

Sebold, Judy.(Secretary)

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U.S. District Court

District of Columbia

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Case Name: NEGLEY v. FEDERAL BUREAU OF INVESTIGATION
Case Number: 1:03-cv-02126-GK
Filer: JAMES LUTCHER NEGLEY
Document Number: 102

Docket Text:

MOTION for Order *Motion for Contempt for Defendant Federal Bureau Of Investigation's Failure to Comply with the Court's September 24, 2009 Order* by JAMES LUTCHER NEGLEY (Attachments: # (1) Memorandum in Support, # (2) Exhibit Exhibit A, # (3) Text of Proposed Order)(Khetan, Prashant)

1:03-cv-02126-GK Notice has been electronically mailed to:

Michelle Lo Michelle.Lo2@usdoj.gov

Prashant K. Khetan prashant.khetan@troutmansanders.com, judith.sebold@troutmansanders.com

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Document description:Main Document

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Electronic document Stamp:

[STAMP dcecfStamp_ID=973800458 [Date=4/5/2010] [FileNumber=2508570-0]
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Document description:Memorandum in Support

Original filename:suppressed

Electronic document Stamp:

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Document description:Exhibit Exhibit A

Original filename:suppressed

Electronic document Stamp:

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Document description:Text of Proposed Order

Original filename:suppressed

Electronic document Stamp:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JAMES LUTCHER NEGLEY,)	
)	
Plaintiff,)	
v.)	Civil Case No. 03-2126 (GK)
)	
FEDERAL BUREAU OF)	
INVESTIGATION,)	
)	
Defendant.)	
_____)	

**PLAINTIFF'S MOTION FOR CONTEMPT FOR DEFENDANT
FEDERAL BUREAU OF INVESTIGATION'S FAILURE TO COMPLY
WITH THE COURT'S SEPTEMBER 24, 2009 ORDER**

Plaintiff, James Lutcher Negley, by his undersigned attorneys, moves for the FBI to be found in contempt for failure to comply with this Court's September 24, 2009 Order and that sanctions be imposed. The grounds for this Motion are set forth in the accompanying Memorandum of Points and Authorities.

Dated: April 5, 2010

Respectfully submitted,

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Attorneys for Plaintiff,
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JAMES LUTCHER NEGLEY,)	
)	
Plaintiff,)	
v.)	Civil Case No. 03-2126 (GK)
)	
FEDERAL BUREAU OF)	
INVESTIGATION,)	
)	
Defendant.)	
_____)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF’S MOTION FOR CONTEMPT FOR
DEFENDANT FEDERAL BUREAU OF INVESTIGATION’S FAILURE TO
COMPLY WITH THE COURT’S SEPTEMBER 24, 2009 ORDER**

Enough should be enough. It has been over eight years since Plaintiff James Luther Negley first submitted his request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to Defendant, the Federal Bureau of Investigation (“FBI”). It has been over six years since Negley initiated this lawsuit. This case has been on appeal once, and through two rounds of summary judgment. On September 24, 2009, Negley believed that the matter was finally coming to a close; indeed, this Court granted his Motion for Partial Summary Judgment and entered an Order unequivocally requiring the FBI to conduct the searches and produce the documents that the FBI should have accomplished years ago in response to Negley’s FOIA request (“the Order”). In so ordering, the Court stated, among other things, that “[the FBI] has provided no explanation or justification for its piecemeal approach to identifying and producing documents in compliance with the Court’s instructions. Such an approach undermines the agency’s credibility, and does little to promote confidence that the FBI has complied with its statutory obligation to conduct a good faith, reasonable search.” The Court’s Order was clear and unambiguous as to what the FBI had to do, and when it had to do those things – including

search for all documents that reference or relate to Negley in any way within 60 days, and produce all responsive documents within another 30 days - so that the FBI would be in compliance with its obligations under FOIA.

Yet, for reasons that Negley cannot understand, the FBI has again ignored the Court's Order. As set forth below, the FBI unilaterally decided to impose restrictions on its search for and production of responsive documents to Negley. At his deposition on January 28, 2010 (his third deposition in this case), David M. Hardy admitted that despite the Order, the FBI used its own set of guidelines in responding to Negley. Specifically, the FBI chose not to search for and/or produce any documents after 2002, any documents outside of San Francisco, or any administrative files/information, despite being aware of responsive documents/information. Indeed, Mr. Hardy was questioned extensively at his deposition specifically regarding the FBI's clear violation of the Court Order, but Mr. Hardy insisted that the FBI's actions were reasonable because they were based on internal interpretations and guidelines. Negley again raised the FBI's violation of the Court Order with the FBI several weeks after the deposition. Yet, to date, the FBI has done nothing to address its violations of the Court's Order, and those violations continue every day.

