UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREEDOM OF THE PRESS FOUNDATION and KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, Plaintiffs, v. DEPARTMENT OF JUSTICE, NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, and OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, Defendants.	No. 1:17-cv-9343-JGK

REPLY TO SUPPLEMENTAL DECLARATION OF MICHAEL G. SEIDEL

Pursuant to this Court's September 28, 2020 Order, ECF No. 64, Plaintiffs submit the following reply to the Supplemental Declaration of Michael G. Seidel, ECF No. 65. The Supplemental Declaration is silent as to three key aspects of the FBI's search, and without that information, it remains unclear whether the FBI carried out an adequate search.

First, the Supplemental Declaration does not state whether the custodians would have had requisite knowledge of the entire time period covered by Plaintiffs' request, which seeks responsive records dating back to May 1, 2013. *See* Ex. A at 5–7, ECF No. 26. The Supplemental Declaration makes clear that the identified custodians are those "line-level employees" who are currently "responsible for NSLs." ECF No. 65 ¶ 3. These individuals, based on their own "work history relevant to the operative request," searched their own "work documents." *Id.* However, the Supplemental Declaration does not indicate how long the line-

level employees have served in their present capacities. If those individuals were not the relevant contact points for the entire period dating back to May 1, 2013, the search would have been incomplete and thus inadequate. *See Nat'l Day Laborer Org. Network v. U.S. Immigr. & Customs Enf't Agency*, 877 F. Supp. 2d 87, 101–02, 112 (S.D.N.Y. 2012) (requiring search of former employees' files for responsive records not included in previous search).

Second, the Supplemental Declaration does not state that the custodians searched all places where responsive records were reasonably likely to be stored. In conspiculously uncertain language, the declaration states that the line-level employees were "likely to have access" to information concerning the request, and that they "*would have access* to any responsive requests for NSLs," ECF No. 65 ¶ 3 (emphasis added), but it does not state that these employees actually searched all places to which they had access. Instead, it states that the employees searched only "within their work documents," *id.*, without explaining whether those "work documents" would have contained all possible responsive records. Because the Supplemental Declaration leaves open the distinct possibility that these requests are stored elsewhere, the FBI has not shown that its search was adequate.

Third, and respectfully, the Supplemental Declaration does not sufficiently address the failure of Mr. Seidel's earlier declaration to explain the particular search methods the custodians used, including what search terms they employed. *See* Pls.' Br. 19; Pls.' Reply 6–7. Review of these terms is critical, because even if the FBI identified the proper custodians, their inadvertent choice of underinclusive search terms or the restrictive combination of terms could exclude responsive records and render the search inadequate. *See Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 107–08 (noting that even simple spelling mistakes in search terms or the use of the

wrong "Boolean operator" in computer searches can have "major consequences"); *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 331, 335 (S.D.N.Y. 2011).

For the reasons set forth herein and in Plaintiffs' prior briefing, Plaintiffs respectfully request that the Court require the FBI to provide the above-described information.

Date: October 1, 2020

/s/ *Anna Diakun*

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