IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SOUTHEASTERN LEGAL FOUNDATION, INC.,	
Plaintiff,	**CIVIL ACTION FILE**
v.	**NO. 1:19-CV-3429-MHC**
UNITED STATES DEPARTMENT OF JUSTICE,	
Defendant.	

ORDER

I. PROCEDURAL AND FACTUAL BACKGROUND

On July 16, 2019, Plaintiff Southeastern Legal Foundation, Inc. ("SLF") filed an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to compel Defendant United States Department of Justice ("DOJ") to produce records responsive to SLF's May 24, 2019, request for documents sent by certified mail to the DOJ. Se. Legal Found., Inc. v. United States Dep't of Justice, No. 1:19-CV-3215-JPB (N.D. Ga. 2019) ("SLF I"). The case was assigned to United States District Judge J. P. Boulee. Two weeks later, on July 30, 2019, SLF filed the instant lawsuit to compel DOJ to produce the exact same documents pursuant to an identical FOIA request served upon the Federal Bureau of Investigation ("FBI").

Compl. [Doc. 1] ("SLF II"). Although SLF did indicate on the Civil Cover Sheet filed in SLF II [Doc. 1-1] that SLF I was a related case, the Clerk assigned SLF II to the undersigned.

The May 24, 2019, FOIA request to the FBI in SLF II, like the May 24, 2019, FOIA request to the DOJ in SLF I, sought "records related to the alleged and suspected attorney misconduct with respect to the Carter Page [Foreign Intelligence Surveillance Act ("FISA")] application and renewals." Letter from Kimberly Hermann, General Counsel for SLF, to Record/Information Dissemination Section ("RIDS"), FBI (May 24, 2019) [Doc. 34-4] at 2.[1] Specifically, the FOIA requests sought:

> 1. All records regarding, reflecting, or related to any orders, opinions, decisions, sanctions, or other records related to any investigation or finding by the Foreign Intelligence Surveillance Court (FISC), any other court, any state licensing bar, any disciplinary committee, or any other entity, that any attorney violated the FISC Rules of Procedure or applicable Rules of Professional Conduct in connection with the Carter Page FISA application and renewals or the Section 702 violations the government orally advised the FISC about in October 24, 2016;
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> 2. All records regarding, reflecting or related to any orders, opinions, decisions, sanctions, or other records finding by the FISC, any other court, any state licensing bar, any disciplinary committee, or any other entity, that any attorney violated or did not violate FISC Rule of Procedure 13, specifically, in connection with the Carter Page FISA

[1] The Court cites to pages of the FOIA request by page number of the letter rather than the page number of the ECF docket entry.

> application and renewals or the Section 702 violations the government orally advised the FISC about on October 24, 2016; and
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> 3. All records regarding, reflecting or related to any referral or complaint made to any attorney disciplinary body for conduct related to the Carter Page FISA application and renewals or the Section 702 violations the government orally advised the FISC about on October 24, 2016.

Id. at 2.

The FBI received the FOIA request on May 28, 2019 [Doc. 34-5], and sent SLF a letter on June 17, 2019, acknowledging receipt of the FOIA request [Doc. 34-6]. These are slightly different dates compared to the dates that the DOJ received and responded to the identical FOIA request in SLF I. This Court, quite frankly, does not understand the purpose for the filing of separate lawsuits which are challenging the exact same purported FOIA violation by the same Defendant.

In any event, in SLF I on July 15, 2020, the DOJ filed a Motion for Summary Judgment, contending that it satisfied its obligation with respect to SLF's FOIA request by conducting an adequate search for the requested records. See Br. in Supp. of Def.'s Mot. for Summ. J. in SLF I [Doc. 29-1]. SLF filed a Cross-Motion for Summary Judgment the same day, contending, in part, that the DOJ failed to satisfy its obligation to provide sufficient evidence that it performed an adequate search for the requested records. See Pl.'s Br. in Supp. of its Mot. for Summ. J. in SLF I [Doc. 30-2]. On March 15, 2021, Judge Boulee entered an

order denying both motions for summary judgment without prejudice because the DOJ's affidavits did not adequately describe the DOJ's search. Mar. 15, 2021, Order in SLF I [Doc. 46] at 11. Judge Boulee permitted the refiling of the motions "upon the DOJ's submission of a reasonably detailed affidavit in accordance with this Order." Id.

On November 11, 2020, both parties in SLF II filed substantially similar motions for summary judgment.[2] For the purpose of this lawsuit, the Court makes the following findings of fact.[3]

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[2] On December 12, 2019, the DOJ filed a Motion to Dismiss the Complaint in SLF II as moot because it had since responded to the FOIA request. Def.'s Mem. of Law in Supp. of its Mot. to Dismiss [Doc. 12-1] at 6. However, this Court denied the DOJ's Motion to Dismiss, finding that SLF's Complaint was not moot because SLF maintained a challenge to the adequacy of the search that was conducted. July 28, 2020, Order [Doc. 28] at 11.

