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 IN REPLY TO THE RESPONSE OF THE FEDERAL BUREAU OF INVESTIGATION

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TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Now Comes James Lutcher Negley, Appellant, and files this Brief in Reply to the Response of the Federal Bureau of Investigation and specifically for the purpose of replying to the FBI's arguments that (1) Mr. Negley's claims are barred by the doctrine of collateral estoppel, and (2) that he has failed to raise an issue regarding the adequacy of the FBI search for records in response to his 2009 FOIA request, as follows:

1. Negley's Claims are Not Barred by Collateral Estoppel

The FBI claims that any objection to the adequacy of the FBI search in response to the 2009 FOIA request is collaterally estopped by a ruling of the D.C. District Court in the prior Litigation over a different 2002 FOIA request to the San Francisco Field Office of the FBI. This claim is a red herring. The D.C. District Court litigation, referred to by the FBI as *Negley II*, was over a 2002 request that was different and far more limited than the 2009 request that is the subject of the instant case. The issue of the adequacy of a search for records responsive to the 2009 request was not necessary to the decision of the D.C. District Court on the contempt issue on which the FBI's collateral estoppel claim is based.

Collateral estoppel prevents litigation of an issue when:

(1) the identical issue was previously adjudicated;

(2) the issue was actually litigated;

(3) the previous determination was necessary to the decision.

Pace v. Bogalusa City School Board, 403 F. 2d 272, 290 (5th Cir. 2005). In *Hicks v. Quaker Oats Co.*, 662 F. 2d 1158, 1168 (5th Cir. 1981), this Court stated that "it has always been the rule that although an issue was fully litigated and a finding made on the issue in prior litigation, the prior judgment will not act as collateral estoppel as to the issue if the issue was not necessary to the rendering of the prior judgment and hence was incidental, collateral, or immaterial to that judgment." *Id*. at 1168. In its Brief, the FBI cites two Orders/Opinions of the D.C. District Court that it claims form the basis of its collateral estoppel argument: *Negley v. FBI*, 766 F. Supp 2d 190 (D.D.C. March 1, 2011)(denying plaintiff's Motion for Contempt); *Negley v. FBI*, 825 F. Supp. 2d 63 (D.D.C. August 31, 2011)(granting FBI summary judgment as to 2002 FOIA request). A review of both decisions shows that the adequacy of the search in response to the 2009 FOIA request was not necessary to the rendering of the decisions in the D.C. District Court.

In the March 1, 2011 decision denying the Motion for Contempt, the D.C. District Court rejected an attempt to expand the issues beyond the 2002 FOIA request:

Plaintiff argues that the Order's language, "for all documents that relate

> to or reference Negley in any manner," broadened the scope of the Order beyond the temporal and geographic limitations of his 2002 FOIA request. Pl.'s Reply 1; Order 2. The interpretation advanced by Plaintiff, that the "Court's Order requir[es] production of all documents that relate to or reference Negley in any manner," is unconvincing for two reasons. Pl.'s Reply 1.

Negley, 766 F.Supp. 2d at 194. The mere fact that Negley attempted, unsuccessfully, toget the D.C District Court to review the FBI's actions in response tothe 2009 request does not create a collateral estoppel.

The FBI claims that the issue before the D.C. District Court was more expansive than it actually was. It is true that Negley asked the D.C. District Court to include in its determination issues regarding the 2009 FOIA request, the D.C. District Court did not agree to do so. *Id.*at 193-194.

Likewise, the August 31, 2011 decision on summary judgment by the D.C. District Court was an adjudication only as to the 2002 FOIA request. That request by Negley sought: " 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 D.C. District Court granted the FBI's summary judgment. Althought the 2009 request and FBI response to it were adressed in that decision, it is not material to the decision. Specifically, the D.C. District Court addressed two issues on the adequacy of the FBI search: "First, Plaintiff argues that the FBI's search was not reasonable becuase it

