

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 REPLY IN SUPPORT OF PLAINTIFF’S CROSS-MOTION  
FOR SUMMARY JUDGMENT**

Plaintiff Southeastern Legal Foundation, Inc. (SLF), respectfully files this Reply in Support of its Cross-Motion for Summary Judgment.

**INTRODUCTION**

It has been nearly two years since SLF submitted its Freedom of Information Act (FOIA) request regarding attorney misconduct to the Federal Bureau of Investigation (FBI). After multiple extensions and delay tactics, the FBI finally claimed it conducted a search for records. However, the search was limited to one division within the FBI—the National Security and Cyber Law Branch (NSCLB)—

and it yielded no results. SLF worked with the FBI and proposed a list of search terms and records custodians, which included individuals and offices beyond the NSCLB. SLF largely based this list on the key actors who were publicly exposed for their involvement in the Carter Page FISA application and renewals and certain Section 702 violations. But after receiving the list, the FBI refused to employ any of the suggested search terms or even confirm SLF's requests for clarification.

The FBI now argues that it was reasonable to limit its search for responsive records to the NSCLB because attorneys who were involved in the Carter Page surveillance and Section 702 violations would have been located within the NSCLB. But in doing so, the FBI improperly and unilaterally narrows SLF's FOIA request. It is well known, and the FBI itself acknowledged, that attorneys outside of the NSCLB participated in these matters, including James Comey, Andrew McCabe, James Baker, Kevin Clinesmith and Bill Priestap. Declaration of Kimberly S. Hermann (Hermann Decl.) ¶¶ 21–22. Notably, SLF did not limit its request to attorneys appearing before the FISC. Instead, it asked for records showing “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.” *Id.* ¶ 4 (emphasis added). SLF also made this clear in subsequent communications with the FBI, when it specifically asked whether the

FBI searched the records of James Comey, Andrew McCabe, James Baker, Kevin Clinesmith, Bill Priestap, and several other employees and officials. *Id.* ¶ 25.

The FBI ignored the plain text of SLF's FOIA request, subsequent communications regarding the scope of the FBI's search for responsive records, and now, before this Court it continues to ignore the evidence SLF has provided showing that responsive records likely existed across various FBI offices. At the eleventh hour, the FBI puts forth a textual argument that SLF sought only the records of attorneys acting on behalf of the FBI within the NSCLB. SLF has communicated with the FBI frequently and in good faith throughout the search process, and at no time did SLF narrow the scope of the search to practicing attorneys within the NSCLB. The FBI thus attempts to drag this matter out further by distracting SLF and this Court from the real issue: it failed to conduct an adequate search.

### **ARGUMENT AND CITATION OF AUTHORITY**

#### **A. The FBI fails to show it conducted an adequate search for responsive records.**

An agency must prove beyond material doubt that its search for records was adequate under the FOIA. *CREW v. Nat'l Archives and Records Admin.*, 583 F. Supp. 2d 146, 167 (D.D.C. 2008). Although an agency does not need to search every record system, 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). To

meet its burden, an agency must identify the terms it used, note the files it searched, and provide specific enough information about its search methods to enable a requester to challenge the agency's procedures. *Nation Mag. v. U.S. Customs Serv.*, 71 F.3d 885, 890–91 (D.C. Cir. 1995); *CREW*, 583 F. Supp. 2d at 168; *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 294 (D.D.C. 2007).

The FBI points to a case that holds in part, “If an agency’s affidavit . . . is not contradicted by contrary evidence in the record or by evidence of the agency’s bad faith, then summary judgment is warranted on the basis of the affidavit alone.” *Am. C.L. Union v. U.S. Dep’t of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011). However, that case turned strictly on an agency’s decision to redact responsive records under the FOIA, *not* on the adequacy of the agency’s search. *Id.* (finding that an agency can withhold or redact responsive records so long as it specifically describes the justifications for doing so through an affidavit). Extending this holding to the adequacy of an agency’s search would turn the purpose of the FOIA on its head. Upon receiving a FOIA request, any agency could conduct the barest of searches, let the matter go to court, and then submit an affidavit saying the search was done in good faith. Under the FBI’s theory, a court would simply have to grant summary judgment to the agency because the agency put forth an affidavit.

