UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NISKANEN CENTER, INC.,	)	
Plaintiff,	)	
v.	)	
U.S. DEPARTMENT OF ENERGY,	)	Civil Action No. 17-676 (JEB)
Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant United States Department of Energy ("Defendant" or "DOE"), by and through undersigned counsel, respectfully moves the Court to enter summary judgment in its favor in this action brought under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") because there is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law. In support of this motion, Defendant respectfully refers the Court to the accompanying Memorandum of Points

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and Authorities, Statement of Material Facts, and Declaration of Alexander C. Morris, FOIA Officer in the Office of Public Information for DOE Headquarters.

Dated: February 2, 2018

Respectfully submitted,

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v.	)	
	)	Civil Action No. 17-676 (JEB)
U.S. DEPARTMENT OF ENERGY,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case arises under the Freedom of Information Act, 5 U.S.C. § 522 ("FOIA"), and pertains to a request submitted by Plaintiff, Niskanen Center, Inc. ("Plaintiff"), to United States Department of Energy ("DOE") and non-party National Coal Council ("NCC")[1] seeking the following 13 categories of documents concerning NCC "for all years since 1985" ("Plaintiff's FOIA Request"):

1. Membership lists;

2. The names of each subgroup, working group, or any group not comprised of all NCC members (together, "NCC subgroups"), and the members of each such NCC subgroup;

3. Reports or studies issued by the NCC and/or any NCC subgroup;

4. Newsletters, announcements, press releases, or any other public communication by the NCC or any NCC subgroup;

[1] NCC is a federal advisory committee to the United States Secretary of Energy that "provides advice and recommendations to the Secretary of Energy on general policy matters relating to coal and the coal industry." *See* NCC Advisory Committee Charter, available at http://www.nationalcoalcouncil.org/page-NCC-Charter.html (last visited Feb. 2, 2018). "The NCC is a totally self-sustaining organization; it receives no funds from the Federal government." *See* http://www.nationalcoalcouncil.org/page-About-Us.html (last visited Feb. 2, 2018). Rather, it is funded from member contributions, investment of reserves, and sponsors. *Id.*

5. Agendas, transcripts and minutes of all meetings of the NCC and all NCC subgroups, and all other meetings sponsored by, or held under the aegis of, the NCC;

6. All documents describing NCC, Inc.'s corporate form, including the application for 501(c)(6) status and the IRS determination letter as to that status;

7. All documents relating to the decision to incorporate NCC, Inc.;

8. All financial statements, whether audited or unaudited, of the NCC and NCC, Inc.;

9. All documents describing the relationship between NCC and NCC, Inc.;

10. All documents describing NCC, Inc. income and expenditures, including the sources of all such income and the recipients of all such expenditures

11. All lists of shareholders, officers and directors of NCC, Inc.;

12. Agendas and minutes of all meetings of the officers, directors, or shareholders of NCC, Inc.; and

13. All reports, registrations, disclosures, or any other submissions by the NCC or NCC, Inc. to the Internal Revenue Service or the Commonwealth of Virginia

See Declaration of Alexander C. Morris ("Morris Decl."), Exh. A. Plaintiff subsequently amended the time period of its FOIA request to "all years since 1986," and to exclude publicly available meeting transcripts, reports, studies, and personal contact information in the membership lists. *Id*. at ¶¶ 20, 29-30, Exh. B.

As detailed in the accompanying Declaration of Alexander C. Morris, FOIA Officer in the Office of Public Information ("OPI") for DOE Headquarters, DOE performed searches which were reasonably calculated to locate responsive records and ultimately produced one Windows Media Player file, one VOB file, and 30 documents in full and part. Morris Decl. ¶¶ 21, 31; Exhs. D, E. DOE released all non-exempt responsive records to Plaintiff after properly

withholding only such information that was subject to a FOIA exemption, including home addresses, personal email addresses, personal telephone numbers and NCC's confidential and privileged business information. Thus, as demonstrated below, in the accompanying Statement of Material Facts Not in Genuine Dispute, and the Morris Declaration, there is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law.

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background is fully set forth in Defendant's Statement of Material Facts and the Declaration of Alexander C. Morris (filed contemporaneously with this motion) and incorporated by reference herein.

