IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS Plaintiff, v. **U.S. DEPARTMENT OF JUSTICE, *et al.*,** Defendants.	Case No. 19-2847 (TFH)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Katie Townsend
Adam A. Marshall
Gunita Singh
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
Email: ktownsend@rcfp.org
Email: amarshall@rcfp.org
Email: gsingh@rcfp.org

Counsel for Plaintiff

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INTRODUCTION

This case concerns three requests submitted by the Reporters Committee for Freedom of the Press ("RCFP" or "Plaintiff") for records from the U.S. Department of Justice Criminal Division ("Criminal Division"), the Federal Bureau of Investigation ("FBI"), and the Executive Office for United States Attorneys ("EOUSA") (collectively, "Defendants") pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA" or the "Act"). RCFP's FOIA requests seek records related to the federal government's involvement in the questioning of freelance journalist Bryan Carmody ("Carmody") during a law enforcement raid of his San Francisco home in 2019.

Bryan Carmody has worked for nearly thirty years as a journalist and videographer covering California's Bay Area.[1] On April 11, 2019, the San Francisco Police Department ("SFPD") requested Carmody's cooperation in identifying his source for an internal SFPD report concerning the death of San Francisco public defender Jeff Adachi.[2] Carmody declined to identify his confidential source.[3] Subsequently, on May 10, 2019, the SFPD executed warrants to search Carmody's home and office, Pl.'s Combined Statement of Material Facts as to Which there is no Genuine Issue and Resp. to Defs.' Statement of Material Facts ("Pl.'s SMF") ¶ 70, taking a sledgehammer to the gate of his home and seizing his computers, phones, journalistic work product, and other devices. *See* Marshall Decl. Ex. 8. While the SFPD made their way through Carmody's home, two FBI agents questioned Carmody. Pl.'s SMF ¶ 71. Carmody refused to answer, informed the law enforcement officers present that he was a journalist, and repeatedly

[1] Amir Vera and Keith Allen, *San Francisco police seize equipment of freelance journalist who refused to identify a source*, CNN (June 11, 2019), https://perma.cc/Y9HR-XJR4.
[2] *See generally* Linda Moon and Melissa Wasser, *A close look at the Bryan Carmody case*, Reporters Committee for Freedom of the Press (Oct. 9, 2019), *archived at* https://perma.cc/R6AQ-DKZ9.
[3] *Id*.

asked to speak to his attorney. Marshall Decl. Exs. 1–4.

Upon learning of the Carmody incident, and his questioning by FBI agents present at the raid, the Reporters Committee, *inter alia*, submitted the FOIA requests at issue in this case to obtain more information about the federal government's involvement. Federal law prohibits the search or seizure of journalists' work product and documentary materials, with exceptions in only extreme circumstances. *See* 42 U.S.C. § 2000aa *et seq.* ("Privacy Protection Act"). In addition, the Department of Justice is subject to internal rules that protect journalists and news outlets from such intrusions by federal law enforcement: the "Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media." 28 C.F.R. § 50.10 (the "News Media Policy"). The News Media Policy, some form of which has been in effect for almost 50 years, along with the United States Attorneys' Manual, mandates robust review, evaluation, and approval before questioning or seizing work product materials from members of the news media. *See id.*; United States Attorneys' Manual § 9-13.400.

As a result of this lawsuit, it has become clear that even though FBI agents questioned Carmody during the raid of his home, the federal government did not follow the procedures set forth in the News Media Policy. *See* Pl.'s SMF ¶ 114; *compare* 28 C.F.R. § 50.10 *with* Declaration of Amanda Marchand Jones ("Jones Decl."), ECF No. 15-2, ¶¶ 13–14 (explaining that authorization requests under the News Media Policy are tracked in a specific database and no records regarding Carmody were located in it). The government's failure to abide by its own policy in connection with the FBI's questioning of Carmody is deeply troubling, and it is especially important for the Court in this case to ensure Defendants' compliance with their FOIA obligations. Plaintiff and the public have a right to be fully informed as to how and why the federal

government's own rules for questioning journalists were not followed here.

Defendants have failed to satisfy their obligations under the Act, refusing to search for specific records sought by RCFP, failing to identify how various searches were carried out, and unlawfully withholding the names of the FBI agents who improperly questioned Carmody from the single page they released. As detailed herein, the Criminal Division and the FBI have refused to conduct searches for email records or text messages, despite being specifically requested by RCFP. *Compare* Declaration of Adam A. Marshall ("Marshall Decl.") Exs. 1, 3 (Plaintiff's requests seeking, *inter alia*, "email correspondence, text messages, and other electronic messages") *with* Jones Decl. ¶ 14 and Declaration of Michael G. Seidel ("Seidel Decl."), ECF No. 15-3, ¶ 26 (explaining that the Criminal Division and FBI, respectively, did not search for responsive emails, texts, or other electronic messages). And despite clear and unambiguous leads, the FBI also failed to search the San Francisco Field Office or the records of the two agents who questioned Carmody. These deficiencies are especially egregious given that RCFP has obtained positive proof of responsive emails—including from one of the FBI's agents—through a separate records request to the SFPD.

While the EOUSA has conducted some searches, it has still failed to satisfy basic requirements for describing how it carried them out, in contravention of longstanding, binding caselaw in this Circuit. *See, e.g.*, *Reporters Comm. for Freedom of the Press v. FBI*, 877 F.3d 399, 403 (D.C. Cir. 2017) (recounting standards for agency affidavits in FOIA cases).

Finally, with respect to the single page released in response to RCFP's requests, the FBI has improperly withheld the names of the two agents that questioned Carmody, purportedly under Exemptions 6 and 7(C). Not only is there no foreseeable harm in the release of this information—including because the name of at least one of the special agents is already known—but there is an

overriding public interest in knowing who violated longstanding DOJ rules regarding questioning members of the news media. Accordingly, that information should not be redacted.

