District of Columbia, 999 F. Supp. 2d 128, 132 (D.D.C. 2013)* ("District courts must apply a de novo standard of review when considering objections to, or adoption of, a magistrate judge's Report and Recommendation."). But "objections which merely rehash an argument presented and considered by the magistrate judge are not properly objected to and are therefore not entitled to de novo review." *Hall v. Dep't of Commerce, No. 16-cv-1619, 2018 U.S. Dist. LEXIS 72110, 2018 WL 2002483, at *2 (D.D.C. Apr. 30, 2018)*; *see also* *Shurtleff v. EPA, 991 F. Supp. 2d 1, 8 (D.D.C. 2013)*. The district judge "may accept, reject, or modify, in whole or in part, the findings and recommendations of the magistrate judge, or may recommit the matter to the magistrate judge with instructions." Local Civ. R. 72.3(c).

In accordance with Local Civil Rule 72.3, the Court must assess the parties' summary judgment motions. As Judge Harvey and this Court have previously explained, FOIA cases are generally resolved on motions for summary judgment. *See* *Brayton v. Off. of the U.S. Trade Rep., 641 F.3d 521, 527, 395 U.S. App. D.C. 155 (D.C. Cir. 2011)*. The agency has the burden of justifying its response to the FOIA request it received, and the federal court reviews the agency's response de novo. *5 U.S.C. § 552(a)*. "To prevail on summary judgment, an agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested, which it can do 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." *Reporters Comm. for Freedom of Press v. FBI, 877 F.3d 399, 402 (D.C. Cir. 2017)* (internal quotation marks omitted). Such affidavits or declarations "are accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Servs. v. SEC, 926 F.2d 1197, 1200, 288 U.S. App. D.C. 324 (D.C. Cir. 1991)* (internal quotation marks omitted). And although "an affidavit must explain in reasonable detail the scope and method of the search conducted," it "need not set forth with meticulous documentation the details of an epic search for the requested records." *Reporters Comm., 877 F.3d at 404* (internal quotation marks omitted). In addition, a defendant may seek summary judgment based on searches performed after the inception of litigation in federal court. *See, e.g., Ray v. Fed. Bureau of Prisons, 811 F. Supp. 2d 245, 247-48, 250 (D.D.C. 2011)*.

More generally, under *Rule 56*, a court grants summary judgment if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A "material" fact is one with the potential to change the substantive outcome of the litigation. *See Liberty Lobby, 477 U.S. at 248; Holcomb v. Powell, 433 F.3d 889, 895, 369 U.S. App. D.C. 122 (D.C. Cir. 2006)*. A dispute is "genuine" if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Liberty Lobby, 477 U.S. at 248; Holcomb, 433 F.3d at 895*. "If there are no genuine issues of material fact, the moving party is

entitled to judgment as a matter of law if the nonmoving party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Holcomb, 433 F.3d at 895* (quoting *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).*

III. ANALYSIS

The Court has carefully reviewed each of the plaintiff's objections and has undertaken a de novo review of the entirety of Judge Harvey's thorough Report and Recommendation. Based on its independent assessment of the record and the parties' cross-motions for summary judgment, the Court finds that the defendant's search was adequate and reasonable.

The Court previously held that the defendant's response to the plaintiff's FOIA request to USAO-CT was deficient in only one respect: its failure to search AUSA Sullivan's email. Dkt. 41 at 12. Accordingly, USAO-CT was "instructed to supplement its declaration to fill this gap in its demonstration of the adequacy of its search, either by searching AUSA Sullivan's email or by explaining why such a search is unnecessary." *Id.* (quoting Dkt. 33 at 22). The defendant filled this gap by filing a declaration from AUSA Sullivan that describes a search of his Outlook account and two email archive systems using the terms "Sara Discepolo," "South Boston," and "Massachusetts." Dkt. 43-2, ¶¶ 8-9 (Sullivan Declaration). The Sullivan declaration reports that these searches produced no responsive records, *id.*, and explains why a search of AUSA Sullivan's paper and electronic files was unnecessary, *id.* ¶

10. The declaration further avers that all systems within USAO-CT likely to contain responsive records were searched. *Id.* ¶ 11.

In addition, the defendant filed supplemental declarations explaining that the email databases searched included emails dating from March 1, 2010 to the present, Dkt. 59-2, ¶¶ 5-6 (Biega Declaration), that a legal assistant also searched the case management system used to track all matters handled by USAO-CT, *id.* ¶¶ 1, 7-9, and that EOUSA did not instruct USAO-CT to limit its search to first-party records or use any exemptions or exclusions to limit the scope of USAO-CT's search, Dkt. 59-3, ¶¶ 6, 8 (Luczynski Declaration).

The searches described are adequate and reasonable. "There is no requirement that an agency search every record system." *Oglesby v. U.S. Department of the Army, 920 F.2d 57, 68, 287 U.S. App. D.C. 126 (D.C. Cir. 1990).* An agency need only "show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Reporters Comm. for Freedom of Press, 877 F.3d at 402* (internal quotation marks omitted). An agency can make this showing "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." *Id.* (alteration adopted, internal quotation marks omitted). The declarations submitted by the defendant easily satisfy this standard. Given the scope of the plaintiff's request—which focused on her own reports to AUSA Sullivan, Dkt. 18-4 at 12—it was reasonable for the agency to organize its searches using her

name. Further, the locations and time frames covered by the searches were reasonable in light of the narrow gap identified in the Court's May 8, 2018 ruling—namely, the need to search AUSA Sullivan's email records—and the documents in the defendant's possession.

The plaintiff objects to nearly every detail of Judge Harvey's analysis. However, several of her 38 objections relate to her motion for discovery and motion to strike. *See, e.g.*, Dkt. 71 (Objections 3, 34, 37). Others cover terrain addressed directly, and at length, by Judge Harvey, or seek to relitigate issues already determined by the Court's May 8, 2018 decision. *See, e.g., id.* (Objections 2, 23-24, 28). The plaintiff's remaining objections misconstrue Judge Harvey's decision, are beyond the scope of the plaintiff's FOIA request, are contrary to controlling legal authority or the factual record, or are irrelevant to the issues presented. *See, e.g., id.* (Objections 1, 4-22, 25-27, 29-33, 35-36, 38).

The Court notes specifically that Judge Harvey did not, as the plaintiff argues, draw a factual inference in favor of the defendant by concluding that the email databases searched were the only databases accessible to the agency, *id.* (Objection 10), or by assuming that the agency used the listed search terms separately and not in a compound search limited to records containing all three terms together, *id.* (Objection 11). To be sure, as Judge Harvey explained, "all reasonable inferences from the facts in the record must be made in favor of the non-moving party." Dkt. 69 at 6-7 (citing *Liberty Lobby, 477 U.S. at 255*). But it was not an "inference" to accept at face value the agency's good-faith averment that it searched "[a]ll systems of records within the USAO-CT likely to contain responsive records." Dkt. 43-2, ¶ 11; *see also* Dkt. 59-2, ¶¶

10-12. And no reasonable juror could infer from this language that the agency declined to search accessible databases covering emails from before 2010. *See* Dkt. 43-2 ¶¶ 8-9, 11 (describing search of three email databases and declaring that all systems of records likely to contain responsive records were searched). Likewise, no reasonable juror could interpret AUSA Sullivan's declaration as describing a compound search connecting multiple terms—assuming such a search is even possible in Outlook and the other email databases described. *See* Dkt. 49-2, ¶ 8. Indeed, the declaration specifically describes multiple "*sets* of searches" using those terms, *id.* ¶ 9 (emphasis added), and lists each term separately with its own pair of quotation marks, *id.* ¶¶ 8-9.

In short, after reviewing the parties' cross-motions, the parties' briefs, Judge Harvey's Report and Recommendation, the plaintiff's objections thereto, and the entire record in this case, de novo, the Court concludes that Judge Harvey carefully and persuasively applied the correct legal standards, and it now adopts the entirety of Judge Harvey's reasoning and analysis as the Court's own. The Report and Recommendation is appended below.

CONCLUSION

For the foregoing reasons, the Court grants the defendant's Renewed Motion for Summary Judgment, denies as moot the plaintiff's Cross-Motion for Summary Judgment, and denies as moot the plaintiff's Motion of Extension of Time to File *28 U.S.C. § 1292(a)(1)* Notice of Appeal or Alternatively Motion for Certification of Final Judgment. A separate order accompanies this memorandum opinion.

/s/ Dabney L. Friedrich

DABNEY L. FRIEDRICH

United States District Judge

January 18, 2018

ORDER

For the reasons stated in the accompanying memorandum opinion, it is

ORDERED that the defendant's Renewed Motion for Summary Judgment, Dkt. 43, is GRANTED;

ORDERED that the plaintiff's Cross-Motion for Summary Judgment, Dkt. 45, is DENIED AS MOOT;

ORDERED that the plaintiff's Motion of Extension of Time to File *28 U.S.C. § 1292(a)(1)* Notice of Appeal or Alternatively Motion for Certification of Final Judgment, Dkt. 47, is DENIED AS MOOT.

The Clerk of Court is directed to close this case.

/s/ Dabney L. Friedrich

DABNEY L. FRIEDRICH

United States District Judge

January 18, 2018

APPENDIX C

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 16-cv-2351 (DLF/GMH)

SARA DISCEPOLO,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Appellee.

On Summary Judgment II

REPORT AND RECOMMENDATION

November 15, 2018

Before: G. MICHAEL HARVEY, *UNITED STATES MAGISTRATE JUDGE.*

REPORT AND RECOMMENDATION

As Defendant recognizes, "[t]he only issue remaining in this case," which was brought by Plaintiff Sara Discepolo under the *Freedom of Information Act ("FOIA"), 5 U.S.C. § 552*, "is the adequacy of the search conducted by the United States Attorney's Office for the District of Connecticut ('USAO-CT') with respect to the email of Assistant United States Attorney David X. Sullivan ('AUSA Sullivan')." ECF No. 43 at 1. Specifically, Defendant's original motion for summary judgment was granted in part and denied in part, with directions for it to "fill[] [the] gap in its demonstration of the adequacy of its search, either by searching AUSA Sullivan's email or by explaining why such a search is unnecessary." ECF No. 41 at 12 (quoting *Discepolo v. U.S. Dep't of Justice, No. 16-cv-2351 (DLF/GMH), 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *12 (D.D.C. Jan. 19, 2018), report and recommendation adopted* Memorandum Opinion and Order Adopting Report and Recommendation of Magistrate Judge, *Discepolo v. U.S. Dep't of Justice, No. 16-cv-2351, 2018 U.S. Dist. LEXIS 220866 (DLF/GMH) (D.D.C. May 8, 2018)*, ECF No. 41). Defendant has now filed a renewed motion for summary judgment supported by new three declarations, and Plaintiff has filed a cross motion for summary judgment, both of which are ripe for adjudication.[1] Because Defendant has demonstrated that

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[1] The following are the most relevant docket submissions for the purposes of these motions: (1) Defendant's renewed motion for summary judgment (ECF No. 43) and the declaration of David X. Sullivan dated June 28, 2018 ("June 2018 Sullivan Declaration") (ECF No. 43-2); (2) Plaintiff's cross-motion for summary judgment and opposition to Defendant's renewed motion for summary judgment and attachments (ECF No. 45 through 45-3; ECF No. 46 through 46-3); (3) Defendant's reply

its searches for documents responsive to Plaintiff's FOIA requests were adequate, Defendant's renewed motion for summary judgment should be granted and Plaintiff's cross motion for summary judgment should be denied.

I. BACKGROUND

The pertinent background of this dispute is laid out in the undersigned's Report and Recommendation from January 19, 2018, on Defendant's original motion for summary judgment (the "January 19 Report and Recommendation"). *See Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *2-4*. As relevant here, on April 17, 2017, Plaintiff sent requests to the United States Attorney's Office for the District of Massachusetts ("USAO-MA") and to USAO-CT. *2018 U.S. Dist. LEXIS 220867, [WL] at *2*. The requests to USAOMA sought documents "concerning criminal investigations in which [Plaintiff] was mentioned as the target, the victim, or otherwise." *Id.* The requests to

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in further support of its renewed motion for summary judgment and opposition to Plaintiff's cross-motion for summary judgment (ECF No. 59; ECF No. 60) and the declarations of Elisha Biega dated Sept. 19, 2018 ("September 2018 Biega Declaration") (ECF No. 59-2; ECF No. 60-2) and of David Luczynski dated Sept. 19, 2018 ("September 2018 Luyczynski Declaration") (ECF No. 59-3; ECF No. 60-3); and (4) Plaintiff's reply in further support of her cross motion for summary judgment and sur-reply in further opposition to Defendant' renewed motion for summary judgment (ECF No. 62; ECF No. 63).

Issued contemporaneously with this Report and Recommendation is a Memorandum Opinion and Order resolving Plaintiff's non-dispositive motions, i.e., her motion to take discovery (ECF No. 44) and motion to strike (ECF No. 61).

USAO-CT sought "all documents in [its] possession relating in any way" to (1) Plaintiff's "report to Assistant United States Attorney David X. Sullivan in August of 2000 that [Plaintiff] was the target of criminal activities in South Boston, Massachusetts," and (2) Plaintiff's "report to Assistant United States Attorney David X. Sullivan sometime in August of 2000 that [Plaintiff] had seen Whitey Bulger"—the organized crime boss successfully prosecuted by USAO-MA in 2013—"in person in South Boston, Newton, or the Greater Boston area." *2018 U.S. Dist. LEXIS 220867, [WL] at *2* (alterations in original) (quoting Plaintiff's FOIA requests). In response, "USAO-CT searched for 'Discepolo' and 'Sara Discepolo' in electronic files, searched existing hard files bearing her name, sought additional hard files bearing her name but found none, and quizzed AUSA Sullivan using her name." *2018 U.S. Dist. LEXIS 220867, [WL] at *10*. Although USAO-CT searched for responsive documents in Defendant's case management system CaseView, which "'tracks several types of information including the names of plaintiffs, investigative targets, defendants, when the investigation was opened, and when it was closed,' as well as the location of archived documents," it did not search AUSA Sullivan's email for mentions of Plaintiff. *2018 U.S. Dist. LEXIS 220867, [WL] at *10-11 & n.9*.

Plaintiff raised several arguments in opposition to Defendant's original motion for summary judgment and in support of her own cross motion for summary judgment. Beyond contending that the substantive searches were inadequate, she also argued that (1) Defendant should be deemed to have made admissions as to some of the critical issues in this case because it both failed to respond to

Plaintiff's requests for admissions on the relevant questions and improperly asserted that it lacked sufficient knowledge to admit or deny the relevant allegations in its answer; (2) certain declarations submitted in support of Defendant's original motion—including the declaration of Elisha Biega, the legal assistant who performed USAO-CT's searches, and the declaration of David Luczynski, an attorney advisor at the Executive Office for U.S. Attorneys ("EOUSA") who outlined EOUSA's role with respect to Plaintiff's FOIA requests—were deficient because they were based on hearsay, based "on information and belief," or not compliant with *28 U.S.C. § 1746* because not sworn under penalty of perjury; (3) Defendant improperly limited its searches to "systems of records" in contravention of FOIA, which is "in no way limited to records contained within a system of records"; and (4) Defendant was improperly withholding records pursuant to a FOIA exemption. *2018 U.S. Dist. LEXIS 220867, [WL] at *7-9, 12-13 & n.8*. The January 19 Report and Recommendation rejected each of those arguments,[2] as well as most of Plaintiff's arguments about the inadequacy of Defendant's searches, specifically finding that Defendant's search terms were reasonable and that it had searched most of the appropriate locations. *2018 U.S. Dist. LEXIS 220867, [WL] at *10-11*. However, the undersigned found that, because "Plaintiff's request to USAO-CT sought information regarding reports she reportedly made to AUSA Sullivan that were not strictly case-related," Defendant should have

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[2] Plaintiff made similar arguments in a motion to strike (ECF No. 20), which the Court denied in its entirety. *Discepolo v. U.S. Dep't of Justice, No. 16-cv-2351 (DLF/GMH), 2018 U.S. Dist. LEXIS 220867, 2018 WL 500641 (D.D.C. Jan. 19, 2018)*.

searched AUSA Sullivan's email, as it was reasonable to believe that Plaintiff's reports to him might have been transmitted via email. *2018 U.S. Dist. LEXIS 220867, [WL] at *12*. The January 19 Report and Recommendation therefore recommended allowing Defendant to "supplement its declaration to fill this gap in its demonstration of the adequacy of its search, either by searching AUSA Sullivan's email or by explaining why such a search is unnecessary." *Id.* Quoting those specific words, Judge Friedrich adopted the January 19 Report and Recommendation in full in a May 8, 2018 Memorandum Opinion and Order (the "May 8 Memorandum Opinion"). ECF No. 41 at 12. Judge Friedrich denied Plaintiff's motion for reconsideration of that decision on November 2, 2018. ECF No. 65.