failed to locate one document, 'which is dated September 18, 1995 and contains a San Francisco file number of 149A-SF-106204-S-7575(or 1575).' Pl.'s Mot. 8-9. Second, Plaintiff argues that 'the FBI's use of April 2002 as the cut-off date for production of documents is unreasonable.' Id. at 9-13." Id at 69. The FBI repsonse to the 2009 FOIA request was not adjudicated in the D.C. District Court litigation. The FBI is very critical of the extgent of the D.C. District Court litigation. It should be noted that the August 31, 2011 decision on summary judgment included the following statement by the Court: "Thefact that, after almost 10 years, the FBI has-finally-'gotten it right' is a tribute to the persistence, patience, and diligence of Mr. Negley and his counsel. Indeed, this case is a sad example of how a federal agency can delay, and almost succeed, in avoiding compliance with one of this nation's most important statutes." Negley, 825 F.Supp. 2d at 66.

The FBI references the following in its Brief:

On September 24, 2009, the District Court ordered the FBI to:

> conduct reasonable searches, in response to Negley's FOIA request for all documents that relate to or reference Negley in any manner... FBI Brief at 9.

In his May 2, 2011 Eighth Declaration, Hardy stated that:

> The FBI conducted a series of searches in accordance with the Court's September 24, 2009 Order....The searches...were not limited by date, location, or type of document....All searches conducted after the

> Court's...September 24, 2009 ...Order were designed to locate and identify records responsive to both plaintiff's 2002 and 2009 FOIA...requests. (R.785-787)

The Hardy Declaration also stated that:

> the searches conducted in response to Plaintiff's 2009 request and the Court's [September 2009] Order did not locate any responsive FBI investigative records that had not been previously released to Plaintiff. (R.755)

The FBI states in its brief that "the specific issue which was actually litigated by the parties in *Negley II* was whether the FBI had complied with the Court's September 24, 2009 Order, requiring it to "conduct reasonable searches, in response to Negley's FOIA request for all documents that relate to or reference Negley in any manner." FBI Brief at 18. The key phrase from the D.C. District Court's September 24, 2009 Order is "in response to Negley's FOIA request." The actual text of that request demonstrates why the collateral estoppel argument does not prevail in this case. The request by Negley on which the D.C. District Court litigation was founded was recognized by the D.C. District Court as follows:

> On January 16, 2002, Plaintiff submitted a FOIA request to the FBI's San Francisco Field Office ("SFFO") seeking "a copy of any records about [him] maintained at and by the FBI in [the San Francisco] field office." *Negley v. FBI*, 658 F. Supp. 2d 50, 53 (D.D.C. September 24, 2009).
>
> The Court's September 24, 2009 Order that the FBI conduct reasonable

searches for all documents that relate to or reference Negley in any manner is limited to documents "in response to Negley's FOIA request", which, as is stated above and recognized on page 8 of the FBI's Brief, is limited to records in the San Francisco Field Office. 9/24/2009 Memorandum Opinion, Cause No. 1:03-cv-02126-GK, *Negley v. FBI*, 658 F. Supp. 2d 50, 53 (D.D.C. September 24, 2009). That request is very different from the June 15, 2009 request which is the subject of the instant lawsuit which sought "all records in [the FBI's] possession relating, in any way, to James Lutcher Negley." (R.930).

What Mr. Hardy actually searched for in response to the 2009 D.C. District Court Order is described in his actual Declarations from the D.C. District Court litigation.

Eighth Declaration:

para. 6

The FBI conducted a series of searches in accordance with the Court's September 24, 2009 Order.

Para. 7

The searches which the FBI conducted in accordance with the Order were not limited by date, location or type of document.

Para. 8

The search cut off date for Mr. Negley's 2002 FOIA/PA request seeking records in

the SFFO is April 23, 2002.

Hardy states that: "The FBI, by April 22, 2010, had identified approximately 903 pages of potentially responsive material to be released." Para. 22. This is more than 6400 fewer pages than the FBI processed in response to the 2009 FOIA request, so Mr. Hardy could not have been referring to the complete FBI search in response to the 2009 request in the D.C. District Court litigation.

The Seventh Declaration of David M. Hardy, dated December 23, 2009, also addresses the FBI Search in response to the September 24, 2009 Order of the D.C. District Court.

