UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5296
(C.A. No. 03-2126)

JAMES LUTCHER NEGLEY, Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, Appellee.

APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

Appellee, the Federal Bureau of Investigation ("FBI"), respectfully moves for summary affirmance of the following orders by the Honorable Gladys Kessler in this Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, case: (1) the Memorandum Opinion and Order issued on August 31, 2011, granting Appellee's motion for summary judgment and denying Appellant's cross-motion for summary judgment (Exhibit A); (2) the Memorandum Opinion and Order issued on March 1, 2011, denying Appellant's motion for contempt for FBI's alleged failure to comply with the District Court's September 24, 2009, Order (Exhibit B); and (3) the Memorandum Opinion and Order issued on August 31, 2011, denying Appellant's motion for reconsideration of his motion for contempt (Exhibit C). Summary disposition is appropriate in this case because the "merits of this appeal are so clear as to make summary affirmance proper." *Walker v. Washington*, 627 F.2d 541,

545 (D.C. Cir. 1980). Full briefing and oral argument on the issues presented to the Court would not materially advance the disposition of this appeal. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987) (*per curiam*).

FACTUAL AND PROCEDURAL BACKGROUND

I. Appellant's 2002 FOIA Request

Appellant, James Negley, brought this action to challenge the FBI's response to a FOIA request he submitted on January 16, 2002. R. 126 (Summ. J. Mem. Op.) at 2. Negley's 2002 FOIA Request to the FBI's San Francisco Field Office sought "a copy of any records about [him] maintained at and by the FBI in [the San Francisco] field office." R. 116-5.[1] By fax dated April 23, 2002, Negley amended his request as follows: "As you can see[,] my San Francisco FBI file no. is 149A-SF-106204-Sub S-1575. Please amend my 1/16/2002 FOIA request to your office to include this file no. as well as any others." R. 116-6.

Following an initial round of summary judgment briefing and appeal to this Court, which resulted in reversal and remand, 169 Fed. Appx. 591 (D.C. Cir. 2006), the FBI renewed its motion for summary judgment on all claims. R. 72. At the same time, Negley cross-moved for partial summary judgment challenging the adequacy of the FBI's search and seeking the production of File S-1575. R. 71.

[1] Citations in the form "R. __" refer to corresponding entries on the District Court's electronic docket for this case.

A. The September 24, 2009, Order

On September 24, 2009, the District Court granted Negley's motion for partial summary judgment and denied the FBI's motion for summary judgment ("September 24, 2009, Order"). *Negley v. FBI*, 658 F. Supp. 2d 50 (D.D.C. 2009). In its September 24, 2009, Order, the District Court determined that the FBI maintained investigative information in a records system called CRS, which was searchable through a mechanism known as Automated Case Support, which enable three separate search functions -- the Universal Index ("UNI"), Investigative Case Management ("ICM"), and Electronic Case File ("ECF"). *Id.* at 57 n.4. Finding the FBI's explanations of the searches it had undertaken to be lacking, the District Court ordered the FBI to (1) conduct an additional search of the ICM and ECF functions, and gave the FBI the option of searching or specifying with sufficient detail the terms used in earlier searches of five other "sources of searchable records"; (2) produce File S-1575; and (3) make affiants available for three depositions. *Id.* at 59-61; R. 90.

B. The FBI's Further Searches and Disclosures in Accordance With the September 24, 2009, Order

In accordance with the September 24, 2009, Order, the FBI produced File S-1575 and conducted searches for records responsive to Negley's 2002 FOIA Request as follows:

(1) UNI function: The FBI searched the UNI function using a six-way phonetic breakdown of the name "James Lutcher Negley" and the variation "James Luther Negley." *See* R. 116-2 (Seventh Declaration of David M. Hardy) ¶ 39(a).

(2) ECF function. The FBI searched the ECF function using the six-way phonetic breakdown of the name "James Lutcher Negley" and "James Luther Negley." *Id.* ¶ 39(b). Additionally, on September 28, 2009, the FBI conducted a text search in ECF using multiple file number and variations. *Id.*

(3) ICM function. Upon receipt of the September 24, 2009, Order and again on October 22, 2009, the FBI searched ICM using file numbers associated with Negley based on information obtained from the UNI and ECF searches. *Id.* ¶ 39(c).

(4) Electronic Surveillance index. The FBI searched this index on September 5, 2007, September 28, 2009, and again on October 21, 2009 using a six-way phonetic breakdown of the name "James Lutcher Negley" and "James Luther Negley." *Id.* ¶ 40.

