

<p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE DISTRICT OF COLUMBIA 3 ----- x 4 JAMES L. NEGLEY, : 5 Plaintiff : 6 v. : Civil Action 7 THE FEDERAL BUREAU OF : No. 03-2126 (GK) 8 INVESTIGATION, : 9 Defendant : 10 ----- x 11 12 Deposition of DAVID M. HARDY, Volume 3 13 Washington, D.C. 14 Thursday, January 28, 2010 15 10:10 a.m. 16 17 18 19 20 Job No.: 1-172523 21 Pages: 1 - 134 22 Reported by: Marilyn Feldman, RPR</p>	<p>1 A P P E A R A N C E S 2 ON BEHALF OF PLAINTIFF: 3 PRASHANT K. KHETAN, ESQUIRE 4 MATTHEW McLELLAN, ESQUIRE 5 TROUTMAN SANDERS LLP 6 401 9th Street, NW 7 Suite 1000 8 Washington, D.C. 20004-2134 9 202.662.2028 10 11 ON BEHALF OF DEFENDANT: 12 MICHELLE LO, ESQUIRE 13 ASSISTANT U.S. ATTORNEY 14 U.S. ATTORNEY'S OFFICE FOR THE DISTRICT OF 15 COLUMBIA 16 CIVIL DIVISION 17 555 4th Street, NW 18 Washington, D.C. 20530 19 202.514.5134 20 21 and 22</p>
<p>1 Deposition of DAVID M. HARDY, Volume 3, held 2 at the offices of: 3 4 5 TROUTMAN SANDERS LLP 6 401 9th Street, NW 7 Suite 1000 8 Washington, D.C. 20004-2134 9 202.662.2028 10 11 12 Pursuant to agreement, before Marilyn Feldman, 13 Registered Professional Reporter and Notary Public 14 in and for the District of Columbia. 15 16 17 18 19 20 21 22</p>	<p>1 JEANNETTE WISE, ESQUIRE 2 U.S. DEPARTMENT OF JUSTICE 3 Federal Bureau of Investigation 4 935 Pennsylvania Avenue, N.W. 5 Suite PA- 400, North 6 Washington D.C. 20535 7 202.220.9360 8 9 ALSO PRESENT: 10 Pamela A. Roberts, Assistant General Counsel 11 Federal Bureau of Investigation 12 13 14 15 16 17 18 19 20 21 22</p>

<p>1 C O N T E N T S</p> <p>2 EXAMINATION OF DAVID M. HARDY PAGE</p> <p>3 By Mr. Khetan 6, 128</p> <p>4 By Ms. Lo 125</p> <p>5</p> <p>6</p> <p>7</p> <p>8 E X H I B I T S</p> <p>9 (Attached to the Transcript)</p> <p>10 HARDY DEPOSITION EXHIBIT PAGE</p> <p>11 11 Court order, 9/24/09 6</p> <p>12 12 Sixth Declaration of David Hardy 6</p> <p>13 13 Seventh Declaration of David Hardy 6</p> <p>14 14 Supplement to Seventh Declaration of</p> <p>15 David Hardy 6</p> <p>16 15 Letter to Khetan from Hardy, 11/30/09 30</p> <p>17 16 Letter to requester from John Kelso,</p> <p>18 7/27/99 82</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	<p>5</p> <p>1 general counsel yesterday for about two hours, and I</p> <p>2 also reviewed the litigation file last night, the</p> <p>3 Negley litigation file.</p> <p>4 Q Let me just go through this. Was it a</p> <p>5 single meeting with FBI and DOJ counsel or two</p> <p>6 separate --</p> <p>7 A Yes.</p> <p>8 Q And that was yesterday?</p> <p>9 A Yesterday.</p> <p>10 Q Any other meetings prior to that one</p> <p>11 yesterday in preparation for this deposition?</p> <p>12 A No.</p> <p>13 Q Did you speak to anyone else in</p> <p>14 preparation for this deposition?</p> <p>15 A No.</p> <p>16 Q Who is DOJ counsel?</p> <p>17 A Ms. Chu.</p> <p>18 Q Sorry?</p> <p>19 MS. LO: Lo.</p> <p>20 A Sorry.</p> <p>21 Q And FBI counsel?</p> <p>22 A I'm having a 60 year old moment.</p>
<p>1 P R O C E E D I N G S</p> <p>2 (Hardy Exhibit 11-14 were marked for</p> <p>3 identification and were attached to the transcript.)</p> <p>4 D A V I D M. H A R D Y</p> <p>5 having been duly sworn, testified as follows:</p> <p>6 E X A M I N A T I O N B Y C O U N S E L F O R P L A I N T I F F</p> <p>7 B Y M R. K H E T A N:</p> <p>8 Q Mr. Hardy, for the record let me</p> <p>9 reintroduce myself. I am Prashant Khetan and with</p> <p>10 my associate Matt McLellan we represent Mr. Negley</p> <p>11 in this lawsuit. I understand you have been deposed</p> <p>12 twice in this case so I won't go over the ground</p> <p>13 rules in this case because I expect you are fully</p> <p>14 familiar with them, unless you have any questions.</p> <p>15 A I don't have any questions.</p> <p>16 Q Has there been any change in your job</p> <p>17 duties or responsibilities since your last</p> <p>18 deposition which I believe was in October of 2009?</p> <p>19 A No, no change.</p> <p>20 Q What did you do to prepare for this</p> <p>21 deposition?</p> <p>22 A I met with DOJ counsel and also with FBI</p>	<p>6</p> <p>1 M S. W I S E: Jeannette Wise.</p> <p>2 T H E W I T N E S S: Jeannette Wise. I'm sorry.</p> <p>3 M S. L O: No problem.</p> <p>4 B Y M R. K H E T A N:</p> <p>5 Q And you said you reviewed the litigation</p> <p>6 file last night. What are you referring to?</p> <p>7 A It's the file kept by our litigation</p> <p>8 support unit for each litigation we have pending.</p> <p>9 Q That's special to Mr. Negley?</p> <p>10 A Correct.</p> <p>11 Q Any other preparation you did for this</p> <p>12 deposition?</p> <p>13 A No.</p> <p>14 Q Did you review your prior deposition</p> <p>15 transcripts in preparation for this deposition?</p> <p>16 A No.</p> <p>17 Q Is there anything from your prior</p> <p>18 depositions that you would like to change or modify</p> <p>19 at this time?</p> <p>20 A Not that I can remember, no.</p> <p>21 Q Let us get started. Let me show you what</p> <p>22 has been marked as exhibit 11. Michelle, I</p>

9

1 apologize, I only made one copy of this. This is
2 the court's order dated September 24, 2009. You can
3 take as long as you want to look at it, but I have
4 some specific questions.
5 **A I'm familiar with this.**
6 Q That was going to be my first question.
7 Have you seen this document before?
8 **A Yes.**
9 Q Under what circumstances did you see this
10 document?
11 **A In the course of business and in**
12 **connection with this case.**
13 Q When you say in connection with this case,
14 were you involved in complying with this order on
15 behalf of the FBI?
16 **A Yes.**
17 Q What did you do to comply with this order?
18 If the answer, Mr. Hardy, is it's what is set out in
19 your declaration, I'm not trying to confuse you. If
20 that's what it is, just tell me that.
21 **A My declaration is a summary of what we did**
22 **to comply.**

10

1 Q Did you do anything in addition to what is
2 in your declaration in order to comply with this
3 order?
4 MS. LO: Objection to form.
5 **A Can you be more specific?**
6 Q Sure. What I want to know is you have
7 submitted a sixth and seventh declarations, and
8 we'll mark those exhibits shortly, which detail at
9 length what the FBI has done in compliance with this
10 order. What I'm trying to find out is, did you on
11 behalf of the FBI do anything that's not indicated
12 in those declarations in order to comply with this
13 order?
14 MS. LO: Objection to form.
15 **A The declaration sets out the steps that we**
16 **took. There are some steps that weren't listed in**
17 **there so it's not a complete recorded history of**
18 **every action that was taken, but it is what we did**
19 **to comply with the court's order.**
20 Q So you may not have set out the details of
21 the particular steps that you did but there aren't
22 additional things that you have done that are not

11

1 indicated on the declaration, correct?
2 MS. LO: I object to that as well.
3 **A I think that each paragraph sets out what**
4 **we have done.**
5 Q Okay.
6 **A And I'm not sure of what the definition of**
7 **what additional steps is but I think the declaration**
8 **is the fair reflection of what we did.**
9 Q Do you know if there is anyone else at the
10 FBI other than you who was tasked with complying
11 with this order?
12 **A I'm responsible for complying with the**
13 **order.**
14 Q So did you delegate to other people to do
15 searches and the things that are set out in the
16 declaration?
17 **A That's correct.**
18 Q I don't mean those people who you
19 delegated things to. What I'm trying to find out is
20 if there is someone other than you yourself who was
21 also tasked with complying with parts of the order.
22 **A No. We were the group that would comply**

12

1 **with the parts of the order.**
2 Q Was there anything or is there anything
3 confusing in this order where you are not sure what
4 the judge meant?
5 MS. LO: Objection to form.
6 **A I think we thought we understood what the**
7 **judge meant.**
8 Q If I can get you to turn to page 2 of the
9 order, there is a paragraph and I'll read it for the
10 record, that says, "ordered that within 60 days of
11 the date of this order, defendant must conduct
12 reasonable searches in response to Negley's FOIA
13 request for all documents that relate to or
14 reference Negley in any manner including any
15 reference to file no. 65-21102 as identified in
16 Hardy's fifth declaration."
17 What did you understand that paragraph to
18 mean?
19 MS. LO: Objection, calls for a legal
20 conclusion.
21 **A I understood it to mean what it says, we**
22 **would conduct reasonable searches in response to his**

13

1 **FOIA request.**
2 Q Did you understand there were any
3 restrictions that the FBI was to put in its
4 searches?
5 A **Can you define what you would call**
6 **restrictions?**
7 Q Actually that's what I want to know, what
8 restrictions you would have put. I mean are there
9 any limitations to the searches you conducted for
10 all documents that related to or referenced Negley
11 in any manner?
12 A **Well, there is a distinction to Negley and**
13 **Negley's FOIA request. So we -- these particular**
14 **searches that were conducted were for Negley's FOIA**
15 **request, which is the subject of the litigation.**
16 Q So what did you determine to be Negley's
17 FOIA request?
18 A **We were to search for any documents**
19 **relating to him and there is a cutoff date of 2002.**
20 Q Where is that --
21 A **Could we stop? Could I see the FOIA**
22 **request?**

14

1 Q Why don't we do this. Let me show you
2 what has been marked as exhibits 12, 13, and 14.
3 These are respectively your sixth declaration, your
4 seventh declaration with all of the exhibits, and
5 the supplement to the seventh declaration which I
6 received last night. I believe if you look at your
7 seventh declaration, that has as exhibits what I
8 think you are referring to as the FOIA request.
9 A **So we searched based on Exhibit A, which**
10 **is his January 16, 2002 letter, "for a copy of any**
11 **records about me maintained at and by the FBI at**
12 **your field office," which was the San Francisco**
13 **Field Office.**
14 Q So that I understand it then, your search
15 or the search that the FBI conducted in response to
16 what is indicated on page 2 of the order was for any
17 documents about Mr. Negley in the San Francisco
18 Field Office?
19 A **That's the start of his request.**
20 Q Okay.
21 A **Then on April 23rd he expands it to any**
22 **documents about -- he asks for the initial request**

15

1 **to add the search for sub S 1575.**
2 Q What exhibit are you referring to right
3 now?
4 A **That would be exhibit E I believe.**
5 Q This is of exhibit 13?
6 A **Yes. And so we used the time as a cutoff**
7 **but we did not limit ourselves to the San Francisco**
8 **Field Office.**
9 Q Anything else?
10 A **Those are the basic criteria in**
11 **conjunction with the court order which gave us**
12 **specific direction to search.**
13 Q Okay, let me start with some of the things
14 you just said though. You said you did limit the
15 time. What limitations on time did the FBI impose?
16 A **April 2002.**
17 Q So no documents after April 2002 would
18 have been produced; is that right?
19 A **Correct.**
20 Q What is the basis for that limitation?
21 A **That is established FOIA law as to when**
22 **you set the limits of a search and it is the date**

16

1 **that you first search, so it could have been -- I**
2 **mean theoretically we did not use April 13th, we**
3 **used 2002 because there is a huge gap in records,**
4 **but the FOIA law has it that the date you search is**
5 **your cutoff date.**
6 Q I appreciate that. I'm less interested in
7 your interpretation of FOIA law and more interested
8 in what the FBI did here. What is the cutoff date
9 that the FBI used? Was it April 2002?
10 A **It was generally 2002.**
11 Q So 2002 was the cutoff. And where in the
12 order do you see that that's the cutoff or that that
13 should be the cutoff?
14 A **It says in response to Negley's FOIA**
15 **request.**
16 Q Okay. And how did you interpret that
17 along with the next clause which says for all
18 documents that relate to or reference Negley in any
19 manner?
20 A **That's the scope of the request as far as**
21 **what you are looking for.**
22 Q All right.

