UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mattachine Society of Washington, D.C.
527 16th Street, N.W.
Washington, D.C. 20036

Plaintiff,

v.

United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Defendant.

Case No. 1:16-cv-00773 (RCL)

OPPOSITION OF THE MATTACHINE SOCIETY TO THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant United States Department of Justice (the "DOJ" or "Defendant") moved for summary judgment, claiming that no genuine issue of material fact existed that it had satisfied all of its obligations pursuant to the Freedom of Information Act ("FOIA") in response to the Mattachine Society of Washington, D.C.'s (the "Mattachine Society" or "Plaintiff") FOIA request (the "Request"). Def.'s Mot. Summ. J. 1, ECF No. 37. In response, Plaintiff, by and through its undersigned counsel, respectfully cross-moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.[1] As discussed in the attached Memorandum of Points and Authorities, Defendant has failed, as a matter of law, to conduct an adequate and reasonable search in light of the facts and circumstances underlying the Request. This Court should also grant summary judgment in favor of Plaintiff because Defendant has failed, as a matter of law, to apply properly the statutory exemptions allowed under the FOIA when it improperly withheld

[1] Plaintiff also submits a Statement of Undisputed Material Facts in further support of its Cross-Motion for Summary Judgment.

responsive materials in whole and part.

Dated: January 30, 2017
Washington, D.C.

Respectfully Submitted,

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Case No. 1:16-cv-00773 (RCL)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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Pursuant to Fed. R. Civ. P. 56 and Local Rule 7(h), Plaintiff, The Mattachine Society of Washington, D.C. (the "Mattachine Society" or "Plaintiff"), by and through its undersigned attorneys McDermott Will & Emery LLP, respectfully submits this Memorandum in Support of its Cross-Motion for Summary Judgment and in Opposition to the motion for summary judgment submitted by Defendant United States Department of Justice (the "DOJ" or "Defendant"). Plaintiff also submits a Statement of Undisputed Facts in further support of its Cross-Motion for Summary Judgment. For the reasons stated herein, the Mattachine Society requests that the Court deny Defendant's motion and grant the Mattachine Society's Cross-Motion for Summary Judgment.

INTRODUCTION

This case is about the systemic purge of gays and lesbians from the Federal employment rolls and whether the public has the right to know more about this stain on our history. For decades, the United States Government had an official policy to discriminate against members of the lesbian, gay, bisexual, and transgender ("LGBT") community – a policy rooted in prejudice and fear, and one that led to a total ban on Federal employment for all those accused of "sexual perversion." This ban originated in the form of Executive Order 10,450 ("EO 10450"), signed by President Dwight D. Eisenhower on April 27, 1953. (Am. Compl. Ex. 1.) In the decades that followed, the Federal Bureau of Investigation ("FBI"), the DOJ, and what is now known as the Office of Personnel Management enforced this ban with vigor. Over the course of nearly sixty years and through eight Presidents, this ban led to the investigation and firing of thousands of homosexuals and those suspected of homosexuality.

Unfortunately, this is not ancient history. Prior to the end of his term, now-former U.S. Secretary of State John Kerry issued a formal apology for the U.S. State Department's involvement in the purge of homosexuals from Government employment. Daniel Reynolds, *State*

Dept.'s Lavender Scare Apology Removed From Website, THE ADVOCATE, (Jan. 23, 2017) http://www.advocate.com/media/2017/1/23/state-depts-lavender-scare-apology-removed-website. But that history now runs the risk of being erased. Shortly after the inauguration of President Donald J. Trump, the U.S. State Department wiped former-Secretary Kerry's apology from its website. (*Id.*) Indeed, even to this day, many of the documents evidencing the Federal Government's longstanding policy against gays and lesbians – and the records of the lives that it destroyed – remain buried and out of public view.

To uncover this buried past, on January 25, 2013, the Mattachine Society filed a Freedom of Information Act ("FOIA") request (the "Request") with the FBI, seeking copies of documents related to EO 10450. The Mattachine Society is a non-profit organization that conducts archival research into the events and history that have shaped LGBT history in the United States. One of the most powerful tools at the Mattachine Society's disposal is the ability to request documents from agencies and entities of the Federal Government pursuant to the FOIA.

In the instant matter, the Mattachine Society requested that the FBI provide copies of documents related to EO 10450. Under the guise of protecting national security, EO 10450 empowered the Federal Government to discharge employees (or deny employment to applicants) on the basis of "sexual perversion." At the time, the term "sexual perversion" or reference to "perverts" was the "polite" way to identify someone as homosexual. The Request had two principal components: first, the Mattachine Society sought documents related to the "Sex Deviate program" started by J. Edgar Hoover's FBI which collected information about federal employees who were arrested for, among other reasons, "morals charges," *i.e.*, being caught soliciting or engaging in homosexual acts; and, second, the Mattachine Society requested the relevant papers of Warren E. Burger while he was an Assistant Attorney General ("AAG") of the DOJ in charge of enforcing EO 10450.

