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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Fred J. Schoeffler,

10 Plaintiff,

11 v.

12 United States Department of Agriculture,

13 Defendant.
14

No. CV-17-00055-PHX-GMS

ORDER

15 Pending before the Court is the Motion for Summary Judgment of Defendant
16 United States Department of Agriculture (USDA). (Doc. 22). For the following reasons,
17 the Court grants the motion in part and denies the motion in part.

18 **BACKGROUND**

19 On June 30, 2013, nineteen firefighters from the Granite Mountain Hotshots
20 perished while working to fight the Yarnell Hill Fire near Yarnell, Arizona. Pursuant to
21 the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Plaintiff Fred J. Schoeffler sent
22 several requests for information to the USDA. The United States Forest Service (USFS)
23 is an agency within the USDA. USFS manages an Aerial Firefighting Use and
24 Effectiveness (AFUE) study which collects data to determine “optimal combinations of
25 firefighting aircraft for multiple types of firefighting suppression operations.” (Doc. 22,
26 p. 3). During the Yarnell Hill Fire, AFUE teams were in the area and collecting data.
27 (Doc. 23, p. 2). Other than the AFUE teams, the other firefighting and governmental
28 agencies working on the fire were from the State of Arizona. Similarly, it was the State of

1 Arizona that led the investigation into the deaths of the Granite Mountain Hotshots. *Id.* at
2 pp. 1–2.

3 Mr. Schoeffler’s FOIA requests largely fall into two categories. First,
4 Mr. Schoeffler seeks voice recordings or written transcripts of air-to-ground (A2G) radio
5 transmissions that AFUE may have collected. The USFS determined that all data
6 collected by the AFUE study had been turned over to the State of Arizona, and
7 subsequently made public in an electronic dropbox folder. USFS informed Mr. Schoeffler
8 of this and provided the dropbox link. Second, Mr. Schoeffler seeks documents related to
9 himself that may have been sent or received by employees of the USFS, particularly
10 Coconino National Forest. USFS searched employees’ emails and records and gave
11 Mr. Schoeffler a DVD with 585 pages of results. Mr. Schoeffler appeals these decisions,
12 alleging that USDA and its subsidiary agencies did not complete an adequate search and
13 did not turn over all relevant information. The USDA moved for summary judgment.

14 DISCUSSION

15 I. Legal Standard

16 The Court grants summary judgment when the movant “shows that there is no
17 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
18 of law.” Fed. R. Civ. P. 56(a). Substantive law determines which facts are material, and
19 “[o]nly disputes over facts that might affect the outcome of the suit under the governing
20 law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby,*
21 *Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden to show that there are
22 no genuine disputes of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

23 Upon proper request, federal agencies must disclose records to a member of the
24 public. 5 U.S.C. § 552. An agency has a duty to construe a FOIA request liberally. *Truitt*
25 *v. Dep’t of State*, 897 F.2d 540, 544–45 (D.C. Cir. 1990). The agency has an obligation to
26 conduct a search “reasonably calculated to uncover all relevant documents.” *Zemansky v.*
27 *U.S. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985) (quoting *Weisberg v. United States Dep’t*
28 *of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984); *Campbell v. United States Dep’t of*

1 *Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998). The question “is not whether there might exist
2 any other documents possibly responsive to the request, but rather whether the *search* for
3 those documents was *adequate*.” *Zemansky*, 767 F.2d at 571 (quoting *Weisberg*, 745 F.2d
4 at 1485) (emphasis in original). An agency’s “failure to turn up a particular document, or
5 mere speculation that as yet uncovered documents might exist, does not undermine the
6 determination that an agency conducted an adequate search for the requested records.”
7 *Lawyers’ Committee for Civil Rights of San Francisco Bay Area v. U.S. Dep’t of the*
8 *Treasury*, 534 F.Supp.2d 1126, 1130 (N.D. Cal. 2008).

