

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
JEREMY BIGWOOD,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:11-cv-00602-KBJ
)	Hon. Ketanji Brown Jackson
UNITED STATES DEPARTMENT OF)	
DEFENSE and CENTRAL)	
INTELLIGENCE AGENCY,)	
)	
Defendants.)	
_____)	

DECLARATION OF DANIEL L. REGARD

I, DANIEL L. REGARD II, declare as follows:

I. QUALIFICATIONS

1. I am a managing director in the Washington, D.C., office of Intelligent Discovery Solutions, Inc., an expert services firm which provides independent expert testimony and analysis, original authoritative studies, and strategic consulting services to clients.

2. I have been consulting in the computer industry for 20 years, and have testified nationally on electronic discovery and computer forensic and litigation issues. I am a participating member of the Sedona Conference Working Group on Electronic Document Retention and Production, an e-discovery think-tank dedicated to the advanced study of Law and Policy. I hold a BS in computer science from the University of Southwestern Louisiana and a JD, MBA, and certificate in European legal studies from Tulane University. I am a board member of the Institute for Computer Forensics Professionals. I am a member of the High Tech Computer Investigator's Association, the Certified Fraud Examiner's (CFE) association, and the Law

Technology News editorial advisory board. I am a director of the Georgetown Advanced Institute for e-Discovery.

3. Prior to forming Intelligent Discovery Solutions, Inc., I was the national director of e-discovery for FTI Consulting, Inc. I was also the national (then global) director of e-discovery for LECG, LLP.

II. ASSIGNMENT AND SUMMARY OF CONCLUSIONS

4. I have been retained by counsel for the Plaintiff to provide an analysis of the data collection efforts undertaken by the Department of Defense (“DOD”) in the above-captioned FOIA action and to opine on whether the information provided in the declarations submitted by DOD in support of its summary judgment motion supports its conclusion that the searches it conducted for electronic documents in response to Plaintiff’s FOIA requests were adequate.

5. For the reasons set forth in more detail below, I have concluded that:

- a. The description provided in DOD’s declarations is, for the most part, insufficient to describe what was actually done, leading to ambiguities (or gaps) that undermine the ability of the court and the Plaintiff to understand the completeness of the response.
- b. In certain respects the description is sufficiently detailed so as to show that DOD’s searches were deficient in both their construction and their execution.

6. I am providing my services pro bono.

III. ANALYTICAL FRAMEWORK

7. In evaluating the search and collection efforts engaged in by DOD, I took into account the process prescribed by FOIA. My understanding of the FOIA process is based on my experience as an expert advising on FOIA matters since 2008. If a requestor believes that records

are being withheld in violation of FOIA (or if, as in the present case, the agency simply fails to respond), the requestor may obtain review in a federal district court. In order to obtain summary judgment in such a case, the agency must demonstrate to the court, among other things, that it conducted an adequate search for the relevant records. To meet that burden, the agency must submit declarations that reasonably describe the searches conducted, so that the court can evaluate the adequacy of that search. These declarations generally include a description of the agency's information systems; identification of the specific custodians and/or offices searched; a list of the precise search terms used, including connectors; and a description of the process, protocol or method used with respect to each custodian or office (search instructions, identity of personnel who conducted the searches, etc.).

8. In general, an assessment of whether an agency's search and collection efforts for electronic data meet the applicable standard under FOIA should involve the evaluation of three key components of the agency's search efforts. Those components are:

- (a) Technology. Whether the technology actually employed was suitable for locating relevant records.
- (b) People. Whether (i) the people entrusted to develop strategies for locating relevant records had the competence and technical proficiency needed in light of the available technology; (ii) the people designated to employ those strategies were appropriate under the circumstances, including both those conducting the actual searches and those supervising them; and (iii) the instructions provided to the individual custodians (that is, the lay people actually conducting the search) were clear and comprehensive.

(c) Process. Whether the process employed to evaluate and refine the proposed strategies for locating relevant records was sufficient to ensure that the search for and collection of relevant records was, in fact, effective.

9. Thus, DOD's search methodology must be evaluated to determine whether DOD engaged in a thoughtful, diligent process that effectively used available technology, people and processes. This type of evaluation is made difficult here, because Plaintiff must rely almost entirely upon DOD's FOIA declarations, which I have found to provide only incomplete and ambiguous details concerning the searches conducted.

