

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

)	
NISKANEN CENTER, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 17-676 (JEB)
U.S. DEPARTMENT OF ENERGY,)	
)	
Defendant.)	

**DEFENDANT’S REPLY IN SUPPORT OF ITS SUMMARY JUDGMENT MOTION
AND OPPOSITION TO PLAINTIFF’S CROSS-MOTION FOR SUMMARY
JUDGMENT**

Defendant, United States Department of Energy (“DOE”), by undersigned counsel, respectfully submits this reply in further support of its motion for summary judgment in this Freedom of Information Act (“FOIA”) case and in opposition to Plaintiff, Niskanen Center, Inc.’s (“Plaintiff”), cross-motion for summary judgment.

As detailed in the opening memorandum (Dkt. No. 16) and in the Declaration of Alexander C. Morris, FOIA Officer in the Office of Public Information for DOE Headquarters (Dkt. No. 16-1) (the “Morris Dec.”), and Mr. Morris’ accompanying supplemental declaration (the “Morris Supp. Dec.”), DOE performed a reasonable and appropriate search for records responsive to Plaintiff’s FOIA request seeking multiple categories of documents related to non-party entities National Coal Council (the “Council”) and NCC, Inc. In response, Plaintiff speculates that “responsive documents would likely be located in other parts of DOE. . . .” *See* Plaintiff’s Memorandum in Support of Their Motion for Summary Judgment and in Opposition to Defendant’s Motion for Summary Judgment (Dkt. No. 17) (“Pl. Mot.”) at 14. However, it is firmly established that speculative or hypothetical assertions of the type relied upon by Plaintiff

are insufficient to raise a material question of fact with respect to the adequacy of an agency's search. *See, e.g., Lasko v. U.S. Dep't of Justice*, 10-cv-5068, 2010 WL 3521595, at *1 (D.C. Cir. Sept. 3, 2010) (per curiam) (explaining that the adequacy of the search is not undermined by mere speculation that additional documents might exist); *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 67 n.13 (D.C. Cir. 1990); *Elliott v. National Archives & Records Admin.*, 06-cv-1246 (JDB), 2006 WL 3783409, at *3 (D.D.C. Dec. 21, 2006) (noting that speculative claims about the existence of other documents cannot rebut the presumption of good faith accorded to agency declarations).

Additionally, relying upon an incorrect standard, Plaintiff challenges DOE's withholding of exempt material pursuant to FOIA Exemption 4 and alleges that DOE has not released all segregable non-exempt information. However, as the Morris Declarations and the accompanying Declaration of Janet Gellicci, NCC, Inc.'s CEO (the "Gellicci Dec."), demonstrate, DOE carefully reviewed the responsive records and redacted only as much as was necessary to protect NCC, Inc.'s confidential and privileged business information.

For the reasons set forth below and in DOE's initial memorandum, its motion for summary judgment should be granted and Plaintiff's cross-motion should be denied.

ARGUMENT

I. DOE CONDUCTED A REASONABLE AND ADEQUATE SEARCH FOR RESPONSIVE RECORDS

In response to DOE's motion, Plaintiff asserts three challenges to the adequacy of DOE's search: (1) Plaintiff speculates that "responsive documents would likely be located in other parts of DOE. . . ."; (2) Plaintiff claims there is "no indication that the search was also designed to locate hard copy or electronic files designated 'NCC, Inc.'"; and (3) Plaintiff notes that DOE

neither released nor withheld any documents from the timeframe 1986-2008. *See* Pl. Mot. at 14. None of these claims is adequate to defeat summary judgment.

First, it is firmly established that “[a]n adequate search may be limited to places most likely to contain responsive documents.” *See, e.g., Defenders of Wildlife v. U.S. Dep’t of Interior*, 314 F. Supp. 2d 1, 10 (D.D.C. 2004); *Blank Rome LLP v. Dep’t of the Air Force*, 15-cv-1200 (RCL), 2016 WL 5108016, at *5 (D.D.C. Sept. 20, 2016) (“[T]he search was properly limited to the place most likely to contain responsive documents.”). As explained in the Morris Declarations, DOE searched its Office of Fossil Energy because it is “the office within DOE tasked with providing primary support to the [Council] in [the Council’s] charter,” and, as such, “has the responsibility for managing [the Council’s] records.” Morris Sup. Dec. ¶ 8. Thus, it is the location that maintains records of the type requested by Plaintiff in its FOIA request to the extent such records exist within DOE’s files. *Id.* at ¶ 9. Consequently, DOE properly conducted its search in the location most likely to contain responsive records and did, in fact, find responsive records in that location.

