NO. 13-50912

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES LUTCHER NEGLEY,

***Plaintiff-Appellant*,**

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Texas
San Antonio Division

BRIEF FOR PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

James Lutcher Negley v. Federal Bureau of Investigation

No. 13-50912

The undersigned counsel of record certify that the persons having an interest in the outcome of this case are those listed below.

1. JAMES LUTCHER NEGLEY, Plaintiff-Appellant;

2. JOHN F. CARROLL, Attorney at Law, Counsel for Plaintiff-Appellant in the District Court and Before the Court of Appeals;

3. FEDERAL BUREAU OF INVESTIGATION, Defendant-Appellant;

4. ROBERT SHAW MEADOW, Assistant United States Attorney, Western District of Texas, Counsel for Defendant-Appellant;

5. THE HONORABLE ORLANDO GARCIA, United States District Judge, Western District of Texas, San Antonio Division, Judge in the United States District Court proceedings.

This certificate is made so that the Judges of this Court may evaluate possible disqualifications or recusal.

/s/ John F. Carroll
JOHN F. CARROLL
Attorney for Plaintiff–Appellant

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. Oral argument will aid this Court in reaching a decision on this Appeal and, thus, Counsel for Mr. Negley is requesting an opportunity to present the same to this Court. Appellant submits that oral argument will be helpful despite the fact that this is an appeal from an order granting a motion for summary judgment. There is an issue regarding the proper burden/standard of review for application by the District Court in FOIA cases and issues that are fact intensive.

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STATEMENT OF JURISDICTION

The United States District Court had jurisdiction of this case filed pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. 28 U.S.C. § 1331. This Court has jurisdiction of this appeal from the final Order Granting Defendant's Motion for Summary Judgment, dated July 31, 2013 (Appeal Record Vol. 3, p. 929), and the Judgment in a Civil Action, dated July 31, 2013 (App. Rec. Vol. 3, p. 940), of the United States District Court for the Western District of Texas, San Antonio Division, pursuant to 28 U.S.C. §§ 1291. Notice of Appeal was timely filed pursuant to Rule 4 of the Federal Rules of Appellate Procedure on September 27, 2013(App. Record Vol. 3, p. 990).

STATEMENT OF THE ISSUES

1. Whether the FBI conducted a reasonable search for documents where there was no follow up on a handwritten notation that may have referenced the existence of other documents?

2. Whether the FBI conducted a reasonable search where a law enforcement privilege was asserted (in a case where the FBI denied there were more investigative files) and then claimed to be withdrawn?

3. Whether the District Court applied the correct burden of proof in addressing the adequacy and reasonableness of the FBI search for documents?

4. Whether a prior judgment in a different FOIA lawsuit over a different FOIA request was res judicata as to the instant case?

5. Whether the District Court should have permitted certain limited discovery in a FOIA case prior to granting a summary judgment?

STATEMENT OF THE CASE

Plaintiff-Appellant, James Lutcher Negley ("Negley") filed a Complaint for Relief under the Freedom of Information Act on April 18, 2012 (App. Rec. Vol. 1, p. 8) . The FBI suggested that it needed a certain amount of time in which to complete production of responsive information and to move for summary judgment. (App. Rec. Vol. 1, p. 52) Negley submitted certain discovery requests to the FBI. The FBI objected to the requests and filed a Motion for Protective Order (App. Rec. Vol. 1, p. 61) , which was granted. (App. Rec. Vol. 1, p. 164). A Motion for Reconsideration of the Order was denied. (App. Rec. 3, p. 927) On July 31, 2013 the District Court granted the FBI's Motion for Summary Judgment.(App. Rec. 3, p.929) A Clerk's Judgment in favor of the FBI was entered the same day. (App. Rec.3, p.940) Notice of Appeal was timely filed on September 27, 2013 (App. Rec. 3, p. 990).

STATEMENT OF FACTS

On September 19, 1995, James L. Negley traveled to Chico, California to check on his almond orchard of approximately 150 acres. He invested in the orchard in 1984. This is an ongoing operation. Negley was curious about the Unabomber's Manifesto recently published by the Washington Post and tried to purchase the newspaper from

two different bookstores. Neither bookstore carried the newspaper. One bookstore employee directed Negley to the Chico State University library to find the article. Upon arriving at the library in the early evening, a librarian informed Negley that there was no copy of the Washington Post at the library as it was to arrive the following day from Sacramento. Negley offered the library attendant $20 to copy the manifesto and put it in his inbox at the Holiday Inn. The librarian said the money was not necessary, that she would do it anyway. Negley left the library, ate dinner, returned to the Holiday Inn and went to bed.

Just before midnight, the telephone rang and woke Negley up. A voice on the other end identified himself as an FBI agent and asked him to come down to the lobby for questioning notifying Negley that he was a possible Unabomber suspect. Mr. Negley voluntarily met with FBI agents and answered their questions. It was apparent that Mr. Negley had nothing to do with the Unabomber case.

Since the late 1990's, Mr. Negley has been seeking information relating to him held by the Federal Bureau of Investigation. In that regard he has made certain requests under the Freedom of Information Act ("FOIA"). On two previous occasions he has filed complaints under the provisions of FOIA seeking to compel the FBI to comply with the FOIA requirements. The first instance was in 1999 when he filed suit to enforce his request for records from the Sacramento field Office.(App. Rec. 1, pp. 316-

317, Case No. A-01-CA-057JRN). The second instance was in 2003 when he filed suit in Washington D.C. seeking records in response to a separate FOIA request for records from the San Francisco field office. *Negley v. FBI*, 825 F. Supp. 2d 63 (D.D.C. 2011). One of the issues that arose in that case was the scope of the request to which the FBI was required to respond. The FBI successfully took the position that it was not required to include in its production, any records created after the April 2002 date of the request. *Id*. at 70-71. The instant lawsuit was filed after Mr. Negley made a request in 2009 for all files relating to him held by the FBI. The 2009 request was, in part, a response to the limitations found by the Court on the scope of the April 2002 request.

As for the instant case, by letter dated June 15, 2009, Negley, through authorized counsel, requested that the FBI "provide a copy of all records in the possession of the Federal Bureau of Investigation relating, in any way, to James Lutcher Negley (date of birth and address redacted), to the undersigned....This request includes all records related to any permutation of James Lutcher Negley's name, as well as his business-Davis, Joseph & Negley (591 Redwood Highway, Suite 2155, Mill Valley, CA 94941) (App. Rec. Vol. 2, p. 753)

One year and one month after the submission of the 2009 FOIA request, the FBI issued its first release of documents, stating that it had reviewed 825 pages and that 716 pages were being released. (App. Rec. 1, p. 394) The FBI further notified Mr. Negley

that 3000 pages remained to be processed, for a total of 3,825 pages. A second release of documents stating that 1457 pages had been reviewed and 1,430 released, was made on December 16, 2010. (App. Rec. 1, p. 398) After the 1,457 pages referenced in the December 16, 2010 letter, there remained 1,543 additional pages to be processed.

