[ORAL ARGUMENT NOT YET SCHEDULED]

No. 17-5042

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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.

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

FINAL BRIEF FOR PLAINTIFFS-APPELLANTS

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September 1, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Plaintiffs-Appellants Reporters Committee for Freedom of the Press (the "Reporters Committee") and the Associated Press ("AP") (collectively, "Plaintiffs-Appellants") certify as follows:

A. Parties and *Amici*

Plaintiffs-Appellants are the Reporters Committee and AP. The Reporters Committee is an unincorporated nonprofit association of reporters and editors dedicated to preserving the First Amendment's guarantee of a free press and vindicating the rights of the news media and the public to access government records, including under state and federal freedom of information laws. The AP is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

Defendants-Appellees are the Federal Bureau of Investigation ("FBI") and the United States Department of Justice ("DOJ"). Defendants-Appellees are agencies of the federal government within the meaning of 5 U.S.C. § 551 and 552(f). The FBI is a component of DOJ.

No *amici* appeared in the district court. No *amici* are expected to appear in support of Plaintiffs-Appellants' position on appeal. Plaintiffs-Appellants are unaware of any *amici* expected to appear in support of Defendants-Appellees in this appeal.

B. Ruling Under Review

Plaintiffs-Appellants seek review of the Order of the United States District Court for the District of Columbia in *Reporters Committee for Freedom of the Press and Associated Press v. Federal Bureau of Investigation and United States Department of Justice*, No. 1:15-cv-01392 (Leon, D.J.), --F. Supp. 3d --, 2017 WL 729126 (D.D.C. Feb. 23, 2017), denying their motion for summary judgment and/or partial summary judgment and granting Defendants-Appellees' motion for summary judgment.

C. Related Cases

This case has not previously been before this Court. Counsel are not aware of any related cases currently pending in this Court or in any other court.

CORPORATE DISCLOSURE STATEMENT

As required by Circuit Rules 12(f) and 26.1, Plaintiffs-Appellants state that the Reporters Committee is an unincorporated 501(c)(3) nonprofit association of reporters and editors with no parent corporation and no stock. The AP is a global

news agency organized as a mutual news cooperative under the New York Not-For-Profit Corporation Law. The AP has no parent corporation and no stock.

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GLOSSARY

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

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701–706. The district court denied Plaintiffs-Appellants' motion for summary judgment and/or partial summary judgment, granted Defendants-Appellees' motion for summary judgment, and entered judgment in favor of Defendants-Appellees on February 23, 2017. Joint Appendix ("JA") 583. Plaintiffs-Appellants timely filed a notice of appeal on March 9, 2017. JA 584. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court properly applied the correct legal standard for determining whether the FBI conducted an adequate search for records responsive to Plaintiffs-Appellants' requests for agency records under the Freedom of Information Act, 5 U.S.C. § 552; and

2. Whether the district court erred in concluding that the FBI conducted an adequate search for records responsive to Plaintiffs-Appellants' requests for agency records under the Freedom of Information Act, 5 U.S.C. § 552.

RELEVANT STATUTES

The relevant statutory provisions are attached as an addendum to this brief.

STATEMENT OF THE CASE

This litigation concerns whether the Federal Bureau of Investigation ("FBI") satisfied its obligations under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), to search for records responsive to three FOIA requests submitted by the Reporters Committee for Freedom of the Press ("Reporters Committee") and The Associated Press ("AP") seeking records related to instances in which the FBI has impersonated members of the news media, including the AP, as well as records concerning the guidelines and policies that govern that practice (the "FOIA Requests"). The district court, below, issued a Memorandum Opinion and Order on February 23, 2017, granting the motion for summary judgment of the FBI and Department of Justice ("DOJ") (collectively, the "Government") and denying Plaintiffs-Appellants' cross-motion for summary judgment and/or partial summary judgment. JA 583. The Reporters Committee and AP limit their appeal to challenging the district court's conclusion that the FBI conducted an adequate search for records in response to their FOIA Requests.

A. The FBI's Impersonation of the AP

In 2007, while investigating anonymous bomb threats e-mailed to school administrators at Timberline High School near Seattle, Washington (the "Seattle/Timberline Incident"), an undercover FBI agent contacted the juvenile suspected of making the threats and "portrayed himself as an employee of The

Associated Press[.]" JA 332. Masquerading as an AP journalist, the FBI agent e-mailed the suspect twice under the guise of seeking comment on a draft news article; these initial e-mails were rebuffed by the suspect, who told the agent to "leave [him] alone." JA 552. To coax the suspect into responding, the FBI agent wrote to the suspect that "[a]s a member of the Press, I would rather not know who you are as writers are not allowed to reveal their sources." *Id.* Only after he received this assurance did the suspect express a willingness to help the individual he thought was an AP journalist. JA 553. The FBI agent then sent the suspect links to a fabricated AP news article that, once clicked on by the suspect, automatically downloaded surveillance malware known as a Computer and Internet Protocol Address Verifier ("CIPAV") that revealed the suspect's physical location to authorities. JA 329.

The FBI's impersonation of an AP journalist in the Seattle/Timberline Incident was brought to light in October 2014, when Christopher Soghoian, then-Chief Technologist at the American Civil Liberties Union, spotted references to it in a set of documents that had been obtained by the Electronic Frontier Foundation via a FOIA request. JA 329, 356–357, 364–368. Public and press reaction to the revelation was swift and strong.