[3] The Court views the evidence presented by the parties in the light most favorable to the non-movants and has drawn all justifiable inferences in favor of the non-movants. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Sunbeam TV Corp. v. Nielsen Media Rsch., Inc., 711 F.3d 1264, 1270 (11th Cir. 2013). In addition, the Court has excluded assertions of fact that are immaterial or presented as arguments or legal conclusions or any fact not supported by citation to evidence (including page or paragraph number). LR 56.1B(1), NDGa. Further, the Court accepts as admitted those facts in the parties' respective statements of material facts that have not been specifically controverted with citation to the relevant portions of the record. LR 56.1B(2)(a)(2), NDGa. See Def.'s Statement of Material Facts as to Which There is No Genuine Issue to be Tried [Doc. 33-2]; Pl.'s Resp. to Def.'s Statement of Material Facts and Pl.'s Statement of Undisputed Material Facts in Supp. of its Cross-Mot. for Summ. J. [Doc. 34-2]; Def.'s Resp. to Pl.'s Statement of Material

Michael G. Seidel ("Seidel"), the Section Chief of RIDS, Information Management Division in the FBI, described the typical process by which the FBI conducts searches of its records pursuant to FOIA requests. Decl. of Michael G. Seidel (Nov. 6, 2020) ("Seidel Decl.") [Doc. 33-3] ¶¶ 7-11. Typically, the FBI is able to use index searches of its Central Records System ("CRS"). Id. However, Seidel averred that, "when evaluating Plaintiff's request, the FBI determined it would be difficult to compile and search a set of indexed terms reasonably likely to locate all records responsive to Plaintiff's request. Id. ¶ 11. Thus, RIDS "sought the assistance of the Office of General Counsel, National Security and Cyber Law Branch ("NSCLB")." Id. ¶ 13. Seidel declared that "RIDS determined this was the FBI office most reasonably expected to possess responsive records, should they exist." Id.

Seidel stated that RIDS provided NSCLB a copy of Plaintiff's FOIA request, and NSCLB conducted a search of its records responsive to the request. Id. ¶ 14. NSCLB sent the request to several subject matter experts ("SMEs") within NSCLB

Facts [Doc. 42]; Def.'s Statement of Material Facts [Doc. 43]; and Pl.'s Reply to Def.'s Resp. to Pl.'s Statement of Material Facts and Pl.'s Resp. to Def.'s Additional Statement of Material Facts [Doc. 47].

who were most familiar with the Carter Page FISA applications. Id. The SMEs reported that they were unable to locate any responsive records, "the records sought by Plaintiff are not typically records maintained by the FBI," "if records responsive to Plaintiff's request existed, NSCLB would be the office most likely to possess records," and "NSCLB knew of no other location where responsive records could reasonably be expected to be located." Id. ¶ 15.

On November 21, 2019, the DOJ notified SLF via e-mail that there were no responsive records found. E-mail from Samuel Williams, Assistant United States Attorney, to Kimberly Hermann, General Counsel for SLF (Nov. 21, 2019) [Doc. 34-7]. On December 2, 2019, SLF responded to this e-mail, including additional suggested search terms and suggested records custodians, "based on the publicly available information regarding those persons involved with the Carter Page application and renewals and the unrelated Section 702 warrants." E-mail from Kimberly Hermann, General Counsel for SLF, to Samuel Williams, Assistant United States Attorney (Dec. 2, 2019) [Doc. 34-9]. Specifically, SLF requested clarification on the search time period requested (January 1, 2016, through May 24, 2019), whether NSCLB was the only office searched, and whether certain individuals known to have been involved in the Carter Page application process were included (including James Comey, Andrew McCabe, Kevin Clinesmith,

Bruce Ohr, and Lisa Page, among others). Ex. F-1 (Search Parameters and Questions) [Doc. 34-10] at 1. However, Seidel subsequently declared that because "no other locations or databases where records would reasonably exist have been identified, there [was] no basis to conduct further search efforts of the proposed search terms." Second Decl. of Michael G. Seidel (Jan. 8, 2021) ("Second Seidel Decl.") [Doc. 41-1] ¶ 8. Seidel also declared that the FBI interpreted SLF's FOIA request within the "the four corners of the request, which limited the scope of the request to records only concerning those attorneys involved with the specified matters regarding Carter Page and specified matters regarding 702 violations." Id. ¶ 9. Seidel averred that the final search was conducted on or about October 14, 2019, and encompassed the relevant time period of the request, from January 1, 2016, through May 24, 2019. Id. ¶ 10.