9 FOIA determinations should be resolved at summary judgment stage. *Nat’l*
10 *Wildlife Fed’n v. U.S. Forest Service*, 861 F.2d 1114 (9th Cir. 1988). Courts review an
11 agency’s decision *de novo*. 5 U.S.C. § 552(a)(4)(B); *see also Louis v. United States Dep’t*
12 *of Labor*, 419 F.3d 970, 977 (9th Cir. 2005) (noting that *de novo* review “require[es] no
13 deference to the agency’s determination or rationale regarding disclosures”). However,
14 courts “accord substantial weight to an affidavit of an agency concerning the agency’s
15 determination as to technical feasibility . . . and reproducibility.” 5 U.S.C. § 552(a)(4)(B).
16 If the FOIA dispute presents a genuine issue of material fact, courts proceed to bench trial
17 or adversarial hearing. *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d
18 987, 990 (9th Cir. 2016). The Court may award summary judgment on the basis of
19 information provided by the agency in affidavits or declarations. These affidavits or
20 declarations must be “relatively detailed and non-conclusory, and . . . submitted in good
21 faith.” *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoting
22 *Ground Saucer Watch, Inc. v. C.I.A.*, 692 F.2d 770, 771 (D.C. Cir. 1981). The agency’s
23 affidavits are “accorded a presumption of good faith, which cannot be rebutted by ‘purely
24 speculative claims about the existence and discovery of other documents.’” *SafeCard*, 926
25 F.2d at 1200 (quoting *Ground Saucer Watch*, 692 F.2d at 771).

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1 **II. Analysis**

2 **A. The Government's Affidavits are Sufficient**

3 As a preliminary matter, Plaintiff asserts that the government's affidavits of
4 Mr. Harald Fuller-Bennet and Ms. Marie Derobertis are insufficient and inadmissible
5 because they are "based on inadmissible hearsay statements[,] . . . on documents that are
6 not part of the record[,] . . . [and] offer various conclusory statements about where
7 documents were most likely to be found, or which persons were most likely to have time,
8 or what types of searches would be unreasonably broad." (Doc. 28, p. 9). However, a
9 Court may rely on government affidavits "so long as the affiants are knowledgeable
10 about the information sought and the affidavits are detailed enough to allow the court to
11 make an independent assessment of the government's claim." *Lane v. Dep't of Interior*,
12 523 F.3d 1128, 1135 (9th Cir. 2008) (quoting *Lion Raisins, Inc. v. U.S. Dep't of*
13 *Agriculture*, 354 F.3d 1072, 1079 (9th Cir. 2004). Here, the government affidavits were
14 submitted by the chief information officers of the Washington Office and the Southwest
15 Region Office of the USFS. These are individuals who are knowledgeable and who have
16 access to the information in agency files. The affidavits detail the process followed by the
17 USFS to search for the information Mr. Schoeffler requested. *Cf. Weisberg v. U.S. Dep't*
18 *of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980) (noting that an affidavit which states only
19 that "I have conducted a review of FBI files which would contain information
20 Mr. Weisberg has requested. . . . The FBI files to the best of my knowledge do not
21 include any information requested by Mr. Weisberg other than the information made
22 available to him" is insufficient because it "gives no detail as to the scope of the
23 examination"). The affidavits are proper and may be considered by the Court.

24 **B. Requests 4232-F and 4325-F**

25 On June 7, 2016, Mr. Schoeffler submitted a FOIA request to the Washington
26 Office of the USDA. He requested the following:

- 27 (1) All voice recordings and written transcripts thereof
28 related to the 30 June 2013 Yarnell Hill Fire (YHF)

1 Panebaker and/or Moore and/or USFS Aerial Firefighting
2 Study, also known as the Aerial Firefighting Study, AIR-TO-
3 GROUND (A2G and/or A/G) RADIO TRANSMISSIONS.

4 (2) Between, to, and/or from any and all air resources
5 and any and all Incident Management Team and any and all
6 operational and ground personnel.

7 (3) The timeframe for this request is 30 June 2013
8 between 1500 and 1700 hours.