Accordingly, Negley respectfully requests that this Court find the FBI in contempt of the September 24, 2009 Order and impose sanctions against the FBI, ordering the FBI to comply with this Court's Order by searching for and producing all documents that reference or relate to Negley in any way within 10 days, with no restrictions imposed by the FBI. Additionally, Negley should be given the opportunity to depose Mr. Hardy, at the FBI's cost, limited to what Negley hopes will be the final search and production in this case. Finally, because some of the work by undersigned counsel will have to be repeated if and when the FBI searches for and

produces all responsive documents, the FBI should be ordered to pay a penalty, including but not limited to Negley's attorneys' fees associated with the FBI's failure to comply with the September 24, 2009 Order.¹

I. STATEMENT OF FACTS

On January 16, 2002, Negley submitted a FOIA request to the FBI for "any records about me maintained at and by the FBI in [the San Francisco] field office [(the "SFFO")]."² Negley's request was sent specifically to the SFFO, rather than the FBI headquarters, because the FBI advised Negley that he had to submit a request to a specific field office if he wished to obtain any documents located at that field office.² In response to being told that there were no responsive records, Negley filed an appeal, noting that documents produced under a prior FOIA request made specific reference to a Main File number (File Number 149A-SF-106204) (the "Main File"), which appeared to denote a file containing information about Negley that would be responsive to his FOIA request. On April 23, 2002, Negley amended his FOIA request to all files about him, and File S-1575 in its entirety, regardless of its content. The FBI's response admitted that there were records responsive to Negley's FOIA request, but it did not produce any documents. Negley once again appealed. This time the FBI produced 37 documents (12 pages were redacted) from File No. 149A-SF-106204-S0-3041 ("Serial 3041"), a serial from the Main File. Dissatisfied with the FBI's search for and production of documents responsive to Negley's FOIA request, Negley filed the pending lawsuit to obtain a complete production of agency records responsive to his FOIA request.

¹ Among other fees, the FBI should be ordered to pay for the time spent by counsel in preparing for and taking Mr. Hardy's deposition, as well as in preparing this motion. If the Court so orders, Negley will promptly file a declaration from undersigned counsel attesting to and documenting those fees.

² Cf. Maydak v. DOJ, 254 F. Supp. 2d 23, 44 (D.D.C. 2003) ("For records held by a field office of the [FBI] . . . , however, you must write directly to that FBI . . . field office address.") (citation omitted).

This lawsuit already has resulted in multiple Court Orders requiring the FBI to produce responsive documents. See, e.g., Order dated January 8, 2007 ¶ 1. In January 2007, the FBI represented that in addition to the 37 pages produced prior to the lawsuit, the FBI had produced (since the inception of the lawsuit) an additional 9 redacted pages (and one page was withheld in its entirety), and was producing an additional 2 pages, from Serial 3041. See Praecept dated January 16, 2007 and Notice of Correction to Praecept dated January 19, 2007. Later, the FBI produced documents from File No. 149A-SF-106204-S0-3865 (“Serial 3865”), another serial from the Main File.

The parties then filed cross-motions for summary judgment. In its ruling on September 24, 2009, this Court denied in its entirety the FBI’s Second Motion for Summary Judgment and granted Negley’s Motion for Partial Summary Judgment. In so ruling, the Court noted the following:

- “Defendant’s persistent and inexplicable refusal to search at least the dedicated Zy database . . . actually reflects a distressing active disregard of its obligations under FOIA.”
- With respect to the FBI’s repeated failure to produce File S-1575: “The FBI’s stubborn refusal to turn over this file flies in the face of longstanding principles that favor disclosure in the FOIA context. This refusal is not the first time the FBI has resisted complying with legal mandates in the course of this litigation.”
- Referring to the FBI’s initial refusal to produce all responsive documents from Serial 3041, despite Court Order: “Instead of complying with the Court’s order and disclosing these documents to Negley, the FBI carved out its own exception

to the clearly worded order and elected to withhold production of these duplicates because nothing in them 'suggested additional information would be revealed.'"

- "[The FBI] has provided no explanation or justification for its piecemeal approach to identifying and producing documents in compliance with the Court's instructions. Such an approach undermines the agency's credibility, and does little to promote confidence that the FBI has complied with its statutory obligation to conduct a good faith, reasonable search."

See Negley v. FBI, 658 F. Supp. 2d 50, 56-60 (D.D.C. 2009).

The Court's accompanying Order provided for, among other things, the following:

- Within 60 days, the FBI must conduct searches of 9 different sources for all documents that relate to or reference Negley in any manner (or, for some sources, explain in sufficient detail its manner of previously conducting a reasonable search).
- Within 90 days, the FBI must produce all responsive documents, along with a Vaughn index for any redactions and/or withholdings.
- Within 90 days, the FBI must produce a detailed affidavit explaining the searches conducted, including all search terms used, and the bases for any redactions and/or withholdings. Negley may take the deposition of the affiant.

See Order dated September 24, 2009.

Negley credits the FBI with attempting to comply with portions of this Order. Indeed, following the Court's Order, the FBI searched for and produced some responsive documents and Mr. Hardy submitted his Seventh Declaration. However, at his deposition, Mr. Hardy confirmed

what Negley suspected – that the FBI knowingly failed to comply with other portions of the Order by imposing limits on its search for and production of responsive documents.

