IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PROJECT ON PREDATORY STUDENT LENDING OF THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL, *Plaintiff*, v. UNITED STATES DEPARTMENT OF JUSTICE, *Defendant*.	Civil Action No. 2:17-cv-00210-NBF Hon. Nora Barry Fischer *(Electronic Filing)*

DEFENDANT'S SURREPLY BRIEF IN OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION

Plaintiff is not entitled to summary judgment regarding its request under the Freedom of Information Act ("FOIA") for several reasons. The documents plaintiff seeks are subject to protective orders entered in a False Claims Act case, *United States ex rel. Washington v. Education Management LLC*, No. 2:07-cv-461 (W.D. Pa.) (the "EDMC Litigation"), and as a matter of law are not subject to disclosure under FOIA. Moreover, the aspersions that plaintiff attempts to cast on positions taken by the United States Attorney's Office for the Western District of Pennsylvania (the "USAO") related to plaintiff's motion to intervene in the EDMC Litigation are immaterial to this FOIA action – and have no bearing on the issues before the Court on summary judgment. Moreover, the information that the USAO received in the EDMC Litigation on external electronic media, consisting predominantly of hard drives, but which also included CDs and DVDs (collectively "the Hard Drives") does not constitute agency records under the legal standards applied by other courts. That is so because (i) there is no indication that the Hard Drives were created to be agency records; (ii) the USAO did not have complete

discretion over its use of the Hard Drives; (iii) the USAO was not reading or relying on the Hard Drives at the time of plaintiff's FOIA request – the EDMC Litigation had settled months beforehand; (iv) the Hard Drives were not integrated into the USAO's file system; (v) the Hard Drives contain data from EDMC and provide no meaningful insight into agency decision-making; (vi) EDMC retains possessory interests in the return of the Hard Drives, and therefore they cannot be viewed as agency records; and (vii) the Hard Drives were not in the USAO's permanent possession, but rather were only in the USAO's temporary custody.

Plaintiff also fails to demonstrate that it is entitled to summary judgment on the scope of defendant's FOIA search. Rather the evidence demonstrates that defendant conducted an adequate search that was supported in reasonable detail by a sworn statement.

Finally, summary judgment should not be entered for plaintiff because even if the documents plaintiff seeks were agency records subject to FOIA (which they are not), it would be unduly burdensome for the USAO to search and process the millions of documents on the Hard Drives that may be potentially responsive to plaintiff's FOIA request.

ARGUMENT

I. THE INTERVENTION BRIEFING IN THE EDMC LITIGATION IS IMMATERIAL TO SUMMARY JUDGMENT IN THIS ACTION.

As an indicator of the weakness of its claim to summary judgment, plaintiff begins its Reply Brief with an argument that is wholly immaterial. Specifically, plaintiff attempts to re-litigate its intervention motions in the EDMC Litigation by claiming that the Government in that case made false representations to the Court. *See* Pl.'s Reply Br. at 2-5. Those allegations regarding the EDMC Litigation are plainly immaterial because they have absolutely no bearing on the three elements of a FOIA case, *viz.*, the (i) improper (ii) withholding of (iii) agency records. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 142 (1980).

Although plaintiff's lead argument does nothing to improve its chances for summary judgment, plaintiff's repeated attempts to disparage government counsel in the EDMC Litigation cannot go unrebutted.

Plaintiff's accusations are entirely meritless. First, plaintiff cannot explain away the context of the statements made by the Government in the EDMC Litigation: those were conditional and predictive as to the arc of this FOIA litigation, which had only commenced at the time of the Government's filing in the EDMC Litigation. *See* Def.'s Mem. in Opp. / Reply Br. at 4-5, ECF No. 65 (Mar. 1, 2018). Second, plaintiff is unable to refute the fact that the Government's predictions remain to this day over 99% accurate. *See id.* at 5. And third, plaintiff has made no showing whatsoever that the statements by the Government regarding the breadth of the other defenses that it was contemplating were the least bit inaccurate at the time they were made. *Cf.* Pl.'s Reply Br. at 2-5. To the contrary, as plaintiff has previously argued to this Court, FOIA actions are reviewed *de novo*, *see* Rule 26(f) Report, ECF No. 23 (Apr. 28, 2107), and an agency is not bound in a FOIA action to its prior rationales for withholding documents. Significantly, the fact that defendant asserted fewer defenses in this FOIA action – after preparing for and engaging in mandatory mediation – than it had previously raised at the administrative level is not evidence of bad faith, but rather of a good faith effort to narrow and limit this dispute. Plaintiff grossly errs in attempting to flip the script through accusations that are not only immaterial but also completely unjustified.

If plaintiff has led with its strongest argument, then not much remains of its other theories for summary judgment.

