IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 1:18-cv-9363 (AJN)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN REPLY SUPPORTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff NAACP Legal Defense and Educational Fund, Inc. filed suit pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking records from DOJ's Office of Legal Policy (OLP) and Civil Rights Division (CRT) relating to DOJ's request for the reinstatement of a citizenship question on the 2020 census questionnaire. The parties have resolved their disputes concerning OLP's response. Mem. Supp. Def's. MSJ at 4 n.6 (Def.'s MSJ Mot.), ECF No. 32; Mem. Supp. Pl.'s Cross-MSJ & Opp'n Def.'s MSJ at 4 (Pl.'s MSJ Mot.), ECF No. 26. The only disputed issue regarding CRT's response is the adequacy of CRT's search for responsive records. Plaintiff's arguments that the search was inadequate amount to little more than speculation that additional records must exist, and an attempt to dictate search terms to CRT. Those arguments should be rejected, and Defendant should be granted summary judgment.

ARGUMENT

A. Plaintiff Has Conceded the Propriety of Defendant's Redactions.

At the outset, Defendant should be granted summary judgment on all issues except for those expressly contested by Plaintiff in its opposition brief. *See, e.g.*, *AT&T Corp. v. Syniverse Techs., Inc.*, No. 12 Civ. 1812(NRB), 2014 WL 4412392, at *7 (S.D.N.Y. Sept. 8, 2014) (holding that the plaintiff's failure to address an issue in its opposition brief "concedes the point"); *W. Bulk Carriers KS v. Centauri Shipping Ltd.*, No. 11 Civ. 5952(RJS), 2013 WL 1385212, at *3 (S.D.N.Y. Mar. 11, 2013) (holding that the plaintiff conceded the issue of subject matter jurisdiction by failing to address it in its opposition brief); *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225(RJS), 2012 WL 4471265, at *11 (S.D.N.Y. Sept. 28, 2012) (holding that the plaintiff conceded an issue through silence in its opposition brief), *aff'd sub nom. City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014).

In its opening brief, Defendant moved for summary judgment on the propriety of its withholdings. Def.'s MSJ Mot. at 11-18. Plaintiff's opposition brief does not contest any of these withholdings. *See generally* Pl.'s MSJ Mot. Plaintiff has thus conceded any argument as to the propriety of CRT's withholdings in the documents that CRT has processed and as to CRT's release of all reasonably segregable information. As a result, and for the reasons set forth in their opening brief, Defendant is entitled to summary judgment on all CRT withholdings.

B. CRT Conducted Searches Reasonably Calculated to Locate Responsive Records.

As previously described in Defendant's opening brief, CRT conducted searches reasonably calculated to locate responsive records for all five subparts of Plaintiff's request. Def.'s MSJ Mot. at 6-11. An agency can show it is entitled to summary judgment on the adequacy of a FOIA search with "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search" which are "accorded a presumption of good faith." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). The declaration of Tink Cooper, filed with Defendant's motion for summary judgment, meets the governing standard. Def.'s MSJ Mot. at 6-11; Declaration of Tink Cooper (Cooper Decl.), ECF No. 24. As the Cooper Declaration explains, CRT undertook multiple searches to identify responsive records.[1]

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[1] Plaintiff implies that CRT's supplemental productions to Plaintiff cut against the adequacy of CRT's search or production. *See* Pl.'s MSJ Mot. at 7 (stating that CRT "on multiple occasions, indicated that its productions were 'final'"). To the contrary, CRT's supplemental searches and supplemental productions further indicate the diligent and good faith nature of CRT's responses to Plaintiff. *See Freedom Watch, Inc. v. NSA*, 220 F. Supp. 3d 40, 46 (D.D.C. 2016) ("[E]ven if a case could be made that [an agency's] files should have been searched more thoroughly in the first instance," an agency's "cooperative behavior" in addressing the issue "shows good faith" (citation omitted)); *see also Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013) ("[B]y the time a court considers the matter, it does not matter that an agency's *initial* search failed to uncover certain responsive documents so long as subsequent searches captured them."); *Meeropol v. Meese*, 790 F.2d 942, 953 (D.C. Cir. 1986) ("It would be unreasonable to expect even the most exhaustive search to uncover every responsive file; what is expected of a law-abiding agency is that it admit and correct error when error is revealed.").

