IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOPHIA HELENA IN'T VELD,	)	
Plaintiff,	)	
v.	)	**Civil No. 08-1151 (RMC)**
DEPARTMENT OF HOMELAND SECURITY, *et al.*,	)	
Defendants.	)	

DEFENDANT UNITED STATES DEPARTMENT OF STATE'S
MOTION FOR SUMMARY JUDGMENT

Defendant, United States Department of State ("State"), by and through undersigned counsel, respectfully moves the Court, pursuant to Fed. R. Civ. P. 56, for summary judgment on the grounds that no genuine issue of material fact exists and, therefore, Defendant State is entitled to judgment as a matter of law. In support of this motion, Defendant respectfully refers the Court to the attached Memorandum of Points and Authorities in Support, Statement of Material Facts As To Which There Is No Genuine Issue, and Declaration of Margaret P. Grafeld, State's Information and Privacy Coordinator and Director of State's Office of Information Programs and Services.

Because this is a dispositive motion, Defendant has not sought Plaintiff's consent before filing this motion. *See* LCvR 7(m).

Respectfully submitted,

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STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE

Defendant, United States Department of State ("State"), respectfully submits this statement of material facts as to which there is no genuine issue in accordance with this Court's Local Rule 7(h). The Declaration of Margaret P. Grafeld, State's Information and Privacy Coordinator and Director of State's Office of Information Programs and Services ("Grafeld Decl.") supports this statement. *See* Defendant's Attachment A.

1. By letter dated February 22, 2008, Plaintiff, through her counsel, (hereafter "Plaintiff"), submitted a Freedom of Information Act ("FOIA") request to State for "all records concerning Ms. In't Veld (including but not limited to electronic records) maintained in State's visa databases." Grafeld Decl. ¶ 4, Exhibit 1.

2. By letter dated March 24, 2008, State acknowledged receipt of Plaintiff's request and assigned it case control number 200801276. Grafeld Decl. ¶ 5, Exhibit 2. State notified Plaintiff that the processing of her request had begun and that she would be notified as soon as responsive material was retrieved and reviewed. *Id.* Plaintiff was also advised that the cut-off

date for retrieving records was either the date she had given State or the date the search was initiated. *Id*. State informed Plaintiff that her request had been placed in the "all other requesters" fee category and that unusual circumstances could arise requiring an extension of the time limit. *Id*.

3. By letter sent September 9, 2008, (erroneously dated August 9, 2008), State's Office of Visa Services ("VO") informed Plaintiff that State's search had resulted in the retrieval of five relevant documents, totaling eight pages. Grafeld Decl. ¶ 6, Exhibit 3. VO advised Plaintiff that two of the documents were released in full, one was released in part, and two were withheld in full. Grafeld Decl. ¶ 6.

4. By letter dated September 11, 2008, State informed Plaintiff that searches had been conducted of the Central Foreign Policy Records (a principal records system at State), as well as, the records of VO and the American Embassy in Brussels. Grafeld Decl. ¶ 7, Exhibit 4. State advised Plaintiff that the searches of the Central Foreign Policy records and the American Embassy in Brussels had been completed and resulted in the retrieval of no responsive documents. *Id*. State further advised Plaintiff that the results of VO's search was contained in VO's letter sent on September 9, 2008. *Id*. State informed Plaintiff that since fewer than two hours of search time had been expended and less than 100 pages of material found, there would be no charge for the processing of her request. *Id.*

5. Upon receipt of a FOIA request by State, its Office of Information Program and Services evaluates the request and determines which offices, overseas posts, or other records systems with State may reasonably be expected to contain the information requested. Grafeld Decl. ¶ 8. This determination is based on the description of records in the FOIA request

tempered by any specified limitations on applicable fees or records systems to be searched. *Id*.

6. Plaintiff's FOIA request specifically asked for records "maintained in State's visa databases." Grafeld Decl. ¶ 8. State's searches were focused on records systems pertaining to visas. *Id*.

7. State conducted searches in the VO and the American Embassy in Brussels, where Plaintiff had submitted her visa application. Grafeld Decl. ¶ 8. State searched all of its visa records, including paper and electronic, and whether or not stored in a database. *Id.*

8. State's search encompassed all of VO's visa databases, VO's offsite retired files, and relevant databases and files at the Consular Section of the American Embassy in Brussels. Grafeld Decl. ¶ 8. State also searched the Central Foreign Policy File, a principal records system at State. *Id.*

Respectfully submitted,

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Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT U.S. DEPARTMENT OF STATE'S MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

Plaintiff brought this action against three Federal agencies[1] pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq*. Plaintiff's action against the U.S. Department of State ("State") concerns a response to Plaintiff's FOIA request for "all records concerning [her] (including but not limited to electronic records) maintained in the Department of State visa databases."

