ORAL ARGUMENT NOT SCHEDULED

No. 17-5042

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

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS;
ASSOCIATED PRESS,

Plaintiffs-Appellants,

v.

FEDERAL BUREAU OF INVESTIGATION;
UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

FINAL BRIEF FOR APPELLEES

CHAD A. READLER
Acting Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

MATTHEW M. COLLETTE
JOSEPH F. BUSA
Attorneys, Appellate Staff
Civil Division, Room 7537
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-0261

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

The plaintiffs-appellants are the Reporters Committee for Freedom of the Press and the Associated Press. The defendants-appellees are the United States Department of Justice and the Federal Bureau of Investigation. At the time of writing, there are no intervenors or amici, nor were there in the district court.

B. Rulings Under Review

The appellants have filed a notice of appeal seeking review of the Order of the United States District Court for the District of Columbia in *Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation*, No. 1:15-cv-01392 (Leon, D.J.), -- F. Supp. 3d --, 2017 WL 729126 (D.D.C. Feb. 23, 2017).

C. Related Cases

This case has never been before this Court or any other court. Counsel is not aware of any other related cases currently pending in this Court or in any other court.

s/ Joseph F. Busa
Joseph F. Busa
Counsel for Appellees

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GLOSSARY

FBI	Federal Bureau of Investigation
FOIA	Freedom of Information Act

STATEMENT OF JURISDICTION

Plaintiffs brought this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Joint Appendix (JA) 8. The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered final judgment on February 23, 2017. JA 583. Plaintiffs timely filed a notice of appeal on March 9, 2017. JA 584. This Court has appellate jurisdiction from the final decision of the district court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Pursuant to the FOIA, two news organizations sought certain records from the Federal Bureau of Investigation (FBI) regarding impersonation of the news media during undercover investigations. The FBI searched for records responsive to this request in numerous divisions and offices, as well as the FBI's Central Records System. The search located 290 pages of responsive records. JA 102 & n.1. The sole issue presented in this appeal is whether, as the district court held, the FBI conducted a search reasonably calculated to locate records responsive to the FOIA requests.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to Appellants' Brief.

STATEMENT OF THE CASE

A. The Timberline Incident

For over a week in 2007, Timberline High School, near Seattle, Washington, was paralyzed by bomb and death threats. The culprit delivered those threats largely over the Internet, using anonymous email and social media accounts while taking pains to hide the identity and location of his computer. JA 546-48.

The crisis finally came to a close when the FBI identified that computer. Pursuant to a warrant, FBI agents delivered a package of code to the computer, causing the computer to reveal its Internet Protocol Address—and thus its identity and location—to the FBI. The agents delivered this code to the computer by going under cover. Posing as employees of the Associated Press working on an article about the Timberline crisis, the agents contacted the culprit's email and social media accounts and induced him to click on a link. When the culprit clicked on the link, he unknowingly caused his computer to download the FBI's code, and thus to reveal the location of his computer. This information led to his swift arrest and successful prosecution, and brought an end to the crisis gripping the Timberline community. JA 9-10, 548-53. The FBI did not publish a fake news story, and only the culprit interacted with the undercover agents posing as Associated Press employees. JA 396.

B. FOIA Requests

The public learned about the undercover nature of the Timberline operation in 2014, when, pursuant to a FOIA request unrelated to the present case, the FBI

disclosed emails revealing that FBI agents had identified the culprit in part by delivering surveillance software while posing as Associated Press employees. JA 9, 554.

Soon thereafter, the Associated Press and the Reporters Committee for Freedom of the Press—Plaintiffs in this suit and Appellants here—filed their own FOIA requests with the FBI. The Plaintiffs' FOIA requests were made in three separate letters. The Reporters Committee initially submitted two letters on October 31, 2014. *See* JA 30, 35. In the first request, the Committee 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) [—*i.e.*, the specific tool used to identify the suspect's computer in this case].

JA 30. In the second letter, the Committee 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 35.

The Associated Press submitted its own letter on November 6, 2014, requesting three categories of records, some of which overlapped with the Reporters Committee's earlier requests. The Associated Press sought:

> • Any documents referring to the decision to create the fake [Associated Press] 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 [the] suspect in 2007.
>
> • 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.
>
> • 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 26.

C. The FBI's Search for Responsive Records

1. The FBI employs approximately 233 staff in the Record/Information Dissemination Section to, among other things, conduct searches of FBI records pursuant to FOIA requests, and to produce responsive, non-exempt records to the requester. JA 101. David Hardy has led that Section since 2002, and he previously led a similar component of the Department of the Navy. *Id.* Hardy signed two declarations in the district court attesting, on the basis of his personal knowledge, to

the search the FBI conducted for records responsive to Plaintiffs' FOIA requests. *See* JA 102, 489.

In those declarations, Hardy explained the process the FBI typically uses to conduct FOIA searches. "The FBI generally conducts an index search of its Central Records System . . . in response to most FOIA requests." JA 111. That System is the compilation of "applicant, investigative, intelligence, personnel, administrative, and general files . . . maintained by the FBI in the course of fulfilling its integrated missions and functions." JA 112. The Central Records System is searchable via an index. The System is "indexed and organized based on specific individuals, events, organizations, or other particular subjects of investigative interest." JA 490; *see also* JA 117 ("Indexing information in the [Central Records System] is based on operational necessity, and the FBI only indexes that information considered relevant and necessary for future retrieval.").

When a FOIA request seeks information that is *not* likely to be indexed in the Central Records System (because it is not a subject of future investigative interest), the FBI may conduct a targeted search of specific divisions, offices, and personnel that are likely, in light of their "responsibilities and functions within the FBI," to possess records responsive to the FOIA request. JA 113. Hardy's Record/Information Dissemination Section conducts such a targeted search by sending a directive to the relevant components of the FBI. That directive relays the text of the FOIA request verbatim, directs the components "to search all locations where records [are]

reasonably likely to be located," including "electronic and paper files as well as email," and tells the components to "produce all retrievable agency records regarding th[e] request." JA 112-16, 492-93. The directive also explains that the Bureau is "relying on [the component's] expertise to help identify responsive records, regardless of whether they may be located in [the component] or elsewhere . . . in the Bureau." JA 492-93.