CRT was aware that it possessed records relating to subpart (2) of Plaintiff's request, which sought records relating to DOJ's "request for a citizenship status question on the 2020 decennial U.S. Census as necessary to enforce Section 2 of the Voting Rights Act." Request, ECF No. 1-1. DOJ's request was conveyed through the Gary Letter, and CRT accordingly interpreted subpart (2) as relating to records about DOJ's decision to send the Gary Letter. Cooper Decl. ¶ 8. As described in Defendant's motion for summary judgment, CRT completed several hardcopy and electronic searches for records relating to subpart (2) using custodians in the Voting Section and the Office of the Assistant Attorney General for Civil Rights, including Acting Assistant Attorney (AAG) John Gore. Def.'s MSJ Mot. at 7-10. These searches identified the materials produced to Plaintiff and withheld as described in CRT's *Vaughn* index.

CRT also investigated whether additional records responsive to subparts (1), (3), (4), or (5) of Plaintiff's request existed. Def.'s MSJ Mot. at 10. Those subparts sought records on a number of issues potentially related to the reinstatement of a citizenship question, such as how a citizenship question would affect minority rights, whether a citizenship question would affect the census response rate of Black or African American people or of other racial or ethnic groups, and whether the current American Community Survey citizenship question is adequate to enforce Section 2 of the Voting Rights Act. CRT had identified Acting AAG Gore and custodians in the Voting Section as the likely sources of any responsive records. *See* Cooper Decl. ¶ 11. Acting AAG John Gore was asked if he had additional records responsive to subparts (1), (3), (4), and (5), and indicated that he did not. Cooper Decl. ¶ 18. In the Voting Section, Chief Herren, Principal Deputy Chief Wertz, and Deputy Chief Berman—who have knowledge of the portfolios of all Voting Section employees—were asked and indicated that no records responsive to subparts (1), (3), (4), and (5) were likely to exist in the Voting Section other than the records that would have been located in

relation to subpart (2). Cooper Decl. ¶ 18. CRT thus reasonably concluded that no additional records responsive to subparts (1), (3), (4), or (5) were likely to exist. These searches were more than sufficient to show that CRT "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 v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); 5 U.S.C. § 552(a)(3)(C).

Plaintiff challenges CRT's search for three reasons, none of which prevails. First, Plaintiff incorrectly argues that CRT limited its search to only subpart (2) of Plaintiff's request, when in fact, CRT searched for records responsive to all subparts. Second, Plaintiff argues that CRT's search was deficient because CRT did not use the precise search terms preferred by Plaintiff. But CRT met its burden by selecting and executing a search method reasonably calculated to locate all responsive records, and requesters are not entitled to dictate search terms. Finally, Plaintiff argues that CRT's search must be deficient because CRT identified fewer responsive records than Plaintiff expected. That framing of the issue is backward. Not only does Plaintiff fail to present more than speculation that additional records exist, but the correct analysis is "not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). Here, for the reasons stated in Defendant's previous briefing, the Cooper Declaration, and the Supplemental Cooper Declaration, CRT's search was reasonably calculated to identify responsive records, and the adequacy of CRT's search hinges on that reasonableness—not the matter of how many documents were identified.

1. CRT Conducted Searches for Each Part of Plaintiff's Request, and Reasonably Concluded that Additional Records Responsive to Subparts (1), (3), (4), and (5) Were Not Likely to Exist.

Contrary to Plaintiff's contention that CRT "seemingly narrowed its search to part (2)" of the request, Pl.'s MSJ Mot. at 9, CRT conducted searches for each subpart of Plaintiff's request.

