[ORAL ARGUMENT NOT YET SCHEDULED]

# No. 17-5042

## UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS and
THE ASSOCIATED PRESS,
*Plaintiffs-Appellants*,

v.

FEDERAL BUREAU OF INVESTIGATION and
UNITED STATES DEPARTMENT OF JUSTICE,
*Defendants-Appellees*.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:15-cv-01392 (Leon, J.)

# FINAL REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES*

## CASES



* Authorities upon which Plaintiffs-Appellants chiefly rely are marked with asterisks.

## GLOSSARY

| | |
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| **AP** | The Associated Press |
| **CIPAV** | Computer and Internet Protocol Address Verifier |
| **CRS** | FBI Central Records System |
| **DOJ** | Department of Justice |
| **FBI** | Federal Bureau of Investigation |
| **FOIA** | Freedom of Information Act |
| **JA** | Joint Appendix |

## SUMMARY OF ARGUMENT

Defendants-Appellees' brief underscores the failure of the Federal Bureau of Investigation ("FBI") to fulfill its obligation under the Freedom of Information Act ("FOIA" or the "Act") to conduct a good faith search "reasonably calculated to uncover all relevant documents" in response to Plaintiffs-Appellants' FOIA Requests. *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) ("*Weisberg II*").

When it was revealed in October 2014 that the FBI had posed as an Associated Press ("AP") journalist in 2007 to deliver surveillance software to a juvenile criminal suspect in Seattle, Washington (the "Seattle/Timberline Incident"), the outcry was loud and swift. Alarmed by the revelation, journalists and members of Congress sought more information from the FBI about this practice, including an accounting of other instances in which the FBI had engaged in the practice of media impersonation. The backlash was so substantial that then-FBI Director James Comey took to the pages of *The New York Times* to defend the practice as both "lawful" and "appropriate." JA 332, 396.

After the Seattle/Timberline Incident came to light, Plaintiffs-Appellants submitted three FOIA requests to the FBI with the goal of obtaining information about how often the FBI poses as a member of the news media, as it did in the Seattle/Timberline Incident, as well as the policies and procedures surrounding FBI

impersonation of news media more generally. At every stage, the FBI ignored or sought to dodge its obligations under the Act. And, despite Defendants-Appellees' unconvincing arguments to the contrary, the undisputed material facts make clear that the FBI turned an obvious blind eye to locations where relevant documents were likely to be found—including locations specifically identified by Plaintiffs-Appellants—and grouped the FOIA Requests in a facially illogical manner designed to avoid locating responsive records.

Nothing in Defendants-Appellees' brief justifies the FBI's failure to conduct an adequate search for records in response to Plaintiffs-Appellants' FOIA Requests as required by the Act. For the reasons set forth in Plaintiffs-Appellants' opening brief and herein, this Court should reverse the judgment of the district court and remand with instructions to direct the FBI to conduct an adequate, good faith search for records responsive to the FOIA Requests.

## ARGUMENT

### I. Defendants-Appellees Failed to Search Locations Where Responsive Records Were Likely to be Found.

If an agency has reason to believe that certain locations may house responsive documents, it is obligated under FOIA to search those locations, barring undue burden. *See, e.g., Campbell v. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) ("*Campbell*"); *Krikorian v. Dep't of State*, 984 F.2d 461, 468 (D.C. Cir. 1993); *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1185 (D.C. Cir. 1996)

("*Oglesby II*"). Yet the undisputed material facts make clear that in responding to the FOIA Requests at issue here, the FBI *never searched* offices and divisions where relevant documents were likely to be found, including: (1) the Office of the Director and other offices responsible for responding to congressional inquiries and/or preparing public statements concerning the FBI's practice of impersonating members of the news media; (2) offices responsible for developing the FBI's interim policy regarding impersonation of news media and facilitating the Office of the Inspector General's 2014 investigation into the Seattle/Timberline Incident; and (3) the St. Louis field office and other FBI field offices likely to have relevant documents.

Defendants-Appellees do not argue that searching these offices would have caused undue burden. Instead, they rest their argument on the FBI's application of purported "date-of-search cut-offs" that, according to Defendants-Appellees, somehow relieved the FBI of its obligation to search any of the locations identified by Plaintiffs-Appellants—notwithstanding the fact that the FBI was well aware that these locations were likely to have records responsive to the FOIA Requests. Defendants-Appellees' argument is, at best, a red herring. It fails for at least the following three reasons.

