UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRISON LEGAL NEWS, Plaintiff, v. HARLEY G. LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS, Defendant.	)	Civil Action No. 05-1812 (RBW)

ORDER

The defendant, the Federal Bureau of Prisons ("Bureau"), brings this motion pursuant to Federal Rules of Civil Procedure 60(b)(1) and 60(b)(6), requesting the Court to reconsider the March 26, 2009 Memorandum Opinion and Order granting a motion for summary judgment filed by the plaintiff, Prison Legal News, and denying without prejudice the Bureau's motion for summary judgment. See Defendant's Motion for Reconsideration and Memorandum in Support and Response to the Court's March 26, 2009 Order ("Def.'s Mot.") at 1. The Bureau contends that its reply to the plaintiff's motion for summary judgment, which was to be filed on November 14, 2008, was "set for electronic filing . . . [but] due to an apparent transmission error, the transmission did not occur." Id. at 2. Therefore, the Court issued its Memorandum Opinion and Order without the benefit of the Bureau's additional arguments and supporting affidavits. Id. The Bureau asserts in its motion for reconsideration, which is accompanied by the Bureau's now refiled reply and accompanying declarations, that it had already acted consistently with the Court's March 26, 2009 Order and therefore should be awarded summary judgment. Id. at 3.

The plaintiff opposes the Bureau's motion.[1] Plaintiff's Opposition to Defendant's Motion for Reconsideration and Memorandum in Support and Response to the Court's March 26, 2009 Order ("Pl.'s Opp'n") at 1. For the reasons set forth below, the Court must deny the Bureau's motion without prejudice.

I. BACKGROUND

In its August 6, 2003 Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2006), request, the plaintiff, a non-profit legal journal, requested that the Bureau provide it with copies of "all documents showing all money paid by the [Bureau] . . . for lawsuits and claims against it" from January 1, 1996 to July 31, 2003. Memorandum of Points and Authorities in Support of Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 3. The defendant made six productions of documents to the plaintiff that totaled over 11,000 responsive documents. Def.'s Mot., Exhibit ("Ex.") 3 (Declaration of Wilson J. Moorer) ("Moorer Decl. II") ¶ 5; Memoranda in Support of Plaintiff's Motion for Judgment at 3-6. In its original motion for summary judgment, the plaintiff argued that the declaration of Wilson J. Moorer, who had submitted the only declaration on behalf of the Bureau at that time, failed to show that the Bureau had conducted a reasonably adequate search. Pl.'s Opp'n at 1. Given that the Bureau had submitted no additional declarations to cure the

[1] The Court also considered the following documents in resolving the defendant's motion for reconsideration: the Defendant's Motion for Reconsideration and Memorandum in Support and Response to the Court's March 26, 2009 Order; the Plaintiff's Opposition to Defendant's Motion for Reconsideration and Memorandum in Support and Response to the Court's March 26, 2009 Order; the Defendant's Reply to Plaintiff's Opposition to Defendant's Cross Motion for Summary Judgment; the Defendant's Supplemental Statement of Material Facts as to Which There Is No Genuine Issue; the Declaration of Wilson J. Moorer, dated October 23, 2008; the Declaration of Kimberly E. Blow, dated October 9, 2008; the Declaration of Docia M. Casillas, dated October 9, 2008; the Declaration of Renee Brinker Fornshill, dated October 7, 2008; the Declaration of Cynthia Lawler, dated October 9, 2008; the Declaration of Georganne Osborn, dated October 17, 2008; the Declaration of Vickie Petricka, dated October 17, 2008; the Declaration of Alecia D. Sankey, dated October 7, 2008; the Declaration of Karen Summers, dated October 16, 2008; the Declaration of LeeAnn Tufte, dated October 7, 2008; the Declaration of Kathleen White, dated October 7, 2008; the Declaration of Deidre J. Williams, dated October 7, 2008; and the Declaration of Michael D. Tafelski, dated October 16, 2009.

insufficiencies identified by the plaintiff due to what the Bureau now asserts was an "apparent transmission error," on March 26, 2009, the Court granted summary judgment in favor of the plaintiff and ordered the Bureau to either conduct new searches or submit additional documentation that adequately demonstrated that the Bureau "employed search methods reasonably likely to discover records responsive to the plaintiff's request and which shows that the responsive documents and parts of documents not produced to the plaintiff have properly been withheld under the FOIA exemptions claimed by the Bureau."[2] Mar. 26, 2009 Memorandum Opinion at 9.