(5) Zy index. The FBI conducted a text search of the Zy index on January 10, 2007 and October 13, 2009 using the term "Negley." *Id.* ¶¶ 41-42.

(6) SFFO. The FBI provided a detailed explanation of the search of the SFFO manual index that was conducted on July 6, 2009. *Id.* ¶ 43.

(7) FBIHQ. The FBI searched the FBIHQ manual cards on September 5, 2007, and June 30, 2009. *Id.* ¶ 43.

(8) Handwritten notes, personal files, and restricted files. The FBI determined that none of the documents concerning Negley mentioned the existence of a file that would contain any handwritten notes created during an interview. *Id.* ¶ 44. The FBI also determined that no "personal files or records" concerning Negley existed. *Id.* ¶ 45. With respect to "restricted files," the FBI explained that such files are indexed and all responsive material would have been captured in the Automated Case Support search. *Id.* ¶ 46.

The FBI produced all responsive non-exempt documents resulting from the above searches, along with a coded *Vaughn* index and a declaration from David Hardy explaining the bases for its withholdings. *See id.* In total, the FBI located and processed 120 pages responsive to Negley's 2002 FOIA Request, releasing 66 pages in full and 54 pages in part. *Id.* ¶ 4. The FBI did not withhold any responsive records in full. *Id.* The responsive records pertained to the FBI's UNABOM ("University and Airline Bombing") investigation, a criminal investigation into 16 improvised bombs that were mailed or placed beginning in 1978 that resulted in three deaths and 23 injuries throughout the United States. *Id.* ¶ 57. The UNABOM file and its respective subfiles, including File S-1575, contained information compiled by the FBI's San Francisco Field Office during the

course of the UNABOM investigation. *Id.* The FBI invoked FOIA Exemption 6, 7(C), and 7(D) to redact portions of certain responsive records. *See id.* ¶¶ 47-49.

C. The FBI's Searches Uncover Records Relating to Other Field Offices And Records Created As A Result of 2002 FOIA Request

The FBI's searches located two sets of "records" that it did not include in its production in response to the 2002 FOIA Request: (1) administrative files related to Negley's prior FOIA requests to other field offices and the FBI's file related to this litigation file, and (2) one serial concerning the San Francisco Field Office that came from Negley's litigation file, three serials concerning Negley's prior FOIA requests to other field offices, and one serial not concerning this James Negley. *See id.* ¶¶ 39(a)-(b).

II. Appellant's 2009 FOIA Request

Separate and apart from this litigation, on June 15, 2009, Negley submitted a FOIA request for "all records in the possession of the Federal Bureau of Investigation relating, in any way, to James Lutcher Negley." *See* R. 116-3 (Eighth Declaration of David M. Hardy) Ex. A. Negley did not seek to amend his complaint in this action, nor did he otherwise give the District Court notice of his 2009 FOIA Request. R. 110 (Contempt Mem. Op.) at 9. The September 24, 2009, Order was issued shortly thereafter, so the FBI conducted searches in response to the 2009 FOIA Request at the same time that it was conducting additional searches in response to the 2002 FOIA Request. R. 116-3 ¶ 14. Although some searches

had been conducted for the 2009 FOIA Request prior to the issuance of the September 24, 2009, Order, all searches performed after September 24, 2009 were conducted to find records responsive to both the 2009 and 2002 requests. *Id.* ¶ 14. The FBI's searches for records responsive to both requests did not locate any investigatory records that had not been previously released. *Id.* ¶ 16.

As explained above, the only records located in the FBI's files that had not previously been released were "administrative" and "litigation" files that are typically not processed as part of a FOIA request because most requesters do not want a copy of their request and in fact object to paying for it. *Id.*; R. 116-7 at 27-28. In response to Negley's 2009 FOIA Request, the FBI sent a letter on November 30, 2009 to Negley inquiring whether he wished to receive these administrative-type files. *See* R. 116-3 ¶ 17 & Ex. E. Negley did not respond. R. 116-7 at 127-128. A little over a month later, on January 8, 2010, the FBI sent a follow-up letter advising that it was still awaiting a response as to whether Negley wished to obtain these administrative-type files. R. 116-3 ¶ 18 & Ex. F. Again, Negley failed to respond. *Id.* ¶ 19.[2]

III. Appellant's Motion for Contempt and Motion for Reconsideration

In April 2010, Negley moved for an order holding the FBI in contempt,

[2] Despite Negley's refusal to respond to either of the FBI's two inquiries regarding whether he wished to receive these administrative and litigation files, the FBI nevertheless collected these files for processing and release. R. 116-3 ¶¶ 17-22.

claiming that the agency failed to comply with the September 24, 2009, Order because (1) it limited its production to files maintained at the San Francisco Field Office; and (2) it did not produce the administrative or litigation files created after his 2002 FOIA Request. R. 102. By Order dated March 1, 2011, the District Court denied Appellant's contempt motion. R. 110 (Contempt Mem. Op.). The District Court concluded that "[b]ecause Defendant searched for and produced all documents responsive to Plaintiff's 2002 FOIA request, . . . Defendant has not violated this Court's reasonably clear and unambiguous Order." *Id.* at 15.