First, Defendants-Appellees' reliance on December 11, 2014 and January 6, 2015 search "cut-off" dates is misleading and, as Plaintiffs-Appellants argued

below, improper. The record regarding when the FBI first conducted any search for records in response to the FOIA Requests is, at best, muddled and inconsistent. In his original declaration, filed in support of Defendants-Appellees' motion for summary judgment, JA 101 (hereinafter "First Hardy Declaration"), David M. Hardy testified that the FBI's Central Records System ("CRS") was searched for "Group 2" material "at the litigation stage"—*i.e.*, after this lawsuit was filed in August 2015. JA 121. In response to Plaintiffs-Appellants' motion for summary judgment, however, Mr. Hardy submitted a second declaration stating instead that the FBI had purportedly "initiated the search for plaintiffs' overall request for Group 2" records months earlier, on December 11, 2014. JA 493 (hereinafter "Second Hardy Declaration"). These dueling averments indicate that the FBI utilized a cut-off date of December 11, 2014 despite not actually conducting a search for relevant "Group 2" material until almost one year later. JA 315 (undisputed that responsive records were not released until February 26, 2016 and March 28, 2016). Such conduct is in blatant violation of this Circuit's jurisprudence. *See, e.g.*, *Pub. Citizen v. Dep't of State*, 276 F.3d 634, 644 (D.C. Cir. 2002); *McGehee v. CIA*, 697 F.2d 1095, 1103 (D.C. Cir. 1983) (finding that

the CIA's long delay in responding to requester "cast considerable doubt on the merits" of the agency's application of a date-of-request cut-off).[1]

The record regarding the FBI's search for "Group 1" material is in equal disarray. As described in more detail below, *supra* Section II, the FBI searched only the Operational Technology Division for records the FBI considered "Group 1" records. The First Hardy Declaration provides no information, whatsoever, about when the Operational Technology Division was searched. The Second Hardy Declaration states that the FBI conducted a separate search of its Central Records System for the terms "media impersonation" and "CIPAV" mere days before filing its opposition to Plaintiffs-Appellants' motion for summary judgment in May 2016, but that it applied a search cut-off date of "January 6, 2015" for that search, asserting that it had "initiated the search for plaintiffs' overall request for Group 1 records" on that date. JA 492–493. In short, as Plaintiffs-Appellants

[1] The FBI's use of a December 11, 2014 search cut-off date for "Group 2" records is particularly puzzling with respect to the AP's Request. The FBI did not acknowledge receipt of the AP's request until December 1, 2014. JA 103–104. And, in February of 2015, when asked by the AP for an estimated date of completion for that request, the FBI informed the AP that the estimated date of completion for large requests was 649 days. JA 172–173. If the FBI had in fact conducted its search for "Group 2" records responsive to the AP's FOIA Request within ten days of receiving it, it seems unlikely that it would require 649 days to release records in response to that request. It is also inexplicable why the FBI would have referred to the request as "large" given that only 267 pages of "Group 2" records were ultimately located and processed by the FBI, in total, in response to all three of Plaintiffs-Appellants' FOIA Requests. JA 102.

argued below, the propriety of the "date-of-search cut-offs" selected by Defendants-Appellees are themselves disputed, and cannot be used to justify the FBI's failure to conduct an adequate search.[2]

Second, Defendant-Appellees provide no support for their assumption that locations the FBI failed to search at all should be subject to the same "date-of-search cut-offs" it applied to locations it did search. There is no applicable date-of-search for the locations identified by Plaintiffs-Appellants because no search was conducted; the FBI ignored clear indications that relevant documents were likely to be found in these offices. The FBI cannot be permitted to shirk its responsibilities under FOIA by retrospectively applying a theoretical "date-of-search cut-off" to locations it never searched in the first place.[3]

Third, even assuming, *arguendo*, that the "date-of-search cut-offs" applied by the FBI are proper, reflect when the FBI *actually* searched for records responsive to the FOIA Requests, and can be properly applied to locations that the

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[2] Despite Defendants-Appellees' assertion to the contrary, *see* Def. Br. at 31, Plaintiffs-Appellants have fully preserved their arguments, both at the district court level and before this Court, regarding the sufficiency of the FBI's search for records responsive to the FOIA Requests (including the arbitrary "date-of-search cut-offs" utilized by the FBI).