After that release, no further documents were produced. Correspondence indicates that the FBI had stopped processing the request for non payment of $143.00 in copying charges. (App. Rec. 1, p. 406) The correspondence further shows a misunderstanding as Mr. Negley's counsel had previously written to the FBI stating that the funds had been paid. (App. Rec. 1, p. 402) In order to resolve the issue, Mr. Negley forwarded the requested payment on August 29, 2011. (App. Rec. 2, p. 408) No further production of records in response to the 2009 request was received by Mr. Negley. Mr. Negley waited approximately 8 months without receiving an additional disclosure. He filed the instant lawsuit on April 28, 2013. (App. Rec. 1, p. 8) After the lawsuit was filed, the FBI began further production on August 31, 2012. (App. Rec. 2, p. 415)

Negley filed the instant Complaint in response to the lack of a timely response to his June 2009 request. The FBI's lack of a timely response was all the more egregious when viewed in light of its representations in the prior D.C. District Court FOIA lawsuit, *Negley v. FBI*, Case No. 03-2126(GK). This case is referred to by the

FBI in the District Court as *Negley II.* The FBI represented to the District Court in that case, on May 2, 2011, in its Motion for Summary Judgment that the records responsive to the 2009 request (which are the subject of the instant case) had been located and collected for processing and release:

V. PLAINTIFF'S 2009 FOIA REQUEST

By letter dated June 15, 2009, Plaintiff submitted a FOIA request for "all records in the possession of the Federal Bureau of Investigation relating, in any way, to James Lutcher Negley (D.O.B. [ ]/[ ]/[ ]: 3905 Laguna Vista Cove, Austin, Texas 78746)." *See* Eighth Declaration of David M. Hardy ("Eighth Hardy Decl.") Ex. A. Three serials were from Plaintiff's prior FOIA/FOIPA requests to the Miami, Los Angeles and San Antonio field offices. The fourth was a serial found not to concern Plaintiff. Seventh Hardy Decl. ¶ 39(b). Plaintiff stated that "[t]his request includes all records related to any permutation of James Lutcher Negley's name, as well as his business – Davis, Joseph & Negley (591 Redwood Highway, Suite 2155, Mill Valley, CA 94941)." *Id.* The FBI conducted searches in response to Plaintiff's June 15, 2009 FOIA request at the same time that it was conducting the additional searches in response to the Court's September 24, 2009 Order. *Id.* ¶ *14.* The FBI applied a search cut-off date of June 24, 2009 to determine which records would be deemed responsive to Plaintiff's 2009 request, *Id.* ¶ 13, but did not impose a temporal limitation on the searches themselves. Although some searches were conducted for Plaintiff's 2009 request prior to the issuance of the Court's September 24, 2009 Order, all searches performed after the issuance of the Court's Order were conducted to find records responsive to both Plaintiff's 2002 and 2009 requests. *Id.* ¶ 14. The searches conducted in response to Plaintiff's 2009 request and the Court's Order did not located any responsive FBI investigatory records that had not been previously released to Plaintiff. *Id.* ¶ 16. The only records discovered that had not previously been released to Plaintiff were "administrative" type files that are typically not processed as part of a FOIA request because most requestors typically do not want a copy of their request and in fact object to paying for it. *Id.;* Def.'s Ex. 3 at 27:19-28:21. In response to Plaintiff's June 15, 2009 FOIA request, on November 30, 2009, the FBI sent a letter to Plaintiff's counsel inquiring whether Plaintiff wished to "receive copies of his prior FOIA/PA request files, a copy of one serial in an Office of Professional Responsibility general file

pertaining to his letter to Director Mueller, a copy of the litigation file related to Mr. Negley's prior lawsuit in the Western District of Texas, and two serials within a control file concerning the Congressional Inquiry he previously made," as well as "the materials he previously received in response to his prior FOIA/PA requests." *See* Eighth Hardy Decl. ¶ 17 & Ex. E. The FBI explained that it "does not routinely process this type of material unless it is specifically requested." *Id.* Plaintiff did not respond to the FBI. *See* Def.'s Ex. 3 at 127:22-128:10. On January 8, 2010, the FBI sent a follow-up letter advising Plaintiff that it was still awaiting a response as to whether he wished to obtain the records described in the November 30, 2009 letter. *See* Eighth Hardy Decl. ¶ 18 & Ex. F. Plaintiff again did not respond to the FBI. *See* Eighth Hardy Decl. ¶ 19. Despite the fact that Plaintiff failed to respond to either of the FBI's two inquiries regarding whether Plaintiff wished to receive the administrative and litigation files referred to in the November 30, 2009 letter, the FBI nevertheless collected these administrative and litigation files for processing and release. *Id.* ¶¶ 17-22.(emphasis added).

Negley II Document # 116, FBI's Motion for Summary Judgment and Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, Pages 7-9 (App. Rec. 3, pp. 785-787).

That reference appears to state that the records responsive to the 2009 FOIA request had been located, collected and were ready for processing and release. Yet, after the first two disclosures, and after making the requested payment for copies, no further action was taken by the FBI until after this FOIA lawsuit was filed in April of 2012. The Government's completed response is shown by the timeline set forth below (App. Rec. Vol. 2, pp. 753-754):

Date	Event
July 20, 2010	FBI gave notice it had reviewed 825 pages and that 716 pages were being released. An estimated 3000 pages remained to be processed. App. Rec. 1, p. 394.
December 16, 2010	FBI gave notice that 1457 pages had been reviewed and 1430 pages were being released. This left an estimated 1543 pages to be processed. App. Rec. 1, p. 398.
April 18, 2012	Plaintiff's FOIA Complaint filed in instant case. App. Rec. 1, p. 8.
July 17, 2012	FBI revises responsive documents estimate-now 7450 documents may be responsive to the request. App. Rec. 1, p. 52, Defendant's Unopposed Motion to Extend Scheduling Order Deadlines, p. 1.
August 31, 2012	FBI gave notice that 1020 pages were reviewed and 878 pages were released. App. Rec. 2, p. 415.
September 25, 2012	FBI gave notice that 924 pages were reviewed and 836 pages were released. App. Rec. 2, p. 419.
November 6, 2012	FBI gave notice that 1100 pages were reviewed and 1007 pages were released. App. Rec. 2, p. 423.
November 30, 2012	FBI gave notice that 878 pages were reviewed and 685 pages were released. App. Rec. 2, p. 427
December 28, 2012	FBI gave notice that 1201 pages were reviewed and 1030 were released. FBI stated that this was the final release of documents. App. Rec. 2, p. 431.
March 18, 2013	21 pages of documents are disclosed to Mr. Negley's D.C. counsel from the Executive Office for U.S. Attorneys. App. Rec. 1, p. 200; App. Rec. 2, p. 679.
April 23, 2013	A more expansive disclosure of 77 pages is made by the EOUSA to John Carroll, Mr. Negley's San Antonio counsel. App. Rec. 2, p. 681.