LEGAL STANDARDS

Summary judgment is appropriate when 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). A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment must demonstrate an absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has met its burden, the non-movant "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

"FOIA cases are typically and appropriately decided on motions for summary judgment." *Benjamin v. U.S. Dep't of State*, 178 F. Supp. 3d 1, 3 (D.D.C. 2016), *aff'd*, 2017 WL 160801 (D.C. Cir. Jan. 3, 2017) (quoting *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009)). A defendant is entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, that it has conducted an adequate search for responsive records, and that each

responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *See, e.g., Weisberg v. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, a defendant may rely on reasonably detailed and non-conclusory declarations. *See, e.g., McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Santana v. Dep't of Justice*, 828 F. Supp. 2d 204, 208 (D.D.C. 2011); *Allen v. U.S. Secret Service*, 335 F. Supp. 2d 95, 97 (D.D.C. 2004).

ARGUMENT

I. DOE CONDUCTED A REASONABLE AND ADEQUATE SEARCH FOR RESPONSIVE RECORDS

Under FOIA, an agency is obligated to conduct a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *see also Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."); *Media Research Ctr. v. U.S. Dep't of Justice*, 818 F. Supp. 2d 131, 137 (D.D.C. 2011). A reasonable search is one that covers those locations where responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. To satisfy its obligation, "the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Id.* An agency is not required to answer questions framed as requests for documents. *See, e.g., Judicial Watch, Inc. v. Dep't of State*, 177 F. Supp. 3d 450, 455-56 (D.D.C. 2016), *aff'd*, Dkt. No. 16-5170 (D.C. Cir. Feb. 24, 2017) (per curiam) ("A question is not a request for records under FOIA and an agency has no duty to answer a question posed as a FOIA request.").

A search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *see also Bigwood v. U.S. Dep't of Defense*, 132 F. Supp. 3d 124, 135 (D.D.C. 2015) ("[T]he agency's search for records need not be exhaustive, but merely reasonable. The proper inquiry is not whether there might exist additional documents possibly responsive to a request, but whether the agency conducted a search reasonably calculated to uncover relevant documents."); *Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) ("Perfection is not the standard by which the reasonableness of a FOIA search is measured."). A search is inadequate only if the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby*, 920 F.2d at 68 (noting that an agency need not search every record system, but only those which it believes are likely to hold responsive records). Accordingly, for a court evaluating an agency's search, the fundamental question is "whether the search for those documents was adequate," not "whether there might exist any other documents responsive to the request." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)); *see also Weisberg*, 705 F.2d at 1351 ("[T]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate.") (quoting *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982)). The court's inquiry, therefore, should focus on the method of the search, not its results. *See, e.g.*, *Bigwood*, 132 F. Supp. 3d at 135 (explaining that the adequacy of the search is judged by appropriateness of the methods used to carry out the search rather than by fruits of the search); *Boggs v. United States*, 987 F. Supp. 11, 20 (D.D.C. 1997) (noting that the court's role is to determine the reasonableness of the search, "not whether the fruits of the search met plaintiff's aspirations").

The agency bears the burden of demonstrating the adequacy of its search by providing a declaration setting forth the search terms and type of search performed, "and averring that all files likely to contain responsive materials . . . were searched." *Elliott v. Nat'l Archives & Records Admin.*, Civ. A. No. 06-1246 (JDB), 2006 WL 3783409, at *2 (D.D.C. Dec. 21, 2006) (quoting *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 313-14 (D.C. Cir. 2003)). "Agency affidavits are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *SafeCard Servs*., 926 F.2d at 1200 (internal quotation marks omitted); *West v. Spellings*, 539 F. Supp. 2d 55, 60 (D.D.C. 2008). Once an agency has met its burden of demonstrating the adequacy of its search, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith." *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993); *Elliott*, 2006 WL 3783409, at *3 (explaining that to satisfy his evidentiary burden, the plaintiff "must present evidence rebutting the agency's initial showing of a good faith search"). Speculative or hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of an agency's search. *See, e.g.*, *Lasko v. U.S. Dep't of Justice*, Appeal No. 10-5068, 2010 WL 3521595, at *1 (D.C. Cir. Sept. 3, 2010) (per curiam) (explaining that the adequacy of the search is not undermined by mere speculation that additional documents might exist); *Oglesby*, 920 F.2d at 67 n.13; *Elliott*, 2006 WL 3783409, at *3 (noting that speculative claims about the existence of other documents cannot rebut the presumption of good faith accorded to agency declarations).

