

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRAEME SEPHTON,

Plaintiff,

v.

FEDERAL BUREAU OF
INVESTIGATION,

Defendant.

Civil Action No. 00-30121-MAP

**PLAINTIFF'S REPLY TO DEFENDANT'S
OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT**

I. Introduction

Plaintiff Graeme Sephton, by and through his counsel of record, hereby responds to the defendant Federal Bureau of Investigation's ("FBI's") cross Motion for Summary Judgment. A review of the undisputed evidence as to the remaining issue in this action, namely the adequacy of the FBI's search for records responsive to Sephton's FOIA request, establishes that the FBI's search as to Sephton's 1998 FOIA request is clearly inadequate as a matter of law in that it was not reasonably calculated to discover the requested documents. See, Church of Scientology Int'l v. U.S. Dept. of Justice, 30 F.3d 224, 230 (1st Cir. 1994). To date, even after defendant FBI has attempted four separate times to present supporting declarations from its FOIA staff as to the adequacy of search issue, the government has still not expressly alleged, averred or otherwise demonstrated that it has undertaken an adequate search in responding to Sephton's FOIA request. All four declarations filed by the FBI in this action fail to meet even the minimal standards

required to ascertain the adequacy of the agency's search for responsive records. It is now almost six years from the date of Sephton's 1998 FOIA request, and therefore Sephton now seeks a final determination and order from this Court as to the adequacy of Defendant FBI's search in response to his September 21, 1998 FOIA request.

In order to support the Defendant's Summary Judgment Motion, the FBI is required to present sufficient evidence, through agency declarations or affidavits, that it has conducted a search for records responsive to Sephton's FOIA request that was "reasonably calculated to discover the requested documents." Church of Scientology Int'l, *supra*, 30 F.3d at 230, quoting, Maynard v. C.I.A., 986 F.2d 547, 549 (1st Cir. 1993). As a matter of law, a Motion for Summary Judgment by a federal agency to a FOIA action must be denied if it does not contain a sufficiently detailed affidavit or declaration clearly "setting forth the search terms and the type of search performed, and averring that files likely to contain responsive materials if such records exist were searched." Oglesby v. U.S. Department of Army, 920 F.2d 57, 68 (D.C. Cir. 1990). Such information is "necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine the adequacy of the search." Id. Defendant FBI's litigation declarations clearly have not met this standard as a matter of law.

Neither the Declaration of Scott Hodes, the Declaration of Christine Kiefer, the Declaration of Eileen Rawlinson, nor the Declaration of Gregory A. Carl, contain a statement averring that all file locations likely to contain responsive materials were searched in response to Sephton's 1998 FOIA request, and all four declarations fail to adequately describe the basis for the agency's search parameters in responding to Sephton's FOIA request. Clearly, this continued

failure to address the standards required to measure the adequacy of Defendant's search is indicative of the fact that the FBI is either unable or unwilling to provide a demonstration as to the adequacy of their search in this matter as required by law. Consequently, Defendant's Motion for Summary Judgment in this action must be denied as a matter of law.

However, Sephton's Motion for Partial Summary Judgment as to the adequacy of the FBI's FOIA search in this action should be granted if the record establishes that the agency's search challenged in this action was "inadequate, unreasonable or unlawful under the FOIA." Judicial Watch Inc. v. U.S. Department of Commerce, 34 F.Supp.2d 28, 44-45 (D.D.C. 1998). As Sephton has demonstrated through his evidence, declarations, and by reference to the Defendant's own declarations by various FBI-FOIA staff, the FBI's search was (and is) clearly inadequate as a matter of law, and therefore Sephton is entitled to Partial Summary Judgment as to the remaining issue of the adequacy of Defendant's FOIA search for responsive records to Sephton's FOIA request. See, Church of Scientology Int'l, supra, 30 F.3d at 230; Judicial Watch, supra, 34 F.Supp.2d at 44-45.

More specifically, notwithstanding four strikes at attempting to provide declarations concerning the agency's adequacy of search for this FOIA request, the FBI has still failed to explain: (1) a reason for failing to search for any forensic analysis documents contained at either the FBI's Lab in Washington D.C., the D.C. Headquarters, or any other locations of agency records not accessible from the computers of the FBI's New York office, (2) its basis for reviewing only limited portions of the Central Record system main file and sub files, when other file systems are likely to contain records responsive to Sephton's FOIA request, (3) why reports

and summaries prepared by the FBI and provided to Sephton describe extensive forensic analysis and procedures performed by FBI Lab technicians, and yet no documents or records pertaining to this analysis were ever searched for by the FBI (or provided to Sephton), and (4) why the agency has failed to find specific folders of each foreign body, notwithstanding FBI staff documents indicating these folders shall be made a part of the permanent case file.