2. In this case, the search for records responsive to Plaintiffs' many FOIA requests was divided into two groups, on the basis of distinct challenges that were expected to arise in searching for the information requested in each group. JA 121. Group 1 consisted of the Reporters Committee's first request for "all records concerning the FBI's utilization of links to what are or appear to be news media articles . . . to install data extraction software, remote access search and surveillance tools, or the 'Computer and Internet Protocol Address Verifier' ('CIPAV')." JA 110. Group 2 consisted of the remaining requests for records involving the decision to impersonate the news media in the Timberline investigation in order to deliver surveillance software; an accounting of all similar instances; and records documenting FBI policies, guidelines, training materials, and reviews concerning undercover operations involving impersonation of the news media. JA 110-11, 121-22.

Hardy explained that, because files in the Central Records System are indexed according to investigative interest, "it would be highly unlikely for FBI personnel to index files in the [System] under the name of a specific technique generally or

specifically in reference to impersonating a member of the media." JA 490. The FBI even tested this conclusion, in an abundance of caution, by searching the Central Records System for the terms "media impersonation" and "CIPAV" (an acronym used in the initial FOIA request that refers to the software in the Timberline incident). The search yielded no responsive records. JA 492-93.

Accordingly, to search for Group 1 records "concerning the FBI's utilization of links to what are, or appear to be, news media articles . . . to install . . . surveillance tools," the FBI performed a targeted search of the Operational Technology Division. JA 491. Hardy explained that this Division "was the component where responsive records were reasonably likely to be located" because the Division "is *solely* responsible for the deployment and collection of all lawfully conducted electronic surveillance" in the FBI, including "the alleged methods, techniques, and procedures at issue in this request." *Id.* (emphasis added).

The Operational Technology Division was given, "[a]s one of the search parameters," the verbatim text of the Reporters Committee FOIA request regarding Group 1 records. JA 492. The Division was directed to "search all locations where records were reasonably likely to be located," whether in "electronic or paper files." *Id.* The Division was also tasked with using "its expertise to help identify responsive records, regardless of whether they may be located in their office or elsewhere . . . in the Bureau," and to "advise if it had reason to believe another division, section, or office, may have responsive records." *Id.* The Division was told to search for records

in its possession up to January 6, 2015, the date when the FBI "initiated the search for [P]laintiffs' overall request for Group 1 records." *Id.* The targeted search of the Operational Technology Division yielded no responsive Group 1 records. JA 113.

Similarly, the FBI searched the Operational Technology Division for records responsive to the Associated Press's (Group 2) request for "an accounting of the number of times . . . that the FBI has impersonated media organizations or generated media-style material . . . to deliver malicious software to suspects." JA 494. The FBI "interpreted this request to seek any such accounting records already maintained by the FBI rather than the creation of such an accounting (because FOIA does not require agencies to create records in response to requests)." *Id.*; *see Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1363 (D.C. Cir. 1983). The Operational Technology Division responded that it "does not maintain an accounting of when and how often specific techniques are deployed or authorized." JA 494.

The agency's search for Group 2 categories of information also involved a targeted search of a large number of other components of the FBI, given the large number of components that may have records related to the Timberline investigation and related to policy and guidelines governing media impersonation in general. Components tasked with the search included:

- the FBI's Seattle Division as a whole (including the Special Agent in Charge of the Timberline investigation),

- the Office of General Counsel,
- the National Covert Operations Section of the Criminal Investigative Division (which "is responsible for devising policy matters and techniques to be used in complicated investigations"),
- the Behavioral Analysis Unit of the Critical Incident Response Group (which "facilitate[s] the FBI's rapid response to critical incidents" and was involved in the Timberline incident),
- the Training Division (which trains FBI personnel regarding FBI policies),
- the Inspection Division (which conducts internal investigations and reviews, and thus ensures employee compliance with FBI policies and guidelines), and
- the Discovery Processing Unit (which "identif[ies] information that is relevant and subject to disclosure during the civil discovery process").

JA 114 & nn.8-9, 115 & nn.10-11, 116 & n.12, 493 & n.5. Hardy concluded that, in light of his experience and the organization of the FBI, no other components of the FBI or personnel "would reasonably likely possess records responsive to the Plaintiffs' requests." JA 116.

The targeted components for this Group 2 search, like the component targeted in the Group 1 search, were provided with a "verbatim" list of the Group 2 categories

of information as the search parameters, and the components were "tasked" with searching and producing "all retrievable agency records regarding this request," and with using their "expertise to help identify responsive records" inside the component or "elsewhere . . . in the Bureau." JA 493. The targeted search for Group 2 records sought records in the agency's possession before December 11, 2014, the day when the FBI "initiated the search for [P]laintiffs' overall request for Group 2." *Id.* This search yielded responsive records. JA 116.

Following this targeted search of specific FBI components, the Bureau then performed a search of its Central Records System (including a specialized portion of the System containing records related to electronic surveillance) "for records responsive to the portion of Plaintiffs' request seeking information and records relating to the Timberline High School case." JA 114, 493. The FBI searched for the terms "'Timberline," "'Timberline High School" and "'Timberline Highschool," using the same cut-off date of December 11, 2014 (the day the Group 2 search began). JA 121, 493 & n.4. The FBI searched the Central Records System for terms relating to the Timberline incident because, as noted above, the System is indexed for search by topics of investigative interest, like specific individuals, events, and organizations. JA 117, 122. The Timberline incident was the only specific incident referenced in the FOIA requests or uncovered during the FOIA search. The search of the Central Records System turned up the main investigative file for the Timberline incident, and

a "page by page review of the investigative file . . . did not yield any records not already provided by the Seattle Field Office" in the targeted search. JA 121.

