IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civ. Action No. 18-1814 (TNM)

PLAINTIFF'S COMBINED OPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff Electronic Privacy Information Center ("EPIC") hereby opposes the Motion for Summary Judgment filed by the Defendant United States Department of Justice ("DOJ") and cross-moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. The Court should grant EPIC's motion and deny the DOJ's motion for the reasons set forth in the accompanying Memorandum of Points and Authorities.

Respectfully Submitted,

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Dated: December 16, 2019

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CORRECTED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S COMBINED OPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This case arises from a series of Freedom of Information Act ("FOIA") requests filed by the Electronic Privacy Information Center ("EPIC") seeking disclosure of portions of surveillance orders used to obtain cell site location information ("CSLI"). These records are the possession of the Department of Justice ("DOJ"), but the agency has refused to search for them.

Unlike Title III Wiretap Orders issued under 18 U.S.C. § 2516, the Government does not routinely report on the number and nature of surveillance orders issued under the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701 et seq., including orders for cell phone location data under § 2703. EPIC's mission is to draw public attention to emerging privacy and civil liberties issues and, in furtherance of that mission, EPIC reviews and assesses the annual Wiretap Reports and Foreign Intelligence Surveillance Act Reports. Because these reports do not cover location surveillance orders, EPIC now seeks records from federal prosecutors that identify the location surveillance orders issued each year from 2016–2019. Through EPIC's FOIA requests and future requests, EPIC intends to evaluate the use, effectiveness, cost, and necessity of the collection and use of cell site location information by law enforcement.

The records at issue in this case are surveillance orders that federal prosecutors routinely obtain during the course of their investigations. EPIC accordingly submitted its requests to the DOJ's Executive Office for United States Attorneys ("EOUSA"), which "provides executive and administrative support for the 93 United States Attorneys." U.S. Dep't of Justice, *Executive Office for United States Attorneys* (2019).[1] There is no question that the agency is in possession of records responsive to EPIC's requests. The agency is required by law to "make the records promptly available" in response to EPIC's FOIA request, 5 U.S.C. § 552(a)(3)(A), to "make

[1] https://www.justice.gov/usao/eousa.

reasonable efforts to maintain its records in forms or formats that are reproducible for the purposes of [FOIA]," § 552(a)(3)(B), and to "make reasonable efforts to search for the records in electronic form or format," § 552(a)(3)(C). Yet the agency has not satisfied any of its statutory obligations. The EOUSA and its component offices have not produced any responsive records to EPIC, they have refused to conduct any searches, and they have claimed that the configuration of their computer systems make it impossible for them to search for responsive records.

EPIC is entitled to summary judgment on its FOIA claims because the agency is unlawfully withholding agency records, § 552(a)(4)(B), and because the agency has refused to conduct searches for responsive records "reasonably calculated to uncover all relevant documents," as is required by the FOIA. *Institute for Justice v. IRS*, 941 F.3d 567, 569–70 (D.C. Cir. 2019). But the agency's actions in this case warrant broader injunctive relief, because the EOUSA and its component offices have engaged in an unlawful pattern and practice of refusing to search for electronic records and refusing to manually search its case files. This unlawful agency practice impacts EPIC and all other requestors who would seek disclosure of records stored on EOUSA's computer systems or case files.

EPIC spent many months attempting to resolve the search issues with agency counsel, but to no avail. EPIC suggested that the agency search the largest, and likely most technically advanced, U.S. Attorney's Offices ("USAOs") for the Sothern District of New York and the District of Columbia. When those offices claimed that they could not search for the responsive records, EPIC then suggested that the agency search a small, medium, and large USAO (the Eastern District of Oklahoma, Eastern District of Pennsylvania, and the Southern District of California). The agency responded that none of these "track the statute requested." Declaration of John W. Kornmeier ¶ 11, ECF No. 21-1. But EPIC did not request a record of whether the

USAOs "track" the Stored Communications Act. EPIC requested portions of records in possession of the agency—the first page of § 2703(d) orders and warrants. The agency is obliged to search for the records that EPIC requested. But it has refused. The agency declarations admit that responsive records exist in the USAOs' physical and electronic records systems; they admit that the USAOs did not search these systems; and make clear that they will not search these systems in the future. This policy and practice violates the FOIA.

Given the evidence in the record, it is clear that the DOJ has not satisfied its statutory obligation to conduct a reasonable search for records response to EPIC's FOIA requests. The Court should grant EPIC's Cross Motion for Summary Judgment and deny the DOJ's Motion for Summary Judgment.

BACKGROUND

Cell phones are central to the lives of most Americans. An estimated 96% of Americans own a cell phone, and 81% own a smart phone. *Mobile Fact Sheet*, Pew Research Center (June 12, 2019).[2] But cell phones also generate precise location records that can track a user's movements over time. The government has increasingly sought access to this data for law enforcement purposes raising far-reaching privacy concerns for cell phone users in the United States.

A. Law Enforcement's Use of Cell Site Location Information Pre and Post *Carpenter v. United States*

Enacted in 1986, the Electronic Communications Privacy Act ("ECPA") protects a wide range of electronic communications in transit and at rest. 18 U.S.C. §§ 2510–2523. ECPA updated the federal Wiretap Act and created new legal protections for stored communications. *See* 18 U.S.C. §§ 2701–2712 (the Stored Communications Act ("SCA")). The SCA makes it

[2] https://www.pewresearch.org/internet/fact-sheet/mobile/.

unlawful to access electronic communications held by a service provider in electronic storage without authorization. As part of the SCA, 18 U.S.C. § 2703(d) authorizes the government to compel an electronic communication service provider to disclose customer records using a court order. 18 U.S.C. § 2703(c)(1)(B). Unlike warrants that require a showing of "probable cause" under the Fourth Amendment, § 2703(d) orders only required a showing of "specific and articulable facts" that the records are "relevant and material" to an ongoing investigation—a lower burden of proof than warrants. Recently, the Supreme Court held that cell phone location records are protected by the Fourth Amendment and are inaccessible without a warrant. *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

Prior to the Supreme Court's decision in *Carpenter*, law enforcement agencies routinely used § 2703(d) orders to collect detailed cell site location information for investigations to pinpoint the location of individuals and map their movements over time. When a cell phone communicates with a cellular tower or antenna, information is collected by a cellular provider that can be used to determine the location of the cellular device—and consequently the location of the person using the phone. This CSLI data can be combined from multiple towers to triangulate a phones location "with a high degree of accuracy (typically under fifty meters)." Stephanie K. Pell & Christopher Soghoian, *Can You See Me Now? Toward Reasonable Standards for Law Enforcement Access to Location Data that Congress Could Enact*, 26 Berkeley Tech. L.J. 117, 128 (2012).

The DOJ has never released to the public reports detailing the frequency of law enforcement location surveillance under the SCA. Several major telecommunication companies have released reports about aggregate statistics about government requests, but these reports are neither comprehensive nor detailed enough to evaluate the full scope of law enforcement access

to location data. The overall number of § 2703(d) orders cannot be assessed solely by these telecommunication companies' transparency reports.

The Supreme Court's decision in *Carpenter* raised important questions about the use of cell site location information by law enforcement agencies. The Court held that the acquisition of cell site records constituted a search and that these records are protected by the Fourth Amendment. The Court found that "police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation," but left open the question of what legal process is required in emergencies or other unique situations. *Carpenter*, 138 S. Ct. at 2223.

The legal regime for law enforcement access to CSLI implicates privacy interests of nearly all U.S. persons. CSLI is "detailed, encyclopedic, and effortlessly compiled." *Carpenter*, 138 S. Ct. at 2216. This data can reveal the most intimate details of a person's everyday life and are more comprehensive than GPS records. This precision only increases with advancements in technology, yet the public has been left in the dark to how law enforcement agencies have sought and used CLSI historically and after *Carpenter*.