Meanwhile, Defendant filed its renewed motion for summary judgment on June 28, 2018. The renewed motion is supported by a supplemental declaration from AUSA Sullivan (the "Supplemental Sullivan Declaration") stating that, although he does not recall communicating with Plaintiff, in 2018 he searched his email for responsive documents. ECF No. 43-2, ¶¶ 5, 7-9. The declaration describes those searches, including the terms used ("Sara Discepolo," "South Boston," and "Massachusetts") and the email systems searched, and reports that the searches "yielded no responsive records." *Id.*, ¶¶ 8-9. After Plaintiff filed her opposition to Defendant's renewed motion, Defendant further filed supplemental declarations addressing issues raised in the opposition. Ms. Biega, who assisted Mr. Sullivan in performing those searches of his email, supplied an additional declaration (the "Supplemental Biega Declaration") stating, among other

things, that the searches "yielded no records." ECF No. 59-2, ¶¶ 4-6. Defendant also filed a supplemental declaration from Mr. Luczynski (the "Supplemental Luczynski Declaration"), who reports, among other things, that EOUSA did not use any FOIA exemption to limit its interpretation of Plaintiff's FOIA requests or to limit the scope of USAO-CT's search for records. ECF No. 59-3, ¶¶ 1, 7-8.

II. DISCUSSION

A. Legal Standard

FOIA presumes that an informed citizenry is "vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978)*. It was enacted to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," and generally favors "full agency disclosure." *Dep't of the Air Force v. Rose, 425 U.S. 352, 360-61, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)* (quoting *Rose v. Dep't of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)*). All the same, it incorporates nine exemptions aimed at balancing these ideals with the possibility that "legitimate governmental and private interests could be harmed by release of certain types of information." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 872, 298 U.S. App. D.C. 8 (D.C. Cir. 1992)* (en banc) (quoting *FBI v. Abramson, 456 U.S. 615, 621, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982)*).

FOIA cases are generally resolved on motions for summary judgment. *Brayton v. Office of the U.S. Trade Rep., 641 F.3d 521, 527, 395 U.S. App. D.C. 155 (D.C. Cir. 2011)*. The agency has the burden of justifying its response to the FOIA request it received, and the federal court reviews its response *de novo*. *5 U.S.C. § 552(a)(4)(B)*. "A FOIA defendant is entitled to summary judgment if it proves 'beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Cornucopia Inst. v. Agric. Mktg. Serv., 312 F. Supp. 3d 85, 90 (D.D.C. 2018)* (alteration in original) (quoting *Morley v. CIA, 508 F.3d 1108, 1114, 378 U.S. App. D.C. 411 (D.C. Cir. 2007)*). In determining whether the agency has shown that "it acted in accordance with the statute, the court may rely on '[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.'" *Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326, 336 U.S. App. D.C. 386 (D.C. Cir. 1999)* (alteration in original) (quoting *Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68, 287 U.S. App. D.C. 126 (D.C. Cir. 1990)*). Such affidavits or declarations "are accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200, 288 U.S. App. D.C. 324 (D.C. Cir. 1991)* (quoting *Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771, 224 U.S. App. D.C. 1 (D.C. Cir. 1981)*). Moreover, it is well-settled in the D.C. Circuit that a defendant may seek summary judgment based on searches performed after the inception of litigation in federal court. *See, e.g., People for the Ethical Treatment of Animals, Inc. v. Bureau of Indian*

Affairs, 800 F. Supp. 2d 173, 178-79 nn.2-3 (D.D.C. 2011) (stating that position that "prelitigation searches are the only searches material to the adequacy determination is . . . legally unsupportable" and that courts often require an agency to conduct a more thorough search to remedy an inadequate one); *see also Ray v. Fed. Bureau of Prisons, 811 F. Supp. 2d 245, 247-48, 250 (D.D.C. 2011)* (granting summary judgment for defendant where original FOIA request mishandled and search did not commence until after filing of complaint).

More generally, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. In adjudicating such a motion, all reasonable inferences from the facts in the record must be made in favor of the non-moving party. *Anderson, 477 U.S. at 255*. To prevail, the moving party must show that there is no genuine issue of material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. To do this, it may cite the record, including "affidavits or declarations." *Fed. R. Civ. P. 56(c)(1)(A)*. Factual assertions made in the moving party's affidavits or declarations may be accepted as true in the absence of contrary assertions made in affidavits, declarations, or documentary evidence submitted by the non-moving party. *Neal v. Kelly, 963 F.2d 453, 456, 295 U.S. App. D.C. 350 (D.C. Cir. 1992)*.

B. Defendant's Motion for Summary Judgment

As noted, the Court has already ruled on Defendant's original motion for summary judgment, granting it in large part, but denying it in part to allow USAO-CT to shore up its proof by addressing the search of AUSA Sullivan's email. In response to Defendant's renewed motion for summary judgment, Plaintiff has recycled a number of arguments from her opposition to Defendant's first motion for summary judgment, notwithstanding the fact that those arguments have already been rejected either explicitly or implicitly. The following discussion therefore refers freely to the reasoning of the January 19 Report and Recommendation, and the May 8 Memorandum and Order adopting it, resolving the prior motion for summary judgment.

1. Defendant's Admissions

Plaintiff first argues that Defendant should be deemed to have admitted that responsive records existed because it failed to respond to Plaintiff's requests for admissions[3] and because its answer allegedly improperly stated that it had insufficient knowledge at the time to admit or deny certain allegations in the complaint. ECF No. 45-1 at 4-8. The undersigned recommended rejecting these arguments when they were made in opposition to Defendant's original motion for summary judgment, calling the first "frivolous" because Defendant had been relieved of any duty to

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[3] Plaintiff served two sets of requests for admissions on Defendant in January and February 2017. ECF No. 11 at 2. Defendant then moved for a protective order, noting that a Plaintiff must clear a high burden to justify discovery in a FOIA case. *Id.* at 2, 4. Judge Sullivan granted the motion on April 21, 2017. Minute Order dated Apr. 21, 2017.

respond to Plaintiff's requests for admissions by the entry of a protective order and finding that the second failed because Plaintiff had not shown that Defendant had engaged in bad faith or evasive pleading, as is normally required before "the sanction of deeming an allegation as admitted" is imposed. *Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *7*. Judge Friedrich followed that recommendation and rejected the arguments in her May 18 Memorandum Opinion adopting the January 19 Report and Recommendation. ECF NO. 41 at 6-7. This is now the fifth submission in which Plaintiff has raised the argument (ECF No. 13 at 6-7; ECF No. 19 at 7-9; ECF No. 36 at 2-5; ECF No. 461 at 4-5; ECF No. 61-1 at 2-5) and it is no more successful this time.

2. Plaintiff's Objections to Defendant's Declarations

Plaintiff makes a number of objections to formal aspects of the supplemental declarations submitted with Defendant's renewed motion for summary judgment. These include (1) a suggestion that the declaration of David Luczynski filed in support of Defendant's original motion for summary judgment (the "First Luczynski Declaration") failed to comply with *28 U.S.C. § 1746*, (2) assertions that the declarations of AUSA Sullivan and Ms. Biega are deficient because neither is a "supervisory official[] qualified to make an averment of adequate search," and (3) an attempt to show that Mr. Luczynski is incompetent to testify on the subjects in his declarations and that his declarations are contradictory and therefore cannot be accorded a presumption of good faith. ECF No. 31-1; ECF No. 45-1 at 12-14; 20-21; ECF NO. 62 at 16. These objections fail.

First, to the extent that the objections target declarations filed in connection with Defendant's original motion for summary judgment, they fall flat because it is not necessary to rely on any of those original declarations to answer the narrow question presented here regarding the search of AUSA Sullivan's email. Second, the objection that Mr. Luczynski's prior declaration failed to comply with *28 U.S.C. § 1746* was already rejected in the January 19 Report and Recommendation and the May 8 Memorandum Opinion. *See Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *9 n.8*; ECF No. 41 at 8. Similarly, those opinions dismissed Plaintiff's arguments, raised again here (ECF No. 45-1 at 13, 20-21), that declarations detailing the searches performed to identify documents responsive to a FOIA request must be made by officials who supervised rather than performed the searches. As explained in the January 19 Report and Recommendation, "it is appropriate in a FOIA case to submit a declaration from a person who conducted the search *or* a person who supervised the search." *Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *8*. Thus, Plaintiff's renewed attempts to discredit the Supplemental Sullivan Declaration and Supplemental Biega Declaration on this ground fail.

That leaves Plaintiff's arguments that the First Luczynski Declaration and the Supplemental Luczynski Declaration are deficient. ECF No. 45-1 at 13-14; ECF No. 62 at 13-14. She asserts that Mr. Luczynski lacks sufficient personal knowledge to testify (1) that EOUSA did not direct USAO-CT's searches for documents and (2) that EOUSA did not use any exemption to limit its interpretation or the FOIA requests at issue or the scope of EOUSA's search. However, the declarations clearly state that Mr. Luczynski's

responsibilities include "acting as liaison with other divisions and offices of DOJ in responding to requests and litigation" pursuant to FOIA, reviewing requests for records located in United States Attorneys' Offices, reviewing searches conducted in response to such requests, and preparing responses regarding FOIA exemptions. ECF No. 31-1, ¶ 1; ECF No. 59-3, ¶ 1. He further states that he is familiar with the procedures followed by EOUSA in addressing FOIA requests, including the requests at issue here, and that his declarations are based on his review of files, his personal knowledge, and information acquired through performance of his duties. ECF NO. 31-1, ¶¶ 2-3; ECF No. 59-3, ¶¶ 2-3. That is sufficient to make him competent to testify that EOUSA does not direct the searches of individual U.S. Attorneys' Offices, but that the U.S. Attorneys' Offices "determine the best way to locate responsive information." ECF No. 31-1, ¶ 6 ECF No. 59-3, ¶ 4. Indeed, Mr. Luczynski asserts that the only instruction EOUSA provides to U.S. Attorneys' Offices is to 'read[] the [FOIA] request carefully and perform[] a search for the specific records sought by the requester." ECF No. 59-3, ¶ 4. That assertion is borne out by the memorandum attached to the Supplemental Sullivan Declaration from EOUSA, which directs USAO-CT to "read the request carefully," "search only for the specific records sought by the requester," and "complete the accompanying forms" when the search is completed.[4] ECF No. 43-2 at 7.

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[4] Plaintiff's complaint, repeated throughout her opposition to the renewed motion for summary judgment, that the memorandum limited USAO-CT's search to "first-party records," that is, "records about the Plaintiff as opposed to records that may concern third-parties" (ECF NO. 45-1 at 8) is not accurate. The memorandum states, "Please read the

Moreover, those assertions, which establish that EOUSA's practice is not to interfere in the manner in which an individual U.S. Attorney's Office conducts its FOIA searches, also support Mr. Luczynski's assertions that "EOUSA has not used any exemption or exclusion to limit its interpretation of [P]laintiff's FOIA request" and that "EOUSA has not used any exemption or exclusion to limit the scope of the USAO-CT's search for records responsive to [P]laintiff's FOIA request." ECF No. 59-3, ¶¶ 7-8.

Plaintiff's attempts to uncover contradictions in the declarations also fizzle. Plaintiff asserts that Ms. Biega's statement in her first declaration (which was submitted in connection with Defendant's original motion for summary judgment) that she "identif[ies], discuss[es], and ship[s] records as directed by EOUSA" (ECF No. 16-2, ¶ 1) contradicts Mr. Luczynski's assertions that EOUSA leaves it to the individual U.S. Attorneys' Offices to determine how best to search for responsive documents. ECF No. 45-1 at 13. Specifically, Plaintiff contends that "identification is part of the search process." *Id.* However, the fact that EOUSA "directed" USAO-CT to "identify . . . records" does not mean, as Plaintiff would have it, that "EOUSA . . . actually conducted the search." *Id.* Indeed, that

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request carefully as it is not a typical first-party request for all records; rather, this request seeks specific documents." ECF No. 43-2 at 7. It is not a reasonable to interpret that sentence as limiting any search to records about Plaintiff, rather than limiting any search to the records specifically requested. In any case, Plaintiff's actual requests *did* seek a specific and limited range of records regarding her reports to AUSA Sullivan and, as discussed both in the January 19 Report and Recommendation and below, focusing the searches on Plaintiff's name was reasonable. *See, e.g., Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *10.*

supposition is directly contradicted by the memorandum discussed above. Finally, Plaintiff insists that Mr. Luczynski's assertion that his responsibilities include "locating responsive records" (ECF No. 31-1, ¶ 1; ECF No. 59-3, ¶ 1) negates his statements that EOUSA does not guide the searches performed by U.S. Attorneys' Offices. ECF No. 45-1 at 14. However, both the First Luczynski Declaration and the Supplemental Luczynski Declaration make clear that some FOIA requests seek documents held by EOUSA, itself. ECF No. 31-1, ¶ 1; ECF No. 59-3, ¶ 1. The reasonable interpretation of Mr. Lyczynski's statements, then, is that while Mr. Luczynski might locate responsive records when they are held at EOUSA, he does not do so when the records are held elsewhere, such as at a U.S. Attorney's Office.

In short, Plaintiff has presented no reason to discount the declarations submitted by Defendant in support of its motion.

3. Adequacy of Defendant's Searches

Plaintiff contends that Defendant has not shown that USAO-CT's supplemental searches of AUSA Sullivan's email were "reasonably calculated to uncover all relevant documents." *Morley, 508 F.3d at 1114*. This argument, too, is unsuccessful.

The Supplemental Sullivan Declaration asserts that on January 30, 2018, he and Ms. Biega searched his Department of Justice ("DOJ") Outlook email account using the search terms "Sara Discepolo," "South Boston," and "Massachusetts." ECF No. 43-2, ¶ 8. Ms. Biega clarifies that AUSA Sullivan's Outlook account contained all emails sent or received "beginning two years prior to

January 30, 2018." ECF No. 59-2, ¶ 4. Using the same search terms, AUSA Sullivan and Ms. Biega also searched his archived DOJ emails using "USA Mail Search-Proofpoint, which includes emails sent or received on or after March 1, 2015," and the "Legacy IAP email archive," which includes emails sent or received between March 1, 2010, and March 1, 2015. ECF No. 43-2, ¶ 9; ECF No. 59-2, ¶¶ 5-6. Both declarants assert that those searches yielded no records. ECF No. 43-2, ¶¶ 8-9; ECF No. 59-2, ¶¶ 4-6.

The declarations go beyond describing the searches of emails, however. AUSA Sullivan avers that his paper and electronic files "are organized by the name of a case or investigation." ECF No. 43-2, ¶ 10. Because he was not involved in any investigation of Mr. Bulger, Sara Discepolo, or criminal activities in South Boston, no paper or electronic files would exist that are responsive to Plaintiff's requests. *Id.* Ms. Biega asserts that she searched CaseView in both January 2017 and September 2018 for files including Plaintiff's name in the "witness field" and found nothing. ECF No. 59-2, ¶¶ 7-9. She further "made every effort to search the Administrative File Systems located within the USAO-CT that were likely to contain" responsive records, to no avail. *Id.*, ¶¶ 10-11. Ms. Biega is "not aware of any other locations within USAO-CT where responsive records may be found." *Id.*, ¶ 10.

These searches fulfill Defendant's obligation to perform a reasonable search for responsive documents. The search terms are designed to capture documents included within Plaintiff's FOIA requests, which sought documents related to her alleged reports to AUSA Sullivan about being a target of criminal activities in South Boston and about

seeing Mr. Bulger in that area. As noted in the January 19 Report and Recommendation, "[a]lthough Plaintiff insists these searches were too narrow"—as she does again here (ECF No. 45-1 at 9, 15)—"it is unclear what further search terms could have been used" to find responsive information "once the searches using her name failed to bear fruit." *Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *10*. Thus, "Defendant's use of Plaintiff's name to organize its searches was reasonable" and "followed logically from the particular requests Plaintiff submitted."[5] *2018 U.S. Dist. LEXIS 220867, [WL] at *10, 12*. And, indeed, these searches "yielded no records relating to any communication or contact between AUSA Sullivan and an individual named Sara Discepolo." ECF No. 59-2, ¶ 4.

