UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

James Lutcher Negley, Plaintiff,	§ § §	
vs.	§	Civil Action No. SA-12-CV-00362-OLG
Federal Bureau of Investigation, Defendant.	§ § §	

DEFENDANT'S SUR-RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION

1. **There is no basis to conduct any discovery regarding the FBI's explanation of its reliance on the Privacy Act provision – 5 U.S.C. § 552a(j)(2).**

Plaintiff argues in his Reply (DE 40) that "the stated withdrawal of the Privacy Act privilege, without an accompanying correction of the record by amending or supplementing the FOIA disclosure responses, is grounds for granting limited discovery in this case." (Reply ¶ 8). Plaintiff fails to explain what the discovery might find, or attach specific discovery requests.

Plaintiff also alleges that "[t]he stated basis for the withholding [on the FOIPA Deleted Page Information Sheets] includes Section 552a(j)(2), the law enforcement investigation privilege." (***Id***. ¶ 6). Defendant does not know what Plaintiff is referring to. Not one page of the 23 separate pages submitted as exhibits to Plaintiff's Reply contains any reference or assertion of "the law enforcement investigation privilege" under the Privacy Act. (*See, e.g.*, DE 40-1 at pp. 3, 5, 7). And regardless of what might have been included on a cover page to a prior disclosure, what now governs this Court's determination is the FBI's Vaughn Declaration (by Mr. Hardy) (DE 39-3), its Vaughn Index of exemptions asserted (Exhibit T to the Hardy Declaration) (DE 39-23), and its Motion for Summary Judgment (DE 38). As pointed out previously, any mention of a specific Privacy Act exemption is completely absent from the

Hardy Declaration or from the Vaughn Index. Moreover, the exhibits Plaintiff attaches simply do not support his suggestion that the FBI has withheld any material on the sole basis of the (j)(2) provision. In every single instance Plaintiff has submitted to the Court (and of which Defendant is aware), (j)(2) was asserted **in conjunction** with the assertion of FOIA exemptions, most commonly (b)(7)(C) – personal information in law enforcement records, or (b)(7)(D) – law enforcement information regarding confidential sources. (*See, e.g.*, DE 40-1, at p. 3).[1] No Privacy Act exemption or reference was asserted, standing alone, without a FOIA exemption counterpart. Thus, the Court can and should adjudicate whether the FBI has properly withheld material on the basis of the applicable FOIA exemptions asserted, and may ignore the Privacy Act references.[2] In short, there is simply nothing for the FBI to substantively "amend" or "correct" with respect to its ultimate disclosure decisions which are now ready for adjudication. The Privacy Act is a non-issue.

2. All investigative records have previously been disclosed.

Plaintiff concedes that the FBI's "document production did include many duplicates…" (Reply ¶ 6). What Plaintiff fails to address, however, is the District of Columbia District Court's

[1] In addition, 4 of the 23 pages submitted are completely irrelevant because they do not mention the Privacy Act at all, and the only exemptions checked on these pages are under the FOIA. (See DE 40-1, page 2, 4, 6, and 40-2, at page 2). To assist the Court in interpreting these Deleted Page Information Sheets, the two columns with checkboxes on the left side of each page, under Section 552, pertain to FOIA, and the one column with checkboxes on the far right, under Section 552a, pertains to the Privacy Act.

[2] The FBI has previously explained how it utilized section (j)(2) of the Privacy Act. (*See* Hardy Decl. at ¶ 42). The FBI relies upon the Privacy Act as a mechanism which authorizes law enforcement agencies to process disclosure requests under the FOIA instead of the Privacy Act: "[t]he FBI's release letters in this case indicate that section (j)(2) of the Privacy Act was applied to the processed material … only to indicate that the records being processed were not accessible under the Privacy Act." (***Id***.). Instead, the specific exemptions claimed in this case are FOIA exemptions. As Mr. Hardy explained, and as the Court will see from an examination of the statutory text, (j)(2) is a general exemption provision which allows a law enforcement agency like the FBI to exempt an entire system of records from Privacy Act access requirements. Contrary to Plaintiff's interpretation, Section (j)(2) only provides a general exemption from statutory coverage, not a specific privilege from records disclosure. Section 552a(j)(2) of the Privacy Act provides in pertinent part that: "The head of any agency may promulgate rules … to exempt any system of records within the agency … if the system of records is … (2) maintained by an agency … which performs as its principal function any activity pertaining to the enforcement of criminal laws, … which consists of … [any one of three described records systems]." Plaintiff does not challenge that the FBI is a criminal law enforcement agency which should be exempt from the access requirements of the Privacy Act.

decision in ***Negley II***, which determined that the FBI conducted a reasonable search, and that no additional investigative documents responsive to either Plaintiff's 2002 or 2009 FOIA requests had been located, pursuant to those searches. 825 F. Supp. at 68 (cited at n. 2 of Defendant's Response) (DE 37). Thus, to allow additional discovery in this third FOIA lawsuit -- after significant discovery in ***Negley II*** – would truly be an exercise in flogging a dead horse.

The Motion for Reconsideration should be DENIED, and the Court's original ruling granting Defendant's Motion for Protective Order should stand.

DATED: May 21, 2013

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Sur-Response to Plaintiff's Motion for Reconsideration was electronically filed via the Court's CM/ECF system on this 21st day of May, 2013, and was served via ECF as follows:

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/s/ Robert Shaw-Meadow
ROBERT SHAW-MEADOW
Assistant United States Attorney

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ORDER

The matter before the Court is Plaintiff's Motion for Reconsideration (docket no. 33), filed April 10, 2013.

After reviewing all of the parties' briefing and the Declarations submitted in support of Defendant's Motion for Summary Judgment, the Court concludes that the FBI conducted a reasonable and adequate search for documents in this case, and that Plaintiff's Motion should be in all things DENIED.

SIGNED AND ENTERED this ___ day of _____, 2013.

_____
HON. ORLANDO GARCIA
U.S. DISTRICT JUDGE