IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FINDERS KEEPERS USA LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 22-0009 (APM)
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

REPLY IN SUPPORT OF PLAINTIFF'S RENEWED
CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

In its cross-motion for partial summary judgment (ECF No. 51-1) Plaintiff Finders Keepers identified multiple continuing issues with the adequacy of Defendant's search for responsive records, Defendant's improper reliance on Freedom of Information Act ("FOIA") Exemption 7(E) to withhold portions of a 2019 operational plan, and Defendant's failure to satisfy FOIA's foreseeable harm requirement. Defendant's reply (ECF No. 54) ("D's Reply") fails to cure any of these deficiencies and in many cases simply ignores the evidence contradicting the FBI's claims. Having had multiple bites of the proverbial apple, Defendant's renew summary judgment motion must now be denied and judgment entered for Plaintiff on the remaining issues.

ARGUMENT

1. The FBI Unreasonably Limited Its Search To The Sentinel Indices.

The FBI freely admits it searched only the Sentinel indices, a limitation it justifies by reference to a policy guide that required FBI personnel "to serialize any non-transitory records of investigative importance concerning a particular investigation to the case file of the investigation." 5th Seidel Decl. at ¶ 11. Stated differently the FBI reasons that all likely

responsive records would be accessible through the Sentinel indices because the FBI's recordkeeping guidance required FBI personnel to keep "non-transitory records" and place them in the investigative case file. As Plaintiff pointed out in its last brief, however, that policy guidance is dated September 22, 2022, while the documents at issue here were generated in 2018, more than four years before that guidance went into effect.

The FBI has responded by criticizing Plaintiff for not providing "evidence that this policy has changed in any way since 2018." D's Reply at 8. But this ignores that the defendant agency bears the burden of proof in a FOIA case, not the requester. *See, e.g.*, *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 361 (D.C. Cir. 2021). Here the FBI's reliance on an inapplicable policy, while proffering no evidence of what policy was in effect when the records at issue were created, falls far short of carrying its evidentiary burden.

The FBI's misplaced reliance on a recordkeeping policy not in effect at the relevant time also undermines its insistence that the agency need account only for "non-transitory" records, defined as those records needed for more than 180 days. The FBI has justified searching only for non-transitory records because those are the records the 2022 policy required FBI personnel to preserve. Plaintiff does not quarrel with that policy, as the FBI suggests. D's Reply at 8. Rather, Plaintiff quarrels with the FBI's failure to look for other records that existed at the time Plaintiff submitted the FOIA request at issue in 2018, which was just 60 days after the Dents Run dig and well before the 180-day mark that distinguishes transitory from non-transitory records, at least under the 2022 guidance. In short, the FBI cannot rely on a policy not yet in existence to justify limiting its search to only non-transitory records found in the Sentinel indices. Indeed, by delaying conducting an adequate search until August 2019, when the FBI informed Plaintiff that it had located approximately 2,378 pages of records and 17 video files, Compl. ¶ 51, the FBI

ensured that any transitory records in existence at the time Plaintiff submitted its request were well past the 180-day mark.

2. The FBI Failed To Search For A Key Component Of Plaintiff's FOIA Request.

As Plaintiff explained in its cross-motion for partial summary judgment, the FBI's search ignored a key component of Plaintiff's request, which sought, *inter alia*, copies of requisitions for expenditures incurred in the Dents Run operation. *See* Memorandum Opinion and Order (ECF No 46) at 4 (listing six categories of records Plaintiff requested including "Copies of all requisitions for expenditures associated with the investigation at Dents Run"). The FBI's response ignores this category of requested records entirely. Instead, Defendant cites to only five categories of records Plaintiff requested, omitting any mention of the requested expenditures. *See* D's Reply at 5-6. This omission completely undermines the FBI's claim to have conducted an adequate search.

Moreover, as Plaintiff pointed out in its opening brief, the FBI's warrant application spelled out six categories of equipment and services the FBI would need to conduct the Dents Run dig, *see* ECF No. 1-1. Nevertheless the FBI has neither produced any documents associated with those expenditures nor explained why the search terms it used sufficiently covered those requested records. This too demonstrates the inadequacy of the FBI's search.