II. The FBI Has Failed To Search For Forensic Analysis Documents and Other Responsive Records Located At The FBI's Lab In Washington D.C. and Other Locations For Agency Records Which Are Not Accessible From The FBI's New York Office

The FBI has previously admitted that it has not searched for any responsive records in any other locations that were not accessible from the FBI's New York office. See, Declaration of Rawlinson ¶ 21. See also, Defendant's Response To The Plaintiff's Opposition To Defendant's Motion For Summary Judgment at 6 (CR 44) (5/09/03) (citing to Rawlinson Dec. ¶ 21). In its previous briefing to the Court in this matter, defendant FBI explained its basis for this position as follows: "The Plaintiff made his request directly to the FBI's New York Field Office. Rawlinson Dec., Ex. A. Under the [FBI's FOIA] regulations, the field office appropriately searched only the files in its possession." Id. at 8. The subsequent Declaration of Gregory Carl filed by defendant FBI now expressly concedes that at least one type of records which Sephton is seeking in his FOIA request (forensic analysis records) are generally stored within envelopes which are maintained only at the FBI Lab in Washington DC, and Mr. Carl concedes that the actual contents of such forensic analysis records are not accessible to review via the CRS database from other locations. See, Declaration of Carl ¶ 5.

In light of the undisputed role of several FBI Directors in the TWA Flight 800 explosion investigation previously referenced in Plaintiff's Motion for Partial Summary Judgment, see, Exhibit A and Exhibit B to Plaintiff's Memorandum In Support of Motion for Summary Judgment (Congressional Testimony of FBI Directors Donald Kerr and Lewis D. Schiliro on the FBI's TWA Flight 800 investigation), there is also no basis for the FBI to have failed to search for records responsive to Sephton's FOIA request at the FBI's Headquarters in Washington D.C.

The FBI had a clear legal duty, as a matter of law, to search *all* records systems and locations which are likely to have records responsive to Sephton's FOIA request. Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 68 (D.C. Cir 1990); Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 325-327 (D.C. Cir. 1999); Church of Scientology Int'l, *supra*, 30 F.3d at 230.

III. The FBI Has Not Adequately Searched Within All Central Record System Categories Likely To Contain Records Responsive To Sephton's FOIA Request

None of the Defendant's four litigation declarations ever attempt to explain the FBI's Central Record System file organization categories for its investigation of the TWA Flight 800 explosion, or its basis for searching only within certain specified Sub-Files of the Main File 265A-NY-259028 in response to Sephton's FOIA request. However, as discussed within the Supplemental Declaration of Graeme Sephton attached hereto, Sephton has independently received a copy of the FBI's file index of all of the Sub-Files to File 265A-NY-259028 which sets forth the various subject listings of all Sub-Files of Main File 265A-NY-259028 in the FBI's Central Record System ("CRS"). See, Exhibit A to Supplemental Declaration of Sephton (Sub-

File Index). A review of this CRS file index demonstrates that there are certainly other Sub-Files and components of the Main File that should also have also been searched by the FBI in response to Sephton's FOIA request as alternative locations likely to contain additional documents or records responsive to Sephton's FOIA request, above and beyond those limited CRS categories identified by Defendant. See, Supplemental Declaration of Sephton, ¶¶ 6-7.

For example, by reference to the FBI's Sub-File index of Main File 265A-NY-259028 (attached as Exhibit A to the Supplemental Declaration of Sephton), the FBI should certainly have searched for responsive records to Sephton's FOIA request in Sub File "K" (Investigative Reports Of Outside Agencies/Police Departments) in light of the substantial evidence of the FBI working with outside Agencies/Police Departments with regard to the forensic analysis which is the subject matter of Sephton's FOIA request. See e.g., Exhibit "C" to Supplemental Declaration of Sephton (describing extensive role of outside agencies and law enforcement in forensic analysis of foreign bodies from victims of TWA Flight 800 explosion).

Defendant also has failed to present any basis for failing to ever review or search for any responsive records to Sephton's FOIA request within its Sub File "E" ("Secret") or Sub File "J" ("Top Secret") to determine if either contains any responsive records. See Supplemental Declaration of Sephton ¶7. In addition, Sephton believes that Sub File "A" (Outgoing Communications) and Sub-File "B" (Incoming Communications) should also have been reviewed for records responsive to Sephton's FOIA request, as these file systems are also likely to contain some records discussing the forensic analysis for foreign bodies at issue in Sephton's FOIA request. However, the Declarations filed by the FBI indicate that no effort was

ever made to review or search any of these alternative Sub Files for records responsive to Sephton's FOIA request.

