UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

REPLY MEMORANDUM IN FURTHER SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In an opposition and reply brief that is long on invective and short on facts, law, and logic, Plaintiff goes to considerable lengths to contrive arguments that fail to cast doubt on what is evident in the record: the FBI has conducted an exceedingly thorough search for documents responsive to Plaintiff's 2002 FOIA Request, produced to Plaintiff all non-exempt records responsive to that 2002 FOIA Request, and provided sufficiently detailed justifications for its limited claims of Exemptions 6, 7(C), and 7(D). Plaintiff presents nothing more than false notes, and his arguments on the two remaining issues in this case -- the adequacy of the FBI's search and production in response to his 2002 FOIA Request and the sufficiency of the FBI's justifications for its Exemption 7(C) claims -- are unmeritorious.

In an attempt to overcome the hurdle presented by the Court's March 1, 2011 Opinion finding the agency's reading of the 2002 FOIA Request to be "eminently reasonable," Plaintiff contends that the FBI "appears to confuse" his argument that the FBI's use of a temporal cut-off for its production violated the Court's September 24, 2009 Order with his argument that the FBI's use of a temporal cut-off for its production violated the FOIA. *See* Pl.'s Opp'n at 5 n.2. This novel suggestion that the FBI can comply with a Court order but somehow still run afoul of

the FOIA is not supported by case law and defies logic. The Court's September 24, 2009 Order directed the FBI to conduct additional searches as required by FOIA, and the Court's March 1, 2011, assessed the reasonableness of the FBI's response under the FOIA.

Additionally, Plaintiff maintains a wholesale attack on "all of the redactions made by the FBI," without substantiating his claims that the detailed explanations in the Seventh Hardy Declaration for the FBI's exemption claims are purportedly deficient, and without even addressing any of the FBI's arguments as to Exemptions 6 and 7(D). In the limited instances in which the Plaintiff specifically addresses the Exemption 7(C) claims, Plaintiff concedes the propriety of the agency's redactions on five of the seven contested pages and fails to overcome the third-party privacy interests protected in the two remaining pages, Negley-10 and Negley-103. Perplexingly, despite conceding the propriety of the FBI's redactions on all but two pages, Plaintiff has submitted a proposed order that would require the FBI to re-process all 120 pages that it has produced in response to Plaintiff's 2002 FOIA Request "with no redactions."

As demonstrated in its opening brief and below, the FBI has satisfied its obligations under FOIA and has produced all non-exempt records responsive to Plaintiff's 2002 FOIA Request. Defendant respectfully submits that the FBI is entitled to judgment as a matter of law on all issues in this case and requests that Plaintiff's motion for summary judgment be denied.

ARGUMENT

I. THE FBI CONDUCTED A REASONABLE SEARCH AND PRODUCED ALL NON-EXEMPT RECORDS RESPONSIVE TO NEGLEY'S 2002 FOIA REQUEST

Plaintiff's contention that the FBI's response to his 2002 FOIA Request is unreasonable because "the cut-off date used by the agency for its production is too distant in the past from the release of the records," *see* Pl.'s Opp'n/Reply at 5, reflects his continued misapprehension of the FOIA and the record in this case. As explained in detail in its opening brief, the FBI undertook a

search that was designed to uncover any records about Negley maintained at and by the FBI, without any limitation as to time or location of the documents. *See* Def.'s Mem. at 18-21. Upon completion of its exhaustive search, the FBI processed the records generated by the search and produced, in response to the 2002 FOIA Request, only the documents that were responsive to the 2002 FOIA Request. *See id.* This simple proposition -- that an agency's response to a FOIA request need only consist of records that are responsive to the subject of that request -- appears to escape Plaintiff.

