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.	:	

MEMORANDUM ORDER

Teresa Chambers, the former chief of the U.S. Park Police, brings this action under the Privacy Act, 5 U.S.C. § 552a(g), seeking injunctive and declaratory relief, damages, attorneys' fees, and costs of litigation. Her complaint alleges Privacy Act violations in two separate counts: (1) wrongful refusal to provide access to records naming the plaintiff and consequent interference with plaintiff's right to seek corrections of such records, in violation of 5 U.S.C. § 552a(d), and (2) possible destruction or alteration of plaintiff's performance evaluation and related documents, in violation of 5 U.S.C. § 552a(e)(9) and (10), and 43 C.F.R. § 2.51. Defendant has moved for summary judgment [14]. For the reasons discussed below, that motion [14] is **denied**.

Background

a. Factual overview and procedural history

From February 10, 2002, until July 9, 2004, Teresa Chambers served as chief of the U.S. Park Police. Dkt. # 15-1 at 2. The U.S. Park Police is a subdivision of the National Park Service, Department of the Interior. Affidavit of Teresa C. Chambers, Dkt. #16 ("Chambers Aff't") ¶ 5. Chambers was hired by National Park Service Director Frances P. Mainella, but during her tenure as chief, her day-to-day supervisor was National Park Service Deputy Director Donald W. Murphy. Dkt. #15-1 at 2.

On September 22, 2003, Chambers received an email from Murphy indicating that he had "completed [her] performance appraisal," and that she would be contacted by his secretary to schedule a time for them to review the appraisal together. Dkt. #16, Ex. 1. Chambers states that on or about the same day, Murphy also told her in person that he had completed her performance appraisal, adding, "Don't worry. It's a good one." Chambers Aff't ¶ 7. This was the first and only performance appraisal ever mentioned to Chambers during her more than two years as chief of the U.S. Park Police. Dkt. #15-1 at 3. The record does not disclose whether or not Chambers was ever contacted again to schedule a review, but it is undisputed that she never saw the document during her tenure as chief.

Chambers was interviewed by the *Washington Post* on November 20, 2003 and expressed concerns about the department's budget. A story about her interview was published in the December 2, 2003 edition of the newspaper, Dkt. 1 ¶ 7, 8, and, on the same day, Chambers sent an email to a "high-ranking staff member of the Congressional Subcommittee that oversees the DOI and its budget," repeating her concerns about budgetary constraints and their effect on the department's ability to protect lives and national treasures. Id. at 9. Chambers' supervisors, including Murphy, were aware of this email. Id.

Three days later, Chambers was placed on administrative leave while the department reviewed her conduct. Dkt. #1 ¶ 10, Dkt. #5 ¶ 10. Defendant acknowledges that Murphy was concerned about the plaintiff's discussion of budgetary issues with the media. Id. On December 12, 2003, Chambers was told that she could resume her duties as chief if she agreed to a few stipulations.[1] Dkt. #1 ¶ 11. Plaintiff refused the offer, id. ¶ 13, and, on December 17, 2003, Murphy proposed her removal from federal service. Id. ¶ 14.

[1]The parties have differing recollections of these stipulations. Chambers claims that the stipulations would have required her to obtain permission from Murphy prior to communicating with the media: "both the contact and the content of those conversations" would have to be approved ahead of time. Dkt. #1 ¶ 12. Defendant claims that Chambers would have received media training, an advisor experienced in dealing with Congress, and would have been required to respect "chain-of-command." Dkt. #5 ¶ 12.

On January 29, 2004, Chambers filed a complaint with the Office of Special Counsel (OSC) claiming mistreatment because of her protected whistleblower activities. Id. ¶ 15. Receiving no response from the OSC, she appealed to the U.S. Merit Systems Protection Board (MSPB) on June 28, 2004. Id. ¶ 16. Shortly thereafter, on July 9, 2004, the Deputy Assistant Secretary of Interior for Fish, Wildlife and Parks issued a decision removing Chambers from federal service. Her termination was then incorporated into the MSPB proceedings.

