IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION; and CARMEN ORTIZ, UNITED STATES ATTORNEY FOR THE DISTRICT OF MASSACHUSETTS,

Defendants.

Civil Action No. 14-11759-ADB

ORAL ARGUMENT REQUESTED

ACLUM'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The premise of open government is that an uninformed public cannot hold its government to account. The Freedom of Information Act ("FOIA") is a critical means to ensure open government, as it places a mandatory obligation upon government to search for and – except in few and enumerated circumstances – disclose information the public requests. But the government's refusal to honor that obligation would, if successful, read FOIA out of existence, and militate against the principles of open government by shielding federal authorities from public view. That is the issue here.

The U.S. Attorney's Office ("USAO") refuses to search for documents responsive to ACLUM's FOIA Request, even though there can be no question that FOIA *requires* it to perform an adequate search and the narrow exceptions to that requirement do not apply here. The USAO also has not shown why responding to ACLUM's FOIA Request would *require* it to perform an unreasonable search – particularly here, where the USAO contends, without evidence, that any documents it has would be "duplicative" of documents ACLUM might find elsewhere; and where the USAO contends, without authority, that a separate agency's search exhausts its obligations under FOIA.

This Court should not be the first to find that a separate agency's efforts exhaust the USAO's obligations under FOIA, but should instead find that FOIA's strong presumption in favor of disclosure compels the USAO to perform an adequate search here. Plaintiff ACLUM therefore respectfully requests that the Court grant summary judgment in its favor, and order the USAO to conduct a reasonable search for – and to produce – records responsive to its FOIA Request.

STATEMENT OF FACTS

A. ACLUM's FOIA Request

ACLUM submitted separate FOIA Requests to the Federal Bureau of Investigation, and to Ms. Carmen M. Ortiz, the U.S. Attorney for the District of Massachusetts, on December 9, 2013. Rótolo Decl. ¶ 2 & Exhibit 1. The FOIA Request to the U.S. Attorney's Office ("USAO") sought three overall categories of documents, only two of which are at issue in this motion.[1]

"Part A" of the FOIA Request sought information about the structure of the Massachusetts Joint Terrorism Task Force ("JTTF") and its relationship with the USAO. Rótolo Decl. Exhibit 1. More specifically, the FOIA Request sought agreements between the JTTF and federal or state agencies (including the USAO); records identifying participating agencies, the number of personnel assigned to assist the JTTF, and the number of personnel required to be physically present at the Massachusetts Commonwealth Fusion Center of the Boston Regional Intelligence Center; the JTTF budget; and records showing any protocols for sharing information among those entities. *Id.*

"Part B" of the FOIA Request sought records concerning certain investigations – particularly the type of investigation called "assessments" – by the FBI's Boston Field Office. *Id.* The FOIA Request sought records that would show the number of assessments, preliminary investigations, and full investigations the FBI had conducted since 2011. *Id.* Additionally, the FOIA Request sought records to show how many of those investigations led to arrests,

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[1] As to the third part of the FOIA Request ("Part C"), the Court has ordered Defendants to complete their review of responsive records by January 8, 2016. Dkt. No. 50.

prosecutions, and convictions, and if available, extant records that had categorized that information (e.g., RICO, terrorism, drug-related, etc.). *Id.*

B. <u>The USAO's Response To ACLUM's FOIA Request</u>

The USAO did not respond to the FOIA Request within the 20-day period prescribed under FOIA. Rótolo Decl. ¶¶ 3-5; *see also* 5 U.S.C. § 552(a)(6)(A)(i). On February 28, 2014, ACLUM called the USAO and confirmed by telephone that the USAO had, in fact, received the FOIA Request. Rótolo Decl. ¶ 3. But as of the date ACLUM filed the complaint, ACLUM still had not received any response from the USAO. Rótolo Decl. ¶ 4.