17

1 **A But as far as the term in response to**
2 **Negley FOIA's request, that's the general guidelines**
3 **of the time period that we are looking.**
4 Q So it's safe to say then that any search
5 that is conducted by the FBI in response to this
6 order were capped or limited temporally by 2002?
7 MS. LO: Objection to form.
8 **A In response to this order. Now**
9 **contemporaneously, which confuses the situation if**
10 **you are trying to draw the narrow lines, is that Mr.**
11 **Negley had another FOIA request for all documents**
12 **that related to him and that request goes to**
13 **everything through 2009.**
14 Q Okay.
15 **A Wherever located. So I think as we go**
16 **through here and I think the declaration points out**
17 **that we were finding those documents as well as we**
18 **did the search. But as far as to respond to this**
19 **order, we were using those that were tied to his**
20 **original request in 2002.**
21 Q Okay. And we'll talk about the subsequent
22 request that you just mentioned, but I need to be

18

1 very clear. In this litigation I need to find out
2 what the FBI did in this litigation. So that we are
3 clear, in this litigation, in response to this
4 order, the FBI used 2002 as the cutoff date?
5 **A Correct.**
6 Q Now you also said something at one point
7 limited to the San Francisco Field Office but then I
8 think you changed that. What, if any, geographical
9 limitations were imposed?
10 **A There were no graphical limitations**
11 **imposed.**
12 Q So any field office, headquarters,
13 everything?
14 **A Yes.**
15 Q Okay. Excluding the time restriction you
16 just talked about, the cutoff date of 2002, are
17 there any records that the FBI didn't search for in
18 response to this order for all documents that relate
19 to or reference Negley in any manner?
20 MS. LO: Objection to form.
21 **A I think we did not -- could you define**
22 **what search is?**

19

1 Q Well, if you look at your declaration,
2 your seventh declaration, you use the word search
3 many, many times, so I would ask you to use whatever
4 you meant by the word search in your declarations.
5 **A The only area that I would say that we did**
6 **not do a search would have been for restricted files**
7 **and I think that was because restricted files are a**
8 **subset of ACS that would be in Central Records**
9 **System and would have been visible when we did the**
10 **ACS search.**
11 Q I appreciate that clarification. Any
12 other categories of documents that you didn't search
13 in response to this September 24 order?
14 **A No.**
15 Q If you turn the page on exhibit 11 to the
16 paragraph towards the bottom that says, "ordered
17 that within 90 days of the date of this order,
18 defendant must produce all documents, including
19 duplicates, responsive to Negley's FOIA request,
20 along with a Vaughn Index for any redactions and/or
21 withholdings." Do you see that sentence?
22 **A Correct.**

20

1 Q Are there any limitations at the FBI
2 imposed with regard to complying with this paragraph
3 of the order?
4 **A No.**
5 Q So even if there were any duplicates, this
6 time the FBI produced them?
7 **A Correct.**
8 MS. LO: Objection to form.
9 Q And so there are no documents responsive
10 to Negley's FOIA request that the FBI has not
11 produced then?
12 **A That's correct.**
13 Q Okay. In your seventh declaration, which
14 we'll go through in more detail in a second, you
15 talk about various searches that were conducted. Do
16 any of those searches capture the correspondence
17 between the FBI and the FOIA requester, for example,
18 Exhibit A that you referred to earlier, Exhibit A of
19 exhibit 13?
20 **A Those documents would be in the 197 and**
21 **190 files but they did not -- we did not include the**
22 **190 and 197 files.**

21

1 Q What do you mean when you say the 190 and
2 197 files?
3 A **The 190 file is the FOIA request file.**
4 Q Sorry, that's the 190?
5 A **190, that is the FOIA request file.**
6 Q Okay. What is that?
7 A **That's the file that's generated when you**
8 **make a FOIA request, and then the subsequent**
9 **releases are in it and correspondence is in it for**
10 **the request. What you see in the seventh**
11 **declaration would be the 190 file as well as the**
12 **releases.**
13 Q Let me make sure I understand. When you
14 say 190 and 197, are these file numbers?
15 A **These are file series classifications.**
16 **190 is FOIA and 197 is litigation.**
17 Q Okay. Are these maintained by a
18 particular office?
19 A **They are part of the Central Records**
20 **System.**
21 Q So they are part of CRS?
22 A **Correct.**

22

1 Q Are they somehow indexed in any of the
2 FBI's computer databases?
3 A **Yes.**
4 Q Where would they be indexed?
5 A **They would be indexed in UNI, and they**
6 **would be indexed in FDPS FOIA data processing**
7 **system.**
8 Q Can you tell me a little bit about FDPS
9 because I had not heard that before?
10 A **It is -- the FOIA records are not paper**
11 **records, they are electronic records.**
12 Q Okay.
13 A **So we have authority from the National**
14 **Archives to keep them as electronic records. So**
15 **everything in a FOIA request is kept electronically**
16 **in the system in which there is a repository which**
17 **is the FDPS.**
18 Q Including documents produced in response
19 to FOIA requests?
20 A **It includes the release, that's correct.**
21 Q So it includes all the communications back
22 and forth between the requester and the agency?

23

1 A **Correct. The 190 file would have all the**
2 **exhibits that you see here in the declaration as**
3 **well as the release that we made in the subject**
4 **request.**
5 Q Just so the record is clear when you are
6 talking about exhibits and release, you are talking
7 about what are attachments to your seventh
8 declaration?
9 A **Correct.**
10 Q Would it have internal notes about
11 searches conducted?
12 A **It would have the e-mail correspondence,**
13 **it generally would have search slips, and it**
14 **generally would have the back and forth that might**
15 **go into a particular request, in other words, a copy**
16 **of the e-mails. It is a copy of how we process the**
17 **request.**
18 Q And this is what you have referred to as
19 the 190?
20 A **Correct.**
21 Q Does the 190 -- because I think you said
22 that the FBI wouldn't produce the 190 here -- does

24

1 the 190 relate to James Negley?
2 A **It relates to James Negley but it's post**
3 **2002. In other words, it doesn't get started until**
4 **the request comes in and the search starts so that**
5 **everything is post request.**
6 Q So why wasn't the 190 produced here?
7 A **Again it's post request.**
8 Q Is that the only reason it wasn't produced
9 here?
10 A **That's correct. Since he has requested in**
11 **the second request where he requested everything, we**
12 **have -- I think we have a question on the table as**
13 **to whether he wants the 190 file. So in that one**
14 **you can see easily how it works. In that instance**
15 **his recent request of 2009 would have included the**
16 **190 as a file that was responsive. Generally people**
17 **don't want to see their FOIA request or pay for**
18 **them, so we are asking whether or not he wants**
19 **that -- if he wants it, then we'll produce it.**
20 Q Is there a separate 190 that's created
21 every time someone makes a FOIA request?
22 A **That's correct.**

25

1 Q I am trying to understand how you would
2 refer to it. For example, if Mr. Negley makes three
3 FOIA requests over a scope of 10 years, are each of
4 those somehow administratively referenced or
5 numbered as Negley 1, Negley 2, Negley 3, or
6 something like that?

7 A They are numbered under the FOIA number
8 which is provided to each request. So if he makes a
9 request and we come back with a response and give it
10 a FOIA number, that means the file has been opened
11 for that request.

12 Q Okay. Now when you produce a 190, do you
13 produce the e-mail correspondence, the search slips,
14 the other things you talked about?

15 A We would produce everything that's in the
16 file.

17 Q Now are you aware that Mr. Negley had
18 submitted FOIA requests prior to the January 2002
19 FOIA request that you have referenced as exhibit 13
20 A?

21 A I think you are right, he made a request
22 to Sacramento. I believe it was litigated in the

26

1 western district of Texas.

2 Q So you are aware that he did make a prior
3 request?

4 A Yes.

5 Q So would there be a 190 for that request?

6 A I'm not certain whether there would be or
7 not. That was pre FDPS in paper form and I'm not
8 sure if there would be.

9 Q When did FDPS come in?

10 A The facility became fully functional in
11 2003.

12 Q I think you said 190 would have been in
13 UNI as well as facility. When did UNI come into
14 effect?

15 A I believe UNI came into effect in 1995.

16 Q So do you know if Mr. Negley's prior
17 request was post 1995?

18 A I don't know the timing of his prior
19 request.

20 Q If it were, does that suggest it would
21 have been in UNI?

22 A If it hadn't been destroyed.

27

1 Q What is the destruction schedule for 190s?

2 A It would be seven years.

3 Q Did the FBI search for any 190 files for
4 Mr. Negley?

5 A No.

6 Q Why not?

7 A Again going back to the original request,
8 we were focused on the investigatory files in San
9 Francisco.

10 Q I thought you just told me though a few
11 minutes ago that you didn't limit the search to San
12 Francisco. Am I wrong about that?

13 A I think you are into semantics. What I
14 said was we did not limit it to San Francisco but we
15 were looking for the investigatory files or any
16 other files. As a routine matter we do not produce
17 190 and 197 files unless the individual specifically
18 asks for them.

19 Q How is an individual supposed to know
20 there is a 190 file about him?

21 A Well, they are the ones who make a FOIA
22 request.

28

1 Q Right. But what I'm trying to understand
2 is you just said unless a requester says I want my
3 190 file -- tell me if I'm wrong but I think that's
4 what you said -- unless they said that, the FBI
5 won't produce it. How is an individual supposed to
6 know that there is even something exists that is
7 called a 190 file?

8 A Again you are talking semantics. No one
9 ever asked for a 190 file unless they deal in FOIA.
10 What they request is I would like a copy of the
11 record of my FOIA request.

12 Q What if they say I want all documents
13 about me, is that not broad enough to include --

14 A It's our standard administrative process
15 based on the fact most people don't want their FOIA
16 request. In fact, most people object to it because
17 they end up having to pay for it. We do not provide
18 190s or 197s to individuals who request records and
19 focus it again using the request which was for --
20 clearly for investigatory records, we focused on the
21 investigatory records.

22 Q Where in Mr. Negley's FOIA request does he

29

1 say limit this to investigatory files?

2 **A It's our reading of it that that's what he**

3 **was looking for and so that's what we focused on.**

4 **But again, administratively we did not provide his**

5 **190 and 197 under the assumption that he did not**

6 **want it.**

7 Q Okay. When I asked you maybe about 20

8 minutes ago if you had imposed or if the FBI had

9 imposed any restrictions on it, is it fair to say

10 then that one restriction the FBI did impose in its

11 search and production in response to the order is

12 that it only looked for files related to Negley that

13 are investigatory files?

14 **A I would say that we looked for any record**

15 **other than the 190s and 197s.**

16 Q So now it's anything but 190s and 197s?

17 **A Yes.**

18 Q Okay. Are there other categories of

19 documents that requesters won't know about that you

20 would like to tell me about now because again I'm a

21 little bit worried that -- I didn't know anything

22 about anything called a 190 or 197 until you just

30

1 told me about it. Are there other such categories

2 of documents that you would like to share with me?

3 MS. LO: Object to form, argumentative.

4 **A Individuals know they make a FOIA request**

5 **so I don't think it is hidden. Individuals know**

6 **whether they litigate in federal court. So I assume**

7 **they assume the FBI has a record on them. So I**

8 **don't think, as you characterize it, they are hidden**

9 **areas that people don't know about.**

10 **(Hardy Exhibit 15 was marked for**

11 **identification and was attached to the transcript.)**

12 **BY MR. KHETAN:**

13 Q Mr. Hardy, I show you what has been marked

14 as exhibit 15, a November 30, 2009 letter from you

15 actually to me and it has as the subject James

16 Lutchter Negley and it has a FOIA request number.

17 MS. LO: May we pause for a moment? Is it

18 possible for you to make a copy for me so I can look

19 on?

20 MR. KHETAN: Sure.

21 (Off the record.)

22 BY MR. KHETAN:

31

1 Q Mr. Hardy, I am going to show you again

2 what has been marked as exhibit 15. Take a moment

3 to look at this or take as long as you need to look

4 at it.

5 **A Okay.**

6 Q You have mentioned several times there has

7 been a subsequent FOIA request by Mr. Negley. Is

8 this letter in response to that subsequent FOIA

9 request?

10 **A Yes, it is.**

11 Q And so in this letter you reference --

12 this is the second paragraph, I'm going to summarize

13 it and tell me if I mischaracterizing -- in response

14 to Mr. Negley's FOIA request you identify a variety

15 of different files that the FBI has, including a

16 litigation file, a general file, two serials within

17 a control file. Do you see that?

18 **A Yes.**

19 Q So this is the FBI identifying to the

20 requester that you do have I guess a 197 and some

21 other what you have characterized as administrative

22 files?

32

1 **A Correct.**

2 Q Did the FBI ever do that in response to

3 Mr. Negley's 2002 request?

4 **A No, we did not. I think the reason is**

5 **looking at where the focus was initially was on San**

6 **Francisco and then we were looking at the**

7 **investigatory files. In addition, the only one of**

8 **these which is prior to 2002 I believe would be the**

9 **litigation file from his prior lawsuit so that they**

10 **weren't in the responsive time frame.**

11 Q I guess what I'm really getting at, Mr.

12 Hardy, is in the pending lawsuit which has been

13 going on for nearly six if not seven years, why has

14 the FBI never identified to Mr. Negley that there

15 are 190 or 197 files about him?

