

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES LUTCHER NEGLEY,

Plaintiff

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Civil Action No. 03-CV-2126 (GK)

FIFTH DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), at Federal Bureau of Investigation Headquarters ("FBIHQ") in Washington, D.C. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information ("FOIA") policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney and have been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief, I supervise approximately 211 employees who staff a total of ten (10) units and a field operational service center unit whose collective mission is to effectively plan, develop, direct and manage responses to requests for access to FBI

records and information pursuant to the FOIA; Privacy Act; Executive Order 12958, as amended; Presidential, Attorney General and FBI policies and procedures; judicial decisions and other Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the treatment of the January 16, 2002 FOIA/Privacy Act request, as amended on April 23, 2002, of plaintiff James Lucher Negley, who seeks access to information about himself in FBI files, particularly the UNABOM file located in the FBI's San Francisco Field Office ("SFFO").¹

(4) The purpose of this declaration is to respond to plaintiff's FOIA requests made for the first time in his "Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment" dated August 24, 2007 ("Pl. Mem."). Specifically, the plaintiff requests searches of the (a) Investigative Case Management ("ICM") function of the FBI's Automated Case System ("ACS"), (b) Electronic Case File ("ECF") function of ACS, (c)

¹ UNABOM (captioned as "University and Airline Bombing") is the code name for the investigation into 16 improvised bombs that were mailed or placed during a 17-year period beginning May 25, 1978. The bombings resulted in three deaths and 23 injuries to people throughout the United States. Ted Kaczynski eventually entered a guilty plea for these crimes, and was sentenced to life in prison with no chance of parole. The UNABOM file, 149A-SF-106204, contains information compiled by the San Francisco Field Office during the course of the FBI's UNABOM investigation.

Electronic Surveillance ("ELSUR") indices, (d) ZY database created for the UNABOM file, (e) card system in SFFO, (f) card system at FBIHQ, (g) handwritten notes, (h) personal files, and (i) restricted documents. See Pl. Mem. at 25. Plaintiff also seeks 50 pages in file 149A-SF-106204 that duplicate pages previously released to him. See Pl. Mem. at 27-28, 28-29.²

New FOIA Requests

(5) The FBI requires the submission of a new FOIA request when an individual seeks additional material. See *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996). In this case, plaintiff has made nine new request for material. In the context of this litigation, rather than requiring plaintiff to submit new FOIA requests, the FBI will address plaintiff's nine requests in turn below:

(6) **ICM Function of the ACS:** The ICM serves as a case management function for ACS. See First Hardy Decl., ¶ 23(a) (describing the functions of the ICM); Third Declaration of David M. Hardy dated February 15, 2007 ("Third Hardy Decl."), ¶ 13(a) (same). For example, the ICM is the mechanism by which the FBI opens, assigns, and closes cases. It also is used to set, assign, and cover leads.³ Record checks are set using the ICM. Finally, the ICM functions to

² Plaintiff continues to seek a copy of the documents contained in file 149A-SF-106204-S-1575. This file, however, concerns a third party completely devoid of any connection to plaintiff. See [First] Declaration of David M. Hardy dated January 9, 2004 ("First Hardy Decl."), Exhibit H (September 30, 2002 letter to plaintiff); First Hardy Decl., Exhibit K (November 26, 2002 letter to plaintiff); Second Declaration of David M. Hardy dated May 1, 2006, ¶ 8(d); Fourth Declaration of David M. Hardy dated March 21, 2007, ¶¶ 4-7; Videotape Deposition of David M. Hardy, May 23, 2007 ("Hardy Dep."), pp. 100, 137-162, 194-195; Videotape Deposition of Jennifer A. Wilson, June 27, 2007, pp. 34-38, 141. The FBI has not released the contents of File 149A-SF-106204-S-1575 to plaintiff.

³ A "lead" is a request from the Office of Origin ("OO") to another field office or FBIHQ for assistance in the investigation of a case.

set, complete, and track administrative reminders. In layman's terms, the ICM is the vehicle through which the FBI maintains a case. Case numbers are used to access the ICM. The FBI therefore cannot search ICM using only plaintiff's name.

(7) **ECF Function of ACS:** The ECF serves as the repository for the FBI's official text-based electronic documents. See First Hardy Decl., ¶ 23(b) (describing the functions of the ECF); Third Hardy Decl., ¶ 23(b). The FBI completed a full text search of the ECF using "James Lutch Negley." The only responses obtained were either to plaintiff's FOIA requests or his prior and current litigation files.

(8) **ELSUR:** The ELSUR indices are used to maintain information on a subject whose electronic and/or voice communications have been intercepted as the result of a warrantless (consensual) electronic surveillance or a court-ordered (and/or sought) electronic surveillance conducted by the FBI.⁴ Employees in the SFFO and FBIHQ searched the ELSUR

⁴ The ELSUR indices date back to January 1, 1960. On or about October 9, 1991, the ELSUR indices were automated. Since that time, FBIHQ and all FBI field offices have electronically generated, maintained, and modified and accessed all ELSUR records created since October 9, 1991. The ELSUR indices are a separate system of records from the CRS and, prior to automation, consisted of index cards on individuals who had been the subject of a microphone or telephone surveillance by the FBI from 1960.