10. In writing this declaration, I relied upon documents provided to me by counsel at the Center for Constitutional Rights, specifically DOD's motion for summary judgment, the declarations related to said motion, including their attachments, and communications between counsel concerning the adequacy of DOD's searches.

IV. BACKGROUND

11. On July 1, 2009, Plaintiff submitted a FOIA request to United States Southern Command ("SOUTHCOM"), a component of DOD, seeking records pertaining to the coup against President Manuel Zelaya of Honduras (the "Coup d'État Request"). The Coup d'État Request states that the records should include any observations or reports about the activities of the Honduran Armed Forces with respect to the coup and the coup itself, records of the passage of the kidnapped President through any military bases, including Soto Cano, and any reports about the impending coup d'état before it took place. *See* Declaration of Jeremy Bigwood ("Bigwood Decl.") Ex. A.

12. On July 8, 2009, Plaintiff submitted a second FOIA request to SOUTHCOM, seeking records relating to General Romeo Vásquez Velásquez of the Honduran Army, including

biographic sketches (the “RVV Request”). *See* Bigwood Decl. Ex. B.

13. On March 23, 2011, Plaintiff filed his complaint in this action to compel the release of agency records.

14. DOD produced two sets of documents after Plaintiff filed his complaint. The first set included 71 documents totaling 298 pages. A second production resulted in the release of an additional 88 documents totaling 784 pages. *See* Declaration of Major Lisa R. Bloom (“Bloom Decl.”) ¶¶ 5-6; Bigwood Decl. ¶¶ 13-20.

15. On January 28, 2014, Defendants DOD and CIA filed a motion for summary judgment. It is my understanding that Plaintiff does not contest the branch of the motion seeking summary judgment for the CIA.

V. DEFICIENCIES IN THE DOD DECLARATIONS

16. DOD has devoted a total of four paragraphs of its supporting declarations to the issue of the adequacy of its electronic searches. *See* Bloom Decl. ¶¶ 7, 10, 12; Declaration of Thomas W. Geary (“Geary Decl.”) ¶ 6.

17. The Bloom Declaration provides what appears to be a partial list of search terms used in DOD’s initial response to Plaintiff’s FOIA requests (Bloom Decl. ¶ 7); states that unspecified personnel were sent to Honduras, where six directorates and subcomponents of SOUTHCOM were instructed to “conduct . . . electronic searches of their desktops, hard drives, shares drives, storage data bases, and Microsoft Outlook email files using the search terms described above for documents responsive to Plaintiff’s FOIA requests” (*id.* ¶ 10); and further asserts that SOUTHCOM later conducted additional electronic searches of four of the same directorates. *Id.* ¶ 12. No search terms or further details are provided with regard to the additional searches.

18. Paragraph 6 of the Geary Declaration states only that the J2 directorate of

SOUTHCOM “conducted thorough manual searches of paper files and electronic searches for documents responsive to the Plaintiff’s FOIA requests.” No further details are provided.

19. These paragraphs do not support DOD’s claim that the searches conducted were adequate under FOIA. In particular:

- (a) DOD does not demonstrate that the information systems, software or other technology used by it or the individual custodians to conduct searches was adequate to locate relevant records;
- (b) DOD did not use IT personnel or a third party vendor with appropriate qualifications to conduct an effective electronic search;
- (c) DOD provided insufficient instructions to the individual custodians tasked with searching for relevant records; and
- (d) DOD did not engage in any effort to test the search terms (to the extent search terms were used at all) to ensure they were effective in identifying potentially relevant records.

20. First, DOD fails to show that any of its in-place operating systems or software had the technical functionality necessary for individual custodians to perform the required searches.

21. Many systems, for example, allow for flexible and inclusive searching using root expanders,¹ Boolean operators,² wildcard characters,³ or proximity designations.⁴

¹ Root expanders allow a searcher to locate documents that contain multiple variations of a word, including plural and possessive forms. For example, a search for <Zelaya!> would also return documents containing the word “Zelaya’s,” while a search for <arrest!> would also locate documents using the words “arrests,” “arrested” and “arresting.”

