

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

SOUTHEASTERN LEGAL	)	
FOUNDATION, INC.,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
v.	)	FILE NO. 1:19-cv-03429-MHC
	)	
UNITED STATES	)	
DEPARTMENT OF JUSTICE,	)	
	)	
	)	
Defendant.	)	

**PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION FOR SUMMARY  
JUDGMENT AND PLAINTIFF’S BRIEF IN SUPPORT OF ITS CROSS-  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Southeastern Legal Foundation, Inc. (SLF) respectfully files this Brief in Response to Defendant’s Motion for Summary Judgment and in Support of Plaintiff’s Cross-Motion for Summary Judgment.

**INTRODUCTION**

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, provides the public with a right of access to federal agency records, thus ensuring that the People know what the government is doing. This case turns on the public’s right under the FOIA to information regarding representations made by the Federal Bureau of

Investigation (FBI) and Department of Justice (DOJ) to the Foreign Intelligence Surveillance Court (FISC). Despite public findings that members of the FBI lied to the FISC and withheld pertinent information in violation of the Foreign Intelligence Surveillance Act (FISA), questions linger about whether any FBI employees were actually sanctioned for their roles in the proceedings.

In an effort to shed light on what the government is doing, SLF sent the FBI a FOIA request seeking records regarding two distinct instances of attorney misconduct before the FISC: (1) attorney misconduct related to the Carter Page FISA applications, and (2) attorney misconduct related to the Section 702 violations that the FBI advised the FISC about in October 2016. It has been nearly two years, and still the FBI refuses to produce any records. Although the FBI claims it conducted a search for responsive records, SLF disputes the adequacy of the search because the FBI limited its search to a single department within the FBI's expansive system. Moreover, even after SLF produced evidence showing records existed in other offices, the FBI still refused to conduct an adequate search.

Under the FOIA, the People have a right to access federal agency records to hold their government accountable. 5 U.S.C. § 552. The agency must prove beyond material doubt that it has conducted an adequate search for the records. *CREW v. Nat'l Archives and Records Admin.*, 583 F. Supp. 2d 146, 167 (D.D.C. 2008). It

cannot construe a request narrowly, offer its own opinion about which records are responsive, or restrict its search based on what it thinks the underlying purpose of the request is. *Pub. Emps. for Envtl. Resp. v. U.S. Int'l Boundary & Water Comm'n*, 842 F. Supp. 2d 219, 225 (D.D.C. 2012); *Charles v. Office of Armed Forces Med. Exam'r*, 730 F. Supp. 2d 205, 216 (D.D.C. 2010). But that is what the FBI has done here. It inserted its own judgment into SLF's FOIA request, assumed that only one office would have responsive records, and ignored SLF's requests to expand its search to offices and custodians reasonably likely to have responsive records.

SLF respectfully asks this Court to compel the FBI to fulfill its statutory obligations in order to avoid defeating the purpose of the FOIA. Accordingly, the Court should deny Defendant's summary judgment motion. In addition, the Court should grant SLF's summary judgment motion and order the FBI to conduct an adequate search for records responsive to SLF's FOIA request.

### **FACTUAL BACKGROUND**

#### **I. The Carter Page FISA applications.**

On October 21, 2016, the FBI and DOJ sought and received a FISA probable cause order from the FISC authorizing the government to conduct electronic surveillance of an American citizen and volunteer advisor to the Trump presidential

campaign, Carter Page. *In re Carter W. Page, A U.S. Person, Verified Application*.<sup>1</sup> In total, the FBI and the DOJ obtained one initial FISA warrant targeting Carter Page and three renewals from the FISC in January 2017, April 2017, and June 2017. *Id.* The FBI and DOJ represented to the FISC that the Carter Page FISA applications were verified, and each was verified by unidentified FBI Supervisory Special Agents, certified by the Director or Deputy Director of the FBI, and approved by the Attorney General, Deputy Attorney General, or the Senate-confirmed Assistant Attorney General for the National Security Division. *Id.* The following persons signed one or more of the applications: FBI Director James Comey, FBI Deputy Director Andrew McCabe, Deputy Attorney General Sally Yates, Acting Attorney General of the United States Dana Boente, Deputy Attorney General Rod Rosenstein, unidentified persons in the DOJ, and unidentified FBI Supervisory Special Agents. *Id.*

