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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION

12 CAITLIN KELLY HENRY and JESSE
13 STOUT,
14 Plaintiffs,

15 v.

16 UNITED STATES DEPARTMENT OF
JUSTICE,
17 Defendant.

) Civil Action No. C13-5924 DMR

)
) **FEDERAL DEFENDANT’S MOTION FOR**
) **SUMMARY JUDGMENT**

) Date: January 8, 2015

) Time: 11:00 a.m.

) Place: Courtroom 4 – 3rd Floor

) Hon. Donna M. Ryu

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on January 8, 2015, at 11:00 a.m., or as soon thereafter as the matter
3 may be heard in Courtroom 4 – 3rd Floor, United States District Court, 1301 Clay Street, Oakland,
4 California, the Honorable Donna M. Ryu presiding, defendant United States Department of Justice
5 (“DOJ”), by and through its attorney will appear and move this Court for an order granting summary
6 judgment in favor of defendant and against plaintiffs Caitlin Henry and Jesse Stout. This motion is
7 based on this Notice of Motion, the following Memorandum of Points and Authorities, the declarations
8 of Gisele Bryant (“Bryant Decl.”), Tricia Francis (“Francis Decl.”), David Hardy (“Hardy Decl.”),
9 Lilibeth Margen (“Margen Decl.”), Sandra Mascola (“Mascola Decl.”), Andrea Venetian (“Venetian
10 Decl.”), and Christine Salazar (“Salazar Decl.”), the pleadings on file in this matter, and such oral
11 argument and additional evidence as the Court may permit.

12 **RELIEF SOUGHT BY DEFENDANT**

13 Defendant moves for an order granting summary judgment in favor of defendant and against
14 plaintiffs Caitlin Henry and Jesse Stout.

15 **ISSUES TO BE DETERMINED**

- 16 1. Did the United States Attorney’s Office for the Northern District of California, Central District
17 of California, Western District of New York, District of New Jersey, and District of Rhode
18 Island conduct adequate searches in response to plaintiffs’ Freedom of Information Act and
19 Privacy Act requests?
- 20 2. Did the Federal Bureau of Investigation (“FBI”) conduct an adequate search in response to
21 plaintiffs’ Freedom of Information Act and Privacy Act requests?
- 22 3. Did FBI properly refuse to confirm or deny whether plaintiffs’ names are on a government watch
23 list pursuant to Freedom of Information Act exemption 5 U.S.C. § 552(b)(7)(E) and Privacy Act
24 exemption § 552a(j)(2)?
- 25 4. Is plaintiff Caitlin Kelly Henry’s claim that DOJ failed to issue a timely decision on her appeal
26 of the FBI’s “no records” response moot where Henry received a response to her Freedom of
27 Information Act and Privacy Act request and appeal, and FBI has not withheld any documents to
28 which she is entitled?

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Plaintiffs' claims arise under the Freedom of Information Act, 5 U.S.C. § 522 ("FOIA") and relate to a total of nine FOIA/Privacy Act ("PA") requests. In each of the requests at issue, plaintiffs requested records related to themselves, including "emails, Complaint Forms, Memorandums of Investigation, Reports of Investigation, Field Operation Worksheets, Arrest Reports, Agents' notes, arrest evaluations, and investigation."

On or about May 1, 2013, plaintiffs each separately submitted a request to the FBI, which assigned plaintiff Caitlin Kelly Henry's request No. 1214586, and plaintiff Jesse Stout's request No. 1207771-001. Plaintiffs each mailed a FOIA/PA request to the FOIA/PA Mail Referral Unit of the DOJ, Justice Management Division, which referred plaintiffs' requests to the Executive Office for United States Attorneys (EOUSA"). EOUSA processed both requests in a similar manner, forwarding each to the USAOs in each of the states where the requestor had resided during the time period covered in the request, directing each office to search for responsive records, and assigning each of these forwarded requests a separate request number. Henry challenges the agency response to requests sent to the USAO for the Northern District of California (Request No. 2013-1987), the Central District of California (Request No. 2013-1989), and Western District of New York (Request No. 2013-1993). Stout challenges the agency's response to requests sent to USAO for the District of New Jersey (Request No. 2013-1996), the District of Rhode Island (Request No. 2013-1997), the Northern District of California (Request No. 2013-1999), and the Central District of California (Request No. 2013-2000).

Defendant has fulfilled its obligations under FOIA. As shown in the concurrently filed declarations of David Hardy, Gisele Bryant, Lilibeth Margen, Sandra Mascola Christine Salazar, and Andrea Venetian, the FBI and the USAO for the Northern District of California, Central District of California, Western District of New York, District of New Jersey and District of Rhode Island conducted searches reasonably designed to locate any responsive records subject to FOIA and the Privacy Act. These searches yielded no responsive records. To the extent plaintiffs' requests sought information about whether their names were on a government watch list, FBI determined that confirming or denying plaintiffs' placement on a watch list would reveal law enforcement techniques and procedures protected

1 from disclosure, invoking FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2). This response,
2 commonly known as a Glomar response, was proper and fulfilled FBI's FOIA obligations. Finally, plaintiff
3 Henry's FOIA claim that defendant failed to timely issue a decision on her appeal of FBI's response is
4 moot because an appeal decision was issued and FBI has not withheld records to which Henry is
5 entitled. Summary judgment should be granted in favor of defendant.

6 **II. PLAINTIFFS' FOIA AND PRIVACY ACT REQUESTS**

7 **A. FBI's Response to Plaintiffs' Requests**

8 **1. FBI's Mission and Organization**

9 FBI is an agency of the United States Government within the DOJ. The FBI's mission is to protect
10 and defend the United States against terrorist and foreign intelligence threats, to uphold and enforce the
11 criminal laws of the United States, and to provide leadership and criminal justice services to federal,
12 state, municipal, and international agencies and partners. Hardy Decl. ¶ 2.

13 **(i) Explanation of FBI's Central Records System and Electronic 14 Surveillance Indices**

15 The Central Records System ("CRS") enables the FBI to maintain information that it has acquired in
16 the course of fulfilling its mandated law enforcement responsibilities. *Id.* ¶ 23. The records maintained
17 in the CRS consist of administrative, applicant, criminal, personnel, and other files compiled for law
18 enforcement purposes. *Id.* This system is organized in a numerical sequence of files, called FBI
19 classifications, which are broken down according to subject matter. The subject matter of a file may
20 relate to an individual, organization, company, publication, activity, or foreign intelligence matter (or
21 program). *Id.* Although the CRS is primarily designed to serve as an investigative tool, the FBI uses the
22 records system to conduct searches that are likely to yield documents responsive to FOIA and Privacy
23 Act requests. *Id.*

24 The mechanism that the FBI uses to search the CRS is the Automated Case Support System
25 ("ACS"). *Id.* ¶ 24. ACS is an internal computerized subsystem of the CRS and consists of three
26 integrated, yet separately functional, automated applications that support case management functions for
27 all FBI investigative and administrative cases. *Id.* ¶¶ 24, 27. Retrieval of data from the CRS is made
28 possible through the ACS using the General Indices. *Id.* ¶ 25. The General Indices consist of both

1 automated and manual indices. The manual indices, which are index cards, only contain records created
2 before 1959. *Id.* ¶ 25 & n. 10.