In its motion for reconsideration, the Bureau now contends that in awarding summary judgment to the plaintiff, the Court failed to consider a number of its papers that were inadvertently not transmitted to the Court by counsel for the Bureau. Def.'s Mot. at 1-2. Among these documents were the Defendant's Reply to Plaintiff's Opposition to Defendant's Cross Motion for Summary Judgment ("Def.'s Reply"); Defendant's Supplemental Statement of Material Facts as to Which There Is No Genuine Issue; the October 23, 2008 Declaration by Wilson J. Moorer; and twelve additional declarations from various officials in the Bureau of Prison's administrative and litigation offices. Def.'s Mot. at 2. The Bureau asserts that its failure to timely file its reply and supporting declarations in support of its cross motion for summary judgment was a mere transmission error. Id. at 2. Therefore, the Bureau asks that the Court reconsider its ruling now with the benefit of the Bureau's reply filing and the

[2] The Court considered the following documents in resolving the parties' cross-motions for summary judgment: the plaintiff's Motion for Judgment; the Memoranda in Support of Plaintiff's Motion for Judgment; the Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment; the Memorandum of Points and Authorities in Support of Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment; the Declaration of Wilson J. Moorer ("Moorer Decl. I"); the Defendant's Statement of Material Facts as to Which There is No Genuine Issue and Opposition to Plaintiff's Statement of Material Facts; and the Plaintiff's Reply and Opposition to Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Judgment.

accompanying declarations. Id. at 1-2. The Bureau's position is that these documents demonstrate that it has "already acted consistent with the Court's order on remand" by conducting a reasonably adequate search for the records requested, entitling it to summary judgment. Id. at 3.

In opposition, the plaintiff argues that the Bureau's counsel had a duty to monitor the docket and that its failure to discover and cure this error was inexcusable. Pl.'s Opp'n at 5. Therefore, the plaintiff requests that the Court deny the Bureau's motion for reconsideration. Id.

II. STANDARDS OF REVIEW

A. Motion for Reconsideration

In its discretion, the Court may relieve a party from an otherwise final judgment by granting relief from a judgment resulting from "mistake, inadvertence, surprise, or excusable neglect." Lepkowski v. Dep't of Treasury, 804 F.2d 1310, 1311-12 (D.C. Cir. 1986) (citing Fed. R. Civ. P. 60(b)(1)). Relief under Rule 60(b) is rare, Hall v. CIA, 437 F.3d 94, 99 (D.C. Cir. 2006), and turns on equitable factors, notably whether any neglect was excusable, Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., 507 U.S. 380, 392-93 (1993); see also Smalls v. United States, 471 F.3d 186, 191 (D.C. Cir. 2006) ("Rule 60(b) was intended to preserve the delicate balance between the sanctity of final judgments and the incessant command of the [C]ourt's conscience that justice be done in light of all the facts" (internal quotation marks, ellipses, and citation omitted)). Alternatively, under Rule 60(b)(6), the Court may grant relief from a judgment for "any other reason justifying [such] relief," but courts apply this catch-all provision only in "extraordinary circumstances." Pioneer Inv. Servs. Co., 507 U.S. at 393.

B. Summary Judgment

Courts will grant a motion for summary judgment under Rule 56(c) if "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 moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). When ruling on a motion for summary judgment, this Court must view the evidence in the light most favorable to the nonmoving party. Bayer v. U.S. Dep't of Treasury, 956 F.2d 330, 333 (D.C. Cir. 1992). The Court must also "draw all reasonable inferences in favor of the nonmoving party, and it may not make creditability determinations or weigh the evidence." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). However, the nonmoving party cannot rely on "mere allegations or denials . . . but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (citation omitted). Summary judgment is warranted "if a party fails to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Hazward v. Runyon, 14 F. Supp. 2d 120, 122 (D.D.C. 1998) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). The party moving for summary judgment bears the burden of establishing the absence of evidence that supports the nonmoving party's case. Id.

