

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

GEOFFREY NELS FIEGER,

Plaintiff,

Civil No. 2:08-14125

v.

Hon. David M. Lawson

FEDERAL ELECTION COMMISSION,

Defendant.

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**DEFENDANT’S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

This Court should grant the Commission’s motion for summary judgment for the following reasons.

1. *Plaintiff lacks standing to seek review of attorney’s FOIA requests.* Without citation to any authority, plaintiff claims that he has standing to seek judicial review of FOIA requests made by his attorney simply because he alleged in his complaint that he made such request “by and through his attorney.” Pl. Opp’n at 5 (citing Doc. No. 26 at ¶¶ 6, 10). But the fact remains that this Court lacks subject matter jurisdiction because plaintiff’s individual “name does *not* appear on [either] request for records.” *McDonnell v. U.S.*, 4 F.3d 1227, 1236-37 (3rd Cir. 1993) (emphasis added). As a result, plaintiff “has not made a formal request within the meaning of the statute[, and thus] . . . has no [judicially enforceable] right to receive . . . the documents.” *Id.*

Plaintiff claims that that the agency waived the right to challenge plaintiff’s standing because the agency processed the requests “without objection.” Pl. Opp’n at 5. However,

“[s]tanding is not an affirmative defense that must be raised at risk of forfeiture.” *Community First Bank v. Nat’l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir.1994). Moreover, the FEC does not contest the validity of the requests that were made by plaintiff’s attorney. However, “an attorney must adequately identify that he is making the FOIA request for his client in order for the client to have standing to pursue a FOIA action.” *Three Forks Ranch Corp. v. The Bureau of Land Mgt.*, 358 F. Supp. 2d 1, 3 (D.D.C. 2005). This plaintiff’s attorney’s requests failed to do. See Exs. A & B to Def. Mot. for Sum. J. (Doc. No. 44). Thus, plaintiff lacks standing.

2. *The Commission’s search for records responsive to the requests for records was adequate under the FOIA.* A plaintiff may challenge the adequacy of an agency’s FOIA search not by questioning whether “it actually uncovered every document extant,” but rather only by challenging “whether the search was reasonably calculated to discover the requested documents.” *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). Despite this clearly established precedent, plaintiff’s challenge to the adequacy of the Commission’s search is confined solely to the FEC’s initial failure to find a particular record responsive to one of the requests. Pl. Opp’n at 6. “But it is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate.” *Duenas Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Moreover, although plaintiff claims that the record was “never produced,” Pl. Opp’n at 6, the fact is that the agency later search, located, and produced the responsive document, both to plaintiff and to the Court. See Declaration of Lawrence Calvert (“Calvert Decl.”) ¶ 34 [Attached as Ex. G to Def. Mot. for Sum. J.]; Doc. No. 30-2. As this Court has already correctly determined, the agency’s initial failure to locate this document does not demonstrate bad faith. Hrg. Tr. on Mot. for Leave to Conduct

Discovery, at 31:8-9 (Apr. 16, 2009) [Attached as Ex. H to Def.'s Mot. for Sum. J.]. *Accord Nat'l Inst. of Military Justice v. U.S. Dep't of Defense*, 404 F. Supp. 2d 325, 333 (D.D.C. 2005). Rather, the FEC's additional search and disclosure of this record are sufficient evidence that the agency conducted its search in *good faith* rather than evidence of bad faith or an inadequate search. *See Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999); *W. Ctr. for Journalism v. IRS*, 116 F. Supp. 2d 1, 10 (D.D.C. 2000). Thus, plaintiff fails to legitimately challenge the adequacy of the search.

3. *Plaintiff does not challenge the Commission's invocation of Exemptions 2, 3, 5 and 7(A)*. Although plaintiff claims to "contest[] many" of the FEC's withholding determinations, plaintiff actually challenges only the FEC's redaction of purely personal information under FOIA Exemption 6. *See* Pl. Opp'n at 7. In the absence of any challenge to the agency's withholding of information under FOIA Exemptions 2, 3, 5, and 7(A), this Court should grant defendant's motion for summary judgment with respect to these exemption determinations. *See, e.g., Buggs v. Powell*, 293 F. Supp. 2d 135, 141 (D.D.C. 2003) (when "a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.").

4. *The Commission Properly Withheld Personal Information Under FOIA Exemption 6*. Although the Commission provided plaintiff's counsel with all documents about which plaintiff now seeks further disclosure, the agency properly redacted personal information about government employees and the identities of job applicants under Exemption 6. *See, e.g., Cowdery, Ecker & Murphy, LLC v. Dep't of Interior*, 511 F. Supp. 2d 215, 219 (D. Conn. 2007) (proper to withhold personal information about government employees); *Core v. U.S. Postal*

*Serv.*, 730 F.2d 946, 948-49 (4th Cir. 1984) (proper to withhold identity of job applicants). First, contrary to plaintiff's unsupported claim, Pl. Opp'n at 7, *all* information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection. *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). Second, plaintiff claims that information disclosed in documents at Bates Nos. 872, 880, 898, 973-74, and 1007 "seem to suggest that certain individuals, including political appointees, were seeking favors and/ or *quid pro quo* appointments to top government positions," to such a degree that the identities of individuals and other private information must also be disclosed. Pl. Opp'n at 7. However, because these documents do not in any way support such a contention, plaintiff's allegation is insufficient. *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157, 175 (2004) (requiring a "meaningful evidentiary showing" to overcome privacy interest). Moreover, information that does not *directly* reveal the operations or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Reporters Cmte. for Freedom of the Press v. Dep't of Justice*, 489 U.S. 749, 775 (1989). Here, in light of all the information in the documents that has already been disclosed, "there is no reason to believe that the public [would] obtain a better understanding of the workings of various agencies by learning" the purely personal information or identities of job applicants that was withheld. *Voinche v. FBI*, 940 F. Supp. 323, 330 (D.D.C. 1996), *aff'd*, 1997 WL 411685 (D.C. Cir. June 19, 1997). Thus, the public interest in disclosure of the private information is non-existent.

5. *This Court need not review the withheld portions of the documents in camera.*

Although the FOIA authorizes the court to review the withheld records, or a sample of the withheld records, *in camera*, *Simon v. Dep't of Justice*, 980 F.2d 782, 784 (D.C. Cir. 1992),

“[t]he *in camera* review provision is discretionary by its terms, and is designed to be invoked [only] when the issue before the District Court could not be otherwise resolved.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). In this case, the agency’s declaration, *see* Ex. G, and *Vaughn* index, Ex. I, provide sufficient detail to review the propriety of the agency’s withholding determinations, and allow the Court to find that each determination was proper. *Carbe v. Bureau of Alcohol, Tobacco, and Firearms*, 2004 WL 2051359, at \*8 n.5 (D.D.C. Aug. 12, 2004) (denying plaintiff’s request for *in camera* inspection, because *Vaughn* Index adequately described withheld information). Accordingly, especially in the absence of bad faith, this Court need not burden itself with reviewing the withheld documents *in camera*.

In sum, this Court should grant the Commission’s motion for summary judgment.

Dated: October 15, 2009

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 15, 2009, he filed the foregoing document with the Court's ECF system, through which a copy will be emailed to the following counsel of record:

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