Following the completion of these searches, Hardy concluded that the FBI had "implemented a comprehensive and overlapping search to locate records responsive to all of Plaintiffs' requests." JA 121. In total, the FBI identified 290 pages of responsive documents,[1] JA 102 & n.1, including: the FBI's policies and guidelines that governed undercover activities like the 2007 Timberline investigation; the Attorney General's current "Guidelines on Federal Bureau of Investigation Undercover Operations"; other policies and guidelines regarding the Sensitive Operations Review Committee and sensitive investigative matters; a large number of documents regarding the decision to impersonate a member of the news media to deliver surveillance software pursuant to a warrant in the Timberline investigation; and a Situation Action Background report regarding the Timberline incident, prepared by the Cyber Division in October 2014 for FBI executive leadership after the undercover nature of the investigation became public. *See* JA 102 n.1, 301-13, 455-57, 459-62, 464-70, 472-82, 507-14. These documents gave Hardy "no indication . . . that responsive material would reside anywhere else" or that "other responsive records exist." JA 122. Accordingly, the FBI terminated the search. Hardy determined that "there is no factual basis to conclude additional search efforts would be reasonably calculated to

[1] The FBI processed 267 responsive pages and also provided Plaintiffs with a link to a 23-page responsive document available online. JA 102 & n.1.

yield responsive records." *Id.* Of the 290 pages of responsive records located in the search, the FBI processed and released 106 pages in full and 103 pages in part (with redactions pursuant to applicable FOIA exemptions). JA 102 & n.1. The FBI withheld 59 pages in full, pursuant to applicable FOIA exemptions, and 22 pages in full, as duplicates of already-released material. *Id.*

D. District Court Proceedings

Plaintiffs brought suit in district court under the FOIA. Plaintiffs contended that the agency's search was not reasonably drawn to locate responsive documents, and that the agency had wrongfully redacted or withheld information from its disclosures. JA 20-23.

The district court granted summary judgment to Defendants. JA 567. The court concluded that Hardy's declarations "show[ed] that the FBI conducted a good faith, reasonable search of the systems of records likely to possess records responsive to plaintiffs' requests." JA 572. The court concluded that it was reasonable to direct a targeted search for Group 1 records—involving the use of links impersonating the news media to deliver surveillance software—at the Operational Technology Division, the entity within FBI "solely responsible for the deployment and collection" of such electronic surveillance. JA 573. The reasonableness of that choice was underscored by the fact that a search of the Central Records System, by its very nature, was unlikely to yield any responsive records—as the FBI later confirmed by performing an actual search of that System that yielded no responsive documents. JA 574.

Regarding Group 2 records—records about the Timberline incident, and policies and guidelines governing media impersonation in general—the district court concluded that the search was reasonably targeted to produce responsive records because it targeted numerous components of the FBI based on those components' missions and functions, and was backed up by the electronic search of the Central Records System. JA 574. Plaintiffs asserted that the search was not adequate because other responsive records must exist in light of publicly available information. But the court noted that, "[i]n general, 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)). And the court concluded that it had "reviewed the information identified by plaintiffs for 'positive indications of overlooked materials,'" and found none. *Id.* (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999)). Finally, the court concluded that the FBI had appropriately redacted and withheld information that was exempt from disclosure under various FOIA exemptions (redactions and withholdings that Plaintiffs do not challenge on appeal). JA 576-82.

SUMMARY OF ARGUMENT

The FOIA requires that an agency make a good faith effort to conduct a search reasonably expected to produce the information requested. An agency may obtain a summary judgment in its favor regarding the adequacy of a FOIA search if the agency provides a "relatively detailed and non-conclusory" affidavit demonstrating that such

a search was made. *Mobley v. Central Intelligence Agency*, 806 F.3d 568, 581 (D.C. Cir. 2015) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)).

The FBI affidavits here easily satisfy that standard. Hardy's declarations describe in great detail an extensive targeted search of numerous offices, divisions, and personnel—chosen based on the likelihood of finding responsive documents in those locations in light of their missions and functions within the FBI. This targeted search was followed by an electronic search of the FBI's Central Records System, using search terms likely to uncover responsive records in light of the index and organization of the System. All of these searches yielded 290 responsive pages of documents, which the FBI processed. The district court correctly relied on Hardy's declarations to conclude that the FBI had performed an adequate search.

Plaintiffs' attempt to cast doubt on the reasonableness of the agency's search is without merit. Plaintiffs question the design of the search described in the Hardy declarations in order to speculate about the existence of unknown responsive records in unspecified locations within the FBI. But the Hardy declarations describe a reasonable search for responsive records and warrant "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *Mobley*, 806 F.3d at 581 (quoting *SafeCard*, 926 F.2d at 1200). Plaintiffs also assert that a few publicly available documents indicate that additional responsive records would be found in FBI leadership offices and a second FBI field office, and that it was therefore unreasonable for the agency not to

search those locations. But these publicly available documents do not bolster Plaintiffs' speculation about the existence of additional, unknown responsive records. The public documents are not the kind of "clear and certain" leads an agency is required to follow in order to conduct a reasonable search. *Kowalczyk v. Department of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996). In any event, even if records did exist within the FBI related to these publicly available documents, those records would not have been within the agency's possession at the time of the cut-off date for the search for records responsive to Plaintiffs' FOIA requests. Accordingly, the agency would not be required to search for or produce any such later-acquired records.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment regarding the adequacy of an agency's search for records responsive to a FOIA request. *Mobley v. Central Intelligence Agency*, 806 F.3d 568, 574, 580 (D.C. Cir. 2015).

ARGUMENT

The FBI Conducted an Adequate Search for Responsive Records.