May 6, 2013	Notice included with Motion for Summary Judgment of 22 pages reviewed and 17 pages released. App. Rec. 2, p. 435.

Appellant raised objections to the adequacy of the search including that:

a. Only in March 2013, had there been a disclosure of a document containing a handwritten notation indicating the possibility of additional records. The FBI dismissed, rather the investigate, the potential significance of the notations;

b. After invoking the provisions of a law enforcement records exemption set forth in the Privacy Act throughout each disclosure of records in this matter, the FBI now states that no records were withheld under the exemption.

(App. Rec. 2, p. 749)

Negley served on the FBI, the "Plaintiff's First Requests for Admission and Requests for Production to Defendant Federal Bureau of Investigation". They consisted of twenty requests for admission of facts and nineteen conditional requests for production of documents related to each of the first nineteen requests for admission. (App. Rec. 1, p. 72) The District Court granted the Government's Motion for Protective Order (App. Rec. 1, p. 164) and denied a later request for reconsideration after production of information by the FBI in response to the FOIA request. (App. Rec. 3, p. 927)

SUMMARY OF THE ARGUMENT

Appellant submitted a broad request under FOIA for all records that may relate to him. The District Court granted the FBI's motion for summary judgment despite irregularities which called into question the adequacy of the FBI's search for information. The District Court should have considered Appellant's objections to the adequacy of the search in making its initial determination of whether the agency had carried its burden of showing an adequate search. Instead, the District Court applied a standard on summary judgment requiring that Appellant show bad faith on the part of the FBI with respect to his objections to the adequacy of the search in order to defeat the summary judgment motion. The bad faith standard was applied to objections to the adequacy of the FBI search including the failure to follow up on a handwritten notation that may suggest the existence of additional documents and the withdrawal of an invoked exemption for law enforcement investigative materials in a case where the FBI claimed there were no law enforcement investigative materials that had not been disclosed. Appellant questioned why the privilege was ever invoked in the first place. That bad faith standard should not have been applied as the Appellant's objections went to the threshold issue of whether the agency had conducted an adequate search.

Under the facts of this case the District Court should have allowed Appellant to submit certain discovery requests to the FBI.

ARGUMENT AND AUTHORITIES

I. Issues Relating to Adequacy of the Search for Information and Granting of Summary Judgment: Issues for Review 1-4

a. Standard of Review

Summary judgment in favor of the defending agency is appropriate where the agency can meet its burden of proving that it has "conducted a search reasonably calculated to uncover all relevant documents. " *Weisberg v. United States Dept. Of Justice*, 705 F. 2d 1344, 1351(D.C. Cir. 1983). The agency must show that the search was reasonable, not that it was exhaustive or that every document has been located. *Miller v. United Sates Department of State*, 779 F. 2d 1378, 1383 (8th Cir. 1985). Summary judgment is inappropriate where the agency's response raises serious doubts as to the completeness of the agency's search, where the agency's response is patently incomplete, or where the agency's response is for some other reason unsatisfactory. *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency*, 877 F. Supp. 2d 87, 96 (S.D.N.Y. 2012). When an agency has not satisfied its burden, a showing of bad faith is not necessary in order to defeat a motion for summary judgment. Id at 96. The District Court concluded that the FBI had met its burden of showing an adequate search under FOIA (App. Rec. 3, pp. 933-934) and that Plaintiff failed to carry his burden of showing bad faith on the part of the FBI.

(App. Rec. 3, p. 934) There are a number of facts that raise substantial questions about the adequacy of the FBI's search for records and production of records in this case which questions preclude summary judgment.

a. Only in March 2013, has there been a disclosure of a document containing a handwritten notation indicating the possibility of additional records. The FBI has dismissed, rather the investigate, the potential significance of the notations;
b. After invoking the provisions of a law enforcement records exemption set forth in the Privacy Act throughout each disclosure of records in this matter, the FBI now states that no records were withheld under the exemption;
c. The District Court misapplied the bad faith burden of proof to the threshold question of the adequacy of the search for documents.

d. The FBI claim of res judicata based on *Negley II* is misplaced.

1. **Issue for Review No. 1: March 2013 Disclosure of EOUSA records reference possible existence of additional pages**

A. Facts Pertinent to Issue

On March 18, 2013, Mr. Prashant K. Khetan, an attorney acting on behalf of Mr. Negley, received a FOIA disclosure from the United States Department of Justice. The response disclosed 21 pages of documents with redactions. (App. Rec. 2, p. 679) Then, on April 23, 12013, John F. Carroll received a disclosure from the same office in Washington indicating that it was revised from March 18, 2013, release, disclosing 77 pages of documents and indicating that 18 pages were being released in part. (App.

Rec. 2, p. 681)

One of the pages from that production raised additional questions about the volume of records held which relate in any way to Mr. Negley. Specifically, the page numbered Negley-437-FOIPA. (App. Rec. 2, p. 690) That document is a fax cover sheet dated January 22, 2002, and apparently faxed on that same date according to the fax legend. Curiously, there is a handwritten notation that is dated 1/17/02. It is not understood how a handwritten note could have been made on January 17, 2002 on a document that was not created until January 22, 2002. Appellant inquired as to the genuineness of the notation but did not received a response to said inquiry. (App. Rec. 3, p. 815) After the date, the handwritten notation appears to state: "case is still pending 500,000 pp in file (or it could read "info 6") 42,000 misc(appears to be misc) evidence". (App. Rec. 2, p. 690)

The 77 pages of documents produced came from the Justice Department and, specifically, from the Executive Office for United States Attorneys in Washington, D.C.("EOUSA") The FBI has stated that the documents were in its possession and were referred to the EOUSA for its review and determination as to release because they were documents from a U.S. Attorney's Office. (App. Rec. 1, pp. 374-375) . The notations on page Negley-437-FOIPA appear to refer to numerous documents, as many as 542,000 pages. This revelation suggests that the FBI's identification of 7406 pages as

responsive may be in error.