II. ARGUMENT

A. Standard for Finding a Party in Contempt.

The ability to hold a party in contempt “is essential to . . . the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.” Walker v. Ctr. for Food Safety, 667 F. Supp. 2d 133, 136 (D.D.C. 2009) (citations omitted). Indeed, courts employ civil contempt sanctions in order to “coerce the defendant into compliance with the court’s order, and to compensate the complainant for losses sustained.” Id. (citations omitted). Accordingly, this Court can impose contempt sanctions through an ordinary civil proceeding that does not require a jury or proof beyond a reasonable doubt. Id. In this regard, a party is in contempt of court if it “violates a definite and specific court order requiring him to perform or refrain from performing a particular act or acts with knowledge of that order.” Petties v. District of Columbia, 888 F. Supp. 165, 168 (D.D.C. 1995) (citations omitted).

As the party seeking civil contempt sanctions here, Negley “need only show, by clear and convincing evidence, (1) the existence of a reasonably clear and unambiguous court order and (2) a violation of that order by the defendant.” Walker, 667 F. Supp. 2d at 136 (citations omitted). In this regard, civil contempt sanctions can be imposed even if the failure to comply with a court order is unintentional. Id. (citations omitted). As set forth below, the undisputed evidence satisfies the standard to find the FBI in contempt of this Court’s Order and, particularly because this is not the first time that the FBI has ignored Court Orders or its obligations under FOIA, this case warrants an imposition of sanctions against the FBI.

B. The Court's September 24, 2009 Order is Clear and Unambiguous.

There is no dispute that an Order was entered on September 24, 2009, granting Negley's Motion for Partial Summary Judgment. That Order required the FBI to conduct searches within 60 days of nine different sources "for all documents that relate to or reference Negley in any manner." That Order also required the FBI to produce within 90 days all such documents, including duplicates. The Order's requirements are clear and unambiguous.

C. The FBI Violated the Court's September 24, 2009 Order.

Despite the clarity of the Order, Mr. Hardy's January 28, 2010 deposition reveals that the FBI imposed restrictions on search criteria that were in no way provided for by this Court. Moreover, even when the FBI found responsive documents, it chose not to produce them. Such actions are in clear violation of the Order.

First, the FBI violated the Order by limiting its search for, and production of, responsive documents to documents generated prior to 2002:

Q So what did you determine to be Negley's FOIA request?

A We were to search for any documents relating to him and there is a cutoff date of 2002.

See Exhibit A (Deposition of David M. Hardy dated January 28, 2010), at 13; see also id. at 15 (Hardy confirming that the FBI imposed an April 2002 time limitation for the search for and production of responsive documents in response to the Court's Order). The Order, however, contains no such restriction. When questioned, Mr. Hardy justified this restriction by claiming to be acting in congruence with established FOIA law, which he interpreted to always permit using the date of the initial FOIA request (here, April 2002) as the cut-off date for the search for and production of responsive documents. See id. at 15-16. In fact, the law does not support Mr. Hardy's interpretation. See, e.g., Public Citizen v. Dept. of State, 276 F.3d 634 (D.D.C. 2002)

(rejecting agency's argument that the absence of using the date of request as the cut-off date would be an "administrative nightmare," and holding that the State Department's cut-off date was unreasonable "both generally and as applied to its FOIA request"). But see Jefferson v. Bureau of Prisons, 578 F. Supp. 2d 55, 60 (D.D.C. 2008) (holding that time of request cut-off date for search was reasonable because "at the time of the request, both the plaintiff and the FBI knew that the investigation of [the subject of the FOIA request's] conduct had been completed, that his criminal trial also had been concluded, and that he was no longer a BOP employee"). Moreover, where, as here, the initial request was made more than seven years prior to the search and production at issue, it cannot be reasonable to use this self-imposed restriction. See Negley, 658 F. Supp. 2d at 58 ("Regardless of any policy or conventional operating procedures, it is clear that Plaintiff's requests required Defendant to perform more rigorous searches for responsive documents. Cf. Wiesner v. FBI, 577 F. Supp. 2d 450, 457 (D.D.C. 2008) (taking issue with FBI's "naked reliance on its own procedures" to satisfy its FOIA obligations)."). Indeed, here, Mr. Hardy was aware of responsive documents, but simply chose not to produce them. See, e.g., Ex. A at 23-24 (Hardy admitting that the FBI located a "190 file" that "relates to James Negley," but that the FBI did not produce it because "it's post 2002"); see also id. at 104 (Hardy admitting that the ICM search revealed five serials with Negley's name, but the FBI did not pursue the production of those serials because "[t]hey are all post 2002").

Similarly, the FBI violated the Order by imposing a geographic limitation on the search for and production of responsive documents. Although Mr. Hardy at one point asserts that the FBI did not limit its search to San Francisco, he repeatedly notes that the FBI "focused" its search on the files in San Francisco. See id. at 27. Indeed, Mr. Hardy admits, in one instance, that the FBI did not search for a particular file number because the number reflected that it was

located in Sacramento. See id. at 108-09. In another instance, Mr. Hardy explicitly states that the FBI searched for and located a responsive Sacramento file, but did not produce it because it was not a San Francisco file:

Q Did your search not reveal the Sacramento file?