A. The District Court Correctly Held the Search Was Reasonably Calculated to Locate Responsive Records.

1. Under the FOIA, an agency has a duty to "ma[k]e a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Accordingly, an agency need not "search every record

system." *Id.* Instead, an agency may conduct a targeted search of the particular record systems that, in the agency's reasonable judgment, are "likely to turn up the information requested." *Id.* If, during such a targeted search, the agency uncovers "a lead [that] it cannot in good faith ignore, *i.e.*, a lead that is both clear and certain" regarding the existence of additional responsive records in another, unsearched location, the agency must pursue that lead. *Kowalczyk v. Department of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996). But otherwise, having reached the end of a reasonably designed search for responsive records, the agency may conclude the search and proceed to processing and disclosure of non-exempt information within the responsive records identified in the search. *Id.*

To grant summary judgment to a defendant in a FOIA suit, a court may rely on a "relatively detailed and non-conclusory" agency affidavit describing the search undertaken and why the agency believes the search was reasonably designed to find the information requested. *Mobley v. Central Intelligence Agency*, 806 F.3d 568, 581 (D.C. Cir. 2015) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)). Such affidavits are "accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *Id.* (quoting *SafeCard*, 926 F.2d at 1200).

2. The district court here correctly relied on Hardy's detailed declarations to conclude that "the FBI conducted a good faith, reasonable search of the systems of records likely to possess records responsive to [P]laintiffs' requests." JA 572. The

FBI's search included a comprehensive set of each FBI component whose responsibility and function indicated a likelihood that it would contain records responsive to a particular aspect of the FOIA requests. JA 113-16.

For the so-called Group 1 records regarding the use of media impersonation to install surveillance software, Hardy's declarations explain why it was reasonable to target a search of the Operational Technology Division. The Division "was the component where responsive records were reasonably likely to be located," because the Division "is *solely* responsible for the deployment and collection of all lawfully conducted electronic surveillance" in the FBI, including "the alleged methods, techniques, and procedures at issue in this request." JA 491 (emphasis added). Based on Hardy's experience and knowledge about the structure of the FBI and the function of its components, Hardy identified no other components of the FBI likely to possess responsive records regarding the general practice of impersonation of the media with the specific purpose to deliver surveillance software. Hardy's explanation for the scope of the targeted Group 1 search is reasonable, and it warrants a presumption of good faith and regularity. *See Mobley*, 806 F.3d at 581. And, because the search revealed no leads indicating responsive documents would likely be located elsewhere, this targeted search satisfied the FOIA's requirement of a search reasonably calculated to find responsive records. *See Kowalczyk*, 73 F.3d at 389. Similarly, the FBI reasonably targeted the same Division to search for the Group 2 request for an

accounting of instances in which the FBI had impersonated the media to deliver surveillance software.

For the remaining categories of Group 2 information, a broader search of additional locations was in order, given the range of FBI components that may possess records related to (1) the Timberline case, and (2) FBI policies, guidelines, reviews, and training materials governing media impersonation in general (and not just in relation to the delivery of surveillance software). Hardy directed a targeted search of the FBI's Seattle Division, carried out in part by the Special Agent in Charge of the Timberline investigation, which yielded a large number of Timberline records. JA 121. To search for any additional Timberline records, as well as policy and guideline records about media impersonation in general, the agency performed a search of numerous additional locations, including the Office of General Counsel, the National Covert Operations Section, the Training Division, the Inspection Division, and the Discovery Processing Unit. JA 114 & nn.8-9, 115 & nn.10-11, 116 & n.12, 493 & n.5. This search was reasonably directed at these components in light of their responsibilities and functions within the FBI and the likelihood of them possessing responsive records. Hardy reasonably concluded, on the basis of his knowledge and experience, that no other components of the FBI "would reasonably likely possess records responsive to the Plaintiffs' requests." JA 116.

In addition to these targeted searches of specific components likely to possess responsive records, the FBI also performed an electronic search of the FBI's Central

Records System, which is the primary repository for FBI records. In performing that search, the FBI faced a challenge: the Central Records System is indexed using terms that reflect investigative interest and operational necessity, and not according to the particular type of undercover tactic or surveillance tools at issue in a particular document. JA 490, 492-93.

That feature of the Central Records System limited the FBI's reasonable options for searching the System for records responsive to Plaintiffs' FOIA requests. The FBI reasonably concluded that it should search that System for records related to the Timberline investigation, because that investigation was the particular instance of media impersonation identified in the FOIA requests and because the Timberline investigation was likely to be indexed in the Central Records System. Because the Timberline investigation was the only specific instance uncovered during the search, the FBI could not reasonably search the Central Records System for other such instances by name. Nor would a search of the Central Records System for general terms relating to the topic of media impersonation and the delivery of surveillance software be likely to yield responsive records, as such topics were not likely to be indexed in the System. Indeed, in an abundance of caution, the FBI tested this conclusion, and a search of the Central Records System for "media impersonation" or "CIPAV" (the type of surveillance software at issue in the Timberline case) yielded no responsive records. JA 492-93. The agency thus reasonably concluded that the search

of the Central Records System was complete and no further searches were reasonably likely to be fruitful.

In sum, Hardy's declarations meet—and, indeed, surpass—this Court's requirement of a "relatively detailed and non-conclusory" affidavit describing the agency's search. *Mobley*, 806 F.3d at 581. Hardy's declarations describe how the agency "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.* at 580. That search yielded 290 pages of responsive documents, JA 102 & n.1, including a large number of documents related to media impersonation in the Timberline incident, policies and guidelines that govern sensitive or undercover FBI investigative activities (including the Timberline incident), and an October 2014 review of the Timberline incident for FBI leadership. These documents gave Hardy "no indication . . . that responsive material would reside anywhere else" or that "other responsive records exist." JA 122. For these reasons, the district court correctly relied on the Hardy declarations to conclude that the agency's search was reasonable and adequate. JA 572-73.