II. PLAINTIFF CANNOT OBTAIN SUMMARY JUDGMENT BECAUSE THE DOCUMENTS IT REQUESTS ARE PROPERLY WITHHELD UNDER THE RELEVANT PROTECTIVE ORDERS.

This dispute may be resolved through a recognition that the documents plaintiff seeks – regardless of whether they are agency records – are subject to one or more of the protective orders in the EDMC Litigation. It is black-letter law that an agency does not improperly withhold documents subject to a protective order from a FOIA requestor. *See GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 387 (1980); *Morgan v. DOJ*, 923 F.2d 195, 197 (D.C. Cir. 1991). Plaintiff would have defendant disregard the protective orders in the EDMC Litigation because allegedly there was no good cause for those protective orders. *See* Pl.'s Reply Br. at 4. But that ambitious attempt to re-litigate the EDMC Litigation has no grounding in the law. Despite plaintiff's repeated invocation of the Third Circuit's *Cipollone* decision – decided long before the advent of e-discovery and before the reliance on clawback and quick-peek agreements – it provides no assistance to plaintiff. If anything, *Cipollone*, which was not a FOIA case, establishes the correctness of defendant's withholding of documents under FOIA. As the Third Circuit explained, protective order designations remain in effect, unless challenged by the party receiving the information:

> It is equally consistent with the proper allocation of evidentiary burdens for the court to construct a broad "umbrella" protective order upon a threshold showing by one party (the movant) of good cause. Under this approach, the umbrella order would initially protect all documents that the producing party designated in good faith as confidential. After the documents delivered under this umbrella order, ***the opposing party*** could indicate precisely which documents it believed to be not confidential, and the movant would have the burden of proof in justifying the protective order with respect to those documents.

Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1122 (3d Cir. 1986) (emphasis added). Here, in the course of the EDMC Litigation, the United States did not challenge EDMC's confidentiality assertions of materials responsive to plaintiff's FOIA request, and thus there was no need for EDMC to indicate precisely the justification for its confidentiality designations.

Moreover, nothing in FOIA requires an agency to re-open closed litigation to challenge protective order designations merely to respond to a FOIA request. Nor is it appropriate to reconsider the good cause basis for the protective orders in the EDMC Litigation; those orders were unquestionably in effect on the date of plaintiff's FOIA request, and they remain currently in effect. Consequently, EDMC's confidentiality designations justify defendant's non-production of documents in response to plaintiff's FOIA request, and this action may be resolved on that ground at summary judgment – against plaintiff.

III. PLAINTIFF CANNOT OBTAIN SUMMARY JUDGMENT BECAUSE THE HARD DRIVES ARE NOT AGENCY RECORDS.

Plaintiff could not be more incorrect in its Reply Brief when it proclaims that "[t]here is no dispute that the documents the Project seeks satisfy both prongs of the *Tax Analysts* test." Pl.'s Reply Br. at 5. That is a core dispute in this action, and it cannot be wished away in one sentence. Defendant has explained that the information on the Hard Drives cannot satisfy the second and most important prong – the control prong – of the *Tax Analysts* formulation. *See* Def.'s Mem. in Opp. / Reply Br. at 9. Plaintiff attempts to shortchange the analysis by arguing that the special case of control articulated in *Tax Analysts* – for documents that come into the agency's sole possession in the legitimate conduct of its official duties – applies here. But that approach disregards both the limits of *Tax Analysts* and the specific facts of this case.

Tax Analysts did not address the situation in which another party had a legitimate claim of possession for documents in an agency's custody. *See generally United States Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989). The Supreme Court had previously addressed that scenario, and it concluded that information belonging to another entity within the agency's possession did not constitute agency records under FOIA. *See Kissinger v. Reporters Comm. for*

Freedom of the Press, 445 U.S. 136, 157 (1980). And *Tax Analysts* did not overrule that precedent. For that reason, the issue of "control" requires a deeper analysis.

Plaintiff's reference to the legislative history for the Electronic Freedom of Information Act Amendments of 1996 (the "eFOIA Amendments") confirms that conclusion. The Senate Report, cited by plaintiff, *see* Pl.'s Reply Br. at 7, debunks the notion that Congress intended the narrow formulation of "control" in *Tax Analysts* – in which control means only possession in the legitimate conduct of official duties – to apply to electronic information. As the Senate Report makes clear, Congress viewed *Tax Analysts* as bearing on the issue of whether a document constitutes an agency record, but that same passage also identifies possession and control as separate and distinct concepts:

> The FOIA currently does not define "record." A determination of what constitutes an "agency record" in particular instances shall depend upon a number of factors identified by the Supreme Court in *Department of Justice v. Tax Analysts*. Any item containing information that is in ***the possession and control*** of an agency is usually considered to be an agency record under FOIA.