A. The FBI Reasonably Produced Only Records Responsive to Plaintiff's 2002 FOIA Request

Avoiding any discussion of the subject of his 2002 FOIA Request, Plaintiff flatly asserts that "the Court should find that the FBI's use of a 2002 cut-off date for its production is unreasonable under the circumstances." *See* Pl.'s Opp'n/Reply at 6. The circumstances of the FBI's search for records responsive to Plaintiff's 2002 FOIA Request are, however, directly relevant to the reasonableness of the agency's response. *See McGehee v. C.I.A.*, 697 F.2d 1095, 1101 (D.C. Cir. 1983) (noting the necessity of "turn[ing] to the particular facts of the case . . . to assess the reasonableness of the agency's conduct"). Here, Plaintiff's 2002 FOIA Request sought a copy of records about himself "maintained at and by the FBI [SFFO]," as well as File S-1575. *See* Def.'s Mem. Exs. 1 & 2; Mar. 1, 2011 Mem. Op. [ECF No. 110] at 10. As the FBI has explained on multiple occasions, the searches described in the Seventh Hardy Declaration were designed to locate records responsive to both the 2002 request and the more expansive 2009 request. *See* Def.'s Mem. at 19-20. As a result of this search, the FBI found, but did not produce, two discrete sets of documents that were not responsive to Plaintiff's 2002 FOIA Request: (1) administrative and litigation files created in response to the 2002 FOIA Request; and (2) administrative files created in response to Plaintiff's FOIA requests to FBI field offices

other than the SFFO. *See* Seventh Hardy Decl. ¶¶ 39(a)-(b); Mar. 1, 2011 Mem. Op. [ECF No. 110] at 13 ("The only records discovered that had not previously been released to Plaintiff were 'administrative' type files that were deemed unresponsive to Plaintiff's 2002 FOIA request in that they were created in the process of responding to his request and/or related to field offices other than San Francisco.").

The FBI reasonably excluded these administrative files from its response to the 2002 FOIA Request since "an agency has no obligation to produce information that is not responsive to a FOIA request." *Wilson v. U.S. Dep't of Transp.*, 730 F. Supp. 2d 140, 156 (D.D.C. 2010). First, with regard to the administrative and litigation files that were necessarily created after and as a result of Plaintiff's 2002 FOIA request, the FBI's interpretation that the 2002 FOIA Request "was limited to documents in existence at the time of his request and within the scope of the request was eminently reasonable" given that both parties were aware that the FBI was also responding to Plaintiff's 2009 FOIA request, which had a broader geographic and temporal scope than his 2002 request. Mar. 1, 2011 Mem. Op. [ECF No. 110] at 12-14; *see Jefferson v. Bureau of Prisons*, 578 F. Supp. 2d 55, 60 (D.D.C. 2008) (concluding that "it was reasonable in this instance for the agency to conclude that the information requested would have pre-dated, not post-dated the FOIA request" based upon extrinsic information that both parties possessed). Moreover, Plaintiff's suggestion that these records should have been produced is "inconsistent with Supreme Court precedent holding that the FOIA 'does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created or retained.'" *See Schoenman v. F.B.I.*, No. 04-2202 (CKK), 2009 WL 763065, at *18 (D.D.C. Mar. 19, 2009). As the court in *Schoenman* held, plaintiff's demand for search slips and other documents "that may or may not exist but which, in any event, [were] created during the course

of searching for records responsive to Plaintiff's FOIA/PA Request" should be rejected given that this demand "essentially seeks to have the [agency] create or retain such documents." *Id.*; *see* Mar. 1, 2011 Mem. Op. [ECF No. 110] at 11 ("[A]n agency does not violate its FOIA obligations if it fails to produce administrative documents which have been created as a direct result of responding to the request itself.").

Second, with regard to the administrative files relating to other offices other than San Francisco, these files clearly fell outside the scope of Plaintiff's 2002 FOIA Request, which was directed to the SFFO. The FBI's response therefore accorded with the well-established rule that in complying with a FOIA request, an agency is not required to search for records which are beyond the scope of the original request. *See Williams v. Ashcroft*, 30 Fed. Appx. 5, 6 (D.C. Cir. 2002) (holding that the Bureau of Prisons was "not required to search for or provide tape recordings . . . because [appellant] did not include these materials in his initial FOIA request"); *Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 389 (D.C. Cir. 1996).

