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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CAITLIN KELLY HENRY and JESSE
STOUT,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

) Civil Action No. C13-5924 DMR
)
) **SUPPLEMENTAL DECLARATION OF DAVID**
) **M. HARDY IN SUPPORT OF FEDERAL**
) **DEFENDANT’S MOTION FOR SUMMARY**
) **JUDGMENT**
)
) Date: January 22, 2015
) Time: 11:00 a.m.
) Place: Courtroom 4 - 3rd Floor
)
) Hon. Donna M. Ryu

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA (OAKLAND)

CAITLIN KELLY HENRY AND
JESSE ABRAM STOUT,

Plaintiffs,

v.

FEDERAL BUREAU OF
INVESTIGATION,

Defendant.

Civil Action No. 4:13-cv-05924-DMR

SECOND DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”) in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation (“FBI”), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 231 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters (“FBIHQ”) units and two (2) field operational service center units whose collective mission is

to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA, amended by the OPEN Government Act of 2007 and the OPEN FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13526, Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Specifically, I am aware of the FBI's handling of all three Freedom of Information/Privacy Act ("FOIA/PA") requests concerning plaintiffs. First, I am familiar with plaintiff's FOIA/PA request (FOIPA Request Number 1214586) where plaintiff's counsel, Jesse Abram Stout, requested records on behalf of his client, Caitlin Kelly Henry. Second, I am aware of plaintiff Jesse Abram Stout's FOIA/PA request (FOIPA Request Number 1207771-000) seeking access to records on himself. Third, I am familiar with the handling of plaintiff's FOIA/PA request (FOIPA Request Number 1207771-001) where plaintiff's counsel, Caitlin Kelly Henry, requested records on behalf of her client, "Jesse Abram Stout."

(4) This declaration is being submitted to respond to plaintiffs' Opposition to the FBI's Motion for Summary Judgment and Cross-Motion for Summary Judgment (Docket ["Dkt.,"] No. 35) (hereinafter, "Plaintiffs' Opposition") dated November 06, 2014. Additionally, this declaration supplements, and hereby incorporates by reference the information previously provided in my first declaration dated September 25, 2014 ("First Hardy

Declaration”). Moreover, the FBI submits this declaration in further support of Federal Defendant’s Motion for Summary Judgment.

ADEQUACY OF SEARCH

(5) As previously indicated in the First Hardy Declaration ¶¶ 23-28, the FBI’s Central Records System (“CRS”) is a centralized FBI records system that enables the FBI to maintain information it has acquired in the course of fulfilling its mandated law enforcement responsibilities. The records maintained in the CRS are comprehensive and consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. The CRS currently consists of over 109.4 million records. Given its comprehensive nature, the CRS is the principal records system that RIDS searches to locate responsive records; it is the records system reasonably likely to contain records responsive to FOIA/PA requests. The mechanism that the FBI uses to search the CRS is the Automated Case Support System (“ACS”) which is comprised of three integrated electronic applications: Investigative Case Management (“ICM”), Electronic Case File (“ECF”) and Universal Index (“UNI”). Although the purpose of each of these electronic applications differs, all three applications draw and import information from the same data source, the CRS.

(6) When a FOIA/PA request is made to the FBI for information about individuals, an ACS index search of the CRS employing the UNI function is the standard and rational starting point reasonably calculated to locate responsive records about them, because ACS is the FBI’s primary means by which records about individuals are found and used. Given the broad scope of the CRS encompassing records compiled in furtherance of FBI’s myriad missions of criminal investigation, national security, counterterrorism and intelligence matters, the CRS is the most logical and likely place to search for and identify records pertaining to FOIA/PA

requests seeking information about individuals; *i.e.*, information concerning plaintiffs Henry and Stout. Simply stated, as indicated in ¶¶ 20-32 and 37 of the First Hardy Declaration, the FBI conducted searches of variations of plaintiffs' names in the CRS via ACS by employing the UNI application to locate any responsive records. The search results for the varied name combinations yielded no responsive records and indicate that plaintiffs are not indexed in the FBI's primary records system where individuals of interest are placed for future retrieval by the FBI. This is typically the end point in a FOIA/PA search for records about individuals; nonetheless, the ELSUR indices, and the older general manual indices (manual inactive index cards,¹ were also searched here in an effort to locate any records responsive to plaintiffs' requests. These search efforts yielded no responsive records.