On October 30, 2014, AP General Counsel Karen Kaiser delivered a letter to DOJ condemning the FBI's actions and explaining that by "misappropriat[ing] the

trusted name of The Associated Press" the FBI had "created a situation where [the AP's] credibility could have been undermined on a large scale[.]" JA 331, 347–348 ("It is improper and inconsistent with a free press for government personnel to masquerade as The Associated Press or any other news organization"). On November 6, 2014, the Reporters Committee and 25 other media organizations wrote to then-Attorney General Eric Holder and then-FBI Director James Comey likewise condemning the FBI's actions, stating that the implicit promise of confidentiality made by an FBI agent posing as a journalist could make sources leery of trusting actual journalists in the future, and that the practice "endangers the media's credibility and creates the appearance that it is not independent of the government[.]" JA 332.

The Seattle/Timberline Incident also prompted criticism from members of Congress. On October 30, 2014, Senator Patrick Leahy wrote to then-Attorney General Holder to voice his concerns, stating: "When law enforcement appropriates the identity of legitimate media institutions, it not only raises questions of copyright and trademark infringement but also potentially undermines the integrity and credibility of an independent press[.]" JA 331. And on June 12, 2015, Senator Chuck Grassley delivered a letter to then-FBI Director Comey, criticizing FBI agents for posing as the AP in the Seattle/Timberline Incident and for not "alert[ing] the judge of their plan to mimic the media." JA 333. In that

same letter, Senator Grassley asked the FBI to provide an accounting of how many times the agency had impersonated personnel from legitimate companies in deploying malware, and which companies it had impersonated. *Id*.

To counter the criticism, in the fall of 2014 several FBI officials spoke publicly about the FBI's practice of impersonating the news media. FBI special agent Frank Montoya Jr., for example, stated that media impersonation "happens in very rare circumstances[.]" JA 330. In a letter to the editor published in *The New York Times* on November 6, 2014, then-FBI Director Comey himself confirmed and defended the FBI's practice of impersonating journalists. JA 332. That letter to the editor raised additional questions about the FBI's practice of impersonating members of the media, including how frequently it occurs, and, in the words of AP leadership "double[d the AP's] concern and outrage, expressed earlier to [then-Attorney General Holder], about how the agency's unacceptable tactics undermine AP and the vital distinction between the government and the press." *Id.* Thereafter, AP President and Chief Executive Officer Gary Pruitt sought assurances from the FBI that it would cease this practice, stating, in part, that "[i]n stealing [the AP's] identity, the FBI tarnishes [the AP's] reputation, belittles the value of the free press rights enshrined in our Constitution and endangers AP journalists and other newsgatherers around the world." JA 332–333.

B. Plaintiffs-Appellants' FOIA Requests

After learning of the Seattle/Timberline Incident, the Reporters Committee and the AP submitted three separate FOIA requests to the FBI seeking to learn more about the agency's practice of impersonating members of the news media. These requests sought, in general, three categories of records: (1) records concerning the Seattle/Timberline Incident; (2) records concerning other instances where the FBI has impersonated a member of the news media or used links to news media articles in order to deliver malware to a suspect; and (3) records concerning the guidelines and policies governing the FBI's impersonation of the news media. JA 053–055.

1. The Reporters Committee's FOIA Requests

The Reporters Committee submitted two separate FOIA requests to the FBI's central FOIA Office on October 31, 2014. JA 054–055. The first request ("Reporters Committee Request 1") sought:

> 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 055. The second request ("Reporters Committee Request 2") 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, including, but not limited to, the guidelines and policies relating to the criminal and national security undercover operations review committees and the Sensitive Operations Review Committee; guidelines and

> policies concerning the use of investigative methods targeting or affecting the news media, including, but not limited to, sensitive Title III applications; and all guidelines and policies concerning sensitive investigative matters involving the activities of the news media or relating to the status, involvement, or impact of an investigation upon the news media.

JA 054–055.

By letter dated May 18, 2015, the FBI stated that it had conducted a search of its Central Records System ("CRS") and was "unable to identify main file records responsive" to Reporters Committee Request 1. JA 246. The FBI failed to make a determination with respect to Reporters Committee Request 2 within the statutory time limits proscribed by FOIA. JA 108, 249–253. The Reporters Committee submitted timely administrative appeals for both of its FOIA requests to the Office of Information Policy at DOJ. JA 108, 249–253, 263–268. Both appeals were denied by the Office of Information Policy.[1] No records were produced to the Reporters Committee prior to the filing of this lawsuit. JA 339.

[1] As to Reporters Committee Request 1, on August 5, 2015, the DOJ's Office of Information Policy denied the Reporters Committee's administrative appeal, concluding that the FBI had conducted an adequate search for responsive records. JA 109, 285–286. As to Reporters Committee Request 2, by letter dated August 4, 2015, the Office of Information Policy stated that it was refusing to consider the administrative appeal: "As no adverse determination has yet been made by the FBI, there is no action for this Office to consider on appeal." JA 109, 283.

2. The AP's FOIA Request

On November 6, 2014, AP reporter Raphael Satter submitted a FOIA request on behalf of AP to the FBI's central FOIA Office and its Seattle Division. The request sought:

> (1) Any documents referring to the decision to create the fake AP news article in the Timberline High School case. In particular, I seek correspondence between the FBI's Seattle office and FBI headquarters about the case. I also seek a copy of the internal review carried out by the FBI and a copy of the Web link sent by the FBI to suspect in 2007;
>
> (2) An accounting of the number of times, between Jan. 1, 2000 and Nov. 6 2014, that the Federal Bureau of Investigation has impersonated media organizations or generated media-style material (including but not limited to emails, webpages or links) to deliver malicious software to suspects or anyone else caught up in an investigation; and
>
> (3) Any documents—including training material, reviews and policy briefings—dealing with the creation and deployment of bogus news stories or media-style material in an investigative context.

JA 053–054.

