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6 **UNITED STATES DISTRICT COURT**
7 **NORTHERN DISTRICT OF CALIFORNIA**
8 **SAN FRANCISCO DIVISION**

9
10 PUBLIC JUSTICE FOUNDATION;
ANIMAL LEGAL DEFENSE FUND;
11 CENTER FOR BIOLOGICAL DIVERSITY;
CENTER FOR FOOD SAFETY;
12 FOOD & WATER WATCH,

13 *Plaintiffs,*

14 vs.

15 FARM SERVICE AGENCY,

16 *Defendant.*

Case No. 3:20-cv-1103-WHA

**PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION CHALLENGING
DEFICIENCIES IN FSA'S REVISED
SEARCH AND PRODUCTION**

Judge: Honorable William Alsup
Date: September 17, 2020
Time: 8:00am
Location: 450 Golden Gate Ave.
San Francisco, CA, Crt. Rm. 12

INTRODUCTION

1
2 This case is about Defendant Farm Service Agency (“FSA”)’s pattern and practice of
3 unlawfully responding to Freedom of Information Act (“FOIA”) requests that seek information
4 regarding FSA’s farm loan programs and the connected environmental review. Because of FSA’s
5 unlawful pattern and practice, the extent to which FSA’s programs financially prop up industrial
6 agricultural operations at the expense of independent farmers, public health, and the environment
7 is obfuscated. Plaintiffs and the general public have no way of determining how much federal
8 money is funneled to industry through FSA’s farm loan programs, nor is it clear if the agency is
9 fulfilling its obligations to perform adequate environmental review of the operations it funds.
10 FOIA demands transparency; no FOIA Exemption can carry the weight of keeping this
11 information from the public.

12 Of concern in this motion is Plaintiffs’ April 17, 2019 FOIA request for “all records
13 mentioning or containing FSA’s directives and/or policies for responding to and/or processing
14 FOIA requests and appeals.” Pls.’ Compl., Dkt. No. 1 ¶ 106. The purpose of this request is to
15 obtain any written directives that govern FSA’s responses to Plaintiffs’ requests in order to (1)
16 help establish the existence of an unlawful FOIA policy or practice, and (2) aid Plaintiffs in
17 understanding how FSA processes FOIA requests and thereby how to better structure future
18 requests. *Id.*

19 Both prior to and during this litigation, Plaintiffs and FSA have repeatedly discussed the
20 nature and scope of this request in order to arrive at a collective understanding of the purpose of
21 the request and to tailor FSA’s search. FSA admits that prior to this litigation it understood that
22 Plaintiffs sought non-public “internal guidance” concerning FSA’s use of FOIA Exemptions
23 when responding to “requests from certain groups” for “particular records.” Def.’s Opp. Brief,
24 Dkt. No. 29, at 2-4, 9; Decl. of Philip Buchan (“Buchan Declaration”), Dkt. No. 26-1, at 2-4.
25 FSA’s original search captured some such records. Dkt. No 29, at 9; Dkt. No. 26-1, at ¶ 13-14.
26 Since filing this lawsuit, FSA insisted upon re-conducting its search and production in response
27 to the April 17, 2019 request, claiming that would avoid further litigation on this matter. Joint
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1 CMS, Dkt. No. 21, at 5-7. Plaintiffs have clarified that the April 17, 2019 request seeks internal
2 guidance pertaining to how FSA responds to FOIA requests regarding FSA's farm loan programs
3 and resulting environmental review, particularly if such guidance concerns how to respond to
4 requests originating from groups like Plaintiffs. *See* Dkt. No. 1, ¶¶ 4, 106.

5 Despite this, FSA concedes its revised search was designed to capture two things: (1)
6 documents "which are available on agency websites," and (2) emails addressing the subject of
7 these already publicly available documents. Dkt. No. 29, at 9; Dkt. No. 26-1, ¶ 16. Accordingly,
8 the revised production solely contains already publicly available guidance, draft versions of that
9 public guidance, emails attaching that public guidance, and a single PowerPoint training
10 presentation. *See* Dkt. No. 29; Pls.' Mot. Challenging Deficiencies, Dkt. No. 28, at 4, 10. It does
11 *not* contain any informal exchanges regarding how to apply the FOIA exemptions to groups like
12 Plaintiffs, despite FSA previously producing examples of such documents in response to this
13 request. Dkt. No. 26-1, ¶ 13.