The Request was not, however, limited to just these examples of the application of EO 10450. Rather, the Request sought all documents concerning EO 10450 and any documents that demonstrated its application. Notwithstanding this broad Request, the Defendant produced largely unresponsive documents pursuant to a search not reasonably crafted to meet the needs of the Request. The Mattachine Society is not arguing – as the Defendant mistakenly states in its memorandum in support of its summary judgment motion – that the Defendant's search was inadequate simply because it did not yield many documents. (Def.'s Mem. in Supp. of Mot. for Summ. J. at 15.) The documents that the Defendant did provide, however, are largely limited to post-1957, during which time the Defendant was scrambling to modify EO 10450 after the United States Supreme Court ("U.S. Supreme Court") invalidated it in *Cole v. Young*, 351 U.S. 536 (1956), because it was not sufficiently tailored to address national security interests.

The scope of the search for responsive documents conducted by the Defendant was unreasonable and inadequate because, as detailed below, the Defendant used *only three search terms*: "Executive Order 10450," "Sex Deviate," and "Sex Deviate Program." In actuality, these are only two terms, because any documents that contain the words "Sex Deviate Program" would necessarily already include the term "Sex Deviate." The use of these terms is, on its face, insufficient to identify potentially responsive documents. Indeed, the Defendant failed to use the term "sexual perversion" in its search despite the fact that "sexual perversion" or being a "pervert" was an enumerated ground for dismissal in the text of EO 10450.

To make matters worse, in the limited number of documents that the Defendant produced, several pages were withheld from disclosure in full (or in part) based on an overbroad application of statutory exemptions to disclosure. These documents are ripe for *in camera* review so that this Court can render a considered, neutral judgment about the applicability of the claimed exemptions.

The Mattachine Society asks that this Court require the Defendant to fulfill its statutory mandate to conduct reasonable searches for documents responsive to the Mattachine Society's valid FOIA Request and determine whether the Defendant's applied exemptions are overbroad and/or unwarranted.

BACKGROUND

The Mattachine Society Requests Information Concerning EO 10450

On January 25, 2013, the Mattachine Society submitted its Request to the FBI, Record/Information Dissemination Section pursuant to the FOIA, 5 U.S.C. § 552. (Hardy Decl. Ex. A.) Plaintiff requested that the Defendant

> provide copies of all communications, personnel or investigative files created in association with **Executive Order 10450**, which was signed by President Dwight Eisenhower in April 1953 and made effective on May 27, 1953. This request includes any and all internal FBI correspondence or communications regarding Executive Order 10450 and also specifically includes, but is not limited to, all files created by and communications to or from Warren E. Burger. The date range for this request is 1950-1990.

(Hardy Decl. Ex. A (emphasis in original).)

In an effort to assist the Defendant in designing its search for documents, the Request provided some background and context. In particular, the Request informed the Defendant that EO 10450 "authorized federal agencies, including . . . the Federal Bureau of Investigation, to investigate current and potential federal employees for security risks." (Hardy Decl. Ex. A.) The Request further stated that EO 10450 "expanded the criteria for determining a security risk to include 'any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct . . . [including] *sexual perversion*.'" (Hardy Decl. Ex. A (emphasis added).) The Request also said that EO 10450 "authorized the FBI to expand its 'Sex Deviate program'" and that Warren E. Burger "was in charge of enforcing Executive Order 10450 as an Assistant Attorney General in

charge of the Civil Division at the Department of Justice, for the approximate period **1952-1957**." (Hardy Decl. Ex. A (emphasis in original)).

The impact of EO 10450 was immense and affected thousands of individuals. First, it legitimized the "Sex Deviates Program" that former FBI Director J. Edgar Hoover ("Hoover") created in 1951 in which Hoover "instructed all investigative employees of the FBI to ensure that any information they received during the course of background checks that concerned the employee's sexual orientation be 'completely and fully developed.'" (Am. Compl. ¶ 7.) In addition to investigating allegations of homosexuality in the course of Federal employment background checks, the Sex Deviates Program leveraged local law enforcement arrests when then-Director Hoover required local law enforcement, when arresting a Federal employee, "to place a notation on the arrest fingerprint card that the subject was an employee of the Federal Government." (Am. Compl. ¶ 8.) Once President Eisenhower signed EO 10450, the FBI and other Federal agencies could use the information gathered by Hoover through the Sex Deviates Program to fire homosexual Federal employees solely on the basis of their sexual orientation, regardless of whether those individuals posed a national security risk. Notably, other documents obtained by the Mattachine Society through the FOIA process demonstrate a paper trail of animus toward LGBT people by Hoover and the FBI during the period contained in the Request.

Second, the Government used the information collected by Hoover and other information found during the course of employment background checks to terminate the employment of thousands of homosexual and suspected homosexual employees of the Federal Government from the 1950s through the '70s and '80s. As stated in a report from the U.S. Merit Systems Protection Board, "[a]lthough we will never know the exact number of individuals who were denied employment or who had their employment terminated based on their actual or assumed sexual

orientation, one estimate places this number between 7,000 and 10,000 in the 1950's [*sic*] alone." (Am. Compl. Ex. 3.)