A The search did reveal the Sacramento file.

Q Maybe I'm confused. Why didn't you produce the Sacramento file?

A Going back to the court order, the court order said in response to Negley's FOIA request which again we were looking for San Francisco documents and these were Sacramento documents and so we did not produce them.

...

Q ... And the reason you didn't produce the Sacramento file is because those were not San Francisco documents?

A They were -- his original request was for all documents in San Francisco and he amended it with 1575, and so we did not produce the Sacramento documents because they were not San Francisco documents.

Id. at 86-88.

Finally, the FBI violated the Order by not searching for and/or producing entire files or responsive information because it unilaterally determined that the file(s)/information was not responsive or that Negley would not want it:

- Mr. Hardy stated that the FBI maintains "190" files that are generated whenever an individual makes a FOIA request, and which are searchable using UNI. See id. at 21-22. Each such file contains correspondence between the requestor and the FBI, but also internal FBI e-mail correspondence and search slips. See id. at 22-23. As previously indicated, the FBI did not produce the "190" file relating to Negley's 2002 FOIA request because it took the position that it would not produce any documents after Negley's request was made in 2002. See id. at 23-24. Moreover, later in the deposition, Mr. Hardy indicated that "[a]s a routine matter we do not produce 190 . . . files unless the individual specifically asks for them." See id. at 27-28. This means that the FBI never searched for "190" files related to Negley's prior FOIA requests when it first purported to search for

responsive documents in 2002; those files, according to Mr. Hardy, would now be destroyed because this litigation has spanned more than seven years. See id. at 25-27; see also id. at 83 (after reviewing a specific document that Negley previously obtained, Hardy acknowledging that the “190” file containing that document likely has been destroyed). Thus, Negley will never get those responsive documents because in 2002, Negley did not have the knowledge of the FBI’s inner-workings to “specifically ask for them.” See id. at 27.

- Similarly, the FBI maintains “197” files for every matter that is in litigation. See id. at 20-21. As with the “190” files, Mr. Hardy indicated that the FBI’s policy is not to search for or produce “197” files “unless the individual specifically asks for them.” See id. at 27-28. Later, Mr. Hardy admitted that he is aware of two “197s that relate to Mr. Negley[,]” but that the FBI did not produce them. See id. at 37-38.
- Finally, despite having knowledge of warrantless wiretaps and what Hardy referred to as the “President’s program,” the FBI made no effort to determine where any associated responsive records might be and search for/produce them. See id. at 95-96.

As this Court is aware, the FBI’s dereliction of its obligations under FOIA does not originate with the September 24, 2009 Order. Rather, the FBI’s conduct over the past seven years has represented a persistent recalcitrance with regard to both FOIA law and Orders of this Court. In its September 24, 2009 Memorandum Opinion, this Court noted that the FBI has “provided no explanation or justification for its piecemeal approach to identifying and producing documents in compliance with the Court’s instructions” and that “such an approach undermines the agency’s credibility, and does little to promote confidence that the FBI has complied with its statutory obligation to conduct a good faith, reasonable search.” Apparently, the FBI has decided to yet again ignore a Court Order and its obligations under FOIA.

III. CONCLUSION

For these reasons, Negley respectfully requests that the Court enter the attached Order finding the FBI in contempt of the September 24, 2009 Order and imposing sanctions against the FBI.

Dated: April 5, 2010

Respectfully submitted,

/s/ Prashant K. Khetan

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LOCAL RULE 7(m) CERTIFICATE OF COUNSEL

Following David M. Hardy's deposition on January 28, 2010, I had several communications with Michelle Lo, counsel for Defendant Federal Bureau of Investigation, regarding the issues that remained in the case. During these conversations, including a telephonic conversation on February 10, 2010, I conveyed Mr. Negley's belief that the FBI violated the Court's September 24, 2009 Order. This was confirmed upon receipt of the transcript for Mr. Hardy's deposition. Accordingly, I contacted Ms. Lo via telephone on April 2, 2010, to inform her of the basis of the instant motion, as well as Mr. Negley's desire to complete this case that has been pending for nearly six years. Ms. Lo expressed frustration that Mr. Negley did not give the FBI an opportunity to address the purported violations of the Court Order (even though those violations were discussed at Mr. Hardy's deposition and in conversations after the deposition), but would review the motion upon its filing. I exchanged several more emails with Mr. Lo, setting forth in detail the FBI's violations of the Court Order and the remedy sought by Mr. Negley, and advised her that if the FBI did not respond by April 5 at noon, and given the FBI's delay tactics in the past, Mr. Negley would file the instant motion. As of the filing of this motion, undersigned counsel has not heard back from Ms. Lo.