Plaintiff's reliance on *In Defense of Animals v. Nat'l Institutes of Health*, 543 F. Supp. 2d 83, 99 (D.D.C. 2008) to support his position on the use of a "too distant" production cut-off date is misplaced. The *In Defense of Animals* court addressed a very different situation in which the agency used a time-of-search cut-off date, did not inform the requester of the cut-off date, and did not produce responsive documents until eleven months after the start of the search. *Id.* at 98-99. Although the court noted that an "eleven-month lag between the start of the search and Defendants' final production of documents to Plaintiff . . . does not strike the Court as presumptively unreasonable," it could not find the cut-off date to be reasonable because the agency failed to proffer any explanation justifying its procedure. *Id.* at 99. On the contrary, the FBI not only informed Plaintiff twice about the existence of these non-responsive administrative

records, *see* Eighth Hardy Decl. ¶¶ 17-18 & Ex. E-F, but also explained why it reasonably limited its production to SFFO documents that pre-dated Plaintiff's 2002 FOIA Request in light of the agency's concurrent processing of the 2009 FOIA Request.

Finally, Plaintiff does not address any of the particulars of his 2002 request, electing instead to pepper his brief with accusations of "smokescreen," "gamesmanship," "wait-and-see approach," "misleading," and "bait and switch." *See, e.g.*, Pl.'s Opp'n/Reply at 2, 3, 7, 14. These accusations are not substantiated anywhere in the record, not the least because it is difficult to discern what tactical advantage, if any, the FBI stood to gain by *informing* Plaintiff about the existence of these non-responsive records, *making repeated, unanswered attempts* to determine whether Plaintiff even wanted these records, and processing these records in response to the 2009 FOIA request notwithstanding the absence of any response from Plaintiff.

B. The FBI's Response to Plaintiff's 2002 FOIA Request Is Reasonable In View of the FBI's Concurrent Response to Plaintiff's 2009 FOIA Request

Plaintiff next contends that "[t]he 2009 FOIA Request is, as admitted by the FBI, entirely outside the scope of this litigation and it is inappropriate for the FBI to use it as a sword and shield to avoid compliance with established FOIA law in response to Negley's pending 2002 FOIA Request." *See* Pl.'s Opp'n/Reply at 8. The suggestion that the FBI is precluded from referring to the 2009 FOIA Request because it is not at issue in this litigation is nonsensical.

First, Plaintiff claims that it is somehow "misleading" for the FBI to invoke its response to the 2009 FOIA Request because the FBI's response to that request is ongoing and the FBI is charging Plaintiff for its work in conjunction with that request. *See id.* at 7. Given that Plaintiff has never amended his complaint to incorporate his 2009 FOIA Request, the ongoing nature of the FBI's response to his later request in no way detracts from the reasonableness (and the completeness) of the FBI's response to the 2002 FOIA Request. *See* Mar. 1, 2011 Mem. Op.

[ECF No. 110] at 9 ("[T]he [September 24, 2009] Order could not have been referring to Plaintiff's expansive 2009 FOIA request, as the Court had not been given notice of this request by either party at the time that it issued the Order. The Court could hardly order the FBI to comply with a FOIA request that the Court did not even know about."). Nor is there any relevance to the fact that Plaintiff, like every other FOIA requester, is statutorily required to pay processing fees in connection with his new request. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(III); 28 C.F.R. § 16.11(c)(2).[1]

Second, Plaintiff makes the peculiar assertion that the FBI counsel's statement that "the records are in response to a 2009 FOIA request . . . that is outside this litigation" means that it is "disingenuous . . . for the FBI to use its response to the 2009 Request as justification for its using a 2002 cut-off date for its production of documents in response to the pending 2002 FOIA Request."[2] *See* Pl.'s Opp'n/Reply at 7-8. The existence of the 2009 FOIA Request bears on the FBI's understanding of the 2002 FOIA Request, so Plaintiff's claim that this is somehow "disingenuous" is confounding. As this Court has found, "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." *See* Mar. 1, 2011 Mem. Op. [ECF No. 110] at 13.

