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-cv-11759-ADB

ORAL ARGUMENT REQUESTED

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

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INTRODUCTION

The government makes two arguments in opposition to ACLUM's motion for summary judgment and order compelling the USAO to search for and produce records: first, the USAO is not the proper defendant; and second, even if it is, the government has conducted an adequate search. Neither argument is tenable. In fact, the exact opposite is true: the USAO is the proper defendant, and even if it is not, the government has failed to demonstrate that it conducted a proper search as required by FOIA.

The weight of authority reveals that a DOJ component can be—and USAO's own FOIA practice demonstrate that it already has been—a FOIA defendant. More important, regardless of whether DOJ or USAO is the named defendant, the government has not shown that it has performed an adequate search. The sole evidence the government offers to substantiate its argument that its failure to conduct any search was adequate under FOIA is the Farmer Declaration. This declaration is insufficient both because the affiant does not have the requisite underlying knowledge to support his attestations and because the face of the affidavit itself does not satisfy the requisite standard.

FOIA's requirement that agencies conduct an adequate search is not mere formalism: it is central to the Act's purpose to promote "broad disclosure" of government records. *U.S. Dep't of Justice v. Tax Analysts,* 492 U.S. 136, 151 (1989). The government's actions here frustrate, rather than further, this goal. Because the government has not shown that it has performed an adequate search, ACLUM respectfully requests that this Court enter summary judgment in favor of ACLUM, and order the USAO to search for documents responsive to Parts A and B of ACLUM's FOIA Request.

ARGUMENT

I. The USAO Is the Proper Defendant in this Case[1]

The government claims that it can unilaterally substitute one defendant for another by *notice alone*. The law does not permit that. More important, the weight of authority and the USAO's own FOIA litigation practice show that the USAO is a proper defendant.

A. The Law Does Not Permit Unilateral "Substitution" of Parties

The government does not have the power to unilaterally "substitute" the DOJ as a defendant in this case, and no legal authority exists that would permit a defendant to exit a FOIA lawsuit by mere notice of substitution. The government does not refer to a single case that permitted or could be read to permit unilateral substitution in a FOIA case. [*See* Dkt. No. 66 at 4]. Nothing in the Federal Rules provides for unilateral substitution by notice under these circumstances. *See* Fed. R. Civ. P. 25. FOIA itself says nothing about the substitution of parties. *See* 5 U.S.C. § 552. And ACLUM cannot find a single case addressing – let alone supporting – the USAO's proposition.

Nor would such a case exist. The proper method to substitute parties in a FOIA case is through a *motion* for substitution, which gives the party seeking relief a chance to respond. *See, e.g.*, *Flaherty v. President of the U.S.*, 796 F. Supp. 2d 201, 205–06 (D.D.C. 2011) (granting motion to substitute IRS for individual defendants). Here, there has been no such motion – only

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[1] ACLUM named and sued U.S. Attorney Carmen Ortiz in her official capacity as the head of the Office of the United States Attorney for the District of Massachusetts, a practice common not only in FOIA cases but in other civil actions seeking relief from the government. The Court can, and should, substitute the USAO to the extent it deems that necessary. *See, e.g.*, *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 21 (D.D.C. 2006) (substituting the Bureau of Prisons for the Director of the Bureau of Prisons). For ease of reference, this brief refers to the defendant as USAO throughout.

a mere *notice* of substitution on which the Court did not rule. [Dkt. No. 17]. The government has supplied no legal authority to support this approach.[2]

B. Components of Larger Federal Agencies May Be Defendants in FOIA Actions

FOIA itself and the weight of authority interpreting it permit agencies such as the USAO (i.e., components of other agencies) to be defendants in FOIA actions.