During these MSPB proceedings, Murphy stated that a performance appraisal had been created for Chambers. Chambers then attempted to obtain the appraisal, but the agency refused to release it, and the Administrative Judge (AJ) refused to order its release. Id. ¶ 20. On October 6, 2004, the MSPB AJ issued an Initial Decision sustaining Chambers' termination, but striking some of the bases relied upon by defendant in its decision to terminate. Id. ¶ 21. The plaintiff appealed the decision to the full Board, including the AJ's decision not to compel production of the appraisal document. Id. ¶ 22.

On October 26, 2004, Chambers submitted a FOIA/Privacy Act request seeking "a draft employee evaluation written by Deputy Director Donald Murphy concerning Chief Teresa Chambers during the time period covering 2002 and/or 2003, [and] all routings or transmittal documents indicating what officials

received copies of [such] draft evaluation." Id. at 24. After initially denying the existence of responsive documents, the agency eventually released one document "potentially responsive" to Chambers' request. Dkt. #15-1 at 15. The draft document was entitled "U.S. Department of the Interior Senior Executive Service Performance Plan," and was dated February 11, 2003. Id. It was released to Chambers on March 14, 2005, three weeks after she filed this lawsuit on February 24, 2005, alleging violations of the Privacy Act.

b. The disputed document

The nature of the document referenced in Murphy's September 22, 2003 email is hotly disputed. Plaintiff believes that it was a performance appraisal or evaluation that included a narrative section evaluating her work, but the defendant insists that it was only a performance plan listing standards to be used in evaluating Chambers' work. The pending motion for summary judgment assumes that the document is (or was) a performance evaluation and goes on to consider whether it falls under the Privacy Act. Nevertheless, it will be useful at the outset to set forth the parties' respective positions regarding this document.

On February 4, 2004, Murphy was asked under oath whether or not he had provided Chambers with a performance evaluation. He responded that "one was prepared and was being

scheduled for her just as these incidents happened. So there is one that's actually prepared and it was – the only reason it hadn't been done was because of scheduling conflicts." Testimony of Donald W. Murphy, Dkt. #16 Ex. 2 at 13. On August 11, 2004, Murphy again testified that he had prepared a performance appraisal of Chambers sometime during the "late summer of 2003." Deposition of Donald W. Murphy, included as Exhibit A to Defendant's Motion for Summary Judgment ("Murphy Dep.") at 4. Murphy recalled that the document reflected Chambers' performance during "roughly" the fiscal year between September 2002 and September 2003. Id. at 9. The appraisal was created "in conjunction with the Human Resources Office," id. at 6. He was not absolutely certain, but he believed that Terrie Fajardo was the Human Resources officer who helped him prepare Chambers' appraisal, id. at 8. He knew of no one else who had seen the document, id. at 9. He swore that he had personally prepared the document, and he described it as a narrative performance appraisal that "was [...] final; we would have sat down and discussed it." Id. at 3-5. He repeated his earlier testimony that the reason the appraisal was never communicated to Chambers was "simply a matter of scheduling." Id. at 5.

Eight months later, Murphy signed a declaration asserting that the document he referenced in his deposition was a performance plan, not an appraisal or evaluation, and that his

testimony to the contrary had been mistaken. Declaration of Donald W. Murphy, included as Exhibit B to Defendant's Motion for Summary Judgment, ("Murphy Decl.") ¶ 3. The plan, dated February 11, 2003, set forth "Performance Elements" which would be used to measure Chief Chambers' performance. Id. According to Murphy's declaration, he informed Teresa Chambers that this performance plan was ready for review and discussion via email on September 22, 2003. Id. Murphy additionally swore that this was the only performance plan ever created for Teresa Chambers, that no performance appraisal or evaluation was ever created, that no performance evaluation was ever destroyed by anyone at the Parks Service, and that such a document does not exist. Id. ¶ 4. He concluded by stating that he "would have been the person to prepare such a document, and [he] never did." Id. ¶ 5.