9 (Doc. 23, Ex. 1, Attachment A).

10 USFS assigned this request the FOIA case number of 2016-FS-R3-04232-F. (Doc.
11 23, p. 2). USFS routed the request to the Forest Service Southwest Regional Office
12 (SRO). Raquel Cantu, a government information specialist, determined that the Prescott
13 National Forest was most likely to have possession of the relevant records and instructed
14 them to search for Mr. Schoeffler's request. *Id.* at p. 3. The Prescott National Forest
15 informed Ms. Cantu that they did not have any radio communication with the USFS
16 AFUE team, and thus had no responsive records. *Id.* The SRO informed Mr. Schoeffler
17 that they had no responsive records on June 16, 2016. *Id.* at pp. 3–4. On August 4, 2016,
18 Mr. Schoeffler appealed this decision, and the appeal was assigned the FOIA case
19 number of 2016-FS-WO-00272-A. *Id.* at p. 4.

20 The SRO had also rerouted Mr. Schoeffler's initial request to the Washington
21 Office (WO). The WO assigned a separate FOIA case number, 2016-FS-WO-04325-F,
22 although the records requested remained the same as those for which the SRO had
23 searched. *Id.* The WO oversees the San Dimas Technology Development Center
24 (SDTDC), which manages the AFUE study. *Id.* A WO government information specialist
25 contacted the records manager of the SDTDC and instructed the SDTDC to search for
26 records responsive to Mr. Schoeffler's request. *Id.* The SDTDC stated that all records
27 related to the Yarnell Hill Fire were turned over to the State of Arizona, since the State
28 ran the investigation. *Id.* at p. 5. The State of Arizona, in turn, made all of the
 investigation's records publicly available on a dropbox link. *Id.* SDTDC and AFUE study

1 personal reviewed the State of Arizona’s dropbox link and determined that it did in fact
2 contain all of the AFUE data turned over to the state. *Id.*

3 On August 30, 2016, the WO informed Mr. Schoeffler that all records responsive
4 to his appeal of 4232-F (272-A) were available at the dropbox link. *Id.* On October 11,
5 2016, USFS sent a letter that responded fully to 4232-F, 272-A, and 4325-F. *Id.* at p. 6.
6 The letter again told Mr. Schoeffler of the existence of the dropbox link, which the USFS
7 asserts responds to FOIA requests 4232-F and 4325-F. *Id.* The USFS also states that the
8 appeal, 272-A, was determined to be moot. *Id.* The appeal requested the same
9 information as 4325-F, to which the WO had not yet responded.

10 Mr. Schoeffler argues that, at other times, the USDA and its employees have
11 represented that there are in fact more recordings and transcripts. First, Mr. Schoeffler
12 points to a USFS public affairs employee, Jennifer Jones, who told a journalist that
13 AFUE data was collected and could be obtained through FOIA. (Doc. 30, Ex. 1, p. 3).
14 Second, USFS fire director Mike Dudley stated that USFS wanted to “protect” videos
15 from becoming public. *Id.* Third, USFS employee Ralph Gonzales wrote that some audio
16 and video from the AFUE study was sent to a forensic lab to be cleaned up. *Id.*
17 Mr. Dudley also stated that AFUE radio communications were sent to SDTDC to be
18 analyzed. *Id.* Mr. Schoeffler asserts that responses to his FOIA requests referred to A2G
19 communications, but the actual A2G transmissions were not supplied. *Id.* Finally, a hot
20 shot supervisor, Dean Whitney had a binder with transcripts of A2G communications
21 collected by the AFUE study. *Id.* at p. 4. This binder was apparently personally compiled
22 and portions of the transcripts were later lost. (Doc. 31, Ex. 3). USDA responds that none
23 of these allegations conflict with its assertion that all data from the AFUE study was
24 turned over to the State of Arizona. (Doc. 31, pp. 3–5). The AFUE study did collect some
25 transmissions, which were sent for further investigation. The USDA asserts that the
26 further investigations revealed little and did not produce transcripts, and that all of the
27 recordings were turned over to the State of Arizona and are present in the dropbox. *Id.*
28 Similarly, Mr. Whitney states that the transcripts that had been in his binder were created

