



misfortune of briefly being a suspect in the Unabomber investigations. *See* Dkt. 1, Complaint at ¶ 9. Mr. Negley believes that this continued pattern of harassment could constitute racketeering as defined by Title 18 of the United States Code. *See* 18 U.S.C.S. § 1961 *et seq.*

Mr. Negley initially instituted this litigation in order to obtain documents referenced in handwriting on a facsimile cover sheet produced by the FBI pursuant to a previous FOIA request. *Id.* at ¶ 14. Shortly after filing this litigation, Mr. Negley also issued a FOIA request with the DOJ that has been assigned Request No. FOIA-2016-00039 (the “July 2015 FOIA Request”). In the July 2015 FOIA Request, Mr. Negley broadly requested that the Agency identify and produce all documents relating to him.

Counsel for Mr. Negley and DOJ conferred on the matter and determined that the documents responsive to the current litigation would also be responsive to the July 2015 FOIA Request, and vice versa. Accordingly, the parties jointly requested a stay of this litigation to give the DOJ time to produce the documents responsive to the July 2015 FOIA Request – with the understanding that a complete production of the July 2015 FOIA Request would also comply with the FOIA Request that initially triggered this litigation. This Court granted the requested stay on January 28, 2016. *See* Dkt. 22.

During the stay, counsel for Mr. Negley asked counsel for DOJ whether DOJ would use certain search terms so that documents relating to two items that are **unrelated** to the Unabomber investigation would be searched by the Agency:

1. Mr. Negley’s FBI File labeled SUB S-1575 (the “1575 File”) and the file related to the file number that is completely redacted (under the header “Bureau File Number”) on the front page of Negley-100; and

2. Mr. Negley's energy business, JLN Solar, Inc. ("JLN Solar") which is a file located in Colorado.

The 1575 File is attached hereto as Exhibit 1, and the correspondence chain discussing those issues is attached hereto as Exhibit 2. As noted in the correspondence, DOJ informed Mr. Negley that in order to pursue his FOIA requests, because the issues identified are part of the July 2015 FOIA Request and not the original FOIA litigation, such a request must be appealed administratively. *See* Exhibit 2 at 1, May 23, 2016 e-mail from April Seabrook to Clarence Lee.

Counsel for Mr. Negley noted this issue at the June 1, 2016 status conference and understood that, at that time, all issues relating to the merits of searches be reserved until the conclusion of production, which was ordered for September 1, 2016. As this Court is aware, no additional documents were produced on or before that date and this Court has ordered a new deadline for production of February 20, 2017. The issue of whether DOJ should run additional searches was substantively raised for the first time at the status hearing before this Court on September 19, 2016 and this Court ordered Mr. Negley to file any motion he deems appropriate on the issue of conducting additional searches. *See* Dkt. 32. As such, for the reasons set forth below, Mr. Negley requests that the DOJ conduct additional searches/new searches in two specific United States Attorney's Offices – the Western District of New York and the District of Colorado as well as in all the districts in California and Texas.

**II. THE DOJ SEARCHES ARE NOT REASONABLE AND NO EVIDENCE HAS BEEN PRODUCED TO PROVE REASONABLENESS**

In general, while reserving all of his rights, Mr. Negley does not contest the DOJ's assertion that searches relating to this litigation – and the Unabomber investigation – are adequate. Rather, Mr. Negley believes that the searches performed in the Western District of New York and the District of Colorado are not adequate or should be re-done because they did

not or do not adequately account for all the information Mr. Negley requested in his July 2015 FOIA Request. Mr. Negley further has not received information from the DOJ districts/offices in California and Texas, two of the key areas where Mr. Negley has resided and was being investigated. In addition, prior documents produced by a sub-agency of the DOJ (FBI) indicate that the DOJ has documents relating to those files in the areas mentioned above.

**A. The FOIA Requires the DOJ to Conduct a Reasonable Search**

An agency responding to a FOIA request must conduct a search reasonably calculated to uncover all relevant documents and if challenged must demonstrate beyond material doubt that the search was reasonable. *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990); *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999). Adequacy is the foremost issue, not whether documents might conceivably exist. *Id* at 542. The adequacy of an agency's search is measured by a "standard of reasonableness" and is dependent upon the circumstances of the case. *Id* at 542.

