James L. Negley
3905 Laguna Vista Cove
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December 26, 2017

The Honorable Bob Goodlatte
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jerry Nadler
Ranking Member
House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman, Ranking Member and Members of the Committee,

I am writing to you to express my deep concern over the treatment by the Federal Bureau of Investigation of my requests for information after being interviewed-and cleared-by FBI agents in connection with the UNABOMB Investigation more than twenty (20) years ago. I have been stymied in my legitimate and lawful efforts to discover information in the possession of the FBI. I have been forced to file numerous legal actions under the Freedom of Information Act ("FOIA"). Recently, in a case that has been concluded in San Antonio, Texas, the FBI was allowed to make reckless representations to defeat my efforts to discover information in its possession. That case is no longer pending and has been resolved by a final judgment in the District Court affirmed by the Court of Appeals.

In this letter, I will detail the background and circumstances of that case and the erroneous rulings secured by the FBI. In light of recent information that has been discovered by Congress regarding the conduct of the FBI, I believe it is important to notify this Committee of my experience.

While there are many errors in what occurred, I want to point out at least one

egregious instance in which the FBI made a sweeping claim on a material issue in my case and which, in light of the facts, cannot have been true. Well after my requests for information had been submitted, and in some circumstances, litigated, a document was belatedly produced by the Justice Department. This document was a fax coversheet evidencing a fax transmission from the Office of the United States Attorney for the Western District of Texas to FBI legal counsel in Sacramento California. The typed (or printed) information on the fax coversheet did not appear to be significant (although my lawyer and I could not be sure because of many redactions of information) however, there was a significant handwritten notation that showed that my efforts through FOIA had borne fruit. There was a handwritten notation referring to more than 500,000 pages in a file. There was no further description of the reference made in the notation. I requested that the FBI make a reasonable inquiry into the reference, at the very least, question the parties to the fax to determine their knowledge of the notation and its meaning. The FBI flatly refused and instead, asserted that the reference could not have been to Mr. Negley because the files regarding Negley were not that large (certainly an example of tautological reasoning). The FBI then wildly speculated that it was a reference to the size of the UNABOMB investigation file. This is not possibly true given the vast scope of that investigation. The book, "UNABOMBER: How the FBI Broke Its Own Rules to Capture the Terrorist Ted Kaczynski" authored by the FBI agents who led the investigation, states on page 346: "During its lifetime, the UTF investigated over 2,400 suspects, assembled 3,600 volumes of case files representing almost 18 years of investigation, compiled 82 million records, gathered 8,182 items of physical evidence, and over 22,000 pages of evidentiary documents.

The fax cover notation could not have been a reference to the UNABOMB Investigation file-yet the FBI was able to defeat my right to access to information, by suggesting just that. The FBI may assert that it was forthcoming in response to the 2009 FOIA request in that it produced several thousand pages (many with redactions), however, the vast majority of those pages were documents from my previous litigation with the FBI seeking to enforce my rights under FOIA (in one of those lawsuits, I won an attorney fee award against the FBI in excess of $100,000.00).

In light of the FBI's conduct and its continued stonewalling of my requests for information, I am requesting that this Committee look into the FBI's investigations of me since 1995, including seeking information regarding any FISA warrants that have been requested or issued regarding me or my business, Davis, Joseph & Negley.

Information regarding 2009 FOIA Request and Lawsuit

Background of FOIA Requests

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, went to a Mexican food restaurant for 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 before his 2012 lawsuit filed in Federal Court in San Antonio, Texas he had 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. 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. 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. 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 asserted by the FBI and affirmed by the Court on the scope of the April 2002 request

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. Ex. 3-G, FBI MSJ. 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. Ex. 3-H, FBI MSJ. 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. Ex. 3-J, FBI MSJ. The correspondence further shows a misunderstanding as Mr. Negley's counsel had previously written to the FBI stating that the funds had been paid. Ex. 3-I, FBI MSJ. In order to resolve the issue, Mr. Negley forwarded the requested payment on August 29, 2011. Ex. 3-K, FBI MSJ. 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. After the lawsuit was filed, the FBI began further production on August 31, 2012. Ex. 3-N, FBI MSJ. Mr. Negley filed the instant lawsuit in order to secure the compliance of the FBI with its disclosure obligations under FOIA.

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 a prior FOIA lawsuit, *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 is 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 locate 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).

See Exhibit "B": *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.