No matter how one measures the number of people adversely impacted by EO 10450, lives were ruined through the background checks conducted by the FBI and then disseminated to other agencies in the Federal Government. The Mattachine Society seeks all records concerning this dark period in American history with the goal of educating the public so that history does not repeat itself.

The Defendant's Woefully Inadequate Response to the Request

To uncover documents related to this broad, systemic program executed by the Federal Government, the Defendant made the curious decision to use *only three search terms:* "Executive Order 10450," "Sex Deviate," and "Sex Deviate Program." (Def.'s Mem. in Supp. of Mot. for Summ. J. at 13.)[1] But, crediting the Defendant with using three terms is too generous. The Defendant really only used ***two search terms*** as the terms "Sex Deviate" and "Sex Deviate Program" are duplicative of each other (*i.e.*, any document that includes the words "Sex Deviate" will also find documents that use the phrase "Sex Deviate Program"). The Defendant further states that it conducted a "string ('ST') search," whereby "all names and/or terms whose starting characters match the characters typed into the name field; such a search will automatically capture variations of the names and/or terms searched." (Def.'s Mem. in Supp. of Mot. for Summ. J. at 13 n.9.) A string search, however, will only capture variations of the two search terms selected in this case. As such, the Mattachine Society never had a chance to obtain the information contained in its Request as the Defendant unreasonably narrowed the scope of its searches from the outset.

[1] The full name of the initiative was the "Sex Deviates Program." Although the singular form of "deviate" was used in the Request and also as a search term, any search for "deviate," whether as a plain language or string search, should have picked up this word. The Defendant should re-run the searches to consider the plural form of "deviate" if its systems did not include the plural form of this word.

The Defendant inexplicably failed to include basic search terms that are directly relevant to and stated in the Mattachine Society's Request and the text of EO 10450. Some straightforward terms that the Government should have included in any reasonably crafted search include: "sexual perversion," "pervert," "homosexual," and "Warren Burger." (*See* Hardy Decl. Ex. A.) These terms warrant obvious inclusion in any search because (1) the term "sexual perversion" (and its derivative "pervert") was the actual term used in EO 10450; (2) "homosexual" employees were targeted; and (3) the Mattachine Society specifically requested documents created by Warren Burger, as the AAG in charge of the enforcement of EO 10450, in its Request. Conducting searches with these few additional terms is the bare minimum of what the Defendant should have done to craft a reasonable search. An actual reasonable search would also use search terms such as "homo," "gay," "lesbian," "queer," and "sodomy." Despite panoply of terms that the Defendant could have used, it conducted a narrow, legally insufficient search using just two terms.

In addition, the Defendant applied some of the FOIA statutory exemptions in an overly broad fashion (the "Withheld Documents"). Accordingly, the Mattachine Society respectfully requests that this Court review *in camera* the Withheld Documents to test whether the Defendant should narrow its application of certain exemptions to maximize the disclosure of materials responsive to the Request. In total, the Defendant identified 1,602 pages in response to the Request. (Hardy Decl. ¶4.) Of these documents, the Defendant produced 1,110 pages in full, produced 93 pages in part, and withheld 399 pages in full.[2] (*Id.*) After reviewing the Defendant's motion for summary judgment, the Mattachine Society withdraws its objections to the Defendant's

[2] Because the Defendant's summary judgment papers do not provide a clear page-by-page account of its positions with regard to the withheld or partially disclosed pages at issue, the Mattachine Society has assembled a chart that captures the Defendant's various responses and objections on a page-by-page basis for the Court's reference. *See* Ex. A to Plaintiff's Statement of Undisputed Material Facts.

withholdings except for the following pages of documents to which the Mattachine Society still objects:[3]

- Withholdings in Part: The Defendant has identified four (4) pages that allegedly warrant partial withholding in the form of redactions (*i.e.*, FBI 1151-1152, 1268-1269) that the Mattachine Society hereby challenges. As detailed herein, the redactions in these pages are overbroad and should be limited to cover only the specific material that is eligible for withholding pursuant to the applicable exemptions, if any.
- Withholdings in Full: The Defendant has identified seven (7) pages that allegedly warrant full withholding that the Mattachine Society is challenging (*i.e.*, FBI 458-460, 935-938). The Defendant's claimed exemptions, such as withholding the names of DOJ employees pursuant to 5 U.S.C. §§ 552(b)(6) and (b)(7)(C), can certainly be accomplished by redacting the relevant portions of the documents and do not require a full withholding.

This leaves 129 pages unaccounted for without a page-by-page justification for any claimed exemptions.

In addition, 324 pages were withheld in their entirety because they were referred to other agencies. However, in response to letters dated May 5, 2015, September 28, 2015, September 29, 2015, and September 9, 2016 sent to these respective agencies by counsel for the Mattachine Society, these agencies released an additional 195 pages.[4]

[3] The Defendant has identified sixty-seven (67) pages as duplicative of other pages (*i.e.*, FBI 324-368, 370, 387-396, 452-457, 1410-1414). The Mattachine Society requests that these documents be released to confirm the Defendant's contention that they are, in fact, duplicative.