3 The entries in the General Indices fall into two categories: (a) a “main” entry, also known as a
4 “main” file; and (b) a “reference” entry, also known as a “cross-reference.” A “main” file carries the
5 name corresponding with the subject of a file contained in the CRS. A “cross-reference” is generally
6 only a mere mention of or reference to an individual, organization, or other subject matter contained in a
7 document located in a “main” file on a different subject matter. *Id.* ¶ 25.

8 The Electronic Surveillance (“ELSUR”) indices are used to maintain information on subjects whose
9 electronic and/or voice communications have been intercepted as the result of a consensual electronic
10 surveillance or a court-ordered (and/or sought) electronic surveillance conducted by the FBI, and are a
11 separate system of records from the CRS. *Id.* ¶¶ 33-34. The ELSUR indices date back to January 1,
12 1960, and were automated on or about October 9, 1991. *Id.* Since that time, FBIHQ and all FBI field
13 offices have electronically generated, maintained, modified and accessed all ELSUR records. *Id.* ¶ 33.
14 The automated indices include individuals who were the (a) targets of direct surveillance, (b)
15 participants in monitored conversations, and (c) owners, lessors, or licensors of the premises where the
16 FBI conducted electronic surveillance. In addition to the names of individuals in the above categories,
17 the ELSUR indices contain the date the voice was monitored, a source number to identify the individual
18 on whom the surveillance was installed, and the location of the FBI field office that conducted the
19 monitoring. *Id.* ¶ 34.

20 **(ii) FBI’s Search for Responsive Records**

21 **(a) Plaintiff Caitlin Kelly Henry: FOIA/PA Request No. 1214586**

22 Plaintiff Henry submitted a FOIA/PA request dated May 1, 2013, to FBI for records related to
23 herself within the date range of October 27, 1983 to May 21, 2013.¹ *Id.* ¶ 7, Ex. A at 1. The request
24 stated:

25 Please search both the automated and the older general (manual) indices for all
26 records (in any form or format, including multimedia and all types of electronic
records) related in whole or in part to Caitlin Kelly Henry. This includes, but

27 ¹ Henry submitted a duplicate of this request to the FOIA/PA Mail Referral Unit at the DOJ,
28 Justice Management Division (“JMD”), which JMD forwarded to the FBI on or about May 17, 2013.
Hardy Decl. n. 1.

1 should not be limited to emails, Complaint Forms, Memorandums of Investigation,
2 Reports of Investigation, Field Operation Worksheets, Arrest Reports, Agents' notes,
arrest evaluations, and investigation.

3 *Id.* Henry also requested a public interest fee waiver. *Id.* By letter dated May 7, 2013, FBI
4 acknowledged receipt of Henry's request and assigned it Request Number 1214586. *Id.* ¶ 8, Ex. B. In
5 its acknowledgment letter, FBI notified Henry that it would search the CRS for responsive records. *Id.*

6 In response to Henry's FOIA/PA request, FBI conducted a search of its automated indices to the
7 CRS to identify all potentially responsive main files indexed to Henry for the time period October 27,
8 1983 to May 6, 2013, the date of FBI's initial search for records. *Id.* ¶ 29 & n. 8. The FBI used a three-
9 way phonetic breakdown of the name Caitlin Kelly Henry, which included the following variations:
10 "Henry, Caitlin Kelly;" "Henry, Caitlin K.;" and "Henry, Caitlin." *Id.* ¶ 29. FBI also searched "Henry,
11 Kh," a variation provided in Henry's FOIA/PA request. *Id.* The FBI used Henry's date of birth and
12 social security number, provided by Henry in her FOIA/PA request, to facilitate the identification of
13 potentially responsive files. *Id.* This search did not locate any main files responsive to Henry's request.
14 *Id.* Because Henry's request sought "multimedia and all types of electronic records," FBI also
15 conducted a discretionary search of its ELSUR indices, searching the names "Caitlin Kelly Henry,"
16 "Caitlin K. Henry," "Caitlin Henry;" and "Henry, Kh." *Id.* ¶ 37. FBI used Henry's date of birth and
17 social security number in combination with these name variants to facilitate the identification of
18 potentially responsive files. *Id.* This search located no responsive records. *Id.*

19 On May 9, 2013, FBI issued a response to Henry's FOIA/PA request and advised that a search of the
20 automated indices to the CRS did not locate any main file records responsive to her FOIA/PA request.
21 *Id.* ¶ 9, Ex. C. FBI informed Henry that it was unnecessary to adjudicate her fee waiver request because
22 no responsive main file records were found. *Id.* The FBI's response further stated: "In accordance
23 with standard FBI practice and pursuant to FOIA exemption (b)(7)(E)/Privacy Act exemption (j)(2) [5
24 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this request neither confirms nor denies the existence of your
25 subject's name on any watch lists." *Id.* Ex. C. Finally, FBI's response informed Henry of her appeal
26 rights. *Id.* ¶ 9, Ex. C.

27 Henry appealed FBI's response by letter dated May 29, 2013 to DOJ Office of Information Policy
28 ("OIP"), requesting a more "thorough and adequate search in the Central Records System," to include

1 FBI's automated indices and older manual indices as well as a search for cross-references. *Id.* ¶ 10, Ex.
2 D. By letter dated June 20, 2013, DOJ OIP acknowledged receipt of the appeal and notified Henry that
3 her appeal had been assigned number AP-2013-03738. *Id.* ¶ 11, Ex. E. In a response dated August 6,
4 2013, DOJ OIP advised Henry that it affirmed FBI's actions on her FOIA/PA request. *Id.* ¶ 12, Ex. F.
5 DOJ OIP determined that FBI conducted an adequate, reasonable search, noting that FBI did not search
6 its older manual indices because those indices only contain records created before 1959, prior to the date
7 range specified in Henry's FOIA/PA request. *See id.* DOJ OIP further determined that FBI properly
8 refused to confirm or deny an individual placement on any government watch list because such records
9 are protected from disclosure pursuant to 5 U.S.C. § 552a(j)(2) and 5 U.S.C. § 552(b)(7)(e). *Id.* These
10 Privacy Act and FOIA exemptions apply to records or information compiled for law enforcement
11 purposes, the release of which would disclose techniques and procedures for law enforcement
12 investigations or prosecutions. *See id.* Finally, with respect to Henry's request, through her appeal, for
13 a cross-reference search, DOJ OIP advised that Henry needed to provide information sufficient to enable
14 FBI to "determine with certainty that any cross-references it locates are identifiable to [Henry]" and
15 provided examples of such information. *Id.* DOJ OIP informed Henry that if she was dissatisfied with
16 DOJ OIP's determination, she could seek judicial review. *Id.* On or about December 21, 2013, plaintiff
17 Henry filed the present lawsuit. *See* Compl., ECF No. 1.

