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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 **FEDERAL DEFENDANT'S OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY 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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The only issue raised in plaintiffs' Opposition and Cross-Motion for Summary Judgment ("Pls.' Opp." or plaintiffs' "Opposition") is the adequacy of defendant's search for records in response to plaintiff's FOIA/PA requests. The original and supplemental declarations of David Hardy, Gisele Bryant, Tricia Francis, Sandra Mascola, Lilibeth Margen, Christine Salazar, and Andrea Venetian show that the FBI and the relevant United States Attorney's Offices conducted adequate searches. The numerous and detailed searches for records based on information provided in plaintiffs' FOIA/PA requests conducted by FBI and the United States Attorney's Offices covered those locations where responsive records, if any, were likely to be located. No responsive records were found. In the Opposition, plaintiffs vaguely refers to "other systems of records" and "other search methods" that they contend should have been used, but offer no admissible evidence showing any deficiency in defendant's searches. Plaintiffs' mere speculation that as yet uncovered documents might exist is insufficient to call into question the adequacy of defendant's search. Summary judgment should be granted in favor of defendant.

II. ARGUMENT

A. Legal Standard

1. Summary Judgment

"As a general rule, all FOIA determinations should be resolved in summary judgment." *Lawyers' Comm. for Civil Rights of San Francisco Bay Area v. U.S. Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008). A defendant is entitled to summary judgment in a FOIA case when it demonstrates that no material facts are in dispute, that it has conducted an adequate search for responsive records, and that each responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *Zemansky v. U.S. Envtl. Prot. Ag.*, 767 F.2d 569, 571 (9th Cir. 1985); *Kelly v. U.S. Census Bureau*, No. 10-04507, 2011 U.S. Dist. LEXIS 100279, at *2 (N.D. Cal. Sept. 7, 2011); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). In opposing a motion for summary judgment, a plaintiff must offer more than conclusory statements. *See Broaddrick v. Exec. Office of President*, 139 F. Supp. 2d 55, 65 (D.D.C. 2001) (internal citations omitted).

2. Adequacy of Search Under FOIA

An agency's search for records is considered "adequate" if it was conducted "using methods which can be reasonably expected to produce the information requested." *Nation Magazine v. U.S. Customs 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. Cir. 1990)); *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 564, 986 (9th Cir. 2009). "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but whether the *search* for those documents was *adequate*." *Zemansky*, 767 F.2d at 571 (emphasis original); *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search."); *SafeCard Servs. Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (the agency need only show that "the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant.").

A reasonable search is one that covers those locations where responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. An agency's search need not be exhaustive, merely reasonable, and must be evaluated in light of the request made. *See Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996). An agency is not required to search every record system to locate documents, or search in locations where it believes responsive documents are unlikely to be located. *Oglesby*, 920 F.2d at 68; *see Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978); *Lawyer's Comm. For Civil Rights of SF Bay Area*, 534 F. Supp. 2d at 1130 (explaining that an agency's search need not be perfect);

To show adequacy of search, the agency "may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith." *Zemanksy*, 767 F.2d at 571. In evaluating the adequacy of a search, courts recognize that "[a]gency affidavits enjoy a presumption of good faith, which will withstand purely speculative claims about the existence and discoverability of other documents." *Ground Saucer Watch v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981). Once an agency makes a showing that it conducted a search in good faith that was reasonably calculated to uncover all relevant documents, the agency's position can only be rebutted by showing that the agency's search was not made in good faith. *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir.1993). The plaintiff bears an "evidentiary burden" to "present

evidence rebutting the agency's initial showing of a good faith search." *See Wilson v. DEA*, 414 F. Supp. 2d 5, 12 (D.D.C. 2006). An agency's "failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for requested records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam).

Affidavits describing the agency's search procedures are sufficient for the purposes of summary judgment if they are reasonably detailed in their description of the files searched and the search procedures. The declarations provided by the defendant meet this standard.

B. FBI conducted a thorough search reasonably calculated to uncover records responsive to plaintiffs' FOIA/PA requests.

The FBI conducted an adequate search for records, searching in locations where responsive documents are likely to be located: the Central Records System ("CRS") and Electronic Surveillance Indices ("ELSUR"). David Hardy, the Section Chief of the FBI's Record/Information Dissemination Section, Records Management Division, explained that CRS enables the FBI to maintain information that it has acquired in the course of fulfilling its mandated law enforcement responsibilities, including administrative, applicant, criminal, personnel, and other files. Hardy Decl.[1] ¶ 23.