For the reasons set forth herein, Plaintiff respectfully requests that the Court (1) deny the Criminal Division's and EOUSA's motion for summary judgment; (2) deny FBI's motion for summary judgment as to the adequacy of its search for records and its withholdings pursuant to Exemptions 6 and 7(C)[4]; and (3) grant Plaintiff's cross-motion for partial summary judgment.

FACTS, BACKGROUND, AND PROCEDURAL HISTORY

The Raid of Carmody's Home and the Questioning by the FBI

On the morning of May 10, 2019, San Francisco Police Department ("SFPD") officers executed search warrants at the home and office of longtime freelance journalist Bryan Carmody, Pl.'s SMF ¶ 70, taking a sledgehammer to the entry of his home and seizing his electronic devices and journalistic work product, *see* Marshall Decl. Ex. 8. The raid followed Carmody's refusal to reveal to police his confidential source for an internal SFPD report regarding the death of San Francisco public defender Jeff Adachi.[5] The SFPD officers who raided Carmody's home were specifically instructed *not* to turn on their body worn cameras while executing their warrants, according to an SFPD memorandum obtained by RCFP.[6] Carmody was handcuffed for six hours while the SFPD searched his home, attic, garage, and office.[7] While he was handcuffed, two FBI agents questioned Carmody.[8] Carmody declined to respond to the agents' questions, informing them that he was a reporter and asking to speak to his attorney . *See* Marshall Decl. Ex. 4.

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[4] Plaintiff does not challenge the FBI's redactions under Exemption 7(A).
[5] Moon and Wasser, *A close look at the Bryan Carmody case*, *supra* note 2.
[6] Sabrina Conza, *San Francisco police memo: Officers told not to use bodycams during raid of journalist's home*, Reporters Committee for Freedom of the Press (June 17, 2020), https://perma.cc/G6FF-6D9G.
[7] *Id*.
[8] *Id*.

The incident outraged journalists, news organizations, and press freedom advocates around the country. Sixty news media organizations led by the Reporters Committee sent a letter in support of Carmody's motions to quash the search warrants executed at his home and office, urging a California court to order the immediate return of his journalistic work product, documentary materials, and newsgathering equipment that were seized by the police.[9] Subsequently, Carmody sought and obtained orders from California state courts quashing *all* five search warrants issued with respect to him and his property.[10] All five judges agreed that the search warrants were improperly issued against Carmody in violation of the California shield law which explicitly protects journalists and their work by safeguarding the identity of their sources and the contents of their work product, and prohibits the use of a search warrant to seize journalistic work product.[11]

On May 20, 2019, the Reporters Committee, along with the First Amendment Coalition and the Northern California Chapter of the Society of Professional Journalists, filed a motion to unseal Carmody's arrest and search warrant records in San Francisco Superior Court.[12] On July

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[9] Letter from Reporters Committee for Freedom of the Press and 59 other media organizations to the Honorable Samuel Feng (May 16, 2010), *available at* https://perma.cc/YXJ4-5SYQ.

[10] *See* Order Granting Motion to Quash and Granting Motion to Unseal Search Warrant 25161763 (Cal. Sup. Ct., Jul. 22, 2019), https://perma.cc/UZ3F-G2H5; Order Granting Motion to Quash, Granting Motion to Unseal the Search Warrant Materials, Granting and Denying Requests to Redact Information from Unsealed Affidavit and Making of Related Orders (Cal. Sup. Ct., Aug. 22, 2019), https://perma.cc/EG4K-PV5G; Order of the Court (Cal. Sup. Ct., Aug. 2, 2019), https://perma.cc/EQ6H-ZXU4; Order Granting Motion to Return Property and Motion to Quash re: Search Warrant (Cal. Sup. Ct., Aug. 8, 2019), https://perma.cc/RF5E-UYNY; Order Granting Motion to Return Property and Granting Motion to Quash Search Warrant 43684 (Cal. Sup. Ct., Aug. 2, 2019), https://perma.cc/5C5N-KU75.

[11] *See* Cal. Const. art. I, § 2(b); Cal. Evid. Code § 1070.

[12] Notice of Motion and Motion by Media Coaliton to Unseal Arrest and Search Warrant Records; Memorandum of Points and Authorities in Support; Declaration of David Snyder; Declaration of Duffy Carolan, Ex. A Thereto, *In Re Application of Media Coalition to Unseal Search Warrant Materials Pertaining to Warrant Numbers SW43684 and SW43687* (Sup. Ct. of the State of Cal., May 20, 2019), *available at* https://www.rcfp.org/wp-content/uploads/2019/05/unsealing-motion-brian-carmody.pdf.

18, Superior Court Judge Rochelle East quashed and unsealed the 11-page warrant San Francisco police used to seize Carmody's phone records in May.[13] Judge East found that the warrant should have never been issued, stating that investigators did not inform her that Carmody was a journalist who has had a police press pass for 16 years and was clearly protected under California's shield law.[14] In March 2020, San Francisco approved a $369,000 settlement to compensate Carmody for the illegal search of his home and office and the seizure of his property.[15]

The DOJ's News Media Policy

The provisions of the News Media Policy restricting questioning of journalists were codified in 1973. *See* 38 Fed. Reg. 29,588 (Oct. 26, 1973).[16] The News Media Policy was updated to its current form in 2014 and 2015. *See* 28 C.F.R. 50.10. Its provisions were strengthened following outcry over, among other things, revelations that the Department of Justice secretly subpoenaed phone records from the Associated Press and labeled a Fox News journalist a "co-conspirator" in a criminal investigation to obtain a warrant for his emails.[17] The News Media Policy mandates, among other things, rigorous review of requests by law enforcement to compel members of the news media to disclose documents and information. *See id*. Attorney General approval is required before members of the news media may be targeted by a search warrant or subpoena, or subjected to questioning related to their newsgathering activities. *Id*.