The FBI field offices that have conducted electronic surveillance at any time from 1960 to the present also maintain ELSUR indices. Since January 1, 1960, the field offices have been including in their ELSUR indices -- and reporting to FBIHQ for inclusion in its index -- the names of all persons whose voices have been monitored through an FBI microphone installation or a telephone surveillance. The names of monitored subjects are retrieved through the FBIHQ or local field office ELSUR indices.

Until 1969, FBI field offices were also required to forward the names of all persons mentioned during monitored conversations to FBIHQ for inclusion in the FBIHQ ELSUR index. Although FBIHQ discontinued this requirement in 1969, some field offices still include the names of individuals mentioned in monitored conversations in the field office's ELSUR index. The names of such persons, however, cannot be retrieved through the FBIHQ ELSUR

indices. No references to the plaintiff were found.

(9) **ZY Database:** The ZY database is a stand alone database. It was created specifically to index documents in the enormous UNABOM investigation. The FBI has searched the ZY database for documents responsive to plaintiff's request. See June 27, 2007 Deposition Testimony of Jennifer Wilson, pp. 23-25. The documents retrieved were duplicates of certain documents already processed and released to plaintiff.

(10) **SFFO card index:** The FBI's index to records was automated in October 1995. Before that time, records were indexed using card systems in field offices and at FBIHQ, and the card systems were searched manually. The SFFO card index was searched manually using the name "Negley, James Lucher." The results were negative.

(11) **FBIHQ card index:** The FBIHQ card index was also searched.⁵ A reference to one main file, 65-21102, was found. That file, however, was destroyed in accordance with applicable destruction schedules on December 1, 1998.

(12) **Handwritten notes:** FBI Special Agents are required to retain all interview notes in envelopes and are routinely filed in the 1-A portion of the investigative file, which is indexed in the ACS. If handwritten notes have been retained, they may have been filed in the 1-A section of the file. In this case, the ACS search did not reveal the existence of any 1-A envelopes. Moreover, there is no indication in this case that handwritten notes concerning the plaintiff, which could be retrieved, exist anywhere in the FBI.

index.

⁵ This request is outside the scope of plaintiff's FOIA request, which is limited to SFFO documents.

(13) **Personal files.** The FOIA applies to "agency records" not personal records. In any event, there is no indication in this case that FBI records concerning the plaintiff exist outside of the Central Records System ("CRS"), which is indexed in the ACS. Having completed a search of the CRS for records concerning the plaintiff, the FBI did not search its various Offices and Divisions for such files.

(14) **Restricted files.** Restricted files are part of the CRS, which is indexed in the ACS. Accordingly, all responsive material was captured in the ACS search.

Requests for Duplicate Pages

(15) The FBI initially released 49 pages in full or in part, and withheld one page -- page 47 -- in full.⁶ See Third Hardy Decl., Exhibits A and B.

(16) Plaintiff now requests documents in file 149A-SF-106204 (UNABOM investigation) that duplicate information already released to plaintiff. See Pl. Mem. at 27-28, 28-29. In general, the FBI does not produce duplicative material when responding to FOIA requests.

(17) Plaintiff requests seven duplicate pages in 149A-SF-106204-S0-3041. The FBI has released to plaintiff those pages in full or in part. See Exhibit A.

(18) Plaintiff also requests a copy of 149A-SF-106204-S0-3865 which is entirely duplicative of certain material released to plaintiff from 149A-SF-106204-S0-3041. The FBI has released to plaintiff those pages in full or in part. See Exhibit A.

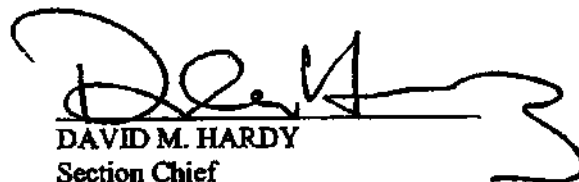
(19) Exhibit B attached hereto is a chart that accounts for these newly released

⁶ The FBI is no longer relying on Exemption 7(D) to withhold information in full on page 47. The FBI therefore has released a copy of page 47 with information deleted pursuant to Exemption 7(C). See Exhibit A attached hereto (copy of release letter dated October 5, 2007).

documents. Exhibit B demonstrates that the newly released pages duplicate certain pages previously released to plaintiff. Exhibit B also shows the coded FOIA exemptions relied upon to withhold material on each newly released duplicate page. The mechanics of the coded format, the exemption categories, and the justifications for redactions appear in paragraphs 22 through 39 of the Third Hardy Declaration.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A and B attached hereto are true and correct copies.

Executed this 8th day of October, 2007.



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Section
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