IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF JAMES LUTCHER NEGLEY'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff James Lutcher Negley has spent the better part of the last decade seeking all documents concerning himself and select other files in the possession of Defendant, Federal Bureau of Investigation (the "FBI"), and has been stonewalled at every turn. Fortunately for Negley, and what should be dismaying for an ordinary American citizen without sufficient financial resources, he has managed to demonstrate the FBI's shortcomings in its response to the pending FOIA request through complex factual and legal investigations. To this end, and partly as a result of forcing Negley and this Court to expend vast resources and time in an attempt to become familiar with the records-keeping intricacies described in the, to date, nine declarations submitted by David M. Hardy (the FBI's Section Chief of the Record/Information Dissemination Section), the FBI has been admonished by this Court for its incomplete searches and productions on numerous occasions.

Despite this, and contrary to the smokescreen that the FBI seeks to put up in its Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment (the "Opposition Brief"), the FBI still has refused to conduct an adequate search and production in response to Negley's FOIA request. Instead, the FBI believes that it can limit its ***production*** to documents in existence in 2002 on the grounds that its ***search*** had no restrictions. No explanation is provided as to why this distinction would matter since regardless of limitations placed on a search, the FBI's production cut-off date dictates what documents are being released to Negley. Perhaps recognizing the frailty of its legal position, the FBI attempts to convince the Court that it has complied with the law in responding to Negley's pending FOIA request based on its response to a subsequent FOIA request submitted by Negley (the "2009 FOIA Request"), even though: 1) two years later, the FBI still has not produced all documents in response to the 2009 FOIA Request; 2) Negley is being forced to pay for the FBI's services in producing those documents; and 3) the FBI expressly stated in this case, on the record, that its compliance with the 2009 FOIA Request (which was the basis of its opposition to Negley's Motion for Contempt for Defendant FBI's Failure to Comply with the Court's September 24, 2009 Order ("Motion for Contempt") and this Court's ruling on that motion dated March 1, 2011 (Dkt. No. 109)), was "outside this litigation" and separate from the issues in the pending motions for summary judgment.

Even under the FBI's self-imposed restrictions, the FBI does not offer a viable explanation for why its current search, if reasonable, could not locate an example of a document clearly within its own parameters. Instead, Mr. Hardy submits yet another declaration offering excuses as to why the document was not located, providing assurances that this time, the FBI

conducted the search properly and could not possibly be blamed for failing to locate one document. Moreover, the FBI's breakdown of its latest search, which the Opposition Brief sets forth by database, refutes rather than supports its position because yet again, there are unreasonable gaps in the parameters for the various databases. As Negley indicated in his Opening Brief, the FBI has mastered the wait-and-see approach, and yet again, it is waiting to see if Negley or the Court figures out its unreasonableness in searching for and producing responsive documents, despite nearly a decade of litigation with Negley and at least nine chances for Mr. Hardy and the FBI to get it correct.

With respect to the redactions, the Opposition Brief and Ninth Declaration of David M. Hardy make Negley's argument perhaps better than even he could (since only the FBI knows what it is redacting). In this regard, the FBI submitted the Ninth Declaration of David M. Hardy ("Hardy's Ninth Declaration"), which purports to set forth the detail and description that the law requires when an agency makes redactions to responsive documents (which is not to say that the redactions are proper, just that Negley and the Court can finally assess the propriety of the select redactions discussed). But the FBI should not be rewarded for attempting to finally comply with the law (and, even then, only with respect to select redactions); to the contrary, the FBI is too late and again, this is an example of the FBI's wait-and-see gamesmanship.[1] Indeed, the Court's Order dated September 24, 2009 (Dkt. No. 90) explicitly required the FBI to produce a *Vaughn* index for any redactions, along with a detailed affidavit, and to make the affiant available for a

[1] As another example, in its Opposition Brief, the FBI suggests that it graciously "has reviewed its Exemption 2 Claims in light of *Milner*" and purports to withdraw the invocation of that exemption. See Opp'n Br. at 30. In Milner v. Dep't of Navy, 131 S. Ct. 1259, 1260 (2011), the Supreme Court rejected the manner in which the FBI has invoked Exemption 2 to redact responsive information in documents produced to Negley. Notably, however, the FBI did not withdraw its invocation of Exemption 2 on its own; rather, it did so only after Negley cited to Milner in his Opening Brief (at p. 13, for a different proposition).