Section 9-13.400 of the United States Attorneys' Manual ("USAM")[18] implements and

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[13] *Available at* https://www.rcfp.org/wp-content/uploads/2019/07/Bryan-Carmody-Search-Warrant-RCFP.pdf.
[14] *See* Linda Moon and Melissa Wasser, *supra* note 2.
[15] Megan Cassidy, *SF Supervisors approve payout to journalist whose home, office were raided*, San Francisco Chronicle (Mar. 31, 2020), https://perma.cc/227Z-W3JC.
[16] *Available at* https://www.govinfo.gov/content/pkg/FR-1973-10-26/pdf/FR-1973-10-26.pdf.
[17] *See* Associated Press, *New Guidelines Issued for US News Media Leak Investigations* (Jan. 14, 2015), *archived at* https://perma.cc/74HA-PYBT.
[18] *Available at* https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.400.

complements the News Media Policy's requirements by mandating, among other things, that DOJ officials submit a memorandum to the agency's Policy and Statutory Enforcement Unit ("PSEU") "describing the relevant facts and addressing the relevant considerations" required to determine whether the DOJ may properly seek to obtain information members of the news media. Pl.'s SMF ¶ 68. Submission of this memorandum is part of a mandatory consultation wherein the Attorney General evaluates whether law enforcement investigative tools may be used against members of the news media. *See id*.

RCFP's FOIA Requests and Defendants' Responses

On June 21, 2019, RCFP submitted a FOIA request to each Defendant. Pl.'s SMF ¶¶ 74, 75, 77. RCFP's requests sought the following records from each agency:

1. All records mentioning or referring to Bryan Carmody.

2. All records, including email correspondence, text messages, and other electronic messages, that include the term "Carmody" (case insensitive) and any of the following keywords (case insensitive):
   a. Shield
   b. Privacy Protection Act
   c. PPA
   d. Leak
   e. Leaks
   f. Subpoena
   g. Newsgathering
   h. Question
   i. Questions
   j. Questioning
   k. Media
   l. Warrant
   m. Search
   n. Seize
   o. Seizure;

3. All communications, including email correspondence, text messages, and other electronic messages between any individual at the [recipient agency] and
   a. the San Francisco Police Department
   b. the District Attorney's Office for the City and County of San Francisco
   c. the San Francisco Sheriff's Department

d. the California Bureau of Investigation
e. the California Office of the Governor, and/or
f. the California Highway Patrol

that mention, refer to, or discuss Bryan Carmody; and

4. All records mentioning, referring to, or constituting the memorandum sent from the United States Attorney's Office for the Northern District of California seeking approval for questioning, arresting, or charging Bryan Carmody.

Id. Each of RCFP's requests included a signed privacy waiver/DOJ-361 form from Carmody. *Id*. at ¶ 80. The request to the FBI specifically sought records from the San Francisco Field Office, in addition to all other locations likely to house responsive records. *Id*. at ¶ 78. The request to EOUSA sought records maintained by the United States Attorneys' Office the Northern District of California. *Id*. at ¶ 76.

The Criminal Division and EOUSA did not make a determination on RCFP's requests within the statutory time frame. *Id*. at ¶¶ 110, 117. The FBI denied RCFP's request in its entirety, citing FOIA Exemption 7(A); a timely administrative appeal of that determination was also denied. *Id*. at ¶¶ 81–83. RCFP initiated this action on September 23, 2019. *See* Compl., ECF No. 1.

After the complaint was filed in this matter, the FBI produced one partially redacted record. Pl.'s SMF ¶ 84. The FBI redacted the names of the FBI agents that questioned Carmody from that record, citing Exemptions 6 and 7(C). The FBI also withheld file numbers under Exemption 7(A); RCFP does not challenge the FBI's withholding of file numbers.

Neither the Criminal Division nor EOUSA have produced any records in response to RCFP's requests. Pl.'s SMF ¶¶ 116, 120.

The FBI's Search for Responsive Records

In responding to RCFP's request, the FBI conducted an index search of its Central Records System ("CRS"). Pl.'s SMF ¶ 85; Seidel Decl. ¶ 24. The CRS, however, is indexed using only certain pre-populated terms, Seidel Decl. ¶¶ 14–15; thus, an index search of the CRS does not

search the text of any underlying records maintained in the CRS, *id*. According to the FBI, its index search located one "reference" record. Pl.'s SMF ¶ 84.

The FBI did not search its email systems or other electronic messages in response to RCFP's request, Pl.'s SMF ¶ 91, even though it acknowledges that RCFP's request sought email correspondence, text messages, and other electronic messages containing certain keywords and/or exchanged between certain entities, Seidel Decl. ¶ 26.

The FBI did not search for records in the San Francisco Field Office, Pl.'s SMF ¶ 94, even though RCFP's request specifically sought such records and the raid of Carmody's home took place in San Francisco. *Compare* Marshall Decl. Ex. 3 (Plaintiff's request to the FBI, seeking records from the San Francisco Field Office) *with* Seidel Decl. (making no mention of the San Francisco Field Office). The FBI also did not search the email or other records of the two FBI agents who questioned Carmody who, RCFP is informed and believe, work in the San Francisco Field Office. Pl.'s SMF ¶¶ 95, 98.

EOUSA's Search for Responsive Records

Upon receipt of RCFP's request, EOUSA forwarded it to the United States Attorney's Office for the Northern District of California (the "USAO/NDCA"), Defs.' Mem. at 10, where agency personnel searched for Bryan Carmody's name in Case View, PROMIS, and Lexis Nexis. *Id*. Those searches returned no responsive records, *id*., and the agency informed RCFP that it had located no responsive records. Pl.'s SMF ¶ 120.

