UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TERESA C. CHAMBERS	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 05-0380 (JR)**
	)	
U.S. DEPARTMENT OF THE INTERIOR,	)	
	)	
	)	
Defendant.	)	

REPLY IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant U.S. Department of the Interior ("Interior"), by undersigned counsel, hereby respectfully replies in support of Defendant's Motion for Summary Judgment and supporting memorandum filed therewith ("Opening Memorandum" or "Def. Mem.") and in reply to Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment ("Opposition" or "Pl. Opp.").

* * *

1. Defendant established in its Opening Memorandum that the Privacy Act, 5 U.S.C. § 552a ("the Act"), provides a limited waiver of sovereign immunity for suits against federal agencies satisfying certain terms and conditions as set forth in the statute and construed by controlling case law. *See* Def. Mem. at 6-12; § 552a(g)(1). Defendant also established that the terms and conditions of that waiver are to be strictly construed, *id*. at 10 (citing *Tomasello v. Rubin*, 167 F.3d 612, 618 (D.C. Cir. 1999)), and that to establish jurisdiction here, plaintiff would need to show that the alleged "draft performance evaluation" that was the subject of plaintiff's counsel's October 26, 2004 Privacy Act request, *see* Complaint ¶ 24, and described in

the deposition of Terrie Fajardo, former Chief of Human Resources Operations for the National Park Service ("NPS"), Washington Office ("Fajardo deposition," cited herein in the format of "page/line"), was maintained within a "system of records" under the Act, *see* Def. Mem. at 1-12; 5 U.S.C. § 552a(a)(5) (defining "system of records" as a "group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual").

Defendant additionally demonstrated that it would be entitled to summary judgment even assuming the veracity of Fajardo's deposition testimony that she (a) had created such a draft performance appraisal at the request of NPS Deputy Director Donald Murphy ("Murphy"); (b) personally believed that her work product accurately reflected Murphy's views of plaintiff's performance, and that Murphy would sign off on the draft performance appraisal without making further changes; (c) hand-delivered the document to Murphy for his signature but never received a signed copy back from him; (d) saved the document in her individual computer's "My Documents" file and on a floppy disc; and (e) placed a hard copy of the document in an unmarked file cabinet behind her desk where she kept files on "hot topics" on which she was working at the moment in her capacity as the human resources chief for the Washington Office of NPS. *See* Def. Mem. at 1-5; 13-15. This was so, defendant established, because even assuming the truth of Fajardo's testimony, the "draft performance evaluation" sought in plaintiff's October 26, 2004 Privacy Act request would not have been a final performance appraisal required to be placed in plaintiff's official personnel file ("OPF") (a duly noticed system of records, *see* 5 U.S.C. § 552a(e)(4)(A) - (I)), but would have been, instead, a working draft filed in a locked, unmarked file cabinet behind a desk in a private office with other papers relating to matters

sharing the common characteristic that a certain employee was working on them, or believed that they were significant or high-profile in the context of her workload. There was no evidence (and plaintiff has since failed to present any evidence) that those working papers were within a group of records retrieved by the agency in the normal course of business by individuals' names or other personal identifiers. *See* cases cited at Def. Mem. 9-10 (requiring, to establish the existence of a Privacy Act system of records, a finding that the agency regularly follows a practice of retrieving the document by a personal identifier, and not simply a finding that there was capacity to retrieve records by such identifier). Nor was there evidence (and there is none now) that the agency (as opposed to Fajardo personally) maintained control over those documents so as to be in a position to ensure their maintenance with accuracy, timeliness, relevance and completeness. *See* Def. Mem. at 13, citing Defendant's Statement of Undisputed Material Facts ("Defendant's Facts" or "Def. Facts") ¶ 27. Indeed, the very fact that they were working papers suggested that it would have been non-sensical to subject them to the requirements that they be maintained with accuracy, timeliness, relevance and completeness. Defendant argued properly that the design of Fajardo's "hot topics" file was not in accordance with any design of the agency, see 5 U.S.C. § 552a(e)(4)(A) - (I), and that a working file maintained for the convenience of one agency employee, relevant only to the matters that were on her personal plate at the time, did not trigger the substantial and extensive legal obligations imposed upon federal agencies by the Privacy Act. *See generally* Def. Mem.