14 FSA's arguments attempting to justify its revised search and production are illogical,
15 contrary to precedent and the purpose of FOIA, and blatantly conflict with each other. To start,
16 FSA argues Plaintiffs should have filed a new FOIA request rather than FSA performing a search
17 based on the parties' mutual understanding of the information Plaintiffs seek. In other words,
18 FSA argues in seeking to resolve this matter through a new production rather than litigation it
19 was appropriate for FSA to ignore the parties' prior understanding and interpret Plaintiffs'
20 request as seeking primarily already publicly available information. This argument is in conflict
21 with the basic principles that "material already published by the agency need not be provided
22 pursuant to a FOIA request," *Linn v. U.S. Dept't of Justice*, 1995 WL 631847, at *17 (D.D.C.
23 Aug. 22, 1995) (citing *Lead Industries Ass'n v. OSHA* 610 F.2d 70, 86 (2d Cir. 1979)), and that
24 "an agency must 'tailor the scope of its search based on the information known to it at the time,'" *James v. U.S. Customs and Border Protection*, 549 F. Supp. 2d 1, 6 (D.D.C. 2008) (citing
25 *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998)).
26
27

1 Then, contradicting this argument, FSA states its revised search would have uncovered
2 “guidance relating to FOIA requests concerning environmental reviews, *if they were to exist.*”
3 Dkt. No. 29, at 11 (emphasis in original). Yet, FSA does not dispute that Plaintiffs have
4 identified records matching this description that *do exist* and have been previously released to
5 Plaintiff Food & Water Watch in response to a prior FOIA request. *Id.* at 11-12. FSA does not
6 dispute that its search did not capture these discussions (described in Plaintiffs’ Complaint, Dkt.
7 No. 1, ¶¶ 93-105, 127). It claims the Food & Water Watch request concerned a different subject
8 matter, but that is irrelevant. The documents also fall within Plaintiffs’ April 17, 2019 request.
9 The revised search also failed to locate yet other responsive documents produced as a result of
10 FSA’s original search that the parties agree are responsive. *Id.* at 12. The fact that the original
11 and revised searches were distinct does not justify why the first search was more successful in
12 capturing responsive information than the second.

13 Finally, despite FSA’s acknowledgment that this Court directed the parties that this round
14 of briefing “should address only plaintiffs’ April 17, 2019, FOIA request and the government’s
15 response thereto,” Dkt. No. 29, at 1 (citing Dkt. No. 23, at 1), FSA spends nearly as many pages
16 as it does responding to the substance of Plaintiffs’ motion arguing that their FOIA Exemption 6
17 withholdings are appropriate as a matter of law, not only as to these documents, but as to whole
18 categories of information such as “information pertaining to the farm owner/operator.” *Id.* at 14.

19 Plaintiffs respectfully request that the Court reject FSA’s attempt to rewrite Plaintiffs’
20 FOIA request such that only already publicly available information is responsive and reject
21 FSA’s attempt to litigate much of Plaintiffs’ pattern and practice claims in this motion contrary
22 to the direction of the Court. Plaintiffs will address that issue in subsequent briefing, as the Court
23 directed. Dkt. No. 23, at 1.

24 ARGUMENT

25 FSA’s Opposition Brief, Dkt. No. 29, fails to justify the deficiencies Plaintiffs identified
26 in their Opening Brief challenging FSA’s revised search and production for records responsive to
27 Plaintiffs’ April 17, 2019 FOIA request, Dkt. No. 28.

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1 “The true purpose of the FOIA is to enable disclosure of nonexempt information that is
2 *not otherwise publicly available.*” *Crews v. Internal Revenue*, 2009 WL 900800, at *6 (C.D. Cal.
3 April 26, 2000) (emphasis in original); *see also Linn*, 1995 WL 631847, at *17 (“material
4 already published by the agency need not be provided pursuant to a FOIA request ... it is already
5 on the public record and need not be disclosed.”) (citing *Lead Industries Ass’n*, 610 F.2d at 86).

6 FOIA requires an agency to “make reasonable efforts to search for responsive records,” 5
7 U.S.C. § 522(a)(3)(C), using methods “reasonably calculated to uncover *all* relevant documents.”
8 *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (emphasis added). “[I]f an agency has
9 reason to know that certain places may contain responsive documents,” the agency must search
10 those places. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999); *Our*
11 *Children’s Earth Found. v. Nat’l Marine Fisheries Serv.*, 85 F. Supp. 3d 1074, 1083 (N.D. Cal.
12 2015) (holding that an agency’s search was inadequate because it failed to search places it “had
13 reason to know ... contained responsive documents”).

