

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN IMMIGRATION COUNCIL,

Plaintiff,

v.

Civil Action No. 12-856 (JEB)

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, *et al.*,

Defendants.

**PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	2
I. Mr. Law’s Supplemental Declaration Still Fails to Satisfy the D.C. Circuit’s Standard for Demonstrating Specificity and Adequacy.....	2
II. Defendants Have Failed to Address the Points Raised in AIC’s Opposition Brief.....	5
A. Defendants Have Failed to Explain Why Local Offices Were not Searched.	5
B. Defendants Have Failed to Explain the Guidance Provided to Selected Offices.....	5
C. Defendants Have Provided No Details Regarding Their Recordkeeping or File Selection.	6
D. Defendants Fail to Address AIC’s Countervailing Evidence.	7
CONCLUSION.....	7

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>ACLU of S. Cal. v. United States Dep’t of Homeland Sec.</i> , 2012 WL 5342411 (C.D. Cal. Oct. 25, 2012).....	3, 4
<i>Church of Scientology of Cal. v. IRS</i> , 792 F.2d 146 (D.C. Cir. 1986), <i>aff’d</i> , 484 U.S. 9 (1987).....	2
<i>Morley v. Cent. Intelligence Agency</i> , 508 F.3d 1108 (D.C. Cir. 2007)	7
<i>Nation Magazine, Washington Bureau v. U.S. Customs Serv.</i> , 71 F.3d 885 (D.C. Cir. 1995)	6
<i>Oglesby v. U.S. Dep’t of the Army</i> , 920 F.2d 57 (D.C. Cir. 1990)	3
<i>Steinberg v. U.S. Dep’t of Justice</i> , 23 F.3d 548 (D.C. Cir. 1994)	2, 5
<i>Tarzia v. Clinton</i> , 2012 WL 335668 (S.D.N.Y. Jan. 30, 2012)	4
<i>Valencia-Lucena v. U.S. Coast Guard</i> , 180 F.3d 321 (D.C. Cir. 1999)	7
<i>Weisberg v. U.S. Dep’t of Justice</i> , 627 F.2d 365 (D.C. Cir. 1980)	2
OTHER AUTHORITIES	
Fed. R. Civ. P. 56(a)	1

Plaintiff American Immigration Council (“AIC”) respectfully submits this sur-reply in opposition to Defendants’ United States Department of Homeland Security (“DHS”) and United States Immigration and Customs Enforcement (“ICE”) motion for summary judgment.

INTRODUCTION

Since Plaintiff American Immigration Council (“AIC”) filed its memorandum in opposition to Defendants’ motion for summary judgment, Defendants have attempted to remedy the glaring defects in their adequacy-of-the-search argument through their reply brief. Additionally, “in an abundance of caution,” Defendants have submitted a supplemental declaration from Mr. Ryan Law, Deputy FOIA Officer of the Freedom of Information Act Office at U.S. Immigration and Customs Enforcement, “to provide even more detail of exactly how the search was conducted.” Defs. Reply, ECF No. 17 (*hereinafter* “Reply Br.”) at 7. Although Mr. Law’s supplemental declaration provides much more detail (most of which Defendants should have but did not provide in Mr. Law’s original declaration), the supplemental declaration still is deficient under controlling D.C. Circuit precedent because it fails to describe the search methods employed and the scope of the search. Further, Defendants have not offered any explanation for why it did not search local offices for records, despite the fact that AIC’s request encompassed records from field offices and other local offices. Defs. Mot. Summ. J., ECF No. 12-3 at 1 (*hereinafter* “Defs. 12-3”). Finally, Defendants take no steps to address AIC’s countervailing evidence in their reply brief and instead dismiss this evidence out of hand.

Because Defendants’ search still is inadequate and unreasonable, Defendants have failed to meet their burden under Fed. R. Civ. P. 56(a) and their motion must be denied.