[3] As discussed in Section II, below, Defendants-Appellees' argument that the FBI's search of a single records system was adequate here is contrary to the law of this Circuit. As this Court has held, an "agency cannot limit its search to only one records system if there are others that are likely to turn up the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("*Oglesby I*").

FBI never searched at all, Defendants-Appellees still do not explain how that excuses the FBI's failure to search any of the locations identified by Plaintiffs-Appellants. These are offices and divisions that the FBI *knew*—either at the time it asserts it "initiated" its search for responsive records or while it was in the process of searching for and processing records in response to Plaintiffs' FOIA Requests—were likely to have relevant documents. For example, the FBI was certainly aware that the Office of the Director was likely to have responsive records; *The New York Times* published a letter to the editor written by then-Director Comey defending the FBI's impersonation of members of the media on November 6, 2014—well before the FBI's purported "date-of-search cut-offs." Similarly, the Office of the Inspector General began its investigation shortly after the Seattle/Timberline Incident was exposed in October 2014. In any event, as discussed in more detail below, contrary to Defendants-Appellees' erroneously narrow reading of this Court's decision in *Campbell*, 164 F.3d 20, nothing in that case or in any other decision of this Court permitted the FBI to ignore clear and specific "leads that emerge[d]" during the course of searching for and processing records in response to Plaintiffs-Appellants' FOIA Requests. *Id.* at 28.

### A. The Office of the Director and Other Offices Responsible for Responding to Congressional Inquiries and/or Issuing Public Statements Regarding the FBI's Media Impersonation.

In responding to the FOIA Requests, the FBI failed to search offices responsible for responding to congressional inquiries or drafting public statements in the wake of the public outcry surrounding the Seattle/Timberline Incident, including the Office of the Director or Office of Public Affairs, despite clear indications that relevant documents were likely to be located in those offices.

Shortly after the public revelation of the Seattle/Timberline Incident, *The New York Times* published a letter to the editor on November 6, 2014 from then-FBI Director Comey addressing the FBI's use of media impersonation and defending the tactic as both legal and reasonable. JA 396. If this publicly-available document, which was also identified in Plaintiffs-Appellants' Complaint, is not a "clear and certain" lead an agency is required to follow, *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996), then Plaintiffs-Appellants are not certain what could possibly meet that standard. Indeed, then-Director Comey's characterization of the FBI's use of media impersonation as "rare," JA 332, 396, suggests that then-Director Comey had taken steps to determine how frequently the practice of media impersonation is utilized.

Defendants-Appellees speculate that "[i]f the Office of the Director relied on background material in creating the letter to the editor, such material would have

come from and reside in the components tasked with performing the search at issue here—*i.e.*, the components involved in the Timberline incident and the components likely to have policies and guidelines regarding media impersonation." Def. Br. at 32. Defendants-Appellees, of course, have no support for that claim because they did not search the Office of the Director, or even make any inquiries concerning what types of responsive materials might be located there. A search of the Office of the Director would have turned up, at the very least, the letter to the editor written by then-Director Comey, the November 6, 2014 letter sent by the Reporters Committee and 25 other media organizations to then-Director Comey seeking information about the FBI's practice of media impersonation, and any internal correspondence related to either document. JA 332. All of these items fall within the scope of Plaintiffs-Appellants' FOIA Requests, and all of these items are also dated before the arbitrary "date-of-search cut-offs" cited by Defendants-Appellees. The FBI should have searched the Office of the Director; it could not under the law of this Circuit "limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby I*, 920 F.2d at 68.

Further, as detailed in Plaintiffs-Appellants' opening brief, Senator Leahy delivered a letter to then-Attorney General Eric Holder on October 30, 2014—before the "date-of-search cut-offs" cited by Defendants-Appellees—expressing concern about the "ethical and legal risks" involved in the FBI's practice of media

impersonation. JA 331, 387–388. Senator Grassley soon followed suit, delivering a letter to then-FBI Director Comey on June 12, 2015 asking the FBI for an accounting of how many times the agency impersonated personnel from legitimate companies in deploying spyware, and which companies it has impersonated. JA 333, 390–393. Plaintiffs-Appellants filed their Complaint in August 2015, ten months after Senator Leahy sent his letter to then-Attorney General Holder and two months after Senator Grassley sent his letter to the FBI. JA 007, 331, 333. The FBI did not release *any* material responsive to the FOIA Requests until February 26, 2016—more than a year after Senator Leahy's letter, eight months after Senator Grassley's letter, and six months after Plaintiffs-Appellants filed their Complaint. JA 315. By neglecting to search these locations, the FBI clearly ignored information which "suggest[ed] the existence of documents that it could not locate without expanding the scope of its search." *Campbell*, 164 F.3d at 28.