PLAINTIFFS' CONTENTION CONCERNING THE FBI'S SEARCH EFFORTS

(7) On November 6, 2014, plaintiffs Henry and Stout filed Plaintiffs' Opposition, that the FBI's search for responsive records was inadequate, unreasonable and deficient. Plaintiffs aver that the FBI failed to perform searches of potentially responsive systems and ignored alternative search methodologies when performing its searches. Specifically, plaintiffs assert that the FBI failed to execute searches of Sentinel and Investigative Data Warehouse ("IDW"), failed *to execute* a full-text search of the CRS using ECF, and failed to search the San Francisco Field Office, the Joint Terrorism Task Force ("JTTF"), and the Counter Terrorism Unit ("CTU"). Additionally, plaintiffs aver that in other cases, the FBI identified "numerous other records management systems" that should be searched (Plaintiffs' Opposition p. 10) and also claim that the FBI failed to incorporate other personal identifiers; *i.e.*, email address, date

¹ As explained in the First Hardy declaration, the manual indices or inactive cards are only searched if the subject of the request was born during or before 1958. Neither plaintiff Henry nor Stout were born on nor before 1958; however, the FBI conducted this search only because plaintiffs specifically requested it. As expected, this search yielded negative results.

of birth, and Social Security numbers when performing searches of plaintiffs' name variations. Moreover, plaintiffs state that the FBI failed to complete searches concerning keywords that were supplied in their initial FOIA/PA requests and use of these keywords are likely to result in the return of responsive records. Finally, plaintiffs also appear to question (1) why the search methods used by the FBI, are considered to be the most likely methods to obtain the records being sought by plaintiffs; (2) why ACS is the best way to find requested records; and (3) if plaintiffs were a party to a telephone conversation in which another party's telephone conversations were being monitored, whether plaintiffs' names be indexed to that particular investigation? To the extent these "questions" may be considered challenges to the adequacy of search, they are addressed herein.

Sentinel

(8) Sentinel is the FBI's next generation case management system. It provides users a web-based interface to access CRS information and all three ACS applications can be utilized through the Sentinel platform. Beginning July 1, 2012, all FBI generated records are created electronically in case files via Sentinel; however, Sentinel did not replace ACS and its component parts. ACS remains the primary case management system that the FBI employs to search its vast investigative and other records in the CRS; therefore, RIDS relies on ACS to locate CRS information.² This includes searching for individuals indexed into FBI records created in Sentinel after July 1, 2012 as such index data is also transferred or "back-filled" into ACS. In other words, the same type of information entered into ACS about individuals for the purpose of indexing (i.e., name, DOB, SSN) is likewise entered into Sentinel for FBI records

² ACS is a system designed for agents to share information and is relied upon by the FBI daily to fulfill mission essential functions such as criminal and national security investigations, background investigations, screening personnel for citizenship or employment; and security screening, to include Presidential protection.

created after July 1, 2012 and this same indexing information is back-filled into ACS. In sum, while Sentinel can be characterized as another portal into the CRS, the UNI application of ACS to locate information remains intact given the backfill of index data into ACS; therefore, a search of the Sentinel platform would be a duplication of effort not reasonably calculated to uncover responsive records. Duplication of search efforts unduly burden the finite resources of RIDS in responding to the approximately 18,000 requests it receives annually. Moreover, duplication of search efforts frustrates the good faith implementation of the FOIA statute by RIDS to make prompt request determinations.³ Nonetheless, solely for the purpose of eliminating the issue in this case, the FBI took the extraordinary step of conducting a Sentinel search for records about plaintiffs employing the same UNI application that was used to conduct the ACS index searches. The FBI used the variation of plaintiffs' names listed in the First Hardy Declaration to conduct these searches and was unable to locate any responsive records, confirming the results obtained via the ACS index searches of the CRS.

Investigative Data Warehouse

(9) On December 1, 2012, the Investigative Data Warehouse (IDW) application was retired and its functionality merged with the Data Integration and Visualization System ("DIVS").⁴ Unlike ACS, DIVS is not a case management system. DIVS is a tool that facilitates the sharing of information from internal and external data sources, to include the CRS. Simply put, DIVS is best described as an analytical tool that assists agents and intelligence analysts to effectively sift thorough and prioritize data to support their ability to research, analyze, and investigate. DIVS searches the vast CRS; therefore, DIVS would

³ See 5 USC § 552 (a)(6)(A), requiring agencies to determine within 20 days after receipt of a request whether to comply with a request.

⁴ DIVS is an access control system. Access is only granted to specific individuals on a need to know basis. Not all FBI's employees have access to DIVS.

merely duplicate search efforts of the CRS already performed via ACS. Accordingly, as described in ¶10, *infra*, such a duplication of effort would not be reasonably calculated to locate responsive records, unduly burden finite resources, and frustrate implementation of FOIA timing mandates.