14 Importantly for this search, “an agency must ‘tailor the scope of its search based on the
15 information known to it at the time,’” including the manner in which the requestor explicated the
16 request in subsequent communications. *James*, 549 F. Supp. 2d at 6. “The drafter of a FOIA
17 request might reasonably seek all of a certain set of documents while nonetheless evincing a
18 heightened interest in a specific subset thereof” and the agency’s search must be structured in
19 response. *LaCedra v. Executive Office for U.S. Attorneys*, 317 F.3d 345, 348 (D.C. Cir. 2003).

20 The agency bears the burden of demonstrating in reasonable detail that the “search terms
21 and type of search performed” was likely to uncover *all* responsive records. *Oglesby v. Dep’t of*
22 *Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

23 **I. FSA’s Revised Search Is Premised on an Illogical Interpretation of Plaintiffs’**
24 **Request That Is Contrary to FOIA and the Parties’ Shared Understanding.**

25 FSA is “attempting to rewrite” Plaintiffs’ April 17, FOIA request to be primarily seeking
26 information which is “already available on agency websites.” Dkt. No 29, at 9; Dkt. No. 26-1,
27 ¶ 16. This is improper, as the parties had already come to the mutual understanding that Plaintiffs
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1 solely seek non-public “internal guidance.” Dkt. No. 29, at 8-9; Dkt. No. 26-1, ¶ 12. Indeed,
2 FSA’s interpretation of the request is at odds with the purpose of FOIA, i.e., to unveil to the
3 public information which is not already publicly available. *Crews*, 2009 WL 900800, at *6.
4 FSA’s eleventh hour claim that the parties’ discussion and mutual agreement was actually an
5 illegitimate attempt to rewrite Plaintiffs’ FOIA request, Dkt. No. 29, at 11, should be rejected as
6 the ploy it is given FSA did not raise this argument until after the parties had agreed on the
7 search.¹

8 FSA recognizes that the request seeks “internal guidance—formal or otherwise”
9 particularly if such guidance instructs “FSA officers to look out for certain requests from certain
10 groups and/or use select exemptions under certain circumstances.” Dkt. No. 29, at 8-9 (emphasis
11 omitted); Dkt. No. 26-1, ¶ 12 (emphasis omitted). Moreover, at minimum, the complaint and
12 meet and confer process have put FSA on notice that the primary “groups” of concern are
13 Plaintiffs or other similar advocacy organizations, that the “exemptions” at issue are FOIA
14 Exemptions 3 and 6, and that the “circumstances” are when the agency receives FOIA requests
15 concerning FSA’s farm loan programs and resulting environmental review. Dkt. No. 1, ¶¶ 4,106;
16 Dkt. No. 21, at 8 & n.2.

17 FSA has not met its burden to show that its search terms and type of search performed
18 (including which custodians were searched) was tailored to obtain this information. *James*, 549
19 F. Supp. 2d at 6.; *Oglesby*, 920 F.2d at 68. First, the agency searched its “online laws and
20 regulations website” because it “is the routine repository for FSA policy and handbooks,” i.e.,
21 already publicly available information. Dkt. No. 26-1, ¶ 17. In other words, this search was
22
23

24 ¹ Plaintiffs find FSA’s argument particularly at odds with “well-established” principles “that,
25 when search terms are used in ESI discovery, the parties should cooperate to select reasonable
26 search terms and custodians.” *Baranco v. Ford Motor Company*, 2018 WL 9869540, at *1 (N.D.
27 Cal. April 10, 2018) (citing N.D. Cal. Guidelines for Discovery of ESI, 1.02, 2.02-2.03)
28 (collecting cases). After all, the purpose of parties coming together “before documents are
collected and produced is to minimize the risk of an inadequate search.” *Id.* (emphasis in
original). FOIA case law does not depart from these principles. *E.g. James*, 549 F. Supp. 2d at 6.

1 designed solely to obtain records the parties understand to not be responsive, and not designed to
2 uncover responsive internal communications.

3 Second, FSA searched the entire USDA e-mail system, but only for emails with the
4 “subject line” containing terms that were either extremely broad (“FOIA Policy,” “FOIA
5 Guidance,” “FOIA Directives,” “FOIA processing,” “processing FOIA requests and appeals,”
6 and “processing FOIA appeals”) or were search terms specific to already publicly available
7 information (“2-Info,” and “App-70”). *Id.* ¶ 18. Again, this search is designed to capture
8 documents that are already in the public domain and not the internal communications Plaintiffs
9 have requested.