Plaintiffs' FOIA/PA requests to the FBI requested: "Please search both the automated and the older general (manual) indices for all records (in any form or format, including multimedia and all types of electronic records) related in whole or in part to" plaintiffs Caitlin Kelly Henry and Jesse Stout. Hardy Decl. Exs. A & I. FBI indexes information considered pertinent, relevant, or essential for future retrieval. *Id.* ¶ 28. FBI Special Agents and employees index information so that they can locate that information for other investigations and intelligence activities. *See* Suppl. Hardy Decl. fn. 5. As requested by plaintiffs in their FOIA/PA requests, FBI searched both the automated and manual indices of the CRS for main files and cross-reference records related to plaintiffs. The Automated Case Support

[1] "Hardy Decl." refers to the Declaration of David M. Hardy In Support of Federal Defendant's Motion for Summary Judgment, filed on October 2, 2014. The "Bryant Decl.," "Francis Decl.," "Margen Decl.," "Mascola Decl.," "Salazar Decl.," and "Venetian Decl." refer to the declarations submitted by Gisele Bryant, Tricia Francis, Lilibeth Margen, Sandra Mascola, Christine Salazar, and Andrea Venetian, respectively, filed on October 2, 2014 in support of Federal Defendant's Motion for Summary Judgment.

System ("ACS"), a mechanism used to search the CRS, is designed for FBI agents to share information and is relied upon by the FBI daily to fulfill its mission, and consists of three applications. FBI's index search was completed using the Universal Index ("UNI") application of ACS. *See* Hardy Decl. ¶¶ 29-30, 32; Suppl. Hardy Decl.[2] ¶ 6, fn. 2. Hardy has explained that the ACS is the FBI's primary means by which records about individuals are found and used. Suppl. Hardy Decl. ¶ 6. FBI conducted an automated search using a three-way phonetic breakdown of plaintiffs' names as well as the variations of plaintiffs' names that plaintiffs provided in their FOIA/PA requests in combination with plaintiffs' social security numbers and dates of birth. *See* Hardy Decl. ¶¶ 29-30, 32. Because plaintiffs' requests specified that they sought "multimedia and all types of electronic records," FBI also searched its ELSUR indices, which are used to maintain information on subjects who's electronic and/or voice communications have been intercepted through surveillance conducted by the FBI. *Id*. ¶ 37. These indices include those individuals who were participants in monitored conversations. *Id*. ¶¶ 34, 36. None of FBI's searches returned any responsive records. *Id*. ¶¶ 29-30, 32, 37.

Plaintiffs characterize the Hardy Declaration as "boilerplate" and assert that on summary judgment, the FBI must describe why all of FBI's "other systems and search methods" would have been unlikely to produce responsive records. Pls.' Opp. at 20. No such burden exists under FOIA. "FOIA demands only a reasonable search tailored to the nature of a particular request. When a request does not specify the locations in which an agency should search, the agency has discretion to confine its inquiry to a central filing system if additional searches are unlikely to produce any marginal return." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998) (citing *Oglesby*, 920 F.2d at 68). The agency is not required to "set forth with meticulous documentation the details of an epic search for the requested records," *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982), nor does FOIA require the agency to

[2] "Suppl. Hardy Decl." refers to the Supplemental Declaration of David M. Hardy in Support of Federal Defendant's Motion for Summary Judgment, filed concurrently with Federal Defendant's Opposition to Plaintiffs' Cross-Motion for Summary Judgment and Reply in Support of Federal Defendant's Motion for Summary Judgment. "Suppl. Bryant Decl.," "Suppl. Francis Decl.," "Suppl. Margen Decl.," "Suppl. Mascola Decl.," "Suppl. Salazar Decl.," and "Suppl. Venetian Decl." refer to the supplemental declarations submitted by Gisele Bryant, Tricia Francis, Lilibeth Margen, Sandra Mascola, Christine Salazar, and Andrea Venetian, respectively, filed concurrently with Federal Defendant's Opposition to Plaintiffs' Cross-Motion for Summary Judgment and Reply in Support of Federal Defendant's Motion for Summary Judgment.

speculate about potential leads. *See Kowalczyk*, 73 F.3d at 389. The case plaintiffs cite in support of their assertion that FBI must, for *every* FBI system of record, explain why the system was not searched -- *Rosenfeld v. U.S. Dep't of Justice*, No. C 07-3240 MHP, 2010 WL 3448517 (N.D. Cal. Sept. 1, 2010) -- does not help plaintiffs' argument. In *Rosenfeld*, the FOIA request at issue sought, among other records, records related to former President Ronald Reagan. *See*. at *1; *Kowalczyk*, F.3d 386 at 388-89 (an agency's search must be evaluated in light of the FOIA request made). In *Rosenfeld*, the court ordered the FBI to provide information about is decision not to search additional databases because the documents that FBI located in its search of the indices to the CRS contained references to other files. *See Rosenfeld*, 2010 WL 3448517, at *6-7. In contrast, here, FBI's searches of both the CRS and ELSUR located no records, and thus, did not suggest that other systems are likely to have the information requested. *Cf. Campbell*, 164 F.3d at 28 (reasonable for FBI to start with CRS review unless and until FBI discovers information suggesting existence of other documents outside scope of this search).