Moreover, the search locations were also reasonable. The May 8 Memorandum Opinion specifically adopted the recommendation in the January 19 Report and Recommendation that "USAO-CT be instructed to

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[5] Plaintiff's suggestion that the search was impermissibly narrow because focused on "records about . . . Plaintiff as opposed to records that may concern third-parties" should fail. ECF No. 45-1 at 8-11, 14-15. Plaintiff's requests to USAO-CT clearly sought information about reports that she herself made, asking for documents related to "[m]y report to [AUSA Sullivan] . . . that I was the target of criminal activities in South Boston, Massachusetts," and "[m]y report to [AUSA Sullivan] . . . that I had seen Whitey Bulger in person." ECF No. 1 at 7. As Judge Friedrich recently emphasized, Plaintiff's requests involve only reports that she made to law enforcement and not, for example, "information about Bulger's whereabouts." ECF No. 65 at 5. Thus, as noted, the use of her name to organize the searches was sufficient under the statute. Defendant is correct that Plaintiff "is simply being revisionist in arguing that the FOIA request was broader in scope than a request for records relating to reports that she allegedly made to a specific Assistant United States Attorney in the USAO-CT on specific topics." ECF No. 59 at 3.

supplement its declaration to fill [the] gap in its demonstration of the adequacy of its search, either by searching AUSA Sullivan's email or by explaining why such a search is unnecessary." ECF No. 41 at 12 (quoting *Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *12)*. Defendant has now done so, searching AUSA Sullivan's emails, including archived emails back to 2010. ECF No. 43-2, ¶¶ 8-9; ECF No. 59-2, ¶¶ 4-6. Plaintiff complains that the search was inadequate unless the searched emails "reached back to the year 2000." ECF No. 45-1 at 21. But both Ms. Biega and ASUA Sullivan describe searches of two archival email databases, one of which contains the "email communications that were created prior to March 1, 2015," and reached back more than eight years, to 2010. ECF No. ¶ 59-2, ¶¶ 5-6; *see also* ECF No. 43-2, ¶¶ 8-9. The reasonable interpretation is that those databases contained the emails reasonably accessible to USAO-CT. "The agency need not search every record in the system or conduct a perfect search. Nor need the agency produce a document where 'the agency is no longer in possession of the document[] for a reason that is not itself suspect.'" *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec., 384 F. Supp. 2d 100, 107 (D.D.C. 2005)* (alteration in original) (internal citations omitted) (quoting *SafeCard Servs., 926 F.2d at 1201*). In addition, in light of the fact that USAO-CT was ordered to search AUSA Sullivan's email based primarily on the likelihood that Plaintiff had communicated with him by email, *Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *12*, Plaintiff has undercut her argument that a search of emails from the year 2000 would be likely to turn up relevant documents by admitting (for the first time in her opposition to Defendant's renewed motion for summary judgment) that

her "reports" to AUSA Sullivan "were made . . . over the telephone, not email." ECF No. 45-1 at 31.

Many of Plaintiff's remaining objections to the adequacy of the search have already been decided. For example, Plaintiff complains that AUSA Sullivan did not search his paper or electronic files, protests that court filings were excluded from the search, and challenges Ms. Biega's queries of CaseView. ECF NO. 45-1 at 11-12, 22-32; ECF NO. 62 at 2-3. However, the January 19 Report and Recommendation, which Judge Friedrich adopted in her May 8 Memorandum Opinion, found that USAO-CT's original search comported with the requirements of FOIA "with one exception": USAO-CT needed to search AUSA Sullivan's email or explain why that was unnecessary. *Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *11-12*. Moreover, searches of AUSA Sullivan's paper or electronic files would not be reasonably likely to yield relevant documents because those files are all case-related, and USAO-CT did not handle any case or investigation involving Plaintiff, Mr. Bulger, or criminal activities in South Boston. ECF No. 43-2, ¶ 10.

Plaintiff also complains that USAO-CT's searches were "limited to investigative materials within the jurisdiction of Connecticut only," noting that she "resided in a different jurisdiction"—Massachusetts—"at the time of making the reports to [AUSA] Sullivan." (ECF No. 45-1 n.3; ECF No. 62 at 10). There is no reason to believe, however, that USAO-CT had reasonable access to documents from USAO-MA (the only other jurisdiction with any possible connection to Plaintiff's requests). Nor has Plaintiff explained on what basis USAO-CT should be required to search another jurisdiction's files for materials responsive

to a request she herself directed to USAO-CT. In any case, the Court already determined that the searches performed in response to her requests to USAO-MA (the only other jurisdiction with any possible connection to Plaintiff's requests) were sufficient. *Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *10-11*. Those searches, like the searches that USAO-CT engaged in, "focused on information about Plaintiff" and also "began[] with variations of Plaintiff's first and last names." *Id.* Thus, there is no reason to believe that, assuming USAOCT had reasonable access to materials from USAO-MA, any searches it performed using Plaintiff's name would garner more results than did USAO-MA's searches.

Finally, Plaintiff asserts that the searches cannot have been adequate because they were limited to "systems of records," a term that has a specific meaning under the *Privacy Act*, *5 U.S.C. § 552a(a)(5)*, denoting "group[s] of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." According to Plaintiff, searching only "systems of records" is inadequate because "[u]nder FOIA . . . , [she] is entitled to a search of all files or locations without reference to how the records are grouped or indexed." ECF No. 45-1 at 17; *see also id.* at 33-36. This argument, too, was resolved against Plaintiff in connection with Defendant's original motion for summary judgment:

> [Defendant's] declarations repeatedly indicate Defendant responded to the requests pursuant to FOIA. More importantly, neither USAO-CT nor USAO-MA actually limited its search only to "systems of

> records" as defined by the Privacy Act. Rather, USAO-CT searched paper files and also questioned AUSA Sullivan; USAOMA combed through boxes of hard files as well as questioning members of the prosecution team. Finally, the limitation to searches for Plaintiff's name, as explained above, was not imposed because Defendant performed searches only pursuant to the Privacy Act, but rather followed logically from the particular requests Plaintiff submitted.

*Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *12* (internal citations to record omitted). The same is true here. Moreover, to the extent Defendant limited its searches, it did so based upon the specific directions provided by the Court—that is, to search of AUSA Sullivan's email based on Plaintiff's name. It is thus irrelevant whether the email and archives searched are considered "systems of records" or not.

Therefore, the undersigned recommends finding that the supplemental searches performed by USAO-CT complied with the requirements of FOIA.

3. Other Objections

Plaintiff argues that the fact that Defendant assigned her requests to its "complex track" for processing, thus providing it more time to respond to the requests, and yet produced no records "justifi[es] [an] inference [] that the agency used th[e] extended time to consult with other agencies, offices or sub-components of the Department of Justice." ECF No. 45-1 at 33; *see also* ECF No. 62 at 16. Because "none of the declarations filed in the case give any detail as to any consultations that took place in this particular case," she asserts that Defendant's motion for

summary judgment must be denied. ECF No. 45-1 at 33. The Supplemental Luczynski Declaration asserts that EOUSA did not consult with any other office or agency regarding Plaintiff's requests. ECF No. 59-3, ¶ 9. Plaintiff's hunch that consultation occurred does not undermine this assertion. *See, e.g.*, *SafeCard Servs., 926 F.2d at 1200* ("[Agency declarations] are accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" (quoting *Ground Saucer Watch, 692 F.2d at 771*)). More importantly, Plaintiff has not explained how a more detailed declaration regarding any consultations with other agencies could bear on the question of whether USAO-CT's search of AUSA Sullivan's email was sufficient under the statute.

Plaintiff also hypothesizes that Defendant did not search "for any records it pre-determined would either be exempt or excludable under FOIA" or that it is withholding records subject to a FOIA exclusion. ECF No. 45-1 at 36-38. As noted, the Supplemental Luczynski Declaration explicitly denies the former speculation, stating that EOUSA did not use any exemption or exclusion to limit its interpretation Plaintiff's requests or USAO-CT's search for records. ECF No. 59-3, ¶¶ 7-8. Moreover, the Supplemental Biega Declaration asserts that the searches of AUSA Sullivan's email "yielded no records." ECF No. 59-2, ¶¶ 4-6. Defendant has thus adequately shown that no records are being withheld pursuant to a FOIA exemption.

4. Conclusion

As noted, a search under FOIA need not be perfect; it need only be reasonable. *SafeCard Servs., 926 F.2d at 1201*.

Moreover, because "[t]he process of conducting an adequate search for documents requires 'both systemic and case-specific exercises of discretion and administrative judgment and expertise'" it is "hardly an area in which the courts should attempt to micromanage the executive branch." *McKinley v. Bd. of Governors of the Fed. Reserve Sys., 849 F. Supp. 2d 47, 56 (D.D.C. 2012)* (quoting *Schrecker v. Dep't of Justice, 349 F.3d 657, 662, 358 U.S. App. D.C. 334 (D.C. Cir. 2003)).* Here, the Court previously found that the searches performed by USAO-CT in response to Plaintiff's requests were sufficient under the statute "with one exception," which related exclusively to the failure to search AUSA Sullivan's email. *Discepolo, 2018 U.S. Dist. LEXIS 9302, 2018 WL 504655, at *11-12.* Because Defendant has now done so and presented "reasonably detailed affidavit[s], 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," *Valencia-Lucena, 180 F.3d 321, 326, 336 U.S. App. D.C. 386 (D.C. Cir. 1999),* the undersigned recommends granting its motion for summary judgment.

C. Plaintiff's Cross-Motion for Summary Judgment

Plaintiff moves for summary judgment on two of Defendant's affirmative defenses raised in its answer. The first is that this Court lacks subject matter jurisdiction because Defendant "has not improperly withheld information within the meaning of FOIA"; the second is that Plaintiff's requests "implicate certain information that is protected from disclosure by one or more statutory exemptions." ECF No. 45-1 at 41-43. Because the

undersigned recommends granting Defendant's renewed motion for summary judgment, which would end the case, Plaintiff's motion for summary judgment may be denied as moot.

III. CONCLUSION

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendant's renewed motion for summary judgment (ECF No. 43) be **GRANTED**, Plaintiff's cross-motion for summary judgment (ECF No. 45) be **DENIED AS MOOT**, and the case be **CLOSED**.

* * * *

The parties are hereby advised that under the provisions of Local Rule 72.3(b) of the United States District Court for the District of Columbia, any party who objects to the Report and Recommendation must file a written objection thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the report and/or recommendation to which objection is made, and the basis for such objections. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).*

Date: November 15, 2018

/s/ G. Michael Harvey

G. MICHAEL HARVEY

UNITED STATES MAGISTRATE JUDGE

APPENDIX D

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 16-cv-2351 (DLF/GMH)

SARA DISCEPOLO,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Appellee.

On Motion for Reconsideration

MEMORANDUM OPINION AND ORDER

November 2, 2018

Before: DABNEY L. FRIEDRICH, *United States District Judge*

MEMORANDUM OPINION AND ORDER

Before the Court is plaintiff Sara Discepolo's Motion for Reconsideration, Dkt. 48. For the reasons that follow, the Court will deny the motion.

I. BACKGROUND

The Court assumes the parties' familiarity with the facts and provides only a brief outline of the relevant history. Sara Discepolo made three requests under the Freedom of Information Act (FOIA), *5 U.S.C. § 552 et seq.*, for documents from the U.S. Attorney's Office for the District of Massachusetts (USAO-MA) and the U.S. Attorney's Office for the District of Connecticut (USAO-CT). Discepolo Decl. exs. A & B, at 7-9, Dkt. 18-4. Discepolo requested that USAO-MA produce (1) documents related to "[a]ny criminal investigation of [Discepolo] from January 1, 2000 through December 31, 2000 or until said investigation terminated"; (2) documents containing any "mention of [Discepolo's] name in any criminal investigation of any other person from January 1, 2000 through December 31, 2000 or until said investigation terminated"; (3) documents with "[i]nformation reflecting that [Discepolo] was the subject or the target of any criminal activities occurring anytime from January 1, 2000 through December 31, 2000"; and (4) documents related to Discepolo's "report in August 2000 of having seen Whitey Bulger in person." *Id.* ex. A, at 7. She also requested that USAO-MA produce all documents related to "[a]ny criminal investigation of [Discepolo] (or the mention of [Discepolo's] name in any criminal investigation of any other person) from January 1, 2012 through the present." *Id.* ex. A, at 9. And she

requested that USAO-CT produce "all documents in [USAO-CT's] possession relating in any way" (1) to Discepolo's "report to Assistant United States Attorney David X. Sullivan in August of 2000 that [Discepolo] was the target of criminal activities in South Boston, Massachusetts"; and (2) to Discepolo's "report to Assistant United States Attorney David X. Sullivan sometime in August of 2000 that [Discepolo] had seen Whitey Bulger in person in South Boston, Newton, or the Greater Boston area." *Id.* ex. B, at 12.

On January 19, 2018, Magistrate Judge Harvey issued a Report and Recommendation that granted in part and denied in part the government's motion for summary judgment. R & R at 26-27, Dkt. 33. Judge Harvey considered declarations provided by Elisha Biega and Susan Husted—two government employees who personally conducted or oversaw searches conducted in 2017—and he concluded that the government performed adequate searches for almost all of the requested information. *Id.* at 14-17; *see also* Biega Decl., Dkt. 16-2; Husted Decl., Dkt. 16-3. He denied summary judgment only as to USAO-CT's search for information about the reports Discepolo made to Sullivan. R & R at 22. He recommended that USAO-CT "supplement its declaration to fill [a] gap in its demonstration of the adequacy of its search, either by searching Sullivan's email or by explaining why such a search is unnecessary." *Id.* On May 8, 2018, this Court adopted Judge Harvey's Report and Recommendation in its entirety. Mem. Op. & Order, Dkt. 41.

The government immediately searched Sullivan's email account and again moved for summary judgment before Judge Harvey. *See* Dkt. 43. In support of its motion, the

government submitted a declaration by Sullivan that explained that several searches of his email account "yielded no responsive records." Sullivan Decl. ¶¶ 8, 9, Dkt. 43-2. The declaration also stated that Sullivan had searched for responsive records in May of 2015 and that he "d[id] not recall how [he] conducted that search but [his] signature is on [an attached] form . . . that indicates [he] had no responsive records." *Id.* ¶ 6. Discepolo now argues, among other things, that the attached form constitutes new evidence that requires the Court to reconsider its decision. Pl.'s Mot. for Recons. at 2-3.

II. LEGAL STANDARD

Under *Federal Rule of Civil Procedure 54(b)*, a court may revise any non-final order "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." But although "[m]otions to reconsider interlocutory orders . . . are within the discretion of the trial court," *Lewis v. United States, 290 F. Supp. 2d 1, 3 (D.D.C. 2003)*, the Supreme Court has warned that "courts should be loathe" to revisit prior decisions "in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)* (internal quotation marks omitted). "A motion for reconsideration is not an opportunity to reargue facts and theories upon which a court has already ruled, nor is it a vehicle for presenting theories or arguments that could have been advanced earlier." *Negley v. FBI, 825 F. Supp. 2d 58, 62 (D.D.C. 2011)*. "The burden is on the moving party to show that reconsideration is appropriate and that harm

or injustice would result if reconsideration were denied." *Lewis v. Gov't District of Columbia, 324 F.R.D. 296, 300 (D.D.C. 2018)* (internal quotation marks omitted); *see also United States ex rel. Westrick v. Second Chance Body Armor, Inc., 893 F. Supp. 2d 258, 268 (D.D.C. 2012)*. To prevail, the moving party must show: "(1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order." *In re Guantanamo Detainee Litig., 706 F. Supp. 2d 120, 122-23 (D.D.C. 2010)* (internal quotation marks omitted).

III. ANALYSIS

A. The 2015 Form

Discepolo argues that the 2015 form with Sullivan's signature constitutes new evidence that bears on the adequacy of the 2017 searches, *see* Pl.'s Mot. for Recons. at 3-4, but the Court disagrees. The form refers to a specific 2015 search by Sullivan, *see* Sullivan Decl. ex. B, at 7-8, that Judge Harvey never even considered. Judge Harvey determined that the separate and more recent searches conducted and supervised by Biega and Husted were adequate based on the declarations submitted by Biega and Husted. R & R at 14-17. Because the form is irrelevant to the analyses of both Judge Harvey and this Court, Discepolo has not satisfied her burden of showing "that harm or injustice would result if reconsideration were denied." *Lewis, 324 F.R.D. at 300* (internal quotation marks omitted).

B. The Adequacy of the USAO-MA Search

Discepolo unpersuasively attempts to relitigate several arguments that this Court has already considered and rejected about the adequacy of the USAO-MA search and the decision not to search the records of a certain joint fugitive task force. Pl.'s Mot. for Recons. at 4-7. She argues that it was unreasonable for the agency to focus on case-related records instead of searching the records of the task force, and she contends that the Court did not address the "inference" that "relevant materials were likely to be located in the fugitive task force materials." *Id. at 5*. But an agency is not required to search every location that could conceivably house a responsive document. *See Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68, 287 U.S. App. D.C. 126 (D.C. Cir. 1990)*; *Meeropol v. Meese, 790 F.2d 942, 952-53, 252 U.S. App. D.C. 381 (D.C. Cir. 1986)*. To obtain summary judgment, it need only make a "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby, 920 F.2d at 68*. Here, the government satisfied its obligation for the reasons discussed by Judge Harvey and this Court. *See* Mem. Op. & Order at 9-12.

Discepolo accuses the Court of impermissibly "shift[ing] the burden to [Discepolo] without permitting any discovery to be taken." Pl.'s Mot. for Recons. at 7. But in a FOIA case, summary judgment is only inappropriate "if a review of the record raises substantial doubt as to the search's adequacy, particularly in view of well defined requests and positive indications of overlooked materials." *Reporters Comm. for Freedom of Press v. FBI, 877 F.3d 399, 402 (D.C. Cir. 2017)*

(internal quotation marks omitted). The Court found no "substantial doubt" here, and Discepolo is not entitled to reargue facts and theories upon which the Court has already ruled in a motion for reconsideration, *see* *Stati v. Rep. of Kaz., 302 F. Supp. 3d 187, 197 (D.D.C. 2018)*.