16 MS. LO: Objection to form.

17 **A The assumption is again that if you make a**

18 **FOIA request, you assume somewhere there is a record**

19 **of your FOIA request and if you engage in litigation**

20 **that within the FBI there is going to be a file on**

21 **that litigation, and so routinely we do not produce**

22 **that unless people specifically ask for it because**

33

1 **it is our standard business practice that people**
2 **don't want us to pull out and pay for documents that**
3 **they already have or that they are intimately**
4 **familiar with.**
5 Q Except that as it relates to this exhibit
6 15 in Mr. Negley's more recent FOIA request, the FBI
7 identified to Mr. Negley that there are several
8 administrative files and it gives him the option as
9 to whether or not he wants the FBI to produce it,
10 and I'm wondering why in the 2002 FOIA request which
11 has been in litigation for six years, why the FBI
12 has never done the same thing.
13 A **I think it's common sense. First off,**
14 **most of these are not within the time frame that we**
15 **searched. Second, after seven years of litigation,**
16 **Mr. Negley is getting boutique service at this point**
17 **as far as we are going to make sure he knows every**
18 **file that we have. And third, the focus has been on**
19 **the investigatory files from the entire litigation**
20 **and that's where we have been focused, and we assume**
21 **that if Mr. Negley was interested in additional**
22 **files outside the administrative files that he would**

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1 **have asked us.**
2 Q Okay. You have now said several times
3 that you focused on investigatory files. Can you
4 point to me where in the court's September 24, 2009
5 order the court tells the FBI that it should limit
6 its search in that manner?
7 A **I think before we just bang all around on**
8 **this thing, we did not take the court's order to**
9 **mean that they wanted his litigation, and if there**
10 **is a remaining FOIA request file which I'm not sure**
11 **there is because I don't see it listed there, but**
12 **his prior District of West Texas litigation file is**
13 **part of it, and we assumed that we were looking for**
14 **the investigatory files and any other files that**
15 **might be out there that may not be technically**
16 **investigative but might have been out there during**
17 **the time period, and we did assume that it did not.**
18 **That was an assumption that we made including his**
19 **prior litigation in Texas.**
20 Q It says all documents that relate to
21 Negley in any manner.
22 A **It goes back to his original request. It**

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1 **says specifically, "in response to Negley's FOIA**
2 **request for all documents that relate to or**
3 **reference Negley in any manner," and then we used**
4 **the four frames of the initial request of Mr. Negley**
5 **to frame our search.**
6 Q Let me make sure I understand. You said
7 the original request. Does that mean the January
8 16, 2002 letter that's Exhibit A of exhibit 13?
9 A **Right.**
10 Q I'll refer you to it, second paragraph of
11 that letter, "based upon the information received
12 indicated herein, I request a copy of any records
13 about me maintained at and by the FBI." Where does
14 that limit it to investigatory files?
15 A **Again, as the standard assumption that we**
16 **have and as we spin around and go round and round on**
17 **this, I feel my assumption is correct and that we**
18 **fully complied with the court order and that's what**
19 **the court wanted us to do and that was our**
20 **interpretation of it.**
21 Q Let me also ask you in response to you
22 saying that the destruction schedule is seven years,

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1 does that mean that the 190 associated with Mr.
2 Negley's prior FOIA request to the Sacramento office
3 has since been destroyed?
4 A **I said I wasn't certain.**
5 Q Well, if it did exist, would it be
6 indicated on exhibit 15?
7 A **Yes.**
8 Q Is it indicated on exhibit 15?
9 A **I don't see it on exhibit 15, but I can't**
10 **say for certain it has been destroyed.**
11 Q Okay. I guess I'm just wondering if had
12 the FBI identified that earlier in this case which
13 has been going on since 2002, that file may not be
14 destroyed -- may not have been destroyed at that
15 time.
16 MS. LO: Objection to form.
17 BY MR. KHETAN:
18 Q I mean, is that possible?
19 A **It's possible. Well, it wouldn't have**
20 **been destroyed within seven years, okay.**
21 Q Right. And this litigation has been going
22 on since I think early 2003 or late 2003; is that

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1 right? So I mean it's plausible that file has been
2 destroyed just during the course of this litigation,
3 right?
4 **A The Sacramento file?**
5 Q Yes.
6 **A The Sacramento FOIA request, it's**
7 **possible.**
8 Q We did talk quite a bit about the 190 and
9 how it would be part of CRS in UNI and in the
10 facility depending on the dates of when those two
11 databases began. For the 197 I think you said that
12 that's a litigation file. Describe that to me.
13 What is that?
14 **A It's the record that's generated during**
15 **the course of a civil litigation and again it's in**
16 **the Central Records System accessible by UNI, and**
17 **I'm not totally familiar with what goes into each**
18 **one of those files.**
19 Q Do you know if for example it includes
20 pleadings?
21 **A I would speculate that it would have to,**
22 **but I have no idea.**

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1 Q I don't want you to speculate. Do you
2 know if there is a 197 that relates to Mr. Negley?
3 **A There are two 197s that relate to Mr.**
4 **Negley.**
5 Q You are telling me this as a fact, you
6 know this?
7 **A Well, there are two litigations that I**
8 **know of.**
9 Q Have you seen 197s related to Mr. Negley?
10 **A I have never looked at them.**
11 Q What would the two be that you are
12 referring to?
13 **A His suit in the Western District of Texas**
14 **and this current litigation.**
15 Q In response to the court's order, did the
16 FBI search for 197s relating to Mr. Negley in
17 response to the court's order?
18 **A No. Again going back to I think our**
19 **interpretation was correct, that he was looking for**
20 **the files relating to this and not looking for**
21 **administrative files of prior legal action.**
22 Q Is there a division within the FBI called

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1 the Counterespionage Section?
2 **A Counterespionage Division.**
3 Q Is that within the FBI?
4 **A That's correct.**
5 Q So if a requester like Mr. Negley had sent
6 a letter to the Counterespionage Division, is that
7 something that would also be classified -- that
8 would get into a 190?
9 **A What kind of letter? You are going to**
10 **have to be more specific.**
11 Q Well, a letter basically seeking
12 information about investigations being done of an
13 individual.
14 **A A letter that requests records would go --**
15 **and results in the opening of a FOIA request would**
16 **be in a 190 file.**
17 Q Okay, because 190 is limited to FOIA
18 requests; is that right?
19 **A Correct.**
20 Q Would any of the FBI searches that were
21 conducted in response to the court's order, would
22 those obtain letters that were sent by Mr. Negley to

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1 the Counterespionage Division?
2 **A By the way, it's counterintelligence.**
3 Q I'm sorry, counterintelligence.
4 **A If it was in the time frame that we were**
5 **searching, yes.**
6 Q So limited up until 2002?
7 **A Correct.**
8 Q Is there something called a
9 Counterespionage Division or a Counterespionage
10 Section?
11 **A No.**
12 Q Mr. Hardy, if I could have you take a look
13 at what has been marked as exhibit 12, this is your
14 sixth declaration with an Exhibit A.
15 **A Correct.**
16 Q Is that fair, that is your sixth
17 declaration?
18 **A Correct.**
19 Q Was this sixth declaration submitted in
20 response to the court's September 24, 2009 order?
21 **A Yes.**
22 Q If you would turn to the second page of

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1 this declaration, paragraph 5, there is a sentence
2 that says "subfile" -- and I am going to call it
3 1575 if that's okay with you --
4 **A That's fine.**
5 Q -- "subfile 1575 pertains to a third party
6 who is not in any way connected to plaintiff." Do
7 you see that?
8 **A Yes.**
9 Q How did you determine that 1575 pertains
10 to a third party who is not in any way connected to
11 plaintiff?
12 **A What we were saying is that there is no**
13 **connection to plaintiff within that file.**
14 Q That's what I am trying to understand.
15 How did the FBI determine that?
16 **A By reading it.**
17 Q Okay. So you read the file and is there
18 any investigation done to determine if the
19 individual referred to in 1575 is connected to
20 plaintiff?
21 **A There is not anything in the file that**
22 **connects this individual to the plaintiff.**

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1 Q What I'm trying to understand, Mr. Hardy,
2 because I don't want to play with semantics, is what
3 does that mean that it's not connected to plaintiff?
4 **A There is nothing in the file that in any**
5 **way relates to show any connection between that**
6 **individual and the plaintiff.**
7 Q Okay. So does that mean that there is
8 nothing in subfile 1575 which mentions Negley?
9 **A Mentions Negley, mentions his corporation,**
10 **mentions other issues which came up during previous**
11 **depositions -- there is some technology involved.**
12 **So there is nothing that from our understanding that**
13 **would in any way relate to any connection to Mr.**
14 **Negley.**
15 Q And that's exactly what I am trying to
16 understand. How did the FBI determine that this
17 file doesn't relate to Mr. Negley and you mentioned
18 it doesn't have -- is it the full name, James
19 Lutchter Negley, or does it not have the name Negley
20 in it anywhere?
21 **A It has to do solely with one individual**
22 **and it has nothing to do with Negley. There is not**

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1 **a Negley mentioned there. There is not even another**
2 **person besides Negley mentioned in there that was**
3 **the subject of the investigation. It has nothing to**
4 **do with this corporation. It has nothing to do with**
5 **technology. It is simply what it is. It is**
6 **somebody thought he looked like the Unabomber, this**
7 **individual, and they looked at him and decided it**
8 **was not.**
9 Q Did the FBI conduct any investigation to
10 see if the person or persons who are mentioned in
11 1575 have some connection to Mr. Negley that's not
12 specifically referenced in these seven pages?
13 **A No.**
14 Q If you would, I believe Exhibit A to
15 exhibit 12 are the seven pages that the FBI
16 produced?
17 **A Right, correct.**
18 Q I am going to suggest, and tell me if I'm
19 wrong, that these are the same seven pages that are
20 reproduced as Exhibit K to your seventh declaration
21 as pages I think 100 through 106.
22 **A I'll have to look at it.**

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1 Q You actually have it in front of you, Mr.
2 Hardy, that big stack. If you turn toward the end
3 of that big stack, I believe 100 through 106 of
4 exhibit 13 are the same as the seven pages that are
5 attached to your sixth declaration.
6 **A Correct.**
7 Q Is that fair?
8 **A Yes.**
9 Q If you would, just because I want to be
10 clear about this, if you would turn to the first
11 page of what the FBI is calling subfile 1575. Is
12 there any reference to Negley on that page?
13 MS. LO: Objection. The document speaks
14 for itself.
15 **A Can you say the page number?**
16 Q Well, I'm looking at exhibit 12 which is
17 your sixth declaration, it's the first page of that
18 exhibit.
19 **A The cover of the file?**
20 Q Yes, and just so the record is clear it
21 has a notation at the bottom that says page 1.
22 **A Correct.**

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1 Q Is there any mention of Negley on that
2 page?
3 A No.
4 Q Is there anything redacted from this page?
5 A Yes.
6 Q What has been redacted on this page?
7 A Personal information.
8 Q Where is that, if you can point?
9 A Under the bureau file.
10 Q So that box is personal information?
11 A Correct.
12 Q When you say personal information, do you
13 mean the name of an individual?
14 A Well, going through the coded Vaughn
15 (b)(3), (b)(6)-3, name, identifying information of a
16 third party of investigative interest, so yes.
17 Q Again I'm not asking you if it has James
18 Lutchter Negley, just Negley. Negley does not appear
19 on this page, correct?
20 A Correct.
21 Q If you will turn the page to page 2 of
22 this document --

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1 A Correct.
2 Q -- does the name Negley appear anywhere on
3 this document, whether it has been redacted or not?
4 A I can't answer that. I understand what
5 you are asking now and so -- if it's a third party,
6 then it's not Mr. Negley, and if the (b)(6) 371 --
7 I'll go back to the code -- 371 I believe is law
8 enforcement, so it's a law enforcement officer.
9 Q I want to make sure that the word Negley
10 doesn't appear on any of these pages even if the
11 entire James Lutchter Negley or James L. Negley
12 doesn't appear because Negley -- the reason I ask
13 you this, Mr. Hardy, is there appear to be a lot of
14 times where individuals in these documents are
15 referenced just by their last names. So what I am
16 trying to find out is on page 2 if there is any
17 reference to Negley that's been redacted, just the
18 word Negley.
19 MS. LO: I am actually going to object to
20 this line of questioning on the basis that if you
21 are asking him -- obviously what's not redacted, the
22 document speaks for itself, and you can tell if

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1 Negley is in the unredacted portion, but if you are
2 asking him if the word Negley appears in the
3 redacted portion, I'm not certain that's something
4 he can answer because of the third party
5 confidentiality issue.
6 MR. KHETAN: Except the problem would be
7 if the FBI redacted Negley, I would suggest that
8 that violates the order, and you may disagree with
9 that legally but I think I'm at least entitled to
10 ask him that.
11 MS. LO: Well, I think the order again you
12 know speaks for itself and deals with your client.
13 If this is a third party issue, that's not something
14 that he can identify whether the third party's name
15 has anything to do with Negley or not. This is a
16 privacy issue.
17 MR. KHETAN: I'm not asking if it has
18 anything to do with Negley. I'm asking specifically
19 if the word Negley has been redacted off of any of
20 these documents.
21 THE WITNESS: Can I have a time out for
22 just a minute?

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1 MR. KHETAN: Sure, we can go off the
2 record.
3 (Off the record 11:03-11:10.)
4 MR. KHETAN: Do you want to make a
5 statement?
6 THE WITNESS: Can I hear the question read
7 back?
8 (Record read page 46, lines 9-18.)
9 THE WITNESS: In response to that first,
10 I'm always uncomfortable going underneath redactions
11 and I think the categories where we have coded and
12 said the privacy interest and the type of privacy
13 interest that we are protecting speaks for itself,
14 and I also -- but I would say in this instance that
15 there is no form of Negley anywhere on these
16 documents.
17 BY MR. KHETAN:
18 Q Okay. I can go through each of the pages,
19 but if you are willing to make a blanket statement
20 that pages 3 through 7 similarly don't have Negley
21 on them or redacted --
22 A There is no redaction, Negley is not

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1 **redacted on any of the pages.**
2 Q Okay, that's what I needed to know. If
3 you would go back to paragraph 5 of your sixth
4 declaration, just focusing again on the sentence
5 where it says, "file 1575 pertains to a third party
6 who is not in any way connected to plaintiff," if
7 there were an agent referenced in 1575, because I
8 believe some of the redactions relate to FBI special
9 agents and support personnel, so if there were
10 agents that were somehow connected to Negley, does
11 this sentence exclude that?
12 MS. LO: Objection to form.
13 BY MR. KHETAN:
14 Q Let me try that differently. In other
15 words, this sentence says that file 1575 pertains to
16 a third party who is not in any way connected to
17 plaintiff. Would you agree, Mr. Hardy, that there
18 have been portions of 1575 that reference agents'
19 names or support personnel at the FBI?
20 **A There are redactions for support personnel**
21 **and agents, that's correct.**
22 Q So if an agent or one of these support

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1 personnel were connected to Negley, is that somehow
2 excluded from what you say here in paragraph 5 that
3 1575 pertains to a third party who is not in any way
4 connected to plaintiff?
5 MS. LO: Objection to form.
6 BY MR. KHETAN:
7 Q In other words, do you consider whether an
8 agent or support personnel who is mentioned in 1575,
9 if they are connected to Mr. Negley?
10 MS. LO: I am going to object to that,
11 it's vague.
12 BY MR. KHETAN:
13 Q In response to what your counsel just
14 said, connected to is actually your word so I don't
15 know if your words are vague, but using that same
16 language, has the FBI taken into consideration
17 whether or not any of the agents or support
18 personnel who are mentioned in 1575, if they are
19 connected to plaintiff, Mr. Negley?
20 **A The agents who conducted the investigation**
21 **are not the same individuals who did the interviews**
22 **with him out in California, if that's the question**

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1 **you are asking, they are different agents.**
2 Q I am not just limiting it to the agents
3 you just referred to. What I'm talking about is any
4 of the agents or support personnel whose names have
5 been redacted from file 1575, did the FBI consider
6 whether any of those individuals are connected to
7 Mr. Negley?
8 **A I am afraid I don't quite understand what**
9 **you are asking, it is escaping me totally.**
10 Q Sure. You make a statement in your
11 declaration that says, "file 1575 pertains to a
12 third party who is not in any way connected to
13 plaintiff." Do you see that?
14 **A Correct.**
15 Q I think you said that there are FBI agents
16 and/or support personnel whose names have been
17 redacted in file 1575; is that correct?
18 **A Correct.**
19 Q What I'm trying to find out is did the FBI
20 consider or look into whether any of those agents or
21 support personnel whose names are mentioned in 1575,
22 if they are in any way connected to plaintiff?