FOIA cases can be brought against any "agency," which FOIA defines through the Administrative Procedures Act as "each authority of the Government of the United States, *whether or not it is within or subject to review by another agency*." 5 U.S.C. § 551(1) (emphasis added). Whether a government unit is an "agency" is determined through a functional test meant "to expand, rather than limit, its coverage" to include any unit with "substantial independent authority in the exercise of specific functions." *Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 22 (D.D.C. 2006). In fact, the most recent decision analyzing this issue from the District Court for the District of Columbia found that the weight of authority in the D.C. Circuit supported interpreting DOJ components as "agencies" under FOIA:

> Although a small number of decisions hold that only the DOJ, and not its subcomponents, may be sued under FOIA, *see, e.g., Holt v. U.S. Dep't of Justice*, 734 F. Supp. 2d 28, 33 n. 1 (D.D.C. 2010), *Benavides v. Bureau of Prisons*, 774 F. Supp. 2d 141, 143 n. 1 (D.D.C. 2011), the weight of authority is that subcomponents of federal executive departments may, at least in some cases, be properly named as FOIA defendants. *See, e.g.*, *Prison Legal News*, 436 F.Supp.2d at 22; *Peralta v. U.S. Att'ys Office*, 136 F.3d 169, 173–74 (D.C. Cir.1998) ("we suspect that the FBI is subject to the FOIA in its own name"); *McGehee v. CIA*, 697 F.2d 1095, 1108 (D.C. Cir.1983) ("the organs of government that first compiled the

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[2] Where Congress wanted to authorize substitution by notice, it has created a specific statutory vehicle to do so. *See, e.g.*, 28 U.S.C. § 2679(d). FOIA does not contain such language.

> records" are "clearly are covered by the Act"). Accordingly, the Court will not dismiss the FOIA claim against the [Bureau of Prisons] on the grounds that it is not a proper party defendant.

Jean-Pierre v. Fed. Bureau of Prisons, 880 F. Supp. 2d 95, 101 (D.D.C. 2012);[3] *see also Prison Legal News v. Lappin*, 436 F. Supp. 2d 17, 22 (D.D.C. 2006) (holding Bureau of Prisons, a DOJ component, to be a proper FOIA defendant); *American Civil Liberties Union of Michigan v. FBI*, No. 11-13154, 2012 WL 4513626, *3 (E.D. Mich. Sept 30, 2012) *aff'd* 734 F.3d 460 (6th Cir. 2013); *but see Brown v. US Dep't of Justice,* No. 1:13-CV-01122-LJO, 2015 WL1237274, at *1 (E.D. Cal. Mar. 17, 2015); *Bosworth v. United States*, No. CV 14-0283 DMG SS, 2014 WL 7466985, at *10 (C.D. Cal. Dec. 30, 2014).

Reflecting this reality, the U.S. Attorney for the District of Massachusetts and the Executive Office for United States Attorneys have litigated FOIA cases in their own names, without substituting the DOJ as the defendant. *See, e.g.*, *Carpenter v. U.S. Dep't of Justice & U.S. Attorney for the Dist. of Mass.*, 470 F.3d 434 (1st Cir 2006); *Smith v. Executive Office for United States Attorneys*, 83 F. Supp. 3d 289, 292 (D.D.C. 2015). In fact, it is common for other U.S. Attorney's Offices to do this as well. *See, e.g.*, *Petit-Frere v. U.S. Attorney's Office for S. Dist. of Fla.*, 800 F. Supp. 2d 276, 279 (D.D.C. 2011), *aff'd sub nom. Petit-Frere v. Office of U.S. Attorney for S. Dist. of Florida*, No. 11-5285, 2012 WL 4774807 (D.C. Cir. Sept. 19, 2012); *Lee v. U.S. Attorney for S. Dist. of Fla.*, 289 F. App'x 377, 379 (11th Cir. 2008); *Jackson v. U.S. Attorneys Office, Dist. of N.J.*, 293 F. Supp. 2d 34, 37 (D.D.C. 2003); *Jackson v. U.S. Attorney's Office*, 362 F. Supp. 2d 39, 41 (D.D.C. 2005); *Thomas v. Office of U.S. Attorney for E. Dist. of*

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[3] While *Acosta v. F.B.I.* is slightly more recent than *Jean-Pierre*, it assumed, without deciding, that agency subcomponents are properly named FOIA defendants. *See* 946 F. Supp. 2d 47, 50 (D.D.C. 2013) (citing *Jean-Pierre*).