ACLUM filed this action on April 10, 2014 to seek the release of records responsive to the FOIA Request. (Dkt. No. 1.) Nearly two weeks *after* filing the complaint, the Executive Office for United States Attorneys confirmed receipt of the FOIA Request by letter. Rótolo Decl. Exhibit 3.

Following its Answer to ACLUM's Complaint,[2] the USAO stated on July 21, 2014 that it would search for documents responsive to Parts A and B of the FOIA Request. Dkt. No. 25 at 2 ("The U.S. Attorney's Office is to provide its first interim response, consisting of emails *responsive to all three portions of Plaintiff's FOIA request*, by September 2, 2014") (emphasis added). But just two months later, the USAO told ACLUM that it had not searched – and would not search – for records responsive to Parts A and B of the FOIA Request. Dkt. No. 34 at 2. ACLUM objected on the grounds that the USAO was obligated to perform a search under FOIA. *Id.*

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[2] The U.S. Attorney's Office filed a "Notice of Substitution," purportedly pursuant to 5 U.S.C. § 552(f)(1), seeking to substitute the Department of Justice as the sole defendant in this case, even though the FBI and the U.S. Attorney's Office received separate FOIA requests. (Dkt. No. 17.)

C. **The Farmer Declaration**

To this day, the USAO has not undertaken *any* search for records responsive to Parts A and B of the FOIA Request. Rótolo Decl. Exhibit 3 (hereinafter "Farmer Decl.") ("With respect to both categories [A and B], the Office has not undertaken a search for such documents."). The USAO's declarant states that he has a "general familiarity" or a "good idea" of what documents the USAO *might* have. Farmer Decl. at 2. The USAO's declarant also "believe[s]" that any records it has that are responsive to Part A and Part B of the FOIA Request would be "duplicative" of documents the FBI has, since "any" such documents "would have been originated by or received from the FBI…." *Id.* The USAO also says that a "conscientious search" to locate any records responsive to Parts A and B of the FOIA Request would require "an extensive manual search of paper files" at three locations since it "think[s]" that responsive documents would not exist in electronic form – but the USAO has not identified the anticipated volume of the paper files to be searched, or the amount of time and expense it would take to perform such a search. *See id.* Even though the USAO has not performed *any search* in this case, its declarant nevertheless states that he is "not aware" of any responsive records, or that the USAO "has no documents" that are responsive. *Id.* at 3-4.

ACLUM now moves for summary judgment and an order compelling the U.S. Attorney's Office to conduct an adequate search for – and to produce – records responsive to Parts A and B of the FOIA Request.

SUMMARY JUDGMENT STANDARD

The summary judgment standard is well known to this Court. Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. There is no "genuine" dispute of fact where the evidence would not permit the factfinder to return a verdict for the non-moving party. *See, e.g.*,

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party must therefore present specific and sufficient facts – and not conclusory allegations, improbable inferences, or speculation – that would permit a factfinder to return a verdict in its favor, and which would therefore require a trial for resolution. *Id.* at 248-49. But creating "metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), or pointing to the "mere existence of a scintilla of evidence in support of the [non-moving party's] position," *Anderson*, 477 U.S. at 252, will not create a genuine issue for trial.

ARGUMENT

The USAO has not performed any search for documents responsive to Parts A and B of ACLUM's FOIA Request, and under the circumstances presented in this case, the USAO's refusal to search is a clear violation of FOIA. Since the USAO was obligated to perform an adequate search but did not, the Court should grant summary judgment in favor of ACLUM, and compel the USAO to search for – and to produce – records responsive to Parts A and B of the FOIA Request.

I. FOIA Statutory Structure

FOIA requires every authority of the United States to search for and promptly produce records requested under its provisions except under few and limited circumstances. 5 U.S.C. §§ 551, 552. FOIA was designed to place "mandatory disclosure requirements" upon federal authorities, in the hope that doing so would "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21, 242 (1978). It is, in short, a primary tool for citizens to craft and maintain open government.