18 At the initial administrative stage, FBI's policy is to search for and identify main files responsive to
19 FOIA/PA requests and subject to the FOIA. Here, that search resulted in no records being located.
20 Upon receipt of Henry's Complaint in the present lawsuit, FBI conducted another search of the CRS for
21 responsive records. *Id.* ¶ 30. FBI searched its main files as well as cross-references using the same
22 three-way phonetic search of the name, Caitlin Kelly Henry, as described above. This search used both
23 the automated and manual indices. *Id.* No responsive records were located. *Id.*

24 **(b) Plaintiff Jesse Stout: FOIA/PA Request No. 1207771-001**

25 By letter dated April 30, 2013 and emailed on May 1, 2013, plaintiff Stout submitted a FOIA/PA
26 request seeking access to records on "Jesse Abram Stout" within the date range of July 17, 1984 to May
27 21, 2013.² *Id.* ¶ 17, Ex. I. Stout's request stated:

28

² Stout submitted a duplicate of this request to the FOIA/PA Mail Referral Unit, DOJ, JMD,
FED. DEF.'S MOT. FOR SUMM. J.
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1 Please search both the automated and the older general (manual) indices for all
2 records (in any form or format, including multimedia and all types of electronic
3 records) related in whole or in part to Jesse Stout. This includes, but
4 should not be limited to emails, Complaint Forms, Memorandums of Investigation,
5 Reports of Investigation, Field Operation Worksheets, Arrest Reports, Agents' notes,
6 arrest evaluations, and investigation.³

7 *Id.* Stout also requested a public interest fee waiver. *Id.* FBI assigned the request Number 1207771-
8 001, and in response to the request, FBI conducted a search of its automated indices to the CRS to
9 identify all potentially responsive main files indexed to Stout for the time period July 17, 1984 to May 3,
10 2013, the date of FBI's initial search for records. *Id.* ¶ 18 n. 12. The FBI used a three-way phonetic
11 breakdown of the name Jesse Abram Stout, which included the following variations: "Stout, Jesse
12 Abram," "Stout, Jesse A.," and "Stout, Jesse." *Id.* ¶ 32. FBI also searched for "Stout, Jessie," a
13 variation provided in the FOIA/PA request. *Id.* In addition, the FBI used Stout's date of birth and social
14 security number to facilitate the identification of potentially responsive main investigative files. *Id.* The
15 search located no main files responsive to Stout's request. *Id.* Because Stout's request sought
16 "multimedia and all types of electronic records," FBI also conducted a discretionary search of its
17 ELSUR indices using "Jesse Abram Stout," "Jesse A. Stout," "Jesse Stout," and "Jessie Stout" as well as
18 Stout's date of birth and social security number. *Id.* ¶ 37. This search located no responsive records. *Id.*

19 On May 6, 2013, FBI responded to Stout's FOIA/PA request via letter, advising that a search of the
20 automated indices to the CRS did not locate any main file records responsive to his request and further
21 stating that in accordance with standard FBI practice and pursuant to FOIA exemption, 5 U.S.C.
22 § 552(b)(7)(E) and Privacy Act exemption 5 U.S.C. § 552a(j)(2), its response "neither confirms nor
23 denies the existence of [Stout's] name on any watch lists." *Id.* ¶ 18, Ex. J. FBI informed Stout that it
24 was unnecessary to adjudicate his fee waiver because no responsive main file records were found and
25 notified Stout of his appeal rights. *Id.*

26 which JMD forwarded to the FBI on or about May 17, 2013. *Id.* n. 5.

27 ³ Stout had previously submitted, via email, a similar FOIA/PA on January 13, 2013. *Id.* ¶ 14,
28 Ex. G. By letter dated February 5, 2013, FBI acknowledged receipt of Stout's request, but notified him
that his January 31, 2013 email did not contain sufficient information about him for FBI to conduct an
accurate search. *Id.* ¶ 15, Ex. H. FBI requested that Stout provide additional information, listing
examples such as date of birth, social security number, and address. *Id.* FBI informed Stout that he
must respond within 30 days or his request would be closed. *Id.* Around March 7, 2013, FBI closed this
request due to Stout's lack of response. *Id.* ¶ 16. The FBI's response to this FOIA/PA request does not
appear to be at issue in this action.

1 Stout appealed the FBI's response to the DOJ OIP by letter dated May 29, 2013. *Id.* ¶ 19, Ex. K.
2 He requested a "more thorough and adequate search" of the CRS, to include "both [FBI's] automated
3 indices and older general (manual) indices" and a cross-reference search. *Id.* Ex. K. DOJ OIP
4 acknowledged receipt of Stout's appeal by letter dated June 20, 2013 (*id.* ¶ 20, Ex. L), and on September
5 10, 2013, affirmed FBI's actions concerning Stout's FOIA/PA request. *Id.* ¶ 21, Ex. M. DOJ OIP
6 explained that to the extent Stout sought access to records that would either confirm or deny an
7 individual's placement on any government watch list, the FBI properly refused to confirm or deny the
8 existence of any responsive records under FOIA and Privacy Act exemptions 5 U.S.C. § 552(b)(7)(E),
9 and 5 U.S.C. § 552a(j)(2), which exempt from disclosure records or information compiled for law
10 enforcement purposes, the release of which would disclose techniques and procedures for law
11 enforcement investigations or prosecutions. *Id.* DOJ OIP further determined that the FBI conducted an
12 adequate, reasonable search for responsive records, explaining that it was reasonable for FBI to limit its
13 search to its automated indices because FBI's manual indices contain records created before 1959, prior
14 to the time period sought in Stout's FOIA/PA request. *Id.* DOJ OIP advised Stout that if he was
15 dissatisfied with its determination, he could seek judicial review. *Id.* Stout filed the present lawsuit on
16 December 21, 2013. *See* Compl., ECF No. 1.

17 Upon receipt of Stout's Complaint in the present lawsuit, FBI conducted another search of the CRS
18 for potentially responsive records using the same three-way phonetic search of the name, Jesse Abram
19 Stout, as described above. *Id.* ¶ 32. This search used both the automated and manual indices to locate
20 any main file or cross-reference records responsive to Stout's request. *Id.* No responsive records were
21 located.

22 **B. EOUSA's Response to Plaintiffs' Requests**

23 Plaintiffs each separately submitted a FOIA/PA request addressed to the FOIA/PA Mail Referral
24 Unit, DOJ, Justice Management Division ("JMD"), which JMD forwarded to EOUSA, the
25 administrative arm of the ninety-four United States Attorney's Offices located throughout the country.
26 Francis Decl. ¶¶ 1, 4, 14. Plaintiffs' requests were identical to those requests submitted to FBI.
27 *Compare id.* Exs. A (Henry) & L (Stout) *with* Hardy Decl. Exs. A (Henry) & I (Stout). EOUSA
28 received plaintiffs' FOIA/PA requests on May 20, 2014. Francis Decl. ¶¶ 4, 14. Because each USAO

1 maintains records for criminal and civil matters handled by that office, after reviewing Henry's and
2 Stout's requests, in order to perform a search for the requested records, EOUSA forwarded each
3 FOIA/PA request to the USAO offices in the states where the subject of the request had resided during
4 the time period covered by the request. *See id.* ¶¶ 5,6, 15, 16, 24. Once a USAO tasked with searching
5 for responsive records returned the results of its search to EOUSA, which makes all determinations
6 regarding the release or withholding of records in response to FOIA/PA requests, EOUSA issued a final
7 action letter to the requestor. *See id.* ¶¶ 2, 12, 22.