10 Third, FSA claims in its Opposition Brief that the final search was “sensitive to locating
11 internal FOIA guidance documents,” Dkt. No. 29, at 13, yet the paragraph in the Buchan
12 Declaration it cites to support this merely states “FSA searched FSA electronic files for FOIA
13 documents,” Dkt. No. 26-1, ¶ 19. Moreover, this vague and undefined search only uncovered a
14 109 page “PowerPoint training presentation that had been used to train FOIA processors for the
15 agency at the state level.” *Id.* It seems clear that the location searched is unlikely to contain
16 responsive information if a search for “FOIA documents” captured so little information.

17 The Buchan Declaration makes clear that FSA abandoned the parties’ shared
18 understanding of Plaintiffs’ FOIA request when it performed its revised search, *compare id.*
19 ¶¶ 7-13, *with id.* ¶¶ 16-20. While FSA is best positioned to know the appropriate custodians
20 whose records it should search and the best search terms and connectors to use in order to
21 uncover responsive information, FSA has demonstrated that it made no effort to identify which
22 custodians were likely to have information specific to responding to requests about FSA’s farm
23 loan programs, nor craft search terms that relate to FOIA Exemptions 3 and 6. These are just two
24 obvious examples Plaintiffs can think of that would make the search more likely to uncover
25 responsive information. Perhaps if the Buchan Declaration detailed the custodians searched and
26 search terms used in their original search, which uncovered responsive information, *id.* ¶¶ 12-13,
27 Plaintiffs would be in a position to recommend additional appropriate ways to expand that search
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1 such that it would encompass *all* records responsive to the narrowed scope of Plaintiffs' request.
2 FSA has tactically chosen not to include that information. *See id.*

3 While FSA devotes several pages to detail the arduous nature of the task it performed, no
4 one asked them to proceed this way. The reality is the search performed seems like the
5 equivalent of typing the word "policy" into a search engine. While reviewing the responses is
6 sure to consume a great deal of resources, it is difficult to imagine a scenario in which such a
7 search would qualify as "reasonable" and "tailored" to the needs of any request for information
8 about FSA's informal policies. FSA should not be surprised that the search it performed
9 uncovered an overwhelming mass of irrelevant and unresponsive material: it was crafted to do so
10 rather than respond to Plaintiffs' request.

11 **II. FSA Admits Its Revised Search Did Not Capture Responsive Information the** 12 **Parties Know Exists.**

13 FSA admits that there are two sets of responsive information not captured in FSA's
14 revised search that *do exist*: (1) "the records produced in FSA's original search and production in
15 July 2019," Dkt. No. 29, at 12; and (2) "records released in response to a different FOIA request
16 in 2016 relating to environmental assessments," *id.* at 11 (emphasis omitted).

17 FSA relies on *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004) to argue that the
18 "mere speculation that an uncovered document might exist is not sufficient to defeat the
19 reasonableness and adequacy of the agency's search." *Id.* But a quick review of the district court
20 decision on appeal in *Wilbur* reveals that the facts are inapposite. In *Wilbur*, the agency at issue
21 demonstrated with affidavits that it had "destroyed" the identified responsive records prior to
22 receiving the FOIA request at issue. *Wilbur v. C.I.A.*, 273 F. Supp. 2d 119, 125 (D.D.C. 2003).
23 Thus, that the "responsive documents once existed" did not mean that the agency's search that
24 failed to uncover them was inadequate because the documents were destroyed and therefore no
25 longer in the agency's custody or control. *Wilbur*, 355 F.3d at 678. Here, FSA has made no
26 showing that the documents that have been identified have been "destroyed" or are otherwise no
27 longer in its custody or control. Thus, *Wilbur* is irrelevant.

1 In any case, it is always true that when an agency responds to a “FOIA request, the
2 existence of responsive documents is somewhat ‘speculative’ until the agency has finished
3 looking for them.” *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 28-29 (D.D.C. 1998). “[T]he
4 proper inquiry is whether the requesting party has established a sufficient predicate to justify
5 searching for a particular type of record.” *Id.* Plaintiffs cannot think of any better predicate that a
6 search for the type of records it seeks are justified than pointing to previous examples where FSA
7 has produced just such records. Where responsive information clearly exists, it is safe to assume
8 that it is possible there could be more. That is, if it were actually searched for. As discussed
9 above in Section I, FSA has made no effort to craft a search for such information.

10 FSA makes two more arguments for why it was reasonable that these two sets of
11 responsive information were not captured in FSA’s revised search. First, they state that Plaintiff
12 Food and Water Watch’s June 2016 FOIA request was different than Plaintiffs’ April 17, 2019
13 FOIA request. Dkt. No. 29, at 11-12. That is irrelevant. In FSA’s response to Plaintiff Food and
14 Water Watch’s June 2016 FOIA request FSA identified “discussions within FSA that concern
15 requests for records that pertain to the Environmental Assessment” at issue in that request. Dkt.
16 No. 1, ¶ 103. This information is plainly responsive to Plaintiffs’ April 17, 2019 FOIA request as
17 well. That the two requests are different does not mean information responsive to one is not
18 responsive to the other.