B. EPIC's FOIA Requests and Initiation of Litigation

EPIC submitted three FOIA requests to the DOJ's Executive Office for United States Attorneys for the first page of surveillance orders for the production of cell site location information during 2016, 2017, 2018, and 2019. Am. Compl. ¶¶ 23–42, ECF No. 18. EPIC's submitted its first FOIA request on June 14, 2017 seeking the first page of all § 2703(d) orders for CSLI during January 1, 2017 through March 31, 2017. Am. Compl. ¶¶ 23–30. EPIC submitted its second FOIA request on June 21, 2017 seeking the first page of all § 2703(d) orders for CSLI during 2016. Am. Compl. ¶¶ 31–37. EPIC's third FOIA request, submitted after the *Carpenter* decision, sought the first pages of all § 2703(d) orders and warrants during 2017, 2018, and 2019. Ex. 1. EPIC sought expedited processing and a few waiver for all three requests.

See Am. Compl. ¶¶ 25, 26, 33, 34, 40, 41. After the DOJ failed to make a timely decision on EPIC's first two FOIA requests, EPIC filed suit. *See* Compl, ECF No. 1.

After filing suit, EPIC contacted the DOJ to propose a processing schedule. Joint Status Report, ECF No. 6. The DOJ provided copies of two letters it asserted that were previously sent to EPIC stating that the DOJ "does not track the statute requested" in the first FOIA request and that additional information was needed to perfect the second request. *See* Kornmeier Decl. ¶ 5. The parties agreed to discuss the scope of the issues in dispute and to agree upon a processing schedule.

C. EPIC's Efforts to Assist with the Searches and the EOUSA's Refusal to Conduct the Searches

On November 6, 2018, EPIC sent the DOJ several questions about its record retention practices pertaining to § 2703(d) orders that would be helpful in identifying responsive records. EPIC proposed to schedule a call to discuss scoping the request and to help the agency develop a search methodology. Joint Status Report, ECF No. 7.

On November 15, 2018, the parties conferred to discuss the agency's search capabilities and records systems. The EOUSA acknowledged that individual USAOs maintain records responsive to EPIC's FOIA request (e.g. copies of surveillance orders). The EOUSA indicated that it had contacted two of the largest USAOs, District of Columbia ("USAO-DC") and Southern District of New York ("USAO-SDNY"), and found that these districts do not have a system for tracking § 2703(d) applications or orders without Criminal AUSAs "going through their hard copy and electronic files." Kornmeier Decl. ¶ 8. The EOUSA stated that "limited searches could be performed." Kornmeier Decl. ¶ 8. The EOUSA suggested a preliminary search in the USAO-SDNY's Criminal Clerk log and EPIC agreed to this preliminary search in order to locate § 2703(d) orders issued in 2016. Kornmeier Decl. ¶ 8. The USAO-SDNY's Manhattan

office has a Criminal Clerk log that tracks what documents are brought to court. Declaration of John M. McEnany ¶ 3, ECF No. 21-4. The log "includes the name of the AUSA . . . a magistrate's docket number, or a USAO-SDNY file number; and a brief description of the document." McEnany Decl. ¶ 3. The SDNY Criminal Clerk's log for 2016–2019 "shows approximately 268 items referencing 'cell site.'" McEnany Decl. ¶ 3. The USAO-SDNY states that they "have been searching for responsive documents based on the 'cell site' items referenced in the Criminal Clerks logs and anticipate that a search will be completed in November 2019." McEnany Decl. ¶ 3. EPIC has not received any records from the USAO-SDNY office and was not informed prior to the filing of the agency declaration that any search or processing of responsive records was underway.

On February 7, 2019, the EOUSA sent an email to EPIC describing the issues that the USAO-SDNY claimed would prevent it from conducting a search, stating that "it is impossible" to comply with this request because, among other issues, a search of the office's digital records would require file indexing that would "crash the system." Am. Compl. ¶ 54, ECF No. 18.

On February 15, 2019, EPIC proposed a revised methodology to search several USAOs that might be able to locate responsive records. EPIC proposed that the DOJ contact three different sized U.S. Attorney's offices—the Eastern District of Oklahoma ("USAO-OKE") (a small sized office), the Eastern District of Pennsylvania ("USAO-EDPA") (a medium sized office), and the Southern District of California ("USAO-SDCA") (a large sized office)—to determine whether those offices could conduct searches for responsive records. Joint Status Report, ECF No. 12. On March 13, 2019, the parties held a teleconference and the EOUSA agreed to contact the three offices.

On April 25, 2019, the DOJ sent an email to EPIC stating that all three USAOs "do not track" the information requested and would not conduct a manual or electronic search. Joint Status Report, ECF No. 13.

The EOUSA manages and administers the CASEVIEW database, a database which tracks cases and maintains information for every case across all 94 USAOs. Kornmeier Decl. ¶ 6. The EOUSA initially inquired about using CASEVIEW to search for records responsive to EPIC's FOIA requests but its Data Analysis Staff stated that CASEVIEW "does not track" information about § 2703(d) orders. Kornmeier Decl. ¶ 7.

The agency has argued that none of the offices identified can conduct a search of their digital files because their computer systems are not configured to enable key word searches. Leshner Decl. ¶ 8. For example, the USAO-SDNY states that none of its digital files are indexed but they are stored in a "folder/subfolder" system that does not allow for easy key word or advanced searches. McEnany Decl. ¶ 6. The USAO-SDNY states that a bulk of their files are stored in the "cloud" and "any effort to access even just file names to do a filename search would . . . under [its] current configuration, even just identifying a filename triggers the process to download file data." McEnany Decl. ¶ 6(a). The USAO-SDNY states that this type of search would be "unfeasible" because "digitally search[ing] that data would render the system unusable for ordinary business purposes." McEnany Dec. ¶ 6(a).

All of the surveyed offices hold have a different amount of stored data, yet even the smallest office (the Eastern District of Oklahoma) claims it cannot search its systems. The USAO-SDNY has about 200 TB of data. McEnany Decl. ¶ 6(a). The USAO-EDPA has about 50 TB of data. Perricone Decl. ¶ 5, ECF No. 21-5. The USAO-SDCA has approximately 111 TB of data. Leshner Decl. ¶ 8. The USAO-DC currently has about 500 TB of data. Martin Decl. ¶ 5.

The USAO-OKE, on the other hand, has about 1TB of data. Wilson Decl. ¶ 5. To put that in perspective, it is now standard for desktop and laptop computers to come with 1 TB or more of storage. For example, a search on a popular consumer electronic retailer website for desktop and all-in-one computers with a 1–1.5 TB storage capacity yielded a search result of 255 options. *See 1-1.5TB All Desktops*, Best Buy (2019).[3] It is simply absurd for the agency to argue that it cannot search 1TB of data when the owner of any typical laptop computer can easily search that much data.[4]

The agency's position is also at odds with its own guidance on the management of digital evidence and electronic discovery. The DOJ encourages the use of digital search methods such as technology assisted review ("TAR") for those entities subject to its civil investigative requests. According to DOJ, use of these digital search methods can reduce the cost and simplify the process of electronic discovery. Tracy Greer, Dep't of Justice, *Technology-Assisted Review and Other Discovery Initiatives at the Antitrust Division* 1 (2014).[5] The DOJ recognizes in the civil discovery context that these digital search techniques can lead to "more responsive document productions" that have "contained more relevant information." *Id.* at 5. In civil and criminal discovery disputes, the DOJ has "been aggressive in promoting the use of technology" to reduce the burden on individuals subject to investigation that must comply with producing documents and information. Tracy Greer, Elec. Discovery Antitrust Division, Dep't of Justice, *Avoiding E-Discovery Accidents & Responding to Inevitable Emergencies: A Perspective from*

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[3] https://www.bestbuy.com/site/desktop-computers/all-desktops/pcmcat143400050013.c?id=pcmcat143400050013&qp=totalstoragecapacityrange_facet%3DTotal%20Storage%20Capacity~1%20-%201.5TB.
[4] Even a $380 laptop comes equipped with a 1TB hard drive. https://www.bestbuy.com/site/lenovo-l340-15api-15-6-laptop-amd-ryzen-3-8gb-memory-1tb-hard-drive-platinum-gray/6350522.p?skuId=6350522.
[5] https://www.justice.gov/sites/default/files/atr/legacy/2014/03/27/304722.pdf.

the Antitrust Division 9 (March 2017).[6] How can the DOJ expect that people subject to its civil investigative inquiries will use the most advanced methods available to search electronic records when the agency itself refuses to search the computer files in the offices of its prosecutors?