After identifying records responsive to subpart (2), CRT *did* search for records responsive to the other subparts—it simply did not locate any additional records. CRT had identified Acting AAG Gore and custodians in the Voting Section as the likely sources of any responsive records. *See* Cooper Decl. ¶ 11 (explaining that the senior management and leadership of the Voting Section were used as custodians due to their "personal knowledge of the Section and all matters, cases, or other law enforcement proceedings addressed by the Section"); Cooper Decl. ¶ 13 (explaining that Acting AAG Gore was used as a custodian as the only OAAG employee "likely to have responsive records concerning DOJ's request regarding the citizenship question as necessary to enforce Section 2 of the Voting Rights Act"). When asked, Acting AAG Gore indicated that he had no additional records responsive to subparts (1), (3), (4), and (5), and Chief Herren, Principal Deputy Chief Wertz, and Deputy Chief Berman indicated that no additional records responsive to subparts (1), (3), (4), and (5) were likely to exist in the Voting Section. Cooper Decl. ¶ 18. Far from Plaintiff's assertion that "the custodians were queried in a way that framed the request as only related to the Gary Letter," Pl.'s MSJ at 18, the custodians were provided with Plaintiff's request and specifically asked—separate from the searches relating to subpart (2)—if they had additional records responsive to subparts (1), (3), (4), and (5). Supp. Cooper Decl. ¶ 8. And, notably, Plaintiff does not appear to challenge CRT's selection of custodians.

Plaintiff appears to object because no *electronic* searches using search terms were conducted specifically for subparts (1), (3), (4), or (5). But there is no requirement than an agency use a particular means to conduct its searches, or conduct an electronic search. Here, the agency selected a reasonable means of searching and determined that no additional documents are likely to exist. CRT's decision is especially reasonable given that the same individuals identified documents responsive to subpart (2) of Plaintiff's request, that DOJ's request for the reinstatement

of a citizenship question was high-profile and likely memorable, and the fact that Plaintiff does not dispute that Acting AAG Gore and the leaders of the Voting Section are the persons expected to have knowledge of any additional records responsive to subparts (1), (3), (4), or (5), if any such records existed. There is no reason to think that CRT's determination was incorrect. It would therefore not be reasonable to require CRT to conduct additional searches. *Cf. Amnesty Int'l USA v. CIA*, Civ. No. 07-5435, 2008 WL 2519908, at *11 n.17 (S.D.N.Y. June 19, 2008) ("Where . . . the Government's declarations establish that a search would be futile, . . . the reasonable search required by FOIA may be no search at all."); *cf. also Cunningham v. DOJ*, 40 F. Supp. 3d 71, 83 (D.D.C. 2014), *aff'd*, No. 14-5112, 2014 WL 5838164 (D.C. Cir. Oct. 21, 2014) ("An agency is not required to expend its limited resources on searches for which it is clear at the outset that no search would produce the records sought."); *id*. (upholding agency's decision not to search using electronic search terms when the agency declarations supported the agency's conclusion that it did not maintain records of the type sought); *Reyes v. EPA*, 991 F. Supp. 2d 20, 27 (D.D.C. 2014) (upholding the EPA's decision not to use search terms to search for requested data when, after individuals with knowledge had multiple meetings on the subject, the EPA did not have responsive records because it did not conduct the type of investigation sought by plaintiff); *W. Ctr. For Journalism v. IRS*, 116 F. Supp. 2d 1, 8 (D.D.C. 2000), *aff'd*, 22 F. App'x 14 (D.C. Cir. 2001) ("The [agency] bears no obligation to conduct an exhaustive search, merely to carry out a reasonable one.").

2. CRT Selected Search Terms Reasonably Expected to Locate All Responsive Documents, and Plaintiff's Desired Search Terms Are Overbroad.