In addition, defendant FBI has made no attempt to identify which other file categories may contain responsive records to Sephton's FOIA request within the CRS Main File 265A-NY-259028 itself, or in those materials which are "annexed" to the Main File. See e.g., Rawlinson Declaration, ¶¶ 12 - 15 (explaining that some file categories are not designated as Sub Files, but are instead either contained within the Main File itself or "annexed" to the Main File). For example, Rawlinson indicates that at least some agency records responsive to Sephton's FOIA request were located in the Main File designation under FBI index category "1B" which, according to Rawlinson, either pertains to "collected items" or to "bulky items." See, Declaration of Rawlinson, ¶ 12. However, it is unclear exactly what other Main File subject matters also contain records responsive to Sephton's FOIA request, or why the FBI limited its search to only the 1B files, as none of the FBI declarations ever describe the structure of the Main File categories or subject matter, or aver that all Main File categories which are likely to include responsive records have ever been searched for Sephton's FOIA request.

As defendant FBI has made no showing whatsoever in any of its litigation declarations that explain its basis for conducting such a narrow search of certain CRS file systems, and has failed to provide any rational explanation for excluding other file categories likely to contain records responsive to Sephton's FOIA request, the FBI's search in response to Sephton's FOIA request is clearly inadequate as a matter of law. See, Church of Scientology Int'l, supra, 30 F.3d at 230; Judicial Watch, supra, 34 F.Supp.2d at 44-45.

IV. The FBI Has Also Failed To Explain Why It Did Not Search For Records and Documents Expressly Identified By Other FBI Records and Documents That Are Clearly Within The Scope of Plaintiff's FOIA Request

Defendant FBI's search in this matter is also inadequate as a matter of law by failing to search for documents and records which are clearly responsive to Sephton's FOIA request that were cross referenced within those limited FBI records and documents which have been provided to Sephton. For example, Sephton has indicated that there are numerous examples of forensic analysis records that were directly referenced within those records he has received from the FBI that were never reviewed by the FBI or provided to Sephton. See, Supplemental Declaration of Sephton, ¶ 9 - 13. Sephton has provided eight pages of examples of documents that were provided in response to his request that should have clearly caused the FBI to search for additional materials responsive to his 1998 FOIA request. See, Supplemental Declaration of Sephton, Exhibit C 1-8.

For example, one of the documents provided in response to Sephton's 1998 FOIA request references National Transportation Safety Board (NTSB) and FBI "force vector analysis" of foreign bodies that impacted victims. See, Supplemental Declaration of Sephton, Exhibit C 1-2. However, to date, the FBI has neither searched for nor provided Sephton with the referenced NTSB analysis or the referenced force vector analysis of foreign bodies found in TWA Flight 800 victims in response to Sephton's FOIA request. See, Supplemental Declaration of Sephton, ¶ 10. Another set of documents provided to Sephton describes a thorough inter-agency forensic analysis for all foreign bodies of all victims found with such materials, which was undertaken by the NTSB and FBI. See, Supplemental Declaration of Sephton, Exhibit C 3-4. Yet the FBI has never attempted to search for, nor provide Sephton with, any documents or records resulting

from this NTSB / FBI forensic analysis of fragments removed from victim bodies that were described in FBI records provided in response to Sephton's FOIA request. See, Supplemental Declaration of Sephton, ¶ 11.

The documents provided to Sephton by the FBI also make reference to a specific analysis of foreign body materials using an "energy dispersive spectrometer (EDS) analysis to determine its chemical composition. See, Supplemental Declaration of Sephton, Exhibit C at 5. However, once again, the FBI has made no attempt to search for or provide Sephton with any of these referenced EDS analysis records responsive to his FOIA request. See, Supplemental Declaration of Sephton, ¶ 12. The materials provided to Sephton by the FBI also indicate that 89 victims were found with foreign bodies in their remains, and indicate that "examinations of these recovered FBI's did not disclose anything that would be overtly indicative of an explosive device," and that "investigation is continuing to identify FB's of unknown origin." Id., Exhibit C at 6-7. However, with respect to this detailed analysis of all foreign bodies recovered from victims, Sephton has to date only received one single page document describing forensic analysis of a single object by FBI technicians for all of the foreign bodies reviewed by the FBI investigators, and he has not received any similar forensic analysis records or documents as to any of the other foreign bodies referenced in the above mentioned FBI investigation materials, although such forensic analysis records are clearly responsive to the subject matter of Sephton's 1998 FOIA request. See, Supplemental Declaration of Sephton ¶ 13. The inadequacy of defendant FBI's search in this regard is remarkably evidenced by the fact that, to date, it has provided Sephton with only one single page document pertaining to direct forensic analysis by FBI Lab technicians. See, Supplemental Declaration of Sephton ¶¶ 15 - 17.