Instead, 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 for the agency. *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)). Summary judgment also will not be granted if the agency's search is unreasonable "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). Finally, the burden is on the agency to prove that it conducted an adequate search; otherwise, summary judgment will be granted to the FOIA requester. *See* 5 U.S.C. § 552(a)(4); *see also* *CREW*, 583 F. Supp. 2d at 167–68.

**B. Despite SLF's showing that records could reasonably exist elsewhere, the FBI refuses to search other departments that would likely have responsive records.**

The FBI unreasonably limited its search for responsive records to the NSCLB. Even with a second affidavit, the FBI *still* fails to provide SLF with enough information to challenge the procedures it used to search that division. For example, the affidavit merely asserts that the text of Plaintiff's original request was forwarded to the NSCLB, and it describes what counts as a record. *See* Second Declaration of Michael G. Seidel (Seidel Decl.) ¶¶ 6–7. The FBI *still* has not identified which terms

were searched or how the databases within the NSCLB were searched. The FBI also declared that it refused to conduct a search pursuant to SLF's proposed terms "since there were no other locations or databases" in which the FBI believed the records existed. *Id.* ¶ 8. But as SLF has set forth in its opposition brief and below, the FBI erroneously reached this conclusion. *See* Doc. 34-1. When SLF confronted the FBI with countervailing evidence showing that other branches were likely to possess responsive records, the FBI ignored the evidence and declared the search over.

SLF has provided the FBI with ample evidence that shows limiting its search to the NSCLB was unreasonable. For example, the OIG Report demonstrates that there were a number of departments and offices outside of the NSCLB that actively participated in the Carter Page FISA application and renewals and were involved in the Section 702 violations. Hermann Decl. ¶¶ 13–21. The FBI argues that it interpreted SLF's FOIA request according to its four corners, and thus only searched for the records of FBI attorneys involved in the Carter Page FISA application and renewals and Section 702 violations. It is true that SLF sought records of attorney misconduct related to these matters. *Id.* ¶ 4. But the FBI narrowed SLF's request to attorneys actively representing the FBI within the NSCLB; it ignored the fact that SLF sought the records of *any and all* attorneys involved in the matters. Attorneys known to be involved in the matters included James Comey (FBI Director), Andrew

McCabe (Deputy Director), James Baker (Office of General Counsel, or OGC), Kevin Clinesmith (OGC), and Bill Priestap (Assistant Director, Counterintelligence Division). *Id.* ¶¶ 18, 21–23. SLF named each of these attorneys in its communications with the FBI about its FOIA request. *Id.* ¶¶ 21–25.

Recently, the Senate Judiciary Committee confirmed the OIG Report’s findings. *See* Transcripts of Interviews Conducted During Oversight of Crossfire Hurricane Investigation.<sup>1</sup> Over the course of several months, members of the FBI and DOJ testified about their roles in Crossfire Hurricane, including surveillance of Carter Page and Section 702 violations. Michael Steinbach, Executive Assistant Director of the National Security Branch, testified that Crossfire Hurricane briefings generally involved James Comey, Andrew McCabe, Bill Priestap, “and others.” Interview of Michael B. Steinbach at 39 (June 12, 2020).<sup>2</sup> Supervisory Special Agent 1 described frequently briefing Andrew McCabe, James Baker, and Bill Priestap about Crossfire Hurricane, as well as fifteen other members of the FBI. Interview of

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<sup>1</sup> [www.judiciary.senate.gov/press/rep/releases/judiciary-committee-releases-transcripts-of-interviews-conducted-during-oversight-of-crossfire-hurricane-investigation](http://www.judiciary.senate.gov/press/rep/releases/judiciary-committee-releases-transcripts-of-interviews-conducted-during-oversight-of-crossfire-hurricane-investigation).