1 and maintained by the state of Arizona, not the USFS. (Doc. 31, Ex. 3). He also declares
2 that the transcripts were taken, and he knows neither by whom, nor where those
3 documents may be, and he knows of no other copies within USFS possession. *Id.* To the
4 extent Mr. Schoeffler argues that he should be allowed to depose some or all of these
5 persons prior to filing additional responses to this motion, such an assertion is
6 insufficiently supported.

7 The USDA undertook a search reasonably calculated to return all relevant
8 documents. The USDA instructed the agency in charge of the AFUE study, SDTDC, to
9 search for the records requested by Mr. Schoeffler. The SDTDC employee who manages
10 all records from the Yarnell Hill Fire, Ryan Becker, stated that all information was turned
11 over to the State of Arizona. The State of Arizona made all materials publicly available
12 and AFUE study personnel reviewed the materials and ensured that all of the information
13 turned over to the State was in fact on the dropbox. In FOIA cases, “discovery of any
14 type is generally not allowed.” *Pinson v. U.S. Dep’t of Justice*, 55 F.Supp.3d 80, 82 (D.C.
15 Cir. 2014). The exception to this “is when the plaintiff raises a sufficient question as to
16 the agency’s good faith in processing documents.” *Landmark Legal Foundation v.*
17 *E.P.A.*, 959 F.Supp.2d 175, 184 (D.C. Cir. 2013) (citations omitted). Mr. Schoeffler has
18 not raised substantial enough issues to question the good faith of the government’s search
19 or assertions. The statements by USDA personnel that Mr. Schoeffler claims prove bad
20 faith are insufficient. Mr. Whitney, for example, says that transcripts were from the State
21 of Arizona. Mr. Dudley states that recordings from transmissions that were sent for
22 further examination were likely retrieved from files on the dropbox. Many of the
23 statements were made at an early phase in the investigation when it was unclear what
24 might be captured by the AFUE study. The Court therefore grants summary judgment as
25 to these requests.

26 **B. Request 4284-F**

27 Mr. Schoeffler sent a new FOIA request on June 7, 2016 to the Coconino National
28 Forest, asking for:

1 (1) All records related to Fred J. Schoeffler and the 30 June
2 2013 Yarnell Hill Fire (YH Fire).

3 (2) Between, to, and/or from any and all Coconino N.F.
4 personnel and private citizens and/or legal entities.

5 (3) The timeframe for this request is between 30 June 2013
6 and 7 June 2016.

7 (Doc. 23, Ex. 2, Attachment C).

8 Mr. Schoeffler further stated that “COF [Coconino National Forest] Fire Staff
9 Duane Tewa, likely Custodian of these records, stated that numerous individuals have
10 submitted records regarding Schoeffler, and because of Schoeffler, YH Fire ‘drama’ is
11 being directed toward the COF.” *Id.* USFS assigned this FOIA case number 2016-FS-R3-
12 04284-F. On June 9, 2016, Mr. Schoeffler sent an addendum. He expanded on part (2) of
13 the request, to also ask for documents: “(2) Between, to, and/or from any and all COF,
14 and any/all other Federal, State, and/or municipal Wildland Fire personnel and private
15 citizen and/or legal entities, including but not limited to: Amanda Marsh, Holly Neill,
16 Elizabeth Nowicki, and/or Deanna Thompson.” (Doc. 23, Ex. 2, Attachment D).

