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.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, by undersigned counsel and pursuant to Federal Rule of Civil Procedure 56, hereby respectfully moves for summary judgment in this case based on lack of subject matter jurisdiction. In support of this Motion, defendant respectfully refers the Court to the memorandum in support thereof, Defendant's Statement of Undisputed Material Facts, the exhibits attached hereto, and the entire record in this case.

An order granting the relief sought is attached hereto.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff, a former Chief of the U.S. Park Police, has invoked the Privacy Act, 5 U.S.C. § 552a, to obtain from the United States Department of Interior ("Interior") a "draft employee evaluation," Complaint ¶ 23 (sometimes hereafter "appraisal document"), allegedly prepared by National Park Service ("NPS") Deputy Director Donald Murphy ("Murphy"), her then-immediate supervisor, for the time period covering 2002-03, id.[1] Plaintiff alleges, and it is undisputed, that Murphy testified in a deposition taken during the course of proceedings initiated by plaintiff before the Merit System Protection Board ("MSPB") that he prepared such a document. Id. ¶¶ 18, 19. Shortly following the filing of this action, Murphy executed a declaration stating that he had misspoken during his MSPB deposition, and that the document he had referenced as a "performance appraisal" was, in fact, one setting forth plaintiff's performance standards. See Declaration of Donald Murphy, filed as Exhibit B to Docket Entry No. 8 and

[1] Plaintiff also seeks all transmittal and routing sheets for the appraisal document indicating to whom the document was transmitted. Id.

Exhibit B hereto ("Murphy Declaration"). A performance appraisal document consists of the performance standards plus a narrative section commenting on the extent to which an employee has satisfied the performance standards. See Deposition of Terrie Fajardo, former Chief of Human Resources Operations for the NPS, Washington Office ("Fajardo Deposition") (relevant excerpts attached hereto as Exhibit C), page 19, lines 10-11 ("[the appraisal document] is the performance standards with a pass/fail and a narrative summation of her performance").[2] The documents are thus substantially similar.

At an in-chambers status conference in this case on July 27, 2005, the Court ordered limited discovery to assist plaintiff in ascertaining the existence of the draft appraisal document. See Order filed July 27, 2005, Docket Entry No. 10. Plaintiff subsequently propounded written discovery, to which defendant responded. Plaintiff also deposed Murphy and Fajardo. (Murphy had referenced Fajardo in his MSPB deposition as a "personnelist" who had assisted him in drafting the appraisal document. Murphy MSPB deposition, attached hereto as Exhibit A at 21-22.)

Fajardo testified at her deposition (in this case) that, as Chief of Human Resources, NPS, she had drafted performance standards and a performance appraisal for plaintiff at Murphy's request. See Defendant's Statement of Undisputed Material Facts ("Def. Facts") ¶¶ 10-13.[3] She also testified to, *inter alia*, the following:

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[2] References to deposition transcripts are hereafter cited, using the above example, in the following format: "19/10-11".

[3] References to designated paragraphs of Defendant's Statement of Undisputed Material Facts incorporate by reference all documentation to the evidentiary record set forth therein.

– Fajardo knew of no one, including her supervisor or colleagues in her office, other than Murphy and herself, who was involved in the preparation of the document, who knew of its creation and existence, who had a copy of it, or who had seen it, Def. Facts ¶ 14-16;

– there was no e-mail record of the document, id. ¶ 16, and although Fajardo prepared the document on her computer, she did not save it to any shared server, and does not recall specifically saving it to a floppy disc but thinks she probably did because that would have been her practice, id. ¶¶ 24, 25;

– the disc box in which she probably kept the disc on which she probably saved the appraisal document was not labeled because it was in her private office, id. ¶ 25;

– she kept a hard-copy version of the appraisal document in an unlabeled, locked file cabinet behind her desk where she kept materials dealing with "hot topics," matters that she was personally working on at the moment, id. ¶ 27;

– a performance appraisal cannot be final unless the performance standards (sometimes referred to as a performance plan) have been issued to the employee, id. ¶ 18, and only signed, and thus final, versions of performance appraisals are to be filed in an employee's official personnel file, id. ¶¶ 17-18;