D. The USAOs Confirm That They Are in Possession of Responsive Records

The declarations submitted by DOJ make clear that the agency is in possession of records responsive to EPIC's request, yet the USAOs have refused to search the electronic systems that store these records and have not produced any responsive records. According to the USAO Southern District of California ("USAO-SDCA"), "[a] paper copy of the application and order should be maintained in the USAO-SDCA case file, and an electronic version of the application and order should exist in the network folder of the individual who created the documents." Leshner Decl. ¶ 4. The USAO-SDCA claims it is "not feasible" to search electronic files for § 2703(d) orders because "it will crash the system doing the search." Leshner Decl. ¶ 8. "Any effort to access just the file names to do a filename search would also crash." Leshner Decl. ¶ 8. "Most AUSAs save a Microsoft Word copy of their documents," though most do not scan and electronically save a signed copy of the § 2703(d) order. Perricone Decl. ¶ 6. However, in some offices, like the USAO-DC, beginning in 2016, "AUSAs or their paralegals worked to more consistently digitally scan and electronically save signed copies of the 2703(d) Orders." Martin Decl. ¶ 5.

The USAO-SDNY states that responsive documents may be contained in attachments to email and that it or the "EOUSA may run a search across [its] USAMail Archive and across [its] users' Personal Archive Folders." McEnany Decl. ¶ 6(d). The USAO-SDNY, however, has "never conducted such a search and do not know how it may run in practice." McEnany Decl. ¶

[6] https://www.justice.gov/atr/page/file/953381/download.

6(d). In USAO-SDNY, "it would take over a year to conduct" a search for responsive records. McEnany Decl. ¶ 6(c).

Some USAO-EDPA AUSAs, "beginning some time in 2017, began to enter 2703(d) Orders . . . in CaseView as a means of tracking deadlines for renewing non-disclosure orders that accompany some 2703(d) Orders." Perricone Decl. ¶ 3.

The USAO for the Eastern District of Oklahoma ("USAO-OKE"), states that hard copies of applications and § 2703(d) orders should be located in the relevant case file and an electronic version of the application and order should exist on the USAO-OKE network. Wilson Decl. ¶ 4. The USAO-OKE "has a keyword index search capability through the Perceptive Workgroup software program." Wilson Decl. ¶ 6. The USAO-OKE performed a Perceptive Workgroup Search query of the indexed and searchable electronic files using the search terms "2703" and "cell-site" for the dates requested in EPIC's FOIA request. Wilson Decl. ¶ 6. The keyword search produced 445 documents and would take "1 hour to *thoroughly* review the documents." Wilson Decl. ¶ 6 (emphasis added). But, the USAO-OKE stated that the search is not complete because the electronic search does not query for all possible locations where an application could be located. Wilson Decl. ¶ 8. The USAO-OKE contends that to "ensure the search is complete," a manual search must be conducted. Wilson Decl. ¶ 9. A manual search is estimated to require 109 hours to locate, retrieve, and search the files for responsive records. Wilson Decl. ¶ 10. The USAO-OKE estimates that a search, though still incomplete, would "likely require approximately 190 hours." Wilson Decl. ¶ 12. But, when the EOUSA queried whether or not the USAO-OKE could search for responsive records, the USAO-OKE "reported that they do not have access to orders regarding cell site locations." Joint Status Report, ECF No. 13.

The USAO District of Columbia ("USAO-DC") states that

> *Some* USAO-DC AUSAs within some Sections of the Criminal Division, beginning sometime in 2016, began to enter 2703(d) orders . . . by logging the case number for the 2703(d) orders in an electronic document log maintained within the Section as a means of tracking deadlines for renewing non-disclosure orders that company some 2703(d) orders.

Martin Decl. ¶ 3.

The USAO-DC states that it has no tracking or central filing system that would "allow for easy key-word or other advanced searches." Martin Decl. ¶ 5. But whether they can search their entire file repository based on key words is simply not relevant; the office has several different methods to find 2703(d) orders. "Beginning in 2016, AUSAs or their paralegals worked to more consistently digitally scan and electronically save signed copies of the 2703(d) Orders." Martin Decl. ¶ 5. And in 2017 the U.S. District Court for the District of Columbia Clerk of the Court ("Clerk's Office") and the USAO-DC adopted a Memorandum of Understanding ("MOU") to catalog and report surveillance orders, to switch to electronic filing, and to keep records of when and why these surveillance orders are being sought. *See Memorandum of Understanding: Electronic Filing of Certain Sealed Applications and Orders*, U.S. District Court for the District of Columbia (Oct. 31, 2019).[7] The MOU explicitly states that the USAO-DC and the Clerk's Office will use an agreed upon standard format for captions in sealed surveillance orders; docket numbers and associated information for surveillance orders are periodically unsealed and published via the Court's Website. *Id.*; *see also* Martin Decl. ¶ 6. The USAO-DC has offered no explanation for why it cannot search its records of electronic filings or search the semiannual reports of surveillance orders to locate responsive records.

The EOUSA and all five of the USAOs tasked with a search for responsive records have also failed to address how they will search for cell phone location SCA warrants. EPIC's third

[7] https://www.dcd.uscourts.gov/sites/dcd/files/MOU-AUSA-October-31-2019.pdf

FOIA request sought not only § 2703(d) orders but also SCA warrants. *See* Ex. 1. The USAO-SDCA, USAO-EDPA, USAO-DC, and USAO-SDNY mention that they stopped seeking § 2703(d) orders following the *Carpenter* decision. See Leshner Decl. ¶ 5 (USAO-SDCA stopped seeking cell site location information in June 2018); Perricone Decl. ¶ 8 (USAO-EDPA stopped using § 2703(d) orders for cell site location information after Oct. 25, 2018); McEnany Decl. ¶ 2 (USAO-SDNY stopped submitted § 2703(d) orders in September 2017); Martin Decl. ¶ 7 (USAO-DC stopped using § 2703(d) orders for cell site location information "after on or about" June 22, 2018). None of these agency components has conducted a search for SCA warrants for cell phone location data.

E. EPIC's First Amended Complaint Challenging the DOJ's Policies and Practices That Violate the FOIA

On August 26, 2019, EPIC amended its complaint stating that the DOJ has engaged in a pattern and practice of failing to conduct a search in response to reasonably described FOIA requests and a pattern and practice of failing to comply with statutory deadlines. *See* Am. Compl. The DOJ has a policy of not conducting key term or targeted searches its electronic case files, network drives, document management systems, or email archives for records that it acknowledges should exist in those systems. *See* Leshner Decl. ¶ 8; McEnany ¶ 6; Martin Decl. ¶ 5; Perricone Decl. ¶¶ 5–6. The DOJ has a policy of not manually reviewing case files for § 2703(d) orders. *See* McEnany Decl., ¶ 7; Martin Decl., ¶ 4; Perricone Decl., ¶ 4; Wilson Decl., ¶¶ 9–10, 12; Leshner Decl., ¶¶ 5–6. Further, the DOJ has a policy of not searching its CASEVIEW database for information that is not already "indexed" or "tracked" by the database. *See* Kornmeier Decl. ¶ 6–7; Perricone Decl., ¶ 3; Martin Decl., ¶ 3.

ARGUMENT

The FOIA "vests courts with broad equitable authority." *Citizens for Responsibility and Ethics in Washington v. DOJ*, 846 F.3d 1235, 1241 (D.C. Cir. 2017). This includes the authority to grant "prospective injunctive relief," especially in cases where "federal law is at issue and the public interest is involved." *Id*. at 1242 (internal quotation marks omitted). The underlying purpose of the FOIA is "to 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." *EPIC v. DHS*, 999 F. Supp. 2d 24, 29 (D.D.C. 2013) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)). The FOIA "reflects a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Judicial Watch, Inc. v. DHS*, 895 F.3d 770, 775 (D.C. Cir. 2018) (internal quotation marks omitted). "Designed to facilitate public access to Government documents, FOIA requires federal agencies to disclose information to the public upon reasonable request unless the records at issue fall within specifically delineated exemptions." *Reporters Comm. for Freedom of Press v. FBI*, 877 F.3d 399, 401 (D.C. Cir. 2017) (internal quotation marks omitted).