19 Second, FSA states that the responsive documents it originally found in response to
20 Plaintiffs’ April 17, 2019 FOIA request were not captured in the revised search because the
21 “agency’s initial search and supplemental searches were distinct.” *Id.* at 12. True, but again, why
22 does that matter? Indeed, the agency claims its latest search was meant to take the broadest view
23 possible of the request to uncover all potential documents. Dkt. No. 26-1, ¶ 16. FSA’s argument
24 would only make sense if Plaintiffs were arguing that the information produced in FSA’s original
25 search were non-responsive. That is not the case. Rather, Plaintiffs alleged that there had to be
26 other documents similar to the “two responsive records” it initially found and it should perform a
27 search to encompass *all* such documents, including the original two.

1 It appears that FSA is trying to avoid performing a search that may capture records
2 damaging to their defense of Plaintiffs' pattern and practice claims. This is not a legitimate
3 reason to justify the search they performed.

4 **III. FSA Improperly Attempts to Litigate That Its FOIA Exemption 6 Withholdings Are**
5 **Justified as a Matter of Law.**

6 Plaintiffs have chosen not to challenge the adequacy of FSA's *Vaughn* Index nor the
7 FOIA Exemption 6 redactions that remain in FSA's revised production "[s]o as to prevent delay
8 on issues not central to the case." Dkt. No. 28, at 5, n.1. The specific information FSA has
9 redacted in its revised production is not material to Plaintiffs. However, Plaintiffs are not
10 conceding that the process or standards that FSA uses in applying FOIA Exemption 6 to
11 withhold information is correct. *Id.* The types of records and categories of information FSA
12 withholds under Exemption 6 are precisely what is at issue in Plaintiffs' remaining pattern and
13 practice claims. Dkt. No. 1, ¶¶ 170-185.

14 The Court directed the parties that this round of briefing "should address only plaintiffs'
15 April 17, 2019, FOIA request and the government's response thereto," Dkt. No. 23, at 1.
16 Moreover, FSA states that because Plaintiffs do not challenge any of the redactions "these issues
17 are no longer before the Court ." Dkt. No. 29, at 13. Yet, even with the Court's direction and the
18 reality that Plaintiffs do not challenge any of the withholdings referenced in FSA's *Vaughn*
19 Index, Dkt. No. 27, FSA argues that their FOIA Exemption 6 withholdings are "properly
20 applied" and their process is appropriate as a matter of law, not only as to these documents, but
21 as to categories of information such as "information pertaining to the farm owner/operator." Dkt.
22 No. 29, at 13-14. Such a finding would potentially foreclose whole swaths of information
23 Plaintiffs wish to litigate in their pattern and practice claims. *E.g.* Dkt. No. 1, ¶¶ 176-182. It is
24 Plaintiffs understanding that the purpose of addressing the April 17, 2019 FOIA request prior to
25 the remaining claims was to ensure a complete record to demonstrate the pattern and practice and
26 reasons for it. FSA's approach, however, would turn that process on its head by forcing the
27 parties to litigate only a small portion of Plaintiffs' Exemption 6 claims, without any of the
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1 responsive policy information that may be uncovered in response to the April 17, 2019 FOIA
2 request, and in regards to specific information that is immaterial to Plaintiffs.

3 Therefore, the Court should forego resolving these issues as the parties agree they “are
4 no longer before the Court,” Dkt. No. 29, at 13, and allow the parties to address remaining
5 disputes about withholdings as they pertain to Plaintiffs’ pattern and practice claims—and any
6 additional withholdings FSA makes in any future productions in response to Plaintiffs’ April 17,
7 2019 request—in future briefing.

8 **CONCLUSION**

9 For the foregoing reasons, Plaintiffs respectfully reiterate their request that the Court find
10 Defendant FSA’s revised search and production for documents responsive to Plaintiffs’ April 17,
11 2019 FOIA request deficient and order Defendant FSA to perform a new search and production
12 correcting the deficiencies outlined in this Reply and Plaintiffs’ Opening Brief, Dkt. No. 28, and
13 file and serve its new production and response, alongside a declaration and *Vaughn* Index
14 demonstrating the adequacy of the search and justifying any withholdings, within fourteen days
15 of this motion being heard.

16
17 Date: August 31, 2020

Respectfully submitted,

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