Once a court relies on an agency declaration describing, on its face, a search reasonably targeted to locate responsive records, "the burden is on [the FOIA plaintiff] to identify specific additional places the agency should now search," or other specific problems with the search the agency conducted. *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013). Plaintiffs may not meet this burden with "purely speculative

claims about the existence and discoverability of other documents." *SafeCard*, 926 F.2d at 1200. Plaintiffs instead may meet their burden and foreclose summary judgment for the defendants only if they introduce into the record evidence that "raises substantial doubt" as to the adequacy of the agency's search. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999). But Plaintiffs here failed to meet that burden in the district court, and their arguments on appeal fair no better.

B. Plaintiffs' Arguments on Appeal Are Unavailing.

Plaintiffs contend that the FBI's search for responsive records in this case was unreasonable, for two reasons: (1) the search, as described in the Hardy declarations, was "facially flawed and inadequate," and (2) publicly available information "clearly shows that the FBI failed to search offices and other locations where relevant documents were likely—if not certain—to be found." Br. 19. Both arguments are without merit.

1. The agency's declarations are not facially flawed.

a. Regarding the agency's search for Group 1 records in the Operational Technology Division, Plaintiffs contend that Hardy's declarations do not specify which "search terms" and what "type of search" was performed. Br. 23. But, to the contrary, the declarations make clear that the Division was given the complete text of the Group 1 request—asking for "all records concerning the FBI's utilization of links to what are or appear to be news media articles . . . to install . . . surveillance tools"—as a "search parameter[]." JA 492 (alteration omitted). And the declarations specify

that the Division was instructed to perform a comprehensive "search [of] all locations where records were reasonably likely to be located, including, electronic and paper files as well as email," and to "help identify responsive records, regardless of whether they may be located in [the Division] or elsewhere." *Id.* The Division was even told to send an email to all of its employees, asking each of them to aid the Division in the search for responsive records. JA 113.

An agency affidavit, describing a targeted search of a specific office as part of a broader search, does not need to elaborate further in order to provide the "reasonabl[e] detail[]," *Mobley*, 806 F.3d at 581, required by the FOIA. Contrary to Plaintiffs' contention, Br. 23, an agency affidavit is not required to list in detail precisely which employees performed a search of which specific documents within a particular office on a certain date. Plaintiffs cite no precedent establishing such a requirement. And such information would be contrary to this Court's precedent holding that an agency's affidavit does not need to "set forth with meticulous documentation the details of an epic search for the requested records." *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982).

Plaintiffs also contend that the Group 1 search of the Operational Technology Division was insufficient because it yielded no responsive records relating to the Timberline incident or any other case in which media impersonation was used to deliver surveillance software. Br. 23-25. But "the adequacy of a search is 'determined not by the fruits of the search, but by the appropriateness of [its] methods.'" *Hodge*,

703 F.3d at 579 (alteration in original) (quoting *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)). And Plaintiffs have identified no evidence that would call into question Hardy's conclusion that the Operational Technology Division was the location in the FBI reasonably likely to possess records regarding the "utilization of links to what are or appear to be news media articles . . . to install . . . surveillance tools." JA 492.

As Hardy explained, the Division was the FBI component with "sole[]" responsibility for deploying this kind of electronic surveillance, whether done via media impersonation or not. JA 491. Any individual field office that may have used surveillance software at issue in the FOIA requests would have to go to the Division for approval, coordination, and monitoring. JA 492. Accordingly, if records existed regarding Group 1 anywhere, they were likely to exist within the Division. And the evidence in the record only underscores that conclusion. The FBI searched the Central Records System, which contains records from across the FBI, for the terms "media impersonation" and "CIPAV" (the specific surveillance software used in the Timberline investigation). JA 492-93. This search yielded no responsive records, *id.*, highlighting the reasonableness of conducting a more-targeted search of the office in charge of deploying the surveillance tool at issue in the Group 1 request.

After the FBI reasonably concluded that the Operational Technology Division would have any records responsive to the Group 1 request, the FBI was not then required to search all documents in all of its individual field offices and other

components in order to negate any possibility that such a search might turn up additional records not located in the Division. Absent a lead pointing to a particular location, the FBI's choice to target the Operational Technology Division was reasonable. And an agency's duty under the FOIA is to conduct a reasonable search, not to "search every record system." *Oglesby*, 920 F.2d at 68; *see also American Fed'n of Gov't Emps., Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 208 (D.C. Cir. 1990) (concluding that an agency need not search "every chronological office file and correspondent file, internal and external, for every branch office, staff office" in response to a FOIA request). Plaintiffs do not identify any additional, particular components within the FBI that, in their view, should have been selected for a targeted search for Group 1 records based on the responsibilities or functions of the components. *See* Br. 23-25. Plaintiffs thus fail to raise any substantial doubt as to the adequacy of targeting the Group 1 search at the Operational Technology Division. *See Hodge*, 703 F.3d at 580 ("[B]ecause the sworn declarations from the FBI indicate that it conducted 'reasonably calculated' searches, the burden is on [the FOIA plaintiff] to identify specific additional places the agency should now search.").

To the extent Plaintiffs suggest that the Group 1 search should have at least mirrored the portion of the Group 2 search for documents relating to the Timberline incident, that contention is meritless. Plaintiffs do not explain why it would be reasonable to duplicate the Timberline portion of the Group 2 search in the course of conducting the Group 1 search. Plaintiffs offer no evidence indicating that the Seattle

field office was likely to contain any additional records responsive to the Group 1 search, beyond what was already being sought regarding the Timberline incident in Group 2.

b. Regarding the Group 2 search, Plaintiffs again argue that the declarations do not specify the "search terms or methods" used in each component to conduct the search. Br. 25. As a result, Plaintiffs purport to be uncertain whether the FBI components searched for Group 2 records were instructed to search for policies and guidelines regarding media impersonation in general (as specified in the FOIA request) or instead "were instructed to search for documents related only to the Seattle/Timberline Incident." Br. 26. But, as with the Group 1 search, the Hardy declarations make clear that the components targeted for the Group 2 search were provided a "verbatim" list of the Group 2 information categories, drawn from the initial FOIA requests, as their search parameters. JA 493. And the declarations state that the components were told to conduct a comprehensive search of "all retrievable agency records regarding this request, including database systems, paper or manual files," and to state whether they have reason to believe that responsive records may be located elsewhere. *Id.* Plaintiffs offer no basis to call into question the veracity and accuracy of these descriptions of the Group 2 search.