Having received no records in response to the request, AP submitted an administrative appeal to the Office of Information Policy at DOJ on June 2, 2015. JA 105, 177–180. The appeal was denied.[2] JA 105, 202. No records were produced to the AP prior to the filing of this lawsuit. JA 339.

[2] By letter dated August 21, 2015, DOJ's Office of Information Policy notified the AP that it was refusing to consider the appeal, stating: "As no adverse determination has yet been made by the FBI on [the FOIA requests], there is no further action for this Office to consider on appeal." JA 105, 202.

C. Plaintiffs-Appellants' Lawsuit and the Parties' Cross-Motions for Summary Judgment

The Reporters Committee and the AP filed suit against the FBI and DOJ on August 27, 2015. JA 007. Thereafter, the Government located and processed 267 pages of records in response to Plaintiffs-Appellants' three FOIA requests and released 186 pages of responsive records. JA 056. Of the records released, 103 pages contained redactions and 59 pages were withheld in their entirety. *Id*.

Of the released material, only 11 pages were dated during or after October 2014, when the FBI's 2007 impersonation of the AP was being widely reported. JA 335. The remainder of the records dated from 2007; they consisted of documents relating to the Seattle/Timberline Incident and a handful of guidelines and policy documents. None of the released records related or referred to any instance of FBI impersonation of the news media other than the Seattle/Timberline Incident. *Id.* By letter dated March 28, 2016, concurrently with the filing of their motion for summary judgment, Defendants-Appellees re-produced a number of those same pages of records citing additional exemptions in support of their redactions, and unredacting approximately five previously redacted words and a small attachment icon. JA 315–316.

The Government moved for summary judgment on March 28, 2016, and Plaintiffs-Appellants cross-moved for summary judgment and/or partial summary judgment on April 25, 2016. JA 004. The parties' motions for summary judgment

were fully briefed on June 10, 2016. JA 005.

D. The Office of the Inspector General's Report and the FBI's Interim Policy

On September 15, 2016, after the parties' cross-motions for summary judgment were fully briefed and awaiting a ruling by the district court, the Office of the Inspector General for the Department of Justice ("Office of the Inspector General") issued a report concerning the Seattle/Timberline Incident titled "A Review of the FBI's Impersonation of a Journalist in a Criminal Investigation" (hereinafter, the "Inspector General's Report"). JA 526, 533.

The Inspector General's Report states that "[i]n undertaking [its] review" of the Seattle/Timberline Incident, the Office of the Inspector General "examined approximately 2000 documents, including the FBI's investigative case file, applicable Department and FBI policies and guidelines, and a 2014 briefing paper prepared by FBI staff for Director Comey detailing the events surrounding the 2007 investigation and the applicable investigative standards currently in effect[.]" JA 540. In addition, the Office of the Inspector General "interviewed FBI employees and a federal prosecutor who participated in the 2007 investigation and an FBI attorney who helped draft the 2014 briefing paper." *Id.* The Inspector General's Report also revealed that the FBI had issued new interim guidelines in

June 2016, referred to as Policy Notice 0907N, concerning posing as a member of the news media or a documentary film crew. JA 536, 544.

According to the Inspector General's Report, the FBI's new interim policy provides agents with new procedures they must follow before posing as members of the news media or documentary filmmakers. JA 536.[3] The Inspector General's Report concluded that "FBI policies [in place during the Seattle/Timberline Incident] did not expressly address the tactic of agents impersonating journalists," and that "the FBI's undercover policies then in effect provided some relevant guidance, but were less than clear." *Id.* The Inspector General's Report deemed the interim policy to be a "significant improvement to policies that existed in 2007 during the Timberline investigation, as well as to those policies that would have governed similar undercover activities prior to June 2016." *Id.*

Plaintiffs-Appellants only learned of the Office of the Inspector General's investigation and of the FBI's new interim policy in September 2016, when the Inspector General's Report was released publicly; none of the records released by the FBI in response to the FOIA Requests related to either the Inspector General's Report or Policy Notice 0907N. Nor did it appear that the Government had

[3] For instance, the Inspector General's Report states that under Policy Notice 0907N "an application must first be approved by the head of the FBI field office submitting the application to [FBI Headquarters], reviewed by the Undercover Review Committee at [FBI Headquarters], and approved by the Deputy Director, after consultation with the Deputy Attorney General." JA 536.

identified any records concerning the Inspector General's Report or Policy Notice 0907N in its search for records responsive to the FOIA Requests; no such records were reflected on the *Vaughn* index filed by the Government. JA 507–514.

On September 16, 2016, Plaintiffs-Appellants filed a notice in the district court attaching a true and correct copy of the Inspector General's Report, informing the district court of the Office of the Inspector General's investigation and of the FBI's new interim policy, and detailing the Inspector General's Report references to what appeared to be a number of records responsive to the FOIA Requests that were neither produced in full or in part, nor identified as having been withheld in the Government's *Vaughn* index.[4] JA 526–530, 533.

E. The District Court's Order

On February 23, 2017, the district court issued a Memorandum Opinion and Order granting the Government's motion for summary judgment and denying Plaintiffs-Appellants' cross-motion. JA 567, 583. Judge Leon concluded that the FBI had conducted an adequate search for records responsive to the FOIA Requests and that its withholding of records, or portions thereof, pursuant to

[4] On January 12, 2017, after Plaintiffs-Appellants notified the district court of the Inspector General's Report, counsel for the Government provided, via email to counsel for Plaintiffs-Appellants, two additional pages of redacted records. JA 564. The FBI did not notify the district court of its release of those two additional pages of records; as such, it was not in the record before the district court.

Exemptions 1, 3, 5, 6, 7(C), and 7(E) was lawful. 5 U.S.C. § 552(b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C), and (7)(E). *Id*.