Plaintiffs attempt to challenge the sufficiency of FBI's search on the following grounds: (1) FBI did not use Sentinel and the Investigative Data Warehouse ("IDW") systems in its search; (2) FBI searched the automated and general indices of the CRS, but did not conduct a full text search of all text-based documents in the CRS; (3) FBI's search of the ELSUR would only have resulted in records where plaintiffs were the "targets of direct surveillance," and would not have located records where plaintiffs were participants in a monitored conversation or "associated with the premises where surveillance was conducted;" and (4) FBI failed to consult with staff responsible for surveillance at the field offices where plaintiffs resided or search field office records. *See* Pl.'s Opp. at 21-23. These arguments rely on unsupported speculation and ignore the facts provided in Hardy's declaration.

As a preliminary matter, defendant notes that plaintiffs state generally that "defendant's searches, largely restricted to searches of Plaintiff's names, are insufficient and unreasonable given the fact that other systems and search methods exist . . . ." Pl. Opp. at 20. It is unclear if plaintiffs contend that FBI should have used the "key words" that plaintiffs included with their FOIA/PA requests. Here, the FBI reasonably concluded that none of the "key words" listed by plaintiffs constituted a valid search term that would assist in locating information about plaintiffs. *See* Suppl. Hardy Decl. ¶ 15; *Physicians for*

Human Rights v. U.S. Dep't of Defense, 675 F. Supp. 2d 149, 164 (D.D.C. 2009) ("there is no bright-line rule requiring agencies to use the search terms proposed in a FOIA request."). Plaintiff Henry's FOIA/PA request listed approximately 37 "key words," including names of organizations (*e.g.*, Alameda County Sheriff, Alameda County District Attorney, California Appellate Project, New York University, DePaul University), and assorted common words and phrases (*e.g.*, anarchy, moral character, occupy, grand juries, radical, terrorism and the law). Plaintiff Stout's FOIA/PA request listed approximately 36 "key words," which, like Henry's, ranged from names of organizations (*e.g.*, Brown University, California State Assembly, Office of Legal Affairs, San Francisco Sheriff, San Quentin State Prison) to common phrases (*e.g.*, board of directors, demonstration, occupy, public defender, protest, radical). *See* Hardy Decl. Exs. A & I.

Neither FOIA/PA request included any context for these "key words," despite the commonality of many of these words and phrases. *See id*. Though names of entities and organizations were included in the requests, no date ranges were provided or other identifiers that would link plaintiffs to any of the "key words" or provide a clue to the association between plaintiffs as these organizations. *See* Suppl. Hardy Decl. ¶ 15. Given the extensive searches performed using variations of plaintiffs' names, searches for these assorted "key words" are not reasonably likely to locate records about plaintiffs and, given both the number and commonality of the words listed, would be unduly burdensome. *See id*.

1. There is no evidence to indicate that responsive documents are likely to be located through search of Sentinel or IDW.

Plaintiffs assert that the FBI unreasonably limited its search to the CRS when "more sophisticated systems" exist. Pls.' Opp. at 21. However, plaintiffs provide no explanation – except that these "other" systems are newer – as to why search of unspecified other systems would be reasonably likely to generate responsive records. An agency is "under no obligation to search every system of records which might conceivably hold responsive records," *Truesdale v. U.S. Dep't of Justice*, 803 F. Supp. 2d 44, 51 (D.D.C. 2011), nor is it required to "provide an additional list of each place it did not search." *Gold Anti-Trust Action Comm., Inc., v. Bd. Of Governors of Fed. Reserve Sys.*, 762 F. Supp. 2d 123, 132-33 (D.D.C. 2011). Mere speculation that as yet uncovered documents might exist is

insufficient to call into question the adequacy of an agency's search. *See Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam).

Sentinel and the Investigative Data Warehouse ("IDW") are the only two FBI systems that plaintiffs discuss in the Opposition. Plaintiffs inaccurately describe Sentinel as a replacement for CRS. Sentinel is a case management system that offers another portal to access the CRS. Suppl. Hardy Decl. ¶ 8. Plaintiffs' assertion that Sentinel should have been used to search for documents appears based on the premise that indexing in the CRS via ACS is unreliable because if FBI Special Agents are not sufficiently diligent in marking names to be submitted for uploading onto ACS, a subsequent search of the CRS through the UNI application of the ACS will not locate all responsive records.[3] According to plaintiffs, Sentinel will return more responsive records because Sentinel has made it easier for FBI Special Agents to index names than ACS. Plaintiffs' argument relies entirely on speculation. Plaintiffs provide no evidence of lack of diligence by FBI in indexing names. *Cf.* Suppl. Hardy Decl. fn. 2 (noting that ACS is designed for FBI agents to share information and is relied upon by the FBI daily to fulfill its mission). A plaintiff's questioning of whether the kind of information being sought was indexed, "without a concrete showing that there are other indexes or records that should have been searched, or a demonstration of actual doubt as to whether the system is comprehensive does not raise a reasonable doubt about the adequacy of the search." *Allen v. U.S. Secret Service*, 335 F. Supp. 2d 95, 99 (D.D.C. 2004). Even assuming that more information is indexed via Sentinel than ACS, Hardy has explained that this data would be captured in a UNI search on ACS. Index data created in Sentinel is transferred into ACS, and thus, included in searches through the ACS applications. Suppl. Hardy Decl. ¶ 8. Therefore, a search of the CRS through the Sentinel platform would be duplicative of searches of the CRS through ACS. *Id.*