Plaintiff also criticizes CRT for not using the search terms of Plaintiff's choice. Pl.'s MSJ Mot. at 10-11, 17. To some extent, this duplicates Plaintiff's argument that CRT needed to perform electronic searches for subparts (1), (3), (4), and (5), because the search terms that Plaintiff insists

upon appear tailored to Plaintiff's view of what a search for those subparts would entail. *See* Pl.'s MSJ Mot. at 14 (suggesting that the term "ACS" be used to located documents relating to subparts (1), (3), (4), and (5)); *see also* Pl.'s MSJ Mot. at 14-15 (discussing Plaintiff's preferred search terms for subparts (1), (3), (4), and (5)). As previously discussed, CRT was not relying solely on the search term "census" to located documents responsive to subparts (1), (3), (4), and (5)—instead, CRT had already determined it did not need to craft search terms to use in an electronic search relating to those portions of Plaintiff's request because CRT did not reasonably expect any additional records relating to those topics existed. It was not, therefore, necessary to conduct an electronic search for these subparts, let alone an electronic search using the terms Plaintiff dictates.

Furthermore, it is the general rule that "a FOIA petitioner cannot dictate the search terms for his or her FOIA request. Rather, a federal agency has discretion in crafting a list of search terms that they believe to be reasonably tailored to uncover documents responsive to the FOIA request." *Immigrant Def. Project v. ICE*, 208 F. Supp. 3d 520, 527 (S.D.N.Y. 2016) (quoting *Bigwood v. United States Dep't of Def.*, 132 F.Supp.3d 124, 140 (D.D.C. 2015)); *Brennan Ctr. for Justice at New York Univ. Sch. of Law v. DOJ*, 377 F. Supp. 3d 428 (S.D.N.Y. 2019) ("Where the search terms are reasonably calculated to lead to responsive documents, the Court should not 'micro manage' the agency's search." (quoting *Liberation Newspaper v. U.S. Dep't of State*, 80 F. Supp. 3d 137, 146 (D.D.C. 2015)). Yet Plaintiff does precisely that, arguing that CRT must search the broad terms of Plaintiff's choice, including "citizenship," "Section 2," "VRA," "Voting Rights Act," "minority voting rights," "ACS," "American Community Survey," and "response rate." Pl.'s MSJ Mot. at 10, 17.

CRT's declaration has already explained that the search terms CRT selected are reasonably tailored to uncover all documents responsive to subpart (2) of Plaintiff's request. *See* Cooper Decl.

¶¶ 14-15 (describing electronic searches of Acting AAG Gore's email for the term "census"); Cooper Decl. ¶ 20 (explaining that the "broad search term of 'census'" and the term "citizenship question" were used in the final supplemental search "to compile the largest possible data collection to locate all documents responsive to Plaintiff's request"). Where subpart (2) of Plaintiff's request seeks records about why DOJ requested the reinstatement of a citizenship question on the census (as opposed to its previous placement on only the American Community Survey, or ACS), and what impact that would have, it is inherently reasonable to expect that responsive documents would be located by the term "census" or "citizenship question."

Furthermore, CRT has already explained why it would be impracticable and overly burdensome to use Plaintiff's preferred search terms. *See* Cooper Decl. ¶ 22 (explaining that "[t]he use of broader terms such as 'citizenship' or 'Section 2' would be extremely likely to capture a large number of records relating to voting issues but not responsive for records relating to Plaintiff's request"). Plaintiff appears to believe that the burden would be ameliorated because the database "by its own criteria, is a database of records relevant to LDF's FOIA request." Pl's. MSJ Mot. at 11. Not so. The database was *not* collected to be tailored to Plaintiff's request here, or to DOJ's request for the addition of a citizenship question. The database contained documents collected in the process of responding to a Rule 45 subpoena served on the Department of Justice during the substantive census litigation. Supp. Cooper Decl. ¶ 3 & Ex. L. The subpoena covered a number of topics that are considerably broader than Plaintiff's request here, including "communications between the Voting Section and the Census Bureau for the last 10 years; information about Section 2 enforcement; [and] enforcement of the Voting Rights Act since 2010." Supp. Cooper Decl. ¶ 3. Accordingly, the database was collected using a number of search terms

broader than what would be responsive here. *See* Cooper Decl. ¶ 20 & n.1 (describing search terms).