The contents of the applications remained secret until early 2018 when the House Permanent Select Committee on Intelligence publicly released a January 18, 2018 memorandum detailing alleged misconduct before the FISC by the FBI and DOJ. *See* Memorandum from the House Permanent Select Committee on

---

<sup>1</sup> <https://assets.documentcloud.org/documents/4614708/Carter-Page-FISA-Application.pdf>.

Intelligence Majority Staff (Jan. 18, 2018).<sup>2</sup> A few weeks later, the Select Committee’s Democratic members released their own memorandum responding to the memo and unequivocally stating that neither the FBI nor the DOJ abused the FISA process or committed misconduct before the FISC. *See* Memorandum from the House Permanent Select Committee on Intelligence Minority (Jan. 29, 2018).<sup>3</sup> In September 2018, President Trump ordered the declassification of the Carter Page FISA applications. *See* Statement from the White House Press Secretary (Sept. 17, 2018).<sup>4</sup>

On December 9, 2019, the American public learned what the FBI and DOJ knew from the very beginning—that the FBI had in fact lied to, misled, and withheld material facts from the FISC. On that day, the United States Department of Justice Office of Inspector General (OIG) released the *U.S. Department of Justice Office of the Inspector General’s Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation* (OIG Report). *See* Ex. E.<sup>5</sup> The 400-plus page report is the culmination of the OIG’s “review to examine certain actions taken by the FBI and the DOJ during an FBI investigation opened on July 31, 2016, known

---

<sup>2</sup> [www.justsecurity.org/wp-content/uploads/2018/02/nunes-memo-HMTG-115-IG00-20180129-SD001.pdf](http://www.justsecurity.org/wp-content/uploads/2018/02/nunes-memo-HMTG-115-IG00-20180129-SD001.pdf).

<sup>3</sup> [www.documentcloud.org/documents/4387026-Unclassified-Schiff-Memo.html](http://www.documentcloud.org/documents/4387026-Unclassified-Schiff-Memo.html).

<sup>4</sup> [www.whitehouse.gov/briefings-statements/statement-press-secretary-34/](http://www.whitehouse.gov/briefings-statements/statement-press-secretary-34/).

<sup>5</sup> *Available publicly at* [www.justice.gov/storage/120919-examination.pdf](http://www.justice.gov/storage/120919-examination.pdf).

as ‘Crossfire Hurricane,’ into whether individuals associated with the Donald J. Trump for President Campaign were coordinating, wittingly or unwittingly, with the Russian government’s efforts to interfere in the 2016 U.S. presidential election.” Ex. E at i.<sup>6</sup> The OIG focused on “whether the Department and the FBI complied with applicable legal requirements, policies, and procedures in taking the actions [it] reviewed or, alternatively, whether the circumstances surrounding the decision indicated that it was based on inaccurate or incomplete information, or considerations other than the merits of the investigation.” *Id.* at i–ii. The OIG ultimately found “at least 17 significant errors or omissions in the Carter Page applications, and many additional errors in the Woods Procedures.” *Id.* at xiii.