In order to satisfy its obligations under the FOIA, an agency must "demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Jackson v. Exec. Office for United States Attorneys*, No. 1:17-CV-02208 (TNM), 2019 WL 1046295, at *2 (D.D.C. Mar. 5, 2019) (quoting *Ancient Coin Collectors Guild v. U.S. Dep't of State,* 641 F.3d 504, 514 (D.C. Cir. 2011)). "It is well-settled that if an agency has reason to know that certain places may contain responsive documents, it is obligated under FOIA to search barring an undue burden." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 327 (D.C. Cir. 1999). While there is "no requirement that an agency search every record system," the agency

"cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

An agency must "show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested," which it can do by submitting "[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." *Reporters Comm.*, 877 F.3d at 402. Summary judgment for the government is not appropriate if "a review of the record raises substantial doubt as to the search's adequacy, particularly in view of 'well defined requests and positive indications of overlooked materials." *Id*. (internal quotation marks omitted).

This is a *sui generis* search sufficiency case because it the agency has not employed *any* search methodology; the agency has refused to conduct a search at all. The law is clear: an agency must make "records promptly available to any person" who submits a request that "(i) reasonably describes such records and (ii) is made in accordance with the published rules." 5 U.S.C. § 552(a)(3)(A). The agency is obliged to search for responsive records in order to comply with a FOIA request. An agency violates the FOIA when it refuses to conduct a search, especially a search of records systems that it knows are "likely to contain responsive materials." *Reporters Comm.*, 877 F.3d 402. That is precisely what the DOJ has done in this case. The Court should accordingly grant EPIC's motion for summary judgment, deny the agency's cross motion, and order the agency to search for responsive records.

I. STANDARD OF REVIEW

The burden falls on the agency to prove that it has complied with its obligations under FOIA. 5 U.S.C. § 552(a)(4)(B). *See also Valencia-Lucena*, 180 F.3d at 326 (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). Where the government has not carried

this burden, summary judgment in favor of the Plaintiff is appropriate. *See, e.g.*, *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

Summary judgment may be granted if "the movant shows that 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 genuine issue of material fact is one that would change the outcome of the litigation." *EPIC v. DHS*, 999 F. Supp. 2d 24, 28 (D.D.C. 2013) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). FOIA cases are typically decided on motions for summary judgment. *Id.*; *see Brayton v. Office of U.S. Trade Rep.*, 641 F.3d. 521, 527 (D.C. Circ. 2011).

A district court reviewing a motion for summary judgment in a FOIA case conducts a de novo review of the record. 5 U.S.C. § 552(a)(4)(B); *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989). When reviewing an agency's motion for summary judgment, the court must "analyze all underlying facts and inferences in the light most favorable to the FOIA requester," and therefore "summary judgment for an agency is only appropriate after the agency proves that it has 'fully discharged its [FOIA] obligations.'" *Neuman*, 70 F. Supp. 3d at 421 (citing *Moore v. Aspin*, 916 F. Supp. 32, 35 (D.D.C. 1996)).

II. EPIC IS ENTITLED TO SUMMARY JUDGMENT

For an agency to meet its FOIA obligations, it must "demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Walston v. DOD*, 297 F. Supp. 3d 74, 77 (D.D.C. 2018) (quoting *Nation Magazine v. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)). The burden is on the agency to "show that it made 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. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). "[T]he agency cannot limit its search to only one record system if there are others that are

likely to turn up the information requested." *Id.* The adequacy of the agency's search is "'measured by the reasonableness of the effort in light of the specific request.'" *Machado Amadis v. DOJ*, 388 F. Supp. 3d 1, 14 (D.D.C. 2019) (quoting *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986)). Furthermore, "an agency cannot ignore 'clear leads . . . [that] may indicate . . . other offices that should have been searched." *Id.* (quoting *Rollins v. U.S. Dept. of State*, 70 F. Supp.3d 546, 550 (D.D.C. 2014)).

A. The DOJ has Violated its Search Obligations Under the FOIA

The DOJ is obligated under the FOIA to conduct a search, either manually or by electronic means, for records that are reasonably described in order to locate information responsive to an individual's FOIA request. 5 U.S.C. § 552(a)(3)(A), (C), (D). Agencies must make a "good faith effort to [] search for the requested records, using methods which can be reasonably expected to produce the information requested." *Machado Amadis v. DOJ*, 388 F. Supp. 3d 1, 10 (D.D.C. 2019) (alteration in original). The agency bears the burden of demonstrating "beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Am. Immigration Lawyers Ass'n v. DHS*, 306 F. Supp. 3d 162, 163 (D.D.C. 2018).

In this case the DOJ has refused to search for records responsive to EPIC's FOIA requests in the places they concede those records are most likely to be found–case files, shared drives, case management systems, and email archives. Specifically, the DOJ has refused to conduct key term searches of electronic files and e-mails and manual searches of case files. The agency argues that it would be "unreasonably burdensome" to search these records, but the agency declarations on this point are implausible, speculative, and contradicted by the record. None of the five USAOs or EOUSA actually attempted to conduct a search of electronic records

or case files. The DOJ claims that it would be unreasonably burdensome to conduct *any* automated or manual searches of USAO electronic records and case files. The Court should hold their response unlawful.

1. The DOJ refuses to search of electronic case records, shared drives, and e-mail archives.

The DOJ has the capability to conduct automated searches for responsive records in its electronic case files, shared network systems, email archives, and document management systems. And the agency concedes that responsive records exist in these systems. Its failure to search these systems clearly violates the FOIA.

The USAO-SDCA has acknowledged that "an electronic version of the [§ 2703(d)] application and order should exist in the network folder of the individual who created the documents." Leshner Decl. ¶ 4. According to the USAO-EDPA, "most AUSAs save a Word copy of their documents electronically." Perricone Decl. ¶ 6. The USAO-DC claims its attorneys "typically save a Word copy of their documents electronically" and they maintain network files in "folders identified by case identifiers." Martin Decl. ¶ 5. Moreover, beginning in 2016, AUSAs and paralegals in DC "worked to more consistently digitally scan and electronically save signed copies of the 2703(d) Orders." Martin Decl. ¶ 5. The USAO-SDNY AUSAs may store case data in their local "N:Drive" files and if the IT Services gains permission to search the networks, it would take "over a year to conduct such a search." McEnany Decl. ¶ 6(c). The USAO-SDNY states that responsive documents may exist as attachments in emails and that it "or EOUSA may run a search across [its] USAMail Archive and across [its] users' Personal Archive Folders." McEnany Decl. ¶ 6(d). The USAO-SDNY, however, "has never conducted such a search and do not know how it may run in practice." McEnany Decl. ¶ 6(d). The USAO-OKE also states that "an electronic version of the application and order should exist in the [USAO-

OKE] network." Wilson Decl. ¶ 4. The USAO-OKE's computer network files are stored in a folder/subfolder tree structure where open files are maintained on the network drive and closed files are uploaded into the cloud for archiving. Wilson Decl. ¶ 5. The USAO-OKE network files is comprised of approximately 1TB of data. Wilson Decl. ¶ 5.

Despite the fact that all of agency components acknowledge that responsive records exist and know where they are likely to be found, they have uniformly refused to conduct searches on the grounds that they "do not track" § 2703(d) orders. Kornmeier Decl. ¶ 5 ("EOUSA does not track the statute requested."); Leshner Decl. ¶ 5 ("USAO-SDCA does not centrally track or file § 2703(d) applications and orders."); Martin Decl ¶ 3 ("USAO-DC does not have a universal system in place to track or centrally file 2703(d) orders in either paper or electronic form."); McEnany Decl. ¶ ("Nor, beyond [the criminal clerk] log, does USAO-SDNY otherwise centrally track or file 2703(d) cell site orders."); Perricone Decl. ¶ 3 ("USAO-EDPA does not have a system in place to track or centrally file such orders in either paper or electronic form."); Wilson Decl. ¶ 4 ("The USAOKE does not maintain a log or database of the applications submitted to or orders obtained from the Court."). Courts have made clear that it is unlawful for an agency to refuse to conduct a search altogether based on their contention that the search is incompatible with their record system and, therefore, unreasonably burdensome." *Pinson v. DOJ*, 80 F. Supp. 3d 211, 216 (D.D.C. 2015). That is precisely what the DOJ has done in this case, and it is unlawful.