Thus Plaintiff is incorrect to suggest that the database could be used as an easy source of pre-screened material responsive to their request. To the contrary, because the subpoena topics included "information about Section 2 enforcement" and "enforcement of the Voting Rights Act since 2010," CRT expects that using Plaintiff's preferred terms such as "Section 2," "VRA," "Voting Rights Act," etc. would likely result in a large volume of non-responsive material that relates generally to CRT's enforcement actions, but not to Plaintiff's request or the impact of adding a citizenship question on minority rights. Supp. Cooper Decl. ¶¶ 4-5. Plaintiff's proposed search terms are therefore "untethered" from information "likely to be associated" with the desired records. *Henry v. DOJ*, No. 13 Civ. 5924 (DMR), 2015 WL 5138265, at *11 (N.D. Cal. Sept. 1, 2015). For these reasons, this Court should decline Plaintiff's invitation to dictate search terms to CRT. *Cf. Immigrant Def. Project*, 208 F. Supp. 3d at 527 ("FOIA does not give requesters the right to Monday-morning quarterback the agency's search." (citation omitted)).

3. Plaintiff's Speculative Belief That Additional Records Must Exist Does Not Make CRT's Search Inadequate.

Plaintiff also argues that CRT's searches were inadequate because CRT did not find as many records as Plaintiff expected. Pl.'s MSJ Mot. at 12-18. These arguments must fail because "purely speculative claims about the existence and discoverability of other documents" do not create a question of fact on summary judgment in a FOIA case. *Adamowicz*, 402 F. App'x at 650 (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999)). It is well settled that a FOIA search "is judged by whether it was designed to comply with the request rather than by the number of responsive pages it produced." *Immigrant Def. Project*, 2016 WL 5339542, at *3 (citing *Grand Cent. P'ship*, 166 F.3d at 489). Plaintiff "presumes incorrectly that a search term

is inadequate merely because it did not lead to the discovery of documents; another possibility, of course, is that the searched files contained no responsive documents." *Am. Fed. of Gov't Emps., Local 812 v. Broadcasting Bd. of Govs.*, 711 F. Supp. 2d 139, 151 (D.D.C. 2010).

Plaintiff cites several documents that it claims suggest that CRT possesses additional responsive records. But none of the vague and conclusory examples that Plaintiff identifies can support the weight of Plaintiff's arguments. Some, for example, reference phone calls, which may by their nature not result in the agency's possession of a record that can later be produced in response to a FOIA request. Others indicate that individuals at CRT were aware of public, outside documents, but not whether those individuals possessed copies of those documents that would have become agency records.

For example, Plaintiff first cites the Gary Letter's statement that data from a citizenship question "is critical to the Department's enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting." Pl.'s MSJ Mot. at 15 (quoting the Gary Letter at 1, ECF No. 23-2). But the Gary Letter does not establish some secret trove of documents at CRT. The Gary Letter explicitly refers to publicly available cases,[2] not internal

[2] The Gary Letter cites five publicly available Supreme Court and circuit court cases for the proposition that "Multiple federal courts of appeals have held that, where citizenship rates are at issue in a vote-dilution case, citizen voting-age population is the proper metric for determining whether a racial group could constitute a majority in a single-member district." Gary Letter at 1, ECF No. 23-2. After discussing an additional publicly available case from the Fifth Circuit, the Gary Letter continues "These cases make clear that, in order to assess and enforce compliance with Section 2's protection against discrimination in voting the Department needs to be able to obtain citizen voting-age population data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected." Gary Letter at 2. There is thus no mystery as to what the Gary Letter refers to in concluding that citizenship data "is critical to the Department's enforcement of Section 2." Gary Letter at 1. The Gary Letter then spends several paragraphs enumerating the reasons that ACS "does not yield the ideal [citizenship data] for such purposes," Gary Letter at 2-3, all without any reference to any "underlying memoranda, opinions, analyses, or correspondence," Pl.'s MSJ Mot. at 15. And, of course, Plaintiff does not

memoranda or analyses. And of course, Plaintiff received numerous documents related to the drafting of the Gary Letter, and additional documents were withheld by the agency (which Plaintiff did not challenge).