Negley subsequently sought reconsideration of the District Court's decision on his contempt motion. *See* R. 111. The District Court denied this motion as well, finding that Negley's 2002 FOIA Request sought only records maintained at the San Francisco Field Office and that "Defendant reasonably imposed its 2002 cut-off because it was also preparing to produce documents responsive to a much broader FOIA request, which entirely encompassed any post-April 2002 SFFO documents responsive to the 2002 request." R. 124 (Recon. Mem. Op.) at 5-9.

IV. Cross-Motions for Summary Judgment

Finally, the parties filed cross-motion for summary judgment on all claims regarding the 2002 FOIA Request. R. 112, 116-119, 121. Negley ultimately limited his challenge to adequacy of the FBI's search and to the FBI's application of Exemption 7(C) to redact the names and personally identifying information of

third parties. *See* R. 118; R. 126 (Summ. J. Mem. Op.) at 15 n.6. Based on the declarations and deposition testimony in the record, the District Court granted the FBI's motion for summary and denied Negley's cross-motion, finding that the FBI's search was adequate and that the FBI properly invoked Exemption 7(C) to protect against an unwarranted invasion of privacy of third parties. R. 126 (Summ. J. Mem. Op.).

ARGUMENT

The District Court's decisions denying Appellant's motion for contempt and motion for reconsideration, and granting Appellee's motion for summary judgment and denying Appellant's cross-motion, were well-reasoned and should be summarily affirmed.

I. The District Court Correctly Found that the FBI Had Not Violated the September 24, 2009, Order and Thus Denied the Motion for Contempt.

The power to enforce compliance with a court order through civil contempt is "a potent weapon," and "[i]n light of the remedy's extraordinary nature, courts rightly impose it with caution." *Joshi v. Prof'l Health Servs., Inc.*, 817 F.2d 877, 879 n.2 (D.C. Cir. 1987). The party seeking contempt must demonstrate by clear and convincing evidence the existence of a clear and unambiguous court order and a violation of that order by the alleged contemnor. *See Broderick v. Donaldson*, 437 F.3d 1226, 1234 (D.C. Cir. 2006) (concluding that a plaintiff's failure to provide clear and convincing evidence of her employer's purported lack of

compliance with the court order "militate against a finding of contempt").

Here, Negley predicated his contempt motion on his claim that the agency "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." R. 110, Contempt Mem. Op., at 7. The September 24, 2009, Order, however, directed the FBI to produce documents that were responsive to the 2002 FOIA Request. *Id.* at 8-10. The assertion that the September 24, 2009, Order required the FBI to search "for all documents that relate to or reference Negley in any manner," without regard to scope, evinced Negley's belief that the September 24, 2009, Order expanded his 2002 FOIA Request to include his broader 2009 FOIA Request. The District Court correctly rejected this argument, finding that it had no notice of the 2009 FOIA Request at the time of its Order and thus "could hardly order the FBI to comply with a FOIA request that the Court did not even know about." *Id.* at 8-10.

There was, therefore, no evidence, let alone clear and convincing evidence, of any violation of the September 29, 2009, Order. The FBI fully complied with the Order when it limited its production to documents in the San Francisco Field Office because the 2002 FOIA Request sought only records maintained at the San Francisco Field Office -- as Negley conceded, the FBI's production was of responsive documents located in the San Francisco Field Office. *Id.* at 11-12. In

addition, the FBI reasonably did not produce documents created after and as a result of the 2002 FOIA Request -- that is, the administrative-type files in the San Francisco Field Office that were generated in the course of the agency's response to the 2002 FOIA Request -- because it determined that such documents were encompassed by the 2009 FOIA Request. *See McGehee v. Cent. Intelligence Agency*, 697 F.2d 1095, 1103 (D.C. Cir. 1983) (directing courts to "turn to the particular facts of the case . . . to assess the reasonableness of the agency's conduct"). The District Court properly found that "it was reasonable for the FBI to use a cut-off date of April 2002, when it was aware that it would also have to respond to Plaintiff's broader 2009 FOIA request." *Id.* at 13. Therefore, the Court concluded that "[b]ecause Defendant searched for and produced all documents responsive to Plaintiff's 2002 FOIA request, . . . Defendant has not violated this Court's reasonably clear and unambiguous Order." *Id.* at 15.