---

[1] What Plaintiff's brief crystallizes is this: (1) he believes that the Court should have expanded his 2002 FOIA Request to include his 2009 FOIA Request, even though he never provided the Court with notice of his 2009 request in the form of an amended complaint or otherwise; and (2) he believes the Court should grant him an exemption from paying the statutorily required processing fees in connection with his 2009 FOIA Request. Both views reflect a fundamental misunderstanding of FOIA.

[2] Plaintiff also contends that "Negley has not been given the opportunity to challenge the search, redactions/withholdings, and production of documents in response to the 2009 FOIA Request, precisely because it is 'outside this litigation.'" *See* Pl.'s Opp'n at 7-8. The purported lack of "opportunity" is of his own making, as nothing prevents him from bringing a separate suit to challenge any perceived deficiencies in the FBI's response to the 2009 FOIA Request.

Third, Plaintiff concludes his litany of irrelevant arguments with the claim that the FBI "seeks to take advantage of Negley's then frustration and financial difficulties . . . to excuse it from compliance with FOIA." *See* Pl.'s Opp'n at 8. This baseless accusation does not warrant any response. The FBI notes, however, that even in his belatedly proffered second declaration, Plaintiff does not assert any basis to believe that the FBI has anything to do with the investigations by unnamed persons or entities that he is purportedly under, or the property damage, break-ins, or wiretaps that he claims to be experiencing. *See* Pl.'s Opp'n/Reply Ex. A, Second Decl. of James Lutcher Negley ("Second Negley Decl.") ¶¶ 3-7.[3]

C. The "Event Record" Does Not Call Into Question the Reasonableness of the FBI's Search

Plaintiff contends that the FBI's release of the "Event Record" in response to his 2009 FOIA Request calls into question the reasonableness of the agency's search in response to his 2002 FOIA Request because the document appears to have existed at one time in the San Francisco Field Office. *See* Pl.'s Opp'n/Reply at 9-10. Any focus on the results of an agency's

[3] Although he does not address this anywhere in his brief, Plaintiff inserts in his Second Declaration a statement purporting to clarify his "intent" in submitting an amended FOIA request on April 23, 2002, claiming that "[i]n no way did I intend my amendment to limit the scope of the requested records to those maintained at or by the SFFO or any other office. Had I intended to do so, I would have explicitly stated as such." *See* Second Negley Decl. ¶¶ 9-10. The problem with this testimony is that it directly contradicts the plain language of the amended request, which unambiguously stated "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," *see* Def.'s Mem. Ex. 2 (emphasis added), as well as his earlier sworn testimony that "To the extent that there is any ambiguity in the language of my April 23, 2002 correspondence to the FBI, it was and still is my intent to amend my FOIA request to include, *in addition to all files about me at the SFFO*, the entire File No. S-1575, regardless of whether or not that file is about me," *see* Decl. of James Lutcher Negley [ECF No. 71-3] ¶ 3 (emphasis added). Plaintiff's shifting testimony should be stricken under the sham affidavit rule, which "precludes a party from creating an issue of material fact by contradicting prior sworn testimony unless the 'shifting party can offer persuasive reasons for believing the supposed correction' is more accurate than the prior testimony." *See Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1030 (D.C. Cir. 2007).

search is misdirected. "'[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate. Rather, the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search.'" *Ancient Coin Collectors Guild v. U.S. Dep't of State*, No. 09-5439, 2011 WL 1437419, at *6 (D.C. Cir. Apr. 15, 2011) (quoting *Iturralde v. Comptroller of Currency,* 315 F.3d 311, 315 (D.C. Cir. 2003)); *Hodge v. F.B.I.*, No. 08-403 (RJL), 2011 WL 532121, at *6 (D.D.C. Feb. 14, 2011) ("Ultimately, the results of a search do not determine whether the search is adequate.") (citing *Hornbostel v. U.S. Dep't of the Interior*, 305 F. Supp. 2d 21, 28 (D.D.C. 2003)); *see* Def.'s Mem. at 18 (citing additional cases).