8 In the 1990s, the USAOs nationwide implemented a computerized case management system known
9 as the Legal Information Office Network System ("LIONS"), which tracks cases and investigative
10 matters. *See* Bryant Decl. ¶ 6(a); Margen Decl. ¶ 5(a); Mascola Decl. ¶ 6(a); Salazar Decl. ¶ 9(a);
11 Venetian Decl. ¶ 7(a). LIONS is the current database record tracking system that is available to and
12 used by each USAO, and can be searched by case/matter name or number. *See id.* When LIONS was
13 implemented, active cases were transitioned to LIONS and closed cases were purged. *See, e.g.,* Margen
14 Decl. ¶ 5(a); Venetian Decl. ¶ 7(a). If the name for which the search is done was not included in the
15 information entered into the LIONS system for a particular case/matter, the search would not identify
16 that matter as containing potentially responsive information. Margen Decl. ¶ 5(a).

17 **1. Search for Responsive Records: Plaintiff Caitlin Henry Kelly's Request**

18 EOUSA reviewed Henry's FOIA/PA request and noted that Henry was requesting documents related
19 to herself from October 27, 1983 to May 21, 2013, and had lived in California, New York, and Illinois
20 during this period of time. Francis Decl. ¶¶ 4-5. EOUSA sent Henry's request to those USAOs in the
21 states where Henry had resided during the time period covered by her FOIA/PA request and assigned the
22 file sent to each district as separate FOIA/PA request number: Northern District of California
23 ("USAO/NDCA") received Request No. 2013-1987; Eastern District of California ("USAO/EDCA")
24 received Request No. 2013-1988; Central District of California ("USAO/CDCA") received Request No.
25 2013-1989; Southern District of California ("USAO/SDCA") received Request No. 2013-1990; Eastern
26 District of New York ("USAO/EDNY") received Request No. 2013-1991; Southern District of New
27 York ("USAO/SDNY") received Request No. 2013-1992; Western District of New York
28 ("USAO/WDNY") received Request No. 2013-1993; Northern District of Illinois ("USAO/NDIL")

1 received Request No. 2013-1994; and Southern District of Illinois (“USAO/SDIL”) received Request
2 No. 2013-1995. *Id.* ¶ 5. EOUSA sent these requests to the USAOs on or about July 5 and July 8, 2013.
3 *Id.* ¶ 7.

4 EOUSA responded to Henry on July 1, 2013, acknowledging the receipt of Henry’s FOIA/PA
5 request and informing Henry of the USAOs to which her request was being sent and the corresponding
6 FOIA/PA request numbers assigned to each of those requests. *Id.* ¶ 7, Ex. B. By letters dated August
7 27, 2013, EOUSA notified Henry that no records responsive to her request had been located in the
8 USAO/EDCA (Request No. 2013-1988), USAO/SDCA (Request No. 2013-1990), USAO/EDNY
9 (Request No. 2013-1991), USAO/SDNY (Request No. 2013-1992), USAO/NDIL (Request No. 2013-
10 1994) or USAO/SDIL (Request No. 2013-1995), and informed Ms. Henry of her appeal rights with
11 respect to these requests. *Id.* ¶ 8, Exs. C-H. Henry did not appeal any of these responses. *Id.* ¶ 13.

12 **(i) USAO/NDCA (Request No. 2013-1987)**

13 In response to Henry’s FOIA/PA, Lilibeth Margen, the FOIA/PA point of contact for the
14 USAO/NDCA, conducted a search of LIONS to find records referring to Henry, using the variations of
15 Henry’s name that were provided in her FOIA/PA request. Margen Decl. ¶ 5. Margen’s search of
16 LIONS revealed no records of matters in the USAO/NDCA involving Henry. *See id.* Margen
17 conducted a discretionary search of the electronic docket of the United States District Court for the
18 Northern District of California to search for cases involving the USAO/NDCA in which Henry was a
19 party or attorney. This search revealed no such cases. *Id.*

20 EOUSA sent Henry, through her attorney, a letter dated January 10, 2014, informing Henry of the
21 results of the USAO/NDCA’s searches. Francis Decl. ¶ 9, Ex. I. Subsequently, after plaintiffs’
22 Complaint was filed, to confirm the results of her earlier searches, Margen conducted a search on
23 LIONS using each of the “associated key words” listed in Henry’s request, but located no responsive
24 records. *See* Margen Decl. ¶ 5.

25 **(ii) USAO/CDCA (Request No. 2013-1989)**

26 The point of contact for the USAO/CDCA, Christine Salazar, conducted a search of LIONS using
27 every variation of Henry’s name that was provided in her FOIA/PA request, but located no matters in
28 the USAO/CDCA regarding Henry. Salazar Decl. ¶ 9(a). At Salazar’s request, the Criminal Dockets,

1 Civil Dockets, and Records managers for the USAO/CDCA conducted searches to determine if there
 2 were matters purged from LIONS related to Henry. *Id.* ¶ 9(d). Each of these managers confirmed that
 3 their searches did not locate any responsive records. *See id.* In addition, Salazar conducted a
 4 discretionary search the federal courts' Public Access to Court Electronic Records ("PACER") system,
 5 which provides case and docket information for federal cases, using all the variations of Henry's name
 6 that were included in her FOIA/PA request. *Id.* ¶ 9(c). The search located no cases involving Henry.
 7 *See id.*

8 EOUSA sent Henry, through her attorney, a letter dated August 27, 2014, informing Henry of the
 9 results of the USAO/CDCA's searches. Francis Decl. ¶ 10, Ex. J. Subsequently, after plaintiffs'
 10 Complaint was filed, to confirm the results of her earlier searches, Salazar conducted a search on LIONS
 11 using all the "associated key words" provided in the FOIA/PA request and located no responsive
 12 records. *See* Salazar Decl. ¶ 9(b).

13 (iii) USAO/WDNY (Request No. 2013-1993)

14 Andrea Venetian, the FOIA/PA point of contact for the USAO/WDNY, conducted a search of
 15 LIONS, using the terms "Caitlin Kelly Henry" and "Caitlin Henry." Venetian Decl. ¶ 7(a). Venetian
 16 also searched for "Jesse Stout," the name of plaintiff Henry's attorney, and located no responsive
 17 records. *Id.* Venetian manually searched the WDNY's card catalog file for cases that predated LIONS,
 18 using the same search terms, but located no responsive records. *Id.*

19 EOUSA sent Henry, through her attorney, a letter dated September 25, 2014, informing Henry of the
 20 results of the USAO/WDNY's searches. Francis Decl. ¶ 11, Ex. K.

21 2. Search for Responsive Records: Plaintiff Jesse Stout's Request

22 EOUSA reviewed Stout's FOIA/PA request and noted that Stout was requesting documents related
 23 to himself from July 17, 1984 to May 21, 2013, and had lived in New Jersey, Rhode Island, and
 24 California during this period of time. *Id.* ¶¶ 14, 15. EOUSA sent Stout's request to those USAOs in the
 25 states where he had resided during the time period covered by his FOIA/PA request and assigned the file
 26 sent to each District as separate FOIA/PA request number: District of New Jersey ("USAO/DNJ")
 27 received Request No. 2013-1996; District of Rhode Island ("USAO/DRI") received Request No. 2013-
 28 1997; USAO/SDCA received Request No. 2013-1998; USAO/NDCA received Request No. 2013-1999;

1 USAO/CDCA received Request No. 2013-2000; and USAO/EDCA received Request No. 2013-2001.
2 *Id.* ¶ 15. EOUSA sent these requests to the USAOs on or about July 5 and July 8, 2013. *Id.* ¶ 17.