Plaintiffs' contention (Br. 25) that the agency's declarations do not indicate which divisions "if any, failed to conduct a search as requested" is puzzling. In fact, the Hardy declarations specifically state that "[a]ll divisions/units tasked with

conducting searches for records on Groups 1 and 2 conducted the requested searches." JA 494.

And Plaintiffs' assertion (Br. 25) that the Group 2 search was inadequate because the declarations do not "indicate which divisions located responsive records" likewise is flawed. Plaintiffs do not identify any support for the proposition that the FOIA requires an agency affidavit to state which specific components tasked with a targeted search located which responsive records during the search. As this Court has held, agency affidavits need not "set forth with meticulous documentation the details of an epic search for the requested records." *Perry*, 684 F.2d at 127. Instead, they need only describe a reasonable search in a "relatively detailed and non-conclusory" affidavit. *Mobley*, 806 F.3d at 581. Hardy's declarations easily satisfy that standard.

Plaintiffs further contend that the agency unreasonably limited its Group 2 search of the Central Records System by searching for only terms related to the Timberline incident. Br. 25-26. But, as the district court correctly explained, JA 574, the agency's search of the Central Records System was necessarily limited by the structure and organization of that System's index, which focuses on particular people, organizations, and events of investigative interest. Because the Timberline investigation was the only incident of media impersonation identified in the FOIA requests or uncovered during the search process, the only search of the Central Records System reasonably likely to yield responsive records was a search aimed at the Timberline incident. *Id.* And, in any event, a later search of the Central Records

System for the terms "media impersonation" and "CIPAV" confirmed that conclusion, yielding no responsive records. JA 492-93.

In sum, the agency conducted a targeted search of the FBI components likely to contain policies and guidelines governing media impersonation, including the Office of General Counsel, the Training Division, the Inspection Division, and the National Covert Operations Section of the Criminal Investigative Division (which "is responsible for devising policy matters and techniques to be used in complicated investigations"). JA 114 & nn.8-9, 115 & nn.10-11, 116 & n.12, 493 & n.5. That search identified a number of guidelines and policies governing sensitive and undercover operations, including operations involving media impersonation. Plaintiffs have identified no reason to conclude that a search of other locations would have been reasonably likely to produce responsive records.

2. Publicly available information does not undermine the reasonableness of the FBI's search.

Plaintiffs' final argument is that, regardless of whether the FBI's search of certain locations and record systems described in the Hardy declarations was reasonable on its own terms, three pieces of publicly available information indicate that the FBI should have extended its search to additional components of the FBI, where, Plaintiffs contend, additional responsive records were likely to be found. Br. 27-36. But none of these pieces of publicly available information undermine the reasonableness of the FBI's search.

a. Plaintiffs first note that an internal FBI email in the Timberline case, located by the FBI during the search for documents responsive to Plaintiffs' FOIA requests, references "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." Br. 34 (alteration in original) (emphasis omitted); *see* JA 465. Plaintiffs argue that this email should have caused the FBI to search its St. Louis field office for records responsive to Plaintiffs' requests. Br. 34.

But this email does not indicate that it is referencing an incident of media impersonation. Accordingly, it is not the kind of lead that could require an agency to expand its search to a new location. Where, as here, a FOIA request "fails to direct the agency's attention to any particular office other than the one receiving the request, then the agency need pursue only a lead it cannot in good faith ignore, *i.e.*, a lead that is both clear and certain" regarding the existence of additional responsive records. *Kowalczyk*, 73 F.3d at 389. And here, as Hardy explained in a declaration, "[t]he reference to 'St. Louis' in [the email] is too ambiguous to constitute a concrete lead that would allow [the FBI] to conduct a reasonable search," as "there are no facts in the records themselves that indicate the technique employed [in the St. Louis case] also involved the FBI impersonating a member of the media . . . as specifically requested by the Plaintiffs." JA 494-95.

For the same reason, the FBI was not required to expand its search to new locations based on an FBI court filing in Massachusetts that lists the Timberline

incident as being among two other FBI cases involving "network investigative techniques." Br. 34. Whether or not Timberline and two other FBI cases involved "network investigative techniques" says nothing about whether those other cases involved impersonation of the news media or impersonation of the news media to deliver surveillance software—the subject of Plaintiffs' FOIA requests.

b. Plaintiffs also argue that, in light of public documents, it was unreasonable for the FBI to not search the Office of the Director and other offices "responsible for responding to congressional inquiries and/or preparing public statements." Br. 28. Plaintiffs note that Senator Grassley sent the FBI Director a letter on June 12, 2015, "asking the FBI for an accounting of how many times the agency impersonated personnel from legitimate companies in deploying spyware." Br. 33; *see* JA 392. Plaintiffs doubt that the FBI would have "ignored a request from a prominent member of Congress," and further argue that Senator Grassley's letter itself is responsive to the Plaintiffs' FOIA requests. Br. 33. Accordingly, Plaintiffs argue, it was unreasonable for the FBI not to direct its search for responsive records to "the Office of the Director or other offices responsible for responding to congressional inquiries." *Id.*

But Senator Grassley sent his letter to the FBI on June 12, 2015, months after the cut-off date for the search for both Group 1 and Group 2 records (January 6, 2015, and December 11, 2014, respectively). JA 492-93. Those were the dates on which the FBI initiated the Group 1 and Group 2 searches, and Department of

Justice regulations provide that "[i]n determining which records are responsive to a [FOIA] request, a component [of the Department, like the FBI,] ordinarily will include only records in its possession as of the date that it begins its search." 28 C.F.R. § 16.4(a); *see also* U.S. Dep't of Justice, *Freedom of Information Act Reference Guide*, https://go.usa.gov/xNEuJ (last accessed August 2, 2017) (Department "components ordinarily will use the date upon which they begin a record search as the 'cut-off' date for identifying the records that are responsive to a FOIA request.").