### B. Offices and Divisions Involved in Crafting the FBI's Interim Policy and Facilitating the Inspector General's Investigation.

As detailed in Plaintiffs-Appellants' opening brief, the Office of the Inspector General began an investigation shortly after the Seattle/Timberline Incident came to light in October 2014 that culminated in the issuance of a final report in September 2016 ("Inspector General's Report"). JA 526, 534. Further, while the Inspector General's investigation was ongoing, the FBI developed and adopted a new interim policy, Policy Notice 0907N, concerning impersonation of

members of the news media. JA 544. Notwithstanding that this lawsuit was filed in August 2015, Plaintiffs-Appellants were aware of the existence of neither the Inspector General's investigation nor the FBI's interim policy until the Inspector General's Report was released publicly, after the parties' cross-motions for summary judgment in this case were fully briefed. JA 526.

The Inspector General's investigation was ongoing well before Plaintiffs-Appellants filed their Complaint, and it continued while the FBI searched for and processed records in response to Plaintiffs-Appellants' FOIA Requests in 2016. Although records related to the FBI's interim policy and the Inspector General's investigation clearly fall within the scope of the FOIA Requests, numerous responsive e-mails identified in the Inspector General's Report were neither produced to Plaintiffs-Appellants nor are reflected on Defendants-Appellees' *Vaughn* Index. JA 507–514. The FBI's failure to identify documents related to the Inspector General's investigation and its own interim policy raise "substantial doubt" that its search was "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999).

It is undisputed that the Office of the Inspector General reviewed "approximately 2000" documents in preparing its report and that a total of only 267 pages of records were located and processed by the FBI in response to

Plaintiffs' FOIA Requests. JA 540, 329. Plaintiffs-Appellants' opening brief accurately notes that the majority of the approximately 2000 documents reviewed by the Inspector General's Office are likely responsive to the FOIA Requests at issue here. Pls. Br. at 32. Defendants-Appellees' assertion in their brief that "Plaintiffs did not request the entire Timberline case file" is irrelevant and unpersuasive. Def. Br. at 37.

Tellingly, in support of that argument, Defendants-Appellees selectively rely on a portion of the FOIA Request submitted by The Associated Press, which sought "[a]ny documents referring to the decision to create a fake [Associated Press] news article in the Timberline High School case," including "correspondence between the FBI's Seattle office and FBI headquarters about the case," a "copy of the internal review carried out by the FBI," and a "copy of the Web link sent by the FBI to [the] suspect in 2007." JA 053–054. Defendants-Appellees ignore the FOIA Requests submitted by the Reporters Committee, which sought, *inter alia*, "all records concerning the FBI's utilization of links to what are or appear to be news media articles or news media websites to install data extraction software, remote access search and surveillance tools, or the 'Computer and Internet Protocol Address Verifier' (CIPAV)." JA 054–055. Thus, even assuming, *arguendo*, that the "entire Timberline case file" was not responsive to the AP's Request, the vast majority—if not all—records concerning the

Seattle/Timberline Incident, which involved the FBI's utilization of a link to a fake AP news article to install a CIPAV on a juvenile suspect's computer, are responsive to one of the two FOIA requests made by the Reporters Committee. Defendants-Appellees' attempt to explain why the FBI's search turned up only 267 pages of records when the Office of the Inspector General reviewed 2,000 documents in the course of its investigation into the Seattle/Timberline Incident fails on its face.