The district court concluded, *inter alia*, that even though the FOIA Requests made by the Reporters Committee and AP sought records concerning other instances in which the FBI had impersonated members of the news media, the Government's use of search terms relating solely to the Seattle/Timberline Incident was appropriate. JA 573–574. Despite Plaintiffs-Appellants' filing of a notice informing the district court of the Inspector General's Report and its disclosure of the FBI's new interim policy more than five months prior, Judge Leon's Memorandum Opinion makes no mention of either. JA 567–582.

The Reporters Committee and AP timely appealed the district court's ruling to this Court on March 9, 2017. JA 584. Plaintiffs-Appellants limit this appeal to challenging Judge Leon's determination that the FBI conducted an adequate search for records responsive to their requests for agency records under FOIA.

SUMMARY OF ARGUMENT

The sole issue before this Court is whether the FBI complied with its obligations under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") to search for records responsive to three FOIA requests (the "FOIA Requests") submitted by the Reporters Committee for Freedom of the Press ("Reporters Committee") and The Associated Press ("AP").

The three FOIA Requests at issue were submitted in October and November 2014, shortly after the AP and the Reporters Committee learned that seven years earlier the FBI had masqueraded as an AP journalist in order to successfully deliver surveillance malware to a juvenile suspected of sending bomb threats to a high school near Seattle, Washington (the "Seattle/Timberline Incident"). Because impersonation, in any form, of a journalist or news organization by the government compromises the ability of an independent press to gather news safely and effectively, the Reporters Committee and AP sought through their FOIA Requests to learn more about the FBI's practice of impersonating members of the media, as the FBI had done in Seattle, including how frequently (or infrequently) that practice is utilized, and the policies that govern that practice.

The FOIA Requests at issue were not made in a vacuum. At the time they were submitted, the FBI was facing intense scrutiny in response to the revelation that an FBI agent had posed as an AP journalist. Discovery of the Seattle/Timberline Incident in late 2014 prompted not only outcry from members of the media, but inquiries from two leading members of Congress and—as Plaintiffs-Appellants only later learned—an investigation by the Department of Justice Office of the Inspector General. It also led then-Director of the FBI, James Comey, to publicly defend the FBI's use of the practice in a letter to the editor published in *The New York Times*, and the FBI—again, as Plaintiffs-Appellants

only later learned—to craft a new interim policy to govern its agents' impersonation of members of the news media, including documentary filmmakers.

After this lawsuit was filed in August 2015, the FBI located and processed 267 pages of records in response to Plaintiffs-Appellants' three FOIA Requests. It released 186 pages of records, most of which were heavily redacted. The released records consisted of a handful of guidelines and policy documents, as well as records related to the Seattle/Timberline Incident. All of the released records, save one 11-page document, date from 2007. The FBI did not release—nor did it appear to locate and process—a single document concerning any instance of FBI impersonation of the news media other than the Seattle/Timberline Incident, despite its own public statements that such impersonation is "lawful … and appropriate" and occurs in "rare circumstance[s]." JA 330, 396. Nor did the FBI release—nor appear to locate and process—any records related to the development of its interim policy governing FBI agent impersonation of members of the news media, despite clear language in Reporters Committee Request 2 seeking "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.

The Reporters Committee and AP appeal only the district court's determination that the FBI conducted a sufficient search for responsive records in

satisfaction of its obligations under FOIA. The undisputed material facts make clear that in responding to their three FOIA Requests the FBI ignored locations it was required to search as a matter of law, turning a deliberate blind eye to locations where responsive materials were likely to be found. Further, the FBI grouped portions of the FOIA Requests in a facially illogical manner for the purposes of conducting its search for relevant documents, seemingly for the purpose of identifying only records related to the Seattle/Timberline Incident.

Under the law of this Circuit, the FBI failed to meet its burden to establish that it conducted an adequate search for responsive records. To uphold the district court's decision to the contrary would serve only to provide a roadmap for other agencies to follow to avoid locating records requested by members of the press and the public through FOIA. For the reasons set forth herein, this Court should reverse the judgment of the district court and remand with instructions to direct the FBI to conduct a sufficient search for records responsive to the FOIA Requests.

STANDARD OF REVIEW

When a district court decides a FOIA case at summary judgment, this Court reviews the decision *de novo*. *Multi AG Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008); *Assassination Archives & Research Ctr. v. Cent. Intelligence Agency*, 334 F.3d 55, 57 (D.C. Cir. 2003); *Summers v. Dep't of*

Justice, 140 F.3d 1077, 1079 (D.C. Cir. 1998).

ARGUMENT

I. The FBI was Required to Conduct a Search "Reasonably Calculated to Uncover All Relevant Documents" in Response to Plaintiffs-Appellants' Requests.

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). A "core purpose" of FOIA is to contribute to "public understanding *of the operations or activities of the government*." *United States Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 775 (1989) (emphasis in original).

An agency's search for records in response to a FOIA request must be conducted in good faith, using methods that are reasonably expected to produce the requested information. *See Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (citing *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("*Oglesby I*"); *see also Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983) ("*Weisberg II*"). Thus, 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 v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (internal

quotations and citations omitted); *see also Truitt v. Dept. of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). And, "[a]lthough a requester must 'reasonably describe[ ]' the records sought, 5 U.S.C. § 552(a)(3), an agency also has a duty to construe a FOIA request liberally." *Id.*

The adequacy of an agency's search "is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case." *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (citation omitted) ("*Weisberg I*"). "Reasonableness" is "based on what the agency knew at [the search's] conclusion rather than what the agency speculated at its inception." *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998). An agency "cannot 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. Nor may an agency ignore "clear and certain" leads when searching for relevant records, *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996); 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. 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, barring an undue burden. *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 v. U.S. Dep't of Army*, 79 F.3d 1172, 1185 (D.C. Cir. 1996) ("*Oglesby*

II"). "Conclusory statements that the agency has reviewed relevant files are insufficient to support summary judgment." *Nation Magazine*, 71 F.3d 885 at 890.