17 On July 26, 2016, Mr. Schoeffler sent another FOIA request asking for records
18 related to himself. In addition to asking for the information requested in the June 9
19 addendum, Mr. Schoeffler also requested: “(3) Any and all COF and/or Southwest
20 Regional direction to its employees regarding any and all dialogue and/or conversations
21 and/or encounters with Fred J. Schoeffler.” (Doc. 23, Ex. 2, Attachment E). For this
22 request, Mr. Schoeffler used a timeline of “between 30 June 2013 and 26 July 2016.” *Id.*
23 USDA asserts that it considered this request to be an additional addendum or clarification
24 of 4284-F, and not a new FOIA request.¹

25 Ms. Cantu, on June 13, 2016, instructed the Coconino National Forest (CNF)
26 FOIA liaison to send Mr. Schoeffler’s request to all CNF employees. (Doc. 23, p. 7). The

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28 ¹ The September 23, 2016 response to Mr. Schoeffler states that it is a response to
the June 7 and June 9 FOIA requests. It does not mention the July 26 request at all. (Doc.
23, Ex. 2, Attachment F).

1 CNF employees searched hardcopy personnel records, electronic personnel records, and
2 email archives using the search term “Fred J. Schoeffler.” *Id.* at pp. 7–8. The results of
3 this search were sent to Mr. Schoeffler on September 23, 2016. *Id.* at 8. Mr. Schoeffler
4 appealed USDA’s response on October 11, 2016, and that appeal was given FOIA case
5 number 2017-FS-WO-00013-A. *Id.* In order to do a more comprehensive search of CNF
6 employees’ old email records, Mr. Schoeffler was twice requested to provide the names
7 of specific records custodians.² *Id.* at pp. 8–9. USDA states that Mr. Schoeffler never
8 responded, although Mr. Schoeffler claims he did respond over the phone.

9 Some of Mr. Schoeffler’s arguments are unavailing. First, Mr. Schoeffler asserts
10 that his June 9 addendum expanded the request beyond just CNF employees. His updated
11 request asked for records “[b]etween, to, and/or from any and all COF, and any/all other
12 Federal, State, and/or municipal Wildland Fire personnel and private citizen and/or legal
13 entities.” This is a broad and vague request. Under FOIA, federal agencies must “make
14 records available only upon a request which ‘reasonably describes’ the records sought.”
15 *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) (quoting 5 U.S.C.
16 § 552(a)(3)(A). Even though “courts have been wary to prohibit this requirement from
17 becoming a loophole through which federal agencies can deny the public access to
18 legitimate information, it has been held that broad, sweeping requests lacking specificity
19 are not permissible.” *Marks*, 578 F.2d at 263; *see also Yagman v. Pompeo*, 868 F.3d
20 1075, 1081 (9th Cir. 2017) (finding a FOIA request too vague when “Defendants would
21 need to engage in quite a bit of guesswork to execute [Plaintiff’s] request” because the
22 request “does not identify specific persons, much less specific documents, types of
23 documents, or types of information”). Although Mr. Schoeffler asserts in his Response
24 that this was intended to request a search of wildland fire employees beyond those at
25 CNF, it was equally reasonable for the USDA to read this as requesting communications
26 between CNF employees and the other listed groups. Under the USDA’s interpretation, a

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28 ² USDA asserts that to do a more thorough search of all CNF employees would be
time and cost prohibitive. (Doc. 23, p. 9).

1 search of CNF employees' records would naturally turn up any communications CNF
2 employees had with "other Federal, State, and/or municipal Wildland Fire personnel and
3 private citizen and/or legal entities." Even construed as Mr. Schoeffler seeks, the request
4 is overly vague. It would require too much "guesswork" on the USDA's part to determine
5 which other federal wildland fire personnel³ should have their records searched.
6 Additionally, Mr. Schoeffler asserts that the USDA erred by using the search term "Fred
7 J. Schoeffler." This is the language that Mr. Schoeffler used in his FOIA request. It was
8 not unreasonable for the USDA to match their search with the request.