The district court correctly determined that these cut-off dates were reasonable. JA 575. Date-of-search cut-offs are presumptively reasonable because they provide a clear stopping point for a FOIA search. They thereby avoid the moving-target problems that can arise with a search for records in the agency's possession up to the date of production or initiation of litigation. *See Public Citizen v. Department of State*, 276 F.3d 634, 644 (D.C. Cir. 2002) (finding a date-of-request cut-off unreasonable in a particular case, and suggesting a "date-of-*search* cut-off" instead); *see also McGehee v. CIA*, 697 F.2d 1095, 1104 (D.C. Cir. 1983). And, in any event, Plaintiffs have forfeited any argument that the date-of-search cut-off was unreasonable in this case by failing to make any argument to that effect in their opening brief. Because Senator Grassley's letter falls outside the reasonable search cut-off date in this case, that letter is not responsive to Plaintiffs' FOIA requests, and it does not indicate that additional, responsive documents are likely to be located in the Office of the Director.

Plaintiffs similarly contend that it was unreasonable for the FBI to omit the Office of the Director from the search in this case in light of a letter to the editor of the *New York Times*, written by the FBI Director and published on November 6, 2014. Br. 33; JA 396. That letter, created before the search cut-off dates, defends the FBI's conduct of the Timberline investigation, including the agents' limited impersonation of the media in order to deliver surveillance software to a particular target pursuant to a warrant. JA 396. Plaintiffs speculate that the Office of the Director must have "records related to the letter to the editor," Br. 33, and necessarily further speculate that such records would be responsive to their FOIA requests.

But such speculation, like the speculation that the Office of the Director must have records relating to Senator Grassley's letter, is not the kind of "clear and certain" lead an agency is required to follow. *Kowalczyk*, 73 F.3d at 389. The FBI conducted a targeted search of all of the FBI components likely to have records responsive to Plaintiffs' requests, and asked those components to report if there was reason to believe another location may have additional responsive records. If the Office of the Director relied on background material in creating the letter to the editor, such material would have come from and reside in the components tasked with performing the search at issue here—*i.e.*, the components involved in the Timberline incident and the components likely to have policies and guidelines regarding media impersonation.

For example, as detailed in an Inspector General report, the Director's letter to the editor drew from a Situation Action Background document that was drafted by

"FBI employees in the Cyber Division work[ing] with attorneys in the FBI's Office of General Counsel." JA 554. That document, as the Inspector General report summarizes, "described the facts and circumstances surrounding the FBI's [Timberline] investigation" for "FBI executive leadership," and "analy[zed] . . . the applicable Department and FBI policies in effect at the time of the investigation" and "Department and FBI policies currently in effect." *Id.* And, indeed, the Group 2 search carried out by the FBI identified a Situation Action Background report on the Timberline incident, prepared by the Cyber Division for FBI executive leadership on October 29 and 31, 2014—just days before the Director's letter to the editor was published—which describes the FBI's Timberline investigation and analyzes the investigation's compliance with various policies. JA 472-82. Plaintiffs engage in pure speculation when they hypothesize that the Office of the Director itself would have created or continued to hold *other* responsive documents related to the letter to the editor. That kind of speculation is insufficient to overcome the presumption of regularity that attaches to the agency's declarations. As this Court has held, "hypothetical assertions" that responsive documents "*must* exist" given the "importance" of an event are "pure speculation" and "insufficient to raise a material

question of fact with respect to the adequacy of the agency's search." *Oglesby*, 920 F.2d at 67 n.13.[2]

c. Finally, Plaintiffs note that the Office of the Inspector General in the U.S. Department of Justice released a report in September 2016 reviewing the FBI's undercover conduct in the Timberline investigation. Br. 29-32; JA 534. That report concludes that the FBI agents on the Timberline case did not violate then-applicable policies regarding undercover and sensitive operations. JA 539. Although those policies "provided some guidance," they were "less than clear" on certain issues, and the policies "did not expressly address the tactic of agents impersonating journalists." *Id.* The report explains that the FBI adopted a new interim policy on June 8, 2016, that "provides guidance to FBI employees regarding their impersonation of members of the news media during undercover activity." *Id.* "Under this new policy, FBI agents may only represent, pose, or claim to be members of the news media when authorized by the FBI Deputy Director, after consultation with the Deputy Attorney General, as part of an undercover operation reviewed by the Undercover Review Committee (UCRC)." JA 539-40.

[2] Plaintiffs similarly assert that the Office of the Director must contain responsive documents in light of a letter sent to the FBI Director from the Reporters Committee and others on November 6, 2014. Br. 33; JA 382. But Plaintiffs' FOIA requests did not request production of their own letters to the FBI. And there is no indication on the record that the Director responded to this letter or, in doing so, created documents responsive to Plaintiffs' underlying FOIA requests.

Plaintiffs argue that it is "almost certain" that elements of the FBI were developing the new interim policy regarding media impersonation, dated June 8, 2016, "at or around the time Defendants[] searched for, processed, and released documents in response to Plaintiffs[] [FOIA] [r]equests" in February and March of 2016. Br. 28-29. But Plaintiffs' "hypothetical assertions" that documents about the new policy "*must* [have] exist[ed]" several months before the new interim policy was released is "pure speculation" that is "insufficient to raise a material question of fact with respect to the adequacy of the agency's search." *Oglesby*, 920 F.2d at 67 n.13.

