

Attachment 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
RYAN NOAH SHAPIRO,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 13-729 (PLF)
)	
U.S. DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

The United States Department of Justice (“Defendant”), by and through undersigned counsel, hereby supplements its Motion for Summary Judgment, in accordance with the Court’s March 31, 2014 Opinion and Order. The instant supplemental brief provides the following information: 1) whether the Federal Bureau of Investigation (“FBI”) limited its search to records that are related to criminal investigations, 2) why a full-text search is unwarranted in this case, and 3) which third-party Freedom of Information Act (“FOIA”) request records FBI released to Plaintiff. In light of this supplemental information, Defendant respectfully requests that the Court grant Defendant’s Motion for Summary Judgment and deny Plaintiff’s Motion for Summary Judgment.

I. SUPPLEMENTAL FACTUAL BACKGROUND

Defendant hereby incorporates by reference the Declaration of David M. Hardy (“First Hardy Decl.”) (ECF No. 5-3), dated July 22, 2013; the Declaration of Dennis J. Argall (“Argall Decl.”) (ECF No. 11-1), dated September 13, 2013; and the Second Declaration of David M. Hardy (“Second Hardy Decl.”), dated July 10, 2014, attached hereto.

II. SUPPLEMENTAL LEGAL ARGUMENT

A. FBI Did Not Limit Its Search To Records That Are Related To Criminal Investigations.

In its March 31, 2014 Order, the Court determined that Plaintiff's FOIA request was "not confined to documents relating to a criminal investigation[.]" ECF No. 18, p. 11. The Court noted that the Argall Declaration "leaves open the possibility that records relating to Swartz outside the context of a criminal investigation may be located in databases other than CRS [the Central Records System]" and directed FBI to "consider whether responsive records would reasonably reside outside the CRS, and either perform any additional appropriate searches in databases or records systems outside the CRS or explain why additional searches would not be appropriate." *Id.* at pp. 11-12.

FBI did not limit its search to CRS or to records that are related to criminal investigations. Second Hardy Decl., ¶5. In response to Plaintiff's FOIA request, FBI searched CRS, the FOIA Document Processing System ("FDPS"), and the Electronic Surveillance Indices ("ELSUR"). *Id.* at ¶6. CRS contains more than criminal investigative files; for example, CRS includes administrative, applicant, and personnel files. *Id.* at ¶5. When searching CRS in response to Plaintiff's FOIA request, FBI searched not only criminal records, but records of any nature that were indexed to the subject of the FOIA request (Aaron H. Swartz). *Id.* The CRS search did not yield any responsive records. Argall Decl. at ¶7. FDPS, which FBI also searched, is FBI's electronic repository of FOIA/Privacy Act requests received by FBI. First Hardy Decl., ¶22. As such, FDPS includes records unrelated to criminal investigations. *See id.* FBI located records responsive to Plaintiff's FOIA request, in FDPS. *Id.* at ¶¶22-23. FBI also searched ELSUR, which is separate from CRS and is used to maintain information on subjects for whom electronic or voice communications have been intercepted,

but no responsive records were located in ELSUR in this case. *Id.* at ¶¶18, 19, 25. Based on its searches of CRS, ELSUR, and FDPS—as well as the responsive records that were located—FBI determined that there are not likely any additional responsive records. Second Hardy Decl., ¶6.

B. A Full-text Search Is Unwarranted In This Case.

In its March 31, 2014 Order, the Court found that FBI’s explanation as to why a full-text search of the CRS Electronic Case File (“ECF”) was not warranted in response to Plaintiff’s FOIA request, was lacking. ECF No. 18, p. 13. The Court directed FBI to either conduct a full-text search or explain why such a search is unnecessary. *Id.*

Full-text searches of CRS are beneficial in extraordinary situations in which there is information indicating that additional responsive records exist, despite the results of a CRS index search. Second Hardy Decl., ¶8. Absent those extraordinary situations, full-text searches usually yield unidentifiable, incomplete names, without other identifying information, as results—without providing any means by which to determine whether those vague results refer to the subject of the FOIA request. *Id.* at ¶7. Because full-text searches typically utilize a significant amount of time and resources, and yield little or no additional responsive records, FBI generally does not conduct full-text searches unless the aforementioned extraordinary circumstances exist. *Id.* at ¶¶7-8. Here, there are no such extraordinary circumstances. *Id.* at ¶8. Nothing in the responsive records that FBI already located indicates that additional responsive records exist; nor has Plaintiff provided any information indicating that FBI possesses additional responsive records. *Id.* Therefore, FBI reasonably concluded that a full-text search of CRS is unwarranted in this case. *Id.*

C. FBI Released All Responsive Third-party FOIA Request Records, Regardless Of The Dates.

In its March 31, 2014 Order, the Court noted that it was unable to determine whether FBI's decision to withhold third-party FOIA requests after the FOIA request cut-off date was reasonable. ECF No. 18, p. 13. The Court directed FBI to "provide the third-party [FOIA] requests and related documents received after the cut-off date or explain further why its decision to withhold these documents is reasonable." *Id.*