Here, the Morris Declaration establishes that DOE's search method was reasonably calculated to uncover records in its possession responsive to Plaintiff's FOIA Request. DOE performed the searches for responsive records in accordance with its standard procedures for

processing FOIA requests. Morris Decl. ¶¶ 10-16. DOE determined that because of the subject matter of Plaintiff's FOIA Request, the Office of Fossil Energy ("FE") was the office likely to have responsive records. *Id*. at ¶¶ 10-13. DOE's decision to search FE was based, *inter alia*, on the fact that FE is the program office within DOE that is designated by the NCC charter to provide primary support to NCC. *Id*. at ¶ 13. OPI tasked FE with searching for responsive records and providing all such records located during the search to OPI for review and processing. *Id*. at ¶¶ 14, 17.

The Morris Declaration further describes the searches performed by FE. *Id*. at ¶¶ 15-16. Specifically, Morris notes that the FE subject matter expert on NCC and two other FE employees who worked on matters with NCC searched both the records maintained within FE's shared central depository on which FE employees upload and save relevant documents and physical files consisting of CDs and paper files. *Id*. at ¶ 16. Morris further explains that these FE employees searched "for any records containing 'National Coal Council' and the names of working groups and subgroups, announcements, press releases, membership lists, charters, studies, agendas, newsletters, meeting minutes, and audio and written transcripts for all years since 1986." *Id*. The records located as a result of FE's search were forwarded to OPI where they were processed and subsequently released to Plaintiff in full or in part. *Id*. at ¶¶ 17-18.

Thereafter, OPI determined that additional searches should be conducted. *Id*. at ¶ 24. As explained in the Morris Declaration:

> After further inquiry from OPI, the FE subject matter expert, Mr. Daniel Matuszack, reviewed the request and indicated that not all of the physical copies of the National Coal Council's studies, reports, and records held by the previous Designated Federal Officer, Mr. Robert Wright, had been digitized and added to FE's shared central repository of National Coal Council documents upon Mr. Robert Wright's departure from DOE. Thus these documents were not recovered and provided to OPI for processing.

Id. Therefore, FE then conducted an additional search of the former employee's physical files for records containing "National Coal Council," the names of working groups and subgroups, announcements, press releases, membership lists, charters, studies, agendas, newsletters, meeting minutes, and audio and written transcripts for all years since 1986. *Id*. at ¶ 25. Additionally, DOE's Office of the Chief Information Officer conducted an automated search of the former employee's email correspondence using the search terms "National Coal Council" and "NCC." *Id*. at ¶ 26. The records located during the additional searches were forwarded to OPI and released to Plaintiff in full and in part. *Id.* at ¶¶ 27-28, 31.

As a result of its searches, DOE located and produced to Plaintiff one Windows Media Player file, one VOB file, and 30 documents in full and part. *Id*. at ¶¶ 21, 31. As described in the *Vaughn* index attached to the Morris Declaration as Exhibit F, NCC's sensitive financial and privileged information as well as personal information regarding various individuals was withheld pursuant to FOIA Exemptions 4 and 6. *Id*. at ¶¶ 32-38.

II. DOE PROPERLY INVOKED EXEMPTIONS 4 AND 6

FOIA does not allow the public to have unfettered access to government files. *McCutchen v. United States Dep't of Health and Human Services*, 30 F.3d 183, 184 (D.C. Cir. 1994). Although disclosure is the dominant objective of FOIA, there are several exemptions to the statute's disclosure requirements. *Department of Defense v. FLRA*, 510 U.S. 487, 494 (1994). FOIA requires that an agency release all records responsive to a properly submitted request unless such records are protected from disclosure by one or more of the Act's nine exemptions. 5 U.S.C. § 552(b); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). To protect materials from disclosure, the agency must show that they come within one of the FOIA exemptions. *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 904

(D.C. Cir. 1999). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007).

As detailed below, DOE properly invoked FOIA Exemptions 4 and 6 to protect NCC's sensitive financial and privileged information and to prevent the unwarranted invasion of the personal privacy of multiple individuals.

A. Exemption 4 Was Properly Asserted to Protect NCC's Sensitive Financial and Privileged Information

Exemption 4 exempts from disclosure information that is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. 5 U.S.C. § 552(b)(4). In this Circuit, the terms, "commercial" and "financial" are given their ordinary meanings. *See Nat'l Ass'n of Homebuilders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002); *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). "Commercial" is defined broadly to include "records that reveal basic commercial operations or relate to income-producing aspects of a business" as well as situations where the "provider of the information has a commercial interest in the information submitted to the agency." *Baker & Hostetler LLP v. United States Dept. of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006).