[4] Plaintiff also remembers its willingness to pay requisite search and duplication costs and will make the $15.00 payment referenced by the Defendant in footnote 1 of its Memorandum.

ARGUMENT

I. STANDARD OF REVIEW

A. The Defendant Has the Burden to Show That Its Search Was Designed to Uncover All Relevant Documents

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To justify summary judgment in a FOIA case, the agency bears the burden of demonstrating that it has complied fully with its obligations to conduct an adequate search, to release all nonexempt records, and to justify its withholding of responsive records. 5 U.S.C. § 552(a)(4)(B). Specifically, "to prevail on summary judgment in a FOIA action, a defending agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *Landmark Legal Found. v. EPA.*, 959 F. Supp. 2d 175, 180 (D.D.C. 2013) (quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (internal quotation marks omitted) (holding that issues of fact as to the adequacy of the EPA's search precluded summary judgment). *See also Blank Rome LLP v. Dep't of the Air Force*, No. 15-CV-1200-RCL, 2016 WL 5108016, at *4 (D.D.C. Sept. 20, 2016) (explaining that "summary judgment is not appropriate when a review of the record raises substantial doubt, particularly in view of well-defined requests and positive indications of overlooked materials." (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999)) (internal quotation marks omitted)). Moreover, FOIA "compels disclosure in every case where the government does not carry its burden of convincing the court that one of the statutory exemptions apply." *Goldberg v. U.S. Dep't of State*, 818 F.2d 71, 76 (D.C. Cir. 1987).

In FOIA cases, the adequacy of a search is measured by a standard of reasonableness and depends on the individual circumstances of each case. *Truitt v. Dep't of State*, 897 F.2d 540, 542

(D.C. Cir. 1990). *See also Morley*, 508 F.3d at 1114 (stating that applying a reasonableness test to determine the adequacy of a search methodology is "consistent with congressional intent tilting the scale in favor of disclosure.") (quoting *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998)). 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.'" *Agility Pub. Warehousing Co. v. NSA*, 113 F. Supp. 3d 313, 339 (D.D.C. 2015) (quoting *Physicians for Human Rights v. U.S. Dep't of Def.*, 675 F. Supp. 2d 149, 164 (D.D.C. 2009)).

Where the search terms are reasonably calculated to lead to responsive documents, courts should neither "micromanage" nor "second guess" the agency's search. *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) ("FOIA, requiring as it does both systemic and case-specific exercises of discretion and administrative judgment and expertise, is hardly an area in which the courts should attempt to micromanage the Executive Branch."); *Liberation Newspaper v. U.S. Dep't of State*, 80 F. Supp. 3d 137, 146–47 (D.D.C. 2015) ("Where the agency's search terms are reasonable, the Court will not second guess the agency regarding whether other search terms might have been superior."). *See also Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 140–41 (D.D.C. 2015) ("In general, a FOIA petitioner cannot dictate the search terms for his or her FOIA request.").

Although the agency has the initial burden of demonstrating the adequacy of the search, the requestor may produce countervailing evidence to put at issue the retrieval procedure, making summary judgment inappropriate. *Morley*, 508 F.3d at 1116. As described herein, the Defendant cannot meet its initial burden as to its use of two search terms; the search was unreasonable and likely did not identify responsive materials due to the limited scope of the search terms employed.

II. ALL THREE BRANCHES OF THE FEDERAL GOVERNMENT AGREE THAT THE FREEDOM OF INFORMATION ACT IS INTENDED TO ESTABLISH TRANSPARENCY BETWEEN THE GOVERNMENT AND ITS CITIZENRY.

On July 4, 1966, when President Lyndon B. Johnson signed the FOIA, he stated that "[t]his legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation will permit." (President Johnson's Statement Upon Signing the Freedom of Information Act, 316 PUB. PAPERS 699 (July 4, 1966), *available at* http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/Document%2031.pdf.) In that same statement, President Johnson recognized that interests of national security and personal privacy can justify withholding information. "I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private collectors should determine when it must be restricted." (*Id.*) President Johnson further stated that he "signed this measure with a deep sense of pride that the United States is an open society." (*Id.*)

Thirty years later, on October 2, 1996, President William J. Clinton echoed the statements of President Johnson when he signed into law the Electronic Freedom of Information Act Amendments of 1996. President Clinton stated that "[t]he legislation I sign today brings FOIA into the information and electronic age by clarifying that it applies to records maintained in electronic format." (President Clinton's Statement on Signing the Electronic Freedom of Information Act Amendments of 1996, 2 PUB. PAPERS 1743 (Oct. 2, 1996), *available at* https://www.gpo.gov/fdsys/pkg/PPP-1996-book2/pdf/PPP-1996-book2-doc-pg1743.pdf.) "Our country was founded on democratic principles of openness and accountability, and for 30 years, FOIA has supported these principles. Today, the 'Electronic Freedom of Information Act Amendments of 1996' reforges an important link between the United States Government and the American People." (*Id.* at 1744.)