Plaintiff also points to a document produced in response to its FOA request, which states that a "contact at the Census" "recall[ed] questions about citizenship information being raised by career policy staff about a year and a half ago, but not in writing and nothing came of it." Email from Arthur Gary to John Gore (Sept. 11, 2017), ECF No. 24-5 (page 5 of 79 by ECF pagination); Pl.'s MSJ Mot. at 16. Although the document speaks from itself, there is no indication in the email that such "questions" were raised at CRT (rather than at Census), or that any such "questions" would have resulted in CRT possessing responsive records. Plaintiff "acknowledges that the cited email notes that Commerce did not have anything in writing," and thus that there would likely not be records, but maintains that "that does not mean that the DOJ career policy staff did not." Pl.'s MSJ Mot. at 16. This unsupported speculation is insufficient to defeat the adequacy of CRT's search—if the relevant individuals at DOJ had had any such records they likely would have been discovered through the search terms used here.

Likewise, Plaintiff points to a statement by DOJ in a filing in the substantive census litigation that the problems with using ACS data mentioned in the Gary Letter "are widely known, and have been discussed in case law and academic literature for years." Pl.'s MSJ Mot. at 16 (citing a filing in *New York v. U.S. Dep't of Commerce*, No. 18-cv-2921-JMF (S.D.N.Y June 3, 2019), ECF No. 601). Whether or not such issues are, of course, discussed in case law and

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deny that it has received materials relating to the Gary Letter, and does not challenge Defendant's withholdings for privilege of other materials related to drafting the Gary Letter. Instead Plaintiff simply speculates that additional, secret documents exist that CRT has kept from them—but this type of theorizing is counter to how a Court evaluates a FOIA claim.

academic literature for years is irrelevant to whether DOJ has responsive documents to Plaintiff's request. Individuals at CRT may well have been aware of such case law and academic literature without creating or retaining records on the topic. Plaintiff's contention is especially weak because such public documents were produced to Plaintiff as part of the FOIA response here. *See, e.g.*, ECF No. 24-8 (pages 6 to 89 of 98 by ECF pagination) (two publicly available briefs filed in the Supreme Court). Plaintiff received the very thing that it claims is missing.

Plaintiff also suggests, based on documents from the substantive census litigation, that it expected more early records to be found, especially prior to or in September 2017. Pl.'s MSJ Mot. at 17. This is, again, an unsupported inference because, if such records existed, they likely would have been found. This inference is cast into doubt by other documents from the substantive census litigation, which further explain the timeline of DOJ's involvement in the citizenship question and provide no reason to believe that responsive records would exist prior to the records produced from September 2017. *See, e.g.*, Gore Depo. Tr. 62:20-64:4 (Acting AAG Gore explains his understanding that prior to September 8, 2017, "somebody from Commerce had *spoken* to Mary Blanche Hankey, that someone had *spoken* to James McHenry, and that Secretary Ross had *spoken* to the attorney general" about the inclusion of a citizenship question on the census (emphasis added)), attached as Ex. 6; Gore Tr. 73:2-75-9 (explaining that Acting AAG Gore first became involved in deliberations about whether or not to request a citizenship question around Labor Day of 2017 through a call with the attorney general and Mary Blanche Hankey). That a *phone call* or *conversation* occurred, of course, does not necessarily suggest that any responsive records would be in the possession of CRT, and Mary Blanche Hankey and James McHenry are not CRT attorneys. Again, to the extent that additional documents from those times were not located, the

most likely explanation in light of the presumption of good faith accorded to agency declarations is that no such records exist.