In late 2005, plaintiff took the deposition of former NPS Chief of Human Resources Terrie Fajardo. She recalled preparing a performance appraisal/evaluation of Chambers at the direction of Murphy. Deposition of Terrie Fajardo, included as Exhibit 13 to the Chambers Aff't ("Fajardo Depo.") at 20-21. She stated that, aside from the necessary signatures, the appraisal had been finalized. Id. She testified that she delivered a hard copy of the appraisal to Murphy "in a blue envelope," and kept copies of the document on her computer, on a floppy disk, and in a file cabinet in her office in which she kept "hot topics," or

items she was working on of a sensitive nature. Id. at 27, 35-36, 47, 182. When Fajardo gave the appraisal to Murphy, she asked that he return to her a signed copy so that she could include it in Chambers' performance folder. Id. at 135. On her hard drive, the document would have been labeled "Chambers or Chief Chambers," and saved under "My Documents." Id. at 27. The hard copy in the locked file cabinet would have been in a yellow folder labeled either "Chambers" or "Chief Chambers." Id. at 13. When Fajardo retired in March 2004, she instructed her immediate successor to retain all files related to Chambers. Id. at 44. In late August 2005, Fajardo returned to her former office to attempt to locate the appraisal document. She found the document on a floppy disk, but the narrative comments were missing; only the first few pages setting out the performance standard remained. Id. at 9-10, 37-38, 53, 106. Fajardo was not provided with the full range of files and disks maintained in her office. She was unable to locate the complete document, either electronically or in hard copy. Id. at 37-38, 53.

Analysis

Summary judgment is appropriate where no genuine dispute exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In evaluating a motion for summary judgment, "all inferences must be

viewed in a light most favorable to the non-moving party." Tao v. Freeh, 27 F.3d 635, 638 (D.C. Cir. 1994). In an action under the Privacy Act, the party seeking summary judgment prevails by demonstrating a lack of evidence supporting an essential element of the non-moving party's case, unless the non-moving party responds with "specific and credible facts" supporting a reasonable inference of liability. Bettersworth v. FDIC, 248 F.3d 386, 390-91 (5th Cir. 2001).

The Privacy Act effects a limited waiver of sovereign immunity for claims against a federal agency relating to its handling of certain records. See 5 U.S.C. § 552a(g). The reach of the Privacy Act is limited to the agency's collection, maintenance, use, or disclosure of records within a "system of records," defined 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). A "record" within a "system of records" is "any item, collection, or grouping of information about an individual that is maintained by an agency ... 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 photograph." Id. § 552a(a)(5). Agencies must publish annual

statements in the Federal Register describing their systems of records. Id. § 552a(e)(4).

The government contends that the disputed performance appraisal, if it ever existed, would not be covered by the Privacy Act because (1) it was a draft that was not treated as a Privacy Act record, and (2) it was not "retrieved by the name of the individual" from a group of records and therefore was not a record within a Privacy Act system of records. Id. 552a(a)(5), and (2). The two arguments will be addressed in reverse order.

a. "Retrieved by the name of the individual"

In the D.C. Circuit, an agency's group of records is a system of records for purposes of the Privacy Act only if the agency actually retrieves records from the group by using an individual's name or some "other identifying particular assigned to [an] individual," §552a(a)(5), Henke v. Department of Commerce, 83 F.3d 1453, 1460 (D.C. Cir. 1996). The mere capability to retrieve records through such identifiers does not suffice if the agency does not, in practice, retrieve records in the manner described in the Privacy Act. Id. at 1459-61.

The retrieval requirement does not defeat plaintiff's claims. The document Fajardo described was labeled with Chambers' name only. It would have been retrieved by reference to her name, either in hard copy from her "hot topics" file cabinet, or electronically from her hard drive or floppy disk.