It is also simply not plausible, and the record does not support the EOUSA's contention, that there is no mechanism for automating the search of electronic case files at the USAOs. Other DOJ components have, in many cases, searched for responsive records in shared drives, records management systems, and email archive systems. *See*, *e.g.*, *Shapiro v. DOJ*, 293 F. Supp. 3d 99,

109 (D.D.C. 2018) (finding that an agency's search of its Electronic Surveillance System, Central Records System, and a manual search of files was an adequate search); *Gilliam v. DOJ*, 128 F. Supp. 3d 134, 139 (D.D.C. 2015) (finding that the agency's search of its Office of Enforcement Operations database and the Criminal Division's archived email system to be an adequate search); *Wright v. DOJ*, 121 F. Supp. 3d 171, 178 (D.D.C. 2015) (finding that a search in the Office of Enforcement Operations database and archived emails of Criminal division employees was an adequate search); *Cooper v. Stewart*, 763 F. Supp. 2d 137, 144 (D.D.C. 2011), *aff'd*, 2011 WL 6758484 (D.C. Cir. Dec. 15, 2011) (finding that a search of the Legal Information Office Network Systems and sending an office-wide email to AUSAs and support staff requesting a search of manual files and computer systems was an adequate search); *Judicial Watch, Inc. v. DOJ*, 806 F. Supp. 2d 74, 77 (D.D.C. 2011) (finding that the agency's search of emails, networks, and local files within the Voting Section was an adequate search).

The agency's declarations are not only implausible, they are directly contradicted by evidence on the record. For example, the EOUSA states that it cannot search its CASEVIEW database for 2703(d) orders because the system "does not track this information." Kornmeier Decl. ¶ 7. But the USAO-DC and USAO-EDPA declarations state that some AUSAs have begun entering § 2703(d) orders into the CASEVIEW system. Martin Decl. ¶ 3; Perricone Decl. ¶ 3. So it cannot be the case that EOUSA actually searched the CASEVIEW system, or it would have located these files. The EOUSA declaration is also not sufficiently detailed—it does not state with specificity what types of terms CASEVIEW "tracks" or how the system is "indexed" that would allow the search algorithm to retrieve the information. Kornmeier Decl. ¶ 6–7. The EOUSA simply states in a conclusory fashion that it "determined that [CASEVIEW] does not track the information in its database" and as such, there was "not reasonable way to locate the

information requested." Kornmeier Decl. ¶ 16. But this statement is not consistent with the statements made by the USAOs.

The USAO-OKE concedes in its declaration that it has access to a keyword index search capability through the Perceptive Workgroup Search software program and the that office successfully used a search query of indexed and searchable electronic files utilizing the terms "2703" and "cell-site" for 2016–2019. Wilson Decl. ¶ 7. The search query produced 445 documents and the USAO-OKE claims it would take one hour to review all of these electronic documents. Wilson Decl. ¶ 7. The USAO-OKE, however, did not review any of these documents, indicate to EPIC that it would be reviewing these documents, or even inform EPIC that the search was conducted prior to the filing of this declaration. Instead, when EPIC initially asked the EOUSA to conduct a search in the USAO-OKE, the office simply responded that it "does not track" the information requested and does not have access to these orders. Kornmeier Decl. ¶ 11.

The inaccurate statements made by the USAO-DC are especially egregious. The USAO-DC represented that it does not have a system to "track or centrally file 2703(d) orders in either paper or electronic form." Martin Decl. ¶ 3. But the office entered into a Memorandum of Understanding ("MOU") with the Clerk's Office for the U.S. District Court for the District of Columbia in 2017 as a result of the *Leopold* case, 300 F. Supp. 3d 61 (D.D.C. 2018), which requires the office to file all surveillance orders electronically. Under the MOU, the USAO-DC is required to file 2703(d) and other surveillance applications via CM/ECF and adopt uniform, standardized case captions and document titles that "include pertinent information about the number of targeted accounts, the service provider and the primary offense statute applicable to the criminal activity under investigation." *Leopold*, 300 F.Supp.3d at 104; *see also Memorandum*

of Understanding: Electronic Filing of Certain Sealed Applications and Orders, U.S. District Court for the District of Columbia (Oct. 31, 2019).[8] The Chief Judge in the U.S. District Court for the District of Columbia has also ordered the docket numbers and some associated information for applications for § 2703(d) orders filed by the USAO-DC's Criminal Division on or after October 1, 2017 be periodically unsealed and published on the Court's website. *See Standing Orders Regarding unsealing of Limited Docket Information for Sealed Applications*, U.S. District Court for the District of Columbia (Oct. 2, 2018).[9] Since the MOU standardizes the case captions and document titles when filing § 2703(d) applications and orders for at least the information encompassed in the 2017–2018 period and the Clerk's Office is periodically generating reports of these unsealed orders, the USAO-DC has the means to identify both 2703(d) orders and SCA warrants for cell phone location data. The USAO-DC is well aware of the *Leopold* decision and related MOU, *see* Martin Decl. ¶ 5, but the agency failed to address the impact of that agreement on its ability to search for records responsive to EPIC's request. An agency affidavit is not sufficient to justify nondisclosure when it is "controverted by [other] evidence in the record." *People for Am. Way Found. v. DOJ*, 451 F. Supp. 2d 6, 13 (D.D.C. 2006) (alteration in original).

2. The DOJ refuses to attempt a manual search of case files.

The DOJ has also refused to task staff to manually review case files that include surveillance orders, yet the agency concedes that such a review would be likely to identify responsive records. The DOJ acknowledges that hard copies of § 2703(d) orders and applications exist in the USAO case files and that a manual review of the case files would be useful in

[8] https://www.dcd.uscourts.gov/sites/dcd/files/MOU-AUSA-October-31-2019.pdf.
[9] https://www.dcd.uscourts.gov/news/standing-orders-regarding-unsealing-limited-docket-information-sealed-applications.

locating these records. *See* Wilson Decl. ¶ 4; Leshner Decl. ¶ 4; Perricone Decl. ¶ 3. A manual search for § 2703(d) orders could be conducted through a variety of methods, and the DOJ has conducted such searches in other FOIA cases before. For example, in *Borda v. DOJ*, 245 F. Supp. 3d 52, 58 (D.D.C. 2017), the DOJ physically searched and reviewed "approximately [seventy] boxes" of archived records for responsive FOIA documents related to grand jury proceedings for the plaintiff. The court in *Borda* found that the DOJ performed an adequate search for records because the search was conducted by personnel familiar with the plaintiff's criminal case, searched for records in the DOJ archives where responsive records would likely be contained, and identified and reviewed seventy boxes of documents over the span of three months. *Id*. The DOJ's refusal to even attempt a manual search, despite acknowledging that physical records exist, is a violation of its FOIA obligations to conduct a reasonable search.

3. It would not be unduly burdensome to require the DOJ to search its case files.

The DOJ argues that it is not obligated to search any of the USAO records systems in this case, Def.'s Mot. 5, despite its clear statutory obligation to make a "good faith effort to [] search for the requested records." *Machado Amadis*, 388 F. Supp. 3d at 10. In support of this dubious position, the agency cites cases that discuss searches of voluminous physical records. Def.'s Mot. 5–6. These cases are not analogous because automated and manual searches of digital case files, e-mails, and other electronic records do not impose the same time and cost burdens as searches of voluminous physical files. When a plaintiff challenges the sufficiency of an agency's search under the FOIA, " the burden is on the agency to 'provide sufficient explanation why a search . . . . would be unreasonably burdensome.'" *People for Am. Way Found. v. DOJ*, 451 F. Supp. 2d 6, 12 (D.D.C. 2006). The agency has carried that burden here. At bottom, the DOJ is arguing that it

can never be obligated to search the digital case files of federal prosecutors. That is inconsistent with the FOIA and with the precedent set in hundreds of FOIA cases in this Circuit.