After this lawsuit was filed, an employee at EOUSA asked attorneys within the criminal division of the USAO/NDCA to search their emails, correspondence, and text messages for responsive documents and to notify her if any responsive records were located. Pl.'s SMF ¶ 121. There is no information in the record as to whether any of those attorneys searched for records.

Pl.'s SMF ¶ 123. Another employee "conferred with two specific attorneys . . . who could, in his view, possibly have had responsive records." Decl. of Patricia A. Mahoney ("Mahoney Decl."), ECF No. 15-5, ¶ 13. Those attorneys stated they had no responsive records. *Id.* In addition, the agency states that it searched the emails of a former attorney with the USAO/NDCA for responsive records, but found none. Pl.'s SMF ¶ 125.

EOUSA has not provided the search terms used for any search conducted for emails, correspondence, or text messages. Pl.'s SMF ¶¶ 124, 126.

The Criminal Division's Search for Responsive Records

The Criminal Division conducted a search for records within one database at the Policy and Statutory Enforcement Unit ("PSEU") known as the Front Office Tracking System ("FOTS"), which contains consultation and authorization requests to question members of the news media. Pl.'s SMF ¶¶ 113–14. The agency located no responsive records in that database. Pl.'s SMF ¶ 116.

The Criminal Division did not search for email correspondence, text messages, or other electronic messages sought by RCFP's request. Pl.'s SMF ¶ 115.

LEGAL STANDARDS

FOIA was enacted to create an enforceable, statutory right of "access to official information long shielded unnecessarily from public view[.]" *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). As the Supreme Court has explained, the "core purpose" of FOIA is to increase "public understanding *of the operations or activities of the government.*" *Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 775 (1989). "Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose." *Id.* at 773 (citation omitted).

Under FOIA, an agency's actions are reviewed by the district court *de novo*. 5 U.S.C. § 552(a)(4)(B). The agency bears the burden of establishing that it conducted a search "reasonably calculated to uncover all relevant documents," *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983), and that its withholding of records is proper, *Campbell v. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998), *as amended* (Mar. 3, 1999); *see also* 5 U.S.C. § 552(a)(4)(B). FOIA's exemptions must be construed "narrowly." *Milner v. Dep't of Navy*, 562 U.S. 562, 571 (2011) (citing *Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993)).

FOIA cases are frequently decided on summary judgment. *See, e.g.*, *Defenders of Wildlife v. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009) (collecting cases). Summary judgment may be granted if "the movant shows that 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). An agency is entitled to summary judgment in a FOIA action only if it establishes that it has "fully discharged" its statutory obligations. *Weisberg*, 705 F.2d at 1350.

ARGUMENT

I. The FBI and Criminal Division have failed to conduct adequate searches.

An agency is required to perform more than a perfunctory search in response to a FOIA request. *Ancient Coin Collectors Guild v. Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011). An agency "fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was 'reasonably calculated to uncover *all* relevant documents.'" *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (emphasis added).

Here, both the FBI and the Criminal Division have failed to satisfy this basic obligation, refusing to search for emails, text messages, and other electronic messages sought by RCFP's

requests. *See* Marshall Decl. Exs. 1, 3. Their failure to search for such records is not only violative of agencies' obligation to construe "a FOIA request liberally," *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995), but also ignores the plain text of RCFP's requests, which expressly ask for such records. Moreover, there are *multiple* positive indications—indeed, there is definitive proof—of overlooked materials in the possession, custody, and control of Defendants, including responsive emails RCFP obtained from the SFPD though a separate request made under the California Public Records Act. Accordingly, because the FBI and the Criminal Division failed to conduct an adequate search for records, their motion for summary judgment must be denied and summary judgment should entered in favor of Plaintiff.

A. By only conducting an index search within the Central Records System, the FBI failed to search systems housing responsive records.

To show that it has satisfied its obligations under FOIA, an agency "must demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Nation Magazine*, 71 F.3d at 890 (internal quotations and citations omitted); *see also Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). Summary judgment for an agency as to the sufficiency of its search is "inappropriate if a review of the record raises substantial doubt as to the search's adequacy, particularly in view of well-defined requests and positive indications of overlooked materials." *Reporters Comm. for Freedom of the Press v. Fed. Bureau of Investigation*, 877 F.3d 399, 402 (D.C. Cir. 2017) (cleaned up) (citations omitted).

Here, the FBI has failed to satisfy its search obligations for at least three reasons: (1) it has refused to search for email or text message records specifically sought by RCFP's request; (2) proof of responsive, but so far unlocated, emails exist; and (3) the FBI has refused to follow clear and certain leads identifying additional locations where responsive records reside, including the San Francisco Field Office and the records of the two FBI agents who questioned Carmody.

i. The FBI unlawfully refused to conduct a search for email and text messages.

Item two of RCFP's request to the FBI expressly asks for "email correspondence, text messages, and other electronic messages, that include the term 'Carmody'" and certain specified keywords. Marshall Decl. Ex. 3. Likewise, item three of the request asks for "[a]ll communications, including email correspondence, text messages, and other electronic messages between any individual" at the FBI and specified California agencies that mention Carmody. *Id*. Notwithstanding RCFP's express request for email and other electronic communications, the FBI has not conducted a search for these records. Pl.'s SMF ¶ 91. The FBI's failure to undertake a search for records specifically requested by RCFP violates its obligations under FOIA. *See* 5 U.S.C. § 552(a)(3)(A). An agency is "bound to read [a FOIA request] as drafted [and] not as agency officials . . . might wish it was drafted[.]" *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 183 (D.D.C. 2013) (internal quotations and citations omitted); *accord Conservation Force v. Ashe*, 979 F. Supp. 2d 90, 101 (D.D.C. 2013) (explaining that when an agency disregarded the precise language of the request at issue, the agency's "reading of Plaintiff's FOIA request renders portions of the request mere surplusage—a result that is anathema to established principles of reasoned interpretation").