– 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;

– Fajardo had no knowledge as to whether the performance standards for plaintiff had ever been approved or presented to plaintiff, or whether plaintiff had ever signed them, id. ¶ 19;

– to Fajardo's knowledge, Murphy never signed off on the appraisal; the copy she maintained did not contain Murphy's signature; she did not know whether the appraisal was ever communicated to plaintiff, and Fajardo never received back from Murphy a signed copy of the appraisal, even though she had asked that he send her back a signed copy so that it could be filed in Plaintiff's employee performance file, an official file maintained by the agency, id. ¶ 20;

– Fajardo did not invoke any formal protocol in transferring the responsibility of maintaining this working file on plaintiff upon Fajardo's retirement from the agency: There were no specific instructions regarding any institutional requirements for its maintenance, or with respect to any larger file system in which the appraisal document was required to be kept, id. ¶ 30.

At a December 16, 2005 status conference, the Court heard counsels' respective representations regarding the evidence adduced to date, and a discussion of plaintiff's plan for further discovery. See letter dated December 15, 2005 from plaintiff's attorney Richard Condit to defendant's attorney Lisa Goldfluss, attached as Exhibit G hereto, discussed at the December 16th status conference. The Court permitted defendant to file this motion, which seeks summary judgment solely on the threshold jurisdictional question of whether, even assuming the truth of Fajardo's testimony, the document sought in this Privacy Act case constitutes a record in a "system of records" under the Act, so as to trigger the substantial and extensive legal obligations imposed upon federal agencies by the various provisions of the Act. Although defendant does not concede, for purposes outside the four corners of this motion, that any part of Fajardo's testimony is true, defendant maintains, and demonstrates below, that assuming the truth of Fajardo's contentions for purposes of the motion only, there is no genuine issue of material fact

regarding the status of the appraisal document as outside any Privacy Act system of records maintained by Interior, and defendant is entitled to judgment as a matter of law.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendant incorporates herein, as if fully set forth verbatim below, Defendant's Statement of Undisputed Material Facts, filed simultaneously herewith in a separate document as required by Local Civil Rule 7(h).

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is required where no genuine dispute exists as to any material fact and a party should prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A genuine issue of material fact is one that would change the outcome of the litigation. *Id.* at 247. "The burden on the moving party may be discharged by 'showing' -- that is, pointing out to the [Court] -- that there is an absence of evidence to support the non-moving party's case." *Sweats Fashions, Inc. v. Pannill Knitting Company, Inc.*, 833 F.2d 1560, 1563 (Fed. Cir. 1987).[4] Privacy Act suits are as amenable to summary judgment as any other type of civil action. *See, e.g.*, *Quinn v. Stone*, 978 F.2d 126, 131 (3th Cir. 1992). *See also Bettersworth v. FDIC*, 248 F.3d 386, 390-91 (5th Cir.) (moving party may rely on absence of evidence to support essential element of the non-movant party's case; granting summary judgment in Privacy Act case), *cert. denied*, 534 U.S. 1021 (2001).

[4] In the context of this jurisdictional motion, the Rule 56 burden of the moving party may be discharged by showing an absence of evidence to support the establishment of subject matter jurisdiction over the action.

Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must instead proffer specific facts showing that a genuine issue exists for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, to avoid summary judgment, the plaintiff must present some objective evidence that would enable the court to find that the plaintiff is entitled to relief (or, in the context of this motion, to find that the plaintiffs have established an alleged factual predicate for subject matter jurisdiction under the Privacy Act). In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court held that, in responding to a proper motion for summary judgment, the party who bears the burden of proof on an issue at trial must "make a sufficient showing on an essential element of [his] case" to establish a genuine dispute. *Id.* at 322-23. In *Celotex*, the Supreme Court emphasized that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

II. THE DRAFT PERFORMANCE APPRAISAL DOCUMENT WAS NOT A RECORD WITHIN A SYSTEM OF RECORDS UNDER THE PRIVACY ACT OVER WHICH THE AGENCY HAD CONTROL AND WHICH THE AGENCY HAD A PRACTICE OF RETRIEVING BY PLAINTIFF'S PERSONAL IDENTIFIER.