S. Rep. No. 104-272, at 19 (1996) (emphasis added). Thus, because the eFOIA Amendments indicate that control and possession are separate and distinct for purposes of electronic information, the special test developed based on the facts of *Tax Analysts*, in which possession may serve as a proxy for control, should not be extended to electronic information. Rather, the analysis should proceed as defendant has previously explained: *Tax Analysts* is the starting point for the agency records issue, not the finish line. *See* Def.'s Mem. in Opp. / Reply Br. at 9.

To evaluate the issue of control in instances outside of the narrow factual confines of *Tax Analysts*, courts have applied either the four *Burka* factors, *see Burka v. HHS*, 87 F.3d 508, 515 (D.C. Cir. 1996), or a totality of the circumstances approach, *see Consumer Fed'n of Am. v. USDA*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Edelman v. SEC*, 172 F. Supp. 3d 133, 149 (D.D.C. 2016). Under either approach – as defendant has explained extensively in prior briefing – the

Hard Drives and the information they contain do not constitute "agency records." Those reasons are summarized below.

- The First *Burka* Factor. The intent of the documents' creator does not suggest that the Hard Drives are agency records. *See Burka*, 87 F.3d at 515. There is nothing to suggest that, at the time the documents were created, EDMC intended them to become agency records, and even more, when EDMC produced the Hard Drives to the USAO, they were subject to protective orders, which required their return or destruction.

- The Second *Burka* Factor. Defendant did not have complete discretion to use and dispose of the Hard Drives. *See Burka*, 87 F.3d at 515. Under the protective orders in the EDMC Litigation, the USAO could use the documents only for specified purposes, and the USAO was obligated to return or destroy the documents at the conclusion of the EDMC Litigation. *See* First Amended Protective Order, EDMC Litigation, ¶ 13 (Sept. 16, 2016); Family Educational Rights and Privacy Act Protective Order, EDMC Litigation, ¶ 5 (W.D. Pa. Apr. 8, 2013). Consequently, the USAO did not have complete discretion to use and dispose of the Hard Drives.

- The Third *Burka* Factor. At the time of plaintiff's FOIA request, defendant was not reading or relying on the Hard Drives. *See Burka*, 87 F.3d at 515. The *Tax Analysts* decision makes clear that the control inquiry must be made at the time of the FOIA request. *See Tax Analysts*, 492 U.S. at 145 ("[T]he agency must be in control of the requested materials at the time the FOIA request is made."). The third *Burka* factor uses an agency's reading or reliance on documents as evidence of control, but per *Tax Analysts*, the control inquiry must be made at the time of the FOIA request. And here, it is clear that the USAO was not reading or relying on the Hard Drives at the time of

plaintiff's FOIA request; rather at that time the Hard Drives had been taken offline and were inaccessible. *See* Def.'s Concise Statement of Material Facts ("SMF"), ¶ 20, ECF No. 43 (Nov. 17, 2017).

- The Fourth *Burka* Factor. The Hard Drives were not integrated into the USAO's file systems. *See Burka*, 87 F.3d at 515. The USAO did not integrate the Hard Drives into its filing system, rather it sent the Hard Drives to the McKool Smith law firm to upload the contents onto an electronic information review platform. *See* Def.'s SMF ¶ 7. And after the Hard Drives were returned to the USAO, the USAO did not operate an electronic information review platform to host the Hard Drives. *See* Comber Decl. ¶¶ 23-26, ECF No. 44-1 (Nov. 17, 2017).

- Totality of the Circumstances Additional Factor 1. The Hard Drives provide no meaningful insight into agency decision-making. FOIA's central purpose is to allow the public to be informed about the activities, functioning, operations, or structure of any federal agency. *See generally U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). While some records subject to FOIA may not satisfy those broad purposes, where any doubt exists as to whether a document is or is not an agency record, the statutory purpose behind FOIA counsels strongly against construing such a document as an agency record. *See Judicial Watch, Inc. v. Fed. Hous. Fin. Agency*, 646 F.3d 924, 928 (D.C. Cir. 2011) (holding that "a document that could not reveal anything about agency decision-making is not an 'agency record'"). And there is no clear expression of Congressional intent that documents (i) produced to a federal agency in litigation subject to a protective order and (ii) destined for return to the

producing party and (iii) which themselves shed no meaningful light on agency operations, should constitute agency records.