[3] The criticism levied by plaintiffs that some information may not be captured and uploaded via ACS to the CRS, does not render FBI's search inadequate. *See Stevens v. Dep't of Homeland Security*, N. 13 C 03382, 2014 WL 5796429, at * 6 (Nov. 4, 2014) (explaining that agency's failure to locate video did not render the search inadequate) (citing *Roberts v. U.S. Dep't of Justice*, CIV. A. No. 92-1707 (NHJ), 1995 WL 356320, at *2 (D.D.C. Jan. 29., 1993) ("If a reasonable search fails to unearth a document, then it makes no difference whether the document was lost, destroyed, stolen, or simply overlooked).

Solely for the purposes of addressing plaintiffs' arguments in this case, FBI conducted a Sentinel search using plaintiffs' names. *Id*. This search located no records, confirming the results obtained via FBI's ACS index searches of the CRS. *Id*.

It is unclear why plaintiffs believe that IDW is likely to contain responsive records. According to plaintiffs, IDW contains information from FBI case files. From an unauthenticated document purporting to be FBI testimony from more than a decade ago, in August 2004, plaintiffs conclude that IDW includes information not otherwise contained in CRS. *See* Pls.' Opp. at 15, Ex. M; Fed. R. Evid. 801, 901. In fact, the cited testimony does not compare the contents of IDW to CRS. *See* Pls.' Opp. Ex. M.

As described in the Hardy declaration, the CRS consists of, among other documents, files compiled for law enforcement purposes; it encompasses records compiled in furtherance of FBI's criminal investigations, national security mission, and counterterrorism and intelligence matters. In 2012, the IDW application was retired and merged with the Data Integration and Visualization System ("DIVS"). DIVS is an analytical tool that assists agents and analysts. The DIVS searches the CRS, and thus, a search of DIVS would duplicate search efforts already performed by FBI. Suppl. Hardy Decl. ¶ 9. Though plaintiffs tout the search capabilities of IDW, such as multi-word searches and structured queries, plaintiffs' Opposition fails to cite any evidence that searches of IDW would likely return additional responsive records, where, as here, searches of the CRS (via both ACS and Sentinel) and ELSUR for plaintiffs' names have located no responsive records. *Campbell*, 164 F.3d at 28 (reasonable for FBI to use CRS review).

2. Full-text searches of CRS were unwarranted.

Plaintiffs argue that FBI should have conducted full text searches of the CRS Electronic Case File ("ECF"). To support their argument, plaintiffs cite to a purported court order in *Shapiro v. Department of Justice*, Case No. 1:13-cv-00729-PLF (hereinafter, "*Shapiro I*"), a case currently pending in the United States District Court, District of Columbia. According to plaintiffs, the district court in *Shapiro I* ordered the FBI to perform a full text search of the ECF, and that search located hundreds of page of records. Pls.' Opp. at 22. Plaintiffs mischaracterize the district court's decision as well as the purported subsequent search.

Unlike the FOIA/PA requests at issue in this case, Shapiro's FOIA request asked the FBI to conduct a full-text search of the ECF. *See Shapiro v. Dep't of Justice*, -- F. Supp. 2d --, No. 13-0729 (PLF), 2014 WL 1280275, at *6 (D.D.C. Mar. 31, 2014). The district court found FBI's explanation as to why it declined to do so insufficient. The district court "recognize[d] that a full-text search may not be warranted in every case," and directed FBI to "either conduct a full-text search *or* provide further explanation as to why such a search is unnecessary." *Id* (emphasis added). Contrary to plaintiffs' claim, the FBI did not undertake an ECF search that located hundreds of pages of documents. Rather, in *Shapiro I*, FBI provided the requested further explanation regarding why an ECF search was unnecessary and the district court has yet to reach a determination on the FBI's renewed summary judgment motion.[4]

Here, the only purported evidence that plaintiffs Henry and Stout rely on to support their argument that a full-text search on ECF would locate responsive records is Shapiro's opposition brief, submitted in *Shapiro I* to respond to the FBI's supplemental briefing and declaration. The opposition brief summarizes Shapiro's belief that an ECF search would locate addition records in the context of Shapiro's FOIA request. Pls.' Opp. at 22, Ex. Q. This opposition brief from *Shapiro I* is inadmissible hearsay, without exception, and cannot be considered. Fed. R. Civ. P. 801, 802, 803.