A. The Privacy Act's "Systems of Records" Requirement

The Privacy Act provides a limited waiver of sovereign immunity, and thus a limited grant of subject matter jurisdiction to federal courts, for claims against a federal agency arising from the agency's collection, maintenance, use, and/or disclosure (here, alleged non-disclosure)

of certain information concerning that claimant. *See* 5 U.S.C. § 552a(g).[5] The Act "'safeguards the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records . . . by allowing an individual to participate in ensuring that his records are accurate and properly used.'" *Henke v. Department of Commerce*, 83 F.3d 1453, 1456 (D.C. Cir. 1996) (citations omitted). To that end, the Act requires any agency which maintains a "system of records" under the Act (defined below) to publish at least annually a statement in the Federal Register describing that system. *Id*.

Notice in the Federal Register of the existence and character of each of those systems of records maintained by a federal agency includes, under 5 U.S.C. § 552a(e)(4), the following information:

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[5] "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), *quoting Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884). In actions against the United States, the establishment of a waiver of sovereign immunity is jurisdictional. *Hercules Inc. v. United States*, 516 US 417, 422-23 (1996); *United States v. Orleans*, 425 U.S. 807 (1976); *United States v. Testan*, 424 U.S. at 399 ("except as Congress has consented to a cause of action against the United States, 'there is no jurisdiction . . . to entertain suits against the United States'") (*quoting United States v. Sherwood*, 312 U.S. at 587-88).

Where the federal government waives its immunity from suit, "limitations and conditions upon which the Government consents to be sued must be strictly observed, and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981). "[A] waiver of [sovereign] immunity . . . must be 'unequivocally expressed.'" Id. *See also United States v. Nordic Village*, 503 U.S. 30, 33-34 (1992); *United States v. King*, 395 U.S. 1, 4 (1969).

A party bringing suit against the United States bears the burden to prove that the government has unequivocally waived its immunity. *United States v. Sherwood, supra; Interstate Bank Dallas, N.A., v. United States*, 769 F.2d 299, 303 (5th Cir. 1985); *Cominotto v. United States,* 802 F.2d 1127, 1129 (9th Cir. 1986); *Cole v. United States*, 657 F.2d 107, 109 (7th Cir.), *cert. denied*, 454 U.S. 1083 (1981).

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention and disposal of records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system.

5 U.S.C. § 552a(e)(4)(A) - (I).

"[T]he determination that a system of records exists triggers virtually all of the other substantive provisions of the Privacy Act, such as an individual's right to receive copies and to request amendment of her records." *Id.* at 1459. The Act defines "record" as

> any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

5 U.S.C. § 552a(a)(4). The Act defines "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.*

Id. § 552a(a)(5) (emphasis added). "This qualifying language in the statute reflects a statutory compromise between affording individuals access to those records relating directly to them and protecting federal agencies from the burdensome task of searching through agency records for mere mention of an individual's name." *Bettersworth v. FDIC*, 248 F.3d at 391.

A Privacy Act system of records, then, is one from which "there is actual retrieval of records keyed to individuals," *Henke*, 83 F.3d at 1460, either by using the individual's name or "some identifying number, symbol, or other identifying particular assigned to the individual," § 552a(a)(5), such as "a finger or voice print or a photograph." § 552a(a)(4). Importantly, retrieval capability by personal identifier is insufficient to find that a "system of records" exists. Instead, the agency must follow a practice of actually retrieving information keyed to individuals according to their name or other personal identifying particular. *Henke*, 83 F.3d at 1459-61 (computerized database containing information concerning grant proposals not system of records as to individuals listed as contact persons for applications because agency in practice did not retrieve the information using contact person's name, *though they did have that capability*). *See also Baker v. Department of Navy*, 814 F.2d 1381, 1384-85 (9th Cir. 1987) (even though Navy could design program capable of retrieving any document containing reference to particular individual, that mere possibility was legally inconsequential for determining existence of system of records if Navy did not in fact use such system; "an individual's ability to obtain access to a record under FOIA or because of the person's knowledge of its existence in a certain file will not provide that individual with access to the record or to any remedies under the Privacy Act"), *cert.*

