

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BARTON GELLMAN,

Plaintiff,

v.

DEPARTMENT OF HOMELAND

SECURITY, *et al.*,

Defendants.

Case No. 1:16-cv-0635-CRC

SECOND DECLARATION OF VANESSA R. BRINKMANN

I, Vanessa R. Brinkmann, declare the following to be true and correct:

1. I am Senior Counsel in the Office of Information Policy (OIP), United States Department of Justice (the Department or DOJ). In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests subject to litigation processed by the Initial Request Staff (IR Staff) of OIP. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from within six senior leadership offices of the Department of Justice, specifically the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), Legal Policy (OLP), Legislative Affairs (OLA), and Public Affairs (PAO).

2. The IR Staff determines whether records responsive to requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when appropriate, in other components within the Department of Justice, as well as with others in the Executive Branch.

3. I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

4. This second declaration supplements and incorporates by reference my April 3, 2019 Declaration in support of Defendants' Motion for Summary Judgment, see ECF No. 37-5, which described OIP's processing of Plaintiff's March 16, 2015 FOIA Request.

OIP's Identification and Processing of Responsive Records

5. Plaintiff challenges redactions labeled "Non-Responsive Record" within the material produced to Plaintiff by OIP in its September 7, 2016 and April 3, 2019 responses. See ECF No. 41-1 at 41-42.

6. As part of OIP's search process, which was previously described in my April 3, 2019 Declaration, see ECF No. 37-5, ¶¶ 16-28, an initial keyword search was conducted in order to locate a volume of potentially responsive records. OIP then undertook the process of reviewing the universe of material located by this search in order to identify records responsive to Plaintiff's request – i.e., "records about [Gellman]" (subject to several express limitations). See id. Ex. A. Finally, OIP processed these responsive records in their entirety, applying FOIA exemptions as appropriate and releasing all non-exempt material.

7. Where OIP determined that a record was not responsive, and where such record appeared on the same Portable Document Format (PDF) page as a record identified as

responsive, OIP accordingly marked the non-responsive record as “Non-Responsive Record.”¹ A selection of the material at issue, containing these “Non-Responsive Record” markings, is attached hereto as Exhibit A.²

OIP’s Guidance on Defining a “Record” Under the FOIA

8. After the decision in *American Immigration Lawyers Association v. EOIR* (“*AILA*”), 830 F.3d 667 (D.C. Cir. 2016), OIP issued guidance consistent with this ruling in order to assist federal agencies in determining whether it is appropriate to divide a document page into discrete “records.” See *Defining a “Record” Under the FOIA*, DEP’T OF JUSTICE: OIP GUIDANCE (updated Feb. 15, 2017), https://www.justice.gov/oip/oip-guidance/defining_a_record_under_the_foia.

9. All determinations made by OIP when processing Plaintiff’s request were fully consistent with this DOJ guidance, with the D.C. Circuit’s decision in *AILA*, and with the FOIA.

A. OIP’s Bases for Determining Whether It is Appropriate to Divide Documents into Discrete Records

10. OIP’s first step in processing records pursuant to any given FOIA request is to identify those records that are responsive to the request. A critical part of this analysis involves making a determination as to where one record ends and the next begins. In order to make this determination, OIP conducts a careful review of the material it locates in order to assess whether

¹ Where certain pages within a given document contained no responsive records, OIP removed those pages in their entirety and did not produce them to Plaintiff. Those pages are not included here, inasmuch as they consist wholly of non-responsive records, and Plaintiff’s challenge appears to be limited to non-responsive record markings within the material produced to him.

² In this public filing, OIP has redacted Plaintiff’s personal email address when it appears in the records contained in Exhibit A, in an effort to protect Plaintiff’s privacy, and because Plaintiff’s personal email address is not relevant to the matter discussed herein. OIP did not withhold that information from Plaintiff in its productions of records to Plaintiff in response to Plaintiff’s FOIA request.

the material contains discrete groupings of information, distinguished by reasonable breaks from the information preceding it and following it. These breaks in information are defined both by the material's content *and* by the subject of the FOIA request. See id. (providing as an example a document containing complaints against a list of administrative law judges, where (1) for the purposes of a FOIA request seeking "complaints against all administrative law judges," the entire document would be defined as the responsive "record," and whereas (2) for purposes of a FOIA request seeking "complaints against Judge Smith," only the particular section discussing complaints concerning Judge Smith would be defined as the responsive "record.")

11. OIPs analysis is further informed by the physical characteristics of the document, such as headers, spacing, bullet points, or numbering, which signify a break in information and, consequently, a distinct record. For example, a paragraph or bullet point could constitute a distinct record, if the subject of the request is sufficiently specific to pertain to only that paragraph or bullet point, or the subject of the paragraph is sufficiently distinct from the surrounding paragraphs. This analysis also takes into account the fact that the individual who created a given document may have had a particular purpose for compiling certain distinct and discrete pieces of information together. It also takes into account the fact that some electronic records may automatically be displayed in a group to the end user or to FOIA professionals, regardless of whether any person intended them to be grouped together for recordkeeping purposes.