The OIG Report speaks for itself and SLF certainly does not seek to restate the OIG Report’s findings. Indeed, it is ripe with example after example of how “FBI personnel fell far short of the requirement that they ensure that all factual statements in a FISA application are ‘scrupulously accurate’” and how factual assertions relied upon in the Carter Page FISA applications were “inaccurate, incomplete, or

---

<sup>6</sup> The Special Counsel ultimately concluded that members of the Trump campaign did not conspire or coordinate with the Russian government in its election interference activities. Special Counsel Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (Mar. 2019), [www.justice.gov/storage/report.pdf](http://www.justice.gov/storage/report.pdf).

unsupported by the appropriate documentation, based upon information the FBI had in its possession” when it sought the applications from the FISC. *Id.* at viii; *see also id.* at xi–xiii. It also discloses that in July 2018, the DOJ submitted a FISC Rule 13(a) letter to the FISC notifying the court that material facts concerning George Papadopoulos had been omitted from the FISA applications because the FBI had failed to include them. *Id.* at 167–68, 230–31.<sup>7</sup> Further, it discloses that an FBI attorney altered an email from another U.S. government agency so that the email stated that Mr. Page was “not a source” for the other agency, when in fact the original email confirmed that he was a source.<sup>8</sup> *Id.* at xi, xii, 8, 254, 368.

Even more importantly for current purposes, the OIG Report publicly discloses the identities of particular FBI and DOJ offices and employees that were involved with Crossfire Hurricane and the Carter Page FISA applications, and provides in depth discussion of each of their roles. For example, we now know that the Crossfire Hurricane team went through three iterations and included dozens of FBI personnel, including the Director, Deputy Director, Special Counsel’s Office,

---

<sup>7</sup> Specifically, in September 2016 Mr. Papadopoulos denied that he or anyone in the Trump campaign was collaborating with Russia or outside groups like Wikileaks in the release of the Democratic National Committee emails. *See Ex. E* at ix.

<sup>8</sup> Based on multiple media reports, SLF believed at the time that the FBI attorney was Kevin Clinesmith. SLF’s beliefs were confirmed in August 2020, when Clinesmith pleaded guilty to altering the email. *See Ex. G.*

EAD National Security Branch, Counterintelligence Division, Intel Section Chief, the Office of General Counsel (OGC), the National Security and Cyber Law Branch (NSCLB), the OGC unit chief and reporting attorneys, multiple operations branches and their analysts and agents, multiple field offices and their case agents, the intelligence section chief and its reporting analysts, and multiple units and their chiefs, among others. *See* Ex. E at 64–80, Figs. 3.1–3.3 at 81–83. The decision to go to the FISC, the gathering of information for the FISA applications, and the drafting of the FISA applications touched a wide swath of government offices including, for example, the entire Crossfire Hurricane team and many in the DOJ including those as high up as the Attorney General. *See generally id.*

The public now knows with certainty that what the House Committee alleged and what SLF suspected when it submitted its FOIA request was true—that dozens of FBI and DOJ attorneys were involved in the Carter Page FISA applications and, according to the OIG Report, a number of them engaged in misconduct before the FISC. But the public does not know what the FISC, any other court, licensing board, bar association, or the FBI have done about it. And that is why SLF submitted its FOIA request. But in response, the FBI unilaterally limited its search to the NSCLB and refused to produce any records. Declaration of Kimberly S. Hermann (Hermann Decl.), ¶ 9, Ex. D.

## **II. Section 702 Violations.**

Section 702 of the FISA allows the U.S. government to target for surveillance foreign persons located outside the United States for the purpose of acquiring foreign intelligence information. 50 U.S.C. § 1881a(a). It requires the Attorney General and Director of National Intelligence to provide the FISC with annual certifications regarding its collection of data pursuant to Section 702, including its minimization procedures. *Id.* at §1881a(h). In October 2016, the government told the FISC, for the first time, that it had not complied with the NSA’s minimization procedures involving searches acquired under Section 702 of the FISA. FISC Memorandum Opinion and Order at 19–20 (Apr. 26, 2017). Several days later, the government notified the FISC in writing of the compliance problems. *Id.* In a declassified opinion, the FISC addressed the “FBI’s apparent disregard of minimization rules” and the government’s failure “to meet its obligation to provide prompt notification to the FISC when non-compliance is discovered” as required by FISC Rule of Procedure 13. *Id.* at 68 n.57, 87.