The FOIA requires an agency to conduct its search using methods reasonably expected to produce requested information. *See Campbell v. United States Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998). The agency bears the burden of showing that its search was calculated to uncover all relevant documents. *Steinberg v. United States Dep't of Justice*, 23 F.3d 548, 551-552 (D.C. Cir. 1994); *see Ahanmisi v. United States DOL*, 859 F. Supp. 2d 7, 10-11 (D.D.C. 2012) (finding that the reasonableness of a search depends less on the time it takes to conduct the search, or the results of the search, and more on the thoroughness with which it was conducted, and as long as the agency does not undermine the "reasonableness" of the search, it will be adequate). Courts have examined this threshold and determined that:

"To meet its burden, the agency may submit affidavits or declarations that explain in reasonable detail the scope and method of the agency's search. *See Perry v. Block*, 221 U.S. App. D.C. 347, 684 F.2d 121, 126-27 (D.C. Cir. 1982) (per curiam). In the absence

of contrary evidence, such affidavits or declarations are sufficient to demonstrate an agency's compliance with the FOIA. *Id.* at 127. If the record "leaves substantial doubt as to the sufficiency of the search, summary judgment for the agency is not proper." *Truitt v. Dep't of State*, 897 F.2d at 542."

*Wilson v. DEA*, 414 F. Supp. 2d 5, 9 (D.D.C. 2006)

An agency must show that it made a good faith effort to conduct a search using methods which can be reasonably expected to produce the information requested. *See Oglesby v. U.S. Dep't. of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (citing *Weisberg v. United States Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). The adequacy of an agency's search is examined based on the search's reasonableness given the totality of the circumstances. *See Weisberg v. United States Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

The government will not be able to establish the adequacy of its FOIA searches if it does not "record and report the search terms that it used, how it combined them, and whether it searched the full text of documents." *Nat'l Day Laborer Org. Network v. United States Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87, 108 (S.D.N.Y. 2012); *see also Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 857 F. Supp. 2d 129, 140 (D.D.C. 2012) (including the need for an agency to explain who conducted the search, how it was conducted, or what search terms any specific office used). Where specific records, photographs, or attachments are referenced in an agency's documents, courts have found that there is no longer mere speculation that the files exist, and an agency cannot demonstrate beyond a material doubt that its search was "reasonably calculated" until those missing responsive documents are searched for. *Hall v. CIA*, 881 F. Supp. 2d 38, 61-62 (D.D.C. 2012).

**B. No Evidence Exists that Searches in the Western District of New York Were Reasonable**

The first jurisdiction at issue is the Western District of New York. In prior FOIA litigation, documents were produced to Mr. Negley by the FBI – a division of DOJ – that

indicated that Mr. Negley's FBI file was labeled as "SUB S-1575." *See* File 1575, Exhibit 1 at Negley-100. That was confirmed by the deposition testimony of FBI Assistant Special Agent in Charge Clifford Holly taken in the previous litigation, which is reproduced here:

Q: But would you anticipate that that [sic] Sub S 1575 would relate to Mr. Negley or could that relate to someone else?

A: **No, I would – because it's on Exhibit Number 4 relative to the investigation conducted and the interview conducted with Mr. Negley, that that would be attributed to Mr. Negley, 1575. I didn't see that.**

...

A: **That's what – I had seen that and that's what was most confusing to me is I'm seeing an S with 7575 and then I've got Exhibit 3 1575 but now that you point out on what's Exhibit 4, now it makes sense. 1575 as a suspect sub file makes sense.**

Q: For Mr. Negley?

A: **For Mr. Negley.**

Deposition of Clifford Holly, P. 115-116 (bold in original), attached as Exhibit 3.

On Negley-100, the FBI document previously produced, the file is clearly marked as "S-1575" meaning it is a file that pertains to Mr. Negley, as confirmed by Mr. Holly of the FBI. On the next page, Negley-101, under the DOJ seal, there is a Memorandum discussing referencing the "Buffalo teletype to San Francisco/UTF dated January 7, 1994" which presumes to mean the document directly following, Negley-102. Without re-stating the teletype in its entirety, it appears that the FBI investigated a *different suspect in the Buffalo, New York area* who was also assigned the suspect number S-1575. As the original DOJ/FBI memorandum concludes, that "[redacted] has been fully identified, and the information provided does not meet the predication to initiate a specific suspect investigation. Unless new information is developed regarding

[redacted] this will remain unassigned in a suspect dead file. Buffalo division will be advised separately by UTC regarding this.” Exhibit 1 at Negley-102.