III. ANALYSIS

A. The Adequacy of the Bureau's Search

"An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 325 (D.C. Cir. 1999) (citations omitted); Steinberg v. United States, 23 F.3d 548, 551 (D.C. Cir. 1994) ("the agency must demonstrate that it has

conducted a 'search reasonably calculated to uncover all relevant documents'"); Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990) (holding that the agency need not search every record system but "must show that it 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"). In determining whether the search was reasonably adequate, the Court focuses on the search itself and not the results. Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1345 (D.C. Cir. 1984) (noting also that the agency's failure to find a particular document does not undermine the adequacy of the search).

Section 552 of the FOIA requires an agency that has received a request for records to make them "promptly available to any person." 5 U.S.C. § 552(a)(3)(A). To meet the burden of establishing the adequacy of a search for responsive documents, the agency may submit affidavits or declarations that are "'relatively detailed' and nonconclusory and must be submitted in good faith." Perry v. Block, 684 F.2d 121, 126 (D.C. 1982). The plaintiff bears the burden of challenging the adequacy of an agency's search and must present evidence rebutting the agency's initial showing of a good faith search. Lipsey v. U.S. Dep't of Justice, No. 06-423, 2007 WL 842956, at *2 (D.D.C. 2007) (citing Weisberg, 705 F.2d at 1351-52). Speculative claims alleging the existence and discoverability of other documents are insufficient to support a rebuttal. SafeCard Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (citation omitted).

As the Court noted in the March 26, 2009 Memorandum Opinion, an affidavit submitted in support of a motion "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Mar. 26, 2009 Memorandum Opinion at 5 (citing Fed. R. Civ. P. 56(e)). Therefore, on the record that was before the Court when it originally awarded summary judgment, which was

devoid of the Bureau's reply and supporting declarations, the Court found that the Bureau's "'single, conclusory affidavit,' that generally assert[ed] adherence to the reasonableness standard" was insufficient. Id. (citing Morley v. CIA, 508 F.3d 1108, 1122 (D.C. Cir. 2007)). However, the Court also recognized that to the extent the Bureau was being asked to disclose records no longer in its possession, it was not required to retrieve records that were no longer contained in its files. Id. at 6 (citing Wilbur v. CIA, 355 F.3d 675, 678 (D.C. Cir. 2004) ("the fact that responsive documents once existed does not mean that they remain in the [agency's] custody today or that the [agency] had a duty under FOIA to retain the records")).

In its motion for reconsideration, the Bureau contends that the twelve additional declarations of officials from its administrative and litigation offices that it has now submitted sufficiently establish that the search was adequate and reasonable. Def.'s Mot. at 3. It maintains that the declarations sufficiently assert that the officials took reasonable efforts to ensure that they discovered all relevant documents, and that all responsive documents were identified, copied, and forwarded to the officer in charge of processing the request, along with an indication of which records the Bureau was unable to locate. See Def.'s Mot., Exs. 3-15. According to the Bureau, the declarations describe the databases and records searched at each office in an effort to identify the responsive documents. See id. In response, the plaintiff opposes the Bureau's motion for reconsideration on fairness principles, contending that because the Bureau's reply was not timely filed, it is "procedurally unsupported and unwarranted."[3] Pl.'s Opp'n at 2. The plaintiff maintains that the Bureau should have, but inexcusably failed, to notice the transmission

[3] The plaintiff also noted that when it filed its opposition its counsel was unavailable to file a substantive response to the defendant's motion for reconsideration because its counsel had recently been injured as a result of being struck by an automobile; the plaintiff therefore requested a sixty-day enlargement of time to review the case if a substantive response from it is required. Pl.'s Opp'n at 1-2. Given that more than sixty days have now elapsed since the filing of the plaintiff's opposition, the Court assumes that the plaintiff's counsel has now had the opportunity to review the motion for reconsideration and its supporting documents.

error as the Court's electronic docketing system provides many avenues by which a party may secure a confirmation of a transmission. Id. at 3-5. Therefore, the plaintiff argues that the Bureau should not be excused from simply failing to monitor the docket in this case. Id.