The Court also rejects Discepolo's argument that the Court adopted an unduly "narrow construction" of one of her requests of USAO-MA. Pl.'s Mot. for Recons. at 6. Discepolo argues that "records showing Bulger was in Boston during the time in question" are responsive to her request for documents "in any way related" to her reports of sighting Bulger. *Id.* But the Court has already explained that "documents showing that Bulger was in Boston are not related to [Discepolo's] FOIA requests here, which involve [her] reports of sighting Bulger, not all information about Bulger's whereabouts." Mem. Op. & Order at 10 n.1.

C. Discepolo's Remaining Arguments

Discepolo's final arguments are equally unconvincing. First, she argues that Judge Harvey and this Court failed to address her objection that Husted's declaration was "facially deficient as a matter of law because the averment was defective." Pl.'s Mot. for Recons. at 7; *see also* Pl.'s Objections at 10-11, Dkt. 36. As the Court explained in its Memorandum Opinion and Order, however, "Judge Harvey determined that the declaration was *not* facially defective, after which he properly considered it." Mem. Op. & Order at 9. Second, Discepolo argues that she is entitled to relief under *Federal Rule of Civil Procedure 60(b)*. Pl.'s Mot. for Recons. at 7. But this motion is properly decided under *Rule 54* because Discepolo seeks reconsideration of an

interlocutory order rather than a final judgment. *Fed. R. Civ. P. 54(a)*; *Lewis v. U.S. Dep't of Justice, 867 F. Supp. 2d 1, 23 (D.D.C. 2011)*; *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 811 F. Supp. 2d 216, 225 (D.D.C. 2011)*; *see also* *Fed. R. Civ. P. 60(b)* (permitting courts to "relieve a party . . . from a *final* judgment, order, or proceeding" (emphasis added)).

CONCLUSION

For the foregoing reasons, it is **ORDERED** that Sara Discepolo's Motion for Reconsideration is **DENIED**.

/s/ Dabney L. Friedrich

DABNEY L. FRIEDRICH

United States District Judge

November 2, 2018

APPENDIX E

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 16-cv-2351 (DLF/GMH)

SARA DISCEPOLO,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Appellee.

On Summary Judgment I

MEMORANDUM OPINION AND ORDER

May 8, 2018

Before: DABNEY L. FRIEDRICH, *United States District Judge*

MEMORANDUM OPINION AND ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Before the Court are the defendant's Motion for Summary Judgment, Dkt. 16, the plaintiff's Cross-Motion for Summary Judgment, Dkt. 18, and the plaintiff's Motion for Reconsideration, Dkt. 26. On January 19, 2018, Magistrate Judge G. Michael Harvey issued a Report and Recommendation, Dkt. 33, to which the plaintiff filed numerous objections, Dkt. 36. For the reasons that follow,, the Court will adopt Judge Harvey's Report and Recommendation in its entirety. Thus the Court will grant in part and deny in part the defendant's Motion for Summary Judgment, deny without prejudice the plaintiff's Cross-Motion for Summary Judgment, and deny the plaintiff's Motion for Reconsideration.

I. BACKGROUND

Pursuant to the *Freedom of Information Act, 5 U.S.C. § 552*, and the *Privacy Act, 5 U.S.C. § 552a* (collectively, FOIA), the plaintiff Sara Discepolo seeks information from the U.S. Department of Justice. Judge Harvey's Report and Recommendation provides a thorough summary of the facts of this case. *See* Dkt. 33 at 2-7. In brief, at issue are two FOIA requests submitted by the plaintiff to the U.S. Attorney's Office for the District of Massachusetts (USAO-MA) and one FOIA request submitted by the plaintiff to the U.S. Attorney's Office for the District of Connecticut (USAO-CT) on April 17, 2017. *Id.* at 2-3.

First, the plaintiff requested that USAO-MA produce all documents related to (1) "[a]ny criminal investigation of [the plaintiff] from January 1, 2000 through December 31, 2000 or until said investigation terminated"; (2) any "mention of [the plaintiff's] name in any criminal investigation of any other person from January 1, 2000 through December 31, 2000 or until said investigation terminated"; (3) "[i]nformation reflecting that [the plaintiff] was the subject or the target of any criminal activities occurring from anytime from January 1, 2000 through December 31, 2000"; and (4) the plaintiff's "report in August 2000 of having seen Whitey Bulger in person." Dkt. 18-4 at 7.

Second, the plaintiff requested that USAO-MA produce all documents related to "[a]ny criminal investigation of [the plaintiff] (or the mention of [the plaintiff's] name in any criminal investigation of any other person) from January 1, 2012 through the present." Dkt. 18-4 at 9.

Third, the plaintiff requested that USAO-CT produce information related to her communications with an Assistant United States Attorney, David X. Sullivan. The plaintiff requested "all documents in [USAO-CT's] possession relating in any way" to (1) the plaintiff's "report to Assistant United States Attorney David X. Sullivan in August of 2000 that [the plaintiff] was the target of criminal activities in South Boston, Massachusetts"; and (2) the plaintiff's "report to Assistant United States Attorney David X. Sullivan sometime in August of 2000 that [the plaintiff] had seen Whitey Bulger in person in South Boston, Newton, or the Greater Boston area." Dkt. 18-4 at 12.

The plaintiff filed her complaint on November 28, 2016. Dkt. 1. In summer 2017, the parties filed cross-motions for summary judgment. *See* Dkt. 16; Dkt. 18. Pursuant to Local Civil Rules 72.2 and 72.3, the previously assigned district court judge referred the case to a magistrate judge for full case management, up to but excluding trial, including recommendations on dispositive motions. *See* Minute Order of July 17, 2017. Magistrate Judge Harvey was randomly assigned. *See* Referral of July 17, 2017. He issued a Report and Recommendation on January 19, 2018. Dkt. 33. Pursuant to Local Civil Rule 72.3(b), the plaintiff filed objections to the Report and Recommendation, *see* Dkt. 36, to which the Court now turns.

II. LEGAL STANDARDS

Under Local Civil Rule 72.3(b), "[a]ny party may file for consideration by the district judge written objections to the magistrate judge's proposed findings and recommendations issued under [Local Civil Rule 72.3(a)] within 14 days." Local Civ. R. 72.3(b). Proper objections "shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for the objection." *Id.* Pursuant to Local Civil Rule 72.3(c), "a district judge shall make a de novo determination of those portions of a magistrate judge's findings and recommendations to which objection is made as provided in [Rule 72.3(b)]." Local Civ. R. 72.3(c); *see also Means v. District of Columbia, 999 F. Supp. 2d 128, 132 (D.D.C. 2013)* ("District courts must apply a de novo standard of review when considering objections to, or adoption of, a magistrate judge's Report and Recommendation."). But "objections which merely rehash

an argument presented and considered by the magistrate judge are not properly objected to and are therefore not entitled to de novo review." *Hall v. Dep't of Commerce, No. 16-cv-1619, 2018 U.S. Dist. LEXIS 72110, 2018 WL 2002483, at *2 (D.D.C. Apr. 30, 2018)*; *see also Shurtleff v. EPA, 991 F. Supp. 2d 1, 8 (D.D.C. 2013)*. The district judge "may accept, reject, or modify, in whole or in part, the findings and recommendations of the magistrate judge, or may recommit the matter to the magistrate judge with instructions." Local Civ. R. 72.3(c).

In accordance with Local Civil Rule 72.3, the Court must assess the parties' summary judgment motions and the plaintiff's motion for reconsideration. As Judge Harvey explained, FOIA cases are generally resolved on motions for summary judgment. *See Brayton v. Off. of the U.S. Trade Rep., 641 F.3d 521, 527, 395 U.S. App. D.C. 155 (D.C. Cir. 2011)*. The agency has the burden of justifying its response to the FOIA request it received, and the federal court reviews the agency's response de novo. *5 U.S.C. § 552(a)*. "To prevail on summary judgment, an agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested, which it can do 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." *Reporters Comm. for Freedom of Press v. FBI, 877 F.3d 399, 402 (D.C. Cir. 2017)* (internal quotation marks omitted). Such affidavits or declarations "are accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence

and discoverability of other documents.'" *SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200, 288 U.S. App. D.C. 324 (D.C. Cir. 1991)* (internal quotation marks omitted). And although "an affidavit must explain in reasonable detail the scope and method of the search conducted," it "need not set forth with meticulous documentation the details of an epic search for the requested records." *Reporters Comm., 877 F.3d at 404* (internal quotation marks omitted). In addition, a defendant may seek summary judgment based on searches performed after the inception of litigation in federal court. *See, e.g., Ray v. Fed. Bureau of Prisons, 811 F. Supp. 2d 245, 247-48, 250 (D.D.C. 2011)*.

More generally, under *Rule 56*, a court grants summary judgment if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A "material" fact is one with potential to change the substantive outcome of the litigation. *See Liberty Lobby, 477 U.S. at 248; Holcomb v. Powell, 433 F.3d 889, 895, 369 U.S. App. D.C. 122 (D.C. Cir. 2006)*. A dispute is "genuine" if a reasonable jury could determine that the evidence warrants a verdict for the nonmoving party. *See Liberty Lobby, 477 U.S. at 248; Holcomb, 433 F.3d at 895*. "If there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law if the nonmoving party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Holcomb, 433 F.3d at 895* (quoting *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*).

Finally, *Rule 54(b)* "governs reconsideration of orders that do not constitute final judgments." *Singh v. George Wash. Univ., 383 F. Supp. 2d 99, 101 (D.D.C. 2005)*; *see also* *Fed. R. Civ. P. 54(b)* (providing that "any order or other decision, however designated, that adjudicates fewer than all the claims . . . does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims . . . ."). *Rule 54(b)* "recognizes" the district court's "inherent power to reconsider an interlocutory order 'as justice requires.'" *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc., 630 F.3d 217, 227, 394 U.S. App. D.C. 73 (D.C. Cir. 2011)* (citation omitted). "Justice may require revision when the Court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the parties, has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts has occurred since the submission of the issue to the Court." *Singh, 383 F. Supp. 2d at 101* (citation and alteration omitted). "In general, a court will grant a motion for reconsideration of an interlocutory order only when the movant demonstrates: (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order." *Parker v. John Moriarty & Assocs., 221 F. Supp. 3d 1, 2016 WL 7438435, at *1 (D.D.C. 2016)* (citation omitted). "[I]n order to promote finality and protect the court's judicial resources, the court is loath to revisit its prior decision absent extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Hall & Assocs. v. EPA, 210 F. Supp. 3d 13, 2016 WL 5396653, at *3 (D.D.C. Sep. 27, 2016)* (citation omitted).

III. ANALYSIS

In response to Judge Harvey's Report and Recommendation, the plaintiff raises eight objections, many with numerous subparts. The Court addresses each in turn.

A. Objection to Referral

The plaintiff objects that this case was referred to a magistrate judge and that Judge Harvey issued a report and recommendation on the parties' summary judgment motions. *See* Dkt. 36 at 1-2. Such actions, however, are expressly permitted by federal law and the local civil rules. *See 28 U.S.C. § 636*; Local Civ. R. 72.1; Local Civ. R. 72.2; Local Civ. R. 72.3.

B. Objection to Recommendation that the Court Grant Summary Judgment as to USAO-MA

The plaintiff objects that Judge Harvey erred by not deeming as admitted the plaintiff's statements that responsive documents exist. *See* Dtk. 36 at 2-3. But Judge Harvey's Report and Recommendation persuasively explains that the defendant did not make critical admissions by (1) not responding to certain requests for admissions or (2) asserting in its answer that it lacked sufficient knowledge to admit or deny certain allegations. *See* Dkt. 33 at 13-14. The plaintiff also objects that Judge Harvey erred by stating that the district court judge previously assigned to this case issued a protective order

that "had the effect of withdrawing [any purported] admissions pursuant to *Rule 36(b) of the Federal Rules of Civil Procedure*." Dkt. 33 at 13 n.6. Not only has the plaintiff already raised this argument unsuccessfully, *see* Dkt. 13 at 6-7; Dkt. 33 at 33, but *Rule 36(b)* expressly permits the action taken by the judge previously assigned to this case. *See Fed. R. Civ. P. 36(b)* ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to *Rule 16(e)*, the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.").

The plaintiff further objects that Judge Harvey did not conclude that the agency's pleadings constituted an admission that responsive records exist because the appropriate standard is "whether the Defendant made reasonable inquiry by the time the Answer was filed." Dkt. 36 at 4. This argument was already raised before Judge Harvey, who persuasively rejected it. *See* Dkt. 33 at 13-14. Moreover, it is common for an agency to continue searching for the requested documents after a complaint has been filed, *see, e.g., Ray, 811 F. Supp. 2d at 247-48, 250*, and such searches do not amount to a critical admission. Therefore, this objection fails.

C. Objection to Consideration of the Husted and Luczynski Declarations

The plaintiff objects that Judge Harvey improperly considered the declaration of Susanne Husted, the FOIA

coordinator for USAO-MA, because Husted did not personally conduct parts of the searches and Husted made her statement based in part on "information and belief." *See* Dkt. 36 at 5-7. Again, this argument was thoroughly analyzed and rejected by Judge Harvey. *See* Dkt. 33 at 14-18. In a FOIA case, it is appropriate to consider the declaration of a person who conducted the search or a person who supervised the search. *Id.* at 15 (collecting cases). Husted permissibly did both. *Id.* at 14-17. And it was permissible for Husted to submit a declaration with an affirmation that it was "true and correct, to the best [of her] knowledge and belief." Dkt. 18-1 at 25; Dkt. 16-3 at 7. Such an affirmation is appropriate for a FOIA case. *See* Dkt. 33 at 17. Therefore, Judge Harvey properly considered Husted's declaration.

The plaintiff also objects that Judge Harvey improperly considered the declaration of David Luczynski, an attorney-advisor for the FOIA unit of the Executive Office for United States Attorneys. *See* Dkt. 36 at 7-10. This argument "merely rehash[es]" issues already addressed by Judge Harvey. *Shurtleff, 991 F. Supp. 2d at 8*. According to the defendant, the declaration "was provided (i) to counter [the plaintiff's] speculation that the Executive Office for the United States Attorneys might have instructed the two United States Attorney's offices to conduct their searches in any particular way and (ii) to explain that no records were processed because no records were found." Def.'s Response, Dkt. 39 at 2. That is, the declaration "explain[ed] [the Executive Office's] limited role in FOIA requests sent to U.S. Attorney's Offices . . . ." Dkt. 33 at 17. And contrary to the plaintiff's objection, the Luczynski declaration satisfied *28 U.S.C. § 1746*. *See* Dkt. 33 at 17 n.8. Also

contrary to the plaintiff's objection, *see* Dkt. 36 at 9, Judge Harvey did not rely on the declaration to draw conclusions about the adequacy of USAO-MA's search, *see* Dkt. 33 at 16 ("[The Executive Office] did not perform or directly supervise the searches, so a declaration would not be probative as to the adequacy of those searches."). Indeed, Judge Harvey's Report and Recommendation cites the Luczynski declaration substantively only one time—when explaining that "the former case tracking system [used by the U.S. Attorney's offices] was migrated to CaseView, which consequently includes information dating back to 1997." Dkt. 33 at 20. In light of the foregoing, Judge Harvey properly considered Luczynski's declaration.

D. Objection to the Adequacy of the USAO-MA Search

The plaintiff objects to the adequacy of the USAO-MA search by raising eleven issues. As a preliminary matter, because Judge Harvey addressed these issues thoroughly and persuasively, the issues are "not entitled to de novo review." *Hall, 2018 U.S. Dist. LEXIS 72110, 2018 WL 2002483, at *2*. Even so, the Court briefly addresses the issues for the sake of a complete treatment of the plaintiff's objections.

First, the plaintiff objects that Judge Harvey failed to determine whether Husted's declaration was facially defective. *See* Dkt. 36 at 10-11. As explained above, however, Judge Harvey determined that the declaration was *not* facially defective, after which he properly considered it. *See* Dkt. 33 at 14-18.

Second, the plaintiff objects to Judge Harvey's determination that it was reasonable for USAO-MA to focus on case-related records and that it was reasonable that USAO-MA did not identify records related to the plaintiff's report of a Whitey Bulger sighting. *See* Dkt. 36 at 11-12. The existence of the joint fugitive task force may suggest that USAO-MA has records related to the Whitey Bulger investigation, but it does not establish that USAO-MA has records related to the plaintiff's report of a Whitey Bulger sighting. Even if the plaintiff's reported sighting was communicated from USAO-CT to USAO-MA as part of the joint fugitive task force, the report likely would have been included in the case files, which were searched extensively. *See* Dkt. 33 at 21-22. Moreover, the report remains most likely to be found by USAO-CT, as to which Judge Harvey recommended that the Court deny summary judgment and that the Court direct supplemental affidavits or searches.

Third, the plaintiff again objects that Judge Harvey considered the Husted declaration, arguing that Judge Harvey improperly deemed Husted a supervisory employee. *See* Dkt. 36 at 12-14. This argument fails because Husted was a proper FOIA declarant for the reasons discussed above, *see supra* Section III.C, and for the reasons discussed by Judge Harvey, *see* Dkt. 33 at 14-23; *see also* Dkt. 34 at 1-2.