The issues in *Shapiro I* are not before this Court, are in dispute, and have yet to be decided. However, even if this Court could consider the opposition brief in *Shapiro I*, the circumstances of *Shapiro I* differ from those presented here in several critical ways. One, Shapiro's FOIA request asked FBI to conduct a full text search. *See Shapiro I*, 2014 WL 1280275 at *6. Both plaintiff Henry's and plaintiff Stout's FOIA/PA requests specifically asked that a search of the general and manual indices be conducted. Hardy Decl. Ex. A & I. As described above, FBI searched those indices. Two, in *Shapiro I*, FBI's CRS index search located responsive records. *See Shapiro I*, 2014 WL 1280275, at *1. Here, FBI's searches – which included searches of both the CRS and the ELSUR – located no records related

[4] For the convenience of the Court, defendant attaches as Attachments 1-3 to this brief, the docket for *Shaprio I* (Attach. 1), Defendant's Supplemental Brief in Support of Motion for Summary Judgment with supporting Hardy Declaration, filed on July 16, 2014, (Attach. 2), and Defendant's Supplemental Reply In Support of Motion for Summary Judgment, filed on December 8, 2014 (Attach. 3).

to either plaintiff. Accordingly, there is no information indicating that additional responsive records exist. Inadmissible hearsay purporting to show existence of additional records related to the subject of Shapiro's FOIA request, does not suggest that records related to either plaintiff Henry or plaintiff Stout exist. Regardless of the final outcome in *Shapiro I*, that an ECF search may be appropriate to locate the types of records requested in *another* FOIA request, does not mean that it is appropriate in response to plaintiffs' requests. *See Kowalczyk*, 73 F.3d at 389 (an agency's search must be evaluated in light of the FOIA request made).

The CRS is structured so that information important to an investigation or information that may become important to the FBI in the future is indexed so that it can be easily retrieved and used. *See* Suppl. Hardy Decl. ¶¶ 6, 10, & fns. 2, 5. FBI has explained that use of the UNI function of ACS to locate information indexed by plaintiffs' name is the appropriate feature to search the CRS indices. Indexing allows for indexing of names, and identifying information, such as date of birth and social security numbers. Suppl. Hardy Decl. ¶ 18. Generally, names that are not indexed are those deemed to have no long-lasting significance to the FBI. *Id.* ¶ 10. Full-text searches usually yield incomplete names, such as only a first or last name, unaccompanied by any other identifying information, and thus, without any means for FBI to determine if the results refer to the subject of the FOIA/PA request. *Id.* As a result, full-text searches typically use a significant amount of time and resources without yielding responsive records because FBI usually cannot identify the vaguely-referenced individuals whose incomplete names are returned from these full-text searches. *Id.*

Full-text searches may be beneficial in extraordinary situations where there is information indicating that additional responsive records exist, despite the result of a CRS index search. *Id.* ¶ 11. The instant case does not present such an extraordinary situation. In the Opposition, plaintiffs point to two FOIA requests to which FBI responded by undertaking a full-text search of ECF: FOIA requests at issue in *Shapiro v. Department of Justice*, Case No. 1:13-cv-00595, in the United States District Court, District of Columbia (hereinafter, "*Shapiro II*"). The contrast between plaintiffs' FOIA/PA requests and the request in *Shapiro II*, further highlight the difference between those extraordinary situations where a full-text search maybe reasonable and the present case. The first FOIA request in *Shapiro II* sought: "any and all records that were prepared, received, transmitted collected and/or maintained by . . . FBI . .

. relating or referring to a potential plan to 'gather intelligence against the leaders of [Occupy Wall Street-related protects in Houston, Texas] and obtain photographs, then formulate a plan to kill the leadership [of the protects] via suppressed sniper rifles.'" *See* Attach. 4 at 2 (Court's Order, dated March 12, 2014, Case No. 1:13-cv-00595 RMC (D.D.C.)). The second FOIA request at issue in *Shapiro II*, sought: "any and all records that were prepared, received, transmitted, collected and/or maintained by . . . FBI . . . relating or referring *to Occupy Houston, and any other Occupy Wall Street-related protests in Houston, Texas, and law enforcement responses to the above protests.*" Id. at 3. Notably, FBI was aware that it had processed records in response to another, recent FOIA request that sought information similar to that described in the two requests in *Shapiro II*. *Id.* at 15, 17.

Unlike the requests in *Shapiro II*, each of plaintiffs' FOIA/PA requests simply sought records related to a single individual, either plaintiff Henry or plaintiff Stout. None of FBI's searches – either of the CRS or ELSUR – located any documents related to plaintiffs. Plaintiffs have provided no information to suggest that FBI records related to plaintiffs exist. Accordingly, the evidence shows that FBI reasonably concluded that a full-text search of CRS is unwarranted in this case.