The FBI attempts to justify its refusal to search for emails and text messages by claiming that if such communications existed they would have been "placed in the CRS for recordkeeping." Seidel Decl. ¶ 26. But the FBI's Records Management Policy Guide (the "FBI's Records Guide"), which Defendants cite as support for that proposition, makes no mention, whatsoever, of text messages or storing them in the CRS. *See* Marshall Decl. Ex. 9. Moreover, the FBI's Records Guide makes clear that its personnel are not required to transfer all emails to the CRS (referencing emails it characterizes as "transitory" or "nonrecord"). *See id.* at 24–25. Indeed, in the past, RCFP

has obtained emails sent from former FBI Director James Comey to senior FBI officials that were classified as "transitory," even though they concerned a matter of fundamental importance: the FBI's public justification for impersonating a member of the news media. *See* Marshall Decl. Ex. 13; *see also Reporters Comm.*, 877 F.3d 399. In short, the record is clear that the CRS does not house all FBI emails or text messages.

Further, an index search of the CRS—which is all the FBI did here, Pl.'s SMF ¶ 85—is not a reasonable method to locate records responsive to RCFP's request. Even if the CRS housed all FBI emails (which it does not), a CRS index search, by definition, does not search the full text of records within it. According to Defendants, because "the CRS is where the FBI indexes information about individuals," Defs.' Mem. at 7, and "[b]ecause Plaintiff's request sought information about an individual," *id.*, the FBI assumes that an index search of the CRS is sufficient. To the contrary, however, RCFP's request does not simply ask for records "about an individual." Items 2 and 3 of the request seek specific "email correspondence, text messages, and other electronic messages" between FBI personnel and California law enforcement entities that contain certain keywords. Pl.'s SMF ¶ 79. An index search of the CRS does not search the text of records within CRS—it *only* searches pre-populated terms that FBI officials choose—and accordingly the emails requested by RCFP could not be located in that fashion. *See* Seidel Decl. ¶¶ 14–15, 23–24. The FBI's search methodology was, simply put, designed to fail: a search of prepopulated index terms is not and cannot be reasonable when RCFP asked for records containing one or more words, or sent between the FBI and another entity.

There is no dispute that the FBI maintains both classified and unclassified email systems. Pl.'s SMF ¶ 92. The FBI is, accordingly, required to search those systems for responsive email records. *See Oglesby*, 920 F.2d 57, 68 (D.C. Cir. 1990) (stating that an agency must use "methods

which can be reasonably expected to produce the information requested"). The FBI's claim that "an electronic search of emails/texts was not reasonable without a clear and certain lead from Plaintiff," Seidel Decl. ¶ 26, is belied by the record. RCFP's request *specifically asks* for "email correspondence, text messages, and other electronic messages," Pl.'s SMF ¶ 79; the plain text of RCFP's request could not be a more "clear and certain" about what it seeks.

In sum, the FBI's sole reliance on an index search of the CRS does not satisfy its search obligations under FOIA with respect to items 2 and 3 of RCFP's request. *See Jett v. Fed. Bureau of Investigation*, 139 F. Supp. 3d 352, 368 (D.D.C. 2015) ("[W]hen [a] request sought information that plainly was not contained within CRS . . . the FBI could not put its head in the sand and ignore an obvious source for the requested material."). As in other cases where courts have rejected such an effort, in "search[ing] *only* the CRS database," the FBI "failed to carry its burden to '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.* (quoting *Oglesby*, 920 F.2d at 68).

ii. There is positive proof of responsive emails for which the FBI has refused to search.

Summary judgment for an agency "must be denied 'if a review of the record raises substantial doubt about the search's adequacy, particularly in view of well defined requests and positive indications of overlooked materials." *DiBacco v. Dep't of the Army*, 926 F.3d 827, 832 (D.C. Cir. 2019) (internal citation omitted); *Reporters Comm.*, 877 F.3d at 402. Here, there are not just "positive indications of overlooked materials," but definitive proof that they exist.

In March 2020, RCFP submitted a public records request to the SFPD pursuant to the California Public Records Act. Pl.'s SMF ¶ 96; *see also* Marshall Decl. Ex. 5. That request sought email records maintained by the SFPD that mention both "Carmody" and "FBI" that were sent or

received between May 11, 2019 and December 31, 2019. *Id*. In response, the SFPD released records that consist of, among other things, emails between the FBI and the SFPD concerning Carmody. *See* Marshall Decl. Exs. 6–7. These records are plainly responsive to RCFP's request to the FBI, but were not located by that agency because it refused to search for emails.

One record produced to RCFP by the SFPD consists of an email chain between Lieutenant Pilar E. Torres of the SFPD and Special Agent Michael Eldridge of the FBI San Francisco Field Office, and spans from the night before the raid of Carmody's home to the following evening. *See* Marshall Decl. Ex. 6. Special Agent Eldridge apologizes to Lieutenant Torres for not being "able to get a better result"—presumably in his attempts to question Carmody—and thanks her for "letting [him] take a shot." *Id*. Another email chain in which Carmody is explicitly named appears to discuss what should be done with forensic images of materials seized during the raid of his home. Marshall Decl. Ex. 7. Two FBI employees—Sherman Kwok and Penni Price—are included in the email chain. *Id.* These emails are proof that the FBI has emails responsive to RCFP's request. Pl.'s SMF ¶¶ 101, 106; Marshall Decl. Exs. 6–7.