Fourth, the plaintiff objects to Husted's declaration because it stated that USAO-MA does not have a file system to record tips from the public regarding fugitives, yet USAO-MA displayed maps of Bulger sightings at a press conference. *See* Dkt. 36 at 16-17. Contrary to the plaintiff's argument, these propositions do not necessarily

contradict each other. As a result, they do not establish that Judge Harvey erred when concluding that USAO-MA's search was adequate.

Fifth, sixth, seventh, and eighth, the plaintiff objects in various ways that USAO-MA's search was improperly limited in scope. *See* Dkt. 36 at 14-16, 17-18, 18-19, 19-21. But the requests to USAO-MA were all related to cases or investigations. Therefore, it was reasonable for USAO-MA to perform interviews of Bulger's prosecution team and conduct searches for case-related files via the CaseView system, which "includes information about each investigation pursued by a U.S. Attorney's Office" and "is the primary way to search for case-related documents." Dkt. 33 at 21. That is sufficient to comply with FOIA, as Judge Harvey thoroughly explained. *See id.* at 20-22; *see also* *Oglesby v. U.S. Department of the Army, 920 F.2d 57, 68, 287 U.S. App. D.C. 126 (D.C. Cir. 1990)* ("There is no requirement that an agency search every record system.").[1]

Ninth, the plaintiff objects that Judge Harvey did not adequately determine "the general structure of systems or files in the two field offices." Dkt. 36 at 21. To the contrary, based on the submitted declarations, Judge Harvey analyzed at length the nature of the search systems and

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[1] The plaintiff attaches a document from the Bulger prosecution in which Bulger reported travelling to Boston when he was a fugitive. *See* Dkt. 36 at 38. The document was not produced by USAO-MA to the plaintiff, which demonstrates—according to the plaintiff—that the search was inadequate. *See id.* at 20-21. But documents showing that Bulger was in Boston are not related to the plaintiff's FOIA requests here, which involve the plaintiff's reports of sighting Bulger, not all information about Bulger's whereabouts.

locations relevant to this case. The CaseView system, just to give one example, "'tracks several types of information including the names of plaintiffs, investigative targets, defendants, when the investigation was opened, and when it was closed,' as well as the location of archived documents." Dkt. 33 at 19 n.9 (quoting Dkt 16-3, ¶ 27). The system "also includes 'the names of any related cases, what the case is about, the name of the AUSA(s) handling the case or matter, the judge assigned to the case, and the status of the case.'" *Id.* (quoting Dkt. 16-2, ¶ 4). Judge Harvey's treatment of the records systems involved in this case was a sufficient groundwork for determining that USAO-MA conducted an adequate search, *i.e.*, a search "reasonably calculated to uncover all relevant documents." *Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 514, 395 U.S. App. D.C. 138 (D.C. Cir. 2011)* (internal quotation marks omitted).

Tenth, the plaintiff objects to, in the plaintiff's words, Judge Harvey's "determination that the court is not required to review whether the agency was using *Section 552(c)* exceptions." Dkt. 36 at 22. This argument also fails for the reasons given by Judge Harvey. *See* Dkt. 33 at 24-25 & n.11.

Eleventh, the plaintiff objects that Judge Harvey accorded a presumption of good faith to the agency declarations. *See* Dkt. 36 at 23-24. But in doing so, Judge Harvey followed controlling precedent, which directs courts to accord adequate affidavits and declarations "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs., Inc., 926 F.2d at 1200*; *see*

also supra Section III.C. Therefore, the plaintiff's objection to the adequacy of USAO-MA's search fails.

E. Objection to the Recommended Disposition as to USAO-CT

Judge Harvey recommended that the Court deny without prejudice the defendant's motion for summary judgment as to the FOIA claims against USAO-CT. *See* Dkt. 33 at 22-23. Specifically, Judge Harvey explained that the plaintiff seeks information regarding reports she may have made to Assistant U.S. Attorney Sullivan. *Id.* at 22. Because the reports were not strictly case-related, searches of the CaseView system may not have turned up responsive material, and "Sullivan's email seems a reasonable place to search for responsive documents." *Id.* Therefore, Judge Harvey "recommend[ed] that USAO-CT be instructed to supplement its declaration to fill this gap in its demonstration of the adequacy of its search, either by searching AUSA Sullivan's email or by explaining why such a search is unnecessary." *Id.* at 22.

Even though Judge Harvey recommended that the Court deny defendant's motion for summary judgment as to USAO-CT, the plaintiff objects on the grounds that the defendant should not be permitted to supplement its motion with additional declarations. *See* Dkt. 36 at 24-27. Such supplementation, however, is common in FOIA cases, and it is unobjectionable here, as Judge Harvey explained. *See* Dkt. 33 at 22-23; *see, e.g.*, *Ancient Coin Collectors Guild, 641 F.3d at 515*; *Freedom Watch v. Bureau of Land Mgmt., 220 F. Supp. 3d 65, 70 (D.D.C. 2016)*; *Toensing v. DOJ, 890 F. Supp. 2d 121, 149 (D.D.C. 2012)*; *People for the*

Ethical Treatment of Animals, Inc. v. Bureau of Indian Affairs, 800 F. Supp. 2d 173, 178 n.2 (D.D.C. 2011).

F. Objection to Denial of Motion to Strike

The plaintiff objects that Judge Harvey exceeded his authority by denying the plaintiff's motion to strike instead of recommending a disposition. *See* Dkt. 36 at 27; *see also* Dkt. 20 (plaintiff's motion to strike); Dkt. 34 (memorandum opinion and order denying the plaintiff's motion to strike). But the denial was solidly within Judge Harvey's authority. *See* Local Civ. R. 72.1(b); Local Civ. R. 72.2(a); Minute Order of July 17, 2017 (referring case to magistrate judge for full case management, up to but excluding trial).

The plaintiff also objects that the denial of the motion to strike improperly determined that no admissions arose from the defendant's pleadings and improperly considered the Luczynski declaration. These objections fail for the reasons discussed above, *see supra* Sections III.B and III.C, and for the reasons discussed by Judge Harvey, *see* Dkt. 33 at 13-18. The plaintiff further objects that Judge Harvey, when issuing the order denying the motion to strike, failed to address the plaintiff's request for sanctions for declarations filed in bad faith. *See* Dkt. 36 at 28. But Judge Harvey determined that the defendant had not submitted filings in bad faith. *See* Dkt. 20. Therefore, it was wholly unnecessary for him to address whether sanctions were warranted.

G. Objection to the Recommended Disposition of the Motion for Reconsideration

During summary judgment briefing, the plaintiff filed a motion to take discovery pursuant to *Rule 56(d)*. *See* Dkt. 25. The previously assigned judge denied the motion as premature in light of the ongoing summary judgment briefing. *See* Minute Order of June 27, 2017 ("In light of the ongoing summary-judgment briefing in plaintiff's FOIA action, plaintiff's motion for leave to take discovery is denied as premature. *See Murphy v. FBI, 490 F. Supp. 1134, 1136 (D.D.C. 1980)* ('Whether the instant case warrants discovery is a question of fact that can only be determined after the defendants file their dispositive motion and accompanying affidavits.')"). The plaintiff then filed a motion for reconsideration, Dkt. 26, after which the case was referred to Judge Harvey.

Although the motion for reconsideration was within Judge Harvey's authority to resolve, *see* Local Civ. R. 72.2, he declined to do so because "a motion for reconsideration is usually decided by the judge who issued the original decision," Dkt. 33 at 1 n.1. Instead, Judge Harvey thoroughly analyzed the motion and recommended that it be denied. *See* Dkt. 33 at 7-11.

The plaintiff objects to this recommendation, but to no avail. As a threshold defect, the plaintiff reprises arguments raised previously, but there is no "good reason" why, "hav[ing] once battled for the court's decision," the plaintiff should be "permitted[] to battle for it again." *Hall & Assocs., 210 F. Supp. 3d 13, 2016 WL 5396653, at *3 (D.D.C. Sep. 27, 2016)* (quoting *Singh, 383 F. Supp. 2d 99, 101 (D.D.C. 2005)*). The plaintiff "asks for a second bite at the apple, which is precisely what reconsideration of an order is not designed to provide." *United States v. Weaver,*

*2013 U.S. Dist. LEXIS 195071, 2013 WL 12061612, at *1 (D.D.C. Aug. 7, 2013)*.

Moreover, the plaintiff does not demonstrate any infirmity in the Court's order denying the motion to take discovery. As Judge Harvey pointed out, "'[d]iscovery in FOIA cases is rare,' in part because agency affidavits are entitled to a presumption of good faith, 'which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.'" Dkt. 33 at 9 (quoting *Competitive Enter. Inst. v. Off. of Sci. & Tech. Policy, 161 F. Supp. 3d 120, 136 (D.D.C. 2016)*). And the circumstances in this case do not justify departing from the usual course in FOIA actions. *See id. at 9-10*. The Court will therefore deny the motion for reconsideration.

H. Objection to the Recommended Disposition of the Plaintiff's Cross-Motion for Summary Judgment

Finally, the plaintiff objects to the recommended disposition of her cross-motion for summary judgment. *See* Dkt. 36 at 35-37. Because Judge Harvey recommended that the Court deny the defendant's motion for summary judgment as to USAO-CT and that the Court direct USAO-CT to supplement its declarations or affidavits, Judge Harvey explained that "it would be premature to address Plaintiff's motion at this time." Dkt. 33 at 26. Therefore, he "recommend[ed] denying Plaintiff's motion without prejudice to renewal once Defendant has submitted its updated affidavit." *Id.*

The Court agrees. The plaintiff's motion seeks summary judgment on issues involving the withholding of

information under FOIA. *See id.* at 25-26. The defendant's updated declarations or affidavits, however, will address the issue of FOIA withholding. Thus the updated filings may modify the legal terrain, and it would be premature and inefficient to decide the plaintiff's motion for summary judgment at this time. Therefore, the Court will deny the plaintiff's motion without prejudice. At the appropriate time following the defendant's updated filings, the plaintiff is free to renew her arguments or any other arguments that may arise.

CONCLUSION

For the foregoing reasons, it is **ORDERED** that Magistrate Judge G. Michael Harvey's Report and Recommendation, Dkt. 33, is **ADOPTED** in its entirety. It is further

ORDERED that the defendant's Motion for Summary Judgment, Dkt. 16, is **GRANTED IN PART** as to USAO-MA and **DENIED IN PART** as to USAO-CT, that the plaintiff's Cross-Motion for Summary Judgment, Dkt. 18, is **DENIED WITHOUT PREJUDICE**, and that the plaintiff's Motion for Reconsideration, Dkt. 26, is **DENIED**. It is further

ORDERED that the parties shall contact Magistrate Judge G. Michael Harvey's chambers to determine a schedule for future proceedings as to the plaintiff's USAO-CT FOIA request, in accordance with this opinion and the adopted Report and Recommendation.

SO ORDERED.

/s/ Dabney L. Friedrich

DABNEY L. FRIEDRICH

United States District Judge

Date: May 8, 2018

APPENDIX F

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 16-cv-2351 (DLF/GMH)

SARA DISCEPOLO,
Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Appellee.

On Summary Judgment I

REPORT AND RECOMMENDATION

January 19, 2018

Before: G. MICHAEL HARVEY, *UNITED STATES MAGISTRATE JUDGE.*

REPORT AND RECOMMENDATION

This matter, brought pursuant to the Freedom of Information Act, *5 U.S.C. § 552*, and the Privacy Act, *5 U.S.C. §552a* (collectively, "FOIA"), has been referred to the undersigned for full case management. Defendant has filed a motion for summary judgment and Plaintiff has filed a cross-motion for summary judgment, both of which are ripe for adjudication. Also ripe for adjudication is Plaintiff's motion for reconsideration of a prior discovery order.[1] Based on the entire record and the reasons below,[2] the

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[1] The discovery order underlying the motion for reconsideration was issued by the Honorable Emmet G. Sullivan, United States District Judge, prior to referral of the case to the undersigned. The case has now been reassigned to the Honorable Dabney L. Friedrich, United States District Judge. Although the motion for reconsideration of that discovery order is technically a non-dispositive motion that could be resolved by a United States Magistrate Judge in an Order rather than a Report and Recommendation, the undersigned does not do so here because a motion for reconsideration is usually decided by the judge who issued the original decision, who, in this case, was Judge Sullivan. However, in the interest of efficiency, the motion for reconsideration is addressed here.

Plaintiff's motion to strike the declarations submitted in support of Defendant's motion for summary judgment is also a non-dispositive motion that may be resolved by the undersigned in an Order. It is addressed in a Memorandum Opinion and Order issued contemporaneously with this Report and Recommendation.

[2] The relevant submissions for the purposes of the motions addressed here are Plaintiff's Complaint [Dkt. 1]; Defendant's Answer [Dkt. 5]; Defendant's Motion for Protective Order [Dkt. 11]; Plaintiff's Opposition to Defendant's Motion for Protective Order [Dkt. 13]; Memorandum in Support of Defendant's Motion for Summary Judgment [Dkt. 16]; Defendant's

undersigned recommends granting Defendant's Motion for Summary Judgment in part and denying it in part without prejudice, denying Plaintiff's Cross-Motion for Summary Judgment without prejudice, and denying Plaintiff's Motion for Reconsideration.

BACKGROUND

This case concerns three FOIA requests[3] made by Plaintiff seeking documents concerning criminal investigations in

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Statement of Material Facts [Dkt. 16-1]; Declaration of Elisha Biega dated May 18, 2017, and attachments [Dkt. 16-2]; Declaration of Susanne Husted dated May 18, 2017, and attachments [Dkt. 16-3]; Memorandum of Points and Authorities in Support of Plaintiff's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment [Dkt. 18-1]; Plaintiff's Statement of Material Facts and Response to Defendant's Statement of Material Facts [Dkt. 18-3]; Declaration of Sara Discepolo dated June 19, 2017, and attachments [Dkt. 18-4]; Plaintiff's Motion for Reconsideration [Dkt. 26]; Defendant's Opposition to Plaintiff's Motion for Reconsideration [Dkt. 28]; Plaintiff's Reply Memorandum re: Motion for Reconsideration [Dkt. 29]; Reply Memorandum in Further Support of Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Cross-Motion for Summary Judgment [Dkt. 30]; Declaration of David Luczynski dated July 19, 2017 [Dkt. 30-1]; Defendant's Response to Plaintiff's Statement of "Additional Facts" [Dkt. 30-2]; and Reply Memorandum re: Plaintiff's Cross-Motion for Summary Judgment [Dkt. 32]. Citations to page numbers reflect the pagination assigned by the Court's Electronic Case Filing system.

[3] Plaintiff objects to the characterization that her requests were made solely under FOIA, citing DOJ guidelines stating that requests under FOIA are treated as if they are made pursuant to both FOIA and the Privacy Act. [Dkt. 18-3, ¶ 1]. She does

which she was mentioned as the target, the victim, or otherwise, as well as documents related to a report Plaintiff purportedly made to federal authorities in August 2000 that she had seen James J. "Whitey" Bulger, the organized crime boss who was prosecuted and convicted by the U.S. Attorney's Office for the District of Massachusetts in 2013.

A. Facts

On April 17, 2017, Plaintiff sent two requests to the U.S. Attorney's Office for the District of Massachusetts ("USAO-MA"). One of those asked for all documents related to (1) "[a]ny criminal investigation of [Plaintiff] from January 1, 2000 through December 31, 2000 or until said investigation terminated"; (2) any "mention of [Plaintiff's] name in any criminal investigation of any other person from January 1, 2000 through December 31, 2000 or until said investigation terminated"; (3) "[i]nformation reflecting that [Plaintiff] was the subject or the target of any criminal activities occurring from anytime from January 1, 2000 through December 31, 2000"; and (4) Plaintiff's "report in August 2000 of having seen Whitey Bulger in person." [Dkt. 18-4 at 7]. The other request asked for documents related to "[a]ny criminal investigation of [Plaintiff] (or the mention of [Plaintiff's] name in any criminal investigation of any other person) from January 1, 2012 through the present." [Dkt. 18-4 at 9].

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not, however, explain how that makes a difference here, and, indeed, it appears that requests made under FOIA are generally entitled to broader disclosure than those made under the Privacy Act. *See, e.g.*, *Acosta v. F.B.I., 946 F. Supp. 2d 53, 61-62 (D.D.C. 2013)*.

Also on April 17, 2017, Plaintiff sent a request to the U.S. Attorney's Office for the District of Connecticut ("USAO-CT") regarding communications she had with one of its Assistant U.S. Attorneys, David X. Sullivan. She requested "all documents in [its] possession relating in any way" to (1) Plaintiff's "report to Assistant United States Attorney David X. Sullivan in August of 2000 that [Plaintiff] was the target of criminal activities in South Boston, Massachusetts," and (2) Plaintiff's "report to Assistant United States Attorney David X. Sullivan sometime in August of 2000 that [Plaintiff] had seen Whitey Bulger in person in South Boston, Newton, or the Greater Boston area." [Dkt. 18-4 at 12]. Plaintiff did not explain how she made these communications or why she made them to a U.S. Attorney's Office outside the District of Massachusetts.