As part of SLF’s efforts to preserve the integrity of the legal profession and judiciary, it sought records related to these acts of attorney misconduct. Compl. ¶ 7 (Doc. 1.) In response, the FBI refused to conduct a search for records related to these

Section 702 violations or even acknowledge that portion of SLF's request. Hermann Decl. ¶11, Ex. D.

### **III. SLF's FOIA Request.**

On May 24, 2019, SLF sent the FBI a FOIA request seeking the following:

1. All records regarding, reflecting, or related to any orders, opinions, decisions, sanctions, or other records related to any investigation or finding by the Foreign Intelligence Surveillance Court (FISC), any other court, any state licensing bar, any disciplinary committee, or any other entity, that any attorney violated the FISC Rules of Procedure or applicable Rules of Professional Conduct in connection with the Carter Page FISA application and renewals or the Section 702 violations the government orally advised the FISC about on October 24, 2016.
2. All records regarding, reflecting or related to any orders, opinions, decisions, sanctions, or other records finding by the FISC, any other court, any state licensing bar, any disciplinary committee, or any other entity, that any attorney violated or did not violate FISC Rule of Procedure 13, specifically, in connection with the Carter Page FISA application and renewals or the Section 702 violations the government orally advised the FISC about on October 24, 2016.
3. All records regarding, reflecting or related to any referral or complaint made to any attorney disciplinary body for conduct related to the Carter Page FISA application and renewals or the Section 702 violations the government orally advised the FISC about on October 24, 2016.

Compl. ¶¶ 11–13 (Doc. 1.) The FBI received the request on May 28, 2019. *Id.* ¶ 14.

As of July 30, 2019, the FBI had failed to (i) produce the requested records or demonstrate that the requested records are lawfully exempt from production; (ii) notify SLF of the scope of any responsive records it intended to produce or withhold

and the reasons for any withholdings; or (iii) inform SLF that it may appeal any adequately specific, adverse determination. *Id.* ¶ 18. Thus, SLF filed suit.

#### **IV. Communications Between Parties.**

##### **A. The FBI's First Response.**

After granting the FBI multiple extensions to allow it time to search for records, on November 21, 2019, the FBI informed SLF that it unilaterally limited its search to the FBI's NSCLB, and that the "NSCLB routed the search request to subject matter experts within NSCLB most familiar with the Carter Page FISA" and was unable to locate any responsive records. Hermann Decl. ¶¶ 9–10, Ex. D. The FBI did not even acknowledge SLF's request for records related to the Section 702 violations. *Id.* ¶ 11, Ex. D.

##### **B. SLF's Response.**

SLF informed the FBI that it disputed the adequacy of the FBI's search, and on December 2, 2019, provided the FBI with a list of custodians believed to have responsive records and a list of suggested search terms. *Id.* ¶¶ 12, 19, Ex. F, F-1. Specifically, SLF asked the FBI to clarify that it only searched the NSCLB, what time period was searched, and whether the FBI searched the following persons, explaining that they were known to have been involved in the Carter Page FISA application and renewals: James Comey; Andrew McCabe; Kevin Clinesmith; Bruce

Ohr; Peter Strzok; Trisha Anderson; Bill Priestap; Jim Baker; Jonathan Moffa; Mike Gaeta; Sally Moyer and the team including the other attorneys she references at page 155 of her October 23, 2018 testimony before the House Committee on the Judiciary and the House Committee on Oversight and Government Reform;<sup>9</sup> Supervisory Special Agent who signed the October 2016 Carter Page application “Verification” (page 54 of the OIG Report); Supervisory Special Agent who signed the January 2017 Carter Page application renewal “Verification” (page 67 of the OIG Report); Supervisory Special Agent who signed the April 2017 Carter Page application renewal “Verification” (page 79 of the OIG Report); Supervisory Special Agent who signed the June 2017 Carter Page application renewal “Verification” (page 89 of the OIG Report). *Id.* ¶ 25, Ex. F-1. SLF also proposed several search terms, including but not limited to: “FISC and omission”; “FISC and misstatement”; “FISC and correction”; “FISC and non-compliance”; “FISC and misconduct”; “Rules of Professional Conduct”; “bar and complaint”; “bar and investigation”; and “Clinesmith.” *Id.* SLF chose to include “Clinesmith” because evidence showed Kevin Clinesmith, an FBI lawyer, knowingly altered an email from another U.S. government agency so that the email fraudulently stated Carter Page was “not a