Second, as explained in the Morris Declarations, and as evidenced by the fact that NCC, Inc. documents were, in fact, located, DOE did search for responsive documents related to NCC, Inc. Morris Dec. ¶¶ 15, 16, 25-26; Morris Sup. Dec. ¶ 10.

Finally, contrary to Plaintiff’s claim, DOE’s search was not inadequate simply because DOE did not locate any documents from the timeframe 1986-2008. Assuming for the sake of argument that responsive documents from that timeframe did exist within DOE’s files at some point, it does not follow that they have remained in DOE’s custody all these many years later and that they were still within DOE’s files at the time of Plaintiff’s FOIA request. *See, e.g., Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) (“Contrary to [plaintiff’s] assertion on appeal, the

fact that responsive records once existed does not mean that they remain in the [agency's] custody today. . . ."); *Amuso v. U.S. Dep't of Justice*, 600 F. Supp. 2d 78, 89 (D.D.C. 2009) ("Even if the FBI's [field office] once maintained records that may have been responsive to plaintiff's FOIA request, the FBI's failure to locate them now does not weaken the FBI's position [that it conducted a reasonable search]."). As this Court has explained:

When an agency cannot locate a document, FOIA only requires the agency to show that it has made a reasonable search. *Weisberg*, 745 F.2d at 1485. Nothing in the law requires the agency to document the fate of documents it cannot find. If a reasonable search fails to unearth a document, then it makes no difference whether the document was lost, destroyed, stolen, or simply overlooked.

Roberts v. U.S. Dep't of Justice, 92-cv-1707 (NHJ), 1995 WL 356320, at *2 (D.D.C. Jan. 29, 1993); *see also Amuso*, 600 F. Supp. 2d at 89 (same); *West v. Spellings*, 539 F. Supp. 2d 55, 62 (D.D.C. 2008) ("While four files were missing, FOIA does not require [the agency] to account for them, so long as it reasonably attempted to locate them.").

The Morris Declarations set forth the reasonable and appropriate search methods employed by DOE to locate responsive records from the entire timeframe of Plaintiff's request. Although not required to account for the fate of the records from the earlier time period of Plaintiff's FOIA request – some of which would now be more than 30 years old – as explained in the Supplemental Morris Declaration:

[The Office of Fossil Energy] provided all relevant documents within its possession to [DOE's Office of Public Information]. According to [the Office of Fossil Energy], if older documents were no longer within the possession of [the Office of Fossil Energy], it is due to [the Office of Fossil Energy's] historical document management processes. Since approximately 2015, DOE has followed National Archives and Records Administration's (NARA) General Records Schedule 6.2 for the disposition of Federal Advisory Committee records (pursuant to which certain records are transferred to NARA when they are 15 years old), which rescinded the old General Records Schedule for

committees (pursuant to which certain records could be transferred to NARA when they were three years old).

Morris Sup. Dec. ¶ 13. As the Morris Declarations demonstrate, DOE performed a reasonable search for responsive documents covering the entire time period noted in Plaintiff's FOIA request. The fact that DOE did not locate documents from the earliest part of that more than 30-year period does not indicate that the search was somehow inadequate or that DOE is not entitled to summary judgment.

II. DOE PROPERLY INVOKED EXEMPTION 4 AND RELEASED ALL REASONABLY SEGREGABLE MATERIAL

Plaintiff asserts that the *National Parks* test applies to the determination of whether DOE appropriately withheld information under Exemption 4. Pl. Mot. at 21-25. Plaintiff's argument is premised on its claim that the withheld information was involuntarily provided to DOE because Plaintiff incorrectly contends it "was provided to DOE by a federal advisory committee and/or its non-profit alter ego – entities that exist *solely* to advise the federal government" *Id.* at 22. Plaintiff is incorrect. The Council and NCC, Inc. are not one in the same. As NCC, Inc. CEO Janet Gellici explains in her declaration:

Since the [Council] is a self-funded organization and receives no financial support from the U.S. Department of Energy ("DOE"), [NCC, Inc.] was created as a private 501(c)(6) to handle all of the business activities required to fulfill the [Council's] charter. . . . There is a strict division kept between business activities of NCC, Inc. and the Federal Advisory Committee Act ("FACA") activities of the [Council].