/s/ Prashant K. Khetan

Prashant K. Khetan

DEPOSITION OF DAVID M. HARDY - VOLUME 3
CONDUCTED ON THURSDAY, JANUARY 28, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

----- x

JAMES L. NEGLEY, :

Plaintiff :

v. : Civil Action

THE FEDERAL BUREAU OF : No. 03-2126 (GK)

INVESTIGATION, :

Defendant :

----- x

Deposition of DAVID M. HARDY, Volume 3
Washington, D.C.
Thursday, January 28, 2010
10:10 a.m.

Job No.: 1-172523

Pages: 1 - 134

Reported by: Marilyn Feldman, RPR

DEPOSITION OF DAVID M. HARDY - VOLUME 3
CONDUCTED ON THURSDAY, JANUARY 28, 2010

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1 FOIA request.

2 Q Did you understand there were any
3 restrictions that the FBI was to put in its
4 searches?

5 A Can you define what you would call
6 restrictions?

7 Q Actually that's what I want to know, what
8 restrictions you would have put. I mean are there
9 any limitations to the searches you conducted for
10 all documents that related to or referenced Negley
11 in any manner?

12 A Well, there is a distinction to Negley and
13 Negley's FOIA request. So we -- these particular
14 searches that were conducted were for Negley's FOIA
15 request, which is the subject of the litigation.

16 Q So what did you determine to be Negley's
17 FOIA request?

18 A We were to search for any documents
19 relating to him and there is a cutoff date of 2002.

20 Q Where is that --

21 A Could we stop? Could I see the FOIA
22 request?

DEPOSITION OF DAVID M. HARDY - VOLUME 3
CONDUCTED ON THURSDAY, JANUARY 28, 2010

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1 to add the search for sub S 1575.

2 Q What exhibit are you referring to right
3 now?

4 A That would be exhibit E I believe.

5 Q This is of exhibit 13?

6 A Yes. And so we used the time as a cutoff
7 but we did not limit ourselves to the San Francisco
8 Field Office.

9 Q Anything else?

10 A Those are the basic criteria in
11 conjunction with the court order which gave us
12 specific direction to search.

13 Q Okay, let me start with some of the things
14 you just said though. You said you did limit the
15 time. What limitations on time did the FBI impose?

16 A April 2002.

17 Q So no documents after April 2002 would
18 have been produced; is that right?

19 A Correct.

20 Q What is the basis for that limitation?

21 A That is established FOIA law as to when
22 you set the limits of a search and it is the date

DEPOSITION OF DAVID M. HARDY - VOLUME 3
CONDUCTED ON THURSDAY, JANUARY 28, 2010

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1 Q Are there any limitations at the FBI
2 imposed with regard to complying with this paragraph
3 of the order?

4 A No.

5 Q So even if there were any duplicates, this
6 time the FBI produced them?

7 A Correct.

8 MS. LO: Objection to form.

9 Q And so there are no documents responsive
10 to Negley's FOIA request that the FBI has not
11 produced then?

12 A That's correct.

13 Q Okay. In your seventh declaration, which
14 we'll go through in more detail in a second, you
15 talk about various searches that were conducted. Do
16 any of those searches capture the correspondence
17 between the FBI and the FOIA requester, for example,
18 Exhibit A that you referred to earlier, Exhibit A of
19 exhibit 13?

20 A Those documents would be in the 197 and
21 190 files but they did not -- we did not include the
22 190 and 197 files.

DEPOSITION OF DAVID M. HARDY - VOLUME 3
CONDUCTED ON THURSDAY, JANUARY 28, 2010

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1 Q What do you mean when you say the 190 and
2 197 files?

3 A The 190 file is the FOIA request file.

4 Q Sorry, that's the 190?

5 A 190, that is the FOIA request file.

6 Q Okay. What is that?

7 A That's the file that's generated when you
8 make a FOIA request, and then the subsequent
9 releases are in it and correspondence is in it for
10 the request. What you see in the seventh
11 declaration would be the 190 file as well as the
12 releases.

13 Q Let me make sure I understand. When you
14 say 190 and 197, are these file numbers?

15 A These are file series classifications.
16 190 is FOIA and 197 is litigation.

17 Q Okay. Are these maintained by a
18 particular office?

19 A They are part of the Central Records
20 System.

21 Q So they are part of CRS?

22 A Correct.

DEPOSITION OF DAVID M. HARDY - VOLUME 3
CONDUCTED ON THURSDAY, JANUARY 28, 2010

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1 Q Are they somehow indexed in any of the
2 FBI's computer databases?

3 A Yes.

4 Q Where would they be indexed?

5 A They would be indexed in UNI, and they
6 would be indexed in FDPS FOIA data processing
7 system.

8 Q Can you tell me a little bit about FDPS
9 because I had not heard that before?

10 A It is -- the FOIA records are not paper
11 records, they are electronic records.

12 Q Okay.

13 A So we have authority from the National
14 Archives to keep them as electronic records. So
15 everything in a FOIA request is kept electronically
16 in the system in which there is a repository which
17 is the FDPS.