---

<sup>9</sup> [www.justsecurity.org/wp-content/uploads/2019/08/10.23.18-Moyer-Interview\\_Redacted-DJ.pdf](http://www.justsecurity.org/wp-content/uploads/2019/08/10.23.18-Moyer-Interview_Redacted-DJ.pdf).

source” for the other agency. *Id.* ¶ 23, Ex. G, E at xi, xii, 8, 254, 368. The DOJ then relied on this information to approve the Carter Page FISA applications. *Id.*

Regarding the Section 702 violations, SLF also asked the FBI to search the records of FBI employees that would have been involved in the Section 702 warrants that led to the February 28, 2017 Notice of Compliance Incident Regarding Incomplete Purges of Information Obtained Pursuant to Multiple FISA Authorities (on page 68, n.57 of the released April 26, 2017 FISA Memorandum Opinion and Order), FBI employees that would have been involved in the Section 702 warrants that led to the government acknowledging an “institutional ‘lack of candor’” before the FISC, and FBI employees that would have knowledge of any misconduct, non-compliance, omissions, or misstatements to the FISC with respect to Section 702 warrants. *Id.* ¶ 26, Ex. F-1.

SLF did not dispute searching the NSCLB; the NSCLB participated in discussions about whether to open Crossfire Hurricane; personnel in the NSCLB including Principal Deputy Counsel Trisha Anderson were on the Crossfire Hurricane team; and unknown persons in the NSCLB reviewed the Carter Page application package. *Id.* ¶ 20, Ex. E at 52, 81–83, 218. However, SLF disputed the FBI’s decision to only search a few custodians within that branch, without even indicating what terms or time periods were searched. *Id.* ¶ 21.

C. The FBI's Final Response.

On December 11, 2019, the FBI informed SLF that it was “unable to identify records responsive to [SLF’s] request.” *Id.* ¶ 27, Ex. H. The following day, the FBI notified SLF that it formally rejected SLF’s December 2 response, including SLF’s proposed search parameters. *Id.* ¶ 28. Thus, it did not search the records of individuals like James Comey, Andrew McCabe, Kevin Clinesmith, Bruce Ohr, Peter Strzok, Trisha Anderson, Bill Priestap, Jim Baker, Jonathan Moffa, Mike Gaeta, Sally Moyer, and various supervisory agents, nor did it search other FBI offices investigated in the OIG Report, such as the Office of the Director, the Office of the Deputy Director, and the OGC. *Id.* ¶ 22. To date, the FBI *still* has not stated whether it searched for records regarding the Section 702 warrants. *Id.* ¶¶ 11, 29.

On that same day, the FBI filed a motion to dismiss. *Id.* ¶ 30 (Doc. 12.) SLF opposed the motion, arguing that the FBI failed to comply with its statutory duty to conduct an adequate search for responsive records, and that SLF’s claims were not moot because it has a cognizable interest in having this Court opine on the adequacy of the FBI’s search. *Id.* ¶ 30 (Doc. 15.) On July 28, 2020, this Court denied the FBI’s motion to dismiss. *Id.* ¶ 31 (Doc. 28.)