He states in part:

Para. 3:

I am aware of the FBI's response to plaintiffs FOIA/Privacy Act ("FOIPA/PA") request for information concerning himself made to the FBI's San Francisco Field Office("SFFO").

Para. 4

In total, the FBI's search located and processed 120 pages deemed responsive to plaintiff's FOIPA request or ordered to be released to Plaintiff by Oreder of this Court. Of these 120 pages, the FBI released 66 pages in full and 54 pages in part. The FBI has not withheld any pages in full. This declaration is being submitted in compliance with the Court's September 24, 2009 Order. This Seventh Declaration supplements and hereby incorporates, my previous six declarations submitted in this case. The purpose of this declaration is to provide the Court and plaintiff with an explanation of the processing of the records provided in response to plaintiff's FOIPA request and to describe the FBI's most recent search for responsive records.

The Declaration then reviews the chronology of the FBI's response to the 2002 FOIPA request for records in the SFFO, culminating in paragraph 22, a description of the action in response to the D.C. District Court's September 24, 2009 Order:

> On September 24, 2009, this Court granted Plaintiff's Motion for Partial Summary Judgment and ordered the FBI, among other things, to produce file number 149A-SF-106204-S-1575 "in its entirety along with a Vaughn index for any redactions and/or withholdings and a detailed affidavit explaining the bases for any redactions and/or withholdings."
>
> In addition, the Court ordered the FBI to conduct a reasonable search for documents related to or referencing plaintiff, including references to file number 65-21102, in: 1) the ICM database; 2) the ECF database; 3) the ELSUR database("or specify in sufficient detail the search terms used in its earlier search"); 4) the Zy database ("or specify in sufficient detail the terms used in its previous search"); 5) the SFFO card index (" or explain in sufficient detail its previous method for searching these files"); 6) FBIHQ("or specify with sufficient detail the search terms ued in its previous search; 7) handwritten notes, personal files, and restricted files ("or explain in sufficient detail its previous method for searching these file systems").

The in paragraph 23, Mr. Hardy states:

Per this Court's Order, on October 26, 2009, the FBI released in its entirety, the third party files 149A-SF-106204-S-1575 along with a Vaughn declaration specific to the release. This release consisted of a total of seven apges and FOIA Exemptions 6 and 7C were asserted.

In paragraph 39, Hardy describes the search in response to the September 24, 2009 Order. Although the FBI was including in its search after the September 24, 2009 Order, records up to the date of the instant 2009 FOIPA request, the issue before the D.C. District Court , as can be seen by reference to its orders and opinions, was only

the search and production of material in response to the 2002 request for records from the SFFO. That was the issue before the Court as noted in the statements of the Court in its rulings. This fact was recognized by Mr. Hardy in his declaration, referenced above. Mr. Negley's claims in the instant case arenot barred by collateral estoppel.

2. Negley Has Properly Challenged the Adequacy of the FBI's Search Methods

The FBI argues, citing numerous decisions reviewed below, that Appellant has failed to raise an objection to the adequacy of the agency search detailed in the Hardy Declaration which was filed in support of the FBI's Motion for Summary Judgment. FBI Brief, p. 23, et seq.

As seen below, the cases cited by the FBI do not apply to the particular facts of the instant case. For example, while the *SafeCard Services, Inc. v. SEC*, 926 F. 2d 1197 (D.C. Cir. 1991), case does hold that "mere" speculation that as yet uncovered documents may exist is insufficient to undermine the finding that an agency conducted a reasonable search, the facts of that case do not meet the situation presented herein. The court found that the SEC had adequately investigated and described circumstances surrounding the destruction of 127 documents under FOIA. The SEC showed, through an employee affidavit, that she had interviewed relevant

employees of a cleaning company that had discarded documents and made an unavailing room to room search for them. *Id*. at 1201. In other words, the SEC followed up on information and took steps to look into the possibility of the existence of other records. This is not what occurred in this case. Here, the FBI simply ignored the notation referring to possible documents. Indeed, as the Court in *SafeCard* said, "[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *Id*. At 1201. In *SafeCard*, the agency took extra steps to follow up on information suggesting the possibility of the existence of additional documents. In the instant case, the FBI failed to follow up on leads given by the fax cover sheet and its handwritten notations, refusing even to contact the parties to the correspondence, both of whom were Justice Department employees. There was not a showing or suggestion by the FBI that those particular individuals would be difficult to find.