In view of FOIA's mandatory disclosure requirements, "[i]t is elementary that an agency responding to a FOIA request must conduct[] a search reasonably calculated to uncover all relevant documents." *Truitt v. Dept' of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotation marks omitted). Agencies responding to FOIA requests must therefore "make a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested," and must "demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (internal quotation marks omitted); *see also McGehee v. U.S. Dep't of Justice*, 800 F. Supp. 2d 220, 229 (D.D.C. 2011) (noting that agency cannot limit search to certain sources if other sources are likely to contain information requested). Agencies must, as a general rule, "prove that 'each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.'" *Friends of Blackwater v. U.S. Dep't of Interior*, 391 F. Supp. 2d 115, 119 (D.D.C. 2005) (quoting *Goland v. Central Intelligence Agency*, 607 F.2d 339, 352 (D.C. Cir. 1978). Because an agency's refusal to search conflicts with FOIA's "strong presumption in favor of disclosure." *Bigwood v. U.S. Agency for Int'l Dev.*, 484 F. Supp. 2d 68 (D.D.C. 2007) at 73-74, courts have allowed agencies to refuse to search in only two narrow scenarios.

First, some courts have found that an authority's refusal to search may be justified where the FOIA request seeks information about specifically identified third parties, without their consent, that would otherwise be exempt from disclosure. *See, e.g.*, *Kim v. I.R.S.*, No. 99-2096-WMN, 1999 WL 1424998, at *3 (D. Md. Dec. 28, 1999) (upholding refusal to search where requestor provided no consent forms or powers-of-attorney to meet exception to general rule); *see also Burke v. U.S. Dept. of Justice*, No. 96-cv-1739-RMU, 1999 WL 1032814, at *1-4

(D.D.C. Sept. 30, 1999); *see also Antonelli v. F.B.I.*, 721 F.2d 615, 617 (7th Cir. 1983). *But see Broward Bulldog, Inc. v. U.S. Department of Justice*, No. 12-cv-61735, 2014 WL 2999205, at *2-3 (S.D. Fla. Apr. 4, 2014) (granting a FOIA plaintiff's motion to compel a further search where court was not "satisfied it has before it a search which looks where documents can be found" following refusal to search); *Schulze v. F.B.I.*, No. 05-cv-0180-AWI(GSAx), 2010 WL 2902518, at *19-23 (E.D. Cal. July 22, 2010) (denying agency's motion for summary judgment where it refused to search and failed to show that harm would result from disclosure).[3]

Second, courts have allowed agencies to refuse to perform a search is where the search required by the request is demonstrably and unreasonably burdensome. FOIA does not prohibit a request for voluminous records or a request that requires an extensive search. *See* 5 U.S.C. § 551 *et seq.*; *see also Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 454-56 (D.D.C. 2014) (noting that "the Act puts no restrictions on the quantity of records that may be sought"). In fact, FOIA "anticipates requests for voluminous records" by providing for agencies to have more time to "search for, collect, and appropriately examine a voluminous amount of separate and distinct records" in "exceptional circumstances." *Tereshchuk*, 67 F. Supp. 3d at 455; *see also* 5 U.S.C. § 552(a)(6)(B)(i)-(iii). FOIA therefore "anticipates that requests for records may be so voluminous as to require an agency to carry an unusual workload." *Tereshchuk*, 67 F. Supp. 3d at 455. The government carries a heavy burden to show that a search crosses the threshold from "unusual" – which does not excuse the obligation to search – to "unreasonable." *Cf. Pinson v. Dep't of Justice*, -- F. Supp. 3d -- , No. 12-1872, 2015 WL 739805, at *4 (D.D.C. Feb. 23, 2015).

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[3] Additionally, Parts A and B of the FOIA Request do not seek records specific to third-party individuals without their consent and that would otherwise be exempt. *Cf. Kim*, 1999 WL 1424998, at *3 (D. Md. Dec. 28, 1999); *Burke*, 1999 WL 1032814, at *1-4 (D.D.C. Sept. 30, 1999); *Antonelli*, 721 F.2d at 617.