3. FBI's conducted reasonable search of ELSUR.

As discussed the Hardy Declaration, FBI searched the ELSUR indices using all the variations of plaintiffs' names that plaintiffs provided in their FOIA/PA requests, as well as the plaintiffs' date of birth and social security number. These searches located no responsive records. Hardy Decl. ¶ 37. The ELSUR indices are used to maintain information on subjects who's electronic and/or voice communications have been intercepted as the result of a consensual electronic surveillance or a court-ordered (and/or sought) electronic surveillance conducted by the FBI. *Id.* ¶¶ 33-36. FBI has explained that the automated indices of the ELSUR include individuals who were the targets of direct surveillance, as well as participants in monitored conversations, and owners, lessors, or licensors of the premises where the FBI conducted electronic surveillance. *Id.*; Suppl. Hardy Decl. ¶ 19. Apparently ignoring these facts, plaintiffs claim that FBI's search would not have included records where plaintiffs were participants, or "associated" with premises where surveillance was conducted. The record contradicts plaintiffs' claims.

4. Investigative records of FBI field offices were included in search of CRS; no responsive records were located, and thus, no "staff consultations" at field offices are warranted.

Plaintiffs assert that FBI's search required "consultation of staff" in the FBI field offices where plaintiffs' resided because "staffs are known to conduct surveillance on plaintiffs' clients and associates, political activists, and plaintiff's search areas." Pls.' Opp. at 23. Hardy has explained that FBI special agents index information so that they can late locate that information. *See, e.g.*, Suppl. Hardy Decl. ¶ 18, fn. 5. Field office investigative records are part of the CRS and would therefore have been captured in FBI's search of the CRS. *Id.* ¶ 12; Hardy Decl. ¶ 23. FBI's search of the CRS located no responsive records. Accordingly, there are no leads that suggest that any "consultation" with staff at FBI field offices would locate responsive records. Indeed, despite allegations of "known" surveillance, plaintiffs fail to specify the names or titles of any relevant staff; the names of any individuals that plaintiffs believe have been targets of surveillance; or any information regarding any dates and location of purported surveillance. Although plaintiffs' FOIA/PA requests provided information on the states where plaintiffs have resided (a total of five states) , and the years of residence in those states, the time frame provided included each plaintiffs' entire lifespan, from birth to the date of their FOIA/PA requests in 2013. Hardy Decl. Exs. A & I. Plaintiffs' vague speculation that some FBI employees, at some point during plaintiffs' lifetimes, have conducted surveillance on unnamed associates, "political activities," and in "Plaintiff's research areas," Pls. Opp. at 23, is not sufficient to suggest that FBI should have consulted with any field office employees, much less all the employees from field offices in five states, from approximately the 1980s to 2013. *See* Hardy Decl. Exs. A & I.

C. The USAOs conducted a thorough search reasonably calculated to uncover records responsive to plaintiffs' FOIA/PA requests.

Through their Complaint, plaintiffs challenge only those searches conducted by the following United States Attorney's Offices ("USAOs or Districts"): USAO/Northern District of California ("NDCA", USAO/Central District of California ("CDCA"), USAO/Western District of New York ("WDNY"), USAO/District of New Jersey ("DNJ"), and USAO/District of Rhode Island ("DRI"). As shown by the declarations submitted by Gisele Bryant, Lilibeth Margen, Sandra Mascola, Christin Salazar, and Andrea Venetian, each of these USAOs conducted a reasonably adequate search in

response to the plaintiffs' FOIA/PA requests. *See* Bryant Decl. ¶¶ 6-7; Margen Decl. ¶¶ 4-7; Mascola Decl. ¶7; Salazar Decl. ¶ 9; Venetian Decl. ¶ 7. In each District, cases and matters are assigned a USAO number. Suppl. Bryant Decl. ¶ 5; Suppl. Margen Decl. ¶ 5; Suppl. Mascola Decl. ¶ 5; Suppl. Salazar Decl. ¶ 5; Suppl. Venetian Decl. ¶ 5. Each District maintains paper files, identified by the USAO number, for the cases and matters handled in that District. *Id*. None of the Districts have an electronic filing system in which it maintains case and matter files. *Id*. Though each District uses the Legal Information Office Network Systems ("LIONS") to track cases and matters opened in the District, LIONS does not store electronically the actual documents from the cases and matters. *Id*.

As a first step, the FOIA/PA contact at each of the relevant USAOs used LIONS to determine if there was a case or matter in the District involving the subject of the FOIA/PA request(s) they received. Suppl. Bryant Decl. ¶¶ 6-12; Suppl. Margen Decl. ¶¶ 6-11; Suppl. Mascola Decl. ¶¶ 6-12; Suppl. Salazar Decl. ¶¶ 6-12; Suppl. Venetian Decl. ¶¶ 6-13. The USAO/NDCA, USAO/CDCA, and USAO/WDNY received plaintiff Henry's FOIA/PA request. The USAO/NDCA, USAO/CDCA, USAO/DNJ, and USAO/DRI received plaintiff Stout's FOIA/PA request. *See id*. The search parameters were set as broadly as possible, including plaintiffs' first and last names, but identified no matters related to the plaintiffs. *See id.*