"Person" includes an individual, partnership, corporation, association, or public or private organization. *See* 5 U.S.C. § 551(2). NCC is a "person" under § 551(2). The records in question relate to NCC. *See* Morris Decl. ¶ 33.

The protection afforded documents withheld under Exemption 4 varies depending on whether the government agency required submission of the information or whether the information was provided voluntarily. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n* ("*Critical Mass II*"), 975 F.2d 871, 878–80 (D.C.Cir.1992) (en banc). NCC provided

these documents to DOE without the need of a subpoena, court order, or warrant. *See* Morris Decl. ¶ 33.

For documents provided to the government voluntarily, a document is confidential "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass II*, 975 F.2d at 879. It is clear that none of the information withheld pursuant to Exemption 4 would customarily be released to the public. The withheld information concerns a litigation matter, dues amounts, financial projections, strategic plans, employee compensation, and information about NCC's income, expenses, assets, and liabilities. Morris Decl. ¶¶ 33-34.

In addition, Exemption 4 protects commercial material that is privileged. 5 U.S.C. § 552(b)(4). *See Washington Post Company v. U.S. Dept. of Health and Human Services, et al.*, 690 F.2d 252, 267, n. 50 (D.D.C. 1982) (noting that the attorney-client privilege, which is explicitly mentioned in the legislative history of Exemption 4, is a valid privilege to assert under Exemption 4). Here, DOE has appropriately protected NCC documents subject to the attorney client and work product privileges. Morris Decl. ¶ 34; Exh. F.

The above noted examples are all categories of information that would not customarily be made public. This information is believed to be appropriate for protection according to FOIA Exemption 4, because it: a) has been held in confidence by NCC; b) is of a type customarily held in confidence by NCC; c) is not available from public sources; d) would, if released, cause substantial competitive harm to NCC including, for example, harming its competitive ability to attract and maintain members which is critically important to its ability to fund its activities; and e) does not shed light on Government operations. Accordingly, this information should remain undisclosed pursuant to Exemption 4.

B. Exemption 6 Was Properly Asserted to Protect Individuals From Unwarranted Invasion of Their Privacy

Exemption 6 permits the withholding of "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The term "similar files" is broadly construed and includes "[g]overnment records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *Lepelletier v. Fed. Deposit Ins. Corp.*, 164 F.3d 37, 47 (D.C. Cir. 1999) ("The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual."); *Govt. Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 97, 105-06 (D.D.C. 2010). In assessing the applicability of Exemption 6, courts weigh the "privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, the disclosure would work a clearly unwarranted invasion of personal privacy." *Lepelletier*, 164 F.3d at 46; *Chang v. Dep't of Navy*, 314 F. Supp. 2d 35, 43 (D.D.C. 2004). "[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier*, 164 F.3d at 47 (quoting *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994)) (alterations in original); *Beck v. Dep't of Justice*, 997 F.2d 1489, 1492 (D.C. Cir. 1993) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). "Information that 'reveals little or nothing about an agency's own conduct' does not further the statutory purpose." *Beck*, 997 F.2d at 1492.

Here, as explained in the Morris Declaration and *Vaughn* index, DOE applied Exemption 6 to withhold personal information including home addresses, home and cell phone numbers, and

personal email addresses, the release of which would constitute an unwarranted invasion of these individuals' personal privacy. Morris Decl. ¶¶ 36-37. Indeed, Plaintiff expressly consented to the withholding of information of this type from certain documents. *Id*. at ¶ 30. This Court has upheld the application of Exemption 6 in such circumstances. *See, e.g., U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 501-02 (1994) (home address); *Government Accountability Project v. United States Dept. of State*, 699 F. Supp. 2d 97, 105-06 (D.D.C. 2014) (personal email address); *Wade v. IRS*, 771 F. Supp. 2d 20, 25 (D.D.C. 2011) (home phone number). The same result is warranted here.

CONCLUSION

For all of the reasons set forth above and in the Morris Declaration, DOE respectfully submits that its motion for summary judgment should be granted.

Dated: February 2, 2018

Respectfully submitted,

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