On December 11, 2019, the FBI formally responded to SLF's FOIA request, stating: "Based on the information you provided, we conducted a search of the places reasonably expected to have records. However, we were unable to identify records responsive to your request. Therefore, your request is being closed." Letter from David Hardy, Section Chief of RIDS, FBI, to Kimberly Hermann, General Counsel for SLF (Dec. 11, 2019) ("Request Resp. Letter") [Doc. 34-12].

Meanwhile, the Office of the Inspector General ("OIG") released a report titled U.S. Department of Justice Office of the Inspector General's Review of Four FISA Applications and other Aspects of the FBI's Crossfire Hurricane Investigation ("OIG Report") [Doc. 34-8].[4] The OIG Report found that, with regard to the four relevant FISA applications, one of which included that of Carter Page,

> relevant information was not shared with, and consequently not considered by, the decision makers who ultimately decided to support the applications. The failure to update [the Office of Intelligence] with accurate and complete information resulted in FISA applications that made it appear that the evidence supporting probable cause was stronger than was actually the case . . . . [The OIG] identified at least 17 significant errors and omissions in the Carter Page FISA applications . . . . Moreover, case agents and [first-line supervisors] did not give equal attention or treatment to the relevant facts that did not support probable cause . . . . That so many basic and fundamental errors were made on four FISA applications by three separate, hand-picked teams, on one of the most sensitive FBI investigations that was briefed to the highest levels within the FBI and that FBI officials expected would eventually be subjected to close scrutiny, raised significant questions regarding the FBI chain of command's management and supervision of the FISA process.

OIG Report at 375-78. In conducting its investigation, the OIG "received and reviewed more than one million documents that were in the Department's and

[4] The Court cites to pages of the OIG Report by page number of the report rather than the page number of the ECF docket entry.

FBI's possession," and "also obtained documents from attorneys and supervisors in NSD, [the DOJ's Criminal Division], [the Office of the Deputy Attorney General], and the Office of the Attorney General." Id. at 12-13.

II. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A party seeking summary judgment has the burden of informing the district court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," and cannot be made by the district court in considering whether to grant summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); see also Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1282 (11th Cir. 1999).

If a movant meets its burden, the party opposing summary judgment must present evidence demonstrating a genuine issue of material fact or that the movant is not entitled to judgment as a matter of law. Celotex, 477 U.S. at 324. In determining whether a genuine issue of material fact exists, the evidence is viewed

in the light most favorable to the party opposing summary judgment, "and all justifiable inferences are to be drawn" in favor of that opposing party. Anderson, 477 U.S. at 255; see also Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999). A fact is "material" only if it can affect the outcome of the lawsuit under the governing legal principles. Anderson, 477 U.S. at 248. A factual dispute is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. Id.

"If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." Herzog, 193 F.3d at 1246. But summary judgment for the moving party is proper "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita, 475 U.S. at 587 (citation omitted). "In reviewing a motion for summary judgment under FOIA, the court must view the facts in the light most favorable to the requester." Greenberger v. Internal Revenue Serv., 283 F. Supp. 3d 1354, 1366 (N.D. Ga. 2017) (citing Burka v. U.S. Dep't of Health and Human Servs., 87 F.3d 508, 514 (D.C. Cir. 1996)).

III. DISCUSSION

As it did in SLF I on July 15, 2020, the DOJ moves for summary judgment here in SLF II on SLF's FOIA claim, arguing that it has met its burden to show

that it conducted an adequate search for SLF's FOIA request. Br. in Supp. of Def.'s Mot. for Summ. J. ("Def.'s Br.") [Doc. 33-1].

The purpose of the FOIA "is to encourage public disclosure of information so citizens may understand what their government is doing." Office of Cap. Collateral Counsel, N. Region of Fla. v. U.S. Dep't of Justice, 331 F.3d 799, 802 (11th Cir. 2003). Under the FOIA, "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). "FOIA mandates disclosure of a federal agency's records, upon request, unless the documents fall within certain enumerated statutory exemptions permitting agencies to withhold information from FOIA disclosure." Greenberger, 283 F. Supp. 3d at 1366 (citing Dep't of the Interior and Bureau of Indian Affs. v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 7 (2001); Chilivis v. S.E.C., 673 F.2d 1205, 1210-11 (11th Cir. 1982); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980)).