denied, 484 U.S. 963 (1987); *Fisher v. NIH*, 934 F. Supp. 464, 473 (D.D.C. 1996) (no system of records where practice and policy of agency regarding scientific misconduct files at time of disclosure was to index and retrieve such files by name of institution in which alleged misconduct occurred, rather than by name of individual scientist accused of committing the misconduct, despite fact that it was possible to use plaintiff's name to identify file containing information about plaintiff), *aff'd,* 107 F.3d 922 (D.C. Cir. 1996). *Cf. Pototsky v. Department of the Navy*, 717 F. Supp. 20, 21-22 (D. Mass. 1989) ("whether a record is subject to amendment [under the Act] depends on '*the method of retrieval* of a record rather than its substantive content'")(*citing Baker*, *supra*) (emphasis provided).

B. The United States' Exposure to Liability under the Privacy Act

Congress has exposed the United States to civil liability in certain circumstances in which an agency's treatment of a "record" within a Privacy Act "system of records" violates the provisions of the Act. Subsection (g)(1) of the Privacy Act, 5 U.S.C. § 552a(g), waives the government's immunity from suit for four separate categories of claims. *See* subsections (g)(1)(A) - (D) (discussed individually below). Because subsection (g)(1) is a waiver of sovereign immunity, the terms and conditions of that waiver must be strictly construed. *See, e.g.*, *Tomasello v. Rubin*, 167 F.3d 612, 618 (D.C. Cir. 1999).

Subsection (g)(1)(A) (governing "amendment" claims) waives immunity where an agency "makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection." Subsection (d)(3), in turn, is predicated on the procedural steps set forth in subsection (d)(1) and (d)(2), which provides, respectively, that "[e]ach agency that maintains a

system of records" shall, *inter alia*, permit an individual, upon request, "to gain access to his record or to any information pertaining to him which is contained in the system [of records]," § 552a(d)(1); shall permit the individual to request amendment of the record pertaining to him; and shall either correct the record or inform the individual of the agency's refusal to amend, § 552a(d)(2). Plaintiffs filing an action against the government under subsection (g)(1)(A), then, must establish that the document that is the subject of their claim is part of a system of records. *See e.g.*, *Baker v. Dep't of the Navy, supra* (Privacy Act's amendment remedy subject to system of records requirement); *Clarkson v. IRS*, 678 F.2d 1368 (11th Cir. 1982)(same); *Pototsky v. Dep't of the Navy*, *supra* (same).

Subsection (g)(1)(B) (governing "access" claims) waives immunity from suit where an agency **"**refuses to comply with an individual request under subsection (d)(1) of this section," § 552a(g)(1)(B), to gain access to his record or other information pertaining to him contained within a system of records, § 552a(d)(1). Because subsection (d)(1) pertains exclusively to documents in a system of records, plaintiffs filing an action against the government under subsection (g)(1)(B) must establish that the document that is the subject of their claim is part of a system of records. *See also Bettersworth v. FDIC*, *supra* (access claim subject to system of records requirement)*; Baker v. Department of Navy*, *supra* (same); *Wren v. Heckler*, 744 F.2d at 87 (same); *Kalmin v. Dep't of the Navy*, 605 F. Supp. 1492, 1495 (D.D.C. 1985) ("[u]nder the Privacy Act, records, to be producible, must be contained in a "system of records").

Subsection (g)(1)(C) waives sovereign immunity for claims arising from circumstances where an agency

> fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual.

5 U.S.C. § 552a(g)(1)(C). Claims filed under subsection (g)(1)(C) are subject to the "systems of records" requirement. *See Hubbard v. EPA*, 809 F.2d 1, 6 n.8 (D.C. Cir. 1987); *Wren v. Heckler*, 744 F.2d at 90.