Because RCFP has provided "evidence to raise substantial doubt concerning the adequacy of [the FBI's] search" in the form of "positive indications of overlooked materials," *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003) (citations omitted), the FBI is not entitled to summary judgment.

iii. The FBI unlawfully failed to search the San Francisco Field Office and the records of the FBI agents who questioned Carmody.

It is well-settled that if an agency has reason to know that certain locations may house responsive documents, it is obligated under FOIA to search them. *See, e.g.*, *Campbell*, 164 F.3d at 28; *Krikorian v. Dep't of State*, 984 F.2d 461, 468 (D.C. Cir. 1982); *Oglesby*, 79 F.3d at 1185. When "the record contains leads that are both clear and certain" an agency cannot fail to pursue

them. *Reporters Comm.*, 877 F.3d at 406 (cleaned up) (citation omitted); *see also Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996) (stating that the agency must pursue "a lead it cannot in good faith ignore, *i.e.*, a lead that is both clear and certain").

Here, the FBI failed to follow "clear and certain" leads in failing to search its San Francisco Field Office and the records of the two Special Agents who questioned Carmody. RCFP's request to the FBI specifically requested that the agency search records located within the FBI's San Francisco Field Office. Pl.'s SMF ¶ 78. That request was based upon what was known at the time—that two FBI agents questioned Carmody in San Francisco. *See, e.g.*, Compl. ¶¶ 18–19. Since then, the FBI has released a record to RCFP confirming that two of its agents interviewed Carmody in San Francisco, *see* Marshall Decl. Ex. 4, and RCFP has obtained emails from the SFPD identifying one of those agents as being from the San Francisco Field Office, *see* Marshall Decl. Ex. 6. Yet, despite all this, the FBI neither searched the San Francisco Field Office nor the files of the two FBI agents who questioned Carmody, Pl.'s SMF ¶¶ 94–95; *see also* Seidel Decl. at 11–12. Just like the FBI Director's Office in *Reporters Committee*, here, "[t]he record unmistakably establishes" that the San Francisco Field Office "was intimately involved in" the subject of RCFP's request. 877 F.3d at 407. And the "FBI's declarations do not explain how the individuals in the [] Field Office . . . would not have responsive records in their e-mail accounts." *Prop. of the People, Inc. v. Dep't of Justice*, 405 F. Supp. 3d 99, 122 (D.D.C. 2019). Indeed, the undisputed evidence shows responsive records exist in the FBI email accounts of Michael Eldridge, who appears to be one of the two FBI agents who questioned Carmody. Pl.'s SMF ¶¶ 98–99.

In light of the FBI's failure to follow clear and certain leads pointing to these additional locations were responsive records are not merely likely—but guaranteed—to be found, summary

judgment for the FBI as to the adequacy of its search is improper. Summary judgment as to the adequacy of the FBI's search should be entered in favor of RCFP.

B. The Criminal Division unlawfully failed to search for responsive emails, text messages, and other electronic communications.

Like RCFP's request to the FBI, its request to the Criminal Division specifically asked for emails, text messages, and other electronic communications. Pl.'s SMF ¶ 79. Notwithstanding its unambiguous request for such records, *see id.*, the Criminal Division's declarant affirms that the "FOIA/PA Unit did *not* undertake a search of emails, text messages, or other electronic messaging services" in conducting its search for records responsive to Plaintiff's request. Jones Decl. ¶ 14 (emphasis added). The Criminal Division's refusal to search for such records is a clear violation of FOIA. *See* 5 U.S.C. § 552(a)(3)(A) (requiring agencies to make any "reasonably described" records "promptly available" upon request).

The Criminal Division's purported explanation for refusing to search for email and other electronic communications is that requests made pursuant to the News Media Policy for authorization to question members of the news media are tracked in a database called the Front Office Tracking System ("FOTS"), and that no records bearing Carmody's name were located within FOTS. *See* Jones Decl. ¶ 13–15. But it *does not follow* that simply because the News Media Policy was not heeded with respect to Carmody's questioning by two FBI agents that the Criminal Division does not possess records responsive to RCFP's request.

RCFP is asking for communications within DOJ or between DOJ and California law enforcement entities, including as to whether they considered the various legal safeguards applicable to members of the news media before questioning Carmody, including the Privacy Protection Act, California's shield law (Cal. Const. art. I, § 2, Cal. Evid. Code § 1070, Cal. Penal Code § 1524(g)), and the News Media Policy, itself. It is entirely possible, for example, that

responsive records exist discussing *whether* to abide by the News Media Policy. Section 9-13.400 of the USAM states that in the event there is a question as to whether an individual is a member of the news media for purposes of the News Media Policy, "members of the [DOJ] must consult with the PSEU before employing the use of a covered law enforcement tool. Members of the [DOJ] must also consult with the PSEU regarding whether the conduct at issue of the affected member of the news media constitutes or relates to 'newsgathering activities.'" Marshall Decl. Ex. 11. Thus, that there is no record pertaining to Carmody in FOTS has no bearing on whether responsive emails or other electronic communications exist elsewhere.

In refusing to search for records in response to half of RCFP's request, the Criminal Division has failed to conduct an adequate search for records as required by FOIA. 5 U.S.C. § 552(a)(3)(A); *Nat'l Sec. Counselors*, 960 F. Supp. 2d at 183; *Conservation Force*, 979 F. Supp. 2d at 101. Summary judgment for the Criminal Division is thus improper and summary judgment should be entered for Plaintiff as to the sufficiency of the Criminal Division's search.