The FOIA/PA contacts at each of the USAOs conducted their searches using the "participants" field on LIONS. *Id*. The "participant" field on LIONS is broad; this field is used for names of litigants, subjects of investigation, witnesses, victims, and other individuals, organizations, or businesses associated with a case or matter. *See* Suppl. Bryant Decl. ¶ 8; Suppl. Margen Decl. ¶ 7; Suppl. Mascola Decl. ¶ 8; Suppl. Salazar Decl. ¶ 8; Suppl. Venetian Decl. ¶ 8. Search of the "participant" field will return all the case/matters opened in which the name (or term), entered into the search has been listed as a "participant." Suppl. Bryant Decl. ¶¶ 9-11 ; Suppl. Margen Decl. ¶¶ 8-11; Suppl. Mascola Decl. ¶¶ 9-11; Suppl. Salazar Decl. ¶¶ 9-11; Suppl. Venetian Decl. ¶¶ 9-11. Those results will include, among other information, the USAO number for the case/matter, permitting the FOIA/PA contact to retrieve the files for the relevant case or matter. *Id*. Each of the FOIA/PA contacts ran searches of the "participant" field using the name of the subject on the FOIA/PA request she received, including the name variants provided on the request. Suppl. Bryant Decl. ¶¶ 6-12; Suppl. Margen Decl. ¶¶ 6-11;

Suppl. Mascola Decl. ¶¶ 6-12; Suppl. Salazar Decl. ¶¶ 6-12; Suppl. Venetian Decl. ¶¶ 6-13.[5] In addition, each of the FOIA/PA contacts also ran searches of the "participant" field using the "associated key words" provided on the request. *Id*. None located any responsive records. To confirm the results of their LIONS searches, several USAOs conducted discretionary searches of the federal courts' electronic docket and of the District's index of older cases (cases prior to the 1990's) that may have been purged from LIONS. *See* Bryant Decl. ¶¶ 6-7; Margen Decl. ¶¶ 4-7; Mascola Decl. ¶ 7; Salazar Decl. ¶ 9. None of these searches revealed any responsive documents. *Id*. All of the FOIA/PA contacts confirmed that a LIONS participant search using the plaintiffs' name variants was the most comprehensive method available to determine whether there was a case or matter in the District involving plaintiffs. Suppl. Bryant Decl. ¶ 14; Suppl. Margen Decl. ¶ 13; Suppl. Mascola Decl. ¶ 14; Suppl. Salazar Decl. ¶ 14; Suppl. Venetian Decl. ¶ 15.

Though plaintiffs contest the reasonableness of the searches conducted by the Districts, it is unclear what specific errors plaintiffs assign to these searches. While plaintiffs describe differences in the practice of Assistant United States Attorneys ("AUSAs") in the USAO/NDCA in opting to open pen registers and search warrants as new matters, with a separate USAO number, or use the existing USAO number of an existing investigation, plaintiff fail to explain why this would render the LIONS searches conducted here – which were neither limited to USAO number nor type of case/matter – unreasonable.

Next, plaintiffs appear to contend that each of the Districts should have consulted with AUSAs in conducting their search, as was done by the USAO/NDCA. This criticism is belied by plaintiffs' apparent recognition that Lilibeth Margen, the FOIA/PA contact for the USAO/NDCA, only communicated with AUSAs when searches on LIONS showed cases in the District involving several of the organizations listed among plaintiff Henry's "key words."[6] Margen Decl. ¶ 5. The FOIA/PA contacts in the other Districts have all explained that neither searches of plaintiffs' names, nor searches of the "associated key words," returned any results on LIONS. Suppl. Bryant Decl. ¶¶ 6-12; Suppl.

[5] To confirm her prior search results using Ms. Henry's name (and the variations thereof that Ms. Henry provided), on December 2 and December 4, 2014, Venetian ran discretionary searches using the "associated key words" listed Ms. Henry's FOIA/PA request. These searches located no records. Suppl. Venetian Decl. Ex. 13.

[6] Margen located no records responsive to Henry's FOIA/PA request. Margen Decl. ¶ 5.

Margen Decl. ¶¶ 6-11; Suppl. Mascola Decl. ¶¶ 6-12; Suppl. Salazar Decl. ¶¶ 6-12; Suppl. Venetian Decl. ¶¶ 6-13.

With respect to the USAO/NDCA only, plaintiffs assert that Margen should have searched paper files and unspecified "additional locations," because data entry errors on LIONS will yield non-responsive results even when records exist. Plaintiffs' argument is based entirely on speculation. *See Oglesby*, 920 F.2d at 67 n.13 (hypothetical assertions are not sufficient to raise a material question of fact with respect to the adequacy of an agency's search.); *see Concepcion v. FBI*, 606 F.Supp. 2d 14, 30 (D.D.C. 2009) ("[S]peculation as to the existence of additional records . . . does not render the searches inadequate."). Plaintiffs have offered no evidence suggesting that records exist. Rather, in the only instance across the Districts where there were cases or matters related to one of the organizations listed among plaintiff Henry's "key words," communication with the assigned AUSA the cases affirmed that there that no records were related to Henry. This further confirmed the results of the USAO/NDCA's LIONS search using variations of Henry's name, which located no cases or matters in which Henry was a "participant." Moreover, in the absence of any evidence suggesting records exist, search of all the paper case files in the District would be unduly burdensome.