While the burden of demonstrating that its search was sufficient lies with the agency, a "plaintiff may … provide 'countervailing evidence' as to the adequacy of the agency's search." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003) (quoting *Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979)). And, where the plaintiff provides "evidence to raise 'substantial doubt' concerning the adequacy of [the agency's] search"—particularly when there is a "well defined request[] and positive indications of overlooked materials'"—a ruling in favor of the agency should not be granted. *Id.* (quoting *Valencia-Lucena*, 180 F.3d at 326); *see also Krikorian*, 984 F.2d 461 at 468.

Here, the FBI unmistakably failed to meet its burden to establish that it conducted a reasonable search for responsive records for two reasons: first, because the limited search it did conduct was facially flawed and inadequate; and second, because the record clearly shows that the FBI failed to search offices and other locations where relevant documents were likely—if not certain—to be found.

II. The Search Conducted by the FBI was Flawed and Insufficient.

As detailed above, 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. In support of their motion for summary judgment, the Government submitted the Declaration of David M. Hardy to support its argument that its identification of 267 pages of records was the result of a sufficient search to locate records responsive to the FOIA Requests.[5] JA 101 (hereinafter "First Hardy Declaration"). The Government submitted a Second Declaration of David M. Hardy, (hereinafter "Second Hardy Declaration"), along with a partial *Vaughn* Index, with its reply to Plaintiffs-Appellants' motion for summary judgment. JA 489, 507. According to the First Hardy Declaration, the FBI took the three separate FOIA Requests at issue and merged them into two "groups." "Group 1," according to the First Hardy Declaration, consists 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 110, 335. "Group 2" includes the remaining two categories of records sought by the Reporters Committee and AP: records relating to the 2007

[5] The First Hardy Declaration also sets forth the Government's position that the FBI's withholding of 59 pages of those records in their entirety, as well as portions of an additional 103 pages of those records, was justified. Because Plaintiffs-Appellants limit this appeal to the adequacy of the Government's search for records in response to their FOIA Requests, those issues are not before this Court.

Seattle/Timberline Incident and records concerning the FBI's guidelines and policies regarding impersonation of the news media. JA 110–111, 335–336.

Although it appears to be the FBI's position that "Group 1" would encompass the broader of the three categories of records sought by Plaintiffs-Appellants—records relating to *all* instances where the FBI has impersonated a member of the news media to deliver or install malware—the FBI did *not* include records related to the 2007 Seattle/Timberline Incident (a subset of that broader category) within "Group 1." Instead, the Seattle/Timberline Incident was illogically lumped into the FBI's "Group 2" search, which also included records relating to the FBI's guidelines and policies concerning impersonation of the news media.

The FBI provided no explanation for its decision to "group" the records sought by Plaintiffs-Appellants in this way for purposes of searching for relevant material and, as the First Hardy Declaration reveals, the FBI's decision to do so effectively ensured that the agency would not locate documents concerning any incident of media impersonation other than the Seattle/Timberline Incident.

A. The "Group 1" Search.

With respect to "Group 1" materials—records concerning the FBI's practice of using "links to what appear to be news media articles or news media websites" to install malware—the FBI determined that its Operational Technology Division

was the *only* location within the FBI reasonably likely to possess documents relevant to the FBI's practice of impersonating the news media for purposes of deploying electronic surveillance software.[6] JA 112–113. The FBI "recommended" that its Operational Technology Division "send an email to each of its employees asking them to search for all relevant records pertaining to" the "Group 1" request. JA 113. According to the Hardy Declaration, "[The Operational Technology Division] completed the search" and located no relevant documents. *Id*.

As an initial matter, "[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment." *Oglesby I*, 920 F.2d at 68; *see also Weisberg II*, 705 F.2d 1344 at 1351; *Morley v. CIA*, 508 F.3d 1108, 1122 (D.C. Cir. 2007); *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982) ("[A]ffidavits setting forth the record

[6] As detailed below, *infra* Section III, this is patently false. As Plaintiffs-Appellants have already established, the FBI possesses other records, including correspondence with members of Congress and statements to the press concerning its practice of impersonating the news media to deliver surveillance software, that the Operational Technology Division would be *unlikely* to possess. The Government's failure to pursue these obvious leads demonstrates that its search was insufficient. *See Kowalczyk*, 73 F.3d 386 at 389.

procurement efforts of an agency should provide some detailing of the scope of the examination conducted."). The Government's showing falls far short of this standard. Neither the First Hardy Declaration nor the Second Hardy Declaration provides any information about the scope of the search conducted by the Operational Technology Division, and both fail to identify the "search terms and the type of search performed," as required by this Court. *Oglesby I*, 920 F.2d at 68. Averring that a search of some kind, on some unspecified date, was "completed" by an unspecified set of Operational Technology Division employees is insufficient to establish that the Government met its burden to conduct a search "reasonably calculated to uncover all relevant documents." *Weisberg II*, 705 F.2d at 1351.