The cases that DOJ cites do not support its sweeping argument that any search of its case files and electronic records systems would be unreasonably burdensome. The court in *AFGE* was reviewing the Census Bureau's refusal "to search virtually every file contained in over 356 branch and division offices, up to and including the director's office." *Am. Fed'n of Gov't Emps., Local 2782 v. U.S. Dep't of Commerce,* 907 F.2d 203, 206 (D.C. Cir. 1990). The Census denied the request in the mid-1980s when the electronic records systems that we take for granted today were science fiction. The court determined that such a voluminous search of the entirety of the agency's physical files, requiring a detailed inspection of "the entirety of every file" would be unduly burdensome. *Id*. at 209. And even then, the court's conclusion that the agency need not conduct the search was informed by the fact that the records were "largely unnecessary to the [plaintiff's] purpose." *Id*. The court in *Nation Magazine* considered a similar request for the U.S. Customs Service to search "23 years of unindexed files for records pertaining to [then-Presidential candidate H. Ross] Perot." 71 F.3d at 892. But the court rejected the agency's argument that it would be "too laborious" to search those same records for a specific record, the "1981 Chadwick memo," since the "files are indexed chronologically." *Id*.

EPIC's request bears no resemblance to the requests that were deemed unreasonably burdensome in the cases that DOJ cites. EPIC has not requested that the agency review "the entirety of every file" in its archives, *AFGE*, 907 F.2d at 209, or "23 years of unindexed files," *Nation Magazine*, F.3d at 892, or an "individual [] review of each potentially responsive e-mail" that was "sent or received by 25 different employees," *Hainey v. Dep't of Interior*, 925 F. Supp. 2d 34, 45 (D.D.C. 2013), or a frame-by-frame reel review of microfilm, *Wolf v. CIA*, 569 F.

Supp. 2d 1, 9 (D.D.C. 2008). EPIC is asking for the federal prosecutors' offices to locate and review the first page of surveillance orders for cell phone location data. These orders are issued based on surveillance applications that the prosecutors have drafted on their computers and submitted to courts. In some districts, these surveillance orders are issued electronically along with an e-mail notification and in many (if not all) districts the courts maintain electronic dockets. Once these records are located, they would not be particularly voluminous and their processing would be straightforward because they all likely contain the similar text and a common format.

Courts in the D.C. Circuit routinely require agencies to search and produce records that are substantially more voluminous than the surveillance orders EPIC seeks in this case. For example, in *Leopold v. Department of State*, the Plaintiff sued to enforce his request for "any and all records that were prepared, received, transmitted, collected and/or maintained by the Department of State (DOS) mentioning or referring to or prepared by Secretary of State Hillary Clinton or any member of the Office of the Secretary (S) from January 21, 2009 to February 1, 2013." Complaint, *Leopold v. Dep't of State*, No. 15-cv-123 (D.D.C. filed Jan. 25, 2015) (ECF No. 1). As part of that case, the State Department agreed to review and release non-exempt portions of 55,000 pages of former Secretary Hillary Clinton's e-mail records. Declaration of John F. Hackett, *Leopold v. Dep't of State*, No. 15-cv-123 (D.D.C. filed Jan. 25, 2015) (ECF No. 12). By October 1, 2016, the State Department had completed review of "52,459 pages of documents provided by former Secretary Clinton" and "24,417 pages of documents" from "several named former State Department officials related to 11 enumerated topics." Joint Status Report, *Leopold v. Dep't of State*, No. 15-cv0123 (D.D.C. filed Aug. 17, 2018) (ECF No. 82). It is not at all uncommon for FOIA cases to require searches of tens of thousands of pages of

records. *See, e.g., Pub. Citizen v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003) (finding that that searching 25,000 paper files would be not be unduly burdensome to the agency).

Moreover, the agency has the ability to use PACER and other court resources to assist in processing FOIA requests and locating responsive records. For example, in *Borda v. DOJ*, 245 F. Supp. 3d 52 (D.D.C. 2017), a paralegal in the USAO-DC began her search for responsive records by initially logging on to the Public Access to Court Electronic Records ("PACER") system to search for the case number specified by the requester and retrieve the docket. Kelly Decl. ¶ 6–8, ECF No. 15-1, *Borda v. DOJ*, 245 F. Supp. 3d 52 (2017). Like how the USAO-DC paralegal searched PACER in *Borda*, the USAO-DC could have checked PACER to conduct a search. The signing and implementation of the MOU as well as the USAO-DC's current practice is directly relevant to the search for responsive records in EPIC's third FOIA request, which sought § 2703(d) orders during 2017, 2018, and 2019. *See Leopold*, 300 F.Supp.3d 61; *see also Memorandum of Understanding: Electronic Filing of Certain Sealed Applications and Orders*, U.S. District Court for the District of Columbia. There are multiple methods that the USAO-DC could implement, including searching PACER, to locate responsive records but the USAO-DC's refusal to conduct a search constitute a pattern and practice that violates the FOIA.

The DOJ's unreasonable burden claim is also inconsistent with the its positions in other cases, where the agency has employed various methods of searching for responsive records. For example, the EOUSA has conducted searches through office-wide email requests to all AUSAs and support staff to search their manual and computer files when searching for responsive records. *See e.g.*, *Cooper v. Stewart*, 763 F. Supp. 2d 137, 142 (D.D.C. 2011), *aff'd*, 2011 WL 6758484 (D.C. Cir. Dec. 15, 2011) (search of records was conducted using LIONS to search case numbers and with an office-wide email to all AUSAs and support staff within the USAO for the

District of Nevada); *Matthews v. DOJ*, 2006 WL 1194277, at *3 (D.D.C. May 4, 2006) (search for records conducted using LIONS, a manual search, and by sending an e-mail message all employees of the USAO for the District of Columbia). In *Richardson v. United States*, the USAO for the Eastern District of Virginia "searched for records physically, sent e-mails to the appropriate staff to ascertain whether they had any responsive records, and used its Legal Information Network System (LIONS), the computer system used by United States Attorneys' offices to track cases and to retrieve files pertaining to cases and investigations," to search for responsive records. 80 F. Supp. 3d 128, 133 (D.D.C. 2015) (internal quotation marks omitted). The EOUSA has also used the Public Access to Court Electronic Records ("PACER") system to assist in locating responsive records. For example, in *Jimenez v. EOUSA*, plaintiff sought information relevant to a superseding indictment and the EOUSA retrieved plaintiff's criminal case file from the USAO-SDNY, accessed PACER to print a docket sheet, and obtained a copy of the indictment from the district court's file to release to the plaintiff. 764 F. Supp. 2d 174, 180–81 (D.D.C. 2011). The DOJ's failure to address these types of alternative search methodologies in its declarations show that it has not performed an adequate search. Moreover, the agency's refusal to conduct any automated search for electronic files in its networks, file management systems, and email archive system violates its FOIA obligations.

The DOJ and its various components have also searched for responsive records that include searching in shared drives, records management systems, and email archive systems. *See*, *e.g.*, *Shapiro v. DOJ*, 293 F. Supp. 3d 99, 109 (D.D.C. 2018) (finding that an agency's search of its Electronic Surveillance System, Central Records System, and a manual search of files was an adequate search); *Gilliam v. DOJ*, 128 F. Supp. 3d 134, 139 (D.D.C. 2015) (finding that the agency's search of its Office of Enforcement Operations database and the Criminal Division's

archived email system to be an adequate search); *Wright v. DOJ*, 121 F. Supp. 3d 171, 178 (D.D.C. 2015) (finding that a search in the Office of Enforcement Operations database and archived emails of Criminal division employees was an adequate search); *Cooper v. Stewart*, 763 F. Supp. 2d 137, 144 (D.D.C. 2011), *aff'd*, 2011 WL 6758484 (D.C. Cir. Dec. 15, 2011) (finding that a search of the Legal Information Office Network Systems and sending an office-wide email to AUSAs and support staff requesting a search of manual files and computer systems was an adequate search); *Judicial Watch, Inc. v. DOJ*, 806 F. Supp. 2d 74, 77 (D.D.C. 2011) (finding that the agency's search of emails, networks, and local files within the Voting Section was an adequate search).

The DOJ has the burden to conduct an adequate search under the FOIA, and an adequate search does not necessarily mean a search of the entire universe of records and a cross-reference search for completeness. The DOJ contends that to conduct a "complete" search, a physical search for each file would still be necessary to confirm that the application was presented and signed by a judge. Martin Decl. ¶ 5. Thus while the agency claims that a search of certain records might be "under-inclusive," there is no requirement that the agency conduct a "burdensome physical search of the relevant files for confirmation." Perricone Decl. ¶ 3.