II. The District Court Correctly Denied the Motion for Reconsideration.

Thereafter, Negley sought reconsideration of the contempt motion based upon his claims that (1) the Court "mischaracterized" his 2002 FOIA request; and (2) the 2009 FOIA request had "no bearing" on the reasonableness of the FBI's decision not to produce documents created after 2002. R. 124 (Recon. Mem. Op.). The District Court found that Negley failed to present any new evidence, law, or argument that warranted reconsideration of its prior decision. To begin, Negley's

representation that "the 2002 FOIA request sought records outside of the SFFO" was directly contradicted by the plain language of the 2002 FOIA request, the plain language of his amendment stating "Please amend my 1/16/2002 FOIA request ***to your office*** to include this file no. as well as any others," and even by his own prior sworn testimony. *Id.* at 5-7 & nn.2-3.

Next, the District Court reiterated its earlier finding that "under the circumstances of this case, 'it was reasonable for the FBI to use a cut-off date of April 2002" given that it was responding to the 2009 FOIA Request at the same time. *Id.* It thus denied Negley's motion for reconsideration, finding that the 2002 FOIA Request sought only records maintained at the San Francisco Field Office and that "Defendant reasonably imposed its 2002 cut-off because it was also preparing to produce documents responsive to a much broader FOIA request, which entirely encompassed any post-April 2002 SFFO documents responsive to the 2002 request." *Id.* at 5-9. The District Court's decision should be summarily affirmed.

III. The District Court Properly Granted Summary Judgment In Favor of the FBI.

A. The FBI's Search Was Exhaustive And, Thus, Adequate.

On summary judgment, in addition to revisiting for a third time his argument that "the FBI's use of April 2002 as the cut-off date for production of documents is unreasonable," Negley launched a results-driven attack on the reasonableness of

the FBI's search for documents responsive to the 2002 FOIA Request because the FBI did not locate a single document dated September 18, 1995, that contained a San Francisco file number. R. 126 (Summ. J. Mem. Op.) at 9-13. Neither argument calls into question the adequacy of the FBI's search in response to the 2002 FOIA Request.

First, the FOIA requires that an agency undertake a search that is "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999); *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Here, Negley did not challenge the parameters of the FBI's search, which were based on the District Court's September 24, 2009, Order, nor did he claim that the FBI searched less than the District Court required. R. 126 (Summ. J. Mem. Op.) at 10. Rather, he pointed to a single document that contained a San Francisco file number and, speculating that this document must have come from the San Francisco Field Office, argued that the FBI's search could not have been reasonable since it failed to locate this one document. *See id.* at 9-13.

Even crediting Negley's conjecture that this one document had been located in the San Francisco Field Office, "the agency's failure to turn up [that] particular document . . . does not undermine the determination that the agency conducted an adequate search for the requested records." *Wilbur v. CIA*, 355 F.3d 675, 678

(D.C. Cir. 2004). Indeed, it is well-established that a search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995) ("Of course, the failure to turn up this document does not alone render the search inadequate; there is no requirement that an agency produce *all* responsive documents.") (emphasis in original). Rather, a search is inadequate only if the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby*, 920 F.2d at 68. That is, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Here, the FBI explained that this document was found in a Sacramento file, not a San Francisco file, and detailed its efforts to determine why this record was not found in the San Francisco files. R. 126 (Summ. J. Mem. Op.) at 10-11; *see* R. 116-4 (Ninth Declaration of David M. Hardy) ¶ 6. Consequently, the District Court correctly concluded that Negley's challenge to the failure to locate one document is not sufficient to defeat summary judgment given the District Court's finding that the FBI had fully complied with the searches required by its September 24, 2009, Order.