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1 **A Well, first off I mean -- I said pertains**
2 **to a third party who is not in any way connected to**
3 **plaintiff, so I said third party. And second, I**
4 **said that this statement is based on the fact that**
5 **there is nothing in the file that in any way**
6 **connects with Negley, this individual with Negley.**
7 **So I think I have pretty much said -- I don't know,**
8 **none of the agents are named Negley that are in**
9 **there and I can say that Negley doesn't appear, and**
10 **they are different agents that investigated him and**
11 **I think that kind of stands on its own. So in my**
12 **mind this sentence is accurate and says what it**
13 **says.**
14 Q Okay. If you would turn to page 5 of
15 that, of your declaration.
16 **A Okay.**
17 Q There is a sentence towards the middle
18 that says, "there is no doubt that this
19 investigation and specifically suspect 1575's
20 subfile falls within the law enforcement duties of
21 the FBI."
22 **A Correct.**

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1 Q What does that mean that it falls within
2 the law enforcement duties of the FBI?
3 A **Before you can use (b)(7) exemption, you**
4 **have to make a finding, the courts require a finding**
5 **that in fact (b)(7), which is the law enforcement**
6 **exemption, relates to law enforcement duties of the**
7 **FBI. So the entire discussion about the Unabomber**
8 **and why these files were created, this is a sentence**
9 **that is almost a talisman, if you will, that you**
10 **have to stick in your declarations so the court says**
11 **you have mentally connected your use of (b)(7) with**
12 **the fact that it's a law enforcement issue.**
13 Q And so in the sentences that precede that
14 are you explaining how this falls within the law
15 enforcement --
16 A **Correct.**
17 Q If you would turn to page 7, paragraph 15,
18 you talk about exemptions (b)(6)-1 and (b)(7)(C)-1.
19 Do you see that?
20 A **Right.**
21 Q It says, "have been asserted to protect
22 the names of FBI special agents." Is it only the

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1 names then of FBI special agents that have been
2 redacted where you invoke or where the FBI invokes
3 exemption one?
4 A **(B)(6)-1?**
5 Q That's correct.
6 A **That's correct. We actually delineate**
7 **between local law enforcement and other federal**
8 **agencies, so when we say special agents, we mean**
9 **special agents.**
10 Q And it's only their names?
11 A **Correct.**
12 Q So you wouldn't redact other identifying
13 information about those special agents?
14 A **Well, that's kind of a broad statement. I**
15 **mean if there was something in there that was**
16 **personally identifying for them like their home**
17 **address or something like that, we would include**
18 **that, but it is the name -- primarily it would just**
19 **be the names.**
20 Q Well, and this is what I need to know
21 because in other instances in your affidavit you
22 actually specify other identifying information, and

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1 I'll refer you to page 8, paragraph 16, where you
2 are talking about exemption 2, you identify
3 identifying information as home address, date of
4 birth, etc. --
5 A **Sir, where are we?**
6 Q Paragraph 16, which is on page 8 of your
7 declaration.
8 A **Okay.**
9 Q You indicate there that it has been
10 asserted to protect the name and identifying
11 information and then you specify two lines down what
12 you consider to be the identifying information.
13 A **Right.**
14 Q What I am trying to find out is the
15 redactions that you have done on subfile 1575 as it
16 relates to exemptions (b)(6)-1 and (b)(7)(C)-1, is
17 it anything other than the name of FBI special
18 agents?
19 A **Let me go through and look.**
20 Q Okay.
21 A **From my looking at it, it's just the**
22 **names.**

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1 Q What you just looked at, is that the seven
2 pages that are attached to your sixth declaration?
3 A **That's correct.**
4 Q Which has redactions on it?
5 A **Right.**
6 Q How are you able to determine that it's
7 only the name that has been redacted?
8 A **Just looking at the context of just how**
9 **(b)(6) (b)(7)(C)-1 appears within the documents.**
10 Q Are you speculating that there is nothing
11 other than the names that have been redacted?
12 A **I'm sorry, there are some initials.**
13 Q Okay. Let's try this again then. Are you
14 basically just looking at the boxes and trying to
15 determine based on the context whether or not it's
16 anything other than the name or initials?
17 A **I'm familiar -- well, all right, let's**
18 **take SSA blank, C-1 --**
19 Q Sorry?
20 A **Let's go to page 3.**
21 Q Okay.
22 A **Looking at SSA, which means supervisory**

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1 **special agent, UNABOM Task Force -- that's what UTF**
2 **stands for -- I would say that that's a name. Let's**
3 **go down to the bottom of the page, (b)(6)-1**
4 **(b)(7)(C)-1, there are two little squares down**
5 **there, do you see those?**
6 Q Yes.
7 A **I would say those are initials.**
8 Q Let me just ask you, how do you know those
9 are initials?
10 A **From their location and general experience**
11 **of seeing thousands and thousands of FOIA documents,**
12 **okay.**
13 Q Okay.
14 A **Let's go to page 4. SA stands for special**
15 **agent, Buffalo Division, I would say that's a name.**
16 **2, SSA special agent UNIBOM Task Force, that's a**
17 **name based on the same criteria and a having seen**
18 **many, many FBI files.**
19 Q Okay.
20 A **I don't see anything on page 5.**
21 Q Okay.
22 A **I don't see anything on page 6. I don't**

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1 **see anything on page 7. Going back to the front of**
2 **it, on page 2 it says on February 20 was reviewed by**
3 **special agent and I don't see where there would be**
4 **room for much more than a name there -- you would**
5 **not put anything in there, having looked at this**
6 **kind of document. So I think that's my assessment**
7 **of it.**
8 Q I'm just looking at page 2. Based on the
9 size of the box, you are saying that that has to be
10 a name?
11 A **And in the context and my experience of**
12 **reading lots of documents, I would say that's a**
13 **name.**
14 Q Okay. And it's the name of a special
15 agent?
16 A **Correct.**
17 Q So again then going back to my initial
18 question which is where the FBI has redacted pages
19 from subfile 1575 based on exemptions (b)(6)-1 and
20 (b)(7)(C)-1, it is only the names or initials?
21 A **You know I'm sorry. It could be the name**
22 **of a support employee.**

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1 Q I appreciate that clarification because I
2 was going to ask you that next. Paragraph 15 talks
3 about an FBI support employee?
4 A **Yes. Sometimes we break them out.**
5 **Sometimes we don't. So in this one it could be a**
6 **support employee.**
7 Q But again it's only names or initials that
8 have been redacted?
9 A **Correct.**
10 Q If you would go to page 8 of your
11 declaration where you talk about exemption (b)(6)-2
12 or (b)(7)(C)-2 --
13 A **Correct.**
14 Q -- there you say it has been asserted to
15 protect the name and/or identifying information. Do
16 you see that?
17 A **Yes.**
18 Q The second sentence of paragraph 16 says,
19 "identifying information withheld concerning this
20 third party includes home address, date of birth,
21 and the nature and circumstances of the third
22 party's association with suspect 1575."

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1 A **Correct.**
2 Q Are there categories of information that
3 are redacted that are not home address, date of
4 birth, or the nature and circumstance of the third
5 party's association?
6 A **Not under (b)(6)-2 or (b)(7)(C)-2.**
7 Q So where it says "includes," that means
8 it's just these three categories of things that are
9 being redacted?
10 A **Correct -- well, four, his name.**
11 Q If you count name?
12 A **If you count name.**
13 Q You are right, I apologize. If you turn
14 to page 9, paragraph 19 talks about where exemption
15 b)(6)-3, (b)(7)(C)-3 have been asserted.
16 A **Yes.**
17 Q And again it says to protect the name and
18 identifying information and the next sentence
19 identifies or says, "the identifying information
20 withheld includes address, phone number, date of
21 birth, driver's license number, employment
22 information and other personally identifying

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1 information."
2 **A Correct.**
3 Q What is "other personally identifying
4 information"?
5 **A It would be information which would allow**
6 **you to, if you read it, to have an idea who this**
7 **person would be. In other words, we are trying to**
8 **protect the identity of this individual.**
9 Q I guess what I am trying to understand is,
10 does the FBI invoke that here as it relates to
11 subfile 1575 to redact information other than
12 address, phone number, date of birth, driver's
13 license number, or employment information?
14 **A Again not wanting to go underneath the**
15 **redactions and speaking in general terms, certain**
16 **information which is not a name, address, telephone**
17 **number, date of birth, driver's license number,**
18 **employment information, in the context of a document**
19 **would allow you to know who it is, but it doesn't**
20 **fall into one of these above categories. So**
21 **essentially it's the context of the document that**
22 **would allow you to identify who that person is.**

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1 Q What kind of information or what
2 information would do that apart from the five
3 categories you already have under paragraph 19?
4 **A Again I'm not going to go underneath the**
5 **redactions, but if I were to -- it would be**
6 **information let's say a statement saying and blank**
7 **gave a deposition at the Troutman law firm on**
8 **January whatever, 2010. That information, if you**
9 **had that, you could identify who that person was.**
10 **It would be me in that instance. But it doesn't**
11 **fall into one of the categories of address,**
12 **telephone number, so it's a contextual**
13 **identification and we protect them.**
14 Q Did the FBI use that category, the other
15 personally identifying information, in order to
16 redact any materials in subfile 1575?
17 **A We would not have put it in here if we did**
18 **not use it.**
19 Q Okay. Where it says "employment
20 information," does that include the name of the
21 employer?
22 **A That would be the type of information it**

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1 **would be.**
2 Q What about the occupation?
3 **A That would -- that could be in there as**
4 **well.**
5 Q Let me try to understand. The occupation,
6 in your opinion how could that be redacted? What is
7 the basis for redacting that?
8 **A Well, again, you could identify it. Blank**
9 **is an associate at the firm of Troutman, okay?**
10 Q Yes.
11 **A And then you put it in the context of that**
12 **and you can figure out what it is from what they do.**
13 **All of these redactions are contextual, meaning you**
14 **have to look at the overall body. So you don't give**
15 **out information which would allow someone to**
16 **identify you.**
17 Q Just to use your own example where you
18 said blank is an associate at Troutman, if I
19 understand what you said before, the first blank
20 might indicate the name of the person, the last
21 blank could be the employer. I'm failing to
22 understand why you would -- it sounds like you would

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1 blank also associate; is that right?
2 **A Yes.**
3 Q How would identifying that someone is an
4 associate without giving them any other context, how
5 does that fall within exemption (b)(6)-3 or
6 (b)(7)(C)-3?
7 **A First off, this is speculative because we**
8 **are not discussing what's actually underneath the**
9 **redaction. And second, what I am trying to say is**
10 **this is contextual and this is -- the ability to**
11 **derive, to identify people from FBI documents, there**
12 **are a lot of people who work very hard at it and so**
13 **what we do is do a reasonable test to make sure that**
14 **we give out as much information as we can but at the**
15 **same time delete the information which we think**
16 **could reasonably lead to someone identifying the**
17 **individual, and that's our philosophy. It's privacy**
18 **we are trying to protect. So that's the balance and**
19 **again we are kind of speculating on it because I am**
20 **not going to go underneath the redactions in this**
21 **case.**
22 Q Let's not speculate. If you would turn to

65

1 page 3 of subfile 1575, about halfway down there is
2 a line that says, "this was based on the blank
3 interview and blank past occupation as a blank."
4 **A Sorry. Where are we?**
5 Q Page 3, halfway down the sentence that
6 says, "this was based on the blank interview and
7 blank past occupation as a blank."
8 **A Yes.**
9 Q So that we are not speculating, I am
10 referring to that last blank which presumably is
11 this individual's past occupation.
12 **A Right.**
13 Q Not employer but occupation.
14 **A Right.**
15 Q What I am trying to understand is why is
16 that redacted. For example, if you told me his past
17 occupation was a construction worker, how would that
18 fall under (b)(7)(C)-3 or (b)(6)-3?
19 **A Again you know it's a mosaic that could be**
20 **put together and I think it might -- I think it's**
21 **one factor that would help you identify the**
22 **individual, so that's why the exemption. Again I**

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1 **think it's very reasonable when you look at where**
2 **you have to look, Buffalo is doing the interview,**
3 **there are a number of other factors. Essentially**
4 **what we are trying to do is using the individual**
5 **mosaics to develop a picture of a person, so I think**
6 **under this thing it is a very reasonable redaction**
7 **to take.**
8 Q Okay. Would you turn back to page 2 not
9 of your declaration but of the attachment to your
10 declaration.
11 **A Um-hmm.**
12 Q It says that serials 1 through 2 were
13 reviewed. What does that mean, that there are two
14 serials? In other words, what is a serial?
15 **A A serial is kind of the basic unit where**
16 **things are uploaded. If you look on page 3 where it**
17 **says 1575-1, that's serial 1.**
18 Q Okay. Just so the record is clear, you
19 are referring to the bottom right corner above the
20 box that has the date on it?
21 **A Right.**
22 Q Okay.