The DOJ's claim that a search would be unduly burdensome is further undermined by the agency's own declarations. Several of the USAOs explicitly discuss ways that they could complete a search for responsive records, even as they claim that a "full" search would be unduly burdensome. For example, the USAO-SDNY an initial search of the Criminal Clerk's log for 2016 and found 39 items that contained the term "cell site." Kornmeier Decl. ¶ 8. For the entire 2016–19 time frame encompassed in EPIC's FOIA requests, the Criminal Clerks log showed approximately "268 items referencing 'cell site.'" McEnany Decl. ¶ 3. The USAO-SDNY claims

that it has been searching for responsive records based on the "cell site" items referenced from the Criminal Clerks logs and anticipated that a search would have been completed in November 2019. McEnany Decl. ¶ 3. The DOJ never provided to EPIC the status of this search and whether a search was completed. Instead, the DOJ conveyed to EPIC in an email detailing the issues that would preclude the USAO-SDNY from conducting a search, including why a search in the Criminal Clerk's log, manual search, or system-wide digital search would be impossible. Am. Compl. ¶ 54.

Likewise, the USAO-OKE began, but never completed, a full search for responsive records despite conducting an initial keyword query that produced 445 documents. The USAO-OKE has both hard copies and electronic versions of § 2703(d) applications and orders in physical case files and its network. Wilson Decl. ¶ 4. The USAO-OKE has "keyword search index capability through the Perceptive Workgroup Search software program" that can search shared criminal folders and cloud storage. Wilson Decl. ¶ 6. The USAO-OKE conducted a preliminary Perceptive Workgroup Search query of its electronic files to determine the potential scope of documents to be reviewed. Wilson Decl. ¶ 7. The USAO-OKE used the search terms "2703" and "cell-site" for the duration of 2016–2019 and the search produced 445 documents. Wilson Decl. ¶ 7. To thoroughly review each electronic document would take "approximately 1 hour" yet the USAO-OKE claims that a manual review of similar hard copy documents would take 10 minutes per file. Wilson Decl. ¶ 7, 10. The DOJ never conveyed the results of this search query to EPIC. Instead, the DOJ told EPIC that the USAO-OKE does "not have access to orders regarding cell site locations. They do not track this information and they do not maintain a log of 2703(d) Orders." Kornmeier Decl. ¶ 11.

The DOJ also misstates the record when it claims that EPIC "ultimately declined to limit its request to a discreet subset of USAO districts or to any limited searches." Kornmeier Decl. ¶ 17. EPIC did initially limit its requests by date and later agreed to searches of a discreet subset of USAO districts, and even limited searches to determine an appropriate search methodology. Am. Compl. ¶¶ 51–57. EPIC first agreed to initially search the two largest USAO districts and narrowed the scope of the request to one year (2016). Joint Status Report, ECF No. 15. Yet, the both districts stated that it was not feasible to conduct a search. Kornmeier Decl. ¶ 8. EPIC then suggested to the DOJ to search for three different sized USAOs to determine if any of these districts can search for responsive records. Kornmeier Decl. ¶¶ 9–10. In all five attempts, all five districts of varying sizes and resource capabilities claim they "do not track" the requested information and it is not feasible conduct a search for records. *See* Kornmeier Decl. ¶ 11; Martin Decl. ¶¶ 3–5; McEnany Decl. ¶¶ 4, 6; Perricone Decl. ¶¶ 4, 5–6; Leshner Decl. ¶¶ 5–6, 8; Wilson Decl. ¶ 4. The record and the agency's prior FOIA history make clear that the unreasonable burden claim in this case is implausible and should be rejected.

B. The DOJ Has a Pattern and Practice of Refusing to Search Electronic Files Despite Having Performed Initial Searches and the Means to Perform Keyword Searches

Under the FOIA, a plaintiff can bring suit to "challenge an agency's 'policy or practice' where it 'will impair the party's lawful access to information *in the future*.'" *CREW*, 846 F.3d at 1242. "So long as an agency's refusal to supply information evidences a policy or practice of delayed disclosure or some other failure to abide by the terms of the FOIA, and not merely isolated mistakes by agency officials." *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 491 (D.C. Cir. 1988). "In this circuit it is settled law that informal agency conduct resulting in long delays in making requested non-exempt records available may serve as the basis for a policy or practice claim." *Judicial Watch*, 895 F.3d 777–78. When evaluating the propriety of

injunctive relief, a court should "evaluate the likelihood that the [agency] will return to its illicit practice of delay in the absence of an injunction." *Payne*, 837 F.2d at 495.

There is no question that the EOUSA practice of refusing to search electronic records will impair EPIC's lawful access to information in the future and is a failure to abide by the terms of the FOIA. EPIC has filed three successive requests for disclosure of location surveillance orders issued in 2016, 2017, and 2018–19. Am. Compl. ¶¶ 23–42. EPIC will continue to submit similar requests so it can obtain access to similar records in the future. Am. Compl. ¶ 11. But unless the Court issues injunctive relief, the agency will continue to reject these requests by refusing to search the electronic records systems that are likely to contain responsive records.

Despite EPIC's best efforts to assist the DOJ in developing a search methodology to find records, the EOUSA and USAOs have all refused to search electronic case files, dockets, e-mail archives and other records systems that would likely contain responsive records. The agency's only claimed basis for this refusal to comply with EPIC's request is that the searches would be "unduly burdensome, and in some cases impossible." Def.'s Br. 2. The DOJ bears the burden of conducting a reasonable search, and the agency's attempts are not reasonable when the agency claims its computer networks and records management systems cannot locate records that exist in the system because these systems are not configured for key-word searches. *See*, *e.g.*, McEnany Decl. ¶ 6(a); Perricone Decl. ¶ 5; Leshner Decl. ¶ 8. The agency's failures are not "isolated mistakes," they are a clear policy of nonresponsiveness to the types of requests that EPIC has submitted.

The EOUSA also claims that solely because its CASEVIEW database does not "track" the information, "there was no reasonable way to locate the information requested." Kornmeier Decl. ¶ 16. The EOUSA manages and administers the CASEVIEW database, which tracks cases

for all 94 USAOs. Kornmeier Decl. ¶ 6. The EOUSA states that it submitted EPIC's FOIA requests to its Data Analysis Staff and the staff informed EOUSA that it does not track this information. Kornmeier Decl. ¶ 7. The EOUSA Data Analysis Staff, however, never performed a keyword search even though some responsive records can be found in the CASEVIEW database. For example, some AUSAs in USAO-EDPA began entering § 2703(d) orders into CASEVIEW around 2017 as a means to tracking deadlines. Perricone Decl. ¶ 3. The EOUSA a policy or practice of refusing to search the CASEVIEW system for information that is not specifically indexed. This policy violates the FOIA and will impact EPIC and other requestors in the future if it is not enjoined.

Additionally, the DOJ has refused to conduct a search across its email archive for responsive documents that they acknowledge may exist in attachments to emails. McEnany Decl. ¶6(d). The USAO-SDNY and the EOUSA "may run a search across [its[USAMail Archive and across [its] users' Personal Archive Folders." McEnany Decl. ¶ 6(d). The USAO-SDNY, however, as never conducted such a search. McEnany Decl. ¶ 6(d). The agency's refusal to search email archives in order to assist in identifying responsive records violates the FOIA and will impact EPIC and other requestors in the future if it is not enjoined.