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. Ex. 3-G, FBI MSJ.**
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. Ex. 3-H, FBI MSJ.**
April 18, 2012	**Plaintiff's FOIA Complaint filed in instant case. Doc. #1.**
July 17, 2012	**FBI revises responsive documents estimate-now 7450 documents may be responsive to the request. Doc. # 17, Defendant's Unopposed Motion to Extend Dispositive Motion Deadline, p. 1.**
August 31, 2012	**FBI gave notice that 1020 pages were reviewed and 878 pages were released. Ex. 3-N, FBI MSJ.**
September 25,	**FBI gave notice that 924 pages were reviewed and 836**

2012	**pages were released. Ex. 3-O, FBI MSJ.**
November 6, 2012	**FBI gave notice that 1100 pages were reviewed and 1007 pages were released. Ex. 3-P, FBI MSJ.**
November 30, 2012	**FBI gave notice that 878 pages were reviewed and 685 pages were released. Ex. 3-Q, FBI MSJ.**
December 28, 2012	**FBI gave notice that 1201 pages were reviewed and 1030 were released. FBI stated that this was the final release of records. Ex. 3-R, FBI MSJ.**
March 18, 2013	**21 pages of documents are disclosed to Mr. Negley's D.C. counsel from the Executive Office for U.S. Attorneys. Ex. 4-B, FBI MSJ.**
April, 2013	**A more expansive disclosure of 77 pages is made by the EOUSA to John Carroll, Mr. Negley's San Antonio counsel. Ex. 4-C, FBI MSJ.**
May 6, 2013	**Notice included with Motion for Summary Judgment of 22 pages reviewed and 17 pages released. Ex. 3-S, FBI MSJ.**

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. The District Court granted the Government's Motion for Protective Order and denied a later request for reconsideration after production of information

by the FBI in response to the FOIA request. The FBI contended that the discovery requests served by Negley constituted an impermissible fishing expedition. Negley countered that the requests were limited and very specific. Rather than seeking to circumvent FOIA, Negley argued that they sought appropriate threshold information necessary to a determination of the issues in the case. The FBI had taken the position that the only documents responsive to Mr. Negley's FOIA request which have not already been produced were administrative in nature. The requests for discovery sought responses that would 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?

That threshold question should have been answered before any final decision was made in the case. But it was never answered. The answer to that question was, and remains, material to the issue of what final decision should have been made and what obligation was owed by the FBI in responding to Mr. Negley's request.

A. Facts Pertinent to Inadequacy of FBI's Search for Information

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. (Ex. 4-B, FBI MSJ) 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. (Ex. 4-C, FBI MSJ)

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. (Ex. 4-C, FBI MSJ, 10th page of the Exhibit and Ex. 3-V, FBI MSJ) 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. Plaintiff has inquired as to the genuineness of the notation but has not yet received a response to said inquiry. **See Exhibit "C"**. 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".

The 77 pages of documents recently 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. Ex. 3, FBI MSJ, Hardy Declaration, para. 68. 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, Plaintiff may reasonably inquire whether in 2002, the file regarding Mr. Negley 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 Mr. Negley'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 indicates that it does not know what the notation means or to what it refers. 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. Ex. 3, FBI MSJ, Hardy Declaration, para. 70. The FBI presumes that the notes were made by an FBI employee. Ex. 3, FBI MSJ, Hardy Declaration para. 70. However, there is no reference to any effort to determine who the employee may have been. Negley 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. 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. FBI MSJ, p. 11. Here, the FBI itself engaged in speculation regarding the meaning of the notations. There is not even any evidence to suggest those numbers represent 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.

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 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.

No such notice was given to Mr. Negley or his attorneys. The first time Plaintiff learned of the referral was 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. The FBI admits that the referral did not take place until January 31, 2013. That is extremely untimely 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. Ex. 3, FBI MSJ, Hardy Declaration para. 69. That 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. See Exhibit "D", Declaration of John F. Carroll. The FBI has not explained 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. In further disregard of the rules and regulations, the FBI elected not to inform Plaintiff of the referral. Instead, the FBI simply turned the

matter over to the EOUSA for its determination, without notice to Plaintiff, contrary to the directive of 28 C.F.R. § 16.4(f), that "it ordinarily shall notify the requester of the referral..." The FBI has not explained why this referral was not within the category of one that should have been disclosed. While the directive for notice is not unconditionally mandatory, it certainly indicates a preference for notification. The FBI has not explained why no notice was given in this case.

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. According to the FBI's disclosures, the FBI has reviewed 7406 pages of documents. It has released 5128 pages in full, 1455 in part and has withheld 823 pages in full. One of the exemptions claimed by the FBI in justifying the

withholding of information based on an exemption 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. However, 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 Negley 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 has been led to understand are largely administrative files.

The FBI has now asserted that the 552a(j) exemption was made in error and the FBI is no longer relying on this exemption. (Response to Motion for Reconsideration, Doc. # 37). 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 seeks 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. Ex. 3, FBI MSJ, Hardy Declaration, para. 42. He 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."