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1 **A Now if you go to page 4 you will see**
2 **serial 2.**
3 Q Okay.
4 **A So there are two serials.**
5 Q So the serials 1 through 2 that are
6 referenced on page 2 are what has been produced here
7 as pages 3 through 7?
8 **A Yes.**
9 Q Okay. If you are on page 3, the first
10 large paragraph that says "referenced teletype
11 furnished," see that?
12 **A Yes.**
13 Q It says, "furnished information from a
14 blank interview." And you've got two different
15 categories of exemptions there, (b)(6)(2)-3,
16 (b)(7)(C)(2)-3. I am trying to figure out what
17 category of information that blank falls into.
18 Because you've got five different boxes in that
19 paragraph and there is no way for me to figure out
20 what you are invoking or what the FBI is invoking as
21 the exemption there.
22 **A Well, I believe (b)-2 is a person of**

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1 **interest, correct? So it's clear that interview**
2 **regarding blank is the (b)-2, (b)(6) (b)-2, because**
3 **that's the individual who is a suspect -- sorry,**
4 **(b)(3). Hold on, let me look at my chart.**
5 Q I'll try to help you out. (b)-2 is third
6 party interview by the FBI. (b)(3) is third party
7 of investigative interest, according to your chart.
8 **A So (b)-2 is the first one and (b)(3) is**
9 **the second.**
10 Q When you say the first one, you are saying
11 that first box where it says from a blank
12 interview --
13 **A Right.**
14 Q -- that first blank is a reference to a
15 name? So in other words, from a Hardy interview?
16 **A It would be one of those categories that's**
17 **in the paragraph that describes (b)-2 and that would**
18 **be the common sense interpretation of it, but I**
19 **don't know what's underneath it, specifically this**
20 **redaction.**
21 Q Do you understand you are here today to
22 testify about what is indicated in your sixth

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1 declaration?
2 **A Correct.**
3 Q Are you prepared to testify about what's
4 in your sixth declaration?
5 **A Is that a rhetorical question?**
6 Q No, that's a question.
7 **A Yes.**
8 Q But you are not able to tell me which
9 exemption is being invoked for the very first box in
10 that paragraph on page 3?
11 **A No, I didn't say that --**
12 MS. LO: He did answer that question.
13 Q Which exemption is it?
14 **A It's (b)-2, and then you asked is it a**
15 **name and I said it's one of the categories that's**
16 **listed under (b)-2.**
17 Q Well, the only thing that you have listed
18 under (b)-2 -- tell me if I'm wrong -- are names and
19 initials.
20 MS. LO: No, that mischaracterizes the
21 witness's testimony.
22 BY MR. KHETAN:

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1 Q Go ahead and correct me if I am wrong
2 then.
3 **A It says under (b)-2 identifying**
4 **information beside the name withheld concerning this**
5 **party includes home address -- paragraph 16, page 8,**
6 **(b)-2, we are talking about the name, it includes**
7 **home address, date of birth, and nature and**
8 **circumstances of the third party's association with**
9 **the suspect.**
10 Q Okay.
11 **A So it can be any one of those four.**
12 Q So what you are suggesting to me is that
13 it could say from A, home address, interview; is
14 that what you are suggesting to me?
15 **A It could be from an associate's interview,**
16 **it could be from a neighbor's interview. It's one**
17 **of those four categories.**
18 Q Just to be clear, when you say from an
19 associate's or neighbor's, you mean their name? It
20 wouldn't just say from a neighbor's interview, or is
21 that also something that the FBI could have
22 redacted?

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1 **A If in fact that information is of a nature**
2 **that it would disclose the circumstances of the**
3 **third party's association with the suspect, yes, we**
4 **would take it out.**
5 Q So it could be, just to be clear,
6 quote-unquote the word neighbor or quote-unquote the
7 word associate?
8 **A Yes.**
9 Q It's not limited to names of individuals?
10 **A It could be wife, it could be cousin,**
11 **okay, it could be Hardy.**
12 Q Okay.
13 **A It's just one of those categories.**
14 Q That's the first box.
15 **A Um-hmm.**
16 Q That's (b)(6)-2.
17 **A Um-hmm.**
18 Q How about the second box?
19 **A That is (b)(6)-3.**
20 Q And the next one?
21 **A (b)-2 -- the next one is (b)(6)-2. This**
22 **one is based on the (b)(6)-2 and the next one and**

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1 **(b)(6)-3, past occupation.**
2 Q As a (b)(6)-3?
3 **A Right.**
4 Q Do you understand why I have to go through
5 these? It's because the way the FBI grouped the
6 whole paragraph together, it didn't identify which
7 exemption it is invoking for each of the boxes. So
8 I'm not doing this to be difficult with you, I'm
9 doing this because I have no way of knowing when the
10 FBI identifies two exemptions for five boxes and
11 groups them all together, there is no way for me to
12 know what it's invoking or not.
13 **A I am more than happy to go through each of**
14 **these pages.**
15 Q I don't need you to where you have only
16 invoked one exemption. You made it easy for us.
17 Would you look at the bottom of page 3 where it says
18 "entered and rapid start."
19 **A Yes.**
20 Q What is rapid start?
21 **A That was a question from the previous**
22 **deposition to which I had no answer.**

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1 Q You still have no answer?

2 A **But I searched around, because it's an**

3 **archaic term which is no longer in use, and rapid**

4 **start was a process by which in a major**

5 **investigation the information was immediately**

6 **disseminated as opposed to going into a file and it**

7 **staying in the file. So that's what it is.**

8 Q It is not a database?

9 A **No.**

10 Q So it's not something you can search?

11 A **No.**

12 Q This is sort of a term that's used?

13 A **It's a term. Entered in rapid start shows**

14 **that -- I mean there was direction apparently, and**

15 **there was I'm sure, in the Unabomber case that**

16 **anything that comes in immediately gets**

17 **disseminated, so that's what this guy did was enter**

18 **it into this dissemination process.**

19 Q And it's the agent that makes that

20 determination?

21 A **You know, I don't know.**

22 Q Okay.

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1 A **I do know it's no longer in use.**

2 Q Okay. If you would turn to page 5, about

3 halfway down there is a line that says, "anyone whom

4 he did not like blank advised that blank" and then

5 again the FBI put two different exemptions without

6 identifying --

7 A **Right. (B)(6)-2 is for the first**

8 **exemption that's before the word advised, and**

9 **(b)(6)-3 is for the word that follows that.**

10 Q How are you able to determine that?

11 A **Familiarity with the documents and the**

12 **context where it sits.**

13 Q Okay. If you would turn to page 6, about

14 seven lines down there's a line that says,

15 "Wednesday, during the month of blank." Do you see

16 that?

17 A **Yes.**

18 Q I am trying to understand what makes a

19 month protected or need to be redacted.

20 A **Again it falls into one of the categories**

21 **of that information would be a mosaic and would**

22 **allow somebody to identify who the suspect -- not**

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1 **the suspect, but the person of interest was.**

2 Q Help me out a little bit with this, Mr.

3 Hardy. So this sentence which reads, "he also

4 advised that it is quite possible that blank would

5 have contacted blank on a Wednesday during the month

6 of blank to discuss blank blank issues," you are

7 saying if the FBI released the month, that that

8 would somehow allow an individual to identify who

9 this third party is?

10 MS. LO: Objection to form.

11 A **This is again going into the mosaic and**

12 **it's all put together. If you take all the (b)-3s**

13 **that appear in that paragraph and you put them**

14 **together, that information could be built to**

15 **identify the individual. So like any mosaic, I**

16 **guess you can hang around the tile and -- the tiny,**

17 **teeny tile and say I don't see the picture, but it**

18 **is in fact part of the picture. And so putting**

19 **together the mosaic and protecting the mosaic is how**

20 **many times we protect identities.**

21 Q I am not suggesting or I'm not asking

22 about the other four blanks in that sentence. What

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1 I am trying to understand is it's the FBI's position

2 that had it released the blank that identified the

3 month, that that would allow someone to figure out

4 the mosaic I guess.

5 MS. LO: Objection. The document and

6 production speak for themselves.

7 A **Again picking at the mosaic, you can say**

8 **okay, well, leave this one in and leave this one in**

9 **and leave this one in. Essentially there is a**

10 **judgment call, but the bottom line is this**

11 **information put together as a whole would identify**

12 **the individual, parts of it would identify the**

13 **individual, and it is considered that this**

14 **information along with other information could help**

15 **identify the individual. So the answer is yes.**

16 Q Did you do these redactions? In other

17 words, did you determine what should be redacted and

18 what shouldn't?

19 A **The redaction was done by a legal**

20 **administrative specialist and then of course it was**

21 **reviewed.**

22 Q Did you review it?

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1 **A** **I reviewed it afterwards, yes.**
2 **Q** By the legal administrative specialist?
3 **A** **Right.**
4 **Q** If you would take a look at your seventh
5 declaration which has been marked as exhibit 13,
6 would you turn to page 4, footnote 5.
7 **A** **Yes.**
8 **Q** This references an April 23, 2002 letter.
9 It says it contains two documents but that RIDS,
10 R-I-D-S, is unable to locate it. Are you referring
11 to the April 23, 2002 letter that's one of the
12 attachments to your declaration?
13 **A** **Yes.**
14 **Q** So I take it that these are documents that
15 would have been in what you previously called a 190?
16 **A** **It would have been in the 190 for not this**
17 **Sacramento Field Office but for this request, this**
18 **request to San Francisco.**
19 **Q** Were these documents that are now attached
20 to your 7 declaration, were these taken off of UNI?
21 MS. LO: Objection to form.
22 **A** **The FOIA file is in UNI, okay, and then**

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1 **the FOIA file, these documents I have to assume were**
2 **within the FOIA file.**
3 **Q** Did you put together your attachments to
4 your declaration?
5 **A** **A clerk put together the attachments to**
6 **the declaration and I assume that it came from the**
7 **FTBS file. Sometimes though we will find that we**
8 **are missing a document and we'll search around and**
9 **find it, but it is now in the FOIA request file.**
10 **Q** I guess what I'm really trying to get at
11 is based on this footnote 5, it appears that these
12 two documents that you referred to in footnote 5,
13 those weren't located. Does that mean they were not
14 on UNI?
15 **A** **UNI references the FOIA file, okay. It**
16 **does not get down to the individual documents that**
17 **are within the FOIA file. So this would have been**
18 **in the FOIA file, the electronic FOIA file. And**
19 **what we are saying I believe in this is that Mr.**
20 **Negley attached two documents to his April 23 letter**
21 **and they were not found in the file, the two**
22 **documents he attached.**

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1 **Q** In the FOIA file?
2 **A** **In the FOIA file.**
3 **Q** Would those attachments have been
4 referenced in UNI?
5 **A** **No. As I said, the FOIA file is**
6 **referenced in UNI but not the individual parts of**
7 **the FOIA file.**
8 **Q** So none of the individual letters would be
9 referenced in UNI?
10 **A** **Correct.**
11 **Q** It's just the entire file?
12 **A** **Correct.**
13 **Q** All right. If you would turn to page 5,
14 footnote 8 of this declaration, there is a sentence
15 that says, "serial 3865 contained information that
16 was duplicative of serial 3041 and to the SCFO
17 file" and it gives a Sacramento file number, do you
18 see that?
19 **A** **Yes.**
20 **Q** That is Sacramento, right?
21 **A** **Correct.**
22 **Q** Then the reference is two serials, 101 and

80

1 355, within parentheses, which plaintiff had already
2 received. What is that Sacramento file number?
3 **A** **My understanding is those were the**
4 **original ones he received from Sacramento when he**
5 **made his initial request.**
6 **Q** When you say those are the original ones,
7 what do you mean?
8 **A** **I'm sorry, this is in fact what he**
9 **received when he made his request from Sacramento.**
10 **Q** When you say to your understanding, what
11 is the basis of that understanding?
12 **A** **The basis of that understanding is what**
13 **has been described to me by the legal administrative**
14 **specialist who put this all together.**
15 **Q** Well, did you review file no.
16 149A-SC-C27507-S?
17 **A** **I have reviewed the Sacramento Field**
18 **Office files at some point.**
19 **Q** I don't want to play with semantics here.
20 Did you review file no. 149A-SC-C27507-S?
21 **A** **I don't remember the file number.**
22 **Q** Do you know if you reviewed a Sacramento

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1 file that relates to Mr. Negley?
2 **A Yes.**
3 Q Has the FBI produced that Sacramento file
4 in this litigation?
5 **A I don't know, I can't remember.**
6 Q Isn't exhibit K to your seventh
7 declaration all the documents the FBI has produced
8 in this litigation?
9 **A That is correct.**
10 Q Is this Sacramento file number included in
11 Exhibit K of your declaration?
12 **A It is contained in serial 3865 and I'll**
13 **have to review it and look.**
14 Q Why don't you do that now.
15 **A Well, let's take a time out.**
16 Q Do you want to go off the record?
17 **A Yes.**
18 **(Discussion off the record.)**
19 **(Lunch recess 11:53 a.m.-1:14 p.m.)**
20 **BY MR. KHETAN:**
21 Q Mr. Hardy, did you do anything during your
22 lunch break to prepare further for this deposition?