3 On July 1, 2013, EOUSA sent letters to Stout's attorney, acknowledging receipt of Stout's FOIA/PA
4 request. *Id.* ¶ 17, Ex. M. The letters further informed Stout of the USAOs to which his request was
5 being sent and the corresponding FOIA/PA Request Number assigned to each of those requests. *Id.* On
6 August 27, 2013, EOUSA notified Stout that the searches conducted by the USAO/SDCA (Request No.
7 2013-1998) and USAO/EDCA (Request No. 2013-2001) revealed no responsive records, and notified
8 Stout of his appeal rights. *Id.* ¶ 18, Exs. N & O. Stout did not appeal any of these responses. *Id.* ¶ 23.

9 **(i) USAO/DNJ (Request No. 2013-1996)**

10 Gisele Bryant, the FOIA/PA point of contact for the USAO/DNJ conducted a search of LIONS for
11 matters in the USAO/DNJ involving Stout using the following variations of Stout's name: "Jesse A.
12 Stout," "Stout," "Jesse," and "Jesse A." Bryant Decl. ¶ 6. Bryant also searched LIONS using all the
13 "associated key words" provided in the FOIA/PA request. *Id.* These searches of LIONS located no
14 records related to Stout. *Id.* Bryant also conducted a search on PACER to determine if there was a case
15 in the New Jersey district court in which Stout was a part or attorney, using the search term "Stout," but
16 did not locate such cases. *See id.* At Bryant's request, an administrative support assistant in the Records
17 Department of the USAO/DNJ, Cheryl McKay, searched a computerized index of archived cases that
18 may have been purged from the LIONS database in the USAO/DNJ, as well as old index cards that
19 would identify any old and/or destroyed cases purged from LIONS. *Id.* ¶ 7. McKay searched these
20 indices for "Jesse" as well as for "Stout," but did not locate any responsive records. *Id.*

21 EOUSA sent Stout, through his attorney, a letter dated September 25, 2014, informing Stout of the
22 results of the USAO/DNJ's searches. Francis Decl. ¶ 21, Ex. R.

23 **(ii) USAO/DRI (Request No. 2013-1997)**

24 Sandra Mascola, the FOIA/PA point of contact for the USAO/DRI, searched LIONS for Stout's
25 name, including the variations of Stout's name provided in the FOIA/PA request and the "associated key
26 words" listed in the FOIA/PA request. Mascola Decl. ¶ 7. The searches located no records related to
27 Stout. *Id.* Mascola also conducted a discretionary search of PACER using the variations of Stout's
28 name that were provided in the FOIA/PA request to locate cases in the District of Rhode Island with the

1 USAO/DRI in which Stout was a party or attorney. *Id.* The search on PACER located no such cases.
2 *Id.*

3 On July 9, 2013, Mascola sent emails to the USAO/DRI Chiefs of the Civil and Criminal Division,
4 First Assistant United States Attorney, and United States Attorney, to ask if they knew of any cases in
5 the office pertaining to Stout. *Id.* The email included all the variations of Stout's name provided in his
6 FOIA/PA request and the "associated key words" included in the request. *Id.* & Ex. C. On October 29,
7 2013, Mascola followed up with an email to the same recipients to confirm whether they knew of any
8 matters in the office related to Stout, stating "[i]f I don't hear from you by Friday, November 1st, I will
9 assume that the answer is no. I will then reply to EOUSA that we have no responsive records." She
10 received electronic confirmation that these emails had been "delivered" and "read" by each recipient on
11 October 29, 2013, and received no responses. *Id.* ¶ 7. Accordingly, on November 18, 2013, Mascola
12 notified EOUSA that USAO/DRI located no responsive records. *Id.*

13 EOUSA sent Stout, through his attorney, a letter dated September 25, 2014, informing Stout of the
14 results of the USAO/DRI's searches. Francis Decl. ¶ 21, Ex. S.

15 **(iii) USAO/NDCA (Request No. 2013-1999)**

16 Margen searched LIONS for records referring to Stout, using the variations of Stout's name that
17 were provided in his FOIA/PA request. Margen Decl. ¶ 7. The search located no responsive records.
18 *Id.* In addition, Margen conducted a discretionary search of the electronic docket of the United States
19 District Court for the Northern District of California to locate cases with the USAO/NDCA in which
20 Stout was involved as a party or attorney, but did not locate any such cases. *Id.*

21 EOUSA sent Stout, through his attorney, a letter dated January 14, 2014, informing Stout of the
22 results of the USAO/NDCA's searches. Francis Decl. ¶ 19, Ex. P. Subsequently, to confirm the results
23 of her earlier searches, Margen conducted a search on LIONS using each of the "associated key words"
24 listed in Stout's request, but located no responsive records. Margen Decl. ¶ 7.

25 **(iv) USAO/CDCA (Request No. 2013-2000)**

26 To locate responsive records, Salazar searched the LIONS system to determine whether there was a
27 matter in the USAO/CDCA involving Stout, using every variation of Stout's name that was provided in
28 his FOIA/PA request. Salazar Decl. ¶ 9(a). None of these searches located any matters in the

1 USAO/CDCA regarding Stout. *Id.* In addition, Salazar requested that the Criminal Dockets, Civil
2 Dockets, and Records managers for the USAO/CDCA search their records to determine if Stout was a
3 party or subject matter in USAO/CDCA matters that had been purged from LIONS. *See id.* ¶ 9(d).
4 Salazar received confirmation from each manager that a search had been conducted, but no responsive
5 records were located. *Id.* Salazar conducted a discretionary search PACER using all the variations of
6 Stout’s name that were included in her FOIA/PA request, but located no cases involving Stout. *Id.*
7 ¶ 9(c).

8 EOUSA sent a letter to Stout, through his attorney, on August 27, 2014, information Stout of the
9 results of the USAO/CDCA’s search. Francis Decl. ¶ 20, Ex. Q. Subsequently, after plaintiffs’
10 Complaint was filed, Salazar conducted an additional search on LIONS using all the “associated key
11 words” provided in Stout’s FOIA/PA request to confirm the results of her prior searches, and located no
12 responsive records. Salazar Decl. ¶ 9(b).

13 **III. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT**

14 **A. Legal Standard**

15 “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to
16 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see*
17 *also Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). One of the principal purposes of
18 summary judgment is to identify and dispose of factually unsupported claims and defenses. *Celotex*
19 *Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment must be granted against a party that
20 fails to demonstrate facts to establish what will be an essential element at trial. *See id.* at 323.

21 **B. Legal Framework Under FOIA**

22 “FOIA was enacted to facilitate public access to Government documents” and requires federal
23 agencies to release records responsive to a request for production. *Lahr v. Nat’l Transp. Safety Bd.*, 569
24 F.3d 964, 973 (9th Cir. 2009) (quotation marks and citation omitted); *see* 5 U.S.C. § 552(a)(3)(A).
25 “Congress recognized, however, that public disclosure is not always in the public interest.” *CIA v. Sims*,
26 471 U.S. 159, 166-67 (1985). “FOIA represents a balance struck by Congress between the public’s right
27 to know and the government’s legitimate interest in keeping certain information confidential.” *Ctr. for*
28 *Nat’l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency v. John Doe*

1 *Corp.*, 493 U.S. 146, 152 (1989)). Accordingly, “FOIA contemplates that some information may
2 legitimately be kept from the public. The statute contains nine enumerated exemptions allowing the
3 government to withhold documents or portions of documents.” *Lahr*, 569 F.3d at 973 (citing 5 U.S.C. §
4 552(b)(1)-(9)).