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. The Privacy Act questions do raise the issue of an adequate search because the original invocation suggests that there was law enforcement investigations activity directed toward Plaintiff 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. Ex. 3-S, FBI MSJ. 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. **See Exhibit "D"**.

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.

3. The FBI's attempt to claim res judicata is misplaced and should be denied

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. FBI MSJ p. 11. 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, Negley 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.

b. Issue Relating to Discovery Order

1. The District Court Did Not Allow Negley to Propound Limited Written Discovery

A. Facts Pertinent to Issue

Negley 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. 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 are 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 has taken the position that the only documents responsive to Mr. Negley's FOIA request which have not already been produced are administrative in nature. The requests for discovery seek responses that will 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 field by the FBI holding that the FBI was not required to respond to the Discovery Requests. After the FBI had completed its production of documents, Negley filed a Motion for Reconsideration. That Motion was denied on July 31, 2013, the same day the Motion for Summary Judgment was granted.

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. However, as pointed out by Negley, 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.

It was clear from the FBI filings in this case that the Government intended to proceed in the following manner:

a. produce, over a number of months, the "administrative" records the Government has identified as responsive to Plaintiff's FOIA request;

b. move for summary judgment finding that the FBI produced all responsive records.

Before the Government moved for summary judgment, Negley needed responses to his discovery requests. Plaintiff did not know the extent to which the FBI had documents that were responsive to his FOIA request. It makes 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. Plaintiff has given the FBI very specific information as to date, location and type of activity which is the subject of the inquiries. 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. See Motion, para. 5d, p. 5: "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...". That the Government does not know is itself justification for the Government to go through the discovery process and learn the answers to the questions before it can make a representation to the Court and to the Plaintiff that it has no additional, non-administrative documents. How can the Government possibly make such a representation in good faith if it does not even know how to respond to the Requests for Admission? The questions 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. The Government cited the *Flowers* case for the proposition that an agency's affidavits are presumed to be in good faith. *Flowers v. IRS*, 307 F. Supp. 2d 60, 72 (D.D.C. 2004). Here, where the Government has essentially admitted that it does not know the answers to the questions, how can affidavits denying the existence of additional records be in good faith. Simply stated, if the FBI had engaged in any of the activity referenced in the requests for admissions, it would know about it. There would be records of such activity. Mr. Negley's name would be on the records, and the FBI's exhaustive search for documents responsive to a FOIA request would reveal them.

The Government has cited many cases and principles in support of its position, however, none of the authorities go to the question of the propriety of a series of simple requests for admission, as in this case:

<u>Discovery is Not Prohibited in FOIA Cases</u>

In paragraph 5a the Government cites three cases for the general proposition

that discovery is strictly limited in FOIA cases. The authorities cited in Government's Motion, *Lane*, *Wheeler* and *Katzman*,(See page 2 of Government's Motion for Protective Order) do not support a complete bar to discovery in a FOIA case. Rather, they support the position that the Courts have authority to place limits on discovery in FOIA cases, which limitations may be greater than in other litigation matters. Mr. Negley does not disagree with that legal principle. He does not seek to circumvent the FBI's right to withhold documents that are privileged or otherwise exempt from disclosure. However, the FBI has sought in this case to bar any discovery. That is not appropriate. The Government goes on in paragraph 5a to state the rationale for restrictions on discovery: "The reason for this prudential limitation is that in the vast majority of FOIA cases, the Court determines on motions for summary judgment *what documents are subject to production*."(emphasis added). That is the problem in this case and the reason that the principles cited by the Government are inapplicable. We are trying to discover what documents are in existence. Only then, can the Court make a fully informed determination of what documents are subject to production. How can we possibly make a fair determination of what documents are subject to production if we do not have disclosure as to what documents are in existence. Not one of the cases cited

by the Government prohibits the type of discovery requests at issue here.

Negley's Requests were Necessary

In paragraph 5b the Government complains that the requests are redundant of the FOIA request seeking all documents relating to Mr. Negley. This argument only applies to the Requests for Production. Plaintiff has made it clear to the Government in correspondence regarding this issue, that he does not seek to circumvent the FBI's right to withhold documents that are privileged or otherwise exempt from disclosure. See Exhibit 4 to Government's Motion for Protective Order, John Carroll's September 10, 2012 letter to Robert Shaw-Meadow. Plaintiff's overriding concern about the Government's position has always been that the Government seeks a complete ban on discovery. Such a ban is not appropriate. Especially where, as here, Plaintiff's requests for admission are specific, detailed and limited.