Although not ultimately material to the resolution of this case, the agency response to these requests can only be described as confused. A May 5, 2017 letter from USAO-MA informed Plaintiff that her request had been forwarded to the Freedom of Information/Privacy Act Unit of the Executive Office of for United States Attorneys ("EOUSA") for review prior to processing. [Dkt. 18-4 at 16]. On May 19, 2015, EOUSA sent Plaintiff a letter informing her that her request, the subject of which is identified as "Self (Specific records)/CT" had been assigned tracking number FOIA-2015-02310. [Dkt. 18-4 at 18]. Apparently assuming that the May 19 letter referred to her USAO-CT request, Plaintiff asked EOUSA to provide her an update on the status of her USAO-MA request. [Dkt. 18-4 at 22]. In a letter dated August 13, 2015, which identifies the subject of the request as "Self (Specific Records)-USAO District of

Massachusetts," EOUSA informed Plaintiff that a "search for records located in the United States Attorney's Office for the District of Connecticut has revealed no responsive records." [Dkt. 18-4 at 25].

On September 22, 2015, the Office of Information Policy at the U.S. Department of Justice ("OIP") sent Plaintiff a letter noting that Plaintiff had appealed "from the action of [EOUSA] on [her] Freedom of Information Act request for access to records located in the United States Attorney's Office for the Districts of Massachusetts and Connecticut concerning reports that . . . [she] provided to an Assistant United States Attorney." [Dkt. 18-4 at 27]. OIP informed her that EOUSA had divided the request into two, assigning tracking number FOIA-2015-02310 to the portion of the request seeking records from USAO-MA and tracking number FOIA-2015-03073 to the portion of the request seeking records from USAO-CT. *Id.* Adding to the confusion, OIP stated that it affirmed EOUSA's report that the USAO-MA request uncovered no responsive records and noted that the USAO-CT request was still being processed. *Id.*

Apparently in response to an inquiry by Plaintiff, USAO-CT then attempted to clarify the situation. In a letter dated October 28, 2015, USAO-CT asserted that the request directed to it was assigned the number FOIA-2015-02310. [Dkt. 18-4 at 30]. USAO-CT processed that request and found no responsive records regarding her report to AUSA Sullivan; however, when EOUSA sent her the decision, it mistakenly identified the District of Massachusetts in the subject line. *Id.* That led to confusion at OIP when it reviewed her appeal, resulting in the September 22, 2015 decision that "referenced Massachusetts, but should have

referenced Connecticut." *Id.* USAO-CT had no knowledge of FOIA-2015-03073, but suggested that the number was assigned to the request directed to USAO-MA. *Id.* at 30-31. However, a decision from EOUSA dated November 10, 2015 referencing request number FOIA-2015-03073 identifies the subject as "Self/Specific Records-USAO Connecticut" and states that a search in that office recovered no responsive records. [Dkt. 18-4 at 33]. OIP's decision in the appeal of that decision again states that it concerns EOUSA's action on Plaintiff's FOIA request "for access to records located in the United States Attorney's Office for the District of Connecticut concerning reports [she] allegedly made to an Assistant United States Attorney in August 2000." [Dkt. 18-4 at 35].

Subsequent to these rather bewildering communications (and after Plaintiff filed this action), both USAO-MA and USAO-CT engaged in searches directed to each of Plaintiff's FOIA requests in a more orderly fashion, querying the offices' case management systems, interviewing relevant individuals, and checking archived paper records, among other things. [Dkt. 16-2 (detailing USAO-CT searches); Dkt. 16-3 (detailing USAO-MA searches)].

B. Procedural History

Having presumably exhausted her administrative remedies, Plaintiff filed her complaint in this Court in November 2016. [Dkt. 1]. Defendant filed its Answer on January 9, 2017, and Plaintiff served Defendant with Requests for Admission on January 26, 2017, and February 1, 2017. [Dkt. 5; Dkt. 18-4 at 41, 47]. Those requests asked

Defendant to admit, among other things, that it did not search for all of the records described in Plaintiff's FOIA requests, that documents described in the FOIA requests exist, that Defendants' reference to "responsive records" in its communications with Plaintiff "did not encompass records which it deemed exempt under FOIA," and that Defendant's search in response to Plaintiff's request to USAO-MA sought records regarding only Plaintiff's report to AUSA Sullivan and searched only records located at USAO-CT. [Dkt. 18-4 at 39, 46].

In early March 2017, in response to an order entered by Judge Sullivan, Defendant proposed a schedule for briefing cross-motions for summary judgment. [Dkt. 8]. Plaintiff, however, asserted that "any agency dispositive motion . . . would be conclusive at best," and sought entry of a discovery schedule; in the alternative, she proposed a summary judgment briefing schedule. [Dkt. 9]. On March 17, 2017, Defendant filed a Motion for a Protective Order "to forbid any discovery" in the case. [Dkt. 11 at 1]. Over Plaintiff's opposition, the Court granted the motion in part, ruling that Plaintiff's requests for discovery were premature. Minute Order dated Apr. 21, 2017. The Court ultimately ordered a summary judgment briefing schedule under which the cross-motions would be fully submitted by August 18, 2017. Minute Order dated Apr. 6, 2017.

In the midst of summary judgment briefing, Plaintiff filed a motion to take discovery pursuant to *Rule 56(d) of the Federal Rules of Civil Procedure*. [Dkt. 25]. The Court denied the motion as premature in light of the ongoing summary judgment briefing, Minute Order dated June 27, 2017, and Plaintiff promptly filed her Motion for Reconsideration [Dkt. 26]. Thereafter, the case was

referred to the undersigned. Minute Order dated July 17, 2017. Later, Judge Friedrich took over the case from Judge Sullivan. Order dated Dec. 4, 2017.

C. Summary Judgment Motions

As noted, the parties have filed cross-motions for summary judgment. Defendant argues that its searches in connection with Plaintiff's FOIA requests were adequate, relying on declarations from Elisha Biega, the FOIA coordinator for USAO-CT; Susanne Husted, the FOIA coordinator for USAO-MA; and David Luczynski, Attorney Advisor for EOUSA's FOIA unit. [Dkt. 16 at 3-7; Dkt. 16-2, ¶ 1; Dkt. 16-3, ¶¶ 1-3; Dkt. 30-1, ¶ 1].

Plaintiff makes a number of arguments in response. She first contends that Defendant's failure to respond to her Requests for Admission, as well as certain averments in Defendant's Answer that it lacked sufficient knowledge to confirm or deny Plaintiff's allegations, function as admissions establishing that the records she seeks exist and that Defendant did not perform an adequate search. [Dkt. 18-1 at 6-9]. Based on these purported admissions, she argues that the Court may not consider the contradictory assertions in the declarations of Ms. Biega and Ms. Husted, and that, having thus established that the requested documents exist, there is a genuine issue of material fact as to whether the searches were adequate and whether documents are being improperly withheld. *Id.* at 9-13. She then challenges the declarations of Ms. Biega and Ms. Husted as substantively insufficient to establish that adequate searches were performed. *Id.* at 14-17, 25-36. She further asserts that Ms. Biega and Ms. Husted are

improper declarants, and attacks the form of their declarations.[4] *Id.* at 18-25. Finally, she contends that, based on the language used in the relevant declarations, a genuine issue of material fact exists as to whether Defendant is withholding records based on *5 U.S.C. § 552(c)*, which exempts certain law enforcement records from the requirements of FOIA. *Id.* at 36-39. Plaintiff also moves for summary judgment on Defendant's affirmative defenses that the Court lacks subject matter jurisdiction over this action and that information responsive to Plaintiff's FOIA requests are protected from disclosure by statutory exemptions. *Id.* at 39-41.

In addition, Plaintiff seeks reconsideration of Judge Sullivan's decision on her motion for discovery pursuant to *Rule 56(d)*. The undersigned turns to that motion first.

DISCUSSION

A. Motion for Reconsideration

In this Court, a motion for reconsideration of a decision on a non-dispositive matter may be granted "as justice requires." *Ludlam v. U.S. Peace Corps, 970 F. Supp. 2d 19, 20 (D.D.C. 2013)* (quoting *Judicial Watch v. Dep't of Army, 466 F. Supp. 2d 112, 123 (D.D.C. 2006)*); *see also Fed. R.*

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[4] Plaintiff's arguments regarding Defendant's purported admissions and the competency of Ms. Biega and Ms. Husted as declarants mirror the arguments in her Motion to Strike [Dkt. 20], which is addressed in a separate Order.

Civ. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities"). In ruling on such a motion, a court may consider "whether the court patently misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decisions or data, or whether a controlling or significant change in the law has occurred." Id. at 20-21 (quoting In Def. of Animals v. Nat'l Inst. of Health, 543 F. Supp. 2d 70, 75 (D.D.C. 2008)). The proponent of reconsideration must show that denial of her motion will result in "legal or at least tangible" harm. Id. at 21 (quoting In Def. of Animals, 543 F. Supp. 2d at 76). The court should exercise its broad discretion on such motions keeping in mind the strictures of the law of the case doctrine and the principle that, once a court has ruled on a motion, the interested parties should be required to address it again only in rare circumstances. See id. ("[The court's] discretion is 'limited by the law of the case doctrine and subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'" (quoting In Def. of Animals, 543 F. Supp. 2d at 76)).

Plaintiff has not made the required showing here. She appears to argue that Judge Sullivan failed to consider controlling decisions of law: "[T]he summary denial and removal of Plaintiff's Motion from the docket was an error of law that should be reversed." [Dkt. 26 at 3]. Plaintiff is

incorrect. She ignores the fact that FOIA cases are "typically and appropriately decided on motions for summary judgment" in which the defendant agency relies solely "on reasonably detailed, nonconclusory affidavits submitted in good faith." *Ryan v. F.B.I., 174 F. Supp. 3d 486, 490-91 (D.D.C. 2016)* (first quoting *Gold Anti—Trust Action Comm., Inc. v. Bd. of Governors of Fed. Reserve Sys., 762 F. Supp. 2d 123, 130 (D.D.C. 2011)*, then quoting *Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485, 240 U.S. App. D.C. 339 (D.C. Cir. 1984))*. "Discovery in FOIA cases is rare," in part because agency affidavits are entitled to a presumption of good faith, "which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy, 161 F. Supp. 3d 120, 136 (D.D.C. 2016)*. Indeed, even if a court determines that the agency's declarations are insufficient, the "remedy of first resort" is not discovery, but a request for the agency to "supplement its supporting declarations."[5] *Freedom Watch v. Bureau of Land Mgmt., 220 F. Supp. 3d 65, 70 (D.D.C. 2016)* (quoting *Judicial Watch v. Dep't of Justice, 185 F. Supp. 2d 54, 65 (D.D.C. 2002))*.

Plaintiff identifies no case that would require granting her discovery motion in the circumstances presented. Her reliance on *Convertino v. U.S. Dep't of Justice, 684 F.3d 93, 401 U.S. App. D.C. 297 (D.C. Cir. 2012)*, is misplaced. That case addressed a situation in which a federal prosecutor

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[5] Plaintiff's statement that *Competitive Enterprise Institute* and *Freedom Watch* are "inapposite" because they did not concern *Rule 54(d)* motions [Dkt. 29 at 3] is not supported by precedent, argument, or logic.

who was under investigation by the Department of Justice ("DOJ") for certain alleged ethical violations in a terrorism prosecution sued the department alleging that "an unidentified DOJ employee willfully or intentionally disclosed confidential Privacy Act-protected information to [a] reporter." *Id. at 97*. Discovery "was both slow and litigious," because, among other things, the reporter invoked his *Fifth Amendment* right against self-incrimination at his deposition. *Id. at 97-98*. When the discovery period ended, DOJ moved for summary judgment, and the plaintiff cross-moved for a stay in order to continue to pursue discovery as to the identity of the alleged leaker. *Id. at 98*. The D.C. Circuit reversed the decision granting the defendant's motion and denying the plaintiff's motion. It based its decision on the district court's "mistaken view" that the plaintiff could continue his discovery efforts in other courts even after the main litigation had terminated, as well as "the 'monumental' efforts [the plaintiff] ha[d] taken to discover the needed information." *Id. at 102* (quoting *Convertino v. U.S. Dep't of Justice, 769 F. Supp. 2d 139, 144 (D.D.C. 2011)*). That situation is hardly analogous to the case, here—an action seeking documents pursuant to FOIA from an administrative agency. *Johnson v. United States, 188 F.R.D. 692, 696 (N.D. Ga. 1999)*, is even less helpful to Plaintiff. She cites that case for the proposition that "[w]here there are both pending discovery requests and pending summary judgment motions in a case, it is an abuse of district court discretion to grant the motion for summary judgment without first considering the discovery motions." *Id. at 696*. That is not the case here, as Judge Sullivan considered and denied her discovery motion prior

to any consideration of the summary judgment motions at issue in this Report and Recommendation.

Moreover, her complaint that Judge Sullivan's order must be reconsidered because it addressed only the issue of discovery and not her request for a stay is ill-considered. The sole reason to impose a stay of summary judgment briefing would have been to allow plaintiff to engage in discovery. The denial of the discovery request therefore required and implied the denial of the stay request.

Finally, Plaintiff has not shouldered her burden of establishing harm from denial of the reconsideration motion. Indeed, she insists that "[t]he only issue [here] is not whether [she] may obtain discovery, but whether it was an abuse of the Court's discretion and an error of law to remove the *Rule 56(d)* Motion as a proper filing on the docket without considering it based on the factors in *Convertino* ." [Dkt. 29 at 2]. That is, she argues that the harm she has suffered is merely that her original motion did not get the consideration it deserved, rather than that the decision was incorrect and she is entitled to the requested discovery. This is too inchoate a harm to merit granting Plaintiff's reconsideration motion. *See, e.g., Ludlam, 970 F. Supp. 2d at 20* (requiring "legal or at least tangible" harm before granting motion for reconsideration).

The undersigned therefore recommends denying the Motion for Reconsideration.

B. Defendant's Motion for Summary Judgment

1. Legal Standard

FOIA presumes that an informed citizenry is "vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978)*. It was enacted to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," and generally favors "full agency disclosure." *Dep't of the Air Force v. Rose, 425 U.S. 352, 360-61, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)* (quoting *Rose v. Dep't of the Air Force, 495 F.2d 261, 263 (2d Cir. 1974)*). All the same, it incorporates nine exemptions aimed at balancing these ideals with the possibility that "legitimate governmental and private interests could be harmed by release of certain types of information." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 872, 298 U.S. App. D.C. 8 (D.C. Cir. 1992)* (en banc) (quoting *FBI v. Abramson, 456 U.S. 615, 621, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982)*).

FOIA cases are generally resolved on motions for summary judgment. *Brayton v. Office of the U.S. Trade Rep., 641 F.3d 521, 527, 395 U.S. App. D.C. 155 (D.C. Cir. 2011)*. The agency has the burden of justifying its response to the FOIA request it received, and the federal court reviews its response *de novo*. *5 U.S.C. § 552(a)(4)(B)*. "At the summary judgment stage, where the agency has the burden to show that it acted in accordance with the statute, the court may rely on '[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.'" *Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 326, 336 U.S. App. D.C. 386 (D.C. Cir. 1999)* (alteration in original) (quoting *Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 68, 287 U.S. App. D.C. 126 (D.C. Cir. 1990)*). Such affidavits or declarations "are accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200, 288 U.S. App. D.C. 324 (D.C. Cir. 1991)* (quoting *Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771, 224 U.S. App. D.C. 1 (D.C. Cir. 1981)*). Moreover, a defendant may seek summary judgment based on searches performed after the inception of litigation in federal court. *See, e.g., Ray v. Fed. Bureau of Prisons, 811 F. Supp. 2d 245, 247-48, 250 (D.D.C. 2011)* (granting summary judgment for defendant where original FOIA request mishandled and search did not commence until after filing of complaint); *Cf. Toensing v. U.S. Dep't of Justice, 890 F. Supp. 2d 121, 149 (D.D.C. 2012)* (denying defendant's motion for summary judgment without prejudice to renewal after searches modified); *People for the Ethical Treatment of Animals, Inc. v. Bureau of Indian Affairs, 800 F. Supp. 2d 173, 178 n.2 (D.D.C. 2011)* (noting that courts often require agency to conduct more thorough search before granting plaintiff relief and terminating case).

More generally, summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed.*

2d 202 (1986). In adjudicating such a motion, all reasonable inferences from the facts in the record must be made in favor of the non-moving party. Anderson, 477 U.S. at 255. To prevail, the moving party must show that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). To do this, it may cite the record, including "affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A). Factual assertions made in the moving party's affidavits or declarations may be accepted as true in the absence of contrary assertions made in affidavits, declarations, or documentary evidence submitted by the non-moving party. Neal v. Kelly, 963 F.2d 453, 456, 295 U.S. App. D.C. 350 (D.C. Cir. 1992).

2. Defendant's Purported Admissions

Plaintiff asserts that Defendant should be deemed to have made admissions as to some of the critical issues in this case—for example, that the records sought in Plaintiff's FOIA requests exist—because Defendant (1) failed to respond to Plaintiff's Requests for Admissions on the relevant questions and (2) improperly asserted that it lacked sufficient knowledge to admit or deny the relevant allegations in its Answer. Neither argument succeeds.