5 On a motion for summary judgment, “the defending agency has the burden of showing that its search
6 was adequate and that any withheld documents fall within an exemption to the FOIA.” *Carney v. Dep’t*
7 *of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). As discussed below, the government may meet its burden
8 on summary judgment entirely through a reasonably detailed affidavit describing the agency’s search
9 and alleging facts sufficient to establish any claimed exemptions. *See Lane v. Dep’t of the Interior*, 523
10 F.3d 1128, 1135-36, 1139 (9th Cir. 2008); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir.
11 1981) (The government may meet its burden by submitting agency affidavits or declarations that
12 “describe the documents and the justifications for nondisclosure with reasonably specific detail,
13 demonstrate that the information withheld logically falls within the claimed exemption, and are not
14 controverted by either contrary evidence in the record nor by evidence of agency bad faith.”). A district
15 court only has jurisdiction to compel the agency to disclose improperly withheld agency records –
16 records that do not fall within an exemption. *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996).

17 When an agency’s response to a FOIA/Privacy Act request is to refuse to confirm or deny the
18 existence of responsive documents, a response commonly known as a Glomar response, the agency
19 “must demonstrate that acknowledging the mere existence of responsive records would disclose exempt
20 information.” *Elec. Privacy Info. Ctr. v. NSA*, 678 F.3d 926, 931 (D.C. Cir. 2012); *Phillippi v. CIA*, 546
21 F.2d 1009, 1011 (1976) (upholding CIA refusal to confirm or deny existence of records of CIA
22 connection to ship named Hughes Glomar Explorer); *see Hunt v. CIA*, 981 F.2d 1116, 1118 (9th Cir.
23 1992). In cases involving a Glomar response, the supporting affidavit must justify the Glomar response
24 based on “general exemption review standards established in non-Glomer cases.” *Elec. Privacy Info.*
25 *Ctr.*, 678 F.3d at 931 (quoting *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2007)).

26 ///

27 ///

1 **C. FBI and USAO Conducted Adequate Searches Under FOIA⁴**

2 As described in the declarations of David Hardy, Lilibeth Margen, Christine Salazar, Andrea
3 Venetian, Gisele Bryant, and Sandra Mascola, filed herewith, FBI and the relevant USAOs conducted a
4 search that could be reasonably expected to discover records subject to FOIA and the Privacy Act
5 responsive to plaintiffs' requests. Because those searches were adequate and conducted in good faith,
6 they satisfied FBI's and the USAOs' statutory obligations.

7 An agency's search for records is considered "adequate" if it was conducted "using methods which
8 can be reasonably expected to produce the information requested." *Nation Magazine v. U.S. Customs*
9 *Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C.
10 Cir. 1990)); *Lahr*, 569 F.3d at 986; *SafeCard Servs. Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991)
11 (the agency need only show that "the search was reasonably calculated to discover the requested
12 documents, not whether it actually uncovered every document extant."). The "issue to be resolved is not
13 whether there might exist any other documents possibly responsive to the request, but rather whether the
14 search for those documents was adequate." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325,
15 1328 (9th Cir. 1995) (quoting *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985)); *Iturralde v.*
16 *Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[T]he adequacy of a FOIA search is
17 generally determined not by the fruits of the search, but by the appropriateness of the methods used to
18 carry out the search."). An agency's search need not be exhaustive, merely reasonable, and must be
19 evaluated in light of the request made. *See Western Ctr. for Journalism v. IRS*, 116 F. Supp. 2d 1, 8
20

21 ⁴ Plaintiff Henry does not appear to bring suit under the FOIA regarding the agency's response to
22 Henry's FOIA/PA requests to the USAO/EDCA (Request No. 2013-1988), USAO/SDCA (Request No.
23 2013-1990), USAO/EDNY (Request No. 2013-1991), USAO/SDNY (Request No. 2013-1992),
24 USAO/NDIL (Request No. 2013-1994) or USAO/SDIL (Request No. 2013-1995). Likewise, plaintiff
25 Stout does not appear to bring suit under the FOIA regarding the agency's response to Stout's FOIA/PA
26 requests to the USAO/SDCA (Request No. 2013-1998) or USAO/EDCA (Request No. 2013-2001). In
27 any event, judicial review of the agency's "no records" response to these requests is barred. Henry and
28 Stout did not exhaust their administrative remedies by appealing the agency's response to these requests.
A plaintiff bringing a suit under FOIA must first exhaust administrative remedies before seeking judicial
review. 5 U.S.C. § 552(a)(6)(A); *Taylor v. Defense Fin. & Accounting Service*, No Civ. 2:12-2466
WBS DAD, 2014 WL 28820, at * 5 (E.D. Cal. Jan. 2, 2014). Exhaustion of administrative remedies
ensures that the "agency has an opportunity to exercise its discretion and expertise on the matter and to
make a factual record to support its decision." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 51 (D.C.
Cir. 1990). Where a plaintiff has failed to exhaust administrative remedies, the district court will
dismiss the claim for lack of jurisdiction. *See United States v. Steele*, 799 F.2d 461, 465-66 (9th Cir.
1986).

1 (D.D.C. 2000); *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996). An agency is not
2 required to search every record system, but must conduct a good faith, reasonable search of those
3 systems of records likely to possess the requested records. *Oglesby*, 920 F.2d at 68. “If an agency
4 demonstrates that it has conducted a reasonable search for relevant documents, it has fulfilled its
5 obligations under FOIA and is entitled to summary judgment on this issue.” *Garcia v. U.S. Dep't of*
6 *Justice*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002).

7 An agency may establish the adequacy of its search by submitting a reasonably detailed, non-
8 conclusory affidavit describing its efforts, setting forth the search terms and the type of search
9 performed. *Zemansky*, 767 F.2d at 571; *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C.
10 Cir. 1990). In evaluating the adequacy of a search, courts recognize that “[a]gency affidavits enjoy a
11 presumption of good faith, which will withstand purely speculative claims about the existence of other
12 documents.” *Ground Saucer Watch v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981). Once an agency makes
13 a showing that it conducted a search in good faith that was reasonably calculated to uncover all relevant
14 documents, the agency’s position can only be rebutted by showing that the agency’s search was not
15 made in good faith. *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir.1993). The plaintiff bears an
16 “evidentiary burden” to “present evidence rebutting the agency’s initial showing of a good faith search.”
17 *See Wilson v. DEA*, 414 F. Supp. 2d 5, 12 (D.D.C. 2006). An agency’s “failure to turn up a particular
18 document, or mere speculation that as yet uncovered documents might exist, does not undermine the
19 determination that the agency conducted an adequate search for requested records.” *Wilbur v. CIA*, 355
20 F.3d 675, 678 (D.C. Cir. 2004) (per curiam).