Full Text Search

(10) Plaintiffs Henry and Stout allege that the FBI's search for records was inadequate since it failed to perform a full text search of the ECF. Generally, the FBI doesn't perform full text searches in order to locate records in response to FOIA/Privacy Act requests. Full text searches are considered an extraordinary measure that is unduly burdensome and not reasonably likely to locate responsive records. The CRS is structured in a manner so that information important to an investigation or information that may become important to the FBI in the future is indexed via ACS so that it can be easily retrieved and used. Thus, ACS would not function as an effective investigative tool without such indexing.⁵ Generally, names that are not indexed in the CRS via ACS are those deemed to have no long-lasting significance to the FBI. Such names are usually incomplete and are unaccompanied by any other identifying information, such as a date of birth, social security number, address, phone number, and so forth to assist in identifying an individual. They may only consist of a first or a last name. A full-text search would return these unidentifiable names as results. In fact, in RIDS's experience, full-text searches generally return a significant number of "hits" that are random and incomplete references. In those instances, RIDS then has to go through each hit to determine whether each hit is responsive to the request. This hit-by-hit analysis is time-consuming, uses a significant

⁵ FBI Special Agents and other employees index information so that they can find that information in reference to other investigations or intelligence activities, in order to ensure that the CRS is an effective and efficient means of locating and accessing information.

amount of resources, and generally does not yield results responsive to a request for information about a specific individual, because RIDS usually cannot identify the vaguely-referenced individuals whose incomplete names are returned as hits. Moreover, the names of plaintiffs here—which contain variations of relatively common names—only exacerbates this unduly burdensome process as the number of hits would be multiplied. If RIDS cannot determine that the hit is the actual subject of the request, then that hit is deemed non-responsive. Therefore, the net result of a full-text search is typically a significant use of time and resources that yield no additional responsive information. As such, the ACS index search of the CRS is the key to locating information about an individual.

(11) There are, however, certain extraordinary situations in which there is a benefit and utility to the FBI conducting full-text searches of the CRS; none apply here. These situations are generally when: (a) a search of the CRS locates no records but the FBI has reason to believe that responsive records likely exist; or (b) a search of the CRS results in some records being located, but there is information indicating that more specific responsive records likely exist. As indicated above, a search of the CRS located no records responsive to either plaintiff. Additionally, neither plaintiff Henry nor plaintiff Stout has provided any concrete information to suggest the existence of responsive records. Consequently, a full text search is not warranted and triggers the unduly burdensome and FOIA implementation harms described in ¶10, *infra*.

Joint Terrorist Task Force (“JTTF”), San Francisco Field Office (“SFFO”) and Counterterrorism Unit (“CTU”)

(12) As explained above, the CRS is a comprehensive, centralized record-keeping system. Investigative records on a particular subject pertaining or somehow related to JTTF, any Field Office and/or any FBI’s operational divisions, such as CTU, would automatically be

captured during a search of the CRS.⁶ Therefore, JTTF, CTU and/or SFFO records about the plaintiffs, should they exist, would be identified via a search of the CRS. The FBI was unable to identify any such records via search of the CRS.

FBI's Failure to Use Other FBI's Failure to Search "Numerous Other Records Management Systems"

(13) As a result of the search efforts performed, there is simply no factual basis to reasonably conclude that FBI records about plaintiffs exist. Likewise, there is no factual basis or "lead" on which the FBI can formulate a reasonable search for records about plaintiffs in any location, "records management system," or database of the FBI. Significant in this regard is the lack of any concrete information provided by plaintiffs that could assist the FBI to search for records about them, should any exist. Requestors often provide contextual details that may assist the FBI to locate records about them such as the names of cases, specific dates or places of contact with FBI agents, or other concrete factual details on which they believe the FBI may possess records about them. No such contextual details were provided by plaintiffs to provide any basis to search elsewhere and trigger the unduly burdensome and FOIA implementation harms described in ¶10, *infra*.

FBI's Failure to Use Other Personal Identifiers When Performing Its Search

(14) Plaintiffs Henry and Stout maintain that the FBI failed to incorporate other personal information i.e., email address, date of birth, and/or Social Security number when performing searches of plaintiffs' name variations. As stated in ¶ 29 and ¶32 of the First Hardy Declaration, the FBI utilized plaintiff Henry's date of birth and social security number, in combination with her name, to facilitate the identification of potentially responsive records.