New York, 928 F. Supp. 245, 246 (E.D.N.Y. 1996). This makes sense, since the USAO, itself, routinely receives and responds to FOIA requests.

II. Regardless of The Named Defendant, The Government's Search Was Inadequate

FOIA requires agencies to 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." *Oglesby v. United States Dep't of Army,* 920 F.2d 57, 68 (D.C.Cir.1990) (citing *Weisberg v. U.S. Dep't of Justice,* 745 F.2d 1476, 1485 (D.C. Cir. 1984). Here, the government argues that it need not perform an adequate search – or indeed any search at all – because the records requested "most likely" would be found at the FBI, and because any records the USAO possesses likely would have originated with the FBI.

The government's argument fails on two grounds. As a threshold matter, its affiant lacks sufficient personal knowledge to make the proffered statements. In addition, the case law does not absolve agencies from performing a search based on the two reasons on which the government relies.

A. The Farmer Declaration is Insufficient because the Declarant Lacks Personal Knowledge

Courts may rely on agency affidavits to evaluate whether an agency has performed an adequate search, but "such reliance is only appropriate when the agency's supporting affidavits are relatively detailed and nonconclusory and . . . submitted in good faith." *Gov't Accountability Project v. U.S. Dep't of Justice*, 852 F. Supp. 2d 14, 23 (D.D.C. 2012) (ellipses in original). Furthermore, the declarant must have personal knowledge of the agency's procedures for processing a FOIA request *and* familiarity with the documents at issue. *Penny v. U.S. Dep't of Justice*, 662 F. Supp. 2d 53, 57 (D.D.C. 2009) (emphasis added); *see also McKinley v. FDIC*, 756 F. Supp. 2d 105, 112 (D.D.C. 2010) (holding that the affidavit provided by the agency failed

to demonstrate that it had conducted a reasonable search because the affiant did not adequately explain search procedures and lacked sufficient personal knowledge)

Here, the government relies on the conclusory statements in the Farmer declaration, which states that while the USAO may have responsive documents in its possession, "the DOJ believes that these documents are duplicates of the FBI's documents." [Dkt. No. 66 at 9.]

Mr. Farmer does not possess the personal knowledge needed to establish that the USAO's records are "duplicative" of records produced by the FBI because he has no basis to *compare* what the FBI (let alone the entire DOJ) has to what his office *might* have. Mr. Farmer does not testify that he has access to the FBI's files, or that he has even reviewed some (let alone all) of the FBI files produced to ACLUM following its FOIA request; he also does not testify that the FBI and the USAO *ever* had the same documents; and he does not testify that the FBI and the USAO have the same (or even similar) document-retention policies, or that those policies were followed in the same manner and to the same degree. Instead, he cites his "general familiarity with this area of practice *in the Office*," and just in his office, for his conclusion. [Dkt. No. 67-2]. Mr. Farmer has therefore not only failed to establish his familiarity with the documents at issue, but any basis for his conclusion that the USAO's records are duplicative of those possessed by the FBI. *See EPIC v DOJ*, 82 F. Supp. 3d 307, 315 (D.D.C. 2015) ("However, this conclusion is based solely on the lead attorney's representations, and it is not obvious why the lead attorney would know the contents of all the responsive records so as to affirm that they are duplicative of his files or, conversely, that his files are duplicative of all other files.").

B. The Government did not Perform an Adequate Search for Documents

Even taking the Farmer Declaration at face value, the government fails to demonstrate that not searching for any records was an adequate response to the FOIA Request. The government argues that the USAO need not search for documents because the responsive records

are "most likely" found in the FBI, and because any responsive documents in the USAO's possession would have originated with the FBI. For the reasons stated below, both arguments fail.