21 Affidavits describing the agency’s search procedures are sufficient for the purposes of summary
22 judgment if they are reasonably detailed in their description of the files searched and the search
23 procedures. The declarations provided by the FBI, USAO/NDCA, USAO/CDCA, USAO/WDNY,
24 USAO/DNJ, and USAO/DRI meet this standard.

25 **1. Plaintiffs’ Requests to FBI**

26 With respect to the FBI, David Hardy explained that the CRS enables the FBI to maintain
27 information that it has acquired in the course of fulfilling its mandated law enforcement responsibilities,
28 including administrative, applicant, criminal, personnel and other files. Hardy Decl. ¶ 23. Hardy

1 explained that FBI searched the automated indices of the CRS for main files related to plaintiffs using a
 2 three-way phonetic breakdown of plaintiffs' names and the variations of plaintiffs' names suggested in
 3 plaintiffs' FOIA/PA requests in combination with plaintiffs' social security numbers and dates of birth.
 4 *Id.* ¶¶ 29-30, 32. Although Hardy explained that at the initial administrative stage, the FBI's policy is to
 5 search only for main files responsive to the FOIA/PA requests, Hardy confirmed that FBI subsequently
 6 conducted a search of the CRS for both main files and cross-reference records, using both the automated
 7 and manual indices.⁵ *Id.* ¶¶ 30, 32. Finally, Hardy explained that because plaintiffs' requests specified
 8 that they sought "multimedia and all types of electronic records," FBI also searched its ELSUR indices,
 9 which are used to maintain information on subjects who's electronic and/or voice communications have
 10 been intercepted through surveillance conducted by the FBI. *Id.* ¶ 37. None of FBI's searches returned
 11 any responsive records. *Id.* ¶¶ 29-30, 32, 37.

12 **2. Plaintiffs' Requests to EOUSA**

13 EOUSA tasked the search for responsive records to the USAOs it determined were most likely to
 14 possess responsive records. Neither Henry's nor Stout's request provided any information regarding a
 15 specific case or investigation involving any USAO or DOJ component with which Henry or Stout may
 16 have been involved. Francis Decl. Ex. A & L. Tricia Francis, an Attorney Advisor at EOUSA,
 17 explained that because each USAO maintains records for criminal and civil matters handled by that
 18 office, after reviewing Henry's and Stout's requests, EOUSA forwarded each request to the USAO
 19 offices in the states where the requestor had resided during the time period covered by his or her request.
 20 *Id.* ¶¶ 5, 6, 15, 16, 24. Henry's request was sent to, among other districts, the USAO/NDCA,
 21 USAO/CDCA, and USAO/WDNY. *Id.* ¶ 5. Stout's request was sent to, among other districts, the
 22 USAO/DNJ, USAO/DRI, USAO/NDCA and USAO/CDCA. *Id.* ¶ 15.

23 As shown by the declarations submitted by Gisele Bryant, Lilibeth Margen, Sandra Mascola,
 24 Christin Salazar, and Andrea Venetian, each of these USAOs conducted a reasonably adequate search in
 25 response to the plaintiffs' FOIA/PA requests. *See* Bryant Decl. ¶¶ 6-7; Margen Decl. ¶¶ 4-7; Mascola
 26 Decl. ¶7; Salazar Decl. ¶ 9; Venetian Decl. ¶ 7. Each USAO searched the LIONS database, the
 27

28 ⁵ In this subsequent search, FBI searched its manual indices even though they only contain records created prior to 1959, outside the time ranges specified in plaintiffs' FOIA/PA requests.

1 computerized system used by each USAOs to track all cases and investigations in the district, including
2 court cases, appeals, and investigations. *See id.* The search parameters were set as broadly as possible,
3 including plaintiffs' first and last names, but identified no matters related to the plaintiffs. *See id.*

4 To confirm these results, several USAOs conducted discretionary searches of the federal courts'
5 electronic docket (*see Dockery v. Gonzales*, 524 F. Supp. 2d 49, 53 (D.D.C. 2007) (EOUSA not required
6 to search the files of the district or superior court)); of the district's index of older cases that may have
7 been purged from LIONS; and of the LIONS system for matter/case names including the "associated
8 key words" suggested in the FOIA/PA request. *See* Bryant Decl. ¶¶ 6-7; Margen Decl. ¶¶ 4-7;
9 Mascola Decl. ¶ 7; Salazar Decl. ¶ 9. None of these searches revealed any responsive documents. Each
10 declarant affirmed that there were no other records systems or locations within her district in which
11 other potentially responsive files were maintained, and that each searched the databases available that
12 were likely to turn up documents responsive to plaintiffs' requests. *See* Bryant Decl. ¶ 8, Margen Decl.
13 ¶ 8; Mascola Decl. ¶ 10; Salazar Decl. ¶ 10; Venetian Decl. ¶ 8.

14 Based on the above referenced declarations' detailed descriptions of the searches conducted and the
15 reasonableness of the search terms and methodologies used, the USAOs' and the FBI's searches were
16 adequate. *Cf. Lahr*, 569 F.3d at 988 & n. 21 (holding that a search for records under FOIA was adequate
17 when the government's submissions described the searches in sufficient detail and the searches were
18 reasonably calculated to uncover responsive documents.). Here, the USAOs and FBI searched those
19 systems of records that they determined were most likely to possess responsive records. None of those
20 searches located any such responsive records. These actions fully satisfied the USAOs' and FBI's
21 search obligations under FOIA.

22 **D. FBI's Glomar Response Was Proper Under FOIA Exemption (b)(7)(E) and Privacy**
23 **Act Exemption (j)(2)**

24 FBI, invoking FOIA exemption (7)(E) and Privacy Act exemption (j)(2), properly refused to confirm
25 or deny plaintiffs' placement on a government watch list. An agency's decision to neither confirm or
26 deny the existence of responsive records is commonly known as a Glomar response. *See Phillippi*, 546
27 F.2d at 1012. A Glomar response is appropriate when "to confirm or deny the existence of records . . .
28 would cause harm cognizable under a FOIA exemption." *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C.

1 Cir. 1982); *see Wilner v. Nat'l Security Ag.*, 592 F.3d 60, 68 (2d Cir. 2009). When an agency issues a
 2 proper Glomar response it need not conduct a search at all. *See Elec. Privacy Info. Ctr.*, 678 F.3d at 934-
 3 35. Accordingly, no adequacy-of-search analysis is appropriate with respect to FBI's determination not
 4 to confirm or deny whether plaintiffs' names are on a government watch list. *See Wheeler v. CIA*, 271
 5 F. Supp. 2d 132, 141 (D.D.C. 2003). To properly employ the Glomar response, an agency must "tether"
 6 its refusal to respond to one of the FOIA or Privacy Act exemptions. *See Wilner*, 592 F.3d at 68;
 7 *Bassiouni v. CIA*, No. 02- C 4049, 2004 WL 1125919 (N.D. Ill. Mar. 31, 2004). The agency employing
 8 the Glomar response bears the burden of proving the applicability of the exemption, and "may meet its
 9 burden by submitted a detailed affidavit showing that the information logically falls within the claimed
 10 exemptions," and should explain the basis for the agency's claim that it can neither confirm or deny the
 11 existence of the requested records. *Wilner*, 592 F.3d at 68. The agency's affidavit is to be accorded
 12 "substantial weight." *Id.*