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1 **A Yes, I reviewed the Sacramento release.**
2 Q Just so the record is clear, when you say
3 the Sacramento release, what do you mean by that?
4 **A A release made to Mr. Negley by FOIA**
5 **request to the Sacramento Field Office and that was**
6 **released to him prior to the San Francisco release.**
7 Q Did you bring those documents with you?
8 **A No.**
9 Q Have those documents been produced in this
10 case?
11 **A No.**
12 Q Do though documents relate or reference
13 Mr. Negley in any manner?
14 **A Yes, they do.**
15 **(Hardy Exhibit 16 was marked for**
16 **identification and was attached to the transcript.)**
17 **BY MR. KHETAN:**
18 Q Let me show you what I have marked as
19 exhibit 16. What I have handed you and marked as
20 exhibit 16 is a July 27, 1999 letter looks like from
21 Mr. Kelso to Mr. Negley.
22 **A Correct.**

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1 Q Have you ever seen this document before?
2 **A No.**
3 Q What does this document appear to be?
4 **A It's what we call a no record response for**
5 **FBI headquarters records.**
6 Q So this would be in response to a request
7 at FBI headquarters?
8 **A Correct.**
9 Q Was this document in the Sacramento
10 release file that you just looked at?
11 **A No.**
12 Q Is this a document that would be in one of
13 the files that's referenced in what we marked as
14 exhibit 15?
15 **A This is a FOIA request, you can see it has**
16 **its request number on it. It would have been a 190**
17 **file, within a 190 file, but given the date I assume**
18 **it has been destroyed.**
19 Q So you say on exhibit 15 about four lines
20 down, "two serials within a control file concerning
21 the congressional inquiry he previously made."
22 **A Yes.**

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1 Q If you look at exhibit 16, this looks like
2 it comes from the FBI but the Office of Public and
3 Congressional Affairs. Is that the same reference
4 or are those completely different things?
5 **A Completely different. At that time the**
6 **Freedom of Information Act was in the Office of**
7 **Congressional Affairs, Public Affairs. It's now in**
8 **the Record Management Division.**
9 Q So this is a document from a different 190
10 than anything that's even referenced in the November
11 30, 2000 letter?
12 **A Correct.**
13 MS. LO: May I just say for the record Mr.
14 Hardy inadvertently scribbled on the docket.
15 MR. KHETAN: That's fine.
16 **BY MR. KHETAN:**
17 Q If we can go back to exhibit 13, which was
18 your seventh declaration. We were looking at
19 exhibit 8 and we were talking about the Sacramento
20 file number serials 101 and 355. Did you review
21 both of those serials during the break?
22 **A Would you direct me to that?**

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1 Q It's on page 5, footnote 8.
2 A **Thank you. All right, I'm looking at it**
3 **now.**
4 **(Question read.)**
5 THE WITNESS: You know I didn't check the
6 serials numbers. I did look at the release from the
7 Sacramento Field Office.
8 BY MR. KHETAN:
9 Q So you don't know if what you looked at is
10 actually serials 101 and 355?
11 A **I didn't note that.**
12 Q And we have already established that the
13 documents you did review during the break relate to
14 Mr. Negley?
15 A **That's correct.**
16 Q And you didn't produce those in this case?
17 A **That's correct.**
18 Q Do you know if you produced serials 101 or
19 355 in this case?
20 A **Again before answering that I have to go**
21 **back -- I'm not sure based on my previous response**
22 **because I didn't look at the serials, but I was**

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1 **informed that we did.**
2 Q Sorry, that you did produce those in this
3 case?
4 A **No, that these were serials 101 and 355.**
5 Q That you looked at. You think it's what
6 you looked at?
7 A **I think it's what I looked at.**
8 Q My question was, have you produced serials
9 101 and 355 in this case?
10 A **The answer is no.**
11 Q You did understand the court's order to
12 produce all documents, even duplicates, that relate
13 to Mr. Negley?
14 A **Relate to Mr. Negley's request.**
15 Q Okay.
16 A **So we searched all records. Our search**
17 **was not limited to the San Francisco records, we**
18 **searched all records in the FBI and we provided**
19 **those records which were related to his request.**
20 Q Did your search not reveal the Sacramento
21 file?
22 A **The search did reveal the Sacramento file.**

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1 Q Maybe I'm confused. Why didn't you
2 produce the Sacramento file?
3 A **Going back to the court order, the court**
4 **order said in response to Negley's FOIA request**
5 **which again we were looking for San Francisco**
6 **documents and these were Sacramento documents and so**
7 **we did not produce them.**
8 Q Mr. Hardy, we can go back to the court
9 reporter, but at the beginning of the deposition
10 today I asked you if you placed geographical
11 limitation on the search and you indicated no, you
12 did not.
13 A **That's correct, we did not.**
14 Q So then maybe I'm confused. Why didn't
15 you produce the Sacramento file?
16 A **You have to understand the search. A**
17 **search is not where you put in a location and it**
18 **then only provides you with those files in a**
19 **particular location. What you do is you put in the**
20 **terms of the words and it gives you a universal --**
21 **you will get a universal return on where all the**
22 **files were. So you asked whether we limited the**

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1 **search to San Francisco. The answer is no. We**
2 **searched the entire universe but the records we**
3 **produced were related to his FOIA request.**
4 Q Okay, that's fair enough. And the reason
5 you didn't produce the Sacramento file is because
6 those were not San Francisco documents?
7 A **They were -- his original request was for**
8 **all documents in San Francisco and he amended it**
9 **with 1575, and so we did not produce the Sacramento**
10 **documents because they were not San Francisco**
11 **documents.**
12 Q Let me try to sum this up if I can. While
13 your search had no geographical limitation, your
14 production did?
15 A **It was -- what we considered responsive**
16 **was based on the four corners of the request.**
17 Q Let me try this again. While your search
18 had no geographical limitation, your production in
19 response to the court order did have a geographical
20 limitation; is that correct?
21 A **We considered the responsive documents and**
22 **the ones we produced were the ones that were tied to**

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1 **the San Francisco request, that's correct.**

2 Q When you say the San Francisco request,

3 this is your interpretation that it's only limited

4 to San Francisco documents?

5 A **It's my interpretation that this order was**

6 **limited to the plaintiff's FOIA request, that's**

7 **correct.**

8 Q Okay. So the FBI didn't produce then any

9 documents it may have found if those documents were

10 not from the San Francisco office; is that right?

11 MS. LO: Objection, mischaracterizes the

12 testimony.

13 A **We produced all the documents that there**

14 **were in the FBI investigatory documents, other**

15 **than -- and they were all related to San**

16 **Francisco -- other than the documents he had**

17 **previously received from the Sacramento request and**

18 **the administrative files we have been talking about**

19 **earlier. But there were no other documents than**

20 **those.**

21 Q Okay. If you would turn to page 12 of

22 your seventh declaration --

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1 A **Yes.**

2 Q -- this is where you started to get into

3 the CRS and ACS databases?

4 A **Right.**

5 Q Are any of the FBI databases ever indexed

6 by phone number?

7 A **No -- well, databases that would be**

8 **indexed by phone number would also be indexed in the**

9 **central records. Do you understand what I'm saying?**

10 **I mean you can have a subindex, but it then should**

11 **be rolled up into the Central Records System.**

12 Q It should be, but does that mean that

13 there are -- well, what databases would be

14 searchable based on phone number?

15 A **Well, I think you have data warehouses**

16 **which contain huge information, but they are really**

17 **not record systems, it's just information that has**

18 **been piled into these huge databases and they are**

19 **used for investigation.**

20 Q Are those different databases than the 9

21 or 10 that are mentioned in the court's order?

22 MS. LO: Objection, mischaracterizes the

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1 testimony.

2 A **These are databases but they are not**

3 **record systems. What the judge is talking about are**

4 **record retrieval systems. This would be like let's**

5 **say you get a telephone number off a scrap of paper**

6 **of somebody who is arrested in Afghanistan and then**

7 **that goes into a database, if you will, and they are**

8 **all recent mostly counterterrorism. So I'm not sure**

9 **I would characterize it as -- they are not record**

10 **databases, okay, they are in fact information**

11 **warehouses.**

12 Q Where does it say in the court order that

13 it's limited to record databases?

14 A **It says in response to Negley FOIA request**

15 **any and all documents that relate to Negley in any**

16 **manner. So we are talking about documents. I am**

17 **talking about information.**

18 Q Well, documents contain information?

19 A **No.**

20 Q They don't?

21 A **Information can be stored and not be on a**

22 **document.**

92

1 Q And so the FBI has not searched for

2 information that is stored but not in a document in

3 response to the court order?

4 A **We searched the -- let me back up here**

5 **before I answer. We searched what the judge**

6 **requested us to search. It's not reasonable to**

7 **search these data warehouses because no. 1, there is**

8 **no indication that there would be a record there,**

9 **okay, because under the Freedom of Information Act**

10 **that's what you do, you are looking for records, FBI**

11 **records. And second, they are not designed -- they**

12 **are essentially -- they are not documents that**

13 **relate or refer to Negley, it's just information**

14 **that's stuck in there.**

15 Q What kind of information?

16 A **I just mentioned like the phone number**

17 **they got off a scrap of paper in Afghanistan or**

18 **something like that.**

19 Q Would the phone number be associated with

20 a name?

21 A **The phone number -- they would be**

22 **associated maybe with the name of who they found it**

93

1 **on or where they found it or the circumstances.**
2 **Then that would all be put together in a document.**
3 **So essentially it's a source for a document. It's**
4 **not in the document. Once it is in a document, then**
5 **it would be in the Central Records System because it**
6 **would be serialized and given a number.**
7 Q Are you able to search these databases by
8 telephone number?
9 A **You can search these databases by**
10 **telephone number, by name, you can search them by**
11 **all kinds of criteria. I can't search them**
12 **obviously because it's for counterterrorism and**
13 **counterintelligence.**
14 Q Okay. Are those databases limited to
15 counterterrorism?
16 A **Counterterrorism -- they are limited, I**
17 **mean counterterrorism, counterintelligence.**
18 Q The Unabomber investigation, does that
19 fall under counterterrorism?
20 A **No, that does not. It fell in I think**
21 **it's destruction of aircraft or something like that.**
22 **But it was pre-counterterrorism days.**

94

1 Q Okay. Did the FBI in fact search these
2 databases for Mr. Negley's name?
3 A **No, not at all.**
4 Q Did they search for any of his phone
5 numbers?
6 A **No.**
7 Q Did the FBI do any searches of any of
8 their databases for Mr. Negley's phone number?
9 A **Not that I'm aware of.**
10 Q Can you search not the databases we are
11 talking about but what you have on CRS, can you
12 search any of those databases using phone numbers?
13 A **You know I'm not sure actually.**
14 Q Well, are any of those -- maybe I'm wrong
15 but I thought some of those databases are full text
16 searches. Are they not full text searchable?
17 A **Oh, the electronic case file, that's**
18 **correct.**
19 Q So presumably you could search that for a
20 phone number?
21 A **Yes, you could.**
22 Q And I suppose if someone indexed or

95

1 subindexed a file under a phone number, then you
2 would be able to search that for the phone number?
3 A **If it was indexed under a phone number.**
4 Q If you turn to page 13 of your
5 declaration, page 13 talks about the ELSUR, which
6 according to your declaration maintains information
7 on a subject whose electronic and/or voice
8 communications have been intercepted as a result of
9 a consensual electronic surveillance or a court
10 ordered surveillance. Do you see that?
11 A **Yes.**
12 Q Does ELSUR capture warrantless wiretaps?
13 A **Are you talking about the president's**
14 **program?**
15 Q Well, I will, but not yet. This is
16 something separate from that, not from a
17 presidential order. Tell me if I'm wrong but I
18 think ELSUR is talking about wiretaps?
19 A **Correct.**
20 Q But it looks to be talking about
21 consensual or court ordered.
22 A **Title 3.**

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1 Q So what I'm talking about are
2 nonconsensual noncourt order, so warrantless
3 wiretaps. Are those captured on ELSUR?
4 A **ELSUR is Title 3 wiretaps and would not be**
5 **covered by warrant.**
6 Q Is there a different database that
7 contains information about warrantless wiretaps?
8 A **Not that I'm aware of in the Central**
9 **Records System.**
10 Q What about outside the Central Records
11 System?
12 A **I don't know of a specific database.**
13 Q Just because I don't want to get into
14 semantics, even if it's not called a database, are
15 you aware of any maintenance of information or
16 documents that would contain information or
17 documents about warrantless wiretaps?
18 A **I'm not aware of any FBI systems.**
19 Q Okay. Now you mentioned wiretaps by
20 presidential order. Are those searchable on ELSUR?
21 A **No.**
22 Q Are those maintained in some separate

97

1 database?

2 **A Not that I know of at the FBI.**

3 Q Are they maintained by a different agency?

4 MS. LO: Objection, lack of foundation.

5 **A I don't know.**

6 Q Are you aware of any type of system or any

7 location that contains information or documents

8 related to presidential ordered wiretaps?

9 **A No, I'm not aware of it.**

10 Q If you would turn to page 15, take a

11 moment if you would and look at paragraph 36.

12 **A Okay.**

13 Q So paragraph 36 I believe is talking about

14 a UNI search.

15 **A Correct.**

16 Q It says in there a search was done using

17 plaintiff's name and then towards the bottom it

18 says, "SFFO also used the plaintiff's date of birth

19 and Social Security number." What I am trying to

20 understand is, does it use all of those, all of that

21 information together to conduct the search?

22 **A It's all put -- yes, it's all put in**

98

1 **there.**

2 Q So is it only looking for documents that

3 for example contain Negley and his date of birth and

4 his Social Security number?

5 **A No, because as you go through this you**

6 **would be shocked at how many James Negleys are in**

7 **the United States and you would be shocked at how**

8 **many James Negleys have FBI files. I mean it's**

9 **just -- there's a tremendous amount, so you do a**

10 **ranking as the computer does a search and does a**

11 **ranking. If you have all five lining up, then the**

12 **analyst knows right away this file is going to be**

13 **responsive, but then you get down -- particularly**

14 **when doing a six-way search and you have initials**

15 **and stuff like that, you just get a criteria of**

16 **number of searches as you go down.**

17 **So to answer your question, it doesn't**

18 **limit the search. It actually helps prioritize the**

19 **searcher so they can see -- it can help them better**

20 **focus in on it. Remember this system is designed**

21 **for investigators as opposed to -- it's not an**

22 **archival system, so time for them is the essence.**

99

1 **They want to be able to not look through 150 James**

2 **Negleys if they can immediately identify this is the**

3 **James Negley, this is the location, we got all the**

4 **stuff, this is where I want to go. And so it's a**

5 **tool to help them.**

6 Q Well, for purposes though of what the FBI

7 did in response to the court order, did you

8 physically look through all of the results from the

9 UNI search?

10 **A I have at one time or another, yes.**

11 Q Well, I want to be clear though. In

12 response to the court's order and what you talk

13 about in your seventh declaration, does that include

14 your reviewing all of the results of the UNI search?

15 **A I looked at the results of the UNI search**

16 **and as a result -- in relation to this order.**

17 Q So when you just talked about

18 prioritizing, would you have looked at every single

19 one even if it wasn't at the top of the priority

20 list?