When it passed the FOIA, Congress made clear that the law was enacted to promote

government transparency. In the Senate, the Conference Report issued during the passing of the FOIA states that "[i]t is the purpose of the present bill . . . to establish a general philosophy of *full agency disclosure* unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld." (S. REP. NO. 89-813, at 3 (1965) (Conf. Rep.) (emphasis added), *available at* http://nsarchive.gwu.edu/nsa/foialeghistory/S.%20Rep.%20No.%2089-813%20(1966%20Source%20Book).pdf.) "Success lies in providing a workable formula which encompasses, balances and protects all interests yet places emphasis on the fullest responsible disclosure." (*Id.*) The United States House of Representatives expressed similar sentiments. The House Conference Report stated that "[i]t is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." (H.R. REP. NO. 89-1497, at 6 (1966) (Conf. Rep.), *available at* http://nsarchive.gwu.edu/nsa/foialeghistory/H.%20Rep.%20No.%2089-1497%20(1966%20Source%20Book).pdf.) "The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government." (*Id.*) The Federal Government has continued to enhance the public's access to Government documents. For example, in June 2016, President Barack H. Obama signed into law the FOIA Improvement of 2016, which contained several substantive and procedural amendments to the FOIA. (Press Release, U.S. Dep't of Justice, *President Obama Signs the FOIA Improvement Act of 2016* (June 30, 2016), https://www.justice.gov/oip/blog/president-obama-signs-foia-improvement-act-2016.)

For its part, the U.S. Supreme Court agrees that the FOIA is concerned with ensuring

openness and transparency between the government and its citizens. The U.S. Supreme Court has stated that the FOIA is "a means for citizens to know 'what their government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–172 (2004) (citations omitted). The FOIA's "basic purpose," as explained by the U.S. Supreme Court, "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). *See also Elec. Privacy Info. Ctr. v. NSA*, 795 F. Supp. 2d 85, 90 (D.D.C. 2011) ("Congress enacted FOIA to promote transparency across the government.").

The U.S. Court of Appeals for the District of Columbia and other Federal courts interpreting the FOIA have agreed with these sentiments and maintained that the FOIA is designed to encourage open access to information that requires Federal agencies to release requested records to the public upon the request by any person, unless a statutory exemption applies. *See, e.g.*, *Long v. OPM*, 692 F.3d 185, 190 (2d Cir. 2012) ("FOIA was enacted to promote honest and open government." (quoting *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999))); *Am. Civil Liberties Union v. U.S. Dep't of Justice*, 655 F.3d 1, 5 (D.C. Cir. 2011) ("FOIA was intended to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation marks omitted)); *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Service*, 524 F.3d 1021, 1023 (9th Cir. 2008) ("FOIA was enacted to facilitate public access to government records."); *Aronson v. IRS.*, 973 F.2d 962, 966 (1st Cir. 1992) (explaining that the "very purpose" of FOIA "is to open agency action to the light of public scrutiny." (quoting *U.S. Dep't of Justice v. Reporters Comm.*

for Freedom of the Press, 489 U.S. 749, 772 (1989) (internal quotation marks omitted)).

III. THE DEFENDANT FAILED TO PERFORM AN ADEQUATE SEARCH

With these defining principles in mind, the Mattachine Society asserts that the Defendant's search for information in response to the Request was unreasonable and inadequate. Summary judgment for the Defendant is inappropriate because, as a threshold matter, the Defendant has not shown that it conducted a search reasonably calculated to uncover all relevant documents. *Landmark Legal Found*, 959 F. Supp. 2d at 180. There is a material question of fact surrounding the sufficiency of the Defendant's search in light of the purpose of the Request to which the Defendant was required to respond.

A. Defendant Unreasonably and Improperly Limited Its Search

In response to the Mattachine Society's Request, the Defendant has put forth evidence that it conducted its search using only *three* terms. "Executive Order 10450," "Sex Deviate," and "Sex Deviate Program." (Hardy Decl. at ¶ 31.) But, as noted above, by using "Sex Deviate" in two of its three search terms, the Defendant essentially only employed two search terms, as the phrase "Sex Deviate Program" would have been a result in a search for documents with the term "Sex Deviate." Defendant claims these search terms were chosen "to ensure a broad search for responsive records." (Def.'s Mem. in Supp. of Mot. for Summ. J. at 13.) But, the search terms are too limited in light of the Request and the facts and circumstances underlying EO 10450. *See Truitt*, 897 F.2d at 542 (explaining that "[t]he adequacy of an agency's search is measured by a standard of reasonableness and is dependent upon the circumstances of the case." (quoting *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344 (D.C. Cir. 1983)) (internal quotation marks omitted)). Plaintiff acknowledges that the Defendant appears to have searched in all available databases (*i.e.*, Central Records System, Arbitrated Case Support, Universal Index and Sentinel) and expanded the date range for the end date of search from 1990 to the date the search was

conducted. Plaintiff further acknowledges that the Defendant did conduct a cross-reference search which yielded additional documents located at the National Archives and Records Administration ("NARA"). That cross-reference search suffers from the same limitations of the prior search, however, as the cross-reference is only as effective as the results from the first search which is, as we demonstrate herein, woefully adequate.