13 Here, FBI's decision to refuse to confirm or deny whether plaintiffs' names are on any government
 14 watch lists is rooted in Privacy Act exemption (j)(2) and FOIA exemption (b)(7)(E). Under Privacy Act
 15 exemption (j)(2),⁶ an agency head may exempt systems of records from the access provision of the
 16 Privacy Act where the system is maintained by a law enforcement agency and consists of "information
 17 compiled for the purpose of a criminal investigation . . . and associated with an identifiable individual,"
 18 or "reports identifiable to an individual compiled at any stage of the process of enforcement of the
 19 criminal laws." 5 U.S.C. § 552a(j)(2)(B) & (C). Pursuant to exemption (j)(2), FBI has exempted both
 20 the CRS and ELSUR (the two systems of records that appear at issue here) from the Privacy Act's
 21 access provision. 28 C.F.R. § 16.96(a)(1) (CRS) & (c)(1) (ELSUR); *see Mobley v. CIA*, 924 F. Supp. 2d
 22 24, 66-67 (D.D.C. 2013) (explaining that the FBI is not required to justify any particular law
 23 enforcement mission implicated by a particular document in the CRS because pursuant to (j)(2), the
 24 entire system has been exempted by the Privacy Act's access provision); *Marshall v. FBI*, 802 F. Supp.

25
 26 ⁶ It is unclear if plaintiffs are challenging FBI's assertion of a Glomar response under the Privacy
 27 Act as well as the FOIA. *See, e.g.*, Compl. ¶ 5 ("This action arises under the Freedom of Information
 28 Act ("FOIA")). Under the Privacy Act, an individual may request access to his or her record. 5 U.S.C.
 § 552a(d)(1). However, like the FOIA, the Privacy Act recognizes that certain federal agency records
 should not be subject to public disclosure and provides statutory exemptions from disclosure. *See* 5
 U.S.C. § 552a(j) and (k).

1 2d 115, 134 (D.D.C. 2011).

2 FOIA exemption (b)(7)(E) protects from disclosure:

3 [R]ecords or information compiled for law enforcement purposes, but only to
4 the extent that the production of such law enforcement records or information . . .
5 would disclose techniques and procedures for law enforcement investigations or
6 prosecutions, or would disclose guidelines for law enforcement investigations or
7 prosecutions if such disclosure could reasonably be expected to risk circumvention
8 of the law.

9 5 U.S.C. § 552(b)(7)(E); see *Blanton v. US Dep't of Justice*, 63 F. Supp. 2d 35, 49 (D.D.C. 1999);
10 *Catledge v. Mueller*, No. 07 C 2116, 2008 WL 4185939, at * 2-3 (N.D. Ill. Sept. 10, 2008) (finding
11 FBI's use of Glomar response under exemption (b)(7)(E) in response to FOIA request for FBI National
12 Security Letters ("NSL") appropriate because disclosure of subjects of NSLs would compromise their
13 effectiveness as a tool for counterterrorism and counterintelligence investigation). "[E]ven commonly
14 known procedures may be protected from disclosure if the disclosure could reduce or nullify their
15 effectiveness." *Vazquez v. U.S. Dep't of Justice*, 887 F. Supp. 2d 114, 116-17 (D.D.C. 2012) (quoting
16 *Citizens for Responsibility and Ethics in Wash. v. U.S. Dep't of Justice*, 870 F. Supp. 2d 70, 85 (D.D.C.
17 2012)).

18 Because the disclosure of whether an individual is on a watch list may cause substantial harm to the
19 law enforcement investigative and intelligence gathering interests of the FBI, the Glomar responses
20 issued by the FBI to plaintiffs' requests were appropriate. See Hardy Decl. ¶¶ 38-44. The FBI's
21 mission is to protect and defend the United States against terrorist and foreign threats, to enforce the
22 criminal laws of the United States, and to provide leadership and criminal justice services to federal,
23 state, municipal, and international agencies and parties. *Id.* ¶ 2. Providing a substantive response
24 regarding whether an individual is on a watch list would force the FBI to reveal whether or not an
25 individual is of investigative interest. *Id.* ¶¶ 40-43. Confirmation of an individual's placement on a
26 government watch list would notify the individual that his ties to criminal or national security activities
27 are known and that that his actions are subject to investigative scrutiny. *Id.* ¶¶ 41, 43. A "no records"
28 response would notify an individual who is engaged in criminal activity that his activities have not yet
been detected. *Id.* ¶ 43. An individual would then be able to use the FOIA process to circumvent the
law by determining whether or not he has been detected. See *id.* Alerting an individual that his ties to

1 criminal activity are known (or unknown) would provide him an opportunity to avoid detection, destroy
2 evidence, or take other actions to thwart the government's investigative efforts. *Id.*

3 In addition, providing a "no records" response to a requester who is in fact, not on a government
4 watch list leaves the FBI no practical response options in cases where the requester has records without
5 alerting him of this fact. *Id.* ¶ 42. Unless the integrity of the system is preserved by consistently
6 providing every individual requester with a Glomar response, regardless of whether the FBI in fact
7 possesses responsive records, an individual could easily discover whether he is on a government watch
8 list. *See id.* ¶¶ 40-44. Accordingly, the FBI properly issued a Glomar response to preserve and protect
9 the integrity and effectiveness of its watch lists.

10 **E. Plaintiff Henry's Claim that DOJ OIP Failed to Respond to Her Appeal of FBI's**
11 **Response Is Unsupported by Facts and Moot**

12 DOJ OIP received Henry's appeal of FBI's response to her FOIA/PA request on June 4, 2013, sent a
13 letter acknowledging receipt of the appeal on June 20, 2013, and issued its decision on the appeal on
14 August 6, 2013. *See Hardy Decl. Exs. E& F.* Henry alleges that pursuant to 5 U.S.C.
15 § 522(a)(6)(A)(ii), DOJ OIP's response was due on July 19, 2013. *See Compl.* ¶ 30.

16 To the extent Henry seeks relief under the FOIA on the grounds that DOJ OIP failed to respond to
17 her appeal, or exceeded the 20-working day time frame for responding to the appeal by about two-
18 weeks, her claim is moot. *See Nelson v. United States Army*, No. 10C 1735, 2011 WL 710977, at *8-9
19 (N.D. Ill. Feb. 22, 2011) (the plaintiff's claim that the Army failed to make 20 day timeline in issuing
20 decision on FOIA appeal was moot where the agency had responded to the plaintiff's FOIA requests).
21 When a government agency fails to meet the timelines set in the FOIA, the remedy is to file suit in
22 federal court to compel the agency to act. However, once an agency has responded to the FOIA request,
23 the timeliness issue is moot and the only question that remains is the sufficiency of the response.
24 *Voinche v. F.B.I.*, 999 F.2d 962, 963 (5th Cir. 1993); *Hainey v. U.S. Dep't of Interior*, 925 F. Supp. 2d
25 34, 42 (D.D.C. 2013); *cf. Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) ("[T]he production
26 of all nonexempt material, however belatedly, moots FOIA claims."). Because the DOJ OIP has already
27 responded to Henry's appeal and the alleged two week delay – from July 19, 2013 to August 6, 2013 –
28 was insignificant, Henry's claim is moot.