If the notation on page Negley-437-FOIPA is correct, Appellant may reasonably inquire whether in 2002, the file regarding him totaled 42,000 pages, or even 542,000 pages. If that is the case, then the production of information by the Department of Justice in response to Appellant's FOIA requests up to the present has been inadequate and the FBI has not made an adequate search for documents and records. The FBI did not indicate what the notation meant or to what it referred. (App. Rec. 1, p. 375) Rather, the FBI merely states that the reference cannot be to records about Negley because the search did not reveal a file of that size.(App. Rec. 1, p. 375-376) The FBI presumes that the notes were made by an FBI employee. (App. Rec. 1, p. 375) However, there is no reference to any effort to determine who the employee may have been. Appellant complained that the failure to follow up and take steps to investigate the reason for the notation shows that the FBI did not conduct an adequate search.

B. District Court Treatment of Issue

The District Court held that the explanation provided by the FBI was sufficient, citing the Hardy declaration's statement that the "investigation of Plaintiff only took place in 1995 and was thereafter dismissed." (App. Rec. 3, p. 934) and that there were only 163 pages produced in the investigation..." (App. Rec. 3, p. 934). The District Court relied on the principle that the information in a defendant's declaration cannot

be rebutted by purely speculative claims about the existence of other documents (App. Rec. 3, p. 934).

C. Argument and Authorities

In this case the FBI did submit a declaration describing a search of databases and sources. The Court found that the search was adequate. Under *Batton v. Evers*, 598 F. 3d 169, (5th Cir. 2010) such a search appearing reasonably calculated to yield responsive documents in response to a FOIA request to the IRS was found to be adequate. However, in the instant case there was specific information that came to the attention of the FBI during the time that it was conducting its search that it chose not to pursue. The FBI relied on its search and did not pursue reasonable measures to seek an explanation for the notations.

An explanation for the notations could be found by determining where the document was maintained, and which personnel had access to or responsibility for custody of such a record. In addition, inquiry could be made to the United States Attorney's office, the original generator of the document, to determine what knowledge its personnel, including Mr. Daniel M. Castillo, the stated sender of the facsimile transmission page on which the notes appear, may have regarding the notation and its basis. Inquiry could also be made to the Chief Division Counsel of the Sacramento Division of the FBI, the recipient of the fax transmission from Mr. Castillo. (App. Rec.

2, p. 690) That person's name was redacted from the document prior to its production. These actions could easily be taken without a great deal of effort and a determination made based on the facts, rather than the FBI's mere speculation that these notations refer to the size of the entire UNABOMBER file. (App. Rec. 1, p. 303) Here, the FBI itself engaged in speculation regarding the meaning of the notations. There was not even any evidence to suggest those numbers represented an accurate statement of the size of the UNABOMBER file. The FBI supported the adequacy of its search by speculating as to the meaning of a notation on one of its documents.

Pointing out the possibility that other documents may exist is not mere speculation that can be ignored under FOIA. In *Campbell v. United States Department of Justice*, 164 F. 3d 20 (D.C. Cir. 1998), the court of appeals found that the FBI did not conduct an adequate search. The FBI had searched its Central Records System (CRS), but did not check a separate electronic surveillance (ELSUR) index or "tickler" files, even though documents that the FBI did produce alluded to potentially responsive ELSUR and tickler records. *Id*. at 28. The court stated that an agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested. *Id*. at 28. "An agency has discretion to conduct a standard search in response to a general request, but it must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its

inquiry." *Id*. at 28. The FBI's reasonable assumption that only a CRS review would be necessary became untenable once it discovered information suggesting the existence of documents that it could not locate without expanding the scope of its search. *Id*. at 28. Likewise, in the instant case, upon discovery of the Negley-437- FOIPA document with the notation referring to thousands of pages, the FBI should have taken some reasonable steps to look into the meaning of the notation. In *Campbell*, the court addressed the need to follow even speculative leads:

> The Department also asserts that the existence of ticklers in its archives is "speculative" because ticklers are not generally preserved for posterity and also might not contain information distinct from what the FBI already found within the CRS. IT is true that Campbell has claimed only that a tickler existed at one time, not that it exists today or that it contains unique information. Yet in any FOIA request, the existence of responsive documents is somewhat 'speculative' until the agency has finished looking for them. As the relevance of some records may be more speculative than others, the proper inquiry is whether the requesting party has established a sufficient predicate to justify searching for that particular record. *Id*. at 28.

In light of the belated disclosure of this document, a document that had been discovered by the FBI very early in its review in response to the 2009 FOIA request, it was unreasonable for the FBI to fail to take certain steps to investigate its meaning. It was not reasonable to simply ignore the letter, even in light of the detailed search for documents described in the Declaration submitted by the FBI. The letter disclosed information that was not explained and that may have revealed the existence of

additional documents. The leads that would have to be followed in order to discover the meaning of the notation were simple and, significantly, were available to the FBI. Ignoring those possible leads was not reasonable.

The late revelation of these documents was also not shown to have been handled according to the recommended manner prescribed by the Government's own regulations. The FBI stated in paragraph 5 of the MSJ that the EOUSA documents were originally referred to the EOUSA for processing on January 31, 2013. The FBI states that the referral was made pursuant to 28 C.F.R. § 16.4. That section provides, in part, that an agency possessing a document of another agency should refer the document to the originating agency for a determination of whether the document should be released under FOIA. Although the section does not contain a time limitation, it does not purport to exempt such inter-agency disclosures from the time limits set forth in FOIA. The section does contain a notice provision in paragraph (f) which provides:

> (f) Notice of referral. Whenever a component refers all or any part of the responsibility for responding to a request to another component or agency, it ordinarily shall notify the requester of the referral and inform the requester of the name of each component or agency to which the request has been referred and of the part of the request that has been referred.

The record does not show that such notice was given to Mr. Negley or his

attorneys (except for a form notation in the referral letter that requester's attorney had been notified of the referral, App. Rec. 2, p. 672). The record shows that Appellant learned of the referral when the attorney who represented him in *Negley II* notified him of his receipt of the disclosure of 21 pages from the EOUSA in March 2013. That is not a timely notice given the date that such documents were pulled by the FBI as shown by its own records. The FBI has utilized a document numbering system in this matter sequentially numbering the documents it has reviewed. This is apparent as the documents produced are numbered sequentially, but certain of the page numbers are missing, indicating a withheld document or documents. The EOUSA documents include page numbers between 24 up to 506. They also include numbers 5300, 6104-6131. (App. Rec. 1, pp 374-375) The page number range, from 24 up to 506, is within the pages identified in the first FBI disclosure in response to the 2009 FOIA request which was made on July 16, 2010. (App. Rec. 3, p. 822)The FBI did not satisfactorily explain why it waited 30 and one-half months, from July 16, 2010 to January 31, 2013, to make the referral of documents to the EOUSA. That is an unreasonable delay. The failure to comply with the appropriate procedures established by the agency itself gives further justification for following up on the potential lead suggested by the notations.