Moreover, even though Plaintiffs-Appellants remain in the dark as to the search terms and methods employed with respect to the Operational Technology Division's search, it is clear that search was insufficient; the search identified *no* records concerning the FBI's impersonation of the news media in order to install data extraction software, remote access search and surveillance tools, or a Computer and Internet Protocol Address Verifier ("CIPAV"). At a minimum, a sufficient search would have identified records concerning the Seattle/Timberline Incident. As this Court has emphasized, the adequacy of an agency's search "is judged by a standard of reasonableness" and depends "upon the facts of each

case." *Weisberg I*, 745 F.2d at 1485 (citation omitted). If, as Mr. Hardy averred, the Operational Technology Division is the division "solely responsible for the deployment and collection of all lawfully conducted electronic surveillance bureau wide[,]" and thus the only location that needed to be searched for relevant "Group 1" material, it is simply not possible that a sufficient search of the Operational Technology Division would have identified *no relevant documents*. JA 491–492.

The fact that the Government's search of the Operational Technology Division identified no responsive records concerning the Seattle/Timberline Incident—a clear example of the FBI using "links to what appear to be news media articles or news media websites" to install malware—raises "substantial doubt" that it was conducted properly.[7] *Valencia-Lucena*, 180 F.3d at 326. Either it was unreasonable for the FBI to limit its search for "Group 1" material to the Operational Technology Division or the search terms and methods the FBI used to

[7] In an attempt to bolster its claim that its search of only the Operational Technology Division constituted an adequate search for "Group 1" records, the Second Hardy Declaration states that on May 19, 2016—the day before Defendants-Appellees' filed their Reply/Opposition to Plaintiffs-Appellants' motion for summary judgment—the FBI queried its CRS for the terms "CIPAV" and "media impersonation," and "failed to locate any records responsive to plaintiffs' [Group 1] request." JA 492–493. Defendants-Appellees did not explain why they chose to query the CRS index using those two terms, or why they conducted such a search only on the eve of filing their Reply/Opposition. This search also failed to locate any records concerning the Seattle/Timberline Incident.

search for "Group 1" material within the Operational Technology Division were inadequate.[8]

B. The "Group 2" Search.

The Government's search for "Group 2" materials, which was purportedly intended to encompass records relating to the 2007 Seattle/Timberline Incident and those relating to the FBI's guidelines and policies concerning impersonation of the news media, was equally flawed. The FBI states that it targeted 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. JA 114–115, 317. Again, as detailed above, the FBI failed to identify which search terms or methods these divisions utilized to search for "Group 2" material. *See Oglesby I*, 920 F.2d at 68. Nor does it indicate which divisions located responsive records and which, if any, failed to conduct a search as requested. The *only* detail provided regarding the scope of the search for

[8] Tellingly, in conducting its search for "Group 2" materials related to the Seattle/Timberline Incident, the FBI did not limit its search to the Operational Technology Division, despite the FBI's assertion that "no other FBI Divisions or personnel [besides the Operational Technology Division] would reasonably likely possess records responsive" to requests seeking records related to the FBI's practice of impersonating the news media for purposes of deploying electronic surveillance software. JA 113–115.

"Group 2" material is the Government's statement that the FBI searched for responsive documents in its Central Records System ("CRS") and Electronic Surveillance ("ELSUR") indices using three keywords relating solely to the Seattle/Timberline Incident: "Timberline," "Timberline High School," and "Timberline Highschool." JA 121, 318–319.[9]

Grouping the portions of Plaintiffs-Appellants' FOIA Requests that sought records concerning the Seattle/Timberline Incident, specifically, with the portions of those FOIA Requests that sought records concerning the FBI's guidelines and policies relating to impersonation of the news media enabled the FBI to search CRS and ELSUR *only* for records related to the Seattle/Timberline Incident. Further, due to the lack of detail in both the First Hardy Declaration and Second Hardy Declaration, Plaintiffs-Appellants are unable to determine if the other divisions identified above were instructed to search for documents related only to the Seattle/Timberline Incident, or if they were instructed to search more broadly for records related to the FBI's guidelines and policies concerning impersonation of the news media. That the search the FBI conducted for documents concerning

[9] As detailed in the First Hardy Declaration, the FBI can only search "index information" within CRS, and cannot search the full text of documents within the database—making it significantly less likely that any relevant records will be found using a search of CRS. JA 117–118. Notably, though the "main entry" is described by Mr. Hardy as "carr[ying] the name of an individual, organization, or other subject matter that is the designate subject of the file," the FBI only used search terms related to Timberline High School. JA 121.

the FBI's policies governing news media impersonation failed to locate records concerning its interim policy, Policy Notice 0907N, which was adopted in June 2016, alone raises "substantial doubt" as to its adequacy. *Valencia-Lucena*, 180 F.3d at 326.

The district court, below, failed to sufficiently grapple with the limited and facially flawed nature of the search conducted by the FBI in response to Plaintiffs-Appellants' FOIA Requests. Judge Leon simply concluded that the FBI's decision to divide the three FOIA Requests into two groups and to conduct different searches for records falling within each of those two groups was permissible because, "[a]lthough plaintiffs would have structured the search differently, an agency 'need not knock down every search design advanced by every requester' in order to prevail at summary judgment." JA 573–574 (citation omitted). It is not, however, that Plaintiffs-Appellants would have merely preferred a different search structure; the FBI's illogical grouping of the FOIA Requests at issue, and the narrow searches that were conducted as a result, fail to pass the "standard of reasonableness" demanded by this Court. *Weisberg I*, 745 F.2d at 1485.

III. The FBI Failed to Search Locations Likely to Have Relevant Documents.

The Government is also unable to establish that it conducted a search "reasonably calculated to uncover all relevant documents," *Weisberg II*, 705 F.2d at 1351, because it ignored locations in which records responsive to the FOIA

Requests were likely to be found. The record is replete with information that points to specific locations that the FBI should have—but did not—search for material responsive to the FOIA Requests, including: (1) those 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 of the Seattle/Timberline Incident; (2) the Office of the Director, and any office or offices in addition to the Office of the Director responsible for responding to congressional inquiries and/or preparing public statements concerning the FBI's practice of impersonating members of the news media; and (3) the St. Louis field office and other FBI field offices likely to have relevant documents. In sum, as discussed in detail below, the record below establishes that the FBI's search, which identified fewer than 270 pages of material, was insufficient.

