

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

JAMES LUTCHER NEGLEY	§	
Plaintiff	§	
v.	§	CIVIL ACTION NO.
	§	SA-12-CV-362
	§	
FEDERAL BUREAU OF	§	
INVESTIGATION,	§	
Defendant	§	

PLAINTIFF’S MOTION FOR LEAVE TO FILE SUR-REPLY TO
DEFENDANT’S REPLY TO RESPONSE TO
MOTION FOR PROTECTIVE ORDER

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Now comes James Lutcher Negley, Plaintiff, and files this Motion for Leave to File Sur-Reply to the Government’s Reply to Plaintiff’s Response to the Government’s Motion for Protective Order pursuant to Local Rule CV-7(f)(1) and in support thereof would show the Court as follows:

1. The Government has filed a Reply to the Plaintiff’s Response to the Government’s Motion for Protective Order in which it cites a new authority not cited in its original Motion. Plaintiff seeks leave of Court to reply to the Government’s citation to the case of *Tamayo v. U.S. Department of Justice*, 544 F. Supp. 2d 1341 (S.D. Fla. 2008), in order to briefly present argument to the Court distinguishing *Tamayo* and explaining why its holding does not preclude the discovery sought by Plaintiff herein. A copy of the Sur-Reply is attached hereto as Exhibit “A”.

2. A telephone conference was held with Robert Shaw-Meadow, attorney for the Government, regarding this Motion. He stated that the Government is opposed to the granting of this Motion, relying on Local Rule CV-7, and stated that he wants to have the last word.

WHEREFORE, Plaintiff respectfully requests that the Court grant this Motion and permit the filing of Plaintiff's Sur-Reply to the Government's Reply to Plaintiff's Response to the Government's Motion for Protective Order.

Respectfully submitted,

/s/ John F. Carroll

John F. Carroll
111 West Olmos Drive
San Antonio, Texas 78212
(210) 829-7183-Phone
(210) 829-0734-Fax
State Bar No. 03888100

ATTORNEY FOR PLAINTIFF
JAMES LUTCHER NEGLEY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's Motion for Leave to File Sur Reply to Defendant's Reply to Response to Defendant's Motion for Protective Order was ELECTRONICALLY FILED with the Clerk of the Court using the CM/ECF system which will send notification to the following:

Mr. Robert Shaw-Meadow
Assistant United States Attorney
601 N.W. Loop 410, Ste. 600
San Antonio, Texas 78216

on this the 17th day of October, 2012.

/s/ John F. Carroll

John F. Carroll

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JAMES LUTCHER NEGLEY	§	
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**PLAINTIFF’S SUR-REPLY TO DEFENDANT’S REPLY TO RESPONSE TO
MOTION FOR PROTECTIVE ORDER**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Now comes James Lutchter Negley, Plaintiff, and files this Sur-Reply to the Government’s Reply to Plaintiff’s Response to the Government’s Motion for Protective Order in support thereof would show the Court as follows:

1. The Government cites the case of *Tamayo v. U.S. Department of Justice*, 544 F. Supp. 2d 1341 (S.D. Fla. 2008). The mere fact that the *Tamayo* case involved requests for admissions, does not make it dispositive of the issues in the instant case. The discovery requests in *Tamayo*, unlike those in the instant case, did not go to the threshold issue of whether responsive documents exist. Instead, they dealt with other issues unrelated to FOIA or issues of how to treat documents that were known to be in existence:

- a. Many of the requests seek to authenticate specific documents. *Id.* at 1345.
- b. Requests aimed at obtaining information as to the content of requested

documents that are being withheld were deemed improper. *Id.* at 1345. In the instant case, Plaintiff does not seek to discover the content of exempt documents, he simply wants to know whether potentially responsive documents exist. The question of exemptions or privileges is premature until we know whether responsive documents exist.

- c. Plaintiffs are attempting to use discovery to obtain additional information about an individual, specifically, information about his position within the Government at the time of certain conduct. *Id.* at 1345. The Court saw these requests a “a tool to obtain information that might be helpful to plaintiffs. That is not the case here as Plaintiff simply seeks to determine whether responsive documents exist.