18 Q Including documents produced in response
19 to FOIA requests?

20 A It includes the release, that's correct.

21 Q So it includes all the communications back
22 and forth between the requester and the agency?

DEPOSITION OF DAVID M. HARDY - VOLUME 3
CONDUCTED ON THURSDAY, JANUARY 28, 2010

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1 A Correct. The 190 file would have all the
2 exhibits that you see here in the declaration as
3 well as the release that we made in the subject
4 request.

5 Q Just so the record is clear when you are
6 talking about exhibits and release, you are talking
7 about what are attachments to your seventh
8 declaration?

9 A Correct.

10 Q Would it have internal notes about
11 searches conducted?

12 A It would have the e-mail correspondence,
13 it generally would have search slips, and it
14 generally would have the back and forth that might
15 go into a particular request, in other words, a copy
16 of the e-mails. It is a copy of how we process the
17 request.

18 Q And this is what you have referred to as
19 the 190?

20 A Correct.

21 Q Does the 190 -- because I think you said
22 that the FBI wouldn't produce the 190 here -- does

DEPOSITION OF DAVID M. HARDY - VOLUME 3
CONDUCTED ON THURSDAY, JANUARY 28, 2010

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1 the 190 relate to James Negley?

2 A It relates to James Negley but it's post
3 2002. In other words, it doesn't get started until
4 the request comes in and the search starts so that
5 everything is post request.

6 Q So why wasn't the 190 produced here?

7 A Again it's post request.

8 Q Is that the only reason it wasn't produced
9 here?

10 A That's correct. Since he has requested in
11 the second request where he requested everything, we
12 have -- I think we have a question on the table as
13 to whether he wants the 190 file. So in that one
14 you can see easily how it works. In that instance
15 his recent request of 2009 would have included the
16 190 as a file that was responsive. Generally people
17 don't want to see their FOIA request or pay for
18 them, so we are asking whether or not he wants
19 that -- if he wants it, then we'll produce it.

20 Q Is there a separate 190 that's created
21 every time someone makes a FOIA request?

22 A That's correct.

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1 Q I am trying to understand how you would
2 refer to it. For example, if Mr. Negley makes three
3 FOIA requests over a scope of 10 years, are each of
4 those somehow administratively referenced or
5 numbered as Negley 1, Negley 2, Negley 3, or
6 something like that?

7 A They are numbered under the FOIA number
8 which is provided to each request. So if he makes a
9 request and we come back with a response and give it
10 a FOIA number, that means the file has been opened
11 for that request.

12 Q Okay. Now when you produce a 190, do you
13 produce the e-mail correspondence, the search slips,
14 the other things you talked about?

15 A We would produce everything that's in the
16 file.

17 Q Now are you aware that Mr. Negley had
18 submitted FOIA requests prior to the January 2002
19 FOIA request that you have referenced as exhibit 13
20 A?

21 A I think you are right, he made a request
22 to Sacramento. I believe it was litigated in the

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1 western district of Texas.

2 Q So you are aware that he did make a prior
3 request?

4 A Yes.

5 Q So would there be a 190 for that request?

6 A I'm not certain whether there would be or
7 not. That was pre FDPS in paper form and I'm not
8 sure if there would be.

9 Q When did FDPS come in?

10 A The facility became fully functional in
11 2003.

12 Q I think you said 190 would have been in
13 UNI as well as facility. When did UNI come into
14 effect?

15 A I believe UNI came into effect in 1995.

16 Q So do you know if Mr. Negley's prior
17 request was post 1995?

18 A I don't know the timing of his prior
19 request.

20 Q If it were, does that suggest it would
21 have been in UNI?

22 A If it hadn't been destroyed.

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1 Q What is the destruction schedule for 190s?

2 A It would be seven years.

3 Q Did the FBI search for any 190 files for
4 Mr. Negley?

5 A No.

6 Q Why not?

7 A Again going back to the original request,
8 we were focused on the investigatory files in San
9 Francisco.

10 Q I thought you just told me though a few
11 minutes ago that you didn't limit the search to San
12 Francisco. Am I wrong about that?

13 A I think you are into semantics. What I
14 said was we did not limit it to San Francisco but we
15 were looking for the investigatory files or any
16 other files. As a routine matter we do not produce
17 190 and 197 files unless the individual specifically
18 asks for them.

19 Q How is an individual supposed to know
20 there is a 190 file about him?

21 A Well, they are the ones who make a FOIA
22 request.

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1 Q Right. But what I'm trying to understand
2 is you just said unless a requester says I want my
3 190 file -- tell me if I'm wrong but I think that's
4 what you said -- unless they said that, the FBI
5 won't produce it. How is an individual supposed to
6 know that there is even something exists that is
7 called a 190 file?

8 A Again you are talking semantics. No one
9 ever asked for a 190 file unless they deal in FOIA.
10 What they request is I would like a copy of the
11 record of my FOIA request.

12 Q What if they say I want all documents
13 about me, is that not broad enough to include --

14 A It's our standard administrative process
15 based on the fact most people don't want their FOIA
16 request. In fact, most people object to it because
17 they end up having to pay for it. We do not provide
18 190s or 197s to individuals who request records and
19 focus it again using the request which was for --
20 clearly for investigatory records, we focused on the
21 investigatory records.