ARGUMENT

I. Mr. Law’s Supplemental Declaration Still Fails to Satisfy the D.C. Circuit’s Standard for Demonstrating Specificity and Adequacy.

Although Mr. Law’s supplemental declaration provides a greater level of detail regarding the Defendants’ search, the declaration is still inadequate because it fails to describe “*what records were searched, by whom, and through what process.*” *Steinberg v. U.S. Dep’t of Justice*, 23 F.3d 548, 551-52 (D.C. Cir. 1994) (emphasis added); *see Weisberg v. U.S. Dep’t of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980) (finding that agency affidavits that “do not denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the requestor] to challenge the procedures utilized” cannot support summary judgment).

First, the supplemental declaration indicates that ICE’s offices searched individual folders and individuals’ messages. *See* Defs. Reply, ECF No. 17-1, Supplemental Declaration of Ryan Law (*hereinafter* “Law Supp. Decl.”), ¶¶ 12, 14. The supplemental declaration also states that the offices conducted “computer searches,” paper file searches, email and CD ROM searches. *Id.*, ¶¶ 17, 19, 22, 25-26, 29, 34, 41. However, as in his first declaration, Mr. Law fails (1) to describe why these files or individuals were chosen and (2) to explain whether these searches were targeted to particular computers or paper files or encompassed all files in a particular office. Instead, the supplemental declaration relies on perfunctory statements that such folders and individuals were “thought to contain relevant records” or “may have been involved in matters relating to the subject matter of the request.” *Id.*, ¶¶ 12, 14. These generic descriptions fail to describe the structure of the agency’s file system in even the most general of terms. *See Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 151 (D.C. Cir. 1986) (stating that affidavit must “describe at least generally the structure of the agency’s file system” to explain why any

further search would be unlikely to disclose additional relevant information), *aff'd*, 484 U.S. 9 (1987). This lack of information regarding how Defendants selected these files prevents AIC from challenging the search's adequacy and from allowing this Court to assess the search's adequacy for summary judgment purposes. *See Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Second, although the supplemental declaration describes Defendants' search terms, these search terms were wildly inconsistent. For example, OPLA searched its shared drive using the terms "attorney representation," "access to counsel," and "right to counsel" while ERO searched its shared drive using the terms "RA memos," "SPC," "Jena," "Florence," "El Paso," "DEAC," "Detention Facility," "LCI," and "Broward," and ODPP searched its shared drive using only the term "attorney."¹ *See* Law Supp. Decl., ¶¶ 11, 30, 40. These inconsistencies show that all three offices could have, and did not, use additional search terms, which could have produced additional responsive documents. These inconsistencies are not isolated to differences among ERO, OPLA, and ODPP because OPLA used inconsistent search terms within its own office. OPLA searched its shared drive using the three terms described above, but its computer search used the search terms "Sixth or 6th Amendment," "Detainer," "Counsel," and "Worksite." *Compare id.*, ¶ 11 *with id.*, ¶ 17. Because Defendants have provided no explanation for why inconsistent search terms were used, they likely failed to locate additional responsive documents, rendering their search inadequate. *See ACLU of S. Cal. v. United States Dep't of Homeland Sec.*, 2012 WL 5342411, *4 (C.D. Cal. Oct. 25, 2012) (determining that search was inadequate in part because of inconsistent search terms).

¹ ICE tasked these offices to search for documents responsive to AIC's FOIA request. OPLA stands for the Office of the Principal Legal Advisor while ERO stands for the Office of Enforcement and Removal Operations and ODPP stands for the Office of Detention, Policy, and Planning. ICE also tasked a fourth office to search for responsive records: HSI. HSI stands for the Office of Homeland Security Investigations. *See* Law Supp. Decl. ¶ 6.