- Totality of the Circumstances Additional Factor 2. EDMC has possessory interests in the Hard Drives, and therefore they should not be viewed as agency records. In *Kissinger*, the Supreme Court held that the personal documents of the head of an agency that were within the agency's custody were not agency records because they belonged to the head of the agency personally. *See Kissinger*, 445 U.S. at 157. The argument that the Hard Drives are agency records is even weaker than the unsuccessful argument in *Kissinger* because here the Hard Drives belong to EDMC, not to an officer or employee of the federal agency. Thus, plaintiff's position that the Hard Drives must be agency records cannot be reconciled with the *Kissinger* decision, which remains binding precedent.

- Totality of the Circumstances Additional Factor 3. The Hard Drives are not agency records because they were only in the temporary custody of the USAO, which was in the process of returning them to EDMC. It would be a broad expansion of FOIA's reach if any document belonging to another entity that was within the temporary custody of a federal agency constituted an agency record.

IV. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ADEQUACY OF DEFENDANT'S SEARCH.

Plaintiff has failed to demonstrate that defendant's search was inadequate in any respect. The relevant standard for a FOIA search is that an agency must conduct a search that is reasonably calculated to locate all responsive records. *See Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). This does not mean that a federal agency must search every employee's files or every record system. *See Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir.

1990). Rather, an agency should describe the scope and method of its search in reasonable detail through a sworn statement. *See Adbelfattah v. DHS*, 488 F.3d 178, 182 (3d Cir. 2007); *SafeCard Servs., Inc., v. Sec. Exch. Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (explaining that agency declarations must be "relatively detailed and non-conclusory"). As explained in Defendant's Surreply in Opposition to Plaintiff's Motion for Discovery Pursuant to Rule 56(d), ECF No. 74 (Apr. 12, 2018), the Declaration of Civil Chief Michael Comber is not conclusory, and it satisfies these standards, especially when measured against other search affidavits whose adequacy has been upheld by the Third Circuit. *Id.* at 2-3.

V. PLAINTIFF IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE UNDUE BURDENSOMENESS OF ITS FOIA REQUEST.

Plaintiff has failed to rebut the undue burdensomeness of its FOIA request as to the Hard Drives. Defendant repeatedly explained that there are millions documents on the Hard Drives, estimated to consist of over a hundred million pages if printed. *See, e.g.*, Def.'s SMF ¶ 9. Plaintiff most recently suggests that those figures do not account for two destroyed Hard Drives. *See* Pl.'s Reply Br. at 24. Plaintiff further proposes several ways that defendant could more easily search the Hard Drives. *See id.* at 25. But none of those considerations transforms plaintiff's unduly burdensome request into a manageable task. As defendant has explained, using case law as a benchmark, even if plaintiff's suggestions taken in aggregate could reduce the volume of documents by 99%, that would still be unduly burdensome. *See, e.g., Nat'l Day Laborer Organizing Network*, -- F. Supp. 3d --, 2017 WL 1494513, at *15 (holding that searching and reviewing between 436,000 and 1.3 million pages of potentially responsive records was unduly burdensome). Notably, even plaintiff, which does not lack for ambition, does not make such a bold claim, *i.e.*, that its proposals would reduce the search burdens by over

99%. Consequently, plaintiff is not entitled to summary judgment on this issue; rather, summary judgment should be entered for defendant.

VI. DEFENDANT HAS NOT WAIVED PRIVILEGE WITH RESPECT TO NON-RESPONSIVE DOCUMENTS NOT INCLUDED ON ITS *VAUGHN* INDEX.

Plaintiff also cannot obtain summary judgment regarding eleven documents that are best viewed as (i) being non-responsive to plaintiff's FOIA request and (ii) containing privileged information. Plaintiff's FOIA request sought "all materials" produced from EDMC to the USAO in response to certain discovery requests in the EDMC Litigation, *see* FOIA Request at 2-3, ECF No. 17-2 (Mar. 16, 2017). The eleven documents that were not included on the *Vaughn* Index are privileged, but also those documents were not the exact copies of documents received from EDMC in discovery. *See* Def.'s Mem. in Opp. / Reply Br. at 8-9 (explaining that six documents also contain the handwritten notes of counsel, four were attachments to emails among counsel, and one was part of an under seal filing). And although some of them contain information that is duplicative of the information produced by EDMC, those specific documents were not received in their current form from EDMC in discovery, and thus they are best viewed as non-responsive to plaintiff's FOIA request. That defendant accounted for these documents in its declarations evidences the extent of its good faith, and the fact that plaintiff now argues for a waiver of privilege demonstrates that plaintiff seeks to ensure that no good deed goes unpunished. The law is not so unkind; plaintiff identifies no authority to support a waiver of privilege for documents that are best viewed as non-responsive to a FOIA request.

CONCLUSION

For the foregoing reasons as well as those in defendant's prior briefing, plaintiff is not entitled to summary judgment.

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Respectfully Submitted,

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