II. <u>The USAO Failed To Establish That a Search for Records Responsive to Parts A and B of the FOIA Request Would Be Unreasonably Burdensome</u>

It is a rare case where an agency refuses to perform any search in response to a FOIA request, and the USAO has not made a showing sufficient to overcome its obligation to search in this case. Here, the USAO claims that searching for documents responsive to the FOIA Request would be unreasonably burdensome for two reasons. First, the USAO raises the novel theory that a search would impose an unreasonable burden because such a search would "duplicate" the FBI's search. Second, the USAO says that a search would be unreasonably burdensome because it would be too hard to perform. Both of these arguments fail – and the Court should therefore grant summary judgment in ACLUM's favor, and compel the USAO to search for – and produce – responsive records.

A. <u>The USAO's "Duplication" Theory Does Not Establish That Its Search Would Be Unreasonably Burdensome</u>

1. Separate Agencies Have Independent Duties To Respond To FOIA Requests

There is no authority for the proposition that a search by *separate agencies or components* in response to separate FOIA requests would be "duplicative," and would on that basis require an unreasonable search as a matter of law. Courts have only described searches as "duplicative" where a FOIA requester has asked the *same* agency or component to perform the *same* search twice, or to perform an additional search of alternative sources. *See, e.g.*, *Am. Chemistry Council, Inc. v. U.S. Dep't of Health & Human Servs.*, 953 F. Supp. 2d 120, 127 (D.D.C. 2013); *In re Agent Orange Prod. Liab. Litig.*, 98 F.R.D. 522, 526-27 (E.D.N.Y. 1983). Here, in contrast, ACLUM has asked the USAO to search for documents once – and the USAO has refused.

Additionally, even putting aside the fact that the USAO responded to the FOIA Request (and not the Department of Justice separately), Rótolo Decl. Exhibit 3, and putting aside the fact that the USAO had previously *agreed* to perform an adequate search (Dkt. No. 25 at 2), the USAO's mandatory disclosure obligations under FOIA are not obviated by the attempted "substitution" of the Department of Justice as a defendant in this case (Dkt. No. 17). The USAO's authority for this "substitution" – 5 U.S.C. § 552(f)(1) (*see* Dkt. No. 17 at 1) – does not authorize any substitution of parties. And in any event, the statute certainly does not transfer a receiving agency's responsibility to respond to FOIA requests.

Further, the Department of Justice's own regulations make clear not only that the USAO was a proper FOIA recipient, but that it has a separate mandatory obligation to disclose. The Department of Justice "has a decentralized system for processing requests, with *each component* handling requests for its records." 28 C.F.R. § 16.1(c) (emphasis added); *see also id.* § 16.3(a). A "component" of the Department of Justice "means each separate bureau, office, division, commission, service, center, or administration that is designated by the Department as a primary organizational entity." *Id.* § 16.1(b). Specifically, the Department of Justice identifies the Federal Bureau of Investigation and the Executive Office for the United States Attorneys as separate components. *Id.* Pt. 16, App. I. Consequently, each *separate* component "ordinarily will include only records in its possession as of the date that it begins its search." *Id.* § 16.4(a); *see also id.* § 16.6 (specifying the responsibilities of each component that receives a FOIA request). The USAO cannot simultaneously use the Department of Justice as a sword and a shield, attempting to hide under its umbrella to claim that any search it would perform is "duplicative," while flaunting its lack of compliance with the Department's own regulations that

require *each component* to handle FOIA Requests separately. No court has permitted a refusal to search on such an extreme view of FOIA.