2. Plaintiff does not seek information outside the scope of FOIA, rather, Plaintiff seeks information as to whether responsive documents exist. The content of any such documents, whether any privileges apply and whether all or part of any such documents are exempt are not matters put in issue by the Plaintiff’s requests for admission. Likewise, the request for admission regarding reliance upon the “Meese Memo” is appropriate at this time. That requests does not seek information about any exemption or proper claim of privilege, but, rather, whether there are existing documents responsive to Plaintiff’s FOIA request. If the Government is going to take the position that FOIA does not apply to any class of documents in existence, that needs to be reviewed by the District Court. We are not talking about an exemption claimed pursuant to the provisions of FOIA, but rather, a unilateral decision by a Government agency that it does not have to comply with FOIA under certain circumstances. That is a different matter than the exemptions at issue in *Tamayo*.

3. The core purpose of FOIA is to “shed[] light on an agency’s performance of its statutory duties”. *Department of Justice v. Reporters Committee for Freedom of the Press*,

109 S. Ct. 1468, 1481 (1989). Attorney General Janet Reno, speaking in 1996, stated that the core purpose of FOIA was “to let people know how their government works”.

http://www.justice.gov/oip/foia_updates/Vol_XVII_3/page3.htm . In that same “Openness Speech”, Attorney General Reno lamented that

relatively few FOIA requests have to do with what the government is doing. The bulk of the requests come from individuals seeking information that the government is merely storing—information about a business competitor, or a celebrity or a historic figure, or simply to satisfy curiosity. Since the purpose of FOIA is to show how government works, surely we might give some consideration to creating different tiers or tracks, to give priority to requests that have a broad public purpose rather than a purely private one...Should we give some thought to the burden we are lacing on the system with complex litigation demands? At a time when the FBI is 5.6 million pages behind in processing FOIA requests, do we really want 29% of the FBI’s FOIA time devoted to responding to what we call “Vaughn Index” demands, which are the detailed explanations we have to give the courts when you sue us for withholding something.

Id.

4. It seems that the Justice Department’s FOIA concerns have not changed much since 1996. Attorney General Reno’s complaints are embodied in the Government’s Motion for Protective Order in this case today. The Government is trying to pigeonhole Plaintiff as a meddlesome citizen who wants what he is not entitled to. But that is not what is going on here. The Plaintiff is not fighting to get exempt documents, or a description of the content of exempt documents. He is seeking to learn how the government works—the core purpose of FOIA. It is without dispute that Mr. Negley has had to go back to the well again and again and again in order to secure production of information to which he is entitled as highlighted

by the District of Columbia District Court FOIA litigation. In the instant case, in response to the 2009 FOIA request, Mr. Negley was first told that there were 3625 responsive pages. That number is now at 7450 pages. The limited discovery sought by Plaintiff is appropriate at this time in order to ensure that a proper disclosure of responsive material is made in this case.

WHEREFORE, Plaintiff respectfully requests that the Court deny the Government's Motion for Protective Order.

Respectfully submitted,

/s/ John F. Carroll

John F. Carroll
111 West Olmos Drive
San Antonio, Texas 78212
(210) 829-7183-Phone
(210) 829-0734-Fax
State Bar No. 03888100

ATTORNEY FOR PLAINTIFF
JAMES LUTCHER NEGLEY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's Sur Reply to Defendant's Reply to Response to Defendant's Motion for Protective Order was ELECTRONICALLY FILED with the Clerk of the Court using the CM/ECF system which will send notification to the following:

Mr. Robert Shaw-Meadow
Assistant United States Attorney
601 N.W. Loop 410, Ste. 600
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on this the 17th day of October, 2012.

/s/ John F. Carroll

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Plaintiff

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**FEDERAL BUREAU OF
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CIVIL ACTION NO.
SA-12-CV-362

ORDER

On this date the Court considered the Plaintiff's Motion for Leave to File Sur-Reply to the Government's Reply to Plaintiff's Response to the Government's Motion for Protective Order. The Court finds that the Motion should be granted.

IT IS THEREFORE ORDERED that the Motion for Leave to File Sur-Reply to the Government's Reply to Plaintiff's Response to the Government's Motion for Protective Order is GRANTED.

SIGNED this _____ day of _____, 2012.

UNITED STATES DISTRICT JUDGE