III. The DOJ's Motion for Summary Judgment Should Be Denied Because the Record Raises Substantial Doubt As to the Reasonableness of the Search

Summary judgment is inappropriate "[i]f a review of the record raises substantial doubt as to the reasonableness of a search, especially in light of 'well-defined requests and positive indications of overlooked materials.'" *Pinson v. DOJ*, 145 F. Supp. 3d 1, 12 (D.D.C. 2015). The DOJ's Motion for Summary Judgment should be denied because the agency has not established that there is not genuine dispute of material facts that would entitle it to summary judgment. The DOJ has not conducted any search for responsive records. The DOJ has not shown that it has

conducted a search reasonably calculated to uncover all relevant documents because it has not searched any electronic or physical files for responsive records, which is an inadequate search and against its FOIA obligations. The agency has identified key terms that can be used to conduct a search and acknowledged that responsive records are in the possession of the DOJ both electronically and physically. *See*, *e.g.*, Wilson Decl. ¶ 4, 7 (USAO-OKE stating that electronic and hard copy versions of each application and order should exist in the relevant case file and USAO-OKE network as well as performing an initial search query utilizing the terms "2703" and "cell-site"); Leshner Decl. ¶ 4 (acknowledging both a paper copy and electronic version of the application and order should exist in the USAO-SDCA files). But the DOJ has not performed any search that shows it made a good faith effort to search for the requested records. The agency ignored clear leads of which systems could be searched or failed to pursue alternative methods to search for responsive records. As such, the DOJ has not fully discharged its FOIA obligations because its refusal to conduct a search is not consistent with the FOIA.

CONCLUSION

The Court should deny the Defendant's Motion for Summary Judgment and grant EPIC's Motion for Summary Judgment.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civ. Action No. 18-1814 (TNM)

PLAINTIFF'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND RESPONSE TO DEFENDANT'S STATEMENT OF FACTS NOT IN DISPUTE

Pursuant to Local Civil Rule 7(h) of the Rules of the United States District Court for the District of Columbia, Plaintiff Electronic Privacy Information Center ("EPIC") hearby submits the following statement of material facts as to which EPIC contends there is no genuine issue in connection with its Cross-Motion for Summary Judgment, and EPIC's response to Defendant Department of Justice's ("DOJ") Statement of Material Facts ("SMF").

1. EPIC disputes the matter set forth in ¶ 1 of the DOJ's SMF because EPIC's July 2, 2019 Freedom of Information Act ("FOIA") request sought "the first page of all § 2703(d) orders and warrants for production of cell site location information during the following calendar years: 2017, 2018, and 2019." *See* Ex. 1.

2. EPIC does not dispute the matter set forth in ¶ 2 of DOJ's SMF.

3. EPIC does not dispute the matter set forth in ¶ 3 of DOJ's SMF.

4. EPIC does not dispute the matter set forth in ¶ 4 of DOJ's SMF.

5. EPIC submits that the matters set forth in ¶ 5 of the DOJ's SMF are not supported by the record because the Declaration of John W. Kornmeier is not sufficiently detailed to establish that the EOUSA "attempted to search" CASEVIEW; EPIC also submits that the matters set forth in ¶ 5 are not material because the fact that CASEVIEW does not "track" certain information is not relevant.

6. EPIC does not dispute the matter set forth in ¶ 6 of DOJ's SMF.

7. EPIC submits that the matters set forth in ¶ 7 of the DOJ's SMF are not support by the record because the Declaration of John W. Kornmeier is not sufficiently detailed to establish that "any such search [by the U.S. Attorney's Office ("USAO") for the District of Columbia ("USAO-DC") and the USAO for the Southern District of New York ("USAO-SDNY")] would involve extensive laborious work;" EPIC also submits that the matters set forth in ¶ 7 are not material.

8. EPIC submits that the matters set forth in ¶ 8 of the DOJ's SMF are not supported by the record because the Declaration of T. Patrick Martin does not establish that a search is "unduly burdensome;" EPIC also submits that whether or not a hypothetical search would be "incomplete" is not material.

9. EPIC submits that the matters set forth in ¶ 9 of the DOJ's SMF are not supported by the record because the Declaration of John M. McEnany does not establish that a search would be "unduly burdensome;" EPIC also submits that whether or not a search is "incomplete" is not material.

10. EPIC does not dispute the matter set forth in ¶¶ 10 of DOJ's SMF.

11. EPIC does not dispute the matter set forth in ¶¶ 11 of DOJ's SMF.

12. EPIC submits that the matters set forth in ¶ 12 of the DOJ's SMF are not supported by the record because the Declaration of John W. Kornmeier does not establish that the USAO for the Eastern District of Oklahoma ("USAO-OKE") would have to manually search all case files; to the contrary, the USAO-OKE declaration affirms that potentially responsive records can be found through a keyword index search of electronic files using its Perceptive Workgroup Search software program. Declaration of Christopher Wilson ("Wilson Decl."), ¶ 6–7; EPIC also submits that the fact that the USAO-OKE does not "track" certain information or "maintain a log of [§ 2703(d)] orders" is not material.

13. EPIC submits that the matters set forth in ¶ 13 of the DOJ's SMF are not supported by the record because the Declaration of John W. Kornmeier does not establish that the USAO for the Southern District of California ("USAO-SDCA") would have to manually search all case files; to the contrary, the USAO-SDCA declaration affirms that electronic versions of the records "should exist in the [USAO-SDCA] network folder." Declaration of David Leshner ("Leshner Decl."), ¶ 4; EPIC also submits that the fact that the USAO-SDCA does not "track" certain information or "maintain a log of [§ 2703(d)] orders" is not material.

14. EPIC submits that the matters set forth in ¶ 14 of the DOJ's SMF are not supported by the record; the USAO for the Eastern District of Pennsylvania ("USAO-EDPA") affirms that some USAO-EDPA Assistant U.S. Attorneys began entering § 2703(d) orders in CASEVIEW as a means to track deadlines. Declaration of Thomas R. Perricone ("Perricone Decl."), ¶ 3; EPIC also submits that the fact that the USAO-EDPA does not "track" certain information is not material.

15. EPIC submits that the matters set forth in ¶ 15 of the DOJ's SMF are not supported by the record because the Declaration of Christopher J. Wilson does not establish that a search

would be “unduly burdensome;” EPIC also submits that whether or not a hypothetical search would be “incomplete” is not material.

16. EPIC submits that the matters set forth in ¶ 16 of the DOJ’s SMF are not supported by the record because the Declaration of David Leshner does not establish that a search would be “unduly burdensome;” EPIC also submits that whether or not a hypothetical search would be “incomplete” is not material.

17. EPIC submits that the matters set forth in ¶ 17 of the DOJ’s SMF are not supported by the record because the Declaration of Thomas R. Perricone does not establish that a search would be “unduly burdensome;” EPIC also submits that whether or not a hypothetical search would be “incomplete” is not material.

18. EPIC submits that the matters set forth in ¶ 18 of the DOJ’s SMF are not supported by the record; the Declaration filed by Mr. John W. Kornmeier is not sufficiently detailed to establish that a search for information responsive to EPIC’s request across 94 USAOs would be “unduly burdensome.”

19. EPIC submits that the matters set forth in ¶ 19 of the DOJ’s SMF are not supported by the record; EPIC also submits that many of the surveillance orders in the United States District Court for the District of Columbia are periodically unsealed and the records can be located by the USAO-DC. Declaration of T. Patrick Martin (“Martin Decl.”), ¶ 6.

20. EPIC submits that ¶¶ 20 of the DOJ’s SMF constitutes a legal conclusion, which EPIC disputes.

21. EPIC submits that ¶¶ 21 of the DOJ’s SMF constitutes a legal conclusion, which EPIC disputes.

22. EPIC submits that the matters set forth in ¶ 22 of DOJ's SMF are not supported by the record because the EOUSA's responses do not qualify as an agency determination.

23. The DOJ has a policy of not conducting an electronic keyword or advanced search of shared network drives for records that it acknowledges should exist due to the configuration of its networks. *See* Leshner Decl., ¶ 8; Declaration of John M. McEnany ("McEnany Decl.
), ¶ 6; Martin Decl., ¶ 5; Perricone Decl., ¶¶ 5–6.

24. The DOJ has a policy of not manually reviewing case files for § 2703(d) orders. *See* McEnany Decl., ¶ 7; Martin Decl., ¶ 4; Perricone Decl., ¶ 4; Wilson Decl., ¶¶ 9–10, 12; Leshner Decl., ¶¶ 5–6.

25. The DOJ has a policy of not searching its CASEVIEW database for information that is not already "indexed" or "tracked" by the database. *See* Declaration of John W. Kornmeier ("Kornmeier Decl."), ¶ 6–7; Perricone Decl., ¶ 3; Martin Decl., ¶ 3.

26. The DOJ has a policy of not conducting an electronic search of its email archives through either USAMail Archive or its users' Personal Archive Folders. McEnany Decl., 6(d).

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