3. The FBI Has Not Justified Its Cut-Off Date.

The FBI has repeatedly justified its use of a May 14, 2018 cut-off date as consistent with Department of Justice guidance recognizing the propriety of using the date the agency commences its search. According to the FBI that date here is May 14, 2018, even though whatever search the FBI in fact commenced on that date was grossly deficient, as it uncovered no responsive documents whatsoever. That is why under the facts of this case—regardless of the

reasonableness of any general DOJ policy concerning a cut-off date—the FBI's chosen cut-off date of May 14, 2018 fails to pass muster. While we still do not know why the FBI's initial search—conducted just months after the FBI completed its large-scale Dents Run investigation—uncovered no responsive records we know it missed thousands of pages of records and video files. This alone demonstrates its glaring deficiencies. Allowing the FBI to use the date of that grossly deficient search as a cut-off date would permit the FBI to profit from conduct that falls far short of what the FOIA requires. It would also allow the FBI to escape accountability for its conduct after May 14, 2018 when—according to the FBI—its Dents Run investigation remained an open and ongoing investigation. Defendant has no answer to any of this making its reliance on DOJ policy insufficient at best and at worst an effort to cover up possible FBI misconduct.

4. The FBI Still Has Not Properly Accounted For The Original Operational Plan.

In its brief in support of its cross-motion Plaintiff explained how the FBI and the Fifth Seidel Declaration failed to account for the Original Operational Plan that properly falls within Plaintiff's FOIA request. Instead, the FBI produced only a plan dated March 13, 2019 that is denoted as "updated," clearly indicating the existence of a previously executed plan. In its reply the FBI ignores this omission entirely, leaving unrebutted this further evidence of the unreasonableness of its search.

5. The FBI Has Not Justified Its Reliance On FOIA Exemption 7(E) To Withhold Those Portions Of The Updated 2019 Operational Plan Containing Specific Information About The Dents Run Dig.

The FBI attempts to justify withholding those portions of the updated 2019 Operational Plan detailing the Dents Run dig as necessary to prevent the safety of law enforcement personnel from being compromised. D's Reply at 11. But the FBI again ignores the uniqueness of the

Dents Run operation. The FBI has not raised even the possibility that it would, or even could once again be engaged in a dig for buried gold. It necessarily follows that disclosing the specific details of the Dents Run dig would create neither an "expected risk" nor a "reasonably expected risk," or even "the chance of a reasonably expected risk" of the harm that Exemption 7(E) protects against. *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009). Accordingly, Defendant has not carried its burden of demonstrating the applicability of Exemption 7(E) to those portions of the updated Operational Plan dealing specifically with Dents Run.[1]

Further, if the Court has any remaining doubts as to whether the FBI has carried its evidentiary burden it should examine the complete plan in camera. *See Quinon v. FBI*, 86 F.3d 1222, 11228 (D.C. Cir. 1996).

6. The FBI Has Still Offered Nothing But Boilerplate Assertions to Support Its Foreseeable Harm Claims.

Plaintiff's opening brief explained how the FOIA's foreseeable harm provision requires agencies to offer more than the generic, boilerplate assertions the FBI posits here. Defendant's reply offers nothing further, passing up the opportunity to provide the requisite "focused and concrete demonstration" that disclosure of the withheld "material at issue will, in the specific context of the agency action at issue, actually impede those same agency deliberations going forward." *Reporters Comm. for Freedom of the Press v. FBI*, 3 F.4th at 370. This failure to carry its evidentiary burden requires that Defendant's renewed motion for summary judgment be denied.

[1] Defendant falsely suggests that Plaintiff has characterized the plan as prepared exclusively for the Dents Run investigation. *See* D's Reply at 10. To the contrary, Plaintiff limited its challenge to the withholding of those portions of the plan dealing specifically with Dents Run, but not the other more generic portions of the plan.

7. The FBI Has Failed To Clear Up The Ambiguity About Its Treatment of Video Clips.

As laid out in Plaintiff's opening brief, the Fifth Seidel Declaration describes the creation of *video* at the Dents Run dig, which then was provided as *video files* to the FBI's Record/Information Dissemination Section, and from there *"[t]he processed video clips* were processed and released[.]" 5th Seidel Decl. at ¶ 14 (emphasis added). What the declaration failed to address was how video and video files were transformed into processed video clips, leaving the question of what remains on the videos. In its reply the FBI asserts that Mr. Seidel never stated that "there was one continuous video shot that was edited into 'clips' for purposes of withholding." D's Reply at 9. But this misses the point. The Seidel declaration uses three separate terms—video, video files, and processed video clips—and not once states, much less suggests that those terms are synonymous. This leaves yet one more unanswered question that undermines, if not defeats Defendant's renewed summary judgment motion.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff's Renewed Cross-Motion for Partial Summary Judgment Plaintiff's motion should be granted and Defendant's motion denied.

Respectfully submitted,

/s/ Anne L. Weismann
Anne L. Weismann
(D.C. Bar No. 298190)
5335 Wisconsin Ave., N.W., Suite 640
Washington, D.C. 20015
Phone: 301-717-6610
Weismann.anne@gmail.com

Dated: March 13, 2024

Attorney for Plaintiff