## ARGUMENT

### I. Standard of Review.

The FOIA is meant to be a “disclosure statute,” not a “withholding statute.” *Milner v. Dep’t of the Navy*, 562 U.S. 562, 565 (2011). The Supreme Court “repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151–52 (1989). “The basic purpose of FOIA is 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.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

In FOIA litigation, as in all litigation, summary judgment is appropriate only when the pleadings and declarations demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Cunningham v. FAA*, No. 1:12-CV-3577-TWT, 2013 Dist. LEXIS 124100, \*9 (N.D. Ga. Aug. 29, 2013). In reviewing a motion for summary judgment under the FOIA, a court must view the facts in the light most favorable to the requester. *Burka v. U.S. Dep’t of Health and Human Servs.*, 87 F.3d 508, 514 (D.C. Cir. 1996); *Weisberg v. U.S. Dep’t of Just.*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). Thus, the burden is on the

agency to demonstrate that there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); *Bory v. United States RRB*, 933 F. Supp. 2d 1353, 1358 (M.D. Fla. 2013); *Brayton v. Off. of U.S. Trade Representative*, 641 F.3d 521, 526 (D.C. Cir. 2011) (finding an agency must “satisfy the summary judgment standard by showing that there are no genuine issues of material fact in dispute and that the government was justified as a matter of law in refusing the plaintiff’s FOIA request”).

In FOIA cases, the agency bears the burden of proving that it has fully complied with its obligations to conduct an adequate search. See 5 U.S.C. § 552(a)(4); see also *U.S. Dep’t of Just. v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989). An agency must satisfy this burden by submitting declarations that demonstrate “beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents.” *CREW*, 583 F. Supp. 2d at 167 (quoting *Weisberg*, 705 F.2d at 1351). Although an agency does not need to search every record system to uncover relevant documents, it must search every record system “likely to turn up the information requested.” *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Summary judgment will not be granted where the agency’s declarations do not “denote which files were searched or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to

enable [the plaintiff] to challenge the procedures utilized.” *CREW*, 583 F. Supp. 2d at 168; *see also Nation Mag. v. U.S. Customs Serv.*, 71 F.3d 885, 890–91 (D.C. Cir. 1995) (finding a declaration sufficient because it described more than 113 systems of records in detail, and explained the methodology for determining which systems would be searched and the terms of the search). “[I]f a review of the record raises substantial doubt, particularly in view of ‘well defined requests and positive indications of overlooked materials,’ summary judgment [for the agency] is inappropriate.” *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003) (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999)). Thus, declarations sufficient to justify summary judgment ordinarily identify the types of files that an agency maintains, state the search terms that were used to search through the files, and contain an averment that all files reasonably expected to contain requested records were, in fact, searched. *Oglesby*, 920 F.2d at 68; *see also Nation Mag.*, 71 F.3d at 890 (“The affidavits must be ‘reasonably detailed . . . , 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.’”) (internal quotation marks and citation omitted).

In evaluating an agency’s declaration, courts apply a reasonableness test to determine whether the agency’s search was adequate, keeping in mind

“congressional intent tilting the scale in favor of disclosure.” *Campbell v. U.S. Dep’t of Just.*, 164 F.3d 20, 27 (D.C. Cir. 1998). The initial burden for demonstrating an adequate search rests with the federal agency. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). However, when a requester produces countervailing evidence that puts the sufficiency of the agency’s identification or retrieval procedure at issue, then summary judgment should not be granted. *Morley v. CIA*, 508 F.3d 1108, 1116 (D.C. Cir. 2007) (quoting *Founding Church of Scientology of Wash., D.C., Inc. v. Nat’l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979)). Finally, courts evaluate the reasonableness of the agency’s search “based on what it knows at the conclusion of the search, rather than on the agency’s speculation at the initiation of the search.” *Inst. for Policy Stud. v. CIA*, 885 F. Supp. 2d 120, 139 (D.D.C. 2012).