FBI previously withheld third-party FOIA request records pertaining to Aaron Swartz, due to the search cut-off date for Plaintiff's FOIA request. Argall Decl. at ¶5. However, FBI subsequently released to Plaintiff all such records in its possession. Second Hardy Decl. at ¶9. Specifically, on June 6, 2014, FBI released to Plaintiff the FOIA request records for twenty-four (24) third-party FOIA requests pertaining to Aaron Swartz. Second Hardy Decl., Exh. E. FBI received those third-party FOIA requests between January 12, 2013 and September 1, 2013. Second Hardy Decl., Exhs. A, C, D. Thus, FBI complied with the Court's March 31, 2014 Order by releasing the third-party FOIA request records. *See* ECF No. 18, p. 13.

III. CONCLUSION

For the aforementioned reasons, Defendant respectfully requests that the Court grant Defendant's Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment.

Dated July 16, 2014

Respectfully submitted,

RONALD C. MACHEN JR., D.C. Bar #447889
United States Attorney for the District of Columbia

DANIEL F. VAN HORN, D.C. Bar #924092
Assistant United States Attorney

By: _____/s/_____

DIONNE SHY
D.C. Bar #980042
Special Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 252-2633
Dionne.Shy@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2014, a true and correct copy of the above Defendant's Supplemental Brief in Support of Motion for Summary Judgment was mailed, postage prepaid, to:

JEFFREY LOUIS LIGHT
Law Office of Jeffrey Light
1712 Eye Street, NW
Suite 915
Washington, DC 20006

_____/s/_____
DIONNE SHY
D.C. Bar #980042
Special Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20530
(202) 252-2633
Dionne.Shy@usdoj.gov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
RYAN NOAH SHAPIRO,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 13-CV-0729
)	
DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

SECOND DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the Federal Bureau of Investigation (“FBI”), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 219 employees who staff a total of ten (10) FBIHQ units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA, as amended by the OPEN Government ACT of 2007 and the OPEN FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General and FBI policies and procedures; judicial decisions;

and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am familiar with the FBI's handling of a FOIA request that was received from plaintiff seeking access to records pertaining to Aaron H. Swartz.

(4) This declaration supplements, and hereby incorporates by reference the information previously provided in my first declaration dated July 22, 2013 ("First Hardy Declaration") (*See* Docket ["Dkt."] No. 5.), and the declaration of Dennis J. Argall dated September 12, 2013 ("Argall Declaration") (*See* Dkt. No. 11.) The purpose of this declaration is to address the Court's March 31, 2014 Opinion ("Opinion") (*See* Dkt. No. 18.) Specifically, this declaration will address the three objections raised by plaintiff regarding the adequacy of the FBI's search, which the court found to have merit.

Whether the Search was Limited to Records Relating to Criminal Investigations

(5) As stated in the Argall Declaration, ¶ 6, the CRS is a centralized records system containing administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. As such, criminal investigative files, as well as other types of files maintained by the FBI, are indexed and serialized in this system of records. Because of its comprehensive nature, the CRS is the searching tool used by RIDS to search for records responsive to FOIA and/or Privacy Act requests. As stated above, the CRS does not contain only criminal investigative files. Although the Argall Declaration, *Id.* stated that records

responsive to plaintiff's request would be of a criminal investigative nature and responsive records would reside in the CRS; it did not intend to indicate that the search for plaintiff's request was limited to criminal records only. The information to which Mr. Argall was referring was based on plaintiff's request letter, which indicated that Aaron H. Swartz was the subject of an alleged "intensive federal investigation." However, the search of the CRS was not limited to only criminal records; it included records of any nature that were indexed to the subject Aaron H. Swartz.¹

(6) The Court directed the FBI to "consider whether responsive records would reasonably reside outside the CRS, and either perform any additional appropriate searches in databases or records systems outside the CRS or explain why additional searches would not be appropriate." *See* Opinion, pg. 12. First, in addition to the search of the CRS, FBI's search included a search of the FBI FOIPA Document Processing System ("FDPS") (which included cross-reference material), and the FBI Electronic Surveillance Indices ("ELSUR"). *See* First Hardy Declaration, ¶¶ 22-25. Second, the FBI reconsidered whether other responsive records would reasonably reside outside the CRS, and concluded that responsive records do not likely reside outside the CRS. This conclusion is based on the information FBI located via the searches of the CRS, FDPS, and ELSUR. None of the information contained in the 23 pages of responsive material indicates or points to the existence of responsive information in any other FBI system or database. In sum, given that there is no main file indexed to Swartz, given the comprehensive nature of the material located in the CRS, and given that the 23 responsive pages--merely referencing Swartz--do not point elsewhere, FBI concluded that responsive records do not likely reside outside the CRS.