The FBI states that it was not required to follow Negley's rabbit trails and speculation. However, what Appellant wanted the FBI to follow were leads created by its own personnel. There is no credible suggestion that the notations on the fax cover sheet were made by anyone other than Justice Department personnel.(R.690) The document was a fax transmission sheet sent from a US Attorney's office to an FBI office. It was produced by the Executive Office for United States Attorneys. It

was not a document subject to being annotated by some non-government third party. It appears to be something that was in the Government's files until its production to Mr. Negley in March and April 2013.

The other cases cited by Appellee in support of the adequacy of its search do not match the facts of the instant case:

In *Woods v. Department of Justice*, No. 12-701, 2013 WL 4852297 (D.D.C. 9/12/2013), the court addressed the plaintiff/requestor's "unsubstantiated belief that there is more evidence or files within the Department of Justice's system of records that was withheld from his trial attorney that could have exonerated [him]". *Id*. As for the instant case, a specific reference to information in the records disclosed by the agency does not constitute an "unsubstantiated belief".

In *Ferguson v. United States Department of Education*, 2011 WL 4089880 (S.D.N.Y. 9/11/2013), the Court stated that an agency was not obligated to interview its employees to attempt to locate records when it has already searched all files likely to contain the relevant information. This does not establish a bright line rule that an agency never needs to interview employees to attempt to locate documents. The simple interviews suggested by Appellant in the instant case would be appropriate in light of the notation on the agency's record.(R.690) In *Ferguson*, there was not a specific showing of the need for follow up measures to complete an adequate search.

The requestor in that case did not identify specific databases and files to be searched. Because of that, the agency had the discretion to confine its inquiry to its central databases. *Id.* at *13. In the instant case, although Mr. Negley's initial request was broadly phrased and did not specify a particular database, the discovery of the notation on the fax cover sheet was sufficient to demonstrate to the FBI a particular source or sources of information: the sender and recipient of the fax. The FBI has not adequately explained its decision not to speak to those individuals. Instead, the FBI has engaged in speculation as to the meaning of the notations, exactly what it argues should not be done.

The statement in *Saldana v. Federal Bureau of Prisons*, 715 F. Supp. 2d 10, 23 (D.D.C. 2010), that an agency is not required to conduct interviews or search where requested documents are not likely to be found, is, like similar statements in the other cited cases, based on the facts of the case. In referring to Saldana's challenges to the adequacy of the search, the court stated that

> [m]ost of the arguments he raises are meritless. As an initial matter, there is no reason to think that some of the documents Saldana seeks ever existed, or if they ever did, that they do now. For example, he presumes that a deputy marshal made handwritten notes of an alleged conversation with a judge that allegedly occurred approximately ten years before he made his FOIA request. A challenge to an agency's search because it did not locate documents that may never have been created in the first instance or may never have been retained as agency records, cannot succeed. *Id* at 23.

In the instant case, we know that there are handwritten notes. The request is simply that the FBI perform some simple follow up with available sources to determine the meaning of those notes.

The FBI argues that the *Maynard* case, cited in Appellant's opening brief, does not support his claim and supports the proposition that an agency need not base further search measures on unspecified clues. *Maynard*, 986 F. 2d at 560. FBI Brief, p. 26. However, in the instant case, Appellant asks that the FBI look into a particular specified clue.

Appellant's complaints about the adequacy of the FBI search are not speculative and remote. They are based upon the existence of facts which could easily be investigated.

WHEREFORE, Appellant requests that the Court set asided the summary judgment entered by the District Court and remand this case to the District Court for further proceedings.

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 20th day of March , 2014.

/s/ John F. Carroll
JOHN F. CARROLL

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