1. "National-level" searches were unwarranted.

Plaintiffs claim that a "national-level" search[7] should have been conducted, but again, articulate no basis for their belief that such a search is reasonably calculated to locate responsive records. Neither Henry's nor Stout's FOIA/PA request provided any information regarding a specific case or investigation involving any USAO or DOJ component with which Henry or Stout may have been involved. Francis Decl. Ex. A & L. Each USAO prosecutes violations of federal law and represents the federal government in litigation involving the United States in its respective District. *See* Suppl. Francis Decl. ¶ 1. Records for the criminal and civil matters handled by a particular USAO are maintained at the District. *See id*. Here, EOUSA reasonably determined that those USAOs in the states where plaintiffs' had resided, as listed in their FOIA/PA requests, were most likely to possess responsive

[7] To the extent plaintiffs suggest a "national-level" search of federal court dockets should have been conducted because "regional-level" searches of court dockets located no results, defendant notes that court dockets are not records of DOJ.

records, if any, and tasked the search to those USAOs. Plaintiff Henry's request was sent to all the districts in California, New York, and Illinois. *See id.* ¶¶ 1, 3. Plaintiff Stout's request was sent to all the Districts in California, New Jersey, and Rhode Island. Francis Decl. ¶¶ 5, 15. Plaintiffs have failed to articulate any basis for their belief that USAOs in districts where plaintiffs never lived would have any records related to them. Such a possibility is even more speculative where, as here, none of the USAOs with jurisdiction in the areas where plaintiffs actually resided located any responsive records.[8] *See id.* ¶¶ 8-11, 18-21.

2. Searches of EOUSA records were unwarranted.

Plaintiffs claim that "the EOUSA records," should have been searched. The only records plaintiffs specify are records at the Federal Records Center ("FRC") and the Master Index Application ("MI"). EOUSA is the administrative arm of the United States Attorney's Office and does not maintain records of the cases or matters handled at each of the Districts. Francis Decl. ¶ 1; Suppl. Francis Decl. ¶ 1. In this case, where searches at the Districts with responsibility for prosecuting and litigating cases in the jurisdictions where plaintiffs resided located no records, there is no evidence that suggests EOUSA is reasonably likely to possess records related to plaintiffs. *See id.* The Districts send closed cases to the FRC. Suppl. Francis Decl. ¶ 4; Suppl. Bryant Decl. ¶¶ 9-10; Suppl. Margen Decl. ¶¶ 8-9; Suppl. Mascola Decl. ¶¶ 9-10; Suppl. Salazar Decl. ¶¶ 9-10; Suppl. Venetian Decl. ¶¶ 9-10. Because LIONS tracks both closed and open cases, the searches conducted by the USAO/NDCA, USAO/CDCA, USAO/NYW, USAO/DNJ, and USAO/DRI would have included any closed cases sent to the FRC. *Id.* Additional searches targeted to cases at the FRC would be duplicative. Finally, the MI is a system of records used by the USAO for the District of Columbia ("USAO/DDC") and contains information about cases brought in the United States District Court for the District of Columbia or in the Superior Court for the District of Columbia. Suppl. Francis Decl. ¶ 3; *see also* Pls.' Opp. Ex. P at 2. Neither plaintiff Stout's nor plaintiff Henry's FOIA/PA request contained information suggesting that Stout or Henry resided in the District of Columbia, or that they were involved in cases within the jurisdiction of the

[8] Defendant notes that in total, fifteen Districts received the FOIA/PA requests at issue. None located responsive documents. Plaintiffs only challenge the responses of five Districts: USAO/NDCA, USAO/CDCA, USAO/NYW, USAO/DNJ, and USAO/DRI. Francis Decl. ¶¶ 5, 8-11, 15, 18-21.

USAO/DDC. Francis Decl. Exs. A & L. Accordingly, EOUSA had no reasonable basis to conclude that the USAO/DDC would be likely to have responsive records.

III. OJBECTIONS TO EVIDENCE

Though many of the exhibits to plaintiffs' Opposition appear to be documents from various government sources, none of the exhibits have been authenticated. *See* Fed. R. Evid. 901. As discussed above, Exhibit Q, an opposition brief submitted by the plaintiff in *Shapiro I*, is inadmissible hearsay, without exception. Defendant objects to Exhibits E, L, and N, on the same grounds. Fed. R. Evid. 801-803.

IV. CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion and grant defendant's motion for summary judgment.

DATED: December 8, 2014

Respectfully submitted,
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_/s/_____
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