The FBI file never explained how a suspect in Buffalo to whom Mr. Negley had no connection of any kind ended up with the same suspect number – 1575 – as Mr. Negley. Nor has the FBI explained how Mr. Negley’s name has turned up in a file number – 1575 – in the Western District of New York, **almost two years before Mr. Negley was investigated as part of the Unabomber investigation in September 1995 in Chico, California.** This requested information clearly falls within the purview of information requested of the DOJ/FBI about Mr. Negley that does not relate to the Unabomber investigation. The File 1575 – which is confirmed by the FBI as being Mr. Negley’s – explicitly references Buffalo, New York on multiple occasions. *See* Exhibit 1 at Negley 102, Negley 103. Mr. Negley believes these clear references from a document previously produced by the Agency indicates that documents exist in this office that are responsive to his July 2015 FOIA Request.

Also un-explained and not disclosed on File 1575 is the FBI file number on the front of the actual file which is completely redacted. *See* Exhibit 1 at Negley 100, redactions. That page of the document is listed as “U.S. Department of Justice” and is dated “1/27/94.” *Id.* Both indicate that there is a file number/documents in possession of the DOJ that **pre-date Mr. Negley’s involvement in the Unabomber investigation.** Any search, such as the July 2015 FOIA request, that requests every document that the Agency possesses involving Mr. Negley, should have the missing file and related documents.

On March 15, 2016, Mr. Negley received a form letter indicating that no files were found in the Western District of New York, without explanation or elaboration. *See* Exhibit 4. Given the seriousness of the investigation and harassment that Mr. Negley has faced, and is prepared to

document – i.e. being investigated and assigned a suspect number *prior to his being investigated in the Unabomber investigation* – the DOJ has not met its burden of proving the reasonableness of its search, without additional evidence.

**C. No Evidence Exists that Searches in the District of Colorado Were Reasonable**

Similarly, but not related to his investigation by the FBI, Mr. Negley believes that his July 2015 FOIA Request should have produced documents from the USAO office in the District of Colorado.

In this connection, Mr. Negley is the founder and CEO of an energy company called JLN Solar, Inc. (“JLN Solar”). In 2011, Mr. Negley and JLN Solar received a subpoena that originated from the United States Department of Energy (“DOE”). Assistant United States Attorney (AUSA) Chris Larson from the DOJ’s office in Colorado, however, was also involved in issuance of the subpoena. Correspondence between the AUSA office in Colorado and Mr. Negley’s counsel evidences the fact that the AUSA office in Colorado was involved. Because Mr. Negley is the founder and CEO of JLN Solar, his name appears, at a minimum, in e-mails, various documents, and in the log that was produced by JLN Solar to the AUSA office in Colorado. *See* Exhibits 5-6. Mr. Negley is prepared to testify that AUSA Larson was involved in this subpoena and facilitating a resolution.<sup>1</sup> Documents attached to this motion as Exhibits 5-8 evidence the DOJ’s involve in connection with this subpoena.

However, despite all of this evidence indicating that the DOJ in Colorado has records relating to Mr. Negley, on February 26, 2016, Mr. Negley received correspondence from the DOJ office for the District of Colorado, informing Mr. Negley that no documents were found.

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<sup>1</sup> As previously noted, counsel for Mr. Negley requested that the DOJ use additional search terms in searching documents within the District of Colorado after the initial search yielded no results. The DOJ declined, stating that the Agency had used the previously provided search terms and that such material is unrelated to the Unabomber investigation which was the subject of the lawsuit. *See* Exhibit 2 at 1.

The DOJ did not provide any further information or explanation regarding the alleged absence of information. Given the information available, the DOJ's assertion that no documents exist – and without trying the additional searches requested by Mr. Negley – does not meet the test of reasonableness under the FOIA.