D. Request for Relief

Based on the above, Appellant requests that the Court find that the FBI did not

carry its burden of demonstrating an adequate search, reverse the summary judgment entered by the District Court and remand the case to the District Court for further proceedings.

2. Issue for Review No. 2: The withdrawal of the §552a privilege/exemption claim

A. Facts Pertinent to Issue

In response to Plaintiff's 2009 FOIA request and this lawsuit, the FBI has made seven separate disclosures of documents as described above. Each disclosure was accompanied by a letter referencing the production, identifying the number of pages reviewed, produced and withheld and identifying the exemptions used to justify the withholding or redaction of information. The seven disclosure letters are attached to the FBI's MSJ as Exhibits 3-G, 3-H, 3-N, 3-O, 3-P, 3-Q, 3-R. (App. Rec. 1, pp. 394, 398, App. Rec. 2, pp. 415, 419, 423, 427, 431). According to the FBI's disclosures, the FBI had reviewed 7406 pages of documents. It released 5128 pages in full, 1455 in part and withheld 823 pages in full. One of the exemptions claimed by the FBI in justifying the withholding of information is identified in the Privacy Act, 5 U.S.C. §552a(j). This exemption is cited in each of the seven disclosure letters referenced above by the FBI as one of the bases justifying the withholding of information. The FBI has maintained that Appellant has not been the subject of an FBI investigation(separate and apart from

the brief Unabomb Investigation questioning in September 1995) (App. Rec. 1, p. 376). This exemption is not one that applies to administrative matters but rather is used to justify the withholding of law enforcement investigation material. The referenced statutory section, 5 U.S.C. §552a(j), provides:

> **5 USC § 552a**
>
> **(j) General exemptions**
>
> The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (I) if the system of records is–
> (1) maintained by the Central Intelligence Agency; or
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) **information compiled for the purpose of identifying individual criminal offenders and alleged offenders** and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) **information compiled for the purpose of a criminal investigation,** including reports of informants and investigators, and associated with an identifiable individual; or (C) **reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.** (Emphasis added)

The law enforcement investigation and record keeping function identified in §

552a(j) does not seem to be necessary in reference to administrative matters. There was no way for Appellant to determine the basis for the broad use of the law enforcement investigation exemption set forth in § 552a(j). The FBI did not explain why a law enforcement exemption was used and claimed by the FBI for almost 3 years to justify the withholding of what Plaintiff had been led to understand are largely administrative files.

The FBI stated that the 552a(j) exemption was made in error and the FBI would no longer be relying on this exemption. (App. Rec. 1, pp. 233-234, Response to Motion for Reconsideration). However, that does not change the fact that the exemption was cited as a justification by the FBI for the withholding of records in connection with each release of information made by the FBI in response to the 2009 FOIA request. The FBI sought to explain this in the David M. Hardy Declaration, Ex. 3 to FBI MSJ, by stating that the FBI has exempted itself from the provisions of the Privacy Act. (App. Rec. 1, pp. 356-357) The Declaration goes on to state that "[t]he FBI's release letters in this case indicate that section (j)(2) of the Privacy Act was applied to the processed material in this case only to indicate that the records being processed were not accessible under the Privacy Act. No information was withheld under Privacy Act section (j)(2) as it does not relate to redacting information but exempting systems of records." (App. Rec. 1, p. 357) There is no explanation as to why the Privacy Act

provision regarding law enforcement investigation needed to be addressed and referenced in reference to the disclosure of mere administrative materials.

B. District Court Treatment of the Issue

The District Court concluded that this issue was not relevant to the question of an adequate search and that the issue was moot. (App. Rec. 3, p. 936). The Court referenced the declaration that no information was withheld under the Privacy Act exemption (App. Rec. 3, p. 936) and that "the EOUSA released information to Plaintiff after being informed that the Privacy Act exemption was no longer being evoked." (App. Rec. 3, p. 936).

C. Argument and Authorities

However, this does not explain the inconsistency between the Hardy Declaration that no information was withheld vs. the disclosure that stated that such information was actually withheld. The EOUSA release of information was not the result of a decision to reverse the Privacy Act withholding notices.(App. Rec. 1. P. 374, Hardy Declaration explanation of referral of records to EOUSA). The Privacy Act questions do raise the issue of an adequate search because the original invocation suggests that there was law enforcement investigation activity directed toward Appellant that was not subject to disclosure and the FBI apparently was unable to locate any records of such activity. If there was no need to invoke the exemption, it should not have been

invoked in the first place. That explanation does not comport with the statement in each release letter that Privacy Act section (j)(2) was an exemption used to withhold information. Incredibly, the very same Privacy Act exemption was cited in the FOIA Disclosure dated May 6, 2013 and served with the FBI Motion for Summary Judgment. (App. Rec. 2, p. 435) In addition, throughout the interim productions, the FBI restated that the section was used to withhold information on certain Deleted Page Information Sheets that were included within the FBI interim releases of documents indicating the invocation of one or more exemptions. (App. Rec. 2, pp. 821-846)

To qualify for exemption from disclosure under the Privacy Act exemption for a system of records maintained by a law enforcement agency, the system of records must be compiled for the purpose of criminal investigation, must be exempted by duly promulgated regulations issued by the agency claiming exemption, and must be maintained by the agency or a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws. *Stimac v. Department of Treasury, Bureau of Alcohol, Tobacco and Firearms*, 586 F. Supp. 34, 36 (N.D. Ill. 1984).

The Privacy Act exemption is directly relevant to FOIA. Exemption 3 of FOIA bars access under FOIA to information "specifically exempted from disclosure by statute. In *Shapiro v. Drug Enforcement Administration*, 721 F.2d 215, 223 (7th Cir.

1983), *cert. granted*, 466 U.S. 926 (1984), the Seventh Circuit held that Exemption (j)(2) of the Privacy Act, 5 U.S.C. Sec. 552a(j)(2) qualifies as a withholding statute within the meaning of Exemption 3 of FOIA. As a result, any record exempt from disclosure under Privacy Act Exemption (j)(2) is likewise exempt from disclosure under FOIA. This means that the Privacy Act exemption is not something to be taken lightly. It is an important part of the framework for protection of information that Congress (and Government agencies, pursuant to their authority granted by Congress) have determined should not be made public. It follows then that if it was invoked, there was some reason to invoke it.

D. Request for Relief

Based on the above, Appellant requests that the Court find that the FBI did not carry its burden of demonstrating an adequate search, reverse the summary judgment entered by the District Court and remand the case to the District Court for further proceedings.