The first contention is frivolous. Defendant filed a motion for a protective order to insulate it from discovery in this matter. [Dkt. 11]. That motion specifically identified Plaintiff's Requests for Admissions. *Id.* at 2. Judge Sullivan granted the motion in relevant part, stating, "[D]efendant is not required to respond to plaintiff's discovery requests at this time." Minute Order dated Apr. 6, 2017. Plaintiff's insistence that the order operates only prospectively [Dkt.

32 at 3] has no foundation in the text of the Order. Indeed, Plaintiff made that argument in opposition to Defendant's motion [Dkt. 13 at 6-7], and Judge Sullivan necessarily rejected it when he absolved Defendant of the duty to respond.[6]

The second argument fares no better. Defendant stated in its Answer that it lacked sufficient knowledge to admit or deny that documents responsive to Plaintiff's requests existed. [Dkt. 5, ¶¶ 20, 27]. Plaintiff asserts these statements were a sham because Defendant "supposedly did a search for [the requested documents] the year before." [Dkt. 20-1 at 4]. However, as the Court noted in *Clay v. District of Columbia*, a case Plaintiff cites in support of her motion, "courts generally resort to the sanction of deeming an allegation as admitted" only "where there is bad faith or evasive pleading." *831 F. Supp. 2d 36, 47 (D.D.C. 2011).* Plaintiff has shown neither here. It is not unusual for an agency to continue to search for requested documents after a complaint has been filed, *see, e.g.,* *Ray, 811 F. Supp. 2d at 247-48*, and, indeed, Defendant did so here. [Dkt. 16-2, ¶¶ 13-15; Dkt. 16-3, ¶¶ 17, 21-26]. Given the evident confusion over Plaintiff's FOIA requests outlined above,

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[6] To the extent that any matters could be deemed admitted by Defendant's failure to respond, Judge Sullivan's order had the effect of withdrawing those admissions pursuant to *Rule 36(b) of the Federal Rules of Civil Procedure*. To quibble, as Plaintiff does, that the motion did not cite *Rule 36(b)* [Dkt. 32 at 3] is to exalt form over substance. *See, e.g., Tequila Centinela, S.A. de C.V. v. Bacardi & Co., 247 F.R.D. 198, 205 (D.D.C. 2008)* ("*Rule 36* 'has never been interpreted so woodenly'" as to require a court to deem a matter admitted in the absence of a timely response. (quoting *Banks v. Office of the Senate Sergeant —at-Arms and Doorkeeper, 226 F.R.D. 113, 118 (D.D.C. 2005)*)).

those additional searches and Defendant's responses in its Answer were both rational and accurate. Plaintiff cites *Summerville v. Covington Coal LLC, No. 14-cv-2099, 2016 U.S. Dist. LEXIS 29076, 2016 WL 797178, at *1 (S.D. Ind. Mar. 7, 2016)* to support her claim that Defendant could have "with the 'slightest effort'" determined definitively whether it did or did not possess the requested information prior to filing its Answer. [Dkt. 18-1 at 8]. That argument is subverted not only by the description of the searches in which the agency actually engaged here, which included interviewing individuals as well as searching electronic and paper records [Dkt. 16-2, ¶¶ 3, 13-15; Dkt. 16-3, ¶¶ 13-17, 21-26, 28], but also by Plaintiff's own position that even more extensive searches were necessary [Dkt. 18-1 at 28-30, 32-36]. There is therefore no basis upon which to deem as admitted Plaintiff's statements that responsive documents exist.

3. Declarations of Ms. Biega, Ms. Husted, and EOUSA

Plaintiff attacks the declarations of Ms. Biega and Ms. Husted, asserting that the declarants are not competent to provide evidence because neither supervised the FOIA searches, because EOUSA was the entity that "processed" the searches, because Ms. Biega's declaration is based on hearsay, and because Ms. Husted made her statement based in part on "information and belief."[7] [Dkt. 18-1 at 18-25]. Plaintiff is incorrect on all counts.

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[7] The undersigned addresses these points out of the order in which they are presented in Plaintiff's brief because, like the issues in the section immediately above, they are based on

Plaintiff begins by asserting that "[i]t is well established that an agency must proffer the declaration of a supervisory employee who processes searches when the agency moves for summary judgment in FOIA cases." [Dkt. 18-1 at 19]. The cases she cites, however, establish no such thing. Rather, they stand for the proposition that one who supervises FOIA searches is *an* appropriate declarant, not the *only* appropriate declarant. *See* Am. Fed'n of Gov't Emps., Local 812 v. Broad. Bd. Of Governors, 711 F. Supp. 2d 139, 150 (D.D.C. 2010) ("[A]n agency *may* rely on an affidavit of an agency employee responsible for supervising the search." (alteration in original) (emphasis added) (quoting Maynard v. C.I.A., 986 F.2d 547, 560 (1st Cir. 1993))); Rosenfeld v. U.S. Dep't of Justice, No. C 07-3240, 2008 U.S. Dist. LEXIS 64620, 2008 WL 3925633, at *11 (N.D. Cal. Aug. 22, 2008) ("For an action involving a FOIA request, an agency *may* submit a declaration from an agency official with 'responsibility for coordinating the agency's decisions on FOIA requests where that official has personal knowledge of the procedures used in handling the FOIA request at issue and is familiar with the documents in question.'" (emphasis added) (quoting Berman v. C.I.A., 378 F. Supp. 2d 1209, 1216 n. 7 (E.D. Cal. 2005))); Brophy v. U.S. Dep't of Defense, No. 05-cv-360, 2006 U.S. Dist. LEXIS 11620, 2006 WL 571901, at *4-5 (D.D.C. Mar. 8, 2006) (approving declaration of supervisory employee because "necessity is the mother of invention" and success of federal FOIA program requires, as practical matter, allowing such declarations). These cases clearly indicate that it is appropriate in a FOIA case to submit a declaration from a person who conducted the search *or* a

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procedural or formal issues and they are included in Plaintiff's motion to strike.

person who supervised the search. Here, each declarant is the FOIA contact person for her district, meaning that she is familiar with the procedures for handling FOIA requests, and each asserts that she performed searches related to Plaintiff's requests, supervised such searches, or both. [Dkt. 16-2, ¶¶ 1, 13-15 (Ms. Biega personally searched files and sought additional information from other employees); Dkt. 16-3, ¶¶ 1, 3, 13-29 (Ms. Husted supervised searches and personally performed searches)]. Each is therefore an appropriate declarant. *See, e.g.,* *Taylor Energy Co. v. United States Dep't of Interior Bureau of Ocean Energy Mgmt., 271 F. Supp. 3d 73, 92 n.11, 2017 WL 4236522, at *12 n.11 (D.D.C. 2017)* (approving use of declarations based on personal knowledge and information from officers responsible for FOIA requests).

Plaintiff's assertion that Ms. Biega "did not review the official files and records of USAO Connecticut or have a familiarity with its records" [Dkt. 18-1 at 23], which is the basis of her hearsay objection, is belied by Ms. Biega's declaration, which, as noted, makes clear that she had such familiarity and performed searches. [Dkt. 16-2, ¶¶ 1, 13-15]. Moreover, it is well-established that "[d]eclarations 'contain[ing] hearsay in recounting searches for documents are generally acceptable' in FOIA cases." *Allen v. Fed. Bureau of Prisons, 263 F. Supp. 3d 236, 242 (D.D.C. 2017)* (second alteration in original) (quoting *Kay v. FCC, 976 F. Supp. 23, 34 n.29 (D.D.C. 1997)).*

Plaintiff's related complaint that no one from EOUSA filed a declaration [Dkt. 18-1 at 19] is irrelevant and, ultimately, inaccurate—indeed, Plaintiff cites no case (nor is the undersigned aware of any) for the proposition that, where the adequacy of a search is at issue, an agency must file an

affidavit from the individual who "processed" FOIA requests. It is irrelevant because EOUSA did not perform or directly supervise the searches, so a declaration would not be probative as to the adequacy of those searches. *See, e.g.,* *Rosenfeld, 2008 U.S. Dist. LEXIS 64620, 2008 WL 3925633, at *12* (rejecting declaration where there was no evidence that declarant directly supervised those performing searches). It is incorrect because Defendant submitted with its Reply a declaration from an Attorney Advisor employed at EOUSA. That declaration explains EOUSA's limited role in FOIA requests sent to U.S. Attorney's Offices, which does not include directing, providing, or evaluating searches.[8] [Dkt. 30-1, ¶¶ 4-7].

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[8] Plaintiff also complains that EOUSA's declaration does not comply with *28 U.S.C. § 1746*. [Dkt. 32 at 11]. *Section 1746* provides that unsworn declarations may be used just as sworn statements as long as they substantially comply with the prescribed form: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." *28 U.S.C. § 1746*; *see Cobell v. Norton, 391 F.3d 251, 260, 364 U.S. App. D.C. 2 (D.C. Cir. 2004)* ("*28 U.S.C. § 1746* contemplate[s] as adequate certifications that are 'substantially' in the form of the language of their provisions."); *LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Worsham, 185 F.3d 61, 66 (2d Cir. 1999)* ("[S]ubstantial[] compli[ance] with these statutory requirements . . . is all that this Section requires."). The declaration at issue states, "Pursuant to *28 U.S.C. § 1746*, I, David Luczynski, declare the following to be a true and correct statement of facts." [Dkt. 30-1 at 1]. That is sufficient. *See, e.g., Project Vote v. Blackwell, No. 1:06-CV-1628, 2009 U.S. Dist. LEXIS 34571, 2009 WL 917737, at *2 n.6 (N.D. Ohio Mar. 31, 2009)* (unsworn declaration "satisfies the spirit of the rule" by citing statute); *Reliance Ins. Co. v. United States, 23 Cl. Ct. 108, 113 n.2 (1991)* (accepting unsworn declaration that cites statute and states that statements are true and correct).

Finally, Plaintiff complains that one of the declarants, Ms. Husted, affirmed that her declaration was "true and correct, to the best of [her] knowledge and belief." [Dkt. 18-1 at 25; Dkt. 16-3 at 7]. This is insufficient, Plaintiff argues, because lay evidence submitted in connection with a motion for summary judgment must be based on personal knowledge alone. [Dkt. 18-1 at 25; 21-1 at 13-15]. However, as noted above, a declaration from a person who supervised, but did not herself perform, a search may be submitted in connection with a motion for summary judgment in a FOIA case. Thus, a declaration based on "knowledge and belief" is appropriate. *See, e.g.,* *Climate Investigations Center v. U.S. Dep't of Energy, No. 16-cv-124, 2017 U.S. Dist. LEXIS 146246, 2017 WL 4004417, at *9 (D.D.C. Sept. 11, 2017)* (rejecting challenge to declaration made on knowledge and belief in FOIA case because such evidence may be based "'partly [on] second-hand' information" (quoting *Safe-Card Servs., Inc. v. S.E.C., 926 F.2d 1197, 1201, 288 U.S. App. D.C. 324 (D.C. Cir. 1991)*); *Hainey v. U.S. Dep't of the Interior, 925 F. Supp. 2d 34, 41 (D.D.C. 2013)* (rejecting challenge to declaration in FOIA case made on knowledge and belief).

Plaintiff's objections to the identity of Defendants' declarants or the form of their declarations are therefore unwarranted.

4. Content of FOIA Searches

Plaintiff mounts a number of objections to the content of the searches Defendant performed, complaining about both the terms and the locations searched. She also argues that the specific language used in Defendant's declarations

indicates that Defendant did not complete a full and adequate search under FOIA and that Defendant is withholding documents under the Privacy Act. Other than the challenge to USAO-CT's failure to search AUSA Sullivan's email account, these arguments are unsuccessful.

a. Search Terms

Plaintiff disapproves of Defendant's search terms because they were based exclusively on her name. [Dkt. 18-1 at 16-17, 27-29; Dkt. 16-2, ¶¶ 13-15 (describing USAO-CT search terms based on versions of Plaintiff's name); Dkt. 16-3, ¶¶ 13, 15-17, 21, 28 (describing USAO-MA search terms based on versions of Plaintiff's name)]. She notes that she sought not only records of which she was the subject, but also information "related to" those records. [Dkt. 18-1 at 29].

But each of Plaintiff's requests focused on information about Plaintiff. She sought documents related to (1) criminal investigations of her; (2) the mention of her name in any criminal investigation of another person; (3) information that she was the subject or target of criminal activities; and (4) her report of having seen Whitey Bulger. [Dkt. 18-4 at 7, 9, 12]. The obvious starting point—indeed, the only rational starting point—for these searches is Plaintiff's name. And that is precisely where both USAO-CT and USAO-MA began, with variations of Plaintiff's first and last names. USAO-CT searched for "Discepolo" and "Sara Discepolo" in electronic files, searched existing hard files bearing her name, sought additional hard files bearing her name but found none, and quizzed AUSA Sullivan using her name. [Dkt. 16-2, ¶¶ 13-15]. USAO-MA similarly searched electronic files for "Discepolo," "Sara," and "Sara

Discepolo," searched paper files for "Discepolo" and "Sara Discepolo," and asked individuals involved in the Bulger trial about her by name. [Dkt. 16-3, ¶¶ 13, 15-17, 21-23, 26, 28]. None of the inquiries revealed information responsive to her requests.

"The adequacy of a search [under FOIA] is measured by a standard of reasonableness . . . ." *Cunningham v. U.S. Dep't of Justice, 961 F. Supp. 2d 226, 236 (D.D.C. 2013)*; *see also Bigwood v. United States Dep't of Def., 132 F. Supp. 3d 124, 135 (D.D.C. 2015)* ("[T]he agency's search for records need not be exhaustive, but merely reasonable."). Although Plaintiff insists that these searches were too narrow [Dkt. 18-1 at 16-17, 27-29], it is unclear what further search terms could have been used to find information "related to" investigations of or involving her once the searches using her name failed to bear fruit. Defendant's use of Plaintiff's name to organize its searches was reasonable. *Cf. Sack v. Dep't of Justice, 65 F. Supp. 3d 29, 35-36 (D.D.C. 2014)* (affidavit insufficient where it failed to indicate whether agency searched for files regarding organization specifically mentioned in FOIA request).

b. Search Locations

Regarding search locations, Plaintiff asserts that the searches performed in CaseView, Defendant's case management system [Dkt. 16-2, ¶ 4; Dkt. 16-3, ¶ 27],[9] were

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[9] CaseView "tracks several types of information including the names of plaintiffs, investigative targets, defendants, when the investigation was opened, and when it was closed," as well as the location of archived documents. [Dkt 16-3, ¶ 27]. It also includes "the names of any related cases, what the case is about, the name of the AUSA(s) handling the case or matter,

insufficient. She points out that Ms. Husted's declaration lists some, but not all, of the CaseView fields that are searchable; states that all searchable CaseView fields were searched; and fails to explain "whether a search can be done in all of CaseView without being limited by the search methods/search fields described." [Dkt. 18-1 at 30]. The argument is confused, at best. The only reasonable interpretation of the declaration at issue is to take Ms. Husted at her word: the search for Plaintiff's name "was conducted in all searchable fields for CaseView." [Dkt. 16-3, ¶ 28]; *see SafeCard Servs., 926 F.2d at 1200* (declarations are to be accorded a presumption of good faith). The fact that Ms. Husted did not exhaustively explain the architecture of CaseView is immaterial, especially in light of the averment that CaseView includes information about all investigations pursued by a U.S. Attorney's office. [Dkt. 16-3, ¶ 27]. Plaintiff's hypothesis that CaseView does not include information pre-dating the year 2000 [Dkt. 18-1 at 30, 32] is negated by EOUSA's declaration, which explains that information in LIONS, the former case tracking system, was migrated to CaseView, which consequently includes information dating back to 1997. [Dkt. 30-1, ¶ 9].

Many of Plaintiff's remaining issues challenge the specific records systems searched, or, more accurately, challenge Defendant's decision not to search other records systems. Specifically, Plaintiff asserts that Defendant should have searched archived records, the records of the Joint Fugitive Task Force, and the emails of employees working with the Task Force and with AUSA Sullivan. [Dkt. 18-1 at 31-36].

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the judge assigned to the case, and the status of the case." [Dkt. 16-2, ¶ 4].

"There is no requirement that an agency search every record system. However, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby, 920 F.2d at 68* (internal citations omitted). Nevertheless, a court is entitled to rely on "[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." *Valencia-Lucena, 180 F.3d at 326* (alteration in original). Where a plaintiff provides a reasonable basis to believe that other files, systems, or locations are likely to have responsive documents, the agency should search them or explain why they were not searched. *See, e.g., Wilson v. U.S. Dep't of Justice, 192 F. Supp. 3d 122, 128 & n.3 (D.D.C. 2016)* (requiring response from agency as to why records systems were not searched in light of plaintiff's "suggestion . . . based on declarations filed previously by the agency" that they "may . . . contain additional responsive records").