Nor should this Court be the first to allow an agency or component to "piggyback" on the work of a *separate* agency or component to avoid even performing a *search* for responsive records. Aside from being contrary to FOIA's plain intent and strong presumption in favor of disclosure, a decision allowing the USAO to refuse to search in this case would encourage other separate agencies or components – each of which have very different and specific authority under federal law, very different access to information, and very different records – to refuse to search *not* on the grounds that another agency or component is the *proper recipient* of a FOIA request, but on the grounds that any further search would be "burdensome." Redirecting a request to a proper recipient encourages open government, as it is designed to place the request in the hands of those most likely to have the information sought. But creating a new, non-statutory, judicial exemption for "burden" where separate agencies or components have already conducted a search *discourages* open government: the public will have fewer sources and fewer opportunities to obtain indisputably non-exempt materials, despite long judicial recognition FOIA's "mandatory disclosure requirements," *Robbins Tire*, 437 U.S. at 220-21, 242, and FOIA's "strong presumption in favor of disclosure." *Bigwood*, 424 F. Supp. 2d at 73-74.

The USAO's refusal to perform a search *at all* is an extreme position that the Court should not countenance. It effectively renders judicial review of the USAO's response to the FOIA Request impossible, as the Court cannot evaluate the adequacy of a search that has not occurred, cannot evaluate the propriety of asserting the few and enumerated exemptions to disclosure without a *Vaughn* Index, and cannot determine whether there was any reasonably discoverable and segregable information that should have been released. *See Broward Bulldog,*

Inc., 2014 WL 2999205, at *2-3 (S.D. Fla. Apr. 4, 2014); *Schulze*, 2010 WL 2902518, at *19-23 (E.D. Cal. July 22, 2010); *McGehee*, 800 F. Supp. 2d at 237-38. FOIA was designed to avoid this opacity in government, not to enable it.

2. The USAO Has Not Shown That A Search Would Be "Duplicative"

Even if one agency's search could be duplicative of a separate agency's search, the USAO has not established that it would be duplicative here. While the USAO's declarant "believes" that a search would be duplicative, there are two critical flaws with this proffer.

First, the USAO's declarant did not – and by all accounts, cannot – lay foundation to show that he is familiar in any way with the records in the FBI's possession at the time of ACLUM's FOIA Request. It is well established that an agency responding to a FOIA Request is only required to search for and produce records in its control at the time a request is made. *See, e.g.*, *Reich v. U.S. Dep't of Energy*, 784 F. Supp. 2d 15, 21 (D. Mass. 2011) (citing *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989)). The declarant's experience with the USAO does not translate into knowledge of the records maintained at the FBI – a separate DOJ component – as of December 9, 2013.[4] Without some basis for the USAO's declarant to know the universe of documents that the FBI had in its control, there is no evidence that the USAO's documents would be "duplicative," and that a search for such documents would be unreasonable on that basis. *See* 28 U.S.C. § 1746; *see also McKinley v. F.D.I.C.*, 756 F. Supp. 2d 105, 112-13 (D.D.C. 2010) (granting plaintiff's motion for summary judgment where FOIA declarant failed to attest to personal knowledge of search used); *Penny v. U.S. Dep't of Justice*, 662 F. Supp. 2d

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[4] Consequently, whether some documents in the USAO's control "would have been originated by or received from the FBI," Farmer Decl. at 2, is irrelevant to the question of what records were in the USAO's control – and therefore, subject to disclosure – at the time of ACLUM's FOIA Request.

53, 57-58 (D.D.C. 2009) (denying defendant's motion for summary judgment where FOIA declarant did not attest to personal knowledge). Additionally, even for searches conducted at separate offices or locations *within* an agency (as opposed to searches at *separate* agencies or components), courts have found agency affidavits inadequate where they fail to describe why the locations searched were the ones "likely" to contain responsive documents. *See, e.g.*, *Hooker v. U.S. Dep't of Health & Human Servs.*, 887 F. Supp. 2d 40, 50-52 (D.D.C. 2012) (denying HHS motion for summary judgment where defendant failed to explain why office searched as likely location for documents); *Elkins v. Fed. Aviation Admin.*, 65 F. Supp. 3d 194, 200-201 (D.D.C. 2014) (denying FAA motion for summary judgment where declarant failed to explain why locations searched were appropriate, particularly where "common sense" dictated that records could be located elsewhere). This is *not* to "speculate" as to the responsive records the USAO may have: but it is to say that the lack of foundation for the USAO's claim that the records of these *separate DOJ components* are "duplicative" is a definitive reason to *require a search* for responsive records as an initial matter, in accordance with the USAO's obligations under FOIA.[5]