## **II. The FBI Failed to Conduct an Adequate Search.**

The FBI attempts to justify its limited search by stating it need not exhaustively search for every record. Indeed, the D.C. Circuit Court of Appeals held in *Oglesby*, “There is no requirement that an agency search every record system.” 920 F.2d at 68. But the court went on to say: “However, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” *Id.*

SLF does not dispute that the NSCLB was one division in the FBI likely to have responsive records. However, SLF disputes the FBI's conclusion that the records requested were *only* likely to appear in the NSCLB. The FBI is made up of many offices and divisions, including the NSCLB, the Office of the Director, the Office of the Deputy Director, and the OGC, each of which were named and investigated in the OIG Report. Hermann Decl. ¶ 21. Several of the key government actors who were investigated never served in the NSCLB. They included James Comey (Director), Andrew McCabe (Deputy Director), Kevin Clinesmith (OGC), Trisha Anderson (OGC), and Jim Baker (OGC). *Id.* ¶ 22. And beyond the OIG Report, SLF's FOIA request and subsequent December 2 letter specifically sought records regarding violations of the Rules of Professional Conduct or other disciplinary actions or findings against any attorney within the FBI. *Id.* ¶¶ 4, 25–26. Thus, it was reasonably likely that such records would exist in FBI departments like the Office of Professional Responsibility or even Human Resources.

Nothing in SLF's FOIA request mentioned or indicated SLF's desire to limit the FOIA search to the NSCLB. *See id.* ¶ 4. The suggested search terms SLF provided on December 2 included the individuals and offices named above who were located outside the NSCLB. *Id.* ¶¶ 25–26. And based on even a cursory review of the Carter Page FISA Applications and the OIG Report, it would be unreasonable

not to include them as records custodians in the FBI's search. Although the FBI may have originally speculated that only the NSCLB held responsive records at the initiation of the FOIA request, SLF provided countervailing evidence through its frequent communications with the FBI that other offices, employees, and records systems were also likely to contain responsive records. *Id.* ¶¶ 12–26.

Even if the NSCLB were the only location likely to have responsive records, the FBI only provides one declaration in support of its motion for summary judgment. *See generally* Declaration of Michael Seidel (Seidel Decl.) (Doc. 33-3.) Although the declaration provides detailed information about the FBI's record indices, the declaration itself does not provide SLF or this Court with enough information to determine whether the search at issue was reasonable. For example, the declarant avers that “the FBI determined it would be difficult to compile and search a set of indexed terms reasonably likely to locate all records responsive to Plaintiff's request.” *Id.* ¶ 11. As a result, the records custodians determined, “Since NSCLB's core functions include providing comprehensive legal advice on [FISA] related matters . . . [it] was the FBI office most reasonably expected to possess responsive records, should they exist.” *Id.* ¶ 13. However, the declarant fails to explain how and why—after consulting with OGC—it decided to exclude OGC from its search. *Id.* He also fails to explain why the FBI refused to search the records of

the Director, Deputy Director, Office of Professional Responsibility, or Human Resources for any orders, opinions, decisions, or investigations into attorneys who violated any of the rules described in SLF's FOIA request.

Additionally, the declarant does not address what terms the FBI searched, whether it restricted its search to a certain time period, the files it searched, or which custodians conducted the searches. Whereas the declarant provides thorough information about the Central Records System (CRS) indexing system, that information fails to shed any light on how the FBI conducted a search for records responsive to SLF's FOIA request and whether that search was reasonable. The declarant describes the types of classification numbers a file might receive, the several offices CRS spans, and how the indices are arranged and logged. *Id.* ¶¶ 7–10. But then he states that the FBI did *not* use the CRS to conduct a search for records responsive to SLF's request, because “it would be difficult” to do so. *Id.* ¶ 11. Nothing in the declaration indicates why or how that decision was reached. In other words, Defendant devotes over one-quarter of the length of its declaration to the document system Defendant did *not* search. This appears to be nothing more than a thinly veiled attempt to distract this Court from the ultimate issue of whether the search it *did* conduct was adequate.