A. The FBI Did Not Search for Records Related to the FBI's Interim Policy or the Inspector General's Report.

As detailed above, while this litigation was pending the FBI developed and adopted a new interim policy, Policy Notice 0907N, concerning impersonation of members of the news media. JA 544. Given that Policy Notice 0907N—titled "Undercover Activities and Operations – Posing as a Member of the News Media or a Documentary Film Crew"[10]—was adopted in June 2016, *id.*, it is almost

[10] Plaintiffs-Appellants note that inclusion of the disjunctive "or" in the title of this interim policy has important implications; to the extent that the FBI excluded from

certain that departments within the FBI were developing the policy at or around the time Defendants-Appellees searched for, processed, and released documents in response to Plaintiffs-Appellants' Requests. *See* JA 315 (productions dated February 29, 2016, and March 28, 2016)[11] Yet, *no* records related to the development of Policy Notice 0907N were located or processed by the FBI, even though the Requests specifically sought, among other things, all records related to 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.

Although records related to the interim policy clearly fell within the scope of the FOIA Requests, the Reporters Committee and AP only learned of Policy Notice 0907N on September 15, 2016, when the Office of the Inspector General released a report—titled "A Review of the FBI's Impersonation of a Journalist in a Criminal Investigation" (hereinafter, the "Inspector General's Report")—

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its search records concerning the impersonation of documentary film crews, its search was insufficient. *See, e.g., Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436–437 (10th Cir. 1977) (holding that a documentary filmmaker was entitled to invoke the reporter's privilege).

[11] No search for responsive material was conducted by the FBI prior to the filing of this lawsuit on August 27, 2015. The FBI made its initial release of records in response to the FOIA Requests on February 26, 2016. JA 109–110, 121 (stating that CRS was searched "[a]t the litigation stage").

summarizing its investigation of the Seattle/Timberline Incident.[12] JA 534. The Inspector General's Report notes that "[i]n undertaking [its] review, the [Office of the Inspector General] examined approximately *2000 documents*, including the FBI's investigative case file, applicable Department and FBI policies and guidelines, and a 2014 briefing paper prepared by FBI staff for Director Comey detailing the events surrounding the 2007 investigation and the applicable investigative standards currently in effect[.]" JA 540 (emphasis added). Because the Inspector General's Report focuses entirely on the Seattle/Timberline Incident and FBI policies and procedures regarding impersonation of news media, the majority—if not *all*—of the 2,000 documents considered by the Office of the Inspector General are likely responsive to the FOIA Requests, and should have been located and processed by the FBI in responding to those requests.

In failing to even *mention* the Inspector General's Report or Policy Notice 0907N in its opinion, the district court ignored clear precedent of this Circuit requiring that an evaluation of the reasonableness of an agency's search be "based

[12] As detailed above, *supra* fn. 4, after Plaintiffs-Appellants filed a notice with the district court regarding the Inspector General's Report, counsel for the Government on January 12, 2017 e-mailed counsel for Plaintiffs-Appellants providing two additional pages of material from the FBI's Inspection Division. JA 564–566. The Government did not notify the district court of this further release; as such, it was not part of the record before the district court. This *post hoc* attempt to supplement their release with two pages of material only further highlights the deficiency of the FBI's search for relevant documents in response to the FOIA Requests.

on what the agency knew at [the search's] *conclusion* rather than what the agency speculated at its *inception*." *Campbell*, 164 F.3d 20 at 28 (emphasis added). The FBI simply cannot argue that it had no knowledge of the Inspector General's Report or the development of Policy Notice 0907N at the time it searched for and produced documents responsive to Plaintiffs-Appellants' FOIA Requests.

In their notice to the district court regarding the Inspector General's Report, Plaintiffs-Appellants identified numerous specific records cited in the report that are responsive to its Requests and that, to the best of Plaintiffs-Appellants' knowledge, have neither been produced in full or in part, nor identified as having been withheld in full in Defendants-Appellees' *Vaughn* Index. JA 507–514, 527–529.[13] The Inspector General's Report also identifies a series of emails between the suspect in the Seattle/Timberline Incident and FBI agent(s) on June 13, 2007 that are responsive to the FOIA Requests and do not appear to be reflected on Defendants-Appellees' *Vaughn* Index.[14] *Id.* Further, the Inspector General's

[13] These records include a document sent from an FBI agent to an Assistant Special Agent-in-charge on June 10, 2007, titled "Notification of SAC/ASAC Authority Granted for Use of Telephonic and/or Nontelephonic Consensual Monitoring Equipment in Criminal Matters[.]; the response of the Assistant Special Agent-in-Charge to the above on the same day; an email from the FBI to the suspect in the Seattle/Timberline Incident dated June 12, 2007, at 5:38 pm, containing a link to a fake news article; and a Gmail chat between the suspect in the Seattle/Timberline Incident and FBI agent(s) dated June 13, 2007, starting at 3:48 pm. JA 548–549, 552–553.

[14] Though the *Vaughn* Index includes some records described as a "copy" or "copies" of emails "exchanged on June 13, 2007," the records themselves are dated

Report notes that, "[a]fter reviewing a draft of [the Inspector General's Report,] the FBI provided comments" *explaining its policies* regarding impersonation of members of the news media. JA 540, 559, 561. Though these comments are responsive to the FOIA Requests, they were neither produced to Plaintiffs-Appellants nor are reflected on Defendants-Appellees' *Vaughn* Index.