Unfortunately for the Bureau, even upon subsequent consideration of the previously omitted documents, the Court finds that the Bureau has failed to establish the adequacy of its search. Although the Bureau's declarations suggest that the officials made a good faith effort to conduct the search, Def.'s Mot., Exs. 3-15, the declarants fall short of explaining, in reasonable detail, the scope and method of the search. See Oglesby, 920 F.2d at 68 (holding that the declarations must contain the degree of detail "necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate"). The declarations do indicate whether responsive documents were identified and whether certain records could not be located. For example, one declaration asserts that the staff "searched cabinets containing case files which would have included all settlements or decisions maintained at the time [the] office received the request." See Def.'s Mot., Ex. 5 (Declaration of Docia M. Casillas) ¶ 5. However, another declaration merely notes whether the documents were in paper or electronic format, and identifies the databases, monthly reports, and log books searched. See Def.'s Mot., Ex. 8 (Declaration of Georganne Osborn) ¶ 6 (stating that she "reviewed the Southeast Regional log for relevant litigation"); Def.'s Mot., Ex. 9 (Declaration of Vickie Petricka) ¶ 5 (identifying responsive records based on the monthly reports generated from the databases used in the office). Some of the other declarations do come closer to establishing the reasonableness of the search in the individual offices. For example, two of the declarations specify that officials "developed a list of litigation cases . . . in which money damages and/or attorney's fees [were paid] to litigants or claimants" and assert that they

searched two Bureau databases, the Tort Information Management System (TIMS) program, and the Lawpack database for responsive records. See Def.'s Mot., Ex. 15 (Declaration of Michael D. Tafelski) ¶¶ 5-6; see also Def.'s Mot., Ex. 11 (Declaration of Karen Summers) ¶¶ 5-6. And another declaration details how the search was narrowed to identify the responsive records, the information that the search reports provided, and which specific files could not be located. See Def.'s Mot., Ex. 12 (Declaration of Leeann Tufte) ¶¶ 5-6. However, these declarations are nonetheless insufficient to establish the adequacy of the entire search, as specificity and detail to a reasonable degree must be provided in the supporting declaration for all individual offices.

The declarations fail to identify any search terms used, specify how the search was conducted, or detail with specificity what the search yielded. See Morley, 508 F.3d at 1122 (finding that adequacy of search had not been demonstrated because declarations lacked specificity concerning details of the search). Instead, the declarants state, without specificity, that they either used a "pre-formatted search," see, e.g., Def.'s Mot., Ex. 4 (Declaration of Kimberly E. Blow) ¶ 4 (utilizing a pre-formatted search created by the computer staff, which revealed a "complete list of litigation and tort claims . . . in which monies were paid"), or "had a review conducted of the [database system]," see, e.g., Def.'s Mot., Ex. 6 (Declaration of Renée Brinker Fornshill) ¶ 5, or "reviewed the statistical reports that . . . identif[ied] the status of every case being handled," see, e.g., Def.'s Mot., Ex. 14 (Declaration of Deidre J. Williams) ¶ 5. Without providing further description or specific detail concerning the search, the declarants' conclusions that as a result of the search, "all responsive claims were identified," see, e.g., Def.'s Mot., Ex. 7 (Declaration of Cynthia Lawler) ¶ 5, do not provide sufficient information for the Court to independently determine if the search was adequate, see Oglesby, 920 F.2d at 68.