As discussed below, State searched all relevant records systems and files for information responsive to Plaintiff's FOIA request. State located five relevant documents, totaling eight pages. State released to Plaintiff two of the documents in full and one in part. State withheld two documents pursuant to FOIA Exemption 3, 5 U.S.C. §552(b)(3).

[1] Defendants named in the complaint are the United States Department of Justice, the U.S. Department of State and the U.S. Department of Homeland Security.

I. FACTUAL BACKGROUND

By letter dated February 22, 2008, Plaintiff, through her counsel, (hereafter "Plaintiff"), submitted a Freedom of Information Act ("FOIA") request to State for "all records concerning Ms. In't Veld (including but not limited to electronic records) maintained in State's visa databases." Grafeld Decl. ¶ 4, Exhibit 1. By letter dated March 24, 2008, State acknowledged receipt of Plaintiff's request and assigned it case control number 200801276. Grafeld Decl. ¶ 5, Exhibit 2. State notified Plaintiff that the processing of her request had begun and that she would be notified as soon as responsive material was retrieved and reviewed. *Id.* Plaintiff was also advised that the cut-off date for retrieving records was either the date she had given State or the date the search was initiated. *Id*. State informed Plaintiff that her request had been placed in the "all other requesters" fee category and that unusual circumstances could arise requiring an extension of the time limit. *Id*.

By letter sent September 9, 2008, (erroneously dated August 9, 2008), State's Office of Visa Services ("VO") informed Plaintiff that State's search had resulted in the retrieval of five relevant documents, totaling eight pages. Grafeld Decl. ¶ 6, Exhibit 3. VO advised Plaintiff that two of the documents were released in full, one was released in part, and two were withheld in full. *Id*. In addition, by letter dated September 11, 2008, State informed Plaintiff that searches had been conducted of the Central Foreign Policy Records (a principal records system at State), as well as, the records of VO and the American Embassy in Brussels. Grafeld Decl. ¶ 7, Exhibit 4. State advised Plaintiff that the searches of the Central Foreign Policy records and the American Embassy in Brussels had been completed and resulted in the retrieval of no responsive documents. *Id*. State further advised Plaintiff that the results of VO's search was contained in

VO's letter sent on September 9, 2008. *Id*. State informed Plaintiff that since fewer than two hours of search time had been expended and less than 100 pages of material found, there would be no charge for the processing of her request. *Id.*

II. LEGAL STANDARDS

A. Motion for Summary Judgment Under Rule 56

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To determine which facts are material, the Court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, the Court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *Id.*, at 255. A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of her position. *Id*. at 252. By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. at 322. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc*., at 249-250.

B. Summary Judgment In FOIA Cases

The FOIA, 5 U.S.C. § 552, represents a balance "between the right of the public to know and the need of the government to keep information in confidence." *John Doe Agency v. John Doe Corp*., 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, 89th Cong., 2d Sess., 6 (1966)). While the FOIA requires agency disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest." *Baldridge v. Shapiro*, 455 U.S. 345, 352 (1982). Consequently, the FOIA "provides that agency records may be withheld from disclosure under any one of the nine exemptions defined in 5 U.S.C. § 552(b)." *Id*. As directed by the Supreme Court, the statutory exemptions must be construed "to have meaningful reach and application." *John Doe Agency v. John Doe Corp*., 493 U.S. at 152.

For purposes of summary judgment, an agency's decision to withhold information from a FOIA requester is subject to *de novo* review by the Courts. *Hayden v. National Security Agency Cent. Sec. Serv*., 608 F.2d 1381, 1384 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide v. Dept. of State*, 257 F.3d 828, 833 (D.C. Cir. 2001); *Weisberg v. U.S. Dept. of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and a plaintiff with affidavits or declarations which show that the documents are exempt from disclosure. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Canning v. United States Dep't of Justice*, 848 F. Supp. 1037, 1042 (D.D.C.) (agencies are typically permitted to meet

[their] heavy burden by 'filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed.") (quoting *King v. United States Dep't of Justice*, 830 F.2d 210, 217 (D.C. 1987)).