¹ It should be noted that Joint Terrorism Task Forces ("JTTF") operate similar to any squad located within FBIHQ and Field Offices and are therefore subject to the same records storage requirements. Any JTTF documents would be indexed in the CRS.

Whether an Index Search is Adequate

(7) As explained in the Argall declaration, the FBI generally does not conduct full text searches in responding to FOIA and Privacy Act requests as this extraordinary measure is unduly burdensome and/or not reasonably calculated to locate responsive records. The CRS is structured in a way that information important to an investigation, or information that may become important to the FBI in the future, is indexed so that it can be easily retrieved. The system would not function as an effective investigative tool without such indexing.² Names in the CRS that are not indexed are generally those deemed to have no continuing significance to the FBI. Such names are generally incomplete and are not accompanied by any other identifying information, such as a date of birth, social security number, address, phone number, etc. They may only consist of a first or a last name. A full-text search would return these unidentifiable names as results. In fact, in RIDS's experience, full-text searches generally return a significant number of "hits" that are random and incomplete references. In those instances, RIDS then has to go through each hit to determine whether each hit is responsive to the request. This hit-by-hit analysis is time-consuming, uses a significant amount of resources, and generally does not yield results responsive to a request for information about a specific individual, because RIDS usually cannot identify the vaguely-referenced individuals whose incomplete names are returned as hits. If RIDS cannot determine that the hit is the actual subject of the request, then that hit is deemed non-responsive. Therefore, the net result of a full-text search is typically a significant use of time and resources yielding little or no additional responsive information.

(8) There are, however, certain extraordinary situations in which there is a benefit and utility to the FBI conducting full-text searches of the CRS. These situations are generally when:

² FBI Special Agents and other employees index information so that they can find that information in reference to other investigations or intelligence activities, in order to ensure that the CRS is an effective and efficient means of locating and accessing information.

(a) a search of the CRS locates no records but the FBI has reason to believe that responsive records likely exist; or (b) a search of the CRS results in some records being located, but there is information indicating that more specific responsive records likely exist. As indicated above, a search of the CRS located responsive records about the subject of this FOIA request, Aaron Swartz. In addition, nothing in the records located suggested that other responsive records about Mr. Swartz likely exist. Nor did the requestor provide any additional information indicating that the FBI has other records about Mr. Swartz. Consequently, a full text search was not warranted here.

Release of Records Received After the Search Cut-Off Date

(9) The FBI's search identified a total of 24 requests made by third parties for records about Aaron Swartz. Of the FBI's responses to these 24 requests, the FBI's response to 22 of the requests consisted of the same 21-page release provided to Aaron Swartz when Mr. Swartz made his first-party request. These 22 requests (FOIA request numbers 1207016, 1207039, 1207041, 1207043, 1207047, 1207049, 1207058, 1207076, 1207084, 1207094, 1207115, 1207116/1207020, 1207117, 1207181, 1207320-001, 1207321, 1207322, 1027585, 1207586, 1207591, 1208132, and 1211531), along with the final disposition letters in which the FBI responded to the requests, are attached as **Exhibit A**. The 21-page release that the FBI provided in response to each of these 22 requests is attached as **Exhibit B**. The FBI's response to one of the third-party FOIA requests (FOIA request number 1227835) consists of the same 21-page release (Exhibit B) discussed above, along with a single additional page that was also released. With respect to that request, the request letter, final disposition letter, and additional released page are attached as **Exhibit C**. Finally, the FBI's response to one third-party FOIA request (FOIA request number 1207015) consisted of five pages that were processed, but

withheld in their entirety pursuant to FOIA Exemptions. With respect to that request, the request letter, final disposition letter, and deleted page sheet are attached as **Exhibit D**.

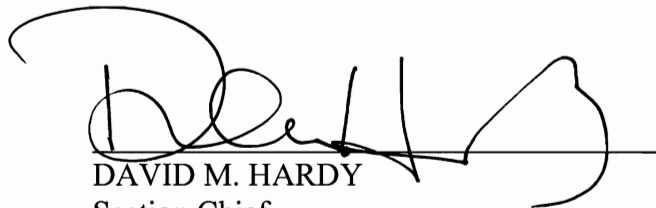
Although the FBI previously withheld records that it determined were precluded from release by the search cut-off date, in a good faith effort to respond to the FOIA request in this case, on June 6, 2014, the FBI released to plaintiff all records (Exhibits A, B, C, and D) regarding all requests for FBI records pertaining to Aaron Swartz. (*See Exhibit E.*)

CONCLUSION

(10) The FBI conducted a reasonable search for records responsive to plaintiff's FOIA request. The FBI released to plaintiff all third party requests received after the search cut-off date.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through E are true and correct copies.

Executed this 10th day of July, 2014.



DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Winchester, Virginia