"An agency is entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and each responsive record was either produced to

the plaintiff or is exempt from disclosure." Id. (citing Weisberg v. U.S. Dep't of Justice, 627 F.2d 365, 368 (D.C. Cir. 1980)). The search itself need not be "exhaustive," but rather "the agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." Ray v. U.S. Dep't of Justice, 908 F.2d 1549, 1558 (11th Cir. 1990), rev'd on other grounds, U.S. Dep't of State v. Ray, 502 U.S. 164 (1991). The agency may meet its burden "by producing affidavits of responsible officials 'so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith.'" Id. (quoting Miller v. United States Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985)).

"[I]n certain cases, affidavits can be sufficient for summary judgment purposes in an FOIA case if they provide as accurate a basis for decision as would sanitized indexing, random or representative sampling, *in camera* review, or oral testimony." Miscavige v. I.R.S., 2 F.3d 366, 368 (11th Cir. 1993) (emphasis added) (citing Dep't of Justice v. Reps. Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989)). The affidavits should describe the documents and "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency

bad faith." Greenberger, 283 F. Supp. 3d at 1366 (quoting Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009)). Specifically, the "affidavits should include what records were searched, who did the search, and what search terms or processes were used." Id. (citing Judicial Watch, Inc. v. Dep't of the Navy, 971 F. Supp. 2d 1, 2 (D.D.C. 2013)); see also Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990) ("A reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched, is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment.").

This Court agrees with Judge Boulee's order on the initial motions for summary judgment in SLF I. Summary judgment is not proper in this case because the DOJ's affidavits—the Seidel Declaration and the Second Seidel Declaration—do not adequately describe the DOJ's search. The Seidel Declaration describes the usual indexing search system that the FBI generally uses to search through its CRS and the advantages of using such a system, but then Seidel cursorily states that it was "determined [that] it would be difficult to compile and search a set of indexed terms reasonably likely to locate all records responsive to Plaintiff's request."

Seidel Decl. ¶ 11. The affidavit does not explain why this would have been difficult, especially given its explanation of how frequently and reliably indexing is typically used to respond to FOIA requests. Id. ¶¶ 9-11. While the Second Seidel Declaration adds that NSCLB was sent an exact copy of SLF's FOIA request, Seidel also does not otherwise describe the search, by explaining the method or search terms used or the databases searched. Second Seidel Decl. ¶¶ 6-7. In fact, there is no such explanation of the search terms or methods used to search the CRS for SLF's FOIA request in any of the DOJ's filings to support its Motion for Summary Judgment.

Moreover, the Seidel Declaration further states that NSCLB was determined to be the FBI office "most reasonably expected to possess responsive records" to SLF's FOIA request. Seidel Decl. ¶ 13. Seidel describes that NSCLB gave the request to SMEs familiar with the Carter Page FISA and these SMEs "advised that the records sought by Plaintiff are not typically maintained by the FBI," that NSCLB would be the office most likely to possess records if the FBI did have them, and that NSCLB knew of no other locations where responsive records could reasonably be located. Id. ¶ 15. These statements are contradicted by the fact that the DOJ was at least aware of the publicly available OIG Report, detailing the extent to which the FBI handled FISA applications and the different offices within

the DOJ and FBI that oversaw their administration. Thus, it is not clear from the DOJ's affidavit that the NSCLB branch of the FBI was the only possible place where responsive records were likely to be located. See Oglesby, 920 F.2d at 68 ("There is no requirement that an agency search every record system . . . However, the agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested. It is not clear from State's affidavit that the Central Records system is the *only* possible place that responsive records are likely to be located.").

Accordingly, "summary judgment on the adequacy of the search [is] improper."[5] Id. As was ordered in SLF I, the DOJ is ordered to submit a reasonably detailed affidavit upon which the reasonableness of its search can be judged. Id. (directing the district court to order the defendant to submit a reasonably detailed affidavit on remand).

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendant United States Department of Justice's Motion for Summary Judgment [Doc. 33] and Plaintiff Southeastern Legal Foundation, Inc.'s Cross-Motion for Summary

[5] For this reason, adjudicating SLF's Motion for Summary Judgment on the same issue would also be improper.

Judgment [Doc. 34] are **DENIED WITHOUT PREJUDICE** to refile upon the DOJ's submission of a reasonably detailed affidavit in accordance with this Order.

The Court fully expects that the parties will now file precisely the same revised motions for summary judgment that are currently pending before Judge Boulee. See SLF I [Docs. 48, 49]. It is a colossal waste of judicial resources, not to mention expenses undertaken by the parties, to continue to file duplicative motions and briefs in both cases. Accordingly, it is further **ORDERED** that the parties shall **SHOW CAUSE IN WRITING**, within ten (10) days of this Order, if any there be, why this Court should not enter an order to consolidate this case with SLF I pending before Judge Boulee.

IT IS SO ORDERED this 12th day of August, 2021.

Mark H. Cohen

MARK H. COHEN
United States District Judge