In any event, whatever documents the FBI might have possessed in February or March of 2016, regarding the June 2016 policy, were outside the scope of the FOIA search conducted by the agency. As discussed above, the FBI searched for responsive documents that were in its possession as of the date the FBI initiated the Group 1 and Group 2 searches: January 6, 2015, and December 11, 2014, respectively. JA 492-93. Date-of-search cut-offs for FOIA searches are presumptively reasonable under this Court's precedent, *see Public Citizen*, 276 F.3d at 644; *McGehee*, 697 F.2d at 1104, the district court concluded the cut-offs were reasonable in this case, JA 575, and Plaintiffs have not raised an argument to the contrary on appeal. Accordingly, any documents the FBI might have created in 2015 or 2016, in preparation for the June 2016 interim policy, would have been beyond the scope of the FBI's reasonably designed search. So, too, would be any documents the

FBI might have had related to the Inspector General's report, such as the FBI's comments on the draft report in 2016. Br. 32; JA 561 n.30.

Plaintiffs' reliance (Br. 30-31) on *Campbell v. United States Department of Justice*, 164 F.3d 20 (D.C. Cir. 1998) is misplaced. In *Campbell*, an agency began a FOIA search by inspecting a system of records that, typically, would identify all responsive records. 164 F.3d at 27-28. Though that standard search was reasonably designed at the outset to target all locations where responsive records were likely to be found, the search turned up documents indicating that additional responsive records would be found by searching a separate system of records. *Id.* The agency did not search that separate system, and this Court concluded that the agency's search was inadequate. *Id.* The Court reasoned that "[a]n agency has discretion to conduct a standard search in response to a general request, but it must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Id.* at 28. "Consequently, the court evaluates the reasonableness of an agency's search based on what the agency knew at its conclusion rather than what the agency speculated at its inception." *Id.*

Plaintiffs quote that last sentence from *Campbell* as support for the proposition that "[t]he FBI simply cannot argue that it had no knowledge of the Inspector General's Report or the development of [the new interim policy] at the time it searched for and produced documents." Br. 31. But *Campbell* stands for the proposition that where a search that was reasonably designed *ex ante* reveals a lead

indicating that further responsive documents exist in another location, an agency must expand its search to that other location. *Campbell* does not stand for the further proposition that date-of-search cut-offs are unreasonable and that agencies must conduct continuously updated searches for responsive records created after the date of initial search but before the date of production of records to the FOIA requester. Indeed, neither *Campbell* nor Plaintiffs' brief on appeal address date-of-search cut-offs at all. This Court's precedents presumptively endorse date-of-search cut-offs, *see Public Citizen*, 276 F.3d at 644, and such cut-offs are consistent with the more-general principle of reasonableness that governs FOIA searches, *see Campbell*, 164 F.3d at 27.

Finally, Plaintiffs argue (Br. 31-32) that the Inspector General's report indicates that the FBI's search was inadequate because the Office of the Inspector General reviewed "approximately 2000 documents" in preparing the report, JA 540, while the FBI found only 290 pages of records responsive to Plaintiffs' FOIA requests. Plaintiffs speculate that "the majority—if not *all*—of the 2,000 documents considered by the Office of the Inspector General are likely responsive to the FOIA [r]equests." Br. 30. But Plaintiffs' speculation is unwarranted. The Office of the Inspector General reviewed "the FBI's investigative case file" for the Timberline case, JA 540, whereas Plaintiffs did not request the entire Timberline case file but rather "[a]ny documents referring to the decision to create the fake [Associated Press] news article in the Timberline High School case," including "correspondence between the FBI's Seattle office and FBI headquarters about the case," a "copy of the internal review

carried out by the FBI," and a "copy of the Web link sent by the FBI to [the] suspect in 2007." JA 26. As Hardy explained in a declaration, the FBI conducted a "page by page review of the [Timberline] investigative file" and produced only those parts of it that were responsive to Plaintiffs' requests. JA 121. Plaintiffs provide no reason to conclude that the Office of the Inspector General reviewed materials from the Timberline case file that are responsive to Plaintiffs' FOIA requests but were not identified by the FBI's thorough search of the Central Records System, the Seattle field office, and other FBI offices involved in the Timberline incident.[3]

[3] Plaintiffs argue, in a footnote, that the Inspector General's report refers to a handful of emails and other documents from the Timberline case file regarding the use of media impersonation, and which, Plaintiffs say, have not been produced to them. Br. 31 n.13. But "the FBI's search, under FOIA, 'is not unreasonable simply because it fails to produce all relevant material.'" *Mobley*, 806 F.3d at 583 (quoting *Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986)). And "the adequacy of a search is 'determined not by the fruits of the search, but by the appropriateness of [its] methods.'" *Hodge*, 703 F.3d at 579 (alteration in original) (quoting *Iturralde*, 315 F.3d at 315). In light of the FBI's thorough electronic and targeted searches for responsive Timberline documents, and the 290 pages produced to Plaintiffs in this case, this handful of documents—even if responsive and unproduced—does not render the agency's search unreasonable.

Plaintiffs also argue, in a footnote, that the fact that the agency made a supplementary production of two additional responsive pages of records to Plaintiffs, after the initial production of 290 pages, "only further highlights the deficiency of the FBI's search." Br. 30 n.12. But such a limited supplementary release of responsive material does not cast serious doubt on the adequacy of the agency's search. *See Perry*, 684 F.2d at 128 (concluding that supplementary release of ten pages following a prior release of 600, "indicate[d] neither artifice nor subterfuge" and did not undermine the reasonableness of the agency's search).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

MATTHEW M. COLLETTE
s/ JOSEPH F. BUSA
JOSEPH F. BUSA
Attorneys, Appellate Staff
Civil Division, Room 7537
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-0261
Joseph.F.Busa@usdoj.gov

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,498 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ JOSEPH F. BUSA
Joseph F. Busa
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ JOSEPH F. BUSA
Joseph F. Busa
Counsel for Appellees