Gellici Dec. ¶ 2.

As both Janet Gellici and Alexander Morris attest in their declarations, the subject documents were provided to DOE voluntarily. Gellici Dec. ¶ 5; Morris Dec. ¶ 33; Morris Sup. Dec. ¶ 14. Plaintiff points to no authority that suggests otherwise and the case upon which Plaintiff relies, *Center for Public Integrity v. U.S. Department of Energy*, 234 F. Supp. 3d 65

(D.D.C. 2017), does not support Plaintiff's contention that the *National Parks* test applies. *Center for Public Integrity* involved a government contractor that operated a government-owned nuclear laboratory that was overseen by DOE. *Id.* at 70-71. There, the Court concluded that "where an agency requests information from a regulated entity that it would otherwise have the legal authority to compel the resulting productions are involuntary and the *National Parks* test controls." *Id.* at 75. Such circumstances do not exist here. NCC, Inc. is not a "regulated entity," as was the government contractor in *Center for Public Integrity*, and there is no similar "legal authority" permitting DOE to compel it to provide the subject documents.

Thus, since the documents at issue were voluntarily provided, the Court's analysis is governed by *Critical Mass Energy Project v. Nuclear Regulatory Commission* ("*Critical Mass II*"), and information is confidential, and properly protected under Exemption 4, "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc). As Janet Gellici explains in her declaration: "[D]ocuments such as the ones at issue are routinely kept in confidence by NCC, Inc. They are not customarily shared with anyone outside of NCC, Inc. including those at DOE." Gellici Dec. ¶ 5. Ms. Gellici further explains that the information is of such a confidential nature that its disclosure would cause considerable harm to NCC, Inc. by, for example, dissuading members from joining the Council or by "caus[ing] reputational harm to NCC, Inc. that could lead to the public discrediting of [the Council] and its reports." *Id.* at ¶¶ 6-7. Therefore, it was properly withheld pursuant to Exemption 4.

Additionally, although Plaintiff concedes that Exemption 4 also protects commercial material that is privileged (*see* Pl. Mot. at 33), Plaintiff incorrectly contends that DOE improperly withheld a privileged legal memorandum. As explained in the Supplemental Morris

Declaration and the *Vaughn* Index, the legal memorandum was prepared “by NCC, Inc.’s outside counsel for NCC, Inc.’s [in house] counsel regarding litigation strategies in potential private litigation” concerning “confidential financial information related to its brokerage account.” *See* Morris Decl., Exh. F, at 2; Morris Sup. Dec. ¶ 22. As such, it is subject to the protections of the work product privilege. *See* Fed. R. Civ. P. 26(b)(3). Therefore, it was properly withheld.¹

Finally, as Alexander Morris explains, he undertook an extensive and careful review of the responsive documents to ensure that all reasonably segregable, non-exempt information was released to Plaintiff. *See* Morris Decl. ¶¶ 35, 38; Morris Sup. Decl. ¶¶ 19-23.

[Remainder of page intentionally left blank.]

¹ In its discussion of privileged material, Plaintiff references the portion of an “agenda item referring to private litigation” that was withheld from Document No. 1 from the September 13, 2017, production. *See* Pl. Mot. at 36. To the extent Plaintiff intends to suggest that information was withheld because it is privileged, that is incorrect. It was withheld because it contains “information related to NCC, Inc.’s potential private litigation related to NCC, Inc. regarding a brokerage account.” *See* Morris Decl., Exh. F, at 1; Morris Sup. Dec. ¶ 19. Therefore, it is the kind of information that NCC, Inc. would not customarily release to the public as doing so would significantly hinder NCC, Inc.’s ability to make decisions concerning private litigation.

CONCLUSION

For the reasons set forth above and in DOE's initial memorandum, its motion for summary judgment should be granted and Plaintiff's cross-motion should be denied.

Dated: June 22, 2018

Respectfully submitted,

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