9 There are, however, some questions of fact that remain as to the adequacy of the
10 USDA's search for records on Request 4284-F. First, USDA argues that CNF employees
11 could not do a more thorough records search unless Mr. Schoeffler identified specific
12 custodians. But, Mr. Schoeffler's initial June 7 request and the June 9 addendum both
13 identify Duane Tewa as a custodian of records.⁴ Although the USDA's Reply avows that
14 Mr. Tewa has searched his own and his predecessor's documents and neither source
15 contains any information responsive to Mr. Schoeffler's request, USDA had earlier
16 volunteered the use of a program, eComply,⁵ that would be used for a more thorough
17 search of Mr. Tewa's records. Even assuming as USDA's affidavit states that Mr. Tewa
18 searched through his emails and files, USDA admits that older emails and files not saved
19 in a particular manner may not turn up through a standard search.⁶ USDA requested that

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21 ³ USDA cannot search the records of state and municipal firefighters, private
22 citizens, or private legal entities as they are not employees of USDA.

23 ⁴ Mr. Schoeffler also identified Amanda Marsh, Holly Neill, Elizabeth Nowicki,
24 and Deanna Thompson as persons who may have been the subject of or received
25 generated records. These individuals, however, are not employees of the USDA and their
26 records cannot be searched by the USDA.

27 ⁵ According to the USDA, "[a]n eComply search utilizes the Clearwell electronic
28 discovery platform to perform a key-word search in a given employee or employees'
29 email archive. . . . This is contrasted with the initial search which asked only current
30 employees to conduct an email search." (Doc. 22, p. 10).

31 ⁶ "Due to storage limitations, emails from prior years that had not been filed with a
32 particular project may have already been deleted. This [eComply] search would have
33 allowed for a more thorough and comprehensive search of particular employees'
34 inboxes." (Doc. 23, p. 9).

1 Mr. Schoeffler give more targeted names of custodians to run an eComply search. Since
2 Mr. Tewa had already been identified as a potential custodian in the FOIA request itself,
3 the USDA should have used the eComply method to search Mr. Tewa's and his
4 predecessor's records.⁷ Second, questions of fact exist as to whether the USDA properly
5 searched for Mr. Schoeffler's July 26 request. The USDA claims this was resolved with
6 the June 7 and June 9 FOIA requests. Mr. Schoeffler's request pertained to CNF
7 employees *and SRO employees*. There is no evidence in the record that USDA directed
8 the SRO to do any search for information. This request also asks for information up to
9 July 26, 2016. Ms. Cantu emailed CNF employees on June 13, and there is no evidence
10 that any follow up was done after July 26 to ensure that the whole time period requested
11 was searched. There are questions of fact as to whether the USDA conducted an adequate
12 search, and the USDA is therefore not entitled to summary judgment for FOIA request
13 4284-F.

14 **C. Request 5736-F**

15 Mr. Schoeffler sent a FOIA request for AFUE transmissions again on July 27,
16 2016. He requested:

17 1) All voice recordings and written transcripts related to the
18 30 June 2013 Yarnell Hill Fire (YHR) Aerial Firefighting Use and
19 Effectiveness (AFUE),

20 1(a) All voice recordings and written transcripts related to the
21 30 June 2013 Yarnell Hill Fire (YHF) Panebaker and/or Moore and
22 /or USFS Aerial Firefighting Study, also known as the Aerial
23 Firefighting Study, AIR-TO-GROUND (A2G and/or A/G) RADIO
24 TRANSMISSIONS.

25 2) Between, to, and/or from any and all YH Fire air resources
26 and any and all YH Fire Incident Management Team and any and all
27 YH Fire operational and ground personnel.

28 ⁷ USDA argues that Mr. Tewa was not an employee of USDA at the time of the
Yarnell Hill Fire, and thus is unlikely to have relevant information. Mr. Schoeffler,
however, requested records related to himself up to July 2016, a time period extending far
past the fire itself.