3. Issue for Review No. 3: Did the District Court Properly Apply the Burden of Proof in Reviewing the Adequacy of the Search for Information

A. Facts Pertinent to Issue

The District Court determined that the FBI Declaration submitted in support of

its Motion for Summary Judgment established the adequacy of the search. (App. Rec. 3, pp. 933-934) Only then did it turn to the objections raised by Appellant as to the adequacy of the search. (App. Rec. 3, p. 934) The District Court examined those objections in light of the high burden requiring a showing of bad faith on the part of the agency. (App. Rec. 3, p. 934) The District Court concluded that Appellant did not meet his burden and that summary judgment in favor of the FBI should be granted. (App. Rec. 3, p. 939)

B. District Court Treatment of the Issue

See description in paragraph A , above.

C. Argument and Authorities

The adequacy of an agency's search for documents under FOIA is judged by a standard of reasonableness and depends on the facts of each case. *Weisberg v. United States Department of Justice*, 745 F. 2d 1476, 1485 (D.C. Cir. 1984) The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents. *Safecard Services, Inc. v. S.E.C.*, 926 F. 2d 1197, 1201 (D.C. Cir. 1991). In order to establish the adequacy of its search, the agency may rely upon affidavits provided they are relatively detailed and nonconclusory, and are submitted by responsible agency officials in good faith. *See e.g. Miller v. United States Department of State*, 779 F. 2d 1378, 1383 (8th Cir. 1985);

Weisberg, 745 at 1485. A satisfactory agency affidavit should, at a minimum, describe in reasonable detail the scope and method by which the search was conducted. *See e.g. Oglesby v. United States Department of the Army*, 920 F. 2d 57, 68 (D.C. Cir. 1990); *Perry v. Block*, 684 F. 2d 121, 127 (D.C. Cir. 1982). The affidavit should additionally "describe at least generally the structure of the agency's file system which makes further search difficult. *Church of Scientology of California v. I.R.S.*, 792 F. 2d 146, 151 (D.C. Cir. 1886)(Scalia, J.).

If an agency fails to establish through reasonably detailed affidavits that its search was reasonable, the FOIA requester may avert summary judgment merely by showing that the agency might have discovered a responsive document had the agency conducted a reasonable search. *Maynard v. CIA*, 986 F. 2d 547, 560 (1st Cir. 1993); *Weisberg v. United States Department of Justice*, 705 F. 2d 1344, 1351 (D.C. Cir. 1983). However, if an agency demonstrates that it has conducted a reasonably thorough search, the FOIA requester can rebut the agency's affidavit only by showing that the agency's search was not made in good faith. *Miller*, 779 F. 2d at 1383. An agency's affidavit is "accorded a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *Safecard Services*, 926 F. 2d at 1200 (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F. 2d 770, 771 (D.D.C. 1981).

As stated above, in this case, the District Court found that the FBI had provided adequate affidavits. Then it turned to Appellant's complaints applying the burden requiring Appellant to show bad faith on the part of the agency. However, the District Court should not have applied that higher burden to the analysis of Appellant's objections. The complaints raised by Appellant were directed toward the adequacy of the search and questioned whether the agency's search was reasonably calculated to discover the requested documents. *See e.g. Safecard Services*, 926 F. 2d at 1201. The question of whether the agency has carried its initial burden of showing an adequate search should be reviewed in light of all the facts of the case. A reasonably calculated search must be reasonable in light of the totality of the circumstances. *Rein v. U.S. Patent & Trademark Office*, 553 F. 3d 353, 364 (4th Cir. 2009). The totality of the circumstances in this case included the objections and irregularities that had been raised by Appellant. The District Court required the Appellant to show agency bad faith. However, the actual burden that should have been applied to Appellant's objections to the adequacy of the search was the initial burden as referenced in the *Maynard* case cited above: summary judgment would be improper upon a mere showing that the agency might have discovered a responsive document had the agency conducted a reasonable search. By determining that the FBI declaration established an adequate search before turning to Appellant's objections, the District Court applied too

stringent a burden of proof. The District Court should not have required Appellant to establish bad faith in order to defeat a summary judgment.

Had the District Court applied the lesser standard from the *Maynard* case to be applied in making the initial determination of whether the search was reasonably thorough under the facts of this particular case, Appellant asserts that summary judgment should not have been granted. The failure to take some minimal reasonable steps to investigate the notation from the EOUSA produced document numbered Negley-FOIPA-437, for example, was not reasonable and failed to foreclose a mere showing that the agency might have discovered a responsive document had it followed that lead. In addition, the withdrawal of the invocation of the Privacy Act exemption relating to criminal investigative materials also leads to questions regarding the threshold adequacy of the search. If there were no criminal investigative records, why did the FBI initially invoke that particular exemption on several occasions throughout the production?

Appellant objects to the application of the bad faith burden of proof to Appellant's Response to Motion for Summary Judgment in this case. The Court should have examined Appellant's objections to the adequacy of the search in determining its adequacy and, in reviewing those objections, the District Court should have denied summary judgment on a mere showing that the agency might have discovered a

responsive document had the agency conducted a reasonable search.

D. Request for Relief

Based on the above, Appellant requests that the Court find that the FBI did not carry its burden of demonstrating an adequate search, reverse the summary judgment entered by the District Court and remand the case to the District Court for further proceedings.

4. Issue for Review No. 4: Res judicata does not apply to the FBI search for documents

A. Facts Pertinent to the Issue

The FBI asserts that "[a]t least with respect to investigative files, the *Negley II* court has definitively ruled that an adequate search for investigatory documents in response to Negley's 2009 FOIA request has already occurred. (App. Rec. 1, p. 303) That is not correct. The issue before the D.C. District Court was a 2002 FOIA request to the San Francisco Field Office seeking a " copy of any records about [him] maintained at and by the FBI in the [San Francisco] field office. *Negley v. FBI*, 825 F. Supp. 2d at 66. The Court did not rule on the adequacy of a search in reference to the 2009 request. In fact, the D.C. District Court's March 11, 2011 Order Denying a Motion for Contempt filed by Negley makes clear that the FBI was only required to search for and produce records responsive to the 2002 request. *Negley v. FBI*, 766 F.

Supp. 2d at 193. The summary judgment also approved the FBI's imposition of a cutoff date for production of records as of 2002. *Negley v. FBI*, 825 F. Supp. 2d at 70-71.

B. District Court Treatment of the Issue

While the District Court stated that it was relying on the evidence submitted and the Hardy Declaration (App. Rec. 3, p. 936) it did indicate that the court in Negley II "held that the FBI has conducted searches that went beyond the 2002 request and held that the 2009 request did not uncover any new investigatory material (App. Rec. 3, p. 937).

C. Argument and Authorities

To the extent that the District Court relied on res judicata as an independent basis for its summary judgment as to the adequacy of the search for records, Appellant asserts that such a conclusion is not proper. The adequacy of a search for records beyond those that were the subject of the 2002 request was not before the district court in *Negley II* and was not examined, reviewed and ruled upon. As such, the FBI cannot rely upon the judgment in *Negley II* to approve its search in reference to the 2009 request. The doctrine of res judicata provides that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). The adequacy of the search in response to the 2009 request was not raised in *Negley*

II. Further, the Court specifically ruled that the 2009 request was not before it. The FBI cannot rely on the judgment in Negley II to support its search in response to the 2009 request.