22 Q Where in Mr. Negley's FOIA request does he

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1 right? So I mean it's plausible that file has been
2 destroyed just during the course of this litigation,
3 right?

4 A The Sacramento file?

5 Q Yes.

6 A The Sacramento FOIA request, it's
7 possible.

8 Q We did talk quite a bit about the 190 and
9 how it would be part of CRS in UNI and in the
10 facility depending on the dates of when those two
11 databases began. For the 197 I think you said that
12 that's a litigation file. Describe that to me.
13 What is that?

14 A It's the record that's generated during
15 the course of a civil litigation and again it's in
16 the Central Records System accessible by UNI, and
17 I'm not totally familiar with what goes into each
18 one of those files.

19 Q Do you know if for example it includes
20 pleadings?

21 A I would speculate that it would have to,
22 but I have no idea.

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1 Q I don't want you to speculate. Do you
2 know if there is a 197 that relates to Mr. Negley?

3 A There are two 197s that relate to Mr.
4 Negley.

5 Q You are telling me this as a fact, you
6 know this?

7 A Well, there are two litigations that I
8 know of.

9 Q Have you seen 197s related to Mr. Negley?

10 A I have never looked at them.

11 Q What would the two be that you are
12 referring to?

13 A His suit in the Western District of Texas
14 and this current litigation.

15 Q In response to the court's order, did the
16 FBI search for 197s relating to Mr. Negley in
17 response to the court's order?

18 A No. Again going back to I think our
19 interpretation was correct, that he was looking for
20 the files relating to this and not looking for
21 administrative files of prior legal action.

22 Q Is there a division within the FBI called

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1 Q Have you ever seen this document before?

2 A No.

3 Q What does this document appear to be?

4 A It's what we call a no record response for
5 FBI headquarters records.

6 Q So this would be in response to a request
7 at FBI headquarters?

8 A Correct.

9 Q Was this document in the Sacramento
10 release file that you just looked at?

11 A No.

12 Q Is this a document that would be in one of
13 the files that's referenced in what we marked as
14 exhibit 15?

15 A This is a FOIA request, you can see it has
16 its request number on it. It would have been a 190
17 file, within a 190 file, but given the date I assume
18 it has been destroyed.

19 Q So you say on exhibit 15 about four lines
20 down, "two serials within a control file concerning
21 the congressional inquiry he previously made."

22 A Yes.

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1 informed that we did.

2 Q Sorry, that you did produce those in this
3 case?

4 A No, that these were serials 101 and 355.

5 Q That you looked at. You think it's what
6 you looked at?

7 A I think it's what I looked at.

8 Q My question was, have you produced serials
9 101 and 355 in this case?

10 A The answer is no.

11 Q You did understand the court's order to
12 produce all documents, even duplicates, that relate
13 to Mr. Negley?

14 A Relate to Mr. Negley's request.

15 Q Okay.

16 A So we searched all records. Our search
17 was not limited to the San Francisco records, we
18 searched all records in the FBI and we provided
19 those records which were related to his request.

20 Q Did your search not reveal the Sacramento
21 file?

22 A The search did reveal the Sacramento file.

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1 Q Maybe I'm confused. Why didn't you
2 produce the Sacramento file?

3 A Going back to the court order, the court
4 order said in response to Negley's FOIA request
5 which again we were looking for San Francisco
6 documents and these were Sacramento documents and so
7 we did not produce them.

8 Q Mr. Hardy, we can go back to the court
9 reporter, but at the beginning of the deposition
10 today I asked you if you placed geographical
11 limitation on the search and you indicated no, you
12 did not.

13 A That's correct, we did not.

14 Q So then maybe I'm confused. Why didn't
15 you produce the Sacramento file?

16 A You have to understand the search. A
17 search is not where you put in a location and it
18 then only provides you with those files in a
19 particular location. What you do is you put in the
20 terms of the words and it gives you a universal --
21 you will get a universal return on where all the
22 files were. So you asked whether we limited the

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1 search to San Francisco. The answer is no. We
2 searched the entire universe but the records we
3 produced were related to his FOIA request.

4 Q Okay, that's fair enough. And the reason
5 you didn't produce the Sacramento file is because
6 those were not San Francisco documents?

7 A They were -- his original request was for
8 all documents in San Francisco and he amended it
9 with 1575, and so we did not produce the Sacramento
10 documents because they were not San Francisco
11 documents.

12 Q Let me try to sum this up if I can. While
13 your search had no geographical limitation, your
14 production did?

15 A It was -- what we considered responsive
16 was based on the four corners of the request.

17 Q Let me try this again. While your search
18 had no geographical limitation, your production in
19 response to the court order did have a geographical
20 limitation; is that correct?

21 A We considered the responsive documents and
22 the ones we produced were the ones that were tied to

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1 subindexed a file under a phone number, then you
2 would be able to search that for the phone number?