II. The EOUSA has failed to establish that it conducted an adequate search for records.

D.C. Circuit precedent makes clear that a declaration containing "no information about the search strategies of the [agency] components charged with responding to [a] FOIA request" and providing no "indication of what each [component's] search specifically yielded" is inadequate to carry an agency's summary judgment burden. *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007); *see also, e.g.*, *Aguiar v. Drug Enforcement Admin.*, 865 F.3d 730, 738–39 (D.C. Cir. 2017) (explaining that an affidavit identifying the offices "tasked with conducting a search" of specific files but not detailing "how [the offices] searched within those files" is insufficient to support summary judgment). An agency is precluded from prevailing at summary judgment if it does not disclose the search terms used, the type of search performed, and avers that all files likely

to contain responsive materials were searched. *Oglesby*, 920 F.2d at 68; *see also Reporters Comm.*, 877 F.3d at 403 (agency must disclose search terms and type of search performed); *DeBrew v. Atwood*, 792 F.3d 118, 121–22 (D.C. Cir. 2015) (stating that an affidavit which identifies employees tasked with conducting a search, explaining why those employees were chosen, and detailing search results is insufficient "because it [did] not disclose the search terms used by the [agency] and the type of search performed").

Here, RCFP's request to the EOUSA sought, in part, "communications, including email correspondence, text messages, and other electronic messages" between individuals at the USAO/NDCA and certain specified California officials that mention Carmody. Pl.'s SMF ¶ 79. In response, the EOUSA states that its employee, Patricia A. Mahoney, "sent an email to all attorneys within the Criminal Division of the United States Attorney's Office for the Northern District of California ("USAO/NDCA"), requesting that they search their emails, correspondence, text messages, and other electronic messages for responsive documents" and "notify her if any responsive records were located." Defs.' Mem. at 11; *see also* Decl. of Patricia A. Mahoney ("Mahoney Decl."), ECF No. 15-5, ¶ 12. Ms. Mahoney avers that she has "received no responses." *Id*. In addition, the EOUSA conferred with two current attorneys and one former attorney from the USAO/NDCA who "could possibly have had responsive records," but states that those searches yielded "no responsive records." *Id*. ¶ 13.

The EOUSA's submissions are deficient for two reasons. First, nowhere does the EOUSA set forth the search terms used for any of its searches for emails, text messages, or other communications. Pl.'s SMF ¶¶ 124, 126; *see* also Mahoney Decl. For that reason alone, summary judgment in the EOUSA's favor is precluded. *See Oglesby*, 920 F.2d at 68; *Reporters Comm.*, 877 F.3d at 403; *DeBrew*, 792 F.3d at 121–22.

Second, the EOUSA does not aver that the searches Ms. Mahoney asked attorneys in the USAO/NDCA to conduct ever occurred, let alone what the results of those searches were. Pl.'s SMF ¶ 123; *see also* Mahoney Decl. Simply identifying who was responsible for conducting a search without providing "the terms searched," "how the search was conducted," or what each "search specifically yielded" is insufficient and cannot support summary judgment for the EOUSA. *Morley*, 508 F.3d at 1122; *see also Aguiar*, 865 F.3d at 738 (merely averring an office "was tasked with conducting a search" does not satisfy agency's burden on summary judgment). Accordingly, the EOUSA's motion for summary judgment must be denied.

III. The FBI is unlawfully withholding the names of the two FBI agents who questioned Carmody.

The FBI has redacted the names of two special agents from the single record it has produced in this matter, citing FOIA Exemptions 6 and 7(C). Exemption 6 applies to "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). Exemption 7(C) exempts from disclosure "records or information compiled for law enforcement" to the extent that their disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *Id.* § 552(b)(7)(C). In addition to demonstrating that these exemptions apply, following Congress's 2016 amendments to FOIA, the agency must also demonstrate that it "reasonably foresees that disclosure would harm an interest protected by" the cited exemptions or that disclosure is prohibited by law. 5 U.S.C. § 552(a)(8)(A)(i).

With respect to Exemption 6, the D.C. Circuit has made clear that there is a "presumption in favor of disclosure [that] is as strong as can be found anywhere in the Act." *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (citation and internal quotation marks omitted). As to personnel information in particular, given the "presumption of openness inherent

in FOIA," *Campbell*, 164 F.3d at 33, Exemption 6 permits withholding *only* if "disclosure would compromise a substantial, as opposed to a *de minimus*, privacy interest." *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). In determining what constitutes a "substantial" privacy interest, the Court must "balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 31–32 (D.C. Cir. 2002) (citation omitted).

Similarly, under Exemption 7(C), "a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect." *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 776 (1989).[19] Where an agency invokes both Exemptions 7(C) and 6 to withhold information, a court may decline to analyze the Exemption 6 claim since the balancing under Exemption 7(C) is more protective of privacy interests than under Exemption 6. *See, e.g.*, *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 165 (2004). The relevant inquiry, therefore, is whether any privacy interests proffered by the agency outweigh the public interest in disclosure. *See Dep't of Justice v. Reporters Comm.*, 489 U.S. at 776.

Here, the FBI's invocation of Exemptions 6 and 7(C) to withhold the names of the special agents who questioned Carmody is improper. With respect to the purported privacy interests at stake, the Seidel Declaration proffers only boilerplate claims that "prejudice" or "hostility" "could" result from disclosure of the names of the agents. Seidel Decl. ¶ 40. These claims are quintessentially speculative in nature. *See United Am. Fin., Inc. v. Potter*, 667 F. Supp. 2d 49, 64

[19] The language of the balancing test applicable under Exemption 6 differs from that for Exemption 7(C) in that the latter omits the word "clearly" from the required showing; Plaintiff nevertheless addresses both exemptions together because the FBI asserts the two exemptions in tandem and because the D.C. Circuit "has deemed the privacy inquiry of Exemptions 6 and 7(C) to be essentially the same." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1125 (D.C. Cir. 2004).