12. In conducting this analysis, OIP takes care to consider the express parameters of each FOIA request, and to only exclude as "non-responsive" distinct records the content of which is outside the scope of the given request. In so doing, OIP takes into consideration any guidance or input from FOIA requesters themselves in explaining the nature of the records they seek. OIP

also takes into consideration any feedback or clarifications provided by requesters during the course of processing a given request. If a requester has any questions or concerns about OIP's interpretation of his or her request, for example, they can simply contact OIP staff, and we will take that input into account.

13. When reviewing material for responsiveness, OIP also recognizes that, although the document's creator may have had a particular purpose for compiling disparate pieces of information together at the time a document was created (e.g. using "reply all" to create a new email with the same distribution list while switching topic of conversation, or distributing a single email containing multiple news articles of interest to Department personnel instead of sending individuals emails with each article), that document is no longer serving or furthering that purpose in the context of a FOIA review, and the compilation of that information could appear entirely arbitrary in the context of a FOIA request seeking only records on a discrete topic. In some contexts, the compilation of information is relevant and makes the entire document a responsive record to the request, but in other contexts, the compilation is wholly irrelevant to the FOIA request at hand. A rigid, one-size-fits-all analysis of the boundaries of a record, which fails to account for this distinction, would regularly result in federal agencies processing and producing superfluous, discrete packages of information that are wholly non-responsive to a given FOIA request. This would do a disservice to both FOIA requesters and to the FOIA process as a whole.

14. Finally, OIP notes that FOIA professionals review material every day in order to identify records responsive to a given FOIA request. The information they review may exist in two separate physical documents, or it may exist in two separate portions of one physical document. For these FOIA professionals, their analysis is focused on the *content* of the

document in relation to the FOIA request at hand, rather than the physical form of the material. These professionals view material in the context of what has been sought by the FOIA requester and they are capable of identifying whether related information in separate documents or information that physically precedes or follows within the same document is itself responsive when viewed in context.

15. In sum, OIP engages in a holistic, content-based analysis, which takes into account *both* the substance of a given document and its relationship to what has been sought by the requester. Furthermore, OIP thoroughly reviews each set of material in conjunction with each FOIA request to ensure that OIP is identifying records responsive to that request. Once OIP determines which records are responsive to a request, OIP then processes each responsive record in its entirety, applies FOIA exemptions as appropriate, and releases all non-exempt responsive records to the requester.

B. OIP's Bases for Determining that it was Appropriate in this Case to Divide Some Documents into Discrete Records

16. In this case, Plaintiff seeks records on a discrete topic: himself. As part of OIP's search for responsive records, OIP located three categories of material to which it applied the challenged "Non-Responsive Record" markings, consisting of (1) email chains consisting of multiple emails on disparate topics, only some of which pertain to Mr. Gellman, (2) emails to or from Mr. Gellman himself, which were expressly excluded from the scope of his FOIA request, and (3) compilations of news clips and articles on disparate topics, only some of which pertain to Mr. Gellman.

a. Email Chains

17. When reviewing the email chains, OIP observed that each email may be viewed as a distinct record, because each message constituted a discrete package of information, with a

unique header and date- or time-stamp. Modern technology allows one to retrieve each distinct email in an email chain as a separate page or PDF document, retrieve the entirety of the chain in one PDF document, or retrieve the entire chain only up to a certain point in one PDF document. As previously discussed, a record cannot be defined solely by the physical form a resultant PDF takes, which is particularly evident when emails in a chain can be retrieved in multiple formats. Although modern communication technologies depart from the traditional paper letter practice of dividing each record of communication onto a separate page or pages, OIP determined that each email record in a given chain was no less distinct than if the participants chose to send each record of communication by mail instead of email. By treating each individual email as a distinct record, OIP was able to process Plaintiff's FOIA request, without expending significant time and resources reviewing and consulting about non-responsive records.

18. Although emails within an email chain may be viewed as distinct records, OIP also considers the content of the emails within a chain in making responsiveness determinations. For instance, OIP recognizes that when individuals communicate by letter, email, or even text message, each record of communication may provide context for other records sent in response, and vice versa. Email communications often involve a back-and-forth not unlike a conversation, and often, a single email within a chain cannot be understood without reference to a previous message. However, in some circumstances, a subsequent record of communication may be completely unrelated to prior records, changing the topic of discussion to a completely distinct subject from which the conversation began. Therefore, when OIP conducted its responsiveness review in this case, it paid close attention to previous or subsequent emails in a chain in order to understand each record in context and to ensure that it did not overlook responsive records that would have otherwise appeared to be non-responsive out of context. Where neither the context

of the record itself, nor the context of prior or subsequent records indicated that a record was responsive, OIP removed that record as non-responsive (through the use of the “Non-Responsive Record” marking) and did not process that record. For example, some emails began with discussions regarding Plaintiff and then the conversation suddenly shifts toward an entirely unrelated and discrete topic. This is evident in Document ID: 0.7.19790.5010, where the non-responsive emails are on a completely unrelated topic which has nothing to do Mr. Gellman, which would not be entirely obvious on the face of the page since the subject lines of the emails are “Bart Gellman” and “RE: Bart Gellman.” Or, in the context of an email chain which began with a topic unrelated to Plaintiff, someone suddenly makes a comment about Plaintiff, changing the topic of discussion in said email chain. This is apparent in Document ID: 0.7.19790.10928 (attached at Ex. A), which begins with the participants exchanging emails on an unrelated topic that is distinct from the released email at the top of the page.