Finally, Defendants-Appellees urge this Court to adopt an erroneously narrow reading of *Campbell*, 164 F.3d 20. Def. Br. at 36. Applying a standard of "reasonableness," this Court in *Campbell* held that the FBI was not permitted to ignore "leads that emerge[d]" in the course of its search for documents in response to a FOIA request. *Campbell*, 164 F.3d at 28. In *Campbell*, those leads were found in documents located during the FBI's initial search for responsive records, and indicated that relevant documents would be found in additional locations. This specific set of facts is replicated here; as discussed in more detail below, *see supra* Section I.C., the FBI ignored leads found in records identified during its search that pointed to additional locations likely to have relevant documents—namely, certain

FBI field offices. But the holding of *Campbell* is not, as Defendants-Appellees argue, limited solely to that specific set of facts.

As the Court in *Campbell* explained, courts in this Circuit should "appl[y] a 'reasonableness' test to determine the 'adequacy' of a search methodology … consistent with congressional intent tilting the scale in favor of disclosure." *Campbell*, 164 F.3d at 27 (quoting *Weisberg II*, 705 F.2d at 1351). While an agency "has discretion to conduct a standard search in response to a general request," the agency must "revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Id.* at 28. The Court in *Campbell* did not expressly define what constitutes a "lead[]" that would require an agency to "revise its assessment of what is 'reasonable'," *id*., but, presumably, it would include information like the existence of an Inspector General's investigation and the development of a new FBI policy regarding media impersonation. These were leads that undisputedly emerged either *before* or *during* the FBI's search for relevant documents, and well before the FBI produced any records in response to Plaintiffs-Appellants' FOIA Requests. How those leads emerged is irrelevant; under *Campbell*, the FBI could not ignore them. Under the standard of "reasonableness" applied by this Circuit and highlighted in *Campbell*,

it is clear that the FBI failed to conduct a good faith search "reasonably calculated to uncover all relevant documents." *Weisberg II*, 705 F.2d at 1351.

**C. The St. Louis Field Office and Other FBI Field Offices.**

As explained in Plaintiffs-Appellants' opening brief, records released by the FBI indicate that the court order sought by the FBI in the Seattle/Timberline case was patterned on one previously sought by the FBI in St. Louis. This suggests that a search of the FBI's St. Louis field office would be likely to locate relevant documents; the FBI, however, did not search the St. Louis field office. Defendants-Appellees argue that it was not required to pursue that lead because "there are no facts in the records themselves that indicate the technique employed [in the St. Louis case] also involved the FBI impersonating a member of the media." JA 494–495. Similarly, Defendants-Appellees use the same logic to argue that the FBI was not required to expand its search based on an FBI court filing in Massachusetts that lists the Seattle/Timberline Incident among several others utilizing similar "network investigative techniques." JA 333–334. Defendants-Appellees misapprehend the relevant standard. "An agency has discretion to conduct a standard search in response to a general request, but it must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Campbell*, 164 F.3d at 28. As was the case in *Campbell*, *id*., an explicit reference in records identified in the course of an

agency's initial search for responsive material "may indicate, for example, other offices that should have been searched, additional search terms that should have been used, or records custodians who should have been consulted." *Rollins v. United States Dep't of State*, 70 F. Supp. 3d 546, 550 (D.D.C. 2014). Asserting that a lead is "speculative" is inappropriate; "in any FOIA request, the existence of responsive documents is somewhat 'speculative' until the agency has finished looking for them." *Campbell*, 164 F.3d at 28.

## II. The Limited Search Conducted by Defendants-Appellees Was Flawed and Inadequate.

Because the FBI turned a blind eye to a number of specific offices and other locations that were likely to possess records responsive to Plaintiffs-Appellants' FOIA Requests, its search was inadequate as a matter of law. *See Oglesby I*, 920 F.2d at 68. And while the search that the FBI *failed* to conduct, alone, requires reversal, the narrow search the FBI *did* conduct was also fundamentally flawed.

Defendants-Appellees have fallen far short of carrying their burden to establish "beyond material doubt," *Weisberg II*, 705 F.2d at 1351, that the FBI made a "good faith effort to conduct a search" for the records requested by Plaintiffs-Appellants, "using methods which can be reasonably expected to produce the information requested." *Oglesby I*, 920 F.2d at 68.