Although Plaintiff appears to suspect that internal memoranda and analyses beyond the materials identified by CRT exist, it offers no evidence supporting that theory. Instead, the most likely conclusion is that they do not, because if they did they would have been identified by CRT's searches for the term "census."[3] Plaintiff is far from "aver[ing] specific evidence about a search's inadequacy." *Immigrant Def. Project*, 208 F. Supp. 3d at 527.

Finally, Plaintiff presents a laundry list of reasons that CRT interpreted its request too narrowly. Pl.'s MSJ Mot. at 18. Plaintiff notes that their request would cover soft copy memoranda, hard copy materials and Voting Section emails, Pl.'s MSJ Mot. at 18, but CRT's search would have identified materials in all of these categories, if they existed. *See* Cooper Decl. ¶¶ 11-12, 14, 15, 20-22 (discussing electronic searches); Cooper Decl. ¶¶ 16, 21-22 (discussing hard copy searches); *see also* Supp. Cooper Decl. ¶ 6 (describing search for electronically stored information for material other than email). Indeed, Plaintiff was provided with materials that resulted from a hard-copy search. *See* Cooper Decl. ¶ 27 (describing 97 pages released in full to Plaintiff from Acting AAG Gore's hard copy documents).

CRT's search was adequate and reasonably calculated to locate responsive records, if they existed. CRT did in fact identify numerous responsive records, and produced the non-exempt

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[3] Plaintiff identifies a single document that it suggests is responsive that does not contain the term "census." Pl.'s MSJ Mot. at 17 & n.54. Even if that record were responsive, "failure to turn up a particular document, . . . does not undermine the determination that the agency conducted an adequate search for the requested records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam). *See also Physicians for Human Rights v. DOD*, 675 F. Supp. 2d 149, 164 (D.D.C. 2009) ("[I]n responding to a FOIA request, an agency is only held to a standard of reasonableness; as long as this standard is met, a court need not quibble over every perceived inadequacy in an agency's response, however slight.").

portions to Plaintiff. To the extent that CRT did not identify some unknown number of unknown documents that Plaintiff posits may have existed, the most likely conclusion is that these documents do not exist. Agency affidavits are "accorded a presumption of good faith," which "cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Grand Cent. P'ship, Inc.*, 166 F.3d at 489 (internal quotation marks and citations omitted). "The process of conducting an adequate search for documents requires 'both systemic and case-specific exercises of discretion and administrative judgment and expertise' and is 'hardly an area in which the courts should attempt to micromanage the executive branch.'" *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 56 (D.D.C. 2012) (quoting *Schrecker v. DOJ*, 349 F.3d 657, 662 (D.C. Cir. 2003)).

C. The Court Should Disregard Plaintiff's Local Civil Rule 56.1 Statement.

As noted in Defendant's opening memorandum, Def. MSJ Mot. at 5 n.4, submission of Local Civil Rule 56.1 statements in FOIA cases has been deemed unnecessary by courts in this district because, in FOIA actions, "agency affidavits alone will support a grant of summary judgment." *N.Y. Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012). Accordingly, Defendant has submitted, in support of its motion and in opposition to Plaintiff's cross-motion, declarations that explain Defendant's searches and withholdings. *See generally* Cooper Decl.; Supp. Cooper Decl. No Local Civil Rule 56.1 statement was required, nor should Defendant have to respond to the Statement submitted by Plaintiff. However, in the event the Court determines that a Local Civil Rule 56.1 counter-statement is required from Defendant in connection with its motion for summary judgment, Defendant is prepared to draft and file such a statement.

CONCLUSION

For these reasons and reasons set forth in Defendant's opening brief, Defendant's motion for summary judgment should be granted and Plaintiff's cross-motion for summary judgment denied.

Dated: July 8, 2019

Respectfully submitted,

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