As set forth in detail in the Complaint, EO 10450 legalized the targeting and discharge of federal employees on the sole basis of "sexual perversion" *i.e.*, simply on the basis of sexual orientation. (Am. Compl. at ¶ 11.) The FBI, with the aid of the U.S. Civil Service Commission, used EO 10450 to discharge thousands of employees from Federal service based simply upon evidence or suspicion of homosexuality. (*Id*. at ¶ 12.) In light of the objective of EO 10450, the pervasiveness of its enforcement and the thousands of Federal employees who were terminated because of it, or who never had a chance at Federal employment, it is wholly unreasonable that only two terms were used by the Defendant in its searches for the requested information. It defies logic why the Defendant failed to use additional terms such as "sexual perversion," or "pervert," at a minimum. The term "sexual perversion" comes directly from the text of the Executive Order as an independent basis for employee discharge. It is reasonable to believe that those words were used in documents discussing the implementation of EO 10450 and certainly could have been used in a document without using the words "Executive Order 10450" or "Sex Deviate." Omitting terms reflected in the text of EO 10450 could never have led to a search that was reasonably tailored to remove all material doubt that all responsive documents responsive to the FOIA request were located.[5]

[5] Frankly, in the context of EO 10450, a full search would include other related terms such as "morals charges," "immoral," "homo," "homosexual," "gay," "lesbian," "queer," "sodomy," "deviant," and "abomination."

Another striking and unjustifiable omission from the search was the absence of terms related to AAG Warren E. Burger. The Mattachine Society explicitly named AAG Burger in the Request and explained his role in enforcing EO 10450. (*See* Hardy Decl. Ex. A.) The Defendant's choice to limit its search terms to exclude the very Government official charged with enforcing the very Executive Order at the center of the Mattachine Society's Request demonstrates the Defendant's resistance to crafting a sufficient search and response to the Request.

Failing to include any terms related to AAG Burger could not and did not lead to a search "reasonably calculated to uncover all relevant documents." *Landmark Legal Found*., 959 F. Supp. 2d. at 182 (quoting *Morley*, 508 F.3d at 1114) (internal quotation marks omitted). Here, a reasonably calculated search would be one that includes the two obvious terms used by the Defendant, and terms that relate to the actual text of EO 10450, the labels applied to people affected by EO 10450, and those charged with the enforcement of EO 10450. *See e.g.*, *Looks Filmproduktionen GmbH v. CIA*, -- F. Supp. 3d. --, No. 14-1163 (BAH) 2016 WL 4186652, at *8 (D.D.C. Aug. 5, 2016) (finding search terms to be reasonable where director named in FOIA request was included as a search term). AAG Burger, a central figure associated with EO 10450, is completely absent from the search. Without searching with these material and relevant additional terms, the Defendant cannot be said to have conducted a reasonable search which should be reason enough for this Court to deny the Defendant's summary judgment motion. At the very least, there is a material question of fact surrounding the sufficiency of the Defendant's search in light of the purpose of the Request to which the Defendant was required to respond.

Defendant asserts that "the fact that the FBI did not locate as many documents as Plaintiff anticipated does not render its search inadequate." (Def.'s Mem. in Supp. of Mot. for Summ. J. at 15.) The Mattachine Society has not – and does not – argue that the search is inadequate because

of the results of the search. *See Hodge v. FBI*, 703 F.3d 575, 579 (D.C. Cir. 2013) (explaining that the adequacy of a search is not determined by the fruits of the search, but instead by the appropriateness of the search's methodology). Similarly, the Mattachine Society has never argued that there "should be additional documents" relevant to EO 10450. (Def.'s Mem. in Supp. of Mot. for Summ. J. at 16.) The Defendant is trying to distract from the central problem that its search was inadequate from the start. As Defendant accurately quotes in its brief, "[a]n adequate search consists of a good faith, reasonable search of those systems of records likely to possess the requested information." *Lardner v. FBI*, 875 F. Supp. 2d 49, 55 (D.D.C. 2012) (emphasis omitted). The Defendant's search does not clear this bar and was flawed from the beginning by the use of extremely limited search terms and the failure to include key terms and key individuals. As a result, although Defendant looked in all the correct databases, it did not search thoroughly enough to respond appropriately to the Mattachine Society's Request. It is for that reason – the flawed and unduly limited search terms, not the fruits of the search – that the Defendant's search was inadequate.[6]

The Mattachine Society acknowledges that the Defendant has discretion to craft its searches but this discretion has its limits and must be examined by this Court against the legislative history and purpose of the FOIA. Simply put, the Defendant's limited search does not comport with its duty to advance "the FOIA's fundamental policy goal in favor of maximum disclosure of government documents." *Charles v. Office of Armed Forces Med. Exam'r*, 730 F. Supp. 2d 205, 216 (D.D.C. 2010). Because of EO 10450, thousands of lives were ruined, and the public has the

[6] The Defendant also claims that the Mattachine Society's challenge to the adequacy of the search "appears to be a thinly veiled challenge to the FBI's document retention program." (Def.'s Mem. in Supp. of Mot. for Summ. J. at 15.) The Mattachine Society has never made this argument, as evidenced by the lack of citation to any source for such statement by Defendant. To the extent a response is warranted, the Mattachine Society does not take issue with the FBI's retention policy, nor does it attribute the policy as being the reason for the Defendant's flawed and deficient search methodology.

right to know about the Federal Government's targeting and purging of homosexuals from civil service. The Mattachine Society agrees that the Court should not micromanage the Defendant's search. But, it should order the Defendant to expand its search criteria. Only then could the Defendant possibly meet the burdens placed upon it by the FOIA.

