



requests two orders from this court: one requiring the federal defendants in this case to produce the requested documents, and the other directing the state crime laboratory in Bismarck, North Dakota to provide him with the requested DNA records.<sup>1</sup> *See id.* at 7. Moore asserts that the DNA records he seeks are maintained in the FBI's National DNA Index System. *See* Pl.'s Motion for Order to Grant Appropriate Relief at 2. Moore has not definitively established that he is the person whose genetic material or genetic profile are the subject of the record identifiers he has provided.

The FBI maintains a National DNA Index System ("NDIS") that is "a national storage medium" consisting of "a system of DNA records uploaded by federal, state, and local criminal justice agencies."<sup>2</sup> Defendants' Response to Order to Show Cause and Renewed Motion for Summary Judgment ("Defs.' Mot. for Summ. J."), Second Declaration of Robert Fram, May 13, 2009 ("Fram Decl.") ¶¶ 4, 10. The NDIS itself does not contain individuals' names or any other personal identifier that would allow the records in the NDIS to be identified with a specific person. *Id.* ¶¶ 4, 5, 23, 24. In short, the NDIS cannot be searched by an individual's name or some other personal identifier for DNA records. *Id.* In order to link a record in the NDIS to any individual, a different database must be used, *id.* ¶¶ 5, 12, which for ease of reference here will be termed a link-database. The FBI maintains such a link-database for federal offenders only,

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<sup>1</sup> This court is without jurisdiction to order the State of North Dakota's crime lab to release documents under its control to Moore.

<sup>2</sup> The Circuit opinion notes that the defendants "did not search" the "Combined DNA Index System ("CODIS")." Order, *Moore v. National DNA Index System et al.*, App. No. 08-5001 (D.C. Cir. Nov. 18, 2008) (unpublished). The defendants' declaration, however, establishes that the CODIS is not itself a database but rather is a software program that searches the NDIS database. *See* Fram Decl. ¶¶ 6, 11.

called the Sample Tracking and Control System, (“STaCS”). *Id.* ¶ 12. The defendants have searched STaCS for Moore’s name and other personal identifiers, and found no responsive records. *Id.* ¶ 13.

The defendants do not maintain and do not have access to either state or local link-databases. *Id.* ¶¶ 12, 24, 25. Thus, if a person who is a state or local offender, but who is not also a federal convict, has a DNA profile in NDIS, the FBI has no means of identifying that person’s DNA records. *Id.* Furthermore, the FBI has no means of confirming that a specific record belongs to a specific person. *Id.*

## II. DISCUSSION

### A. Legal Standards Applied

Under Rule 56 of the Federal Rules of Civil Procedure, a motion for summary judgment must be granted if the pleadings and evidence on file show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering whether there is a triable issue of fact, a court must draw all reasonable inferences in favor of the non-moving party. *Id.* at 255. The party opposing a motion for summary judgment, however, “may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *id.* at 248, that would permit a reasonable jury to find in his favor, *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987). The non-moving party must do more than simply “show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Moreover, “any factual assertions in the movant’s affidavits will be accepted as being true unless [the opposing

party] submits his own affidavits or other documentary evidence contradicting the assertion.”

*Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir.1992) (quoting *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir.1982)).

In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that it conducted a search of records in its custody or control, *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 150-51 (1980), that was reasonably calculated to uncover all relevant information, *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984), which either has been released to the requestor or is exempt from disclosure, *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 833 (D.C. Cir. 2001). To show that its search “us[ed] methods which can be reasonably expected to produce the information requested,” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *see also Campbell v. United States Dep’t of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998), the agency may submit affidavits or declarations that explain in reasonable detail and in a nonconclusory fashion the scope and method of the search, *Perry v. Block*, 684 F.2d 121, 126 (D.C. Cir. 1982). In the absence of contrary evidence, such affidavits or declarations are sufficient to demonstrate an agency’s compliance with the FOIA. *Perry*, 684 F.2d at 127. A search need not be exhaustive, *Miller v. United States Dep’t of State*, 779 F.2d 1378, 1383 (8th Cir. 1985), and the adequacy of a search is not determined by its results, but by the method of the search itself, *Weisberg*, 745 F.2d at 1485. An agency’s failure to find a particular document does not necessarily indicate that its search was inadequate. *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004); *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995).

## B. Analysis

Moore, a state convict, has asked for DNA records related to himself. The FBI can identify DNA records only for federal convicts. On the chance that records pertaining to Moore might be in STaCS, the federal link-database, the defendants searched it. As expected, there were no responsive documents. Fram Decl. ¶¶ 12–13.

The FBI cannot determine which records in the NDIS relate to a particular state convict. In other words, it is not possible for the defendants to identify records in the NDIS that are responsive to Moore’s request for DNA records about himself. Therefore, both a futile search and not searching are methods equally reasonably calculated to uncover responsive documents. The defendants have not searched the record systems they control for which it is impossible to identify records related to Moore. *Id.* ¶ 14. Under these circumstances — where a search for records related to Moore is, by design, literally impossible for the defendants to conduct<sup>3</sup> — not searching satisfies the FOIA requirement of conducting a search that is reasonably calculated to uncover responsive documents.

Moore’s request is also one for specific records, that is, records associated with a specific laboratory number and a specific DNA profile ID number. But, the FOIA would allow Moore access to those records *only* if the records relate to him and not to someone else. *See* 5 U. S. C. §§ 522(b)(6) (exempting from disclosure under the FOIA records that pertain to individuals, the “disclosure of which would constitute a clearly unwarranted invasion of personal privacy”), (b)(7)(C) (exempting from disclosure under the FOIA records “compiled for law enforcement

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<sup>3</sup> That the very design of the NDIS makes such a search impossible is a testament to the government’s well-placed concerns for the personal privacy of any individual whose DNA records are stored in the NDIS.

purposes” that “could reasonably be expected to constitute an unwarranted invasion of personal privacy”). Here, Moore has not offered definitive evidence that the records he identifies by number are related to him and not to someone else. *See* Fram Decl. ¶ 26 (stating that the Laboratory Report Moore claims is related to his DNA does not establish that the report is in fact related to Moore’s DNA). Even if Moore averred that the records relate to him and not to someone else, the defendants cannot verify the accuracy of such an averment. Thus, the defendants are not at liberty when responding to Moore’s FOIA request to disclose the specific records he requested, but which they cannot verify do not belong to someone else.

Moreover, even if the defendants could either link Moore to particular DNA records in the NDIS or confirm that the specific DNA records Moore has identified by number pertain to him and not to someone else, the law expressly forbids disclosure of the NDIS records under the FOIA. *See* 42 U.S.C. § 14132(b)(3) (forbidding release of records stored in NDIS except under four enumerated circumstances, none of which apply to this FOIA request). While one of the four circumstances permits disclosure of DNA samples in the NDIS “for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged,” 42 U.S.C. §14132(b)(3)(C), plaintiff Moore is not a criminal defendant in this action before this court, as defendants correctly note,<sup>4</sup> *see* Defs.’

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<sup>4</sup> As defendants have noted “[t]he DNA information to which plaintiff seeks access is in the control of the authorized state laboratory, which uploaded the profile. In this case, the most likely laboratory is the Fargo North Dakota Crime Laboratory. That is why in my previous declaration, the FBI encouraged plaintiff to contact the Fargo, North Dakota Crime Laboratory directly, so that he may obtain instructions on how to access his record (North Dakota Office of Attorney General, Crime Laboratory Division, 2635 E. Main Ave., Bismarck, ND 58502 – 0937).” Fram Decl. ¶ 28.