In a FOIA case, the Court may award summary judgment solely based on the information provided in affidavits or declarations when they describe "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

ARGUMENT

III. STATE CONDUCTED REASONABLE SEARCHES FOR RECORDS RESPONSIVE TO PLAINTIFF'S FOIA REQUEST

In responding to a FOIA request, an agency is under a duty to conduct a reasonable search for responsive records. *Oglesby v. U.S. Dept. of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Weisberg v. U.S. Dept. of Justice*, 705 F.2d 1344, 1352 (D.C. Cir. 1983). This "reasonableness" standard focuses on the method of the search, not its results, so that a search is not unreasonable simply because it fails to produce relevant material. *Id.* at 777 n.4. An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. Simply stated, the adequacy of the search is "dependent upon the circumstances of the case." *Truitt v. Dept. of State*, 897 F.2d 540, 542 (D.C. Cir. 1990).

The search standards under FOIA do not place upon the agency a requirement that it

prove that all responsive documents have been located. *Nation Magazine v. U.S. Customs Serv.,* 71 F.3d 885, 892 n.7 (D.C. Cir. 1995). It has been held that " 'the search need only be reasonable; it does not have to be exhaustive.' " *Miller v. Dept. of State*, 779 F.2d 1378, 1383 (8th Cir. 1985) (citing *National Cable Television Association v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973). Even when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document so long as the search was diligent. *Nation Magazine*, 71 F.3d at 892 n.7. Additionally, the mere fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it. *Maynard v. CIA*, 982 F.2d 546, 564 (1st Cir. 1993).

The burden rests with the agency to establish that it has "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby*, 920 F.2d at 68; *see SafeCard Servs. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). "An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, non-conclusory and submitted in good faith." *Miller,* 779 F.2d at 1383; *Goland,* 607 F.2d at 352. Though the "affidavits submitted by an agency are 'accorded a presumption of good faith,'" *Carney v. Dept. of Justice*, 19 F.3d 807, 812 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) *(quoting SafeCard Servs*., 926 F.2d at 1200), the burden rests with the agency to demonstrate the adequacy of its search. Once the agency has met this burden through a showing of convincing evidence, the burden shifts to the requester to rebut the evidence by a showing of bad faith on the part of the agency. *Miller,* 779 F.2d at 1383. A requester may not rebut agency affidavits with

purely speculative allegations. *See Carney*, 19 F.3d at 813; *SafeCard,* 926 F.2d at 1200; *Maynard v. CIA*, 986 F.2d 547, 559-560 (1st Cir. 1993). The fundamental question is not "whether there might exist any other documents responsive to the request, but rather whether the search for those documents was adequate." *Steinberg v. Dept. of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (*quoting Weisberg v. Dept. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

Upon receipt of a FOIA request by State, its Office of Information Program and Services evaluates the request and determines which offices, overseas posts, or other records systems with State may reasonably be expected to contain the information requested. Grafeld Decl. ¶ 8. This determination is based on the description of records in the FOIA request tempered by any specified limitations on applicable fees or records systems to be searched. *Id*. Plaintiff's FOIA request specifically asked for records "maintained in State's visa databases." Grafeld Decl. ¶ 8. Therefore, State's searches were focused on records systems pertaining to visas. *Id*.

State conducted searches in the VO and the American Embassy in Brussels, where Plaintiff had submitted her visa application. Grafeld Decl. ¶ 8. State searched all of its visa records, including paper and electronic, and whether or not stored in a database. *Id.* In fact, State's search encompassed all of VO's visa databases, VO's offsite retired files, and relevant databases and files at the Consular Section of the American Embassy in Brussels. Grafeld Decl. ¶ 8. State also searched the Central Foreign Policy File, a principal records system at State. *Id.*

Accordingly, State conducted a more than adequate and reasonable search in response to Plaintiff's FOIA request for all records concerning her in the State's visa databases.

IV. STATE PROPERLY INVOKED FOIA EXEMPTION 3 TO WITHHOLD INFORMATION FROM PLAINTIFF

Exemption 3 allows for the withholding of information "specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Included among the statutes covered under this exemption is 8 U.S.C. § 1202(f)[2] which provides, in part that:

> The records of the Department of State and of diplomatic and consular offices of the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States, except that:
>
> (1) in the discretion of the Secretary of State certified copies of such records may be made available to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court.

In *Medina-Hincapie v. Department of State*, 700 F.2d 737 (D.C. Cir. 1983), the Court held that section 222(f) of the INA, 8 U.S.C. § 1202(f), qualified as a withholding statute under FOIA Exemption 3.