(D.D.C. 2009) ("While the [agency] raises legitimate concerns, it 'offers no explanation whatsoever as to why *this* case presents one of those identified circumstances' of a risk of harassment or animosity[.]"). And in light of the 2016 foreseeable harm standard, 5 U.S.C. § 552(a)(8), purely speculative averments of potential harm are wholly inadequate to support withholding of information under Exemptions 6 and 7(C). *See id.* (stating that an agency shall "withhold information under this section *only*" if the agency "reasonably foresees that disclosure would harm an interest protected by" the exemption) (emphasis added); *see also Ctr. for Investigative Reporting v. Customs & Border Prot.*, No. CV 18-2901 (BAH), -- F.Supp.3d --, 2019 WL 7372663, at *9 (D.D.C. Dec. 31, 2019) (stating that "the defendants' claims of foreseeable harm consist of 'general explanations' and 'boiler plate language,' that do not satisfy the foreseeable-harm requirement") (citation omitted).

Further, the identity of one of the special agents who questioned Carmody is already known. Pl.'s SMF ¶ 98; Marshall Decl. Ex. 6 (emails identifying Special Agent Michael Eldridge as one of the agents who questioned Carmody). Eldridge has been publicly identified as an FBI special agent since at least 2014, following his submission of a search warrant affidavit that was widely reported on. Marshall Decl. Ex. 14. In light of this public information, the FBI has not identified—nor could it—how the release of his name implicates any privacy interest or how disclosing it would harm that interest. *Cf.* 5 U.S.C. § 552(b)(6); *id.* § 552(b)(7)(C); *id.* § 552(a)(8)(A)(i). "One can have no privacy interest in information that is already in the public domain, especially when the person asserting his privacy is himself responsible for placing that information into the public domain." *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 840 F. Supp. 2d 226, 233 (D.D.C. 2012).

Even assuming, *arguendo*, that there is *any* privacy interest in the names of these agents, it

is easily overcome by the strong public interest in knowing who was involved in the questioning of a journalist in violation of the DOJ's News Media Policy. Indeed, by conducting unauthorized questioning of Carmody, the FBI participated in the SFPD-led raid that was deemed *illegal* on the grounds that it violated California law. When Congress enacted FOIA, its "attention . . . was primarily focused on the efforts of officials to prevent release of information in order to hide mistakes or irregularities committed by the agency." *GTE Sylvania v. Consumers Union*, 445 U.S. 375, 385 (1980) (citation omitted). Defendants have made clear the News Media Policy was not followed before FBI agents questioned Carmody; as Defendants openly admit in their memorandum, if the PSEU "had received a consultation or authorization request to the News Media Policy, it would have been entered into the FOTS database." Defs.' Mem. at 6. No consultation or authorization request was located. *Id.* That admission is more than sufficient to warrant "belief by a reasonable person that [] Government impropriety might have occurred." *Favish*, 541 U.S. at 174.[20]

The interest to be advanced here is significant: as the Supreme Court has noted, "matters of substantive law enforcement policy . . . are properly the subject of public concern." *Dep't of Justice v. Reporters Comm.*, 489 U.S. at 766 n.18; *see also Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, 746 F.3d 1082, 1093 (D.C. Cir. 2014) (stating same). The News Media Policy was instituted in 1970 by Attorney General John Mitchell in response to press and public outrage over the growing number of federal subpoenas seeking to compel journalists to

[20] The *Favish* standard only applies if, *inter alia*, there is a privacy interest protected by Exemption 7(C). *See* 541 U.S. at 174. As set forth above, there is no privacy interest in the FBI agents' names at issue in this matter. Nonetheless, even assuming there were, the *Favish* standard is satisfied.

reveal confidential news sources.[21] Strengthened in 2014 and 2015, the News Media Policy, is "the primary restraint on the executive branch from encroaching on press freedom."[22] As DOJ itself has stated, it views seeking information from members of the news media "as an extraordinary measure[,]" and it is its policy to do so "only as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecution." Department of Justice, *Report on Review of News Media Policies* (Jul. 12, 2013), https://perma.cc/J6LH-6H66. Adherence to the News Media Policy is so important that DOJ issues yearly reports on its implementation, which the Reporters Committee reviews and analyzes for dissemination to the public.[23] Access to the name of the other FBI agent who questioned Carmody along with Eldridge will allow RCFP and other members of the public to inquire further as to why these agents did not follow the Department's guidelines and whether any subsequent action was taken. *Cf.* 28 C.F.R. § 50.10(i) ("Failure to obtain the prior approval of the Attorney General, as required by this policy, may constitute grounds for an administrative reprimand or other appropriate disciplinary action."). The public interest in this information outweighs any privacy interest these two agents may have.

Because the FBI has improperly withheld information in the only record it has produced to date, summary judgment for the agency is improper as to those redactions and should be granted in favor of the Reporters Committee.

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[21] Linda Moon, Bruce D. Brown, & Gabe Rottman, *New DOJ reports provide detail on use of law enforcement tools against the news media*, Reporters Committee for Freedom of the Press (Nov. 9, 2018), https://perma.cc/C9BG-M7D7.
[22] *Id.*
[23] *Id.*

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that the Court grant its partial motion for summary judgment; deny Defendants' motion for summary judgment; and order Defendants to produce all responsive, non-exempt records to Plaintiff.

Dated: July 2, 2020

/s/ Katie Townsend
Katie Townsend
DC Bar No. 1026155
Adam A. Marshall
DC Bar No. 1029423
Gunita Singh
DC Bar No. 1601923
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: 202.795.9300
Facsimile: 202.795.9310
Email: ktownsend@rcfp.org
Email: amarshall@rcfp.org
Email: gsingh@rcfp.org

Counsel for Plaintiff