1. Agencies Must Search All Places Likely to Contain Responsive Records – Not Just the Ones "Most Likely" to Contain Them

To fulfill their FOIA obligations, agencies may not search only the places "most likely" to contain responsive records, but instead must search all places that are "likely" to contain such records. *See Hall v. C.I.A.,* 881 F. Supp. 2d 38, 58 (D.D.C. 2012) ("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 still be likely to contain responsive documents."); *Am. Immigration Council*, 950 F. Supp. 2d at 230–31; *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 102.

It stands to reason, then, that an agency may not avoid its obligation by stating that *another agency* is more likely to possess the responsive records. The USAO may not limit the scope of its search – or refuse to conduct a search at all – based on the comparative likelihood of finding responsive documents elsewhere – and yet that is precisely what the government attempts to do here.

Although agencies "are entitled to some degree of deference regarding their determination of search locations," *Nat'l Day Laborer Org. Network v. ICE*, 877 F. Supp. 2d 87, 101 (S.D.N.Y. 2012), a court will not grant summary judgment to an agency that has failed to make a reasonable showing that it searched *every* place likely to house responsive records, *see, e.g.*, *Elkins v. FAA*, 65 F. Supp. 3d 194, 201 (D.D.C. 2014); *Am. Immigration Council v. DHS*, 950 F. Supp. 2d 221, 230–31 (D.D.C. 2013); *Nat'l Sec. Counselors v. C.I.A.*, 960 F. Supp. 2d 101, 154 (D.D.C. 2013); *Hooker v. DHHS*, 887 F. Supp. 2d 40, 51 (D.D.C. 2012) *aff'd*, No. 13-

5280, 2014 WL 3014213 (D.C. Cir. May 13, 2014); *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 102; *Info. Network for Responsible Min. (Inform) v. Bureau of Land Mgmt.*, 611 F. Supp. 2d 1178, 1185 (D. Colo. 2009).

In *American Immigration Council*, the court refused to grant summary judgment to the agency because it failed to indicate "that *all* those offices and records systems likely to contain responsive records have been searched," instead asserting that it had searched only the offices "most likely" to possess responsive documents. 950 F. Supp. 230–31. (emphasis added).

The Farmer Declaration suffers from the same deficiency. Mr. Farmer does not testify that the USAO is not likely to have responsive records; but instead, that the FBI is "far *more* likely" to possess such records. [Dkt. 67-2 at 3]. At the very least, this missing assertion raises a genuine issue of material fact regarding the adequacy of the search that precludes a grant of summary judgment in the government's favor. *See Id.*, 950 F. Supp. 2d at 230–31.

2. The USAO May Not Avoid its Obligation to Search Simply Because Documents May Have Originated with Another Agency

The government also claims that it need not perform a search because the documents sought by ACLUM are not "of the kind that would have originated with the U.S. Attorney's office" [Dkt. No. 66 at 9]. That claim fails for three reasons.

First, for the purpose of its burden to conduct a search, the question under FOIA is not where documents "originated", but what documents the agency actually has in its possession. It is well-settled law that "[i]f an agency receives a FOIA request for documents within its possession, the agency is responsible for processing the request and 'cannot simply refuse to act on the ground that the documents originated elsewhere.' " *Keys v. Dep't of Homeland Sec.,* 570 F.Supp.2d 59, 66 (D.D.C.2008) (quoting *McGehee v. CIA,* 697 F.2d 1095, 1110 (D.C.Cir.1983)).

To date, no one knows what documents the USAO has in its possession, because the USAO has not undertaken a search.

Second, despite Mr. Farmer's declaration, it is conceivable that several types of responsive records may exist at the USAO but not at the FBI. For instance, there may be handwritten notes by U.S. Attorneys responsive to Parts A and B of ACLUM's FOIA Request. There also may be agreements between the USAO and local and state JTTF agencies governing the disclosure of information under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).[4]

Third, the USAO may have FBI-originated documents that the FBI no longer has in its possession and therefore could not produce to ACLUM. As noted above, there is no evidence that the FBI and USAO have the same document-retention policies or practices.