1 2(a) Between, to, and/or from any and all YH Fire air
2 resources and any and all YH Fire Incident Management Team and
3 any and all YH Fire operational and ground personnel; and any and
4 all AFUE members, chairs, project leaders, project coordinators, and
5 module leaders listed below; and any and all others:

6 Bob Roth, AFUE Committee Chair, FS Fire and Aviation,
7 406-829-6712

8 Ryan Becker, Project Leader, San Dimas T&D Center, 909-
9 599-1267 #260

10 Zach Holder, Program Coordinator, Missoula T&D Center,
11 406-214-6178

12 Chris Bolz, R5 Module Leader, San Dimas T&D Center, 909-
13 635-7519

14 Erik Rodim, R1 Module Leader, Missoula T&D Center, 909-
15 635-7519

16 Shannon Moore, R4 Module Leader, NIFC, 909-635-9624

17 Dan Matthews, R3 Module Leader, Prescott, AZ, 909-635-
18 9691.

19 (Doc. 23, Exhibit 1, Attachment C).

20 Because this was related to the AFUE study, the request was routed to the
21 SDTDC. The SDTDC gave the same answer as with requests 4232-F and 4325-F: all
22 information was turned over to the State of Arizona and is on the publicly available
23 dropbox site. The USDA provided this information to Mr. Schoeffler in a letter on
24 October 11, 2016. (Doc. 23, pp. 10–11). Mr. Schoeffler did not appeal. *Id.* at p. 11.

25 FOIA requires a “[e]xhaustion of a parties’ administrative remedies . . . before that
26 party can seek judicial review.” *In re Steele*, 799 F.2d 461, 465 (9th Cir. 1986). Under
27 FOIA, an individual has the right “to appeal to the head of the agency.” 5 U.S.C.
28 § 552(a)(6)(A)(i)(III)(aa). A party “shall be deemed to have exhausted his administrative
remedies with respect to such request if the agency fails to comply with the applicable

1 time limit provisions.” *Id.* at § 552(a)(6)(C)(i). Although the USDA responded past the
2 FOIA deadlines, Mr. Schoeffler received a response before he filed this lawsuit. The
3 “constructive exhaustion provision,” § 552(a)(6)(C)(i), “lasts only up to the point that an
4 agency actually responds.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 61 (D.C. Cir.
5 1990). Once the agency responds, even if late, “the requester can seek judicial review
6 only after he has unsuccessfully appealed to the head of the agency as to any denial.” *Id.*
7 Once Mr. Schoeffler received the USDA’s response to his FOIA request, he was no
8 longer entitled to rely on constructive exhaustion. Because actual exhaustion is required
9 and Mr. Schoeffler did not do so here, the Court grants summary judgment as to request
10 5736-F.

11 CONCLUSION

12 USDA completed an adequate search for records of the AFUE study.
13 Mr. Schoeffler failed to raise a sufficient dispute of facts to justify additional discovery.
14 With regards to records about Mr. Schoeffler, however, there are questions of fact about
15 whether the USDA completed an adequate search. Mr. Schoeffler identified a specific
16 custodian of records as requested by USDA, enabling USDA to run a more thorough
17 search. USDA did not run this search. USDA also did not search for records from the
18 additional agencies and date ranges requested by Mr. Schoeffler in his addendums and
19 clarifications.

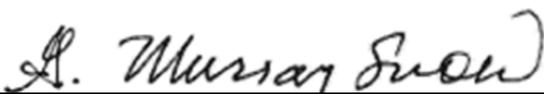
20 **IT IS THEREFORE ORDERED** that the Motion for Summary Judgment of
21 Defendant United States Department of Agriculture (Doc. 22) is **GRANTED IN PART**
22 **AND DENIED IN PART** as follows:

- 23 1. concerning Request 4232-F, the Court **grants** Defendant’s Motion for
24 Summary Judgment;
- 25 2. concerning Request 4325-F, the Court **grants** Defendant’s Motion for
26 Summary Judgment;
- 27 3. concerning Request 4284-F, the Court **denies** Defendant’s Motion for
28 Summary Judgment; and

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4. concerning Request 5736-F, the Court **grants** Defendant's Motion for Summary Judgment.

Dated this 7th day of March, 2018.



Honorable G. Murray Snow
United States District Judge