2. In her Opposition, plaintiff has produced no evidence to refute Fajardo's testimony that a performance appraisal of an agency employee is filed and maintained in the employee's OPF only after it is rendered final by the signatures of the appropriate supervisory officials, *see*

Def. Facts ¶¶ 17-18; that if a performance appraisal is not signed, there is no policy, regulation, or statute requiring the preservation of the appraisal document, and the agency could "use it for bird cage paper," *id*. ¶ 28 (*quoting* Fajardo Deposition, 137/10-11); that neither Murphy nor NPS Director Francis Mainella, respectively plaintiff's rating and reviewing officials, ever signed off on any draft performance appraisal for plaintiff, *id*. ¶¶ 20-21; and that Fajardo kept the alleged draft performance appraisal, not in her capacity as the "chief of operations [, in which capacity] it was [her] responsibility to maintain documents, the legal life of the employee, the personnel folder," Fajardo Deposition 136/13–15, but as "personnel officer for the office [, in which capacity she would] handle things that are of a confidential nature," id. 136/17-21.

Plaintiff's only response to Defendant's Facts ¶ 17 (which is, in turn, based on Fajardo's testimony as to the requirements that must be met, and the events that must take place, before a performance appraisal is deemed to be "final"– including but not limited to the placement of various signatures on the document) is non-responsive and, in fact, evasive. Plaintiff references an Office of Personnel Management regulation that permits Interior to *elect, at its own discretion*, to retain performance-related records in a file system called an Employee Performance File ("EPF"), separate from the OPF. *See* Plaintiff's Opposition to Defendant's Statement of Undisputed Material Facts ("Pl. Opp. Facts") ¶ 17, *citing* 5 C.F.R. 293.402(b). But plaintiff presents no evidence, after having conducted extensive discovery on the question of the existence of the subject document in an Interior system of records, that any such draft performance appraisal was maintained, *or required to be maintained*, in any such EPF, or that the "hot topics" file kept in Fajardo's file cabinet constituted an EPF under the requirements of 5 U.S.C. § 552a(a)(5) and 5 C.F.R. 293.402(b). Citing Fajardo's deposition testimony, plaintiff

observes, "Fajardo requested that Murphy give her a signed copy of the appraisal so that it could be 'put into the performance folder, which is different from the official personnel folder for the employee.'" Pl. Opp. Facts ¶ 17, *citing* Fajardo Dep. 135/17-19. But such an assertion, far from disputing Defendant's Facts ¶ 17, signifies that Fajardo would not have placed the document in "the performance folder," *id., unless it had been signed.* Because there is no evidence that the document was ever signed, and indeed, because there is undisputed affirmative evidence that the document, if it ever existed, was never signed, *see* Def. Facts ¶ 20, plaintiff's citation to Fajardo's testimony that she requested a signed copy so that she could place it in "the performance folder" suggests that Fajardo herself never placed the "draft performance evaluation," Complaint ¶ 24, in any EPF maintained under 5 C.F.R. 293.402. That citation simultaneously defeats plaintiff's suggestion that Fajardo's herself considered her "hot topics" file to be an agency-controlled EPF functioning as a system of records under section 552a(a)(5).

Plaintiff does not dispute the assertions of fact in Defendant's Facts ¶¶ 18, 19 and 20, concerning Fajardo's testimony that a performance appraisal cannot be final unless a performance *plan* has been issued to an employee; that Fajardo had no knowledge as to whether the performance standards comprising plaintiff's performance plan had ever been issued to plaintiff; and that to Fajardo's knowledge, Murphy had never signed off on the alleged draft performance appraisal. *See* Pl. Opp. Facts ¶¶ 18, 19 and 20. Moreover, plaintiff's counsel's opinion of the significance or connotation of Fajardo's usage of the word "final," *see id.* ("Fajardo is using the word 'final' to signify the completion of her work"); *see also id.* ¶ 12 ("'Final' for Fajardo meant she was finished with the document on her end"), only supports defendant's factual assertions that the appraisal document, if it existed, was never finalized for

purposes of any requirement that it be filed in an OPF. *See* Def. Facts ¶ 20 ("Fajardo testified that the appraisal document had been in final form as she "understood it," id. 20/11-14; 28/6-8; 121/14-19; 11/20, but that to her knowledge, Murphy never signed off on the appraisal, id. 33/13-18; see also 28/3-5 (signature blocks were not filled out in the "final form"), and the copy that she had "was not completed with the signature," id. 34/8-9; 111/20 – 112/1 (she understood the document to be final except that it was never shared with Plaintiff and Murphy had not signed it)).