**D. No Evidence Exists that Searches Conducted in California Were Reasonable**

Another issue that was previously raised by Mr. Negley in the Status Report before this Court pertains to a Unabomber-investigation related query to the DOJ office in DOJ Districts in California. As of the date of this motion, no documents have been received from any DOJ office in California. It is possible that documents will be produced when the entirety of the DOJ's production is finalized, and Mr. Negley reserves his rights to challenge those responses at that time. Thus, while Mr. Negley reserves his rights to challenge the reasonableness of searches within more than one relevant DOJ office in California, Mr. Negley highlights the issues germane to the Central District of California by way of example.

As this Court is aware, the origin of Mr. Negley's investigation by the United States government began in Chico, California and involved, at a minimum, the Central District of California and the Sacramento division. In previous litigation in the Western District of Texas, FBI Agent Brian Callihan – at the time the Chief Division Counsel for the Sacramento Division of the FBI – provided a Declaration to the Court (the "Callihan Declaration") which is attached hereto as Exhibit 9. Paragraph 8 of the Callihan Declaration makes clear that a portion of the "Unabomb" file pertains to Mr. Negley:

8. File # 149A-SC-C27507. This file was opened within the Sacramento Field Office in order to contain information pertaining to possible "Unabomb" suspects about whom information as received in the Sacramento Field Office territory. The initial identifier is identical to the explanation provided in the preceding paragraph. The second identifier, SC, is the abbreviated form used for the Office of Origin in the investigation, which is the Sacramento, California Field Office. The third identifier, C27507, indicates the individual case number

for this classification of investigation. This particular file contains information on a large number of other individuals who were contacted/interviewed as possible “Unabomb” suspects or sources of information. Only *a small portion of the file pertains to Mr. Negley*, since he was just one of many individuals about whom information was provided.

Callihan Declaration at ¶ 8 (emphasis added).

Accordingly, there is actual testimony from someone within the ambit of the DOJ that there is a file pertaining to Mr. Negley located in Sacramento, California. Moreover, Mr. Negley was interviewed by the FBI in Chico, California on September 20, 1995. *See* File 1575 at Negley 109. However, no evidence has been provided from the DOJ to explain why no documents have been produced from the any district in California. Another example exists in File 1575 at Negley 100. Underneath the redacted file number, the document has, in handwritten notes, “Please Return to San Francisco” written across the front of the file and underlined. *See* Exhibit 1 at Negley 100 (emphasis in original). This implies that this Agency file that has its file number completely redacted originated in San Francisco. No documents have been produced from any San Francisco field office by the DOJ and Mr. Negley reserves all his rights in that regard.<sup>2</sup>

**E. No Evidence Exists that Reasonable Searches Were Conducted in Texas**

Lastly, Mr. Negley requests that the DOJ produce documents from its associated Texas districts. Mr. Negley is a Texan who resides in Austin, Texas. He has been involved in associated litigation with the FBI in the Western District of Texas. *See Negley v. FBI*, Case No. 5:12-cv-00362 in the Western District of Texas, San Antonio Division (Garcia). In

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<sup>2</sup> To the extent DOJ argues that Mr. Negley seeks files in the possession of the FBI, Mr. Negley notes two points:

1) the FBI is a sub-agency of the DOJ; and

2) the FBI has already performed a search of files in some capacity, and argued that it was exempt from production of those documents because those documents were duplicative of documents previously produced to Mr. Negley. *See* Exhibit 10, August 26, 2016 Letter from the FBI to Clarence Lee. No argument has been made that the FBI (and its associated field offices) is exempt from Mr. Negley’s 2015 FOIA Request.

correspondence with the DOJ, Mr. Negley specifically requested the Agency search all of its offices in Texas. To date, no response has been received.

**III. CONCLUSION**

Mr. Negley has previously raised these concerns about the reasonableness of searches conducted at these offices within the DOJ on multiple occasions and the Agency has declined to either supplement searches or explain why no documents have been produced. Therefore, Mr. Negley respectfully requests that this Court Order the DOJ to use the additional search terms requested by Mr. Negley and to produce documents from the geographic locations noted in this motion.

Date October 4, 2016

Respectfully Submitted,

/s/  
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