Finally, subsection (g)(1)(D) jurisdiction, the Privacy Act's "catch-all" provision, *see, e.g. Quinn v. Stone*, 978 F.2d 126, 131 (3th Cir. 1992), waives sovereign immunity for claims arising from circumstances where an agency "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." Such claims are all subject to the "systems of records" requirement. *See e.g., Quinn v. Stone*, 978 F.2d at 131 (in order to maintain an action under the "catch-all provision" of subsection (g), 5 U.S.C. § (g)(1)(D), for violation of the Act's central provision against disclosure, § 552a(b), a plaintiff must advance evidence to support a finding of four necessary elements, including that the information is covered by the Act as a "record" contained in a "system of records"); *Clarkson v. IRS*, 678 F.2d at 1377 (allegations of agency's violations of subsections (e)(1) and (e)(5) of the Privacy Act subject to systems of records requirement); *Pototsky v. Department of the Navy*, *supra* (subsection (e)(5) claim subject to systems of records requirement).

To establish jurisdiction over this action, then, plaintiff must show that the draft performance appraisal described by Terrie Fajardo was maintained within a "system of records" under the control of the Department of Interior, from which the agency, by its practice, retrieved the subject record by plaintiff's name or other identifying particular.

C. The Draft Performance Appraisal Maintained by Fajardo in a Locked, Unmarked File Cabinet with Other Documents Pertaining to "Hot Topics" on Which She Was Working at the Moment Was Not a Record Within a System of Records under the Privacy Act over Which the Agency Had Control and Which the Agency Had a Practice of Retrieving by Plaintiff's Personal Identifier.

It is undisputed that a performance appraisal of an agency employee is filed and maintained in the employee's official personnel file only after it is rendered final by the signatures of the appropriate supervisory officials, 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 Mainella ever signed off on any draft performance appraisal for plaintiff, Def. Facts 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.

It is clear, then, that the draft appraisal document was kept, not in a system of records over which the agency had control so that it could ensure accuracy, timeliness, relevance and completeness, but in a file of working papers within a locked, unmarked file cabinet in a private office not the subject of records retrieval by the agency in the normal course of business. Def. Facts ¶ 27. The design of that file was not in accordance with any design of the agency, see 5 U.S.C. § 552a(e)(4)(A) - (I), but instead was formulated as a working file for the convenience of one agency employee, relevant only to the matters that were on her personal plate at the time.

Indeed, there is no dispute that the document plaintiff seeks is a draft document, see Complaint ¶ 24, and could have been changed at any time before it was finalized, see Declaration of Frances P. Mainella, ¶ 5. No one pretends that Fajardo was plaintiff's supervisor, in a position to evaluate plaintiff's performance based on any personal knowledge of that performance, or that Fajardo had any authority to do so or issue a final appraisal document. See Def. Facts ¶ 22. The labyrinthine and expensive legal obligations imposed upon federal agencies by the Privacy Act, as discussed above and exemplified by, for example, 5 U.S.C. § 552a(e)(4)(A) - (I), the requirements to ensure accuracy, timeliness, relevance and completeness, and the duties to protect covered records from undue disclosure, do not attach to a draft document by someone not authorized to issue the final version, kept in her private office files designed to cater to her own convenience regarding matters she was working on at the moment. *See Horowitz v. Peace Corps*, 428 F.3 271, 280-81 (D.C. Cir. 2005) (draft administrative separation report, never finalized by the deciding official and maintained in a safe in his office, was not in a Privacy Act system of records for purposes of plaintiff's Privacy Act action for access; the report was not maintained or required to be maintained under the agency's systems of records and because it was pre-decisional, it had no official existence). Because the draft appraisal document was not in a system of records under the Privacy Act, the United States has not waived sovereign immunity for this action, there is no genuine issue of material fact, and defendant is entitled to summary judgment as a matter of law.

CONCLUSION

For the foregoing reasons, this action should be dismissed with prejudice.

Respectfully submitted,

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