Here, Defendant's declarations explain that CaseView includes information about each investigation pursued by a U.S. Attorney's Office and that a search of CaseView is the primary way to search for case-related documents. [Dkt. 16-2, ¶ 6; Dkt. 16-3, ¶ 27, 30-31]. Both USAO-CT and USAO-MA searched CaseView for Plaintiff's name. [Dkt. 16-2, ¶ 13; Dkt. 16-3, ¶ 28]. In addition, USAO-CT further searched the Citizens Complaint email and questioned AUSA Sullivan. [Dkt. 16-2, ¶¶ 14-15]. USAO-MA interviewed members of Mr. Bulger's prosecution team, queried a searchable database including records produced in discovery on that case, searched other electronic files related to the case, and went through boxes of files,

including files that had been archived. [Dkt. 16-3, ¶¶ 13-26]. Both offices assert that all systems of records likely to contain responsive records were searched. [Dkt. 16-2, ¶ 16; Dkt. 16-3, ¶ 32].

The undersigned finds that the declarations describe searches "reasonably calculated to uncover all relevant documents," *Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F.3d 504, 514, 395 U.S. App. D.C. 138 (D.C. Cir. 2011)* (quoting *Valencia-Lucena, 180 F.3d at 325*), with one exception. The requests to USAO-MA were all related to cases or investigations, including the matter of Mr. Bulger. USAO-MA's focus on case-related files was therefore reasonable. Even assuming information related to Plaintiff's alleged report of a sighting of Mr. Bulger, was communicated from USAO-CT to USAO-MA (which is nothing more than an unsupported assumption), it would likely have been included in files related to the case. Plaintiff asserts that records of the Joint Fugitive Task Force should have been searched. [Dkt. 18-1 at 34]. While she provides support for her statement that attorneys from USAO-MA were on the task force [Dkt. 18-3 at 15, 18], there is no showing, other than her conclusory statement, that USAO-MA has control over or access to task force records. Nor does she suggest why, if such records were related to the investigation and prosecution of Whitey Bulger, they would not be found in the extensive search of case-related files in which USAO-MA engaged. *Cf. Wilson, 192 F. Supp. 3d at 128 & n.3* (crediting plaintiff's suggestion, based on filings in other cases, that other records systems should be searched).

However, Plaintiff's request to USAO-CT sought information regarding reports she reportedly made to

AUSA Sullivan that were not strictly case-related. For example, neither USAO-CT nor AUSA Sullivan was involved in the investigation or prosecution of Mr. Bulger. [Dkt. 16-2, ¶ 15]. It is unclear why USAO-CT imagined that CaseView, which is the primary system it searched, would be more likely to include relevant material (assuming it exists) than, for example, AUSA Sullivan's email.[10] Although Plaintiff is silent as to how she communicated with AUSA Sullivan, USAO-CT recognized that information such as Plaintiff's alleged report might be transferred or discussed via email and so searched the Citizen's Complaint email. [Dkt. 16-2, ¶ 14]. In light of this recognition, AUSA Sullivan's email seems a reasonable place to search for responsive documents. The undersigned therefore recommends that USAO-CT be instructed to supplement its declaration to fill this gap in its demonstration of the adequacy of its search, either by searching AUSA Sullivan's email or by explaining why such a search is unnecessary. *See, e.g.*, *Ancient Coin Collectors, 641 F.3d at 515* (remanding case and requiring defendant to provide "further clarification . . . about the seeming gaps" in its search); *see also Freedom Watch, 220 F. Supp. 3d at 70* (court may request supplementation of agency declarations); *Toensing, 890 F. Supp. 2d at 149* (denying without prejudice defendant's motion for summary judgment to allow agency to submit further evidence regarding search); *People for the Ethical Treatment of Animals, 800 F. Supp. 2d at 178 n.2* ("[C]ourts

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[10] To be sure, this also absolves USAO-CT of searching archived documents. As the CaseView search revealed that there were no case-related documents responsive to Plaintiff's requests, it is not clear how USAO-CT would identify what archived files to search.

often deny an agency's motion for summary judgment based upon vague or conclusory declarations and ask the agency to submit more detailed declarations. In other cases, courts ask the agency to conduct a more adequate search." (internal citations omitted)).

c. Other Objections

Finally, Plaintiff founds a number of criticisms in the specific language used in the agency declarations, suggesting that they are worded in such a way as to hide the fact that Defendant did not search for the proper information and that it is withholding, *sub silentio*, relevant documents. First, she notes that Ms. Biega's declaration does not mention tracking number FOIA-2015-02310 and Ms. Husted's declaration does not mention any tracking numbers. [Dkt. 18-1 at 26]. This, purportedly creates a genuine issue of material fact as to whether Defendant searched for the proper material. *Id.* But there is no requirement that a declaration made in support of an agency's motion for summary judgment in a FOIA case include the tracking number assigned to the request. And here, each declaration attaches the actual requests Plaintiff sent. [Dkt. 16-2 at 6; Dkt. 16-3 at 9, 11]. There is no basis for Plaintiff's speculation that USAO-CT and USAO-MA did not address her requests.

Another of Plaintiff's remaining arguments is more complex. She observes that Defendant's declarations state that "the locations searched were 'systems of records.'" [Dkt. 18-1 at 15; Dkt. 16-2, ¶ 16; Dkt. 16-3, ¶ 32]. The phrase "system of records" is used in the Privacy Act, which defines it as "a group of any records under the control of any agency from which information is retrieved by the

name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." *5 U.S.C. § 552a(a)(5)*. Plaintiff argues that the limitation to "systems of records" is unsound because, pursuant to FOIA, searches are "in no way limited to records contained within a system of records." [Dkt. 18-1 at 15 (quoting *Clarkson v. I.R.S., 678 F.2d 1368, 1376 (11th Cir. 1982)]*. Therefore, according to Plaintiff, there is a genuine issue of material fact as to whether "the searches were thorough." *Id.* at 16. However, the declarations repeatedly indicate Defendant responded to the requests pursuant to FOIA. [Dkt. 16-2, ¶¶1, 3, 7, 11-12, 14 (referencing FOIA); Dkt. 16-3, ¶¶ 5, 8-9, 11-12 (same)]. More importantly, neither USAO-CT nor USAO-MA actually limited its search only to "systems of records" as defined by the Privacy Act. Rather, USAO-CT searched paper files and also questioned AUSA Sullivan; USAO-MA combed through boxes of hard files as well as questioning members of the prosecution team. Finally, the limitation to searches for Plaintiff's name, as explained above, was not imposed because Defendant performed searches only pursuant to the Privacy Act, but rather followed logically from the particular requests Plaintiff submitted.

Plaintiff's two residual arguments concern a provision that exempts from the requirements of FOIA certain law enforcement records. *Section 552(c)(1)* states that, when a request is made for law enforcement records that "could reasonably be expected to interfere with enforcement proceedings" involving a possible violation of criminal law, and "there is reason to believe that [] the subject of the investigation or proceeding is unaware of its pendency," the agency may "treat the records as not subject to the

requirements of [FOIA]" while the investigation or proceedings is ongoing. *5 U.S.C. § 552(b)(7)(A), (c)(1).* The subsection codifies one category of records for which the agency may use a so-called *Glomar* response, neither confirming nor denying the existence of responsive documents. *See Mobley v. CIA, 924 F. Supp. 2d 24, 34 & n.10 (D.D.C. 2013).* Plaintiff suggests that the wording of Defendant's declarations—specifically, statements that "no *responsive* records" were found—suggest that it is withholding records pursuant to one of those provisions.[11] [Dkt. 18-1 at 17, 37-38 (emphasis added)].

To the extent that Plaintiff's argument is based on admissions Defendant purportedly made by failing to timely respond to her Requests for Admissions [Dkt. 18-1 at 36], it fails for the reasons discussed above. The argument is otherwise based on pure speculation. Such "speculative claims about the existence . . . of . . .

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[11] Generally, Plaintiff refers broadly to *Section 552(c)*, although at one point she specifies *Section 552(c)(2)*. [Dkt. 18-1 at 17, 36-38]. However, *Section 552(c)(2)* provides that, when informant records are maintained using the informant's name or personal identifier, and they are requested by a third party, "the agency may treat the records as not subject to the requirements of [FOIA] unless the informant's status as an informant has been officially confirmed." *5 U.S.C. § 552(c)(2)*. Here, no third party requested information on an informant by that informant's name. Rather, Plaintiff sought information about herself. Thus, Plaintiff's implication that *5 U.S.C. § 552(c)(2)* is relevant is incorrect. Similarly, the third subsection of *Section 552(c)* cannot be at issue here, as it deals with records held by the F.B.I. pertaining to foreign intelligence and counterintelligence or terrorism. There is no reason to speculate that Defendant is withholding records pursuant to that subsection.

documents" are not a sufficient reason to deny summary judgment. *Competitive Enter. Inst., 161 F. Supp. 3d at 136*. In any case, "even if any of the defendants in this action were relying upon *§ 552(c)* to withhold any records, the Court would not be permitted to comment on the public record about the existence of such reliance." *Mobley, 924 F. Supp. 2d at 34 n.10*.

C. Plaintiff's Cross-Motion for Summary Judgment

Plaintiff moves for summary judgment on two of the affirmative defenses Defendant included in its Answer: that this Court "lacks subject matter jurisdiction over the Complaint because Defendant has not improperly withheld information within the meaning of the FOIA"[12] and that

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[12] This jurisdictional defense appears to derive from the Supreme Court's statement in *Kissinger v. Reporters Comm. for Freedom of the Press* that FOIA

> authorizes federal courts to ensure private access to requested materials when three requirements have been met. Under *5 U.S.C. § 552(a)(4)(B)* federal jurisdiction is dependent upon a showing that an agency has (1) "improperly"; (2) "withheld"; (3) "agency records." Judicial authority to devise remedies and enjoin agencies can only be invoked, under the jurisdictional grant conferred by *§ 552*, if the agency has contravened all three components of this obligation.

445 U.S. 136, 150, 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980). That case concerned a court's authority to order production of documents that had not been withheld in contravention of FOIA. *Id. at 139*. It held that a court lacks "[j]udicial authority to devise [a] remedy" where the statute has not been violated. However, it did not address "subject matter jurisdiction" as

the "FOIA requests that are the subject of this lawsuit implicate certain information that is protected from disclosure by one or more statutory exemptions." [Dkt. 18-1 at 39-41]. Both concern the withholding of information under FOIA. However, in light of the recommendation to allow USAO-CT to shore up support for its position that its searches were adequate, it would be premature to address Plaintiff's motion at this time. The undersigned therefore recommends denying Plaintiff's motion without prejudice to renewal once Defendant has submitted its updated affidavit.

CONCLUSION

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [Dkt. 16] be **GRANTED IN PART** as to USAO-MA and **DENIED IN PART WITHOUT PREJUDICE** as to USAO-CT. The undersigned further **RECOMMENDS** that Plaintiff's Cross Motion for Summary Judgment [Dkt.

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generally construed; that is, it did not address the power of a federal court to hear a dispute, *see* *Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)* (noting that subject matter jurisdiction "involves a court's power to hear a case" (quoting *United States v. Cotton, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)*). Rather, it is undisputed that a federal court has subject matter jurisdiction to review the adequacy of an agency's search for records, even in the absence of a showing that records were improperly withheld. *See, e.g., Valencia-Lucena, 180 F.3d at 326* ("A requester dissatisfied with the agency's response that no records have been found may challenge the adequacy of the agency's search by filing a lawsuit in the district court after exhausting any administrative remedies." (citing See *5 U.S.C. § 552(a)(6)(A)(i)* & *(C)*)).

18] be **DENIED WITHOUT PREJ-UDICE** and Plaintiff's Motion for Reconsideration [Dkt. 26] be **DENIED**.

* * * *

The parties are hereby advised that under the provisions of Local Rule 72.3(b) of the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, any party who objects to the Report and Recommendation must file a written objection thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the report and/or recommendation to which objection is made, and the basis for such objections. The parties are further advised that failure to file timely objections to the findings and recommendations set forth in this report may waive their right of appeal from an order of the District Court that adopts such findings and recommendation. *See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).*

Date: January 19, 2018

/s/ G. Michael Harvey

G. MICHAEL HARVEY

UNITED STATES MAGISTRATE JUDGE

APPENDIX G

THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5060

Sara Discepolo,
Appellant,
v.
United States Department of Justice,
Appellee.

On Petition for Panel Rehearing

February 13, 2020

BEFORE: Millett, Pillard, and Wilkins, *Circuit Judges.*

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied.

Per Curiam

APPENDIX H

THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5060

Sara Discepolo,
Appellant,
v.
United States Department of Justice,
Appellee.

On Petition for Rehearing En Banc

February 13, 2020

BEFORE: Srinivasan, *Chief Judge*, and Henderson, Rogers, Tatel, Garland, Griffith, Millett, Pillard, and Wilkins, Katsas, and Rao, *Circuit Judges.*

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

APPENDIX I

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

THE UNITED STATES CONSTITUTION:

U.S. Const., Art. III, Sec. 1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const., Art. III, Sec. 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and

between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

THE FREEDOM OF INFORMATION ACT:

5 U.S.C. § 552(a)(4)(B):

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of

this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

5 U.S.C. § 552(c):

(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—
(A) the investigation or proceeding involves a possible violation of criminal law; and
(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,
the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.
(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or

international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

THE PRIVACY ACT:

5 U.S.C. § 552a(a):

Records Maintained on Individuals

(a) Definitions. For purposes of this section—

* * *

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

* * *

5 U.S.C. § 552a(b)(2):

Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

* * *

(2) required under section 552 of this title [5 USCS § 552];

* * *

5 U.S.C. § 552a(d)(1):

Access to records. Each agency that maintains a system of records shall—
(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

5 U.S.C. § 552a(t)(2):

No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title [5 USCS § 552].

THE LEGISLATIVE HISTORY:

S.Rep.No.93-1200, 93d Cong., 2d Sess. 11-12 (1974) (Conference Report):

* * *

NATIONAL DEFENSE AND FOREIGN POLICY EXEMPTION (B) (1)

The House bill amended subsection (b) (1) of the Freedom of Information law to permit the withholding of information "authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy."

The Senate amendment contained similar language but added "statute" to the exemption provision.

The conference substitute combines language of both House and Senate bills to permit the withholding of information where it is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is

"in fact, properly classified" pursuant to both procedural and substantive criteria contained in such Executive order.

When linked with the authority conferred upon the Federal courts in this conference substitute for *in camera* examination of contested records as part of their *de novo* determination in Freedom of Information cases, this clarifies Congressional intent to override the Supreme Court's holding in the case of *E.P.A. v Mink, et al.*, supra, with respect to *in camera* review of classified documents.

However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in Section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Restricted Data (42 U.S.C. 2162), communications information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403(d)(3) and (g)), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When suh information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law.

* * *

120 Cong.Rec. 36, 869-70 (1974) (remarks of Sen. Muskie):

* * *

Among many signals transmitted by the voting public on November 5 was that government has become too big, too unresponsive, and too closed to the people it is supposed to serve.

* * *

And as demonstrated in the case of Environmental Protection Agency against PATSY MINK, there was no mechanism for challenging the propriety of classifications under the national defense and foreign policy exemptions of the 1966 act. Thus, the mere rubberstamping of a document as "secret" could forever immunize it from disclosure.

The legislation before us today is designed to close up the loopholes which have led to such abuse of both the spirit and the letter of the law. . . .

* * *

And most importantly, the legislation will establish a mechanism for checking abuses by providing for review of classification by an impartial outside party.

* * *

The legislation passed by Congress would call for a determination by the judge reviewing the documents in question that the documents were properly classified, in

accordance with rules and guideline for classification set out by the executive branch itself.

The judge would be required to give substantial weight to the classifying agency's opinion in determining the propriety of the classification.

* * *

The bill passed by Congress recognizes that special weight should be given agency judgments where highly sensitive material is concerned.

* * *

As a practical matter, I cannot imagine that any Federal judge would throw open the gates of the Nation's classified secretes, or that they would substitute their judgment for that of an agency head without carefully weighing all the evidence in the arguments presented by both sides.

On the contrary, if we constrict the manner in which courts perform this vital review function, we make the classifiers themselves privileged officials, immune from the accountability necessary for Government to function smoothly.

* * *

THE MAGISTRATE ACT:

28 U.S.C. § 636 Jurisdiction, powers and temporary assignment

(b)
(1) Notwithstanding any provision of law to the contrary—
(A) a judge may designate a magistrate [magistrate judge] to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's [magistrate judge's] order is clearly erroneous or contrary to law.
(B) a judge may also designate a magistrate [magistrate judge] to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [post-trial] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
(C) the magistrate [magistrate judge] shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [magistrate judge]. The judge may also receive further evidence or recommit the matter to the magistrate [magistrate judge] with instructions.

* * *

(c) Notwithstanding any provision of law to the contrary—
(1) Upon the consent of the parties, a full-time United States magistrate [magistrate judge] or a part-time United States magistrate [magistrate judge] who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate [magistrate judge] may exercise such jurisdiction, if such magistrate [magistrate judge] meets the bar membership requirements set forth in section 631(b)(1) [28 USCS § 631(b)(1)] and the chief judge of the district court certifies that a full-time magistrate [magistrate judge] is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a

majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

REGULATIONS:

28 C.F.R. § 16.4(a):

Responsibility for Responding to Requests

In general. Except in the instances described in paragraphs (c) and (d) of this section, the component that first receives a request for a record and maintains that record is the component responsible for responding to the request. In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the component shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.