Plaintiff's Limited and Specific Requests are Not a Fishing Expedition

In paragraph 5d, the Government complains that the requests represent a fishing expedition. To the contrary, the requests seek nothing more than a mere admission or denial regarding 20 specific points. Each question is detailed and very specific. These requests are the opposite of a fishing expedition. The Government

then argues that Plaintiff cannot make these requests without establishing a factual basis. That is not supported in the law. FOIA does not require a person to establish a factual basis before making a request for information. The Government seeks to turn FOIA on its head.

Plaintiff does Not Seek Rationale for Activity, Only the Existence of Activity

In paragraph 5e the Government actually states that Plaintiff is not entitled to answers to his questions. This assertion is allegedly supported by two cases which state that a party in a FOIA case is not entitled to seek discovery regarding the rationale for the Government's actions. Plaintiff does not seek to discover the reasons underlying FBI activity. He simply seeks to discover whether there has been FBI activity that a reasonable person would expect to result in the creation of documents. If so, such documents may be subject to disclosure under FOIA. They may be subject to some privilege or exemption. But we cannot make any such determination unless we know the answer to the threshold question, do any such documents exist? Rather than granting Mr. Negley the final relief he seeks, (a practice not allowed in the *Tax Analysts* case cited in the Government's Motion) these specifically tailored discovery requests merely seek to inform Mr. Negley of what sort of relief he may request.

Unlike the *Flowers* and *Williams* cases cited by the Government (*Flowers*, 307 F. Supp. 2d at 72; *Williams v. FBI*, 1991 WL 163757, at 3), the requests made by Mr. Negley do not seek the rationale for the FBI's activities, but rather, whether there have been any activities and whether they resulted in the creation of any documents that may be discoverable under FOIA.

The Time for Discovery was Ripe

In paragraph 5f, the Government alleged that the requests were premature and should wait until after the Government has an opportunity to make its case regarding the applicability of FOIA exemptions. However, moving on to exemptions before we know what is the universe of responsive documents is what is premature. Determination of exemptions would not be appropriate if the parties did not know if the Government had found all the responsive documents? These limited discovery requests were appropriate and timely.

The Government asserted that to the extent the Court allows any discovery in this case, it should be delayed until the Government has moved for summary judgment. However, in most cases it is doubtful that the Government is given 9 months to file a Motion for Summary Judgment. Here, the Government has requested that the Court give it time to complete its review of what is now estimated to be 7450 documents, before it is required to file a motion for summary judgment. This is extraordinary. The Government has not made a sufficient

showing, for example, as to why it needs until April 2013, to respond to a request that it received in 2009.The Government has established a pattern of "foot dragging" in responding to Mr. Negley's requests. See Memorandum Opinion of Judge Gladys Kessler in D.C. District Court FOIA lawsuit involving Plaintiff and the FBI, *Negley v. Federal Bureau of Investigation*, 2011 WL 3836465, at 5 (D.D.C. 2011):

> However, the FBI should take no comfort in prevailing on its Motion for Summary Judgment. It has taken almost 10 years for Mr. Negley to get the documents to which he is legally entitled under FOIA. The FBI has stonewalled, has delayed, has repeatedly "found" responsive documents long after it should have, and has on numerous occasions failed to meet its obligations under FOIA.

Plaintiff hopes to avoid a repeat of the District of Columbia case.

The Meese Memo-An Uncodified "Policy"

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, attached as Exhibit "A". It is appropriate that Plaintiff be permitted to inquire of the FBI whether and to what extent is has applied the Meese Memo in responding to his FOIA request.

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. Plaintiff's efforts to secure such documents, as is his right under federal statutes, have been met with resistance over the years and he has been required to seek compliance with FOIA through litigation. Most recently, the instant lawsuit as well as the litigation in the District of Columbia in Civil No. 03-3126(GK), *James Lutcher Negley v. Federal Bureau of Investigation*. The instant lawsuit is one that Plaintiff hopes to be the last he is required to file in order to receive the documents to which he is entitled by law.

Negley sought reconsideration of the Court's order after the FBI had disclosed documents and was ready to move for summary judgment. Here Negley 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

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. Document # 31. This is not the "usual" case. Negley was able to identify a number of irregularities suggesting that the FBI had not identified all responsive documents. Negley 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. Negley 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 in a case where law enforcement was stated not to be an issue (The 552a(j) exemption has not been 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 new revelation of the possible existence of more than half a million pages of documents.

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.

As the Committee can see from the foregoing, I have been met with stonewalling and deception in my efforts to discover information-information to which I should be legally entitled-from the FBI. The FBI has taken advantage of the deference given to it by the Federal Courts. However, such deference should not be automatically granted. It should be earned, and when an agency has shown itself to no longer be entitled to such deference, it should be forfeited.

Respectfully Submitted,

/s/ James L. Negley

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