In this case, State withheld from Plaintiff information from three documents pursuant to 8 U.S.C. §1202(f). Grafeld Decl. ¶ 17. The withheld information relates directly to the issuance or refusal of a visa or permit to enter the United States in specific cases. *Id*. The information was, therefore, required to be withheld under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). *Id.*; *See*

[2] Section 222(f) of the Immigration and Nationality Act ("INA"), as amended.

Medina-Hincapie v. Department of State, 700 F.2d at 743 n. 36 (the protection afforded by section 1202(f) is not limited to information contained in an actual visa application; it also covers records pertaining to the approval or denial of the application).

Specifically, State withheld the following pursuant to Exemption 3:

Documents V1 and V2 (Withheld In Full)

These documents are printouts of reports from the non-immigrant visa section of the CCD database. Grafeld Decl. ¶ 21. All of the information in these documents pertains to the issuance or refusal of a visa to enter the United States, material which is confidential under 8 U.S.C. § 1202(f). *Id*. These documents are printouts of different types of reports generated from databases used by State in tracking and responding to visa applications. *Id*.

1. Document V1 is a printout, consisting of two pages of a visa database report pertaining to Plaintiff and her visa application. Grafeld Decl. ¶ 19. This printout was generated July 10, 2008, and is marked "SENSITIVE BUT UNCLASSIFIED (SBU)." *Id*. This record was withheld in full pursuant to Exemption 3. *Id.*

2. Document V2 is a printout, consisting of one page, of a different report from a visa database pertaining to Plaintiff. Grafeld Decl. ¶ 20. This printout was generated on July 10, 2008, and is marked "SENSITIVE BUT UNCLASSIFIED (SBU)." *Id*. This record was withheld in full pursuant to Exemption 3. *Id*.

Document V3 (Released With Redactions)

3. Document 3 is a Nonimmigrant Visa Application Form DS-156 that was submitted by Plaintiff at the U.S. Embassy in Brussels, Belgium for a visa to enter the United States with a European Parliament delegation. Grafeld Decl. ¶¶ 22, 23. The application contains personal

identification information, such as the applicant's name, date and place of birth, occupation, name of spouse, and the purpose of the intended travel to the United States. Grafeld Decl. ¶ 23. This document is dated June 20, 2005, and consists of two pages. Grafeld Decl. ¶¶ 22, 23. This document was released to Plaintiff with redactions. Grafeld Decl. ¶ 23. The only material that State redacted was added by consular officials and pertains to the adjudication of the application. *Id.* Such information is considered confidential under 8 U.S.C. § 1202(f) and, therefore, exempt under FOIA Exemption 3, 5 U.S.C. § 552(b)(3). *Id.*

V. ALL REASONABLY SEGREGABLE INFORMATION HAS BEEN RELEASED TO PLAINTIFF

"The FOIA requires that '[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt.'" *Juarez v. Department of Justice*, 518 F.3d 54, 61 (D.C. Cir. 2008) (citing 5 U.S.C. § 552(b)). "This Circuit has long recognized, however, that documents may be withheld in their entirety when nonexempt portions 'are inextricably intertwined with exempt portions [of the record].'" *Id*. (citing *Mead Data Cent., Inc. v. United States Dept. Of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)). "A court may rely on government affidavits that show with reasonable specificity why documents withheld pursuant to a valid exemption cannot be further segregated for this reason." *Id.* (citing *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578 (D.C. Cir. 1996).

A review of Ms. Grafeld's Declaration demonstrates that State carefully reviewed the responsive documents and performed a line-by-line analysis of the documents that had previously been in Plaintiff's possession, her visa application and supporting material. Grafeld Decl. ¶ 18.

With respect to these documents, State withheld only information added to those records by consular officials. *Id*. These documents, therefore, could not be further segregated. Grafeld Decl. ¶¶ 24 All three of the documents withheld in full or in part were reviewed by State for reasonable segregation of non-exempt information. Grafeld Decl. ¶ 24. State properly determined that no additional segregation of meaningful information could be made without disclosing information protected by law. *Id.* With respect to Document V3, only the consular markings and annotations were redacted by State. Thus, there was no additional meaningful non-exempt information in the document that could be segregated from the exempt material and released. Grafeld Decl. ¶ 23.

Conclusion

For the foregoing reasons, Defendant State's motion for summary judgment should be granted.

Respectfully submitted,

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