Besides inconsistent search terms, the supplemental declaration clearly shows that Defendants failed to use variations of its search terms to obtain responsive documents of the same idea or subject matter. For example, OPLA used the singular phrase “detention facility” as well as the plural phrase “detention facilities” in its search. Law Supp. Decl., ¶¶ 25-26. No other office used both singular and plural versions of the search terms. The supplemental declaration also indicates that Defendants did not use proximity locators, like “access w/3 counsel,” and that they did not search both the full name and any abbreviations of particular subjects. For example, the supplemental declaration is silent on whether Defendants searched only for the phrase “RA memos” or also searched other iterations and naming conventions for these memoranda. *Id.*, ¶ 30. These failures, along with Defendants’ lack of any explanation for its search terms, indicate that additional responsive documents likely exist and their search is inadequate. *See ACLU of S. Cal.*, 2012 WL 5342411, *4 (determining that search was inadequate in part because defendants failed to search variations on search terms used); *Tarzia v. Clinton*, 2012 WL 335668, *9 (S.D.N.Y. Jan. 30, 2012) (stating that “it does not follow that every document responsive to his Request necessarily will contain the exact title of the Report or a subsection thereof” and determining that search was inadequate because defendant failed to show that conducting broader search would be unduly burdensome).

Finally, Defendants unreasonably narrowed the scope of AIC’s request. HSI informed Defendants that it “would not have any records in its possession that would be responsive to the request.” *Id.*, ¶ 44. Defendants deemed this response sufficient as “HSI is not responsible for the detention and detainee care of detained aliens within ICE.” *Id.*, ¶ 45. AIC’s FOIA request, however, was not limited to detention and detainee care; rather, its request involved the right to

counsel in four broad topic areas, which included at least thirteen different types of records.²

Defs. 12-3 at 1. Also, Defendants' reliance on HSI's conclusory statement is a factor in determining a search's adequacy. *See Steinberg*, 23 F.3d at 552 (remanding to assess adequacy of U.S. Attorney's search because agency did not describe search's mechanics and relied on one office's conclusory statement that no responsive records existed).

II. Defendants Have Failed to Address the Points Raised in AIC's Opposition Brief.

Beyond those glaring deficiencies in Mr. Law's supplemental declaration, Defendants also have failed to address several issues raised by AIC regarding the adequacy of their search.

A. Defendants Have Failed to Explain Why Local Offices Were not Searched.

The supplemental declaration confirms that Defendants only searched their headquarters. As noted in AIC's opposition brief, ICE has numerous offices; yet, only a few of the released documents came from its local offices. *See* Pl's Mem. in Opp'n to Mot. Summ. J., ECF No. 15 (*hereinafter* "Pl's Opp'n"), at 11. Defendants do not explain why searching the local offices would be unnecessary even though many of ICE's local offices regularly interact with noncitizens and their attorneys. *See* Pl's Opp'n, ECF No. 15-13, Declaration of Beth Werlin, ¶ 4. Because Defendants have failed to explain why searches were not conducted,³ a genuine issue exists regarding whether Defendants' search was adequate.

B. Defendants Have Failed to Explain the Guidance Provided to Selected Offices.

In his first declaration, Mr. Law stated that pursuant to ICE's standard procedures, when it receives a FOIA request, ICE's FOIA Office determines the appropriate responding offices and

² AIC's four broad topics were as follows: (1) "[a]ttorneys' ability to be present during their clients' interactions with ICE"; (2) "[w]hat role attorneys may play during their clients' interactions with ICE"; (3) "[a]ttorney conduct during interactions with ICE on behalf of their clients"; and (4) "[a]ttorney appearances at ICE offices or other facilities." Defs. 12-3 at 1.