Second, the District Court found no reason to change its prior analysis that the FBI reasonably used an April 2002 cut-off date for determining responsiveness to the 2002 FOIA Request because "in this particular circumstance, the FBI responded to Plaintiff's 2002 request while also conducting searches in response to a subsequent, much broader request." R. 126 (Summ. J. Mem. Op.) at 12-13. As such, it was logical for the FBI to conclude that any records created after and as a result of the 2002 FOIA request and located anywhere in the agency -- which in this case included administrative-type files pertaining to other field offices and generated as a result of the 2002 FOIA Request -- were sought by Negley's 2009 FOIA Request.[3]

B. The FBI's Exemption 7(C) Withholdings Were Proper.

The District Court also correctly found that the FBI substantiated its withholdings pursuant to Exemption 7(C), which protects information compiled for law enforcement purposes to the extent that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." *See* R. 126 (Summ. J. Mem. Op.) at 14-18. As a threshold matter, Exemption 7 protects from

[3] As previously stated, the FBI's searches in response to both the 2002 and 2009 FOIA requests did not locate any FBI investigatory records about Negley that had not been previously released. R. 116-3 (Eighth Hardy Decl.) ¶ 16. The only records discovered that had not previously been released were administrative and litigation files that requesters typically do not want -- again, these are the very files that the FBI twice asked Negley whether he wished to receive, and Negley twice failed to respond. *Id.* ¶¶ 17-18.

disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such records or information" would result in one of six specified harms. 5 U.S.C. § 522(b)(7). Negley did not contest that the records at issue -- which pertained to the FBI's UNABOM investigation, *see* R. 116-2 (Seventh Hardy Decl.) ¶ 57 -- were compiled for a law enforcement purpose and that the enforcement activity is within the law enforcement responsibilities of the FBI. *See Tax Analysts v. I.R.S.*, 294 F.3d 71, 77 (D.C. Cir. 2002) ("Therefore, agencies . . . that combine administrative and law enforcement functions, as well as agencies like the Federal Bureau of Investigation ('FBI'), whose principal function is criminal law enforcement, may seek to avoid disclosure of records or information pursuant to Exemption 7."); *Campbell v. U.S. Dep't of Justice,* 164 F.3d 20, 32 (D.C. Cir. 1998) ("Because the FBI specializes in law enforcement, its decision to invoke exemption 7 is entitled to deference.").

Through the sworn testimony of David Hardy, the FBI explained that it invoked Exemption 7(C) to protect names and/or identifying information of: (1) FBI personnel; (2) individuals who furnished information to the FBI under an implied assurance of confidentiality; (3) State government employees or non-federal law enforcement officers; (4) third parties merely mentioned; (5) individuals interviewed by the FBI; and (6) third parties of investigative interest. *Id.* at 15-16; *see* R. 116-2 (Seventh Hardy Decl.) ¶ 49. Negley's claim that the FBI

failed to justify each redaction was demonstrably inaccurate, as the District Court found.

In evaluating the applicability of Exemption 7(C), the District Court may find disclosure to be warranted if the individual seeking the information demonstrates a public interest in the information that is sufficient to overcome the privacy interest at issue. *See Martin v. Dep't of Justice*, 488 F.3d 446, 458 (D.C. Cir. 2007); *Boyd v. Criminal Division*, 475 F.3d 381, 386-87 (D.C. Cir. 2007). In order to trigger the balancing of public and private interests, a requester must "(1) 'show the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake,' and (2) 'show the information is likely to advance that interest.'" *Boyd*, 475 F.3d at 387 (quoting *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004)).

This Court has held that "privacy interests are particularly difficult to overcome when law enforcement information regarding third parties is implicated." *Martin*, 488 F.3d at 457. "'Third parties who may be mentioned in investigatory files' and 'witnesses and informants who provide information during the course of an investigation' have an 'obvious' and 'substantial' privacy interest in their information." *Id.* (quoting *Nation Magazine*, 71 F.3d at 894). Indeed, "the only public interest relevant for purposes of Exemption 7(C) is one that focuses on the citizens' right to be informed about what their government is up to." *Davis v.*

United States Dep't of Justice, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (internal quotation omitted). Thus, "unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1206 (D.C. Cir. 1991).

Although he purported to challenge numerous redactions made by the FBI, Negley ultimately focused on redactions made on two records pursuant to Exemption 7(C), claiming that the FBI failed to demonstrate how removing the redactions would result in an unwarranted invasion of privacy. *See* R. 118 at 16-17. Significantly, Negley failed to identify any public interest that would be served by disclosure of the names and/or other identifying information of witnesses, third parties merely mentioned, individuals interviewed by the FBI, or individuals of investigative interest. R. 126 (Summ. J. Mem. Op.) at 18. Because Negley could not point to any public interest, the District Court rightly concluded that the FBI's claim Exemption 7(C) was proper, and its decision should be summarily affirmed.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the three decisions of the District Court at issue on appeal should be summarily affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2011, the foregoing **Appellee's Motion for Summary Affirmance** has been served by this Court's Electronic Case Filing System and a courtesy copy has been sent by first-class U.S. mail marked for delivery to:

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