⁶ The FBI limits the Field Office searches only when specifically requested. Otherwise, a search in response to a FOIA/PA request encompasses records in all FBI's Field Offices.

Likewise, the FBI utilized plaintiff Stout's date of birth and social security number, in conjunction with his name variations, to facilitate the identification of potentially responsive records. Ultimately, both searches yielded no responsive records. Furthermore, for request number 1214586 and 1207771 neither plaintiff Henry nor Stout provided an email address to be used in conjunction with his/her name variations in the search for responsive records.

FBI's Failure to Search Keywords Identified in Plaintiffs' FOIA/PA Requests

(15) Plaintiff Henry and Plaintiff Stout claim the FBI failed to complete searches of specific keywords supplied in their requests thus, had the FBI searched these keywords, it would have located records about them. After reviewing the keywords⁷ listed by the plaintiffs, the FBI determined that none of them constitute a valid search terms that would assist in locating information about them, if any exist. The key words lack any explanation of context of how the search for such generic terms could reasonably be calculated to locate records about them. This lack of context or supporting detail establishes no nexus between these terms and the location of records about plaintiffs, should any exist. Moreover, these items are too broad, vague, have no date range, and/or precise identifiers linking the plaintiffs to these items. Hence, given the extensive searches already performed using variations of plaintiff's names, searches for these unexplained terms is not warranted and triggers the unduly burdensome and FOIA implementation harms described in ¶10, *infra*.

⁷ Some of the keywords listed by the plaintiffs are: Alameda County Sheriff, Alameda County District Attorney, Anarchy, Anarchist, Animal Enterprise Terrorism Act and others. For a complete list of plaintiff's suggested keywords, see Plaintiffs' FOIA/PA requests, which were attached as exhibits to the First Hardy Declaration.

QUESTIONS CONCERNING FBI'S SEARCHING GUIDELINES

Why the Search Methods Used By the FBI Are the Most Likely Methods Used To Obtain The Records Sought By Plaintiffs?

(16) Information justifying the adequacy of the FBI's search in response to plaintiffs' FOIA/PA requests is provided in ¶¶ 6-7 above.

Why the Search Methods Used By the FBI Are Considered the Most Likely Methods to Obtain the Records Being Sought By Plaintiffs

(17) As stated in the First Hardy Declaration and throughout this declaration, the FBI's CRS is a comprehensive centralized system of records that enables the FBI to maintain information it has acquired in the course of fulfilling its mandated law enforcement responsibilities. Therefore, it is the principal records system that RIDS most commonly uses as the location likely to contain records responsive to FOIA/PA requests. Hence, this is the most logical method likely to identify the records being sought by plaintiffs Henry and Stout.

Why The FBI Is Confident That Automated Case Support ("ACS") Is the Best Way to Find Requested Records

(18) As stated in the First Hardy Declaration and ¶¶ 24-28, and further detailed in ¶ 7, *infra*, ACS is the primary case management system that the FBI employs to search its vast investigative and other records in the CRS; therefore, RIDS relies on ACS to locate CRS information on individuals. ACS is a system designed for agents to share information and is relied upon by the FBI daily to fulfill mission essential functions such as criminal and national security investigations, background investigations, screening personnel for citizenship or employment; and security screening, to include Presidential protection. As relevant here, the FBI used the UNI function of ACS to locate information indexed by the plaintiffs' name variations. The UNI application of ACS is the appropriate feature to search the CRS indices, since the indexing procedures allow for indexing of specific information such as names, and

identifying information, such as date or place of birth, race, sex, locality, Social Security numbers, address, and/or date of event.

If Plaintiffs Were A Party To A Telephone Conversation In Which Another Party's Telephone Is Being Monitored, Would Plaintiffs' Names Be Indexed to That Particular Investigation

(19) As explained in the First Hardy declaration ¶34, the ELSUR indices include individuals who were the (a) targets of direct surveillance, (b) participants in monitored conversations, and (c) owners, lessors, or licensors of the premises where the FBI conducted electronic surveillance.

CONCLUSION

(20) The FBI has performed a search reasonably calculated to locate records responsive to plaintiffs' FOIA/PA requests as articulated above and in the First Hardy Declaration. The FBI searched its automated indices of the CRS via ACS by employing the UNI function, the ELSUR indices, and even the older general manual indices (manual inactive index cards), in an effort to locate records responsive to either plaintiff. No records were located and there is no factual basis on which the FBI can reasonably base further searches. Accordingly, the FBI has fulfilled its obligations under the FOIA/PA to locate information in response to plaintiffs' requests.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 8th day of December 2014.



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