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[4] As the Massachusetts USAO notes in its discovery policy, determining who is on the "prosecution team" for *Brady* and *Giglio* disclosure purposes may be difficult in the context of joint task forces. USAO, District of Massachusetts, *Discovery* (Apr. 18, 2010), *available at* justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/ma_discovery_policy.pdf; *see also* David W. Odgen, DAG, *Memorandum for Department Prosecutors Re: Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010) (discussing criteria relevant to resolving this issue), *available at* http://www.justice.gov/dag/memorandum-department-prosecutors. "the complexity and fact-intensive nature of this inquiry suggests the possibility of written agreements or memoranda of understanding between the USAO and local and state JTTF agencies to govern the agencies' obligations to disclose *Brady* and *Giglio* material to the USAO.

Cf. Arkansas Association of Chiefs of Police, "AACP Model Policy: Duty to Disclose Exculpatory Material," *available at* http://www.arkchiefs.org/PoliciesAccreditation/AACPModelPolicies/tabid/121/FolderID/121/Default.aspx (requiring police departments to "meet with the prosecutor's office to establish a procedure" by which to carry out the intent of the policy); Crestwood Police, "General Order: Duty to Disclose" (eff. Jan.31, 2012) *available at* bettertogetherstl.com/files/better-together-stl/Crestwood%20PD%20-%201go7%20Duty%20to%20Disclose%2001-31-2012%20(00813981).pdf ("The Department will consult with the prosecution offices normally handling this Department's criminal cases to determine specific guidance for the determination of potential witness credibility issues.").

III. **<u>The Government Has Not Shown that a Search of the USAO's Documents Would be Unreasonably Burdensome</u>**

Finally, the government also has not met its burden to show that searching the USAO's records would impose an unreasonable burden. Under FOIA, "the burden is on the agency to 'provide sufficient explanation why a search .... would be unreasonably burdensome.'" *People for Am. Way Found. v. U.S. Dep't of Justice*, 451 F. Supp. 2d 6, 12 (D.D.C. 2006) (citing *Pub. Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003)). While courts may rely on an affidavit from a government official to explain the issue of burden, such an affidavit must be "relatively detailed, nonconclusory, and not impugned by evidence in the record of bad faith on the part of the agency." *Wolf v. C.I.A.*, 569 F. Supp. 2d 1, 9 (D.D.C. 2008) (citing *McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir.1983)).

The Farmer Declaration is not sufficiently detailed to meet that burden. 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). Instead, the Farmer Declaration makes sweeping assertions that a search could involve four buildings at three regional offices – without any detail concerning the number of individuals, pages, or files involved.

Nor does the breadth of the search anticipated in the Farmer declaration approximate the size of searches that courts have found to be overly burdensome. *Cf. People for Am. Way Found. v. U.S. Dep't of Justice*, 451 F. Supp. 2d 6, 13 (D.D.C. 2006) (manual search through 44,000 files located in 93 USAO offices was overly burdensome.); *Am. Fed'n of Gov't Employees, Local 2782 v. U.S. Dep't of Commerce*, 907 F.2d 203, 208 (D.C. Cir. 1990) (requiring agency to locate "every chronological office file and correspondent file, internal and external, for every branch office, staff office..." was unreasonably burdensome); *Goland v. CIA*, 607 F.2d 339, 353

(D.C.Cir.1979) (a "page-by-page search" through "84,000 cubic feet of documents" was overly burdensome).

To be sure, courts have found requests that required searches potentially much *larger* than ACLUM's to be reasonable. *See e.g.*, *Public Citizen*, 292 F. Supp. 2d at 7 (search of 25,000 paper files not burdensome where responsive information certain to exist); *Ruotolo v. Dep't of Justice*, 53 F.3d 4, 10 (2d Cir.1995) (search of 813 files was not burdensome); *Am. Civil Liberties Union of N. California v. Dep't of Justice*, No. 12-CV-04008-MEJ, 2014 WL 4954121, at *8 (N.D. Cal. Sept. 30, 2014) (search for 349 matters not burdensome).

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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Dated: November 6, 2015

Respectfully submitted,

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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 November 6, 2015.

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