As detailed in Plaintiffs-Appellants' opening brief, the FOIA Requests seek essentially three categories of records: (1) records concerning the FBI's

impersonation of an AP journalist in the 2007 Seattle/Timberline Incident; (2) records concerning other instances where the FBI has impersonated a member of the news media to deliver malware to a suspect; and (3) records concerning guidelines and policies governing FBI impersonation of members of the news media. JA 053–055. The FBI separated these three FOIA Requests into two "groups" for processing. "Group 1" was deemed to consist of records concerning the FBI's practice of using "links to what appear to be news media articles or news media websites" to install malware. JA 335, 110–111. "Group 2" consisted of the remaining two categories of records sought by the FOIA Requests: records relating to (1) the 2007 Seattle/Timberline Incident, and (2) the FBI's guidelines and policies concerning impersonation of the news media. JA 335–336, 110–111.

The FBI's decision to "group" the records sought by Plaintiffs-Appellants in this way effectively ensured that records reflecting incidents of media impersonation *other* than the Seattle/Timberline Incident—materials at the core of Plaintiffs-Appellants' FOIA Requests (and at the center of the public controversy the FBI faced after the Seattle/Timberline Incident came to light in 2014)—would not be located in the FBI's search. Remarkably, Defendants-Appellees' brief completely fails to address the FBI's decision to "group" the FOIA Requests in this manner, let alone to demonstrate that doing so was a method "reasonably expected to produce the information requested." *Oglesby I*, 920 F.2d at 68. Ignoring the

bulk of Plaintiffs-Appellants' arguments, Defendants-Appellees fail to establish that the FBI's "Group 1" and "Group 2" search was reasonable and adequate.

**A. The "Group 1" Search**

Relying on the Hardy Declarations, Defendants-Appellees contend that the FBI's decision to search the FBI's Operational Technology Division—and *only* that division—for "Group 1" records was proper because, according to Mr. Hardy, the Operational Technology Division is "solely responsible for the deployment and collection of all lawfully conducted electronic surveillance[.]" Def. Br. at 17. Further, according to Defendants-Appellees, "because the search [of the Operational Technology Division] revealed no leads indicating responsive documents would likely be located elsewhere, this targeted search satisfied the FOIA's requirement of a search reasonably calculated to find responsive records." Def. Br. at 18.[4]

It is unsurprising that the FBI's "targeted" search of only the Operational Technology Division "revealed no leads," because the search turned up no records at all. JA 113. And this is where the problem lies. An adequate search for "Group 1" records—records concerning the FBI's practice of using "links to what appear

[4] As discussed in Section I, above, Defendants-Appellees' argument that the FBI's search of a single records system was adequate here is contrary to the law of this Circuit. As this Court has held, an "agency cannot limit its search to only one records system if there are others that are likely to turn up the information requested." *Oglesby I*, 920 F.2d at 68.

to be news media articles or news media websites" to install malware, JA 335—would be expected to locate at least some records concerning the Seattle/Timberline Incident. Yet the FBI's search of the Operational Technology Division did not; it located nothing. While Defendants-Appellees attempt to sidestep this inconvenient fact by arguing that "the adequacy of a search is 'determined not by the fruits of the search, but by the appropriateness of [its] methods[,]'" Def. Br. at 23 (quoting *Hodge v. FBI*, 703 F.3d 575, 579 (D.C. Cir. 2013) (internal quotation omitted)), where, as here, a search of a single location fails to turn up responsive records that are known to exist, the "appropriateness of [its] methods" are validly called into question. That the FBI's search of its Operational Technology Division failed to locate undisputedly responsive records related to the Seattle/Timberline Incident (records that were found elsewhere by the FBI, utilizing different search methods, *see* JA 102–103, 114–116) is enough to raise "substantial doubt" that the FBI's search for "Group 1" records was adequate. *Valencia-Lucena*, 180 F.3d at 326.

Faced with the inescapable fact that any reasonable search for "Group 1" records would have turned up at least some records related to the Seattle/Timberline Incident, Defendants-Appellees argue perplexingly that it would not have "[been] reasonable to duplicate the Timberline portion of the Group 2 search in the course of conducting the Group 1 search." Def. Br. at 25.

This argument makes no sense. Neither Hardy Declaration indicates that the Operational Technology Division, when asked to search for "Group 1" materials, was instructed to *avoid* searching for documents related to the Seattle/Timberline Incident. And, indeed, had the FBI's narrow search of only the Operational Technology Division in fact been reasonably expected to produce records concerning the FBI's practice of using "links to what appear to be news media articles or news media websites" to install malware, JA 335, as Defendants-Appellees claim, then there would have been no need for the FBI to conduct a separate, different "Group 2" search for records concerning the Seattle/Timberline Incident. That the FBI had to look elsewhere to locate *any* records relating to the FBI's use of a link to what appeared to be an Associated Press news article to install malware in the Seattle/Timberline Incident makes clear that conducting only a narrow search of the Operational Technology Division was inadequate.