² Boolean operators, such as “and,” “or,” “in the same paragraph as,” and so on, enable a searcher to locate documents that contain multiple words or phrases even if those words or phrases are not in a particular order. For example, a search for <Honduras and Coup> would return all documents containing those two words, even if the document does not use the exact phrase “Honduras Coup.” Boolean operators may also enable a searcher to

22. It is common industry practice to use such capabilities when they are available, and failing to do so would reflect unfavorably on the adequacy of a search, particularly where there were not otherwise included specifically known variations of words and phrases. For example, a search for the phrase <Zelaya's Arrest> (*see* Bloom Decl. ¶ 7), if undertaken without these capabilities, might only return documents containing the precise phrase entered and would miss documents containing equally relevant phrases such as “arrest of Zelaya” or “President Zelaya was arrested.”

23. If a system's search capabilities are limited, or if a search tool does not reach certain documents in a system, then an electronic search alone may not be adequate to locate responsive records. For example, on some systems an electronic search of Microsoft Outlook email files does not include the attachments to the emails. This could potentially be a significant population of responsive documents. *See* Bloom Decl. ¶ 12 (SOUTHCOM searched “Microsoft Outlook email files” for responsive documents).

24. Because DOD does not provide any information as to the operating systems, software, software versions, or methods used for its searches (except for a generic reference to “Microsoft Outlook email files,” as noted above), its disclosure does not show that the searches conducted were adequate to identify relevant records—even assuming that its search terms were

locate documents containing multiple words or phrases within a specified proximity of each other, documents containing certain words or phrases but not others, or documents containing at least one of a list of words or phrases.

³ Like root expanders, wild card characters locate variants of a word. For example, a search for <Va*quez> would return documents using the spelling “Vasquez” and “Vazquez.” The exact functionality is dependent upon the tools, but most tools, even default tools with Microsoft Windows, UNIX and Mac OS X, allow for wild card searches.

⁴ Proximity designations determine how close or far apart two words or phrases can fall in order to be considered responsive to a request. Typically these are not order dependent. So “Vasquez w/5 General” would cover any document that had Vasquez within 5 words of General, regardless of the order of the words.

adequately selected, that appropriate connectors were used, and that the personnel conducting the searches were properly selected and adequately instructed or supervised.

25. Second, regardless of the functionality of the technology in place, an effective search presupposes that the individuals responsible for executing the searches either have the necessary expertise to search and collect electronically stored information (“ESI”) or have been given proper instructions and supervision so as to make proper use of the available technology. As best can be determined from its declarations, DOD in this case relied on individual SOUTHCOM custodians (there is no mention of IT professionals or third party vendors) to search for and collect ESI. This heightened the need for thoughtful instructions for the individual custodians responsible for locating relevant records, as well as some assurances that those individual custodians were appropriately implementing the instructions. The apparent absence of IT professionals from the process also heightened and the need for clarity regarding the objectives of the search and the strategy or protocols for meeting those objectives.

26. However, as best can be determined from DOD’s declarations, the instructions that it provided to the individual custodians conducting the searches were inadequate on their face or absent altogether. In connection with the initial search, Major Bloom states that “directorates and units were directed to conduct . . . electronic searches of their desktops, hard drives, shared drives, storage databases, and Microsoft Outlook email files using the search terms described above.” Bloom Decl. ¶ 10. The declaration does not specify whether the custodians were directed to use all of the search terms listed across all systems, or indeed whether the list provided is complete. *See id.* ¶ 7. Regarding the supplemental search, Major Bloom says nothing regarding any search terms used. *Id.* ¶ 12. Since the second search produced an additional 88 documents, however, there presumably must have been some difference in the search terms

selected, the systems that were searched, or the way in which the selected terms were used by the personnel actually performing the searches. DOD's declarations do not divulge any of this information.

27. Third, when searching for ESI, the process by which the producing party selects, evaluates, and refines the search terms is critical. Yet there is little evidence in DOD's declarations to indicate that DOD conducted adequate—or any—evaluation in developing or testing its search terms either before or after the searches began.

28. When relying on individual custodians to use keyword terms to search in-place systems for relevant records, there is an even greater need for careful evaluation and testing of the keywords and search technology before the searches are conducted.

29. I have seen no documentation reflecting an agreement or stipulation between the parties to limit searches to a particular key term list. I would expect such documentation to exist if a limitation on search terms had been agreed to.