D. Request for Relief

Based on the above, Appellant requests that the Court find that the FBI did not carry its burden of demonstrating an adequate search, reverse the summary judgment entered by the District Court and remand the case to the District Court for further proceedings.

II. Issue Relating to Discovery Order: Issue for Review 5

a. Standard of Review

Matters relating to discovery are committed to the discretion of the trial court and this Court reviews the district court's decision to deny a discovery request for abuse of discretion. *Freudensprung v. Offshore Technical Services, Inc.*, 379 F. 3d 327, 347 (5th Cir. 2004).

1. Issue for Review No. 5: The District Court Did Not Allow Appellant to Propound Written Discovery

A. Facts Pertinent to Issue

Appellant served on the FBI, the "Plaintiff's First Requests for Admission and Requests for Production to Defendant Federal Bureau of Investigation". They consist

of twenty requests for admission of facts and nineteen conditional requests for production of documents related to each of the first nineteen requests for admission. (App. Rec. 1, p. 72) Contrary to the assertions in the Government's Motion for Protective Order, the discovery requests served by Plaintiff did not constitute an impermissible fishing expedition. The requests were limited and very specific. The requests did not seek to circumvent FOIA, rather, they sought appropriate threshold information necessary to a determination of the issues in this case. The FBI had taken the position that the only documents responsive to Mr. Negley's FOIA request which had not already been produced were administrative in nature. The requests for discovery sought to discover whether there had been any additional investigative type activity regarding Appellant in order to shed light on a simple threshold question: Are there other documents that exist that have not been identified by the FBI as potentially subject to disclosure?

B. District Court Treatment of Issue

The District Court granted a Motion for Protective Order filed by the FBI holding that the FBI was not required to respond to the Discovery Requests. The order stated, in part: "As the Plaintiff's discovery requests are directed at whether investigations were conducted and-assuming they were-whether they produced any records, Plaintiff's discovery requests 'exceed []the limited scope of discovery usually

allowed in a FOIA case concerning factual disputes surrounding the adequacy of the search for documents'". (App. Rec. 1, p. 165) The Court also left open the possibility that the Appellant could seek leave to submit additional discovery requests after the FBI had moved for summary judgment "narrowly tailored to the issues of whether Defendant has conducted an adequate search for responsive documents and, if necessary, regarding the invocation of any privilege. (App. Rec. 1, p. 165). After the FBI had completed its production of documents, Appellant filed a Motion for Reconsideration. (App. Rec. 1. P. 168) That Motion was denied on July 31, 2013, the same day the Motion for Summary Judgment was granted. (App. Rec. 3, p. 927)

C. Argument and Authorities

In *Weisberg v. United States Department of Justice*, 543 F. 2d 308 (D.C. Cir. 1976), the Court addressed the propriety of discovery in FOIA litigation. That case involved a request for certain scientific investigatory data compiled after the death of President Kennedy. In the course of the litigation over the request, the plaintiff made certain demands for production and addressed interrogatories to the Department of Justice. The District Court refused to require the Government to respond to the interrogatories, found that the Government had substantially complied with the plaintiff's demands and granted a motion to dismiss the complaint. *Id.* at 310. The court of appeals recognized that there were some disputes on questions of material fact.

One such issue recognized in the court's opinion was production of final reports of a spectrographic analysis. The FBI claimed it did not have any such reports and that an oral report had been made by an Agent Gallagher who had incorporated the oral report into a comprehensive report to Dallas police which is a public document that had been turned over to Weisberg. The court of appeals recognized however that Agents Gallagher and Frazier, although retired, were both still living, but no testimony or affidavit had been received from them. *Id*. At 310. The court of appeals went on to discuss four more areas of factual dispute. It is important to note that the dispute recognized by the court as being part of the reason to preclude summary judgment was not a questions of two different stories about the same event, rather, the dispute existed because the FBI took a specific position, but had not sought information from readily available sources who could have confirmed or denied the FBI's position. That is similar to the situation in the instant case where there is a notation the meaning of which, neither party can confirm (Negley-437-FOIPA). However, as pointed out by Appellant, the FBI had at its disposal the means to confirm the notation by simply contacting the two parties to the document, the sender and the recipient, both of whom were employed with the Government. Instead, the FBI conducted, in effect, a differential diagnosis, to find, by logic, that there were no more documents because it did not find any. Discovery relating to the agency's search and the exemptions it claims

for withholding records generally is unnecessary if the agency's submissions are adequate on their face, and a district court may forgo discovery and award summary judgment on the basis of submitted affidavits or declarations. *Trentadue v. FBI*, 572 F. 3d 794, 807 (10th Cir. 2009); *Wood v. FBI*, 432 F. 2d 78, 85 (2d Cir. 2005). Appellant contends that the agency's submissions were not adequate and therefore that some discovery should have been permitted.

Before the Government moved for summary judgment, Appellant sought responses to his discovery requests. Appellant did not know the extent to which the FBI had documents that were responsive to his FOIA request. It made sense that, in a lawsuit filed under the Federal Rules of Civil Procedure, that he should have an opportunity to seek discovery, on a limited basis, regarding the threshold question in this lawsuit: does the FBI hold documents that he may be entitled to under FOIA? In his requests for admission, Plaintiff sought very limited information about certain specified activity. Appellant gave the FBI very specific information as to date, location and type of activity which was the subject of the inquiries. (App. Rec. 1, pp. 76-86) These were not detailed interrogatories, but rather, requests to admit or deny certain statements, followed by requests to produce responsive materials.