Neither the First Hardy Declaration nor the Second Hardy Declaration provides any concrete details about the "search terms and the type of search performed" for Group 1 materials, as is required by this Court's precedent. *Oglesby I*, 920 F.2d at 68; *see also DeBrew v. Atwood*, 792 F.3d 118, 122 (D.C. Cir. 2015) (determining a declaration was insufficient where it "[did] not disclose the search terms" and described only the agency employees to whom the search "was assigned," "why they were chosen," and what they found). "Affidavits

setting forth the record procurement efforts of an agency should provide some detailing of the scope of the examination conducted." *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982); *see also Oglesby I*, 920 F.2d at 68; *Weisberg II*, 705 F.2d 1344 at 1351; *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007). Yet the Hardy Declarations filed by Defendants-Appellees merely note that the Operational Technology Division was given the text of the FOIA Requests related to what the FBI deemed "Group 1" records, JA 491–492, and that the "verbatim" text of the FOIA Requests was "one of the search parameters" provided to the Division; Defendants-Appellees have provided no additional details about the search conducted by the Operational Technology Division. JA 492–493.[5]

An agency's declaration cannot be relied upon where it is "not sufficiently detailed … because it does not disclose the search terms … and the type of search performed." *DeBrew v. Atwood*, 792 F.3d at 122; *see also Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 370 & n.49 (D.C. Cir. 1980) (holding that an affidavit that "merely states the fact that [an employee] searched and expresses his conclusion that the files contain nothing [responsive]" "gives no detail as to the scope of the examination and thus is insufficient as a matter of law"); *Morley*, 508

[5] Indeed, although Defendants-Appellees assert that the Division was "told" to send an email to all of its employees, Def. Br. at 22, the First Hardy Declaration states only that this step was "recommended." JA 112–113. It remains unclear what employees, if any, actually completed the requested search, when they did so, and what search terms and other search parameters those employees used.

F.3d at 1122 (holding that an affidavit that "merely identifies the [agency components] that were responsible for finding responsive documents without identifying the terms searched or explaining how the search was conducted in each component" could not justify summary judgment (internal quotation marks and citation omitted)).

This Court recently reinforced this requirement in *Aguiar v. Drug Enforcement Agency*, Case No. 16-5029 (D.C. Cir. Aug. 4, 2017). In *Aguiar*, the Drug Enforcement Agency asked one office to conduct a search of its files for records responsive to the FOIA request at issue. *Id.* at 12. Because the agency failed to explain the methodology of its search, including which employees were tasked with searching for records and which search terms were used, this Court determined that the agency's "declarations are too sparse to assure the court on summary judgment that the search was reasonable," and remanded the matter to the district court. *Id.* at 14.

Because neither Hardy Declaration offers any information about the search terms or other search methods used by the FBI to conduct its search of the Operational Technology Division, neither provide any explanation for why that search, if it was indeed reasonable and sufficient, located no "Group 1" records. Recognizing that such vague representations on the part of agencies do not aid the court in conducting a *de novo* review of the sufficiency of an agency's search

efforts, this Circuit has long required agency declarations to identify the specific "search terms" employed by agency personnel conducting searches for responsive records. *See Oglesby I*, 920 F.2d at 68; *see also Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011); *Valencia-Lucena*, 180 F.3d at 326; *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). That requirement has undisputedly not been satisfied here.

Finally, Defendants-Appellees argue that "Plaintiffs do not identify any additional, particular components within the FBI that, in their view, should have been selected for a targeted search for Group 1 records based on the responsibilities or functions of the components." Def. Br. at 25. It is astonishing that Defendants-Appellees would make this argument when Plaintiffs-Appellants have done precisely that in every single memoranda of law filed in this litigation. Plaintiffs-Appellants have *repeatedly* pointed to several offices, including the Office of the Director, Office of Public Affairs, and other regional offices, that are reasonably likely to contain records responsive to Plaintiffs-Appellants' FOIA Requests based on their "responsibilities or functions." *See, e.g.* JA 007, 575; *see also* Pls. Br. at 29–37. As detailed above, *infra* Section I, and as Plaintiffs-Appellants have argued consistently throughout this litigation, there are a number of additional, specific offices within the FBI that should have been searched in response to the FOIA Requests.