IV. DEFENDANT APPLIED THE REMAINING EXEMPTIONS TOO BROADLY AND THE FULLY AND PARTIALLY WITHHELD DOCUMENTS SHOULD BE REDACTED AND RELEASED TO THE MATTACHINE SOCIETY

The FOIA requires that government agencies, upon a request for reasonably described records, make available records responsive to said request "unless the records fall within one of the exclusive statutory exemptions." *Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). But, the FOIA's exemptions are to be "narrowly construed." *Id.* at 1113. Trial courts perform a *de novo* review of the agency's justifications for withholdings and redactions, including the applicability of any FOIA exemptions claimed, leaning in favor of disclosure. 5 U.S.C. § 552 (a)(4)(B). If an agency's proffered justifications for withholding documents are insufficient to sustain the burden of proof, the agency is not entitled to summary judgment. *Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng'rs*, 677 F. Supp. 2d 101, 106 (D.D.C. 2009) (denying U.S. Army Corps of Engineers' motion for summary judgment after determining its justifications for withholding documents were vague and conclusory).

The FOIA establishes a strong presumption in favor of disclosure. Under the FOIA, the Federal Government must disclose requested materials unless those materials fall squarely within one of the nine FOIA exemptions. *Burka v. U.S. Dep't of Health and Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996). When an agency fails to meet its burden in justifying any withholding, summary judgment for the FOIA plaintiff is appropriate. *See, e.g., McKinley v. FDIC*, 756 F. Supp. 2d 105 (D.D.C. 2010) (granting summary judgment for plaintiff where agency failed to meet its burden in explaining withheld documents).

As stated above, courts review *de novo* the applicability of FOIA exemptions claimed by an agency. When an agency withholds documents, either in their entirety or portions thereof under any of the exemptions provided under the FOIA, the *agency* has the burden to justify the exemption. 5 U.S.C. § 552(a)(4)(B) (emphasis added). Because the principal objective of the FOIA is "disclosure, not secrecy," all FOIA exemptions must be narrowly construed. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting *Dep't of the Air Force v. Rose,* 425 U.S. at 361). In reviewing the validity of an agency's exemption, a court "may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld." 5 U.S.C. § 552(a)(4)(B). *In camera* review is appropriate when the agency affidavits are "insufficiently detailed to permit meaningful review of exemption claims." *Quinon v. FBI*, 86 F.3d 1222, 1228 (D.C. Cir. 1996). If the affidavits submitted by the agency are conclusory such that they fail to demonstrate that the claimed exemption applies, *in camera* review may be necessary to allow meaningful *de novo* review. *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 392 (D.C. Cir. 1987). When there is a dispute over the contents of the withheld documents, and not the parties' interpretations of those documents, *in camera* review becomes more appropriate. *Id.* at 393.

If the Court determines through its *in camera* review that the exemptions do not apply, it must deny the Defendant's motion for summary judgment. In turn, the Court must grant the Mattachine Society's motion for summary judgment and the documents should be released as a matter of law.

A. FBI 458 through FBI 460: Exemption (b)(7)(D)-1

The Defendant withheld in their entirety FBI 458 through FBI 460 under its coding categories (b)(7)(D)-1 and (b)(7)(D)-2 because the documents allegedly relate to confidential

source information supplied by a foreign government agency under an express or implied assurance of confidentiality. (Hardy Decl. ¶¶ 39, 70.) The affidavit supporting this exemption is nothing more than a boilerplate recitation of the exemption. (Hardy Decl. ¶ 70.) The affidavit does not describe the nature of the documents; instead it provides a vague summary that they consist of information that was provided to the FBI during suitability investigations. *See Carter*, 830 F.2d at 393 (applying rule that explanations as to the nature of the documents cannot be conclusory). Relatedly, because the affidavit lacks detail, the Court must review FBI 458 through FBI 460 because the Mattachine Society takes issue with the exemptions applied to the content of these documents. *Id.* at 393. An *in camera* review will confirm whether withholding is justified because of the purported "chilling effect" that could occur if the documents were released. (Hardy Decl. ¶ 70.) For example, the information in the documents may no longer be sensitive, the informant may be deceased, or the agreements as to an assurance of confidentiality may be obsolete. Therefore, it is the Court's duty to review FBI 458 through FBI 460 *in camera* to determine whether these documents were properly withheld in full, and whether they can be partially released.