B. The FOIA Exemptions

The more troubling aspect of the Bureau's position is that even if the Court could find that the searches were adequate, the Bureau has not justified the exemptions it seeks to invoke. Defendant's Statement of Material Facts as to Which There is No Genuine Issue and Opposition to Plaintiff's Statement of Material Facts at 2-10. When an agency claims an exception under Section 552(b), it "must provide detailed and specific information demonstrating 'that material withheld is logically within the domain of the exemption claimed.'" Campbell v. U.S. Dep't of Justice, 164 F.3d 20, 30-31 (D.C. Cir. 1998) (quoting King v. U.S. Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987)). The Declarations of Wilson Moorer are the only declarations that addressed the exemptions being invoked, while none of the newly filed declarations make any mention of these or any other exemptions. Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment ("Def.'s Cross Mot.") , Ex. 1 (Declaration of Wilson J. Moore) ("Moorer Decl. I") at ¶¶ 7-30; Def.'s Mot., Ex. 3 (Moorer Decl. II) at ¶ 6. However, as the Court has previously found, Mar. 26, 2009 Memorandum Opinion at 4-5, Mr. Moorer lacks the personal knowledge necessary to speak to the information redacted, and he also fails to note how the exemptions specifically apply to each redacted document. Id.; see Campbell, 164 F.3d at 30-31 (holding that categorical descriptions are inadequate and requiring "reasonable specificity . . . to create 'as full a public record as possible, concerning the nature of the documents and the justification for nondisclosure'" (internal citations omitted)). Instead, Mr. Moorer merely notes the total number of documents contained in each release, the number of documents that were redacted in each release, and how the exemptions generally applied collectively to the groups of documents. Def.'s Cross Mot., Ex. 1 (Moorer Decl. I) at ¶¶ 7-10 (asserting that in the first release, the Bureau released 594 pages of responsive documents, of which 406 were redacted, and providing, without specificity, the

applicability of each invoked exemption). For example, with respect to the exemption for medical records, he makes no effort to provide any detail of the type of information redacted upon which the Court could make an informed assessment of the legality of the redactions, instead merely restating the exception and claiming the redacted portions meet the requirements of the exception. Compare 5 U.S.C. § 552(b)(6) (exempting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"), with Def.'s Cross Mot., Ex. 1 (Moorer Decl. I) at ¶ 9 ("Exemption (b)(6) exempts personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The types of records redacted in this release include: Personal and private information of BOP staff and non-BOP staff.").

Moreover, the Court is unaware of whether the Bureau created a Vaughn index to document the exemptions being invoked regarding documents or information being withheld, and a Vaughn index would be helpful, especially in light of the magnitude of the plaintiff's request. See Johnson v. Executive Office for U.S. Att'ys, 310 F.3d 771, 774 (D.C. Cir. 2002) ("An agency may meet [its] burden by providing the requester with a Vaughn index, which must adequately describe each withheld document, state which exemption the agency claims for each withheld document, and explain the exemption's relevance"); Vaughn v. Rosen, 484 F.2d 820, 827 (D.C. Cir. 1973) (noting that this system of itemizing and indexing narrows the scope of the court's inquiry, prevents an agency from making a generalized argument for the applicability of the exemption, and allows the court to rule on each element of the itemized list as opposed to applying an exemption to the search as a whole). The role of a Vaughn index is to provide "the court and the challenging party a measure of access without exposing the withheld information," see Judicial Watch, Inc. v. Food & Drug Admin., 449 F.3d 141, 146 (D.C. Cir. 2006) (explaining

three important functions that the Vaughn index serves that promotes an efficient adversarial process), which would be helpful here. The Court is cognizant that although the FOIA promotes an open government, which is advanced through the accessibility to government records, any of nine exemptions may nonetheless be invoked under § 552(b) in light of "Congress's recognition that the release of certain information may harm legitimate governmental or private interests," Summers v. Dep't of Justice, 140 F.3d 1077, 1080 (D.C. Cir. 1998). However, the Court must be put in position where this assessment can be intelligently made.

Thus, before the Court can conclude that the Bureau has properly invoked the designated exemptions, it must be assured that the Bureau has not utilized exemptions in a manner which "sweep[s] unprotected information within the statute's reach." Judicial Watch, 449 F.3d at 147. Clearly, the Bureau need not provide repetitive or detailed explanations of the documents retrieved in its Vaughn index, Morley, 508 F.3d at 1122, but upon the record now before it, the Court has an inadequate basis to find that the Bureau's invocation of the FOIA exemptions is proper.

Accordingly, it is hereby

ORDERED that the defendant's motion for reconsideration is **DENIED WITHOUT PREJUDICE**.

SO ORDERED this 25th day of February, 2010.

_____/s/_____
Reggie B. Walton
United States District Judge