³ Given that Defendants have had two opportunities to provide an explanation on this issue, AIC must conclude that no such searches were conducted.

provides each office's point of contact ("POC") a copy of the request as well as specific instructions for searching for responsive records. Defs. Mot. Summ. J., ECF No. 12-2, Declaration of Ryan Law (*hereinafter* "Law Decl."), ¶ 7. Then, the POCs forward the information "to the individual employee(s) or component office(s) within the program office that they believe are most likely to have responsive records." *Id.* He, however, failed to describe what guidance was given in this case. Despite receiving an opportunity to address this issue in his supplemental declaration, Mr. Law still provides no description regarding the guidance given to the POCs. This lack of information, coupled with the offices' inconsistent search terms described on page 3 *supra*, strongly suggests that ICE's FOIA Office provided no guidance.

C. Defendants Have Provided No Details Regarding Their Recordkeeping or File Selection.

As discussed above on pages 2-3 *supra*, the supplemental declaration provides no detail on why certain files were searched. Instead, the supplemental declaration generally avers that such information was relevant to AIC's FOIA request. *See* Law Supp. Decl., ¶¶ 27, 37, 43, 46. With respect to the databases searched, Defendants fail to provide any detail about the names or types of those databases. Instead, AIC only has the database descriptions from Mr. Law's first declaration, relating to databases of records for individuals. Law Decl., ¶ 16. The supplemental declaration fails to indicate whether additional databases (beyond those originally described) were searched, and if so, what the names of those databases were and what information those databases contained. Thus, AIC cannot determine if those databases would be of the type that would yield information responsive to its FOIA request. *See Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 891 (D.C. Cir. 1995) (determining that Customs failed to "describe its recordkeeping system in sufficient detail" to allow the court to identify what subject matter files might have information responsive to the FOIA requests).

D. Defendants Fail to Address AIC's Countervailing Evidence.

Instead of addressing the countervailing evidence contained in AIC's opposition brief, Defendants contend that AIC's arguments are "contrary to case law and without merit." Reply Br. at 8. Defendants, however, misconstrue the law regarding countervailing evidence. AIC did not contend that countervailing evidence automatically renders Defendants' search inadequate *per se*; rather, AIC stated that the existence of countervailing evidence strongly undermines Defendants' position that they conducted what they now consider to be a reasonable and adequate search. *See Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1116 (D.C. Cir. 2007) (stating that "the requester may nonetheless produce *countervailing evidence*, and if the sufficiency of the agency's identification or retrieval procedure is genuinely in issue, summary judgment is not in order.") (emphasis added) (internal quotation omitted). AIC's countervailing evidence, described on pages 12 through 16 of its opposition brief, and Defendants' continued failure to explain why local ICE offices were not searched clearly undermines Defendants' contention that their search was adequate. Defendants cannot ignore the fact that their search has overlooked responsive documents. *See Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (stating that summary judgment is inappropriate if "a review of the record raises substantial doubt, particularly in view of well-defined requests and positive indications of overlooked materials" (internal citation and quotation omitted)).

CONCLUSION

Despite providing a supplemental declaration, Defendants still have failed to carry their burden of demonstrating that they conducted an adequate search. AIC respectfully requests that the Court deny Defendants' motion for summary judgment.

Respectfully submitted,

Dated: May 3, 2013

s/Michelle S. Grant

Michelle S. Grant (*Admitted Pro Hac Vice*)

DORSEY & WHITNEY LLP

50 South Sixth Street, Suite 1500

Minneapolis, MN 55402

Telephone: (612) 340-5671

Facsimile: (612) 340-8800

grant.michelle@dorsey.com

Creighton R. Magid (D.C. Bar #476961)

DORSEY & WHITNEY LLP

1801 K Street, N.W., Suite 750

Washington, D.C. 20006

Telephone: (202) 442-3000

Facsimile: (202) 442-3199

magid.chip@dorsey.com

Beth Werlin (D.C. Bar #1006954)

bwlerin@immcouncil.org

Melissa Crow (D.C. Bar #453487)

mcrow@immcouncil.org

American Immigration Council

1331 G Street, N.W., Suite 200

Washington, D.C. 20005

Telephone: (202) 507-7500

Facsimile: (202) 742-5619

*Attorneys for Plaintiff American Immigration
Council*