Second, even if Mr. Farmer could lay foundation to show his knowledge of the FBI's responsive documents, his statement that responsive records "would be far more likely to be found at the FBI" does not meet the test for an adequate search under FOIA. In *Hall v. C.I.A.*, the court stated that "[a] search of the systems 'most likely' to contain responsive documents does not satisfy FOIA, because systems that are not the 'most likely' to contain documents may

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[5] Similarly, Mr. Farmer's lack of familiarity with the FBI's records and systems do not enable him to testify as to the FBI's records retention policy, whether it differs from the USAO's policy, and how that effects the evaluation of whether *any* search of the USAO would be "duplicative."

still be likely to contain responsive documents." 881 F. Supp. 2d 38, 58 (D.D.C. 2012);[6] *see also Nation Magazine*, 71 F.3d at 890 (noting that agency must show "beyond material doubt" that its search was "reasonably calculated to uncover *all* relevant documents" to comply with FOIA) (emphasis added) (internal quotation marks omitted); *McGehee v. U.S. Dep't of Justice*, 800 F. Supp. 2d 220, 229 (D.D.C. 2011) (noting that agency cannot limit search to certain sources if other sources are likely to contain information requested). It is precisely because different sources may contain different documents that FOIA requires a reasonable search for responsive documents – not merely a search of the "most likely" source (particularly where that source is a separate agency). Here, the USAO has conducted no search, and whether the FBI is "far more likely" to have responsive documents is irrelevant.

B. <u>The USAO Has Failed To Establish That A Search Would Be So Costly or Time-Consuming As to Be Unreasonably Burdensome</u>

Courts examining a "burden" argument look to the agency to show that it has met its obligations under FOIA, and that further effort would otherwise impose an "unreasonable burden." *See, e.g.*, *McKinley*, 756 F. Supp. 2d at 111. Here, the Farmer Declaration offers that the search would impose an "unreasonable burden" because (1) without performing a search, the declarant alternatively states that he is "not aware" of any responsive records or that the USAO "has no documents" that are responsive; and (2) says that the search would "involve an extensive manual search of paper files located in a total of four buildings." Farmer Declaration at 2-4. These statements fail to satisfy the government's burden for two reasons.

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[6] The court in *Hall* ultimately found the search to be adequate because the agency *had searched all* of the locations that were "likely" to contain responsive documents – not just the "most likely" source. *Id.*

First, the bare assertion that an agency has "no documents" absent performing a search does not comply with FOIA. In *Defenders of Wildlife v. U.S. Dep't of Agriculture*, the defendant's "search" consisted of reviewing the FOIA request and stating that he had no responsive documents. 311 F. Supp. 2d 44, 55 (D.D.C. 2004). The court found that "the bare assertion that the Deputy Under Secretary saw the FOIA request and that he stated that he had no responsive documents is inadequate because it does not indicate that he performed any search at all." *Id.* The failure to "provide any details about the search" or to show that it was "reasonably calculated to uncover all relevant documents" did not comply with FOIA, and the court ordered the defendant to conduct an adequate search. *Id.*

The same problem exists here. Just as in *Defenders of Wildlife*, the USAO's declarant makes a bare assertion that no responsive documents exist on a conclusory basis – namely, his "general familiarity" with the issues and "a good idea" of where responsive documents might be found. Farmer Decl. at 2. This lack of detail warrants compelling the USAO to comply with its obligations under FOIA.