<sup>2</sup> [www.judiciary.senate.gov/imo/media/doc/Michael%20Steinbach%20Redacted%20FINAL.pdf](http://www.judiciary.senate.gov/imo/media/doc/Michael%20Steinbach%20Redacted%20FINAL.pdf).

Supervisory Special Agent 1 at 48–52 (August 27, 2020).<sup>3</sup> A Supervisory Intelligence Analyst also testified that Bill Priestap, James Baker, Andrew McCabe, and James Comey participated in Crossfire Hurricane briefings. Interview of Supervisory Intelligence Analyst at 41–42 (Oct. 29, 2020).<sup>4</sup> Finally, Bruce Ohr testified that he warned Andrew McCabe that the information the FISC relied on to approve the Carter Page FISA application was unreliable. Interview of Bruce Ohr at 141–45 (June 30, 2020).<sup>5</sup> Thus, it is undeniable that licensed attorneys actively participated in these matters and likely knew of records regarding misconduct before the FISC.

In its subsequent communications with the FBI, SLF made it clear that it was seeking the records of these and other individuals. In November 2019, SLF 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. Hermann Decl. ¶¶ 12, 19.

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<sup>3</sup> [www.judiciary.senate.gov/imo/media/doc/Supervisory%20Special%20Agent%201%20Redacted%20FINAL.pdf](http://www.judiciary.senate.gov/imo/media/doc/Supervisory%20Special%20Agent%201%20Redacted%20FINAL.pdf).

<sup>4</sup> [www.judiciary.senate.gov/imo/media/doc/Supervisory\\_Intelligence\\_Analyst\\_Redacted\\_Transcript\\_SJC\\_FINAL.pdf](http://www.judiciary.senate.gov/imo/media/doc/Supervisory_Intelligence_Analyst_Redacted_Transcript_SJC_FINAL.pdf).

<sup>5</sup> [www.judiciary.senate.gov/imo/media/doc/Bruce%20Ohr%20Redacted%20FINAL.pdf](http://www.judiciary.senate.gov/imo/media/doc/Bruce%20Ohr%20Redacted%20FINAL.pdf).

SLF specifically requested that the FBI search the offices of James Comey, Andrew McCabe, Kevin Clinesmith, James Baker, Bill Priestap, and others. *Id.* ¶¶ 25–26.

As part of its original request, and repeated again in December 2019, SLF sought records of any finding that “any attorney violated . . . applicable Rules of Professional Conduct,” among other records. *Id.* ¶¶ 4, 25. And as the preamble to the Model Rules of Professional Conduct states, “[T]here are Rules that apply to lawyers who are not active in the practice of law . . . [.] For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>6</sup> Thus, attorneys are held to a higher standard of ethics even when they are not actively representing an entity. It was therefore unreasonable for the FBI to unilaterally limit its search to the records of NSCLB attorneys representing the FBI, because even non-practicing attorneys are bound by the Rules of Professional Conduct. As SLF expressed in its communications, and as the OIG Report and various Senate Judiciary Committee transcripts make clear, licensed attorneys in leadership positions across the FBI actively engaged in misconduct before the FISC. As such, it was unreasonable for the FBI to only search one division for records regarding that misconduct.

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<sup>6</sup> [www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope/](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/).

## CONCLUSION

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. Even now, despite ample evidence confirming that multiple divisions and custodians were likely to have responsive records, the FBI maintains that its limited search was adequate. However, the reasonableness of its search must be reviewed based on what has come to light—not what the FBI knew or believed at the start of this litigation.

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

Dated: January 29, 2021.

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 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 January 29, 2021, 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: January 29, 2021.

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)