30. The search terms listed by DOD are mostly compound phrases. Major Bloom states that the terms used “included” the following:

- <Coups/Coups d'etats>
- <Zelaya>
- < Honduras 2009>
- <Elections 2009>
- <Zelaya's Arrest>
- <Zelaya Resignation>
- <Military Activities/Zelaya>
- <Court Decisions/Zelaya>
- <Manual Zelaya>
- <Zelaya Exile>
- <Zelaya Oust>
- <Zelaya Arrest>
- <Zelaya Removal>
- <Honduras Coups>
- <Romeo Vasquez>
- <CHOD Vasquez>

<General Vasquez>

Bloom Decl. ¶ 7. DOD does not warrant that this is a complete list of the search terms used. *See id.*

31. Using compound phrases such as <Honduras Coups>, <Honduras 2009>, or <Elections 2009> as search terms is generally an ineffective strategy, depending upon the tools used and the expected language in the documents. Putting compound phrases into search tools does not account for variations in spacing, spelling, or phrasing that exist in real-world documents. For example, as noted above, a search for <Honduras Coups> may fail to locate documents discussing “the coup in Honduras,” “coups in Honduras” or “the Honduras coups.” Similarly, a search for <Zelaya’s Arrest> could miss documents discussing the “arrest of Zelaya” or containing terms like “Zelaya was arrested” or “President Zelaya’s pre-election arrest.” In my opinion, depending upon the tool used and the expected language in the documents, a search relying on compound phrases would not be reasonably likely to locate responsive documents.

32. Furthermore, such compound phrases—if input into a search engine without quotes or connectors—will lead to inconsistent results across various systems, because different systems respond to such searches differently. For example, depending on the system, a compound phrase such as <Honduras Coups> could be interpreted to mean:

- (a) The exact phrase “Honduras Coups”;
- (b) The conjunctive “Honduras” AND “Coups”, which requires both words, but not necessarily in proximity or order; or
- (c) The disjunctive “Honduras” OR “Coups”, which allows either word and does not require both.

33. It is unclear what the DOD meant when it listed search phrases incorporating a forward slash mark (“/”), such as <Military Activities/Zelaya>. *See* Bloom Decl. ¶7. The forward slash mark, standing alone, does not typically have any recognized meaning in Boolean search

engines. The forward slash mark would either be ignored as a character or return a syntax error. And as noted above, putting a compound phrase into certain search engines will return documents using only that exact phrase—including punctuation. It seems unlikely that many (if any) of the documents responsive to Plaintiff’s FOIA requests contained the exact phrase “Military Activities/Zelaya,” including the forward slash mark.

34. Due to these ambiguities, as well as the lack of detail provided in DOD’s declarations, it is not possible to fully understand what searches were executed and whether or not those searches were adequate. Given the search term list, and even assuming that these phrases were interpreted as broadly as possible by the systems on which the searches were run, DOD’s searches still appear inadequate.

35. An alternative approach would have been to identify and review documents responsive to the requests and develop search terms based on those documents. An additional strategy to identify documents for review would have used broad and inclusive search terms such as single words or roots (like <couple!>, <resign!>, <overthrow!>, <exile>, and <arrest!>), together with additional synonyms (like <seize!>, <remov!>, and <kidnap!>), properly spelled names and titles (like <Zelaya>, <President>, <Vasquez>, and <Velasquez>), and known variants (such as popular nicknames). Yet another approach would utilize wild card searches (like <Va*quez>) to account for name variations. DOD could also have relied on Boolean logic operators to capture compound phrases in a more effective manner. Thus, <Zelaya! AND arrest!> would capture documents that contained both terms, including variants, regardless of order or proximity.

36. The DOD did conduct an additional search of four of the same directorates and subcomponents once a number of deficiencies were brought to its attention. *See* Bloom Decl. ¶ 6;

Declaration of Pamela Spees (“Spees Decl.”) ¶¶ 8-11. However, as noted above, the description of the second search is entirely cursory. There is no description of what search terms were used, much less any detail regarding the systems, personnel and protocols used. *See* Bloom Decl. ¶ 12.

VI. CONCLUSION

37. In light of the foregoing, and based on my extensive experience with the identification and retrieval of electronic information, it is my opinion that the description of the electronic searches conducted by DOD was not sufficiently detailed to adequately describe its search protocol and that the searches as described were not reasonably calculated to uncover all, or indeed most, of the records responsive to Plaintiff’s FOIA requests.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 18, 2014 at Washington, D.C.


Daniel L. Regard II