b. Emails To or From Mr. Gellman

19. Additionally, consistent with Plaintiff’s own express limitation on the scope of his request in his initial request letter, OIP marked emails to or from Plaintiff as non-responsive, unless the correspondence was forwarded to another party, or another party was blind copied on an email to Plaintiff. While these emails could have been responsive – i.e. they concern Plaintiff – given the language included in Plaintiff’s initial request letter that “[e]mails from or to myself need not be considered responsive—unless that correspondence was then forwarded to another party, if another party was included on the email but BCC’d, or any other circumstances in which the full correspondence and its participants would not already be saved in my own email inbox,” they were considered non-responsive to the instant request. OIP still provided Plaintiff with all forwarded communications and related conversations, consistent with the language of his

request.³ This is illustrated in Document ID: 0.7.19790.5066 (attached at Ex. A), which begins with an email from Plaintiff to Matthew Miller which is marked as a “Non-Responsive Record,” while the forwarding and subsequent emails that did not involve Plaintiff are provided to Plaintiff as responsive records.

c. Compilations of News Clips and Articles

20. When reviewing the news clips and article compilations, OIP took care to pay attention to both physical characteristics of the documents as well as the content of the documents. OIP observed that each news article or portion thereof that is included in a compilation of news clips is a distinct record. It is clear, based on the content of each article alone, that each article is distinct from the next, each constituting a discrete package of information. The title of the news article, which acts as a header due to its larger and bolded font, as well as the inclusion of the date of publication, the name of the reporters who wrote each article, and the name of the publication from which the article was sourced, acts as a physical break in information signaling to the reader that each article is a distinct record of information. This is illustrated in Document ID: 0.7.19790.11310-000001 (attached at Ex. A).

21. Moreover, each article contained in each compilation was authored by different reporters. OIP reviewed the totality of the articles to locate those that were written by Plaintiff. Each article written by Plaintiff was deemed responsive and processed, responding to his request

³ OIP interpreted Plaintiff’s request as excluding his own emails, particularly given Plaintiff’s statement in his request that he did not want copies of what he could see in his own inbox. Given that Plaintiff never advised OIP that he wanted his own emails back, OIP proceeded with the assumption that his email which began the forwarded chain, was expressly not being sought and therefore, it was marked as non-responsive, while the forwarded portion was processed and released to Plaintiff.

for records on himself. Only those articles not written by Mr. Gellman, or pertaining to him in any way, were deemed non-responsive.

22. It is evident that the individual compiling each set of news clips had a particular purpose for compiling discrete pieces of information – to ensure that individuals could have access to relevant information in the news all in one place rather than in discrete individual emails for each record. However, given the subject of Plaintiff’s FOIA request – records on himself– the compilation of news clips as a whole is clearly irrelevant to this specific FOIA request. Here, the content of each individual news clip within each compilation is more telling as to what is a distinct record responsive to Plaintiff’s request than the physical from the document takes.

Conclusion

23. With regard to OIP’s process generally, and specifically with regard to OIP’s processing of news clips and email chains, the ability to divide documents into distinct records allows agency staff to process more efficiently, especially to the extent that responsive records require consultation with other equity holders. Even accounting for the time it takes to identify records within a given document and to apply “Non-Responsive Record” markings, this process is still far more efficient because the alternative – processing non-responsive records – would implicate multiple layers of unnecessary review involving multiple Department components and Executive Branch agencies.⁴ Lastly, as indicated above, OIP is always willing to talk with requesters to better understand and/or clarify the scope of their requests. In this instance, OIP was unaware of Plaintiff’s objections to the responsiveness determinations – including the

⁴ OIP conducted eighteen consultations with various Department components and Executive Branch agencies in the course of processing the records responsive to Plaintiff’s FOIA request.

determinations in the September 7, 2016 response – until this matter was only just recently raised in his cross-motion for summary judgment.

24. Finally, OIP’s review and processing of the records was carefully guided by the nature of the material located, analyzed in relation to the records that were expressly requested by Plaintiff on a discrete subject matter. OIP was exacting in applying the “Non-Responsive Record” markings, making such determinations according to its own guidance and guidance provided by the requester in his own request, as detailed above.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Vanessa R. Brinkmann
Senior Counsel

Executed this 25th day of July 2019.