21 MS. LO: Actually if I can interject for a

22 second and make an objection that this is

100

1 mischaracterizing the evidence because this portion

2 of the document that you are referring to clearly

3 states this is discussing a search conducted in

4 January of 2002.

5 MR. KHETAN: Okay. Well, you can correct

6 me if I'm wrong then about this.

7 BY MR. KHETAN:

8 Q I thought you were telling me about the

9 UNI search you did in response to the court order.

10 **A Well, I was talking about UNI searches in**

11 **general.**

12 Q Okay. I want to focus on the UNI search

13 done in response to the court order.

14 **A Correct.**

15 Q What terms were used for that UNI search?

16 **A James Lutchter Negley, James L. Negley,**

17 **James Negley, Lutchter Negley, J.L. Negley, J.**

18 **Negley, James Luther Negley, and Luther Negley.**

19 Q What are you looking at?

20 **A Paragraph 39(a).**

21 Q So did this particular search not use the

22 date of birth and Social Security number then?

101

1 **A** **No, it did not.**
2 **Q** Now this same paragraph mentions, the last
3 sentence of it, 39(a), says, "the only other SFFO
4 information found consisted of administrative files
5 related to the plaintiff's prior FOIA requests to
6 other field offices and the FBI's file related to
7 this litigation file." What are you referring to
8 there?
9 **A** **This was post 2002 and they were**
10 **identified and pulled out in response to this June**
11 **2009 request. So two searches were done together**
12 **actually. Remember when I talked about how a search**
13 **is not localized but in fact you get everything no**
14 **matter where it's located. So this was added.**
15 **There was San Francisco Field Office information but**
16 **it was after 2002 and it deals with administrative**
17 **files dealing with the prior FOIA request. And**
18 **there were other additional information in the field**
19 **office. This is the substance of the November --**
20 **this is talking about the November 30 letter.**
21 **Q** And these are, just to be clear, the
22 administrative files that you referred to in

102

1 paragraph 39(a). Those have not been produced in
2 this case; is that right?
3 **A** **That's right. We are waiting -- we are**
4 **ready to produce them if you guys want to see them**
5 **in the second request.**
6 **Q** Hang on a second. I understand you are
7 bringing in that November 30 letter, but in this
8 case have you produced those files?
9 **A** **We did not produce those files in this**
10 **case.**
11 **Q** That's the same thing with the FBI's file
12 related to this litigation file?
13 **A** **Correct.**
14 **Q** Now why isn't there any mention though of
15 these administrative files related to the
16 plaintiff's prior FOIA/PA request to other field
17 offices and the FBI's file related to this
18 litigation file? Why is this the first time that
19 you have ever mentioned that in any of your
20 declarations?
21 **A** **Again because we have been focused on the**
22 **June 2002 request of Mr. Negley, so that's where our**

103

1 **focus has been throughout the litigation.**
2 **Q** Okay. Well, what is different now then?
3 **A** **Well, no. 1, we received a second request,**
4 **so in drafting the declaration, and it's just a**
5 **drafting, we couldn't ignore the fact this other**
6 **request was out there and we received it and we are**
7 **working on it and it impacts all of Mr. Negley's**
8 **files. That's the difference of bringing all this**
9 **in.**
10 **Q** It's because Mr. Negley made another FOIA
11 request?
12 **A** **Right.**
13 **Q** Nothing to do with this case?
14 **A** **Correct. But obviously it's Mr. Negley**
15 **and obviously it's related.**
16 **Q** Okay. If you turn to page 18, this
17 appears to refer to ECF searches that were conducted
18 on September 28, 2009?
19 **A** **ICM searches.**
20 **Q** I am looking at the bottom of 18,
21 paragraph 39(b).
22 **A** **Okay.**

104

1 **Q** This talks about how the most recent
2 search for the FBI captured five serials on which
3 the plaintiff's name appeared; is that right?
4 **A** **Correct.**
5 **Q** Have you produced those five serials?
6 **A** **No. They are all post 2002.**
7 **Q** Okay. It says in the third line, "only
8 one of those serials concern the SFFO and it was
9 from the plaintiff's current litigation file." Is
10 that a serial that has been produced in this case?
11 **A** **No.**
12 **Q** Then it talks about three serials from
13 prior FOIA requests.
14 **A** **Right.**
15 **Q** Are you aware if any of those serials
16 relate to pre 2002?
17 **A** **None of those serials relate to pre 2002.**
18 **Q** So these are all requests Mr. Negley made
19 post 2002?
20 **A** **Correct.**
21 **Q** Okay. And then the next sentence says,
22 "the fourth was a serial found not to concern this

105

1 James Negley." How did you determine that?
2 **A We looked at the serial and the**
3 **individual -- I forget the exact circumstances but**
4 **it certainly was not Mr. Negley, it was very clear**
5 **that it was not.**
6 Q I need to get a better understanding of
7 how do you or how did you determine that it did not
8 relate to Mr. Negley, to the Mr. Negley that is the
9 plaintiff in this case.
10 **A It was I think under the circumstances the**
11 **individual was completely different, the**
12 **circumstances were completely different, and it was**
13 **on the face of it you could tell, and I can't**
14 **remember exactly what the specific issue it dealt**
15 **with was but it was very clearly not Mr. Negley.**
16 Q When you say the circumstances were
17 different, if you found documents that related to
18 the plaintiff but that weren't related to the FBI
19 investigating him as a Unabomber suspect, did the
20 FBI not produce these documents?
21 MS. LO: Objection to form.
22 **A I see where you are going on this and the**

106

1 **answer is no, we did not limit -- the determination**
2 **that it was not his circumstances was not the fact**
3 **that it had nothing to do with Unabomber, but I**
4 **can't remember exactly what was on the serial but it**
5 **was clearly not Mr. Negley. I mean it dealt with --**
6 **you know I am trying to remember what it was but it**
7 **was not Mr. Negley.**
8 MS. LO: I would also caution you not to
9 get into privacy issues with respect to a third
10 party.
11 THE WITNESS: Right, okay.
12 BY MR. KHETAN:
13 Q And I'm not asking you for identifying
14 information. You understand that, right?
15 **A Right.**
16 MS. LO: Well, I'm just saying he may not
17 be able to answer your question fully without
18 getting into identifying information.
19 MR. KHETAN: Okay.
20 THE WITNESS: Right.
21 BY MR. KHETAN:
22 Q So that is one of the five serials?

107

1 **A Correct.**
2 Q But the other four relate to Mr. Negley?
3 **A Correct.**
4 Q None of which have been produced in this
5 case?
6 **A Correct.**
7 Q Then you say -- I'm still on the same
8 paragraph B -- a text search in ECF was conducted
9 and you list a bunch of different file numbers --
10 well, you list a bunch of permutations of file
11 number 65-21102.
12 **A Right.**
13 Q Did you do any ECF searches of file number
14 148A-SC-C27507?
15 **A No, we did not.**
16 Q Why not?
17 **A It was clearly pre ECF.**
18 Q What does that mean?
19 **A It means the reason they had this indexed**
20 **was because they didn't have electronic case files**
21 **and things did not getting loaded into electronic**
22 **case files until after the year 2002.**

108

1 Q So what you are saying, if I follow you,
2 is that you didn't search 149A-SC-C27507 because
3 that was pre ECF?
4 **A Right, pre ECF. The files would not have**
5 **been uploaded in the text from 149 -- would not have**
6 **been uploaded into electronic case file.**
7 Q Did the FBI try to search for that file
8 number?
9 **A No, we did not.**
10 Q If you look at subparagraph C -- it's on
11 the same page 18 --
12 **A Right.**
13 Q -- now you are talking about ICM?
14 **A Right.**
15 Q Here you say you have searched file
16 numbers and then you list looks like six or seven
17 different file numbers. Do you see that?
18 **A Yes.**
19 Q Did you search for 148A-SC-C27507?
20 **A For the Sacramento file number? No, we**
21 **did not. Did you say SC?**
22 Q Yes.

109

1 **A** **No, we did not search for the Sacramento.**
2 **Q** Why not?
3 **A** **Because it wasn't responsive, it wasn't**
4 **within the four corners of the request.**
5 **Q** Now you do identify the Sacramento file
6 though in this very declaration; is that right?
7 **A** **Are you talking about for note 8?**
8 **Q** Yes.
9 **A** **Yes, we do identify it.**
10 **Q** So the FBI knows about this file?
11 **A** **Yes.**
12 **Q** I mean you knew about the file when you
13 did the searches?
14 **A** **That's correct.**
15 **Q** But you chose not to search that file
16 number?
17 **A** **Not in ICM, no.**
18 **Q** If you turn the page to page 19, about
19 four or five lines down it says, "upon reviewing the
20 list of the titles of the subfiles within these
21 files." Do you see that?
22 **A** **Correct.**

110

1 **Q** I'm not reading the rest of the sentence
2 but you can certainly read that. Is this a list of
3 the titles of the 4500 subfiles, is that what you
4 are referring to, over 4500 subfiles?
5 **A** **Okay there are 4500 subfiles and**
6 **actually -- so, all right, stay with me on this.**
7 **Q** Okay.
8 **A** **So there are 4500 subfiles of which two**
9 **are subfile S and subfile SO, okay?**
10 **Q** Okay.
11 **A** **So that's the 4500. All right, within**
12 **each of these subfiles are thousands of and I guess**
13 **we should have put sub subfiles, okay, and so that's**
14 **what we did. So it's not the 4500, okay, it's**
15 **another thousands.**
16 **Q** It's the listing of the sub subfiles
17 within S and SO; is that right?
18 **A** **Right.**
19 **Q** What does that listing contain?
20 **A** **It lists the number and the name, but the**
21 **name is not searchable, only the number is**
22 **searchable.**

111

1 **Q** So you physically reviewed the names?
2 **A** **I didn't physically review the names but**
3 **yes, the LASs that were working the case physically**
4 **looked through the names to see if his name**
5 **appeared.**
6 **Q** What did they look for?
7 **A** **They looked for the variations on Negley.**
8 **Q** Okay. So the same six-way phonetic
9 breakdown that we talked about?
10 **A** **Right.**
11 **Q** I thought in one of your prior
12 declarations or maybe depositions you talk about how
13 a file can be indexed to a person but there could be
14 a cross-reference to a second person. Am I stating
15 that correctly?
16 **A** **That's correct.**
17 **Q** So this listing that they looked at, does
18 it only list the name of the person who that sub
19 subfile is indexed to?
20 **A** **Right. If you want to find out what's in**
21 **the sub subfile as far as cross-references, you go**
22 **to UNI and do the search in the Central Records**

112

1 **System. The ICM essentially is an administrative --**
2 **is created as you create the document and then once**
3 **you have it, then it is essentially administrative**
4 **in nature, meaning I want to know what the subject**
5 **of this subfile is because I am working with the**
6 **file right now, so if you type that in, it will come**
7 **up and tell you what it is, but you can't search for**
8 **that.**
9 **And you actually can -- in more recent**
10 **versions where there actually is text that is**
11 **uploaded, you could possibly upload it because it's**
12 **electronic, not an image text, so you have to have**
13 **it uploaded. But for these older ones, what you are**
14 **only going to get is the title of the sub subfile.**
15 **Now if you want to know any references in**
16 **the sub subfile, anything that is all in UNI, you**
17 **can go to UNI and locate it by file, you can go and**
18 **locate it by name and it's going to give you the**
19 **information that you need.**
20 **Q** Okay.
21 **A** **So UNI actually pulls a lot of different**
22 **threads together for the search.**

113

1 Q Okay. If you would turn to paragraph 41,
2 paragraph 41 relates to a search of the ZY index; is
3 that right?
4 A **Correct.**
5 Q And you talk about how the search revealed
6 seven documents that contain the word Negley.
7 A **Correct.**
8 Q And six of those documents are attached to
9 exhibit K of your declaration; is that right?
10 A **Let me make sure. Yes.**
11 Q And those six documents are not part of
12 subfile 1575, are they?
13 A **No, absolutely not.**
14 Q Now the seventh document in paragraph 41,
15 you say it's another individual with the last name
16 Negley but having a different first and middle name
17 and therefore it's not responsive?
18 A **Correct.**
19 Q So the FBI did not produce that document,
20 right, the seventh document?
21 A **That's correct.**
22 Q It hasn't submitted a Vaughn Index or

114

1 anything like that for that document?
2 A **That's correct.**
3 Q How did the FBI determine that that
4 document does not relate to Mr. Negley?
5 A **It had a completely different first name
6 and completely different middle name and the
7 occupation which was completely, completely not
8 associated with Mr. Negley, I mean it wasn't even in
9 the same general area.**
10 Q What if it were just a relative of Mr.
11 Negley's, would that still not relate to Mr. Negley?
12 A **For these purposes, no, it would not. We
13 are talking about whether or not it is responsive to
14 his request and it's not responsive to his request.**
15 Q Okay. Would you go to page 23?
16 A **Yes.**
17 Q Towards the end of that long paragraph you
18 talk about file 65-21102 being destroyed.
19 A **Correct.**
20 Q Is there any listing that the FBI keeps of
21 files that have been destroyed?
22 A **It's an electronic listing and you know**

115

1 **that when it's destroyed, the way it works is you
2 will request a file and when you make the request to
3 the Alexandria Records Center and you make the
4 request electronically, then the computer comes back
5 and tells you yes, we have the file, or wait for it,
6 no, we don't have the file, it's checked out to so
7 and so, no, we don't have the file it's been
8 transferred to the National Archives as an
9 historical document, or this file has been
10 destroyed. Okay? So we did that and that's what it
11 came back, that this file had been destroyed.**
12 **Then we did a visual check on the shelf
13 where it should have been at the Alexandria Records
14 Center and it was not there.**
15 Q Is there any data that exists on this file
16 within the FBI?
17 A **Other than it was James Negley, it was
18 destroyed on December 1, 1990.**
19 Q Okay.
20 A **And that it was in the espionage category.**
21 Q And you know that because of the 65?
22 A **65.**