3 A If it was indexed under a phone number.

4 Q If you turn to page 13 of your
5 declaration, page 13 talks about the ELSUR, which
6 according to your declaration maintains information
7 on a subject whose electronic and/or voice
8 communications have been intercepted as a result of
9 a consensual electronic surveillance or a court
10 ordered surveillance. Do you see that?

11 A Yes.

12 Q Does ELSUR capture warrantless wiretaps?

13 A Are you talking about the president's
14 program?

15 Q Well, I will, but not yet. This is
16 something separate from that, not from a
17 presidential order. Tell me if I'm wrong but I
18 think ELSUR is talking about wiretaps?

19 A Correct.

20 Q But it looks to be talking about
21 consensual or court ordered.

22 A Title 3.

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1 Q So what I'm talking about are
2 nonconsensual noncourt order, so warrantless
3 wiretaps. Are those captured on ELSUR?

4 A ELSUR is Title 3 wiretaps and would not be
5 covered by warrant.

6 Q Is there a different database that
7 contains information about warrantless wiretaps?

8 A Not that I'm aware of in the Central
9 Records System.

10 Q What about outside the Central Records
11 System?

12 A I don't know of a specific database.

13 Q Just because I don't want to get into
14 semantics, even if it's not called a database, are
15 you aware of any maintenance of information or
16 documents that would contain information or
17 documents about warrantless wiretaps?

18 A I'm not aware of any FBI systems.

19 Q Okay. Now you mentioned wiretaps by
20 presidential order. Are those searchable on ELSUR?

21 A No.

22 Q Are those maintained in some separate

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1 Q This talks about how the most recent
2 search for the FBI captured five serials on which
3 the plaintiff's name appeared; is that right?

4 A Correct.

5 Q Have you produced those five serials?

6 A No. They are all post 2002.

7 Q Okay. It says in the third line, "only
8 one of those serials concern the SFFO and it was
9 from the plaintiff's current litigation file." Is
10 that a serial that has been produced in this case?

11 A No.

12 Q Then it talks about three serials from
13 prior FOIA requests.

14 A Right.

15 Q Are you aware if any of those serials
16 relate to pre 2002?

17 A None of those serials relate to pre 2002.

18 Q So these are all requests Mr. Negley made
19 post 2002?

20 A Correct.

21 Q Okay. And then the next sentence says,
22 "the fourth was a serial found not to concern this

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1 Q So what you are saying, if I follow you,
2 is that you didn't search 149A-SC-C27507 because
3 that was pre ECF?

4 A Right, pre ECF. The files would not have
5 been uploaded in the text from 149 -- would not have
6 been uploaded into electronic case file.

7 Q Did the FBI try to search for that file
8 number?

9 A No, we did not.

10 Q If you look at subparagraph C -- it's on
11 the same page 18 --

12 A Right.

13 Q -- now you are talking about ICM?

14 A Right.

15 Q Here you say you have searched file
16 numbers and then you list looks like six or seven
17 different file numbers. Do you see that?

18 A Yes.

19 Q Did you search for 148A-SC-C27507?

20 A For the Sacramento file number? No, we
21 did not. Did you say SC?

22 Q Yes.

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1 A No, we did not search for the Sacramento.

2 Q Why not?

3 A Because it wasn't responsive, it wasn't
4 within the four corners of the request.

5 Q Now you do identify the Sacramento file
6 though in this very declaration; is that right?

7 A Are you talking about for note 8?

8 Q Yes.

9 A Yes, we do identify it.

10 Q So the FBI knows about this file?

11 A Yes.

12 Q I mean you knew about the file when you
13 did the searches?

14 A That's correct.

15 Q But you chose not to search that file
16 number?

17 A Not in ICM, no.

18 Q If you turn the page to page 19, about
19 four or five lines down it says, "upon reviewing the
20 list of the titles of the subfiles within these
21 files." Do you see that?

22 A Correct.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JAMES LUTCHER NEGLEY,)	
)	
Plaintiff,)	
v.)	Civil Case No. 03-2126 (GK)
)	
FEDERAL BUREAU OF)	
INVESTIGATION,)	
)	
Defendant.)	
_____)	

ORDER

Upon consideration of Plaintiff's Motion for Contempt for Defendant Federal Bureau of Investigation's Failure to Comply with the Court's September 24, 2009 Order, any opposition and reply thereto, it is this ____ day of _____, 2010, hereby ORDERED that

1. Plaintiff's Motion for Contempt be, and hereby is, GRANTED;
2. the Defendant is in contempt of the Court's September 24, 2009 Order;
3. within 10 days of the date of this Order, Defendant shall comply with the Court's September 24, 2009 Order by searching for and producing all documents that reference or relate to Negley in any way, with no restrictions imposed by the Defendant;
4. Plaintiff shall be given an opportunity to depose David M. Hardy, at the Defendant's cost, based on the aforementioned search and production; and
5. the Defendant shall pay a penalty to Plaintiff of _____, as well as his attorneys' fees associated with the Defendant's failure to comply with the Court's September 24, 2009 Order, based on supporting documentation to be submitted by Plaintiff within 14 days.

Gladys Kessler
UNITED STATES DISTRICT JUDGE