B. FBI 1151 through FBI 1152: Exemptions (b)(6)-2 and (b)(7)(C)-2

The Defendant partially withheld FBI 1151 through FBI 1152 under its coding categories (b)(6)-2 and (b)(7)(C)-2, because the redacted information relates to the "names of non-FBI federal government personnel." (Hardy Decl. ¶ 39.) Exemption 7(C) excludes "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); *Bartko v. U.S. Dep't of Justice*, 79 F. Supp. 3d 167, 172 (D.D.C. 2015) (explaining that the provisions require both agencies and courts to balance the privacy interests that would be compromised by disclosure

against the public interest to release the requested records). While both Exemption 6 and 7(C) require agencies and reviewing courts to balance the privacy interests against the public interest in the release of the requested information, the Court should review these documents *in camera* to determine whether the redactions could be limited in any way without jeopardizing the privacy interests of the individual(s) named in the document. The public interest – learning the scope and extent of the Federal Government's purging of civil servants on the suspicion of homosexuality – justifies the release of information that may have been overly redacted. Alternatively, if the Defendant needs proof that the individuals that are the subject of these pages consent to disclosure or are deceased, the Mattachine Society agrees to keep the identities of these individuals confidential while it seeks to secure such evidence.

C. FBI 935 through FBI 938: Exemptions (b)(6) and (b)(7)

Upon referral to the National Security Division ("NSD") of the DOJ, pages FBI 935 through FBI 938 were withheld *in their entirety* pursuant to 5 U.S.C. § 552(b)(6) and (b)(7) "to protect the names and identifying information of government employees." (Kim Decl. ¶¶ 4, 6.) The NSD determined that the privacy rights of the individuals outweighed the public interest, "if any," in the disclosure of the documents because the documents related to termination proceedings. (Kim Decl. ¶ 7.) The Mattachine Society reasonably believes that these termination proceedings were part of the Defendant's purging of civil servants on the suspicion of homosexual activity, pursuant to EO 10450, which goes to the heart of the Request.

To the extent the Defendant or NSD argues that the identities of the individuals named in the document could be discerned if the documents were redacted in part rather than withheld in their entirety, this Court must reject this assertion. The U.S. Supreme Court has rejected the argument that a document should be withheld entirely, rather than redacted, on the basis that individuals with a privacy claim could be identifiable by deduction. *Dep't of the Air Force v.*

Rose, 425 U.S. at 380–82. Courts have declined to adopt "the 'speculation' approach" as it "is incompatible with the Supreme Court's opinion in *Department of the Air Force v. Rose*." *Arieff v. U.S. Dep't of the Navy*, 712 F.2d 1462, 1467–68 (D.C. Cir. 1983). Therefore, this Court should review these pages *in camera* to determine whether these pages can be released without jeopardizing the privacy interests of those named in the documents. Although the privacy interests of individuals working for the Government during the requested time period is significant, the strong presumption in favor of disclosure must prevail, especially in light of the Government's decades-long engagement in discriminatory actions.

Moreover, the Defendant stated that "the pertinent records were compiled and/or created in furtherance of FBI's authority to conduct personnel background checks concerning applicants and employees under federal personnel security programs." (Def.'s Mem. in Supp. of Mot. for Summ. J. at 26; Hardy Decl. ¶ 56.) The Defendant's proffered reason for withholding these documents is ironic given that the Mattachine Society's Request is designed to find records of individuals who were improperly subjected to investigations into their sexual orientation. The whole point is that these investigations have *nothing to do with national security* and are only pretextual to discriminate against homosexuals. These are the exact types of documents that the Government should disclose, subject to reasonable redactions to protect the identities of the individuals investigated. They should not be withheld in full.

D. FBI 1268-1269: Exemptions (b)(1)-1 and (b)(3)-2

The Defendant partially withheld FBI 1268 through FBI 1269 under its coding categories (b)(1)-1 and (b)(3)-2 because the redacted information allegedly relates to intelligence activities and information specifically exempted by 50 U.S.C. § 3024(i)(1). (Hardy Decl. ¶ 39.) The Defendant has so heavily redacted these pages that the document is essentially indecipherable and devoid of meaning. Because the documents are heavily redacted, this Court should conduct an *in*

camera review of the documents to determine whether the partial withholding was proper and whether the redactions can be limited.

CONCLUSION

For these reasons stated herein, the Mattachine Society respectfully requests that the Defendant's Motion for Summary Judgment be denied and its Cross-Motion for Summary Judgment be granted.

Dated: January 30, 2017
Washington, D.C.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Mattachine Society of Washington, D.C.
527 16th St., N.W.
Washington, D.C. 20036

Plaintiff,

v.

United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Defendant.

Case No. 1:16-cv-00773 (RCL)

[PROPOSED] ORDER

THIS CAUSE comes before the Court upon Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment.

UPON CONSIDERATION of the motions, the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that, for the reasons stated in Plaintiff's Cross-Motion for Summary Judgment, Plaintiff's Cross-Motion is GRANTED. Any pending motions are hereby DENIED AS MOOT.

DONE AND ORDERED in Chambers in Washington, District of Columbia, on this ___ day of _____, 20___.

SIGNED:

_____
Date

_____
Royce C. Lamberth
United States District Judge