Second, the solitary statement that a search by the USAO would require "an extensive manual search of paper files located in a total of four buildings" is insufficiently detailed to establish that a search for responsive records would be unreasonably burdensome. Where an agency alleges that a search for responsive records necessarily imposes an unreasonable burden, the agency must "provide sufficient explanation as to why such a search would be unreasonably burdensome." *Nation Magazine*, 71 F.3d at 892. A "sufficient explanation" is "a detailed explanation by the agency regarding the time and expense of a proposed search in order to assess its reasonableness." *Pinson v. U.S. Dep't of Justice*, No. 12-cv-1872, 2015 WL 739805, at *4 (D.D.C. Feb. 23, 2015).

Only statements that detail an inordinate amount of effort on the part of the agency can satisfy this standard. For example, one court found that requests that sought *all* internal communications between at least 25 individuals over 2 years concerning "hiring reform" created an undue burden, and the court allowed an agency to refuse to search for such documents. *Hainey v. U.S. Dep't of the Interior*, 925 F. Supp. 2d 34, 44-45 (D.D.C. 2013). Similarly, another court found that a request for "every chronological office file and correspondent file, internal and external, for every branch office, staff office," would be unreasonably burdensome. *Am. Federation of Government Employees Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 208-09 (D.C. Cir. 1990).

On the other hand, a vague characterization will not suffice: merely stating that a search would be "costly," or that it would take "many hours," or that "all files" in a particular division would need to be searched and manually reviewed, lack sufficient specificity to show an unreasonable burden. *See, e.g.*, *Pinson*, 2015 WL 739805, at *4; *Public Citizen, Inc. v. Dep't of Education*, 292 F. Supp. 2d 1, 6-7 (D.D.C. 2003) (holding that while "defendants merely claim that searching these 25,000 paper files would be 'costly and take many hours to complete,'" "[w]ithout more specification as to why a search certain to turn up responsive documents would be unduly burdensome, defendants' claim must be rejected.").

Placed along that spectrum, the Farmer Declaration does not meet the USAO's burden to show how responding to ACLUM's FOIA Request would require an unreasonable search. The Farmer Declaration states that a "conscientious search" would require searching paper files in 3 locations. Farmer Decl. at 2. Putting aside the fact that the law requires a "reasonable" search (rather than a "conscientious" one), the Declaration does not even attempt to specify the volume of documents that would need to be searched, the cost involved, the number of individuals who

would have to be devoted to it or – in short – any other detail beyond identifying the number of buildings and locations that might contain documents. And, the declaration merely suggests that four entire buildings would have to be searched to find what the ALCUM seeks – even though it may be the case that only a few individuals can find the responsive records in a handful of files in a short time. Again, this is not to speculate as to any "burden" the USAO might actually bear: but the lack of information from the USAO – which must prove unreasonable burden – is another definitive reason to require the USAO to undertake a reasonable search for responsive records. *See Nation Magazine*, 71 F.3d at 892.[7]

The statements in the Farmer Declaration are precisely the kind of vague characterization of "burden" that courts have rejected. *See, e.g.*, *Pinson*, 2015 WL 739805, at *4; *Public Citizen, Inc.*, 292 F. Supp. 2d at 6-7. Just as courts "will not find a search unduly burdensome simply because of the level of description shown and the number of steps used to describe looking into a box," *Hall*, 881 F. Supp. 2d at 54, this Court should not find a search unduly burdensome solely based on the number of locations the USAO would need to search.

CONCLUSION

For at least the foregoing reasons, the Court should grant summary judgment in favor of ACLUM and order the USAO to conduct a reasonable search for – and to produce – records responsive to Parts A and B of ACLUM's FOIA Request.

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[7] Additionally, the Farmer Declaration only suggests a single option – search four entire buildings – without "explain[ing] why a more limited search would be unfruitful or whether other parts of the [USAO] might have easier access to, at least, some of the requested information." *Pinson*, 2015 WL 739805, at *4.

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Respectfully submitted,

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CERTIFICATE PURSUANT TO LOCAL RULE 7.1

I hereby certify that counsel for Plaintiff has conferred with counsel for Defendants concerning this motion, and that Defendants oppose this motion.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was filed via the Court's CM/ECF system and that and a copy will be sent automatically to all counsel of record on August 24, 2015.

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