Fajardo actually retrieved the file on at least two occasions: once when she prepared it for hand-delivery to Murphy in September of 2003, and again when she returned to her office in August of 2005 and retrieved a partial version of the file from her floppy disk. The document described by Fajardo was not one that contained only a "mere mention" of Chambers' name: it was prepared for the sole purpose of documenting her job performance. Bettersworth v. FDIC, 248 F.3d 386, 391 (5th Cir. 2001). "Congress desired that individuals be granted an opportunity to view ... records [that] could be retrieved by use of the individual's particular identity." Grachow v. United State Customs Service, 504 F. Supp. 632, 636 (D.D.C. 1980). Here, the document was retrieved in just such a fashion, and since "even a few retrievals" can establish that the document was part of a system of records, the retrieval requirement is accordingly satisfied.[2] Henke, 83 F.3d at 1461.

b. Record in a system of records

The DOI acknowledges that, if the performance appraisal had been finalized with the necessary signatures, it would have

[2]It is legally insignificant that Fajardo may have been the only agency employee who actually retrieved the disputed file: her habits are evidence of an agency practice. Defendant's objection that the files may not have been retrieved "through a personal identifier" also rings hollow. Both the electronic and hard copies of the record were labeled with Chambers name alone; it is not clear how else they could have been retrieved. Dkt. 20 at 8.

become part of the official record and placed in Chambers' "official personnel file" (OPF). Dkt. #20 at 2, citing 5 U.S.C. § 552a(e)(4)(A)-(I). Appraisals located in OPFs are unquestionably records within a system of records for Privacy Act purposes. Because the appraisal was never finalized and officially filed, however, the DOI argues that it was never covered by the Privacy Act. Id.

Plaintiff counters that, pursuant to an Office of Personnel Management regulation, the DOI may at its discretion retain performance-related records in "employee performance files" (EPFs), 5 C.F.R. 293.402(a), and argues that the file in which Fajardo placed the draft appraisal was effectively an EPF. Dkt. #15 at 20. The dispute between the parties thus centers, finally, on whether Fajardo's yellow file, in her "hot topics" file cabinet, was or was not an EPF. Defendant apparently does not dispute that an EPF would qualify as a record in a system of records under the Privacy Act, but instead insists that Farjado's did not file the draft appraisal in a file amounting to an EPF. Dkt. #20 at 4-5.

Plaintiff points out that EPFs include "forms or other document[s] which record[] the performance appraisal," 5 C.F.R. § 293.403(b)(1), and argues that Fajardo's "secure office, locked file cabinet, and disc identification and retention system clearly meet the description of an employee performance record

system." Dkt. #15 at 20. The government argues that they do not, relying heavily on Fajardo's testimony that she asked Murphy to give her a signed copy of the appraisal so that it could be inserted "into the performance folder, which is different from the official folder for the employee." Fajardo Depo. At 135. That testimony, the government argues, means (1) that there was a distinction between a personnel folder (OPF) and a performance folder (EPF) (2) that the draft appraisal was not stored in an EPF and would not be until it was signed and finalized, and (3) that the "hot topics" file cabinet where Fajardo was keeping the draft was not an EPF. Dkt. #20 at 5.

The fact that the document in question was unsigned and therefore (in the government's parlance) a draft, or (in Fajardo's view) suitable "for bird cage paper," is not dispositive. The case on which both sides have focused, Horowitz v. Peace Corps, 428 F.3d 271 (D.C. Cir. 2005), is inapposite. In that case, the court held that a draft administrative separation report was not covered by the Privacy Act, not because drafts are never covered by the Privacy Act, but because, pursuant to Peace Corps regulations and on the facts of that particular case (a volunteer resigned before the decision to separate had been made) the ASR had to be removed from the files. No analogous regulation of the Department of the Interior has been cited in this case.

On this summary judgment motion, where the movant's own witnesses have presented conflicting testimony, the plaintiff must have the benefit of the doubt. Murphy's recantation or amendment of two previous statements creates at least a genuine issue of fact as to whether the document in question was a completed performance appraisal or something less. Fajardo's suggestion that only a signed appraisal would be placed in an EPF does not establish that the file she placed in the "hot topics" cabinet did not also serve as an employee performance record system. The document in question clearly contained personal records that were accessible (and in fact retrieved) using Chambers' name.

The agency's refusal to release the performance appraisal to Chambers (if it existed) appears to have been improper. No motion for affirmative relief is now before the court, and it remains to be seen whether the plaintiff can prove any damages from the nondisclosure (or destruction) of the document in question. Given the broadly protective purposes of the Privacy Act, however, see Henke, 83 F.3d at 1456, the correct disposition of the instant motion is to deny it.

JAMES ROBERTSON
United States District Judge