Moreover, Plaintiff's claim that "the FBI cannot explain why the document was not produced in response to Negley's pending 2002 FOIA Request" is inaccurate. The "Event Record" was not produced in response to the 2002 FOIA Request because it did not exist in the SFFO files -- the FBI did not locate either an original or a copy of this document during its search of the San Francisco 149A-SF-106204 file or during a physical review (and later processing) of the 149A-SF-106204-S-1575 file serial.[4] *See* Ninth Hardy Decl. ¶ 6. Plaintiff's speculation that the "Event Record" should have been located in the SFFO files, absent any support for his allegations, does not render the FBI's search inadequate. *See Judicial Watch, Inc. v. U.S. Dep't of Health & Human Servs.*, 27 F. Supp. 2d 240, 244 (D.D.C. 1998) (finding that

[4] The claim that there are "obvious" gaps in the searches of the various databases because the FBI did not search the ECF Function of ACS using File Number 149A-SF-106204-S-1575, Pl.'s Opp'n/Reply at 10 n.4, is totally without merit. As to the ECF Function of ACS, the Court's September 24, 2009 Order required that the FBI "conduct a search that captures at least the 'six-way phonetic breakdown' of Negley's name." *See* ECF No. 90. The FBI conducted the name search ordered by the Court, but also expanded it to a search of certain file numbers and variations. *See* Def.'s Mem. at 13. Moreover and in any event, the FBI had already searched for and released File S-1575. *See id.* at 5 (citing Sixth Hardy Decl.).

"[p]laintiff's unsubstantiated suspicions . . . are insufficient to call into question the adequacy of [the agency's] search and the truthfulness of its affidavit").

In sum, the FBI's search for and production of records in response to Plaintiff's 2002 FOIA Request was thorough and reasonable. The case law does not require the herculean search that the Plaintiff demands of the FBI, nor is there any basis for the contention that the agency's search need encompass his 2009 FOIA Request in addition to his 2002 FOIA Request.

II. THE FBI ADEQUATELY JUSTIFIED ITS EXEMPTION CLAIMS

Plaintiff maintains that he "explicitly sought summary judgment as to all of the redactions made by the FBI and identified, merely as examples, pages with the most commonly invoked exemptions." Pl.'s Opp'n/Reply at 15 n.6. Despite this, his opposition/reply brief, like his opening brief, conspicuously fails to address the FBI's invocations of Exemptions 6 and 7(D), choosing only to bury in a footnote a listing of all the pages that contained redactions. *See* Pl.'s Opp'n/Reply at 15 n.6; *see also* Pl.'s Mem. at 13-19. Because Plaintiff nowhere addresses the FBI's arguments supporting its withholdings under Exemptions 6 and 7(D), the Court should treat these exemption claims as conceded. *See Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003), *aff'd*, 98 Fed. Appx. 8 (D.C. Cir. 2004) ("It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."); *see also Ry. Labor Execs.' Ass'n v. U.S. R.R. Ret. Bd.*, 749 F.2d 856, 859 n.6 (D.C. Cir. 1984) (declining to decide issue "on the basis of briefing which consisted of only three sentences . . . and no discussion of the . . . relevant case law"). Additionally, Plaintiff concedes the propriety of the agency's exemption claims on

Negley-23, Negley-30, Negley-47, Negley-100, and Negley-102, *see* Pl.'s Opp'n/Reply at 16, so these exemption claims are no longer at issue.

A. Plaintiff's Generalized Challenge to Exemption 7(C) Fails

The remainder of Plaintiff's brief is a sweeping, generalized attack on the justifications that the FBI has provided to support its invocation of Exemption 7(C). Plaintiff appears to argue the following: (1) the Seventh Hardy Declaration allegedly does not "explain why a general description of an exemption applies to each specific redaction so that Negley and the Court could assess whether each specific redaction was appropriate"; (2) the FBI should not be permitted to rely on the Ninth Hardy Declaration to further address the specific exemption claims with which Plaintiff took issue[5]; (3) the FBI "has yet to provide the requisite detail to justify its redactions"; and (4) the FBI has not demonstrated that there is a privacy interest at issue in documents Negley-10 and Negley-105. *See* Pl.'s Opp'n/Reply at 12-17.