The fact that Sephton has received only one page of actual forensic analysis is also quite remarkable in light of the subject matter of his FOIA request, and certainly suggests a lack of adequate search for responsive records to Sephton's FOIA request, particularly as FBI records suggest that the FBI Lab technicians performed extensive forensic analysis of the Flight 800 explosion, including detailed analysis and evaluation of the foreign bodies and objects removed from the victims of the TWA Flight 800 explosion. See, Supplemental Declaration of Sephton, Exhibit C 1-8 (referencing extensive forensic analysis of foreign objects from victims by FBI Lab technicians). Although to date, no FBI Lab records have been provided to Sephton in response to his request, many documents were clearly generated by the FBI's Lab concerning the forensic analysis of foreign bodies from the Flight 800 explosion investigation. See, Supplemental Declaration of Sephton, ¶¶ 15 - 17.

Finally, Sephton has also presented evidence of an FBI document that expressly notes the FBI has in its possession 185 distinct "folders" for each item of "1B" evidence, which contain the results of metallurgical and chemical analysis, and all other analytical results from the FBI Lab for these items, along with any lab photographs, and electronic communications documenting the movement of evidence, including forensic analysis of each of these "1B" objects performed by the FBI Lab and the labs of the NTSB, Brookhaven, DIA and Boeing. See, Supplemental Declaration of Sephton, ¶ 10 and Exhibit "B". However, to date, the FBI has not indicated the scope of its search (if any) for responsive records within these "1B" folders, and to date, Sephton has not been provided with the full contents of these folders for any of the foreign body objects which pertain to the subject matter of his FOIA request, notwithstanding this document's notation from FBI staff that "each folder should be made a permanent part of the

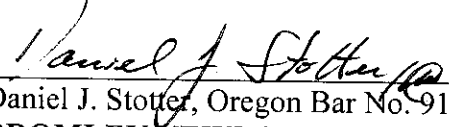
case file 265A-NY 259028.” See, Supplemental Declaration of Sephton, Exhibit B. The FBI has never indicated that it has searched for all responsive 1B records among those 185 folders, nor has the FBI ever provided Sephton with the contents of these folders responsive to his FOIA request. See, Supplemental Declaration of Sephton, ¶ 10.

V. Conclusion

Defendant FBI has continuously refused to adequately explain its basis for conducting only a limited search for responsive records provided to date. Clearly, the FBI’s limited search actions cannot, as a matter of law, constitute a search “reasonably calculated to discover the requested documents.” Church of Scientology Int’l, *supra*, 30 F.3d at 230, quoting, Maynard v. C.I.A., *supra*, 986 F.2d at 549. Defendant FBI had a clear duty to search any and all locations that were known to contain documents and records responsive to Sephton’s FOIA request. Oglesby v. U.S. Dept. of Army, 920 F.2d 57, 68 (D.C. Cir 1990); Valencia Lucena v. U.S. Coast Guard, 180 F.3d 321, 325-327 (D.C. Cir. 1999). The FBI’s failure to search for all responsive records contained within other portions of the main file and sub files of its own Central Record System database, and its failure to search for forensic records which were not accessible from the New York office, such as forensic analysis records found within the FBI Lab, Headquarters, or any other locations likely to have responsive records to this request, clearly violates the agency’s statutory mandate under FOIA. Accordingly, this Court should deny Defendant’s Motion for Summary Judgment, and should grant Plaintiff’s Motion for Partial Summary Judgment, based upon the inadequacy of the FBI’s search for records responsive to Sephton’s FOIA request.

Respectfully submitted,

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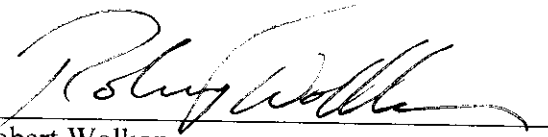


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Dated: July 15, 2004

CERTIFICATE OF SERVICE

I, Robert Wolkon, hereby certify that I have caused a copy of the foregoing document to be served upon Karen Goodwin, Assistant U.S. Attorney, 1550 Main Street, Springfield, Massachusetts, 01103, by hand delivery, this 15th day of July, 2004.



Robert Wolkon