Again, SLF does not dispute that the FBI searched for *some* records responsive to its FOIA request. But it does dispute the adequacy and completeness of that search. Although an agency is not required to turn every stone in its search for records, an agency cannot limit its search to one database where other systems are likely to produce records. Even if it may have been reasonable for the FBI to limit its search to the NSCLB at the start of this case—which SLF disputes—courts evaluate the reasonableness of the agency’s search “based on what it knows at the conclusion of the search, rather than on the agency’s speculation at the initiation of the search.” *Inst. for Policy Studies*, 885 F. Supp. 2d at 139. When SLF provided parameters and suggestions to aid the FBI’s search, the FBI *rejected* those suggestions. Hermann Decl. ¶ 28. The agency had already decided the search was over, and it was not willing to look anywhere else for responsive records.

The FBI now attempts to argue that its response to SLF’s FOIA request—from its initial decision to route the request to one branch, to its determination that there were no records in any other branches, to its refusal to consider SLF’s proposed search parameters despite evidence showing records likely existed in other places—was entirely reasonable. But the fact that this litigation has carried on for nearly two years, impeded by the FBI’s delay tactics and stonewalling, tells a different story. By unilaterally routing SLF’s FOIA request to the NSCLB, then continuing to limit

the search to the NSCLB despite evidence of responsive records outside that division, and refusing to explain why it made those decisions in the first place, the FBI fails to meet its high summary judgment burden of proving it conducted an adequate FOIA search.

### **CONCLUSION**

The public interest in the requested records cannot be overstated. The public knows with certainty that FBI personnel engaged in misconduct before the FISC. But what the public does not know is what the FISC, the FBI, or any other entity has done about it. The FBI should welcome public disclosure of records regarding attorney misconduct so that it can be addressed and so that the proper procedures can be put in place to ensure this misconduct never happens again. Unfortunately, the FBI has failed to uphold its statutory duty to conduct a thorough, adequate search for responsive records in a timely manner. Moreover, the FBI has not even addressed a major portion of SLF's FOIA request regarding Section 702 violations.

Accordingly, SLF requests that Defendant's Motion for Summary Judgment be denied and SLF's Cross-Motion for Summary Judgment be granted.

Dated: December 7, 2020.

By: **Celia Howard O'Leary**  
KIMBERLY S. HERMANN  
Georgia Bar No. 646473  
CELIA HOWARD O'LEARY

Georgia Bar No. 747472  
Attorneys for Southeastern Legal Foundation  
Southeastern Legal Foundation  
560 W. Crossville Rd., Ste. 104  
Roswell, Georgia 30075  
Telephone: (770) 977-2131  
Email: [khermann@southeasternlegal.org](mailto:khermann@southeasternlegal.org)  
Email: [coleary@southeasternlegal.org](mailto:coleary@southeasternlegal.org)

**CERTIFICATE OF COMPLIANCE**

Pursuant to L.R. 7.1D, this is to certify the foregoing complies with the font and point selections approved by the Court in L.R. 5.1. The foregoing was prepared on a computer using the Times New Roman font (14 point).

By: **Celia Howard O'Leary**

KIMBERLY S. HERMANN

Georgia Bar No. 646473

CELIA HOWARD O'LEARY

Georgia Bar No. 747472

Attorneys for Southeastern Legal Foundation

Southeastern Legal Foundation

560 W. Crossville Rd., Ste. 104

Roswell, Georgia 30075

Telephone: (770) 977-2131

Email: [khermann@southeasternlegal.org](mailto:khermann@southeasternlegal.org)

Email: [coleary@southeasternlegal.org](mailto:coleary@southeasternlegal.org)

### **CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail and/or facsimile. Parties may access the filing through the Court's electronic filing system.

Dated: December 7, 2020

By: **Celia Howard O'Leary**  
KIMBERLY S. HERMANN  
Georgia Bar No. 646473  
CELIA HOWARD O'LEARY  
Georgia Bar No. 747472  
Attorneys for Southeastern Legal Foundation  
Southeastern Legal Foundation  
560 W. Crossville Rd., Ste. 104  
Roswell, Georgia 30075  
Telephone: (770) 977-2131  
Email: [khermann@southeasternlegal.org](mailto:khermann@southeasternlegal.org)  
Email: [coleary@southeasternlegal.org](mailto:coleary@southeasternlegal.org)