116

1 Q Does the other five-digit number signify
2 anything?
3 A **It's a number which is added on to by the
4 office of origin, but you can't drill down and find
5 it -- anything more about it.**
6 Q Are you able to identify the office of
7 origin?
8 A **No -- well, headquarters is the office of
9 origin I believe, headquarters was the office of
10 origin.**
11 Q How do you know that?
12 A **Because somewhere in here we have HQ.
13 Look under the ECF search, it lays out all the
14 originations.**
15 Q Okay.
16 A **Yes 65 HQ 21002, the headquarters.**
17 Q Can you please identify what paragraph
18 that is in?
19 A **It's on page 18, paragraph 39(b).**
20 Q Okay. Thank you. If you would turn to
21 exhibit K, your seventh declaration --
22 A **Yes.**

117

1 Q -- take a look at Negley-107. I'm
2 referring to the notations on the bottom right
3 corner of the pages. Are you at that page?
4 A **Negley 107, I'm not sure what you mean by**
5 **notations.**
6 Q The Negley-107 is the notation.
7 A **Okay.**
8 Q Just so you know what page I'm on.
9 A **Okay.**
10 Q If you look towards the top of it, there
11 is a part of the page that says "redacted by" and
12 then it has a redaction.
13 A **Right.**
14 Q And it has a colon JEB which presumably
15 are initials.
16 A **Correct.**
17 Q Does the FBI make determinations when it's
18 redacting stuff that sometimes it's okay to do
19 initials, sometimes it's not?
20 A **Right.**
21 Q How is that determination made?
22 A **It is -- I would like to say it's not,**

118

1 **it's the inconsistency of processors, but in fact**
2 **it's a judgment call as to whether someone could be**
3 **identified and given the age of this document, 1995,**
4 **being able to identify who JEB was at the Sacramento**
5 **Field Office would be almost impossible.**
6 Q Okay. If you would go to Negley 110 --
7 A **Yes.**
8 Q -- the last paragraph talks about Davis
9 Joseph and Negley. Do you have any idea what that
10 is?
11 A **That's one of his companies.**
12 Q Were any searches conducted by the FBI
13 using Davis Joseph and Negley?
14 A **Yes, there were and I'll have to go back I**
15 **believe. Obviously when I gave you the criteria, if**
16 **you use the term Negley, it's going to show up in**
17 **the searches, okay? In other words, for ECF and I**
18 **think ELSUR we did a search using -- specifically**
19 **using the company's name.**
20 MS. LO: Can I get a clarification on
21 whether you need his response to this FOIA request?
22 MR. KHETAN: Can you read back my

119

1 question?
2 (Record read.)
3 MR. KHETAN: Yes, I mean in response to
4 Mr. Negley's 2002 FOIA request. Let's go off the
5 record while you are looking for that.
6 (Off the record.)
7 THE WITNESS: When you asked the question
8 did we search Davis Joseph and Negley and I stated
9 that I thought we had, but in looking at footnote
10 13, I know that we have searched them for the new
11 FOIA request in June 2009, so that would have shown
12 up because we did it contemporaneously. But for the
13 terms of the search here, we did not do this.
14 BY MR. KHETAN:
15 Q So as it relates to this lawsuit, the FBI
16 hasn't searched any database for Davis Joseph and
17 Negley?
18 A **That's correct, although with the ZY index**
19 **and electronic case file it would have popped up**
20 **positive, if you will, because of the name Negley.**
21 Q So under ZY and ECF --
22 A **Electronic case file, right.**

120

1 Q -- under those two databases it would have
2 come up?
3 A **Right.**
4 Q But in the other databases it wouldn't
5 have; is that right?
6 A **Correct.**
7 Q If you would turn to Negley 113 --
8 A **Okay.**
9 Q -- there is a reference at the top to
10 squad 18. Do you know what that is?
11 A **No.**
12 Q Are there squads in the FBI?
13 A **Yes, there are squads. Each field office**
14 **has squads and each squad does a different function.**
15 Q You don't know what squad 18 is?
16 A **No. Squad 18, it's not like -- you can't**
17 **associate it with a function.**
18 Q A little further down in this document, do
19 you see where it says reference?
20 A **Yes.**
21 Q And it mentions I guess two Sacramento --
22 are those Sacramento agents? Is that what SAC means?

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1 **A** **SAC is special agent in charge, he's a**
2 **senior executive, doesn't have any privacy interest.**
3 **ASAC is assistant special agent in charge and again**
4 **he has no privacy interest. Just as a piece of**
5 **history, he is the guy that cracked the Unabomber.**
6 Q Terry Turchie?
7 **A** **Yes.**
8 Q A little further down where it says
9 details there is a name mentioned, Clark. Do you
10 see that?
11 **A** **Yes.**
12 Q It's about four lines --
13 **A** **Yes.**
14 Q Who is that individual?
15 **A** **I'm not sure who Clark is, but if he's the**
16 **chief of police, then we would release his name.**
17 Q You would or would not?
18 **A** **We would. Chiefs of police have no privacy.**
19 Q Negley 116.
20 **A** **Yes.**
21 Q Towards the bottom it says DOB and then it
22 says a citation to what I believe is federal civil

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1 procedure in a local rule.
2 **A** **Right.**
3 Q What is the basis of redacting that?
4 **A** **It's part of a declaration and we file**
5 **electronically, so we are not allowed -- my**
6 **colleagues will tell me if I'm not allowed -- we are**
7 **not allowed to put that information into our**
8 **electronic file.**
9 Q You are not invoking the FOIA exemption,
10 this is something being done essentially by counsel;
11 is that right?
12 **A** **Right, since this declaration is filed**
13 **electronically.**
14 Q Okay.
15 MS. LO: Or maybe in the future.
16 (Discussion off the record.)
17 BY MR. KHETAN:
18 Q Let me ask you if this hasn't been filed,
19 what is your understanding of why you would redact
20 that information?
21 **A** **I would have to have counsel answer that.**
22 MS. LO: I would just interject, since

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1 this was a redaction made by counsel, eventually we
2 are going to file this electronically, we are
3 certainly obligated under the local rules and the
4 federal rules to redact plaintiff's date of birth
5 information.
6 MR. KHETAN: Okay.
7 BY MR. KHETAN:
8 Q If you turn to Negley 117, you see under
9 the listing where it says account number, is that
10 your same understanding for why that information is
11 not shown?
12 **A** **Yes. Social Security account number.**
13 Q Social Security account number, sorry.
14 **A** **Yes.**
15 Q Again, if I understand you correctly, this
16 is not an exemption -- this is not a FOIA exemption
17 that the FBI is invoking, correct?
18 **A** **That's right.**
19 Q Correct?
20 **A** **Correct.**
21 Q There is a phone number listed under that
22 line, do you see that, 328-8008?

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1 **A** **Right.**
2 Q Do you know where that came from?
3 **A** **I assume Mr. Negley gave it to the FBI or**
4 **that they determined it by doing their public**
5 **records research.**
6 Q Okay. I may have asked you this before
7 and if I did, I apologize. The ELSUR search, can
8 you search ELSUR using a phone number?
9 **A** **On the ELSUR search -- let me look and**
10 **make sure I am understanding. No, it is based -- we**
11 **may search it by individuals.**
12 Q But not by telephone?
13 **A** **Not by telephone.**
14 Q That's not a full text searchable
15 database?
16 **A** **No.**
17 Q Are you familiar with foreign intelligence
18 physical searches?
19 **A** **What we call FISAs?**
20 Q Yes.
21 **A** **Just a general knowledge, but I'm not a**
22 **FISA expert at all.**

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1 Q Are documents associated with FISA
2 searches located on any FBI database?
3 A **Those would be contained within ACS.**
4 Q So the searches that were done in this
5 case in response to the court order of ACS, would
6 that have covered if there were any documents
7 associated with FISA searches of Mr. Negley?
8 A **Yes, it would have been a cross reference.**
9 Q And nothing came up in that search; is
10 that right?
11 A **Correct.**
12 Q I think that's everything I have.
13 MS. LO: Okay. I did want to ask a few
14 questions, few brief questions.
15 EXAMINATION BY COUNSEL FOR DEFENDANT
16 BY MS. LO:
17 Q Mr. Hardy, you were asked earlier today
18 about what we have been referring to as the 190 and
19 197 file. Do you recall that?
20 A **Yes, I do.**
21 Q May I direct you to your seventh
22 declaration? I guess that's exhibit --

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1 A **Exhibit 13.**
2 Q -- 13, page 17. Now is that what's
3 referred to in paragraph 39(a), the last sentence,
4 "the only other SFFO information found consisted of
5 administrative files related to plaintiff's FOIA/PA
6 requests to other field offices and the FBI's file
7 related to this litigation file"?
8 A **Yes. They were FOIA requests and then**
9 **obviously the 197 file for this litigation that we**
10 **are on now.**
11 Q So they were turned up as part of your
12 search in response to the court's order?
13 A **Right, that's correct.**
14 Q But you did not -- the FBI has not
15 produced those files?
16 A **That is correct.**
17 Q Why is that?
18 A **First they are post 2002, and second,**
19 **while we found them during our searches, we again**
20 **went back to the court order to the term that's used**
21 **in the order in response to Negley's FOIA request**
22 **which then related us back to San Francisco Field**

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1 **Office.**
2 Q Were there any pre 2002 190 or 197 files?
3 A **Not that the San Francisco Field Office**
4 **had.**
5 Q But for other offices?
6 A **There was a 190 from Sacramento and a 197**
7 **related to this litigation in the Western District**
8 **of Texas.**
9 Q Or you state here in 13 that it's not the
10 FBI's routine practice to process administrative
11 files.
12 A **Our administrative practice is when an**
13 **individual puts in a request, we do not process**
14 **either previous 190s or 197s associated with that**
15 **individual, and this is based on a consistent**
16 **response of requesters who do not want those records**
17 **because they already have them. In many instances**
18 **we actually get accused of trying to thwart their**
19 **request because it costs 10 cents a page to do that**
20 **and so they don't want us to do it so as a general**
21 **administrative practice we don't.**
22 Q Are you willing to produce them in this

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1 case?
2 A **If Mr. Negley wants his 190s and his 197s,**
3 **we will produce those, yes.**
4 Q Has he requested them?
5 A **We are awaiting a response to our November**
6 **15 letter as to whether he wants all the**
7 **administrative files that the FBI has.**
8 Q Okay. So he hasn't indicated one way or
9 the other?
10 A **He has not at this point.**
11 MS. LO: I don't have any other questions.
12 FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFF
13 BY MR. KHETAN:
14 Q The November 30 letter that you just
15 referenced --
16 A **Yes.**
17 Q -- that's not in this case, is it?
18 A **It is not associated to the court order**
19 **but it is now exhibit 15.**
20 Q Right, I understand that. But that is not
21 a FOIA request that's made in this case, is it?
22 A **That's correct, it was not a FOIA request**

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1 **made in this case.**

2 Q In fact, you have repeatedly said today

3 that everything that the FBI is producing in this

4 case is based on Mr. Negley's 2002 FOIA request?

5 A **Yes, we referred back.**

6 Q So right now the statements that you just

7 made about the November letter which relates to Mr.

8 Negley's 2009 FOIA request don't really have

9 anything to do with what the FBI has produced in

10 this case, does it?

11 MS. LO: Objection to form.

12 A **I think since exhibit 15 has been entered**

13 **in and we have discussed this throughout the**

14 **deposition, I think it's fair play at this point.**

15 Q Well, I agree with that but you have made

16 it a point repeatedly to say today that the FBI is

17 not producing anything in this case if it did not

18 relate to Mr. Negley's 2002 request.

19 A **We are not producing anything and the**

20 **other point on it though is other than the 190 and**

21 **197 files, there were no files anywhere in the FBI**

22 **within the time period that Mr. Negley -- San**

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1 **Francisco or not, that were responsive. So yes, we**

2 **were limiting it to the San Francisco request but**

3 **we -- but I can state unequivocally there are no**

4 **other records other than the 190 and 197 records**

5 **dealing with his previous request.**

6 Q And the two serial numbers from the

7 Sacramento file?

8 A **Which was a previous request, that's**

9 **correct, from his previous request to Sacramento.**

10 Q But those are not 190 or 197 documents,

11 right, those are actual serials from a file number

12 that relates to Mr. Negley?

13 A **Yes, you are correct.**

14 Q Okay. So it's administrative files plus

15 those two serials?

16 A **Those two serials, yes.**

17 MR. KHETAN: That's it. Thank you, Mr.

18 Hardy.

19 MS. LO: We want to read.

20 (Signature not having been waived, the

21 deposition of DAVID M. HARDY was concluded at 2:25

22 p.m.)

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1 * * *

2

3 **ACKNOWLEDGMENT OF DEPONENT**

4 **I, DAVID M. HARDY, do hereby acknowledge I**

5 **have read and examined the foregoing testimony, and**

6 **the same is a true, correct and complete**

7 **transcription of the testimony given by me, and any**

8 **corrections appear in the attached errata sheet**

9 **signed by me.**

10

11 _____

12 Date **DAVID M. HARDY**

13

14

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1 **CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC**

2 I, Marilyn J. Feldman, Registered Professional

3 Reporter, the officer before whom the foregoing

4 proceedings were taken, do hereby certify that the

5 foregoing transcript is a true and correct record of

6 the proceedings; that said proceedings were taken by

7 me stenographically and thereafter reduced to

8 computerized transcription under my supervision; and

9 that I am neither counsel for, related to, nor

10 employed by any of the parties to this case and have

11 no interest, financial or otherwise, in its outcome.

12 **IN WITNESS WHEREOF, I have hereunto set my hand**

13 **and affixed my notarial seal this 4th day of**

14 **February, 2010.**

15 My commission expires:

16 December 14, 2011

17

18

19 _____

20 **NOTARY PUBLIC IN AND FOR**

21 **THE DISTRICT OF COLUMBIA**

22

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1 ERRATA SHEET

2 IN RE: Negley vs. FBI

3 RETURN BY: _____

4 PAGE	LINE	CORRECTION AND REASON
5	_____	_____
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22	(DATE)	(SIGNATURE)

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1 ERRATA SHEET CONTINUED

2 IN RE: Negley vs. FBI

3 RETURN BY: _____

4 PAGE	LINE	CORRECTION AND REASON
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20	_____	_____
21	_____	_____
22	(DATE)	(SIGNATURE)

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