The Government's Motion for Protective Order revealed that the Government did not know the answers to the questions.: "the Court should not require the FBI...to

survey current and retired agents over the last 17 years to determine if any additional surveillance or investigation was conducted..." (App. Rec. 1, p. 65) That the Government did not know was itself justification for the Government to go through the discovery process and learn the answers to the questions before it could make a representation to the Court and to the Plaintiff that it had no additional, non-administrative documents. As part of its Motion for Protective Order the Government stated that the discovery requests were not supported by any factual basis. Appellant argued that such a showing was not necessary. (App. Rec. 1, p. 127) The District Court did not address the factual basis issue in its Order. (App. Rec. 1, pp. 164-165)

This again raises the question brought up in the issue for review regarding the proper burden of proof. Was it sufficient for the Government agency to conduct a search of its records databases and not take additional steps based on the specific facts of the case? How can the Government make such a representation in good faith if it does not know how to respond to the Requests for Admission? The question presented by the Government's Motion for Protective Order was whether it is sufficient for the Government to rely upon its search of its files in the manner in which the Government determines is appropriate, or, should the Government, when faced with a specific inquiry, take some reasonable steps to answer the inquiry. It is understood that the Government cannot be expected to follow each and every possible lead or area of

inquiry. However, should the Government do more than what was done in the instant case. For example, the final request for admission, which had no follow up request for production, asked simply whether the FBI had withheld any documents from disclosure to Mr. Negley on the basis of the Meese memo. A denial would have ended that inquiry. An affirmative response would suggest that there are additional documents and that an inquiry should be made into the propriety of their withholding. Discovery inquiries into the possible existence of records is also justified in light of the FBI's previous use of the Memorandum from Edwin Meese, III, U.S. Attorney General, on the 1986 Amendments to the Freedom of Information Act to the Executive Departments and Agencies (Dec. 1987)("Meese Memo") in withholding documents otherwise subject to disclosure. Request for Admission 20 asks:

> Admit or Deny that, in responding to requests from James L. Negley under the Freedom of Information Act, the Federal Bureau of Investigation has withheld records from James L. Negley or has refused to acknowledge the existence of records, in reliance upon the Memorandum from Edwin Meese, III, U.S. Attorney General, on the 1986 Amendments to the Freedom of Information Act to the Executive Departments and Agencies (Dec. 1987).

The Meese Memo set forth a framework whereby a Government agency could deny the existence of a document that did in fact exist in response to a FOIA request if the revealing the existence of the document raised certain national security concerns. The Meese memo was considered for inclusion in the Government's regulations in

FOIA cases, but was rejected. Prior to the issue being raised as a possible regulation, the Meese Memo had presumably been followed by the FBI since its inception. See November 3, 2011 letter from Ronald Weich, Assistant Attorney General to Senator Charles E. Grassley, Ranking Minority Member, Committee on the Judiciary. (App. Rec. 1, p. 133) It would have been appropriate that Plaintiff be permitted to inquire of the FBI whether and to what extent is had applied the Meese Memo in responding to his FOIA request.

In originally granting the Defendant's Motion for Protective Order, the District Court recognized that limitations on discovery in FOIA cases were not mandatory but, rather, the "usual" manner of dealing with such cases: "Usually, 'discovery is limited to 'investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like'" *citing Schiller v. I.N.S.*, 205 F.Supp. 2d 648, 653 (W.D. Tex. 2002), among other authorities. (App. Rec. 1, pp. 164-165). This is not the "usual" case. Appellant was able to identify a number of irregularities suggesting that the FBI had not identified all responsive documents. Appellant did not whether that was a feature of the Defendant's indexing procedures, the adequacy (or inadequacy) of the search, whether documents were being withheld subject to an exemption that was being misapplied or for some other reason. Appellant stated that he would not be able to fully respond to a Motion for Summary Judgment unless he was allowed some

discovery to look into the issues that have already arisen in this case, including a high number of reported withheld documents, the employment of a law enforcement exemption, the Privacy Act, 5 U.S.C. § 552a(j), in a case where law enforcement was stated not to be an issue (The 552a(j) exemption was not identified as limited to matters involving the UNABOMB investigation, which touched Plaintiff in 1995 as a result of his request for information from the California State University library at Chico, California), and a the late revelation of the possible existence of more than half a million pages of documents per the notations on Negley-437-FOIPA. (App. Rec. 2, p. 690)

Because the instant case was not the "usual" case, it would have been appropriate to allow Plaintiff some freedom to utilize the discovery procedures provided for in the Federal Rules of Civil Procedure in order to allow him to prosecute his claims under FOIA. These matters were raised in the Motion for Reconsideration. (App. Rec. 1, pp. 168, 170-174)

In *Murphy v. Federal Bureau of Investigation*, 490 F. Supp 1134 (D.D.C. 1980), the court addressed discovery in FOIA cases and timing of discovery. Discovery is appropriate and often necessary in FOIA cases but only as to factual disputes. *Id*. Factual disputes include whether the agency engaged in a good faith search for all materials. *Id*. As to timing the court stated that whether a particular FOIA case warrants

discovery is a question of fact that can only be determined after the Defendants file their dispositive motion and affidavit. In the instant case, the Motion for Reconsideration was filed after the FBI had stated that it had completed its production (App. Rec. 1, pp. 168, 170, 197) In its December2012 release letter the FBI stated that this was the "seventh interim and final release of documents responsive to the above referenced FOIA request." (App. Rec. 1, p. 197). Despite that, additional releases were made in 2013 of the EOUSA documents previously mentioned.

Appellant sought reconsideration of the Court's order after the FBI had disclosed documents and was ready to move for summary judgment. The Motion for Reconsideration was filed on April 10, 2013. (App. Rec. 1, p. 168) The Motion for Summary Judgment was filed shortly thereafter on May 6, 2013, (App. Rec. 1, p. 293) The specific issues which Appellant relied on to show the need for discovery had arisen and were a matter of record in the FOIA action. They were already before the Court as issues in the case. Appellant restated his need for the discovery in light of the actual production of information by the FBI which raised numerous issues, including those detailed in this brief regarding the adequacy of the search for records. Those matters raised in the Motion for reconsideration included:

1. The notations on the EOUSA produced document indicating the possible existence of additional records;

2. The reversal in position regarding the invocation of the Privacy Act exemption relating to criminal investigation records.

On the basis of these matters which had come to light, Appellant sought reconsideration of the discovery order without waiting for the FBI Motion for Summary Judgment. The securing of information through the use of the Requests for Admission would have been useful as a preliminary first step to outline the parameters of discovery and was likely the most economical means available to Appellant. *Weisberg*, 543 F. 2d at 311. Although the general rule is that, in a FOIA case, whether discovery is warranted is a question that can only be determined after the defendant agency has filed its dispositive motion and affidavit, *Murphy v. FBI*, 490 F. 2d 1134 (D.D.C. 1980), in this case, because the factual issues on which Appellant relied for his request for discovery had ripened, the Appellant sought reconsideration at that time.

D. Request for Relief

Based on the above, Appellant requests that the Court find that the requested discovery should have been permitted upon reconsideration and reverse the summary judgment entered by the District Court and remand the case to the District Court for further proceedings.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff-Appellant James Lutcher Negley respectfully prays that the Court reverse the Order Granting Summary Judgment and the Judgment of the District Court and remand this case to the District Court for further proceedings and for such other relief as the law and justice may require.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief was delivered to:

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in accordance with Fed. Rule of App. P. 25 and Fifth Circuit Rule 25 on this 16th day of December, 2013.

/s/ John F. Carroll
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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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/s/ John F. Carroll
JOHN F. CARROLL