3. Plaintiff's unsupported denial of Defendant's Facts ¶¶ 16 and 30 (denying those paragraphs "for lack of knowledge or information upon which to form a belief as to the truth of the matter asserted") is improper in the context of a motion for summary judgment under Federal Rule of Civil Procedure 56, *see* Fed. R. Civ. P. 56(e); L.Cv.R. 56.1, and should be deemed to have conceded defendant's assertions. Defendant's Facts ¶ 16 merely asserts that Fajardo testified that certain factual circumstances were so, and testified, as well, that she did not recall certain events. Plaintiff was required to either admit that Fajardo testified as set forth in Defendant's Facts ¶16, or refute it with evidence. Plaintiff has done neither, and Defendant's Facts ¶ 16 (reviewing Fajardo's testimony that explains why there is no e-mail record of the subject document in Interior's email archives) must be deemed conceded.[1]

Plaintiff purports to deny Defendant's Facts ¶¶ 24, 25, and 26 (reviewing Fajardo's testimony regarding her preparation of the document on her computer and its maintenance in

[1] Plaintiff relies on a purported need for continuing discovery to be able to respond to Defendant's Facts ¶16. But plaintiff's counsel has not executed a declaration under Rule 56(f), and indeed, has previously propounded a considerable number of discovery requests to defendant in this litigation, to which defendant responded accordingly.

electronic format). But these matters are subject to corroboration through the certified transcript of Fajardo's deposition, and there is no basis for plaintiff's denials. Plaintiff's assertion of matters immaterial to the facts asserted by defendant in response to those respective paragraphs cannot provide the required support for plaintiff's denials. Those paragraphs must therefore be deemed admitted.

In response to Defendant's Facts ¶ 30 (a paragraph demonstrating that Fajardo did not, upon her retirement, invoke any formal protocol in transferring responsibility for maintaining her working file on plaintiff in her "hot topics" files, and thus probative of whether even Fajardo believed that her "hot topics" file was an agency "system of records"), plaintiff merely denies without supporting evidence, and then speculates about what might have been, *see* Pl. Opp. Facts ¶ 30 ("Fajardo's successor may not have required guidance regarding proper procedures and protocols"). Defendant's Facts ¶ 30 must therefore be deemed conceded.

4. In attempting to argue that the "draft performance evaluation," Complaint ¶ 24, that is the subject of this suit was in a Privacy Act "system of records," plaintiff asserts that Fajardo "complied with [Interior] document storage protocol by maintaining the document in a locked file cabinet." Pl. Opp. at 20. This argument is legally erroneous because the definition of a system of records does not turn on compliance with document storage protocol, but instead on whether the document is within a "group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5).

Plaintiff further argues that "the file folder was labeled with Ms. Chambers' name and was even color-coded yellow to conform with the sub-group of the Park Police." Pl. Opp. at 20,

citing Fajardo Deposition 13/7-13. As a matter of law, however, one cannot demonstrate the existence of a Privacy Act system of records by showing that a name was on a file folder or that the file folder was yellow. Plaintiff must show that the agency had control over the file system, and that the *agency followed a practice* of retrieving records from that system *by the use of individuals' personal identifiers*. *See* Def. Mem. at 1-12. Even assuming the truth of plaintiff's allegation that "the file was retrieved on multiple occasions," Pl. Opp. at 20, plaintiff could not establish a system of records because such assertion, without more, does not establish *an agency practice* of retrieving those files *through a personal identifier.* The mere fact of retrieval does not suffice to establish the existence of a Privacy Act system of records. *See* cases cited in Def. Mem. at 9-10.

Moreover, the mere fact that "[e]ach executive agency is required to establish a separate employee record system," Pl. Opp. at 20, and that employee performance files are required to include "'[a]ny form or other document which records the performance appraisal,'" *id*., *quoting* 5 C.F.R. §§ 293.403(b)(1), does not suffice to establish that the "hot topics" file kept in Fajardo's office was a system of records, or that the alleged draft performance evaluation at issue, unsigned by any supervisor, constituted "the performance appraisal" for purposes of the cited regulation.

Additionally, plaintiff misconstrues the striking similarity between the instant case and *Horowitz v. Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005). *See* Pl. Opp. at 21. While attempting to distinguish *Horowitz* on the basis that the document sought there was pre-decisional and therefore not required to be filed in any agency system of records, plaintiff ignores her own unavoidable concession in this case that the "draft performance evaluation," Complaint ¶ 24, that is the subject of this suit was not, if it ever existed, approved or signed by any supervisor,

and was thus not final. As in *Horowitz*, then, the non-final document was pre-decisional and thus not required to be filed in any Interior system of records.

Finally, plaintiff misstates the nature of legal support presented by defendant in its Opening Memorandum. *See* Pl. Opp. at 20 ("The only case law the DOI cites is *Horowitz v. Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005). Defendant respectfully refers the Court to defendant's Opening Memorandum at 7, 9, 10, and 12, wherein defendant has cited numerous cases comprising both controlling and persuasive authority dispositive of this litigation.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment for defendant and dismiss this action with prejudice.

Respectfully submitted,

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