**B. The "Group 2" Search**

Defendants-Appellees' defense of its search for "Group 2" materials—records relating to the 2007 Seattle/Timberline Incident, as well as records related to the FBI's guidelines and policies concerning impersonation of the news media—likewise fails. Notably, Defendants-Appellees offer no explanation for the remarkable fact that no documents related to the FBI's interim policy regarding impersonation of news media were identified by the FBI during the course of its search for "Group 2" records, even though the Reporters Committee's FOIA Requests expressly sought "all records concerning the FBI's guidelines and policies concerning undercover operations or activities in which a person may act as a member of the news media[.]" JA 054–055.

As with its "Group 1" search, the FBI failed to identify the search terms or methods used to search for "Group 2" material. *See Oglesby I*, 920 F.2d at 68. Again, as with its "Group 1" search, the FBI simply states that it provided the Seattle Division, the Office of General Counsel, Discovery Processing Units, the Operational Technology Division, the Behavioral Analysis Unit, the National Covert Operations Section within the Criminal Investigative Division, and the Training Division with a "verbatim" copy of the FOIA Requests; a representation that falls far short of what is needed to demonstrate that a sufficient search for responsive records was conducted. *See Friends of Blackwater v. U.S. Dep't of the*

*Interior*, 391 F. Supp. 2d 115, 119–121 (D.D.C. 2005) ("Without evidence in the agency's affidavit of the specific search terms used to carry out the search, . . . the Court finds that the agency's search . . . was inadequate.").

Defendants-Appellees argue that the FBI "searched" the Operational Technology Division for records responsive to the "Group 2" request seeking an accounting of the number of times the FBI has impersonated media organizations or generated media-style material to deliver malicious software to suspects. Def. Br. at 8. But as Defendants-Appellees' brief makes clear, this "search" was not an actual search for responsive records; the Operational Technology Division merely informed Defendants-Appellees that it "does not maintain an accounting of when and how often specific techniques are deployed or authorized" and ended the inquiry there. JA 494.

Moreover, while the First Hardy Declaration states that the FBI searched for responsive documents in its Central Records System ("CRS") and Electronic Surveillance ("ELSUR") indices, it did so using three keywords relating *solely* to the Seattle/Timberline Incident. JA 121, 318–319. Though Defendants-Appellees note that the FBI, "in an abundance of caution," Def. Br. at 7, 20, searched CRS for the terms "media impersonation" and "CIPAV," as a supplement to their search, they leave out the fact that this search was only conducted on the eve of Defendants-Appellees' reply/opposition to Plaintiffs-Appellants' motion for

summary judgment at the district court level, several months after the FBI had processed and produced responsive records. Predictably, the search yielded no results. JA 492–493.

Given the absence of information about the specific search terms and other search methods used, neither Plaintiffs-Appellants nor the Court has any way of determining which offices or divisions searched for records responsive to which portions of the FOIA Requests and how. The lack of specific details in the Hardy Declarations regarding the agency's search is particularly problematic where, as here, the FBI combined a more specific portion of the FOIA Requests (for documents related to the Seattle/Timberline Incident) with a broader, more general portion (seeking records relating to the FBI's guidelines and policies concerning impersonation of the news media) into the same "Group 2" search and, as discussed above, failed to locate records—including records concerning the FBI's interim policy regarding media impersonation—that are known to exist, and would have been identified by a search "reasonably calculated to uncover all relevant documents" in response to Plaintiffs-Appellants' FOIA Requests. *Weisberg II*, 705 F.2d at 1351.

## CONCLUSION

For the reasons above, the Court should vacate the judgment below and direct the FBI to conduct a sufficient search for records responsive to Plaintiffs-Appellants' Requests.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,149, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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Dated: September 1, 2017

## CERTIFICATE OF SERVICE

On September 1, 2017, I served upon the following counsel for Defendants-Appellees one copy of Plaintiffs-Appellants' FINAL REPLY BRIEF FOR PLAINTIFFS-APPELLANTS via this Court's electronic filing system, and two paper copies via First-Class Mail:

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