As the first three arguments are variations on the same theme, the FBI will address them together. Plaintiff's claim that the Seventh Hardy Declaration does not adequately justify each redaction is demonstrably inaccurate. The Seventh Hardy Declaration describes the coded categories of exemptions which detail the nature of the information withheld pursuant to the provisions of the FOIA and the applicable exemption, and explains in detail the basis for each exemption. *See* Seventh Hardy Decl. ¶¶ 47-75. This type of "coded" *Vaughn* index has routinely been upheld by the courts. *See, e.g., Keys v. U.S. Dep't of Justice*, 830 F.2d 337, 349

[5] Plaintiff suggests that the Ninth Hardy Declaration is somehow improper because he did not have an opportunity to depose Mr. Hardy about specific redactions at the deposition on the issues covered in the Seventh Hardy Declaration. He claims that Mr. Hardy "flatly refused" to testify about exemptions in the context of specific redactions. *See* Pl.'s Opp'n/Reply at 14-15 n.5. Plaintiff's characterization of what transpired at the deposition is misleading, and troubling, considering that counsel's question immediately following Mr. Hardy's response made clear that counsel was not asking for testimony about any specific exemptions. *See* Pl.'s Opp'n/Reply Ex. C at 75:21-22 ("I am not suggesting or I'm not asking about the other four blanks in that sentence.").

(D.C. Cir. 1987) (upholding adequacy of *Vaughn* index that incorporated coded deletions into a declaration with generalized descriptions of exemptions and correlated each deletion with an exemption, rather than a "classical *Vaughn* index" with individualized exemption explanations); *Brown v. U.S. Dep't of Justice*, 734 F. Supp. 2d 99, 106 (D.D.C. 2010) (observing that "Hardy's declaration describes in one document each deletion and withheld document, states the applicable exemption, and explains the basis for the exemption" and "[a]s such, the Court finds that the declaration meets the requirements of a *Vaughn* index"). Moreover, the Seventh Hardy Declaration identified, to the extent possible without disclosing the information, the nature of the information being withheld. With regard to its Exemption 7(C) claims (in some cases, asserted in tandem with Exemption 6 and 7(D)), the Seventh Hardy Declaration made clear that the redacted information consisted of names and/or identifying information pertaining to distinct groups of individuals. *See* Seventh Hardy Decl. ¶¶ 49, 61-70; *see* Def.'s Mem. at 25.

Other than the seven redactions that he specifically addressed in his opening brief (five of which he has now conceded), Plaintiff makes no effort to articulate what is purportedly lacking in the FBI's justifications for the remaining exemptions. As an example, even though Plaintiff does not address the Exemption (b)(7)(C)-1 redactions made to the four pages, Negley-18, Negley-19, Negley-71, and Negley-72, appended as Exhibit A to the Ninth Hardy Declaration, it is evident on the face of the documents that these redactions are of names of FBI personnel.[6] Indeed, as the Seventh Hardy Declaration makes clear, the information on these four pages was redacted pursuant to (b)(7)(C)-1 to "protect the names of FBI SAs and support personnel who were responsible for conducting, supervising, and/or maintaining the investigative activities

[6] These are the four pages on which the FBI had initially invoked Exemption 2, but upon further review following the Supreme Court's decision in *Milner v. Department of Navy*, 131 S. Ct. 1259 (2011), withdrew its assertions of Exemption 2 in all instances. *See* Def.'s Mem. at 30.

reported in the documents responsive to plaintiff's request." *See* Seventh Hardy Decl. ¶¶ 61-62; Ninth Hardy Decl. Ex. A. In sum, Plaintiff's generalized assertions of insufficiency do not withstand scrutiny.