The agency's failure to identify documents related to the Inspector General's Report in its search for responsive material raises "substantial doubt" that the search was "reasonably calculated to uncover all relevant documents." *Valencia-Lucena*, 180 F.3d at 326.

B. The FBI Did Not Search for Records in the Office of the Director or Other Offices Responsible for Responding to Congressional Inquiries and/or Issuing Public Statements.

The FBI also did not search the Office of the Director or other offices responsible for responding to congressional inquiries or drafting public statements in response to Plaintiffs-Appellants' FOIA Requests, despite the clear indications that responsive documents were likely to be located in these offices.

August 30, 2007. JA 507–514, 529. The emails identified in the Inspector General's Report include an email from FBI to suspect, June 13, 2007, 2:51 p.m.; an email from suspect to FBI, June 13, 2007, 2:55 p.m.; an email from FBI to suspect, June 13, 2007, 3:21 p.m.; an email from suspect to FBI, June 13, 2007, 3:23 p.m.; an email to suspect, June 13, 2007, shortly after 3:23 p.m.; an email from suspect to FBI, June 13, 2007, 3:47 p.m.; an email from FBI to suspect, June 13, 2007, 5:50 p.m.; and an email from suspect to FBI, June 13, 2007, 5:53 p.m. JA 527–528.

As detailed above, *supra* 4, Senator Chuck Grassley delivered 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. Any response to Senator Grassley's request—other instances in which the FBI impersonated personnel from legitimate companies in deploying spyware—would include information responsive to the FOIA Requests for information related to other instances in which FBI agents posed as members of the media. Even assuming, *arguendo*, that the FBI ignored a request from a prominent member of Congress, the letter from Senator Grassley itself is responsive to the FOIA Requests and should have been identified in any adequate search of agency records. A search of the Office of the Director would have also presumably turned up records related to the letter to the editor written by then-Director Comey and published in *The New York Times*, as well as the November 6, 2011 letter sent by Reporters Committee and 25 other media organizations to then-Director Comey. JA 332.

This information was both publicly-available and identified by Plaintiffs-Appellants in their Complaint. JA 011–012. The FBI's search for responsive records, however, did not include the Office of the Director, nor any other office or division responsible for responding to the concerns of members of Congress or the

news media, or for crafting the FBI's public statements—offices and divisions very likely to have precisely the type of information requested by Plaintiffs-Appellants. By neglecting to search the Office of the Director, and any of these other locations, the Government improperly ignored available 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.

C. The FBI Did Not Search for Records in the St. Louis Field Office or Other FBI Field Offices Likely to Have Responsive Material.

Additional records released by the FBI also contain other "positive indications of overlooked materials." *Valencia-Lucena*, 180 F.3d at 327. For example, the FBI produced one e-mail from 2007 related to the Seattle/Timberline Incident in which the author—whose name is redacted—references attached "ponies of an application for a mobile tracking order, a mobile tracking/PRTT order, and the affidavit supporting the two *that ST. Louis [sic] drafted for a similar type order.*" JA 338 (emphasis added). At a minimum this record should have signaled to the FBI that it should search the St. Louis field office for responsive records; the FBI, however, did not do so. Additionally, in a recent court filing in the United States District Court for the District of Massachusetts, the Government responded to a court order to provide a list of investigations in which the Government has used "network investigative techniques," by referencing the

search warrant from the Seattle/Timberline Incident, as well as two other unsealed warrants authorizing the use of similar techniques. JA 333–334. The FBI's failure to pursue these "clear and certain" leads is inexcusable. *Kowalczyk*, 73 F.3d 386 at 389.

As detailed above, the district court failed to consider the implications of these records, dismissing Plaintiff-Appellants' arguments as an "uphill climb" and stating that the adequacy of a search "is determined not by the fruits of the search, but by the appropriateness of its methods." JA 575 (quoting *Hodge v. FBI*, 703 F.3d 575, 579 (D.C. Cir. 2013)). However, Plaintiffs-Appellants *do* challenge the "appropriateness of [the FBI's] methods," *id.*; the material facts show the Government ignored places where responsive documents were likely to be found, turning a blind eye to information available to it that "suggest[ed] the existence of documents that it could not locate without expanding the scope of its search." *Campbell*, 164 F.3d at 28. And, while "[a]n agency has discretion to conduct a standard search in response to a general request, [ ] 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.

Here, the FBI failed to conduct *any* search of a number of specific offices and locations within the Bureau that were likely to house material responsive to Plaintiffs-Appellants' Requests. For that reason, alone, its search was inadequate

as a matter of law. *See Oglesby I*, 920 F.2d at 68 (explaining that an agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested").

CONCLUSION

For the reasons above, the Court should vacate the judgment below and remand this matter to the district court with instructions to direct the FBI to conduct a sufficient search for records responsive to Plaintiffs-Appellants' FOIA 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 8,650 words, 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 BRIEF FOR PLAINTIFFS-APPELLANTS via this Court's electronic filing system, and two paper copies via First-Class Mail:

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ADDENDUM

5 U.S.C. § 552. Public information; agency rules, opinions, orders, records, and proceedings

[Selected subsections provided; omissions denoted by "* * *"]

(a) Each agency shall make available to the public information as follows:

* * *

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

> **(ii)** a representative of a government entity described in clause (i).
> (4)(A)

* * *

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause is shown.

* * *

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

> **(i)** determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; –
>
> **(ii)** make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the

provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

(I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of

requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

* * *

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

* * *

(f) For purposes of this section, the term—

> **(1)** "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government

controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) 'record' and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.