B. Plaintiff's Challenges to Negley-10 and Negley-105

Plaintiff's remaining challenges are to the Exemption 7(C) claims on Negley-10[7] ("He advised that Negley had approached his _____ at the library . . .") on the ground that "the FBI has not shown that there is a threat of invasion of privacy in revealing the title of a person who worked at the university library fifteen years ago," and on Negley-105[8] ("[H]e would have to miss a _____ meeting due to his being out of town") on the ground that the FBI allegedly cannot "prove that there is a privacy interest in the 'type of organizational/company/business meeting.'" *See* Pl.'s Opp'n/Reply at 16-17. Plaintiff does not contest that the redactions are of information that could facilitate the identification of individuals who appear in law enforcement records. He also does not dispute that he cannot identify any public interest in these identifying details, but argues that "the balancing test as to whether a public interest outweighs a privacy interest is not appropriate or necessary where there is no privacy interest at issue." *See id.* at 16.

The contention that no privacy interest is implicated by these identifying details is contrary to established case law. "[P]ersons involved in FBI investigations -- even if they are not

[7] As noted in Defendant's opening brief, the FBI invoked Exemption 7(C) in conjunction with Exemption 7(D) on Negley-10. *See* Def.'s Mem. at 26 n.9. Plaintiff does not challenge the FBI's application of Exemption 7(D), so the Court should also find that the information is protected under Exemption 7(D).

[8] Defendant's opening brief referred to Negley-105 as "Negley-103," which was an inadvertent typographical error. *See* Def.'s Mem. at 29. As noted in Defendant's opening brief, the FBI invoked Exemption 6 in conjunction with Exemption 7(C) on Negley-105. *See* Seventh Hardy Decl. ¶ 69. Plaintiff does not challenge the FBI's application of Exemption 6, so the Court should also find that the information is protected under Exemption 7(D).

the subject of the investigation -- 'have a substantial interest in seeing that their participation remains secret.'" *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 767 (D.C. Cir. 1990); *North v. U.S. Dep't of Justice*, No. 08-1439 (CKK), 2011 WL 1193201, at *6 (D.D.C. Mar. 31, 2011) ("It has long been recognized that disclosing information about an individual's involvement in law enforcement proceedings may constitute an unwarranted invasion of personal privacy for purposes of Exemption 7(C)"); *Banks v. Dep't of Justice*, 757 F. Supp. 2d 13, 19 (D.D.C. 2010) (finding that BOP properly withheld the names of and identifying information about crime victims mentioned in law enforcement records). For this reason, courts have "consistently supported nondisclosure of names or other information identifying individuals appearing in law enforcement records under Exemption 7(C)." *Schrecker v. Dep't of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003). Identifying information has encompassed a wide range of personal data, such as the rank and title of a Coast Guard officer dating from seven years before the FOIA request, *see Kurdyukov v. Coast Guard*, 657 F. Supp. 2d 248, 256 (D.D.C. 2009), and the name of a company where "its disclosure might permit the identification" of a corporate officer, *see Computer Professionals for Social Responsibility v. United States Secret Service*, 72 F.3d 897, 905 (D.C. Cir. 1996).

Here, the FBI has proffered evidence that the contested redactions of the title of an individual on Negley-10 and the name of an organizational, company, or business on Negley-105 are necessary to protect against an unwarranted invasion of the privacy of individuals who appear in the FBI's UNABOM investigation. Because the FBI has sufficiently justified its assertions of Exemption 7(C), and because the Plaintiff has not identified any countervailing public interest in this information, the Court should find in favor of the FBI on all challenges to its Exemption 7(C) claims.

CONCLUSION

For the reasons set forth in its opening brief and above, the FBI respectfully submits that its motion for summary judgment should be granted in full and Plaintiff's motion for summary judgment should be denied in full.

Date: July 1, 2011

Respectfully submitted,

RONALD C. MACHEN JR., D.C. Bar #447889
United States Attorney
for the District of Columbia

RUDOLPH CONTRERAS, D.C. Bar #434122
Chief, Civil Division

By: /s/ Michelle Lo .
MICHELLE LO
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20530
Tel: (202) 514-5134 Fax: (202) 514-8780
Michelle.Lo2@usdoj.gov

Of counsel:

Jeannette Wise, Esq.
Assistant General Counsel
Federal Bureau of Investigation