deposition on these topics. Rather than take three separate depositions as permitted by the Court's Order, Negley agreed to a single deposition of Mr. Hardy, including on the topics addressed in the Seventh Declaration of David M. Hardy ("Hardy's Seventh Declaration"), which was to include an explanation of the redactions made by the FBI, as ordered by the Court. In fact, however, Hardy's Seventh Declaration contains no details regarding the specific redactions, and instead groups together all redactions made under the same exemption and provides a boilerplate explanation of the FBI's interpretation of when each of those exemptions applies (but not specific to any of the redactions made by the FBI). Indeed, during the Court-ordered deposition taken by Negley, Hardy refused to address the FBI's justification for specific redactions and instead would speak only "in general terms." The fact that the FBI has submitted Hardy's Ninth Declaration now merely shows that it can, but did not previously, comply with FOIA requirements and stripped Negley of the opportunity to conduct the Court-ordered deposition regarding the redactions. The FBI's approach not only makes a mockery of the law, but effectively violates the Court's September 24, 2009 Order.

For these reasons, and those set forth in its Opening Brief, Negley respectfully requests that the Court enter an Order granting Negley's Motion for Summary Judgment and denying the FBI's Motion for Summary Judgment.

I. Under FOIA Law, the FBI's Search and Production was not Reasonable.

In order to fulfill its obligations under FOIA, an agency bears the burden of "demonstrat[ing] beyond material doubt that its search was reasonably calculated to uncover all relevant documents." See, e.g., Skinner v. United States DOJ, 744 F. Supp. 2d 185, 197 (D.D.C. 2010). Negley and the FBI are in agreement that in order to meet its burden, the FBI may submit declarations or affidavits explaining in reasonable detail the scope and method of the agency's

search. Id. Summary judgment is not appropriate for the agency on the issue of the adequacy of an agency's search "if the record leaves substantial doubt as to the sufficiency of the search." Id. As set forth below, the record leaves "substantial doubt" as to the reasonableness of the FBI's search and production.

A. The FBI Used Unreasonable Temporal Limitations on Its Production.

As noted in Negley's Opening Brief, courts have consistently held that a federal agency's production of records in response to a FOIA request cannot be temporally-limited in a manner that is unreasonable under the circumstances. See, e.g., McGehee v. CIA, 697 F.2d 1095, 1104 (D.C. Cir. 1983) (disapproving of a cut-off date for an agency's production of documents to those documents in existence two and one-half years prior to the release). The FBI, while misleadingly accusing Negley of "taking a third bite at the apple,"[2] continues to conflate the issue by asserting that the FBI complied with FOIA because it used no cut-off date for its *search*. See Opp'n Br. at 19. However, the FBI fails to address (perhaps because it cannot) that courts have deemed an agency's response unreasonable where, as here, the cut-off date used by the agency for its *production* is too distant in the past from the release of the records. See, e.g., In Defense of Animals v. Nat'l Institutes of Health, 543 F. Supp. 2d 83, 99 (D.D.C. 2008) (holding that the agency did not meet its burden of demonstrating the reasonableness of using a cut-off date for its *production* of eleven months prior to the release of documents).

[2] The FBI appears to confuse Negley's argument that the FBI's use of a temporal cut-off date for its production *violated the Court's September 24, 2009 Order*, made in his Motion for Contempt (Dkt. No. 102) and the subject of his pending Motion for Reconsideration (Dkt. No. 111), with the argument being made here – that the FBI's use of a temporal cut-off date for its production *violates FOIA*.

Here, the FBI admits that it released documents to Negley in 2009, in response to Negley's pending FOIA request, using a production cut-off date of 2002. See Opp'n Br. at 20. In other words, the FBI did not *produce* any documents dated post-2002.[3] Simply put, courts do not permit such a long gap between the cut-off date for production – here 2002 – and date of release of responsive records – here 2009. See, e.g., Public Citizen v. Dept. of State, 276 F.3d 634, 644 (D.C. Cir. 2002) (holding that because the date of the agency's search was close in time to the date of the release, a date-of-search cut-off for *production* would be reasonable). Under Public Citizen, then, the reasonable approach here would have been to use the same 2009 cut-off date for its *production* as the FBI purportedly used for its search, rather than arbitrarily deciding that FOIA permits using a cut-off date for its *production* that was seven years prior to the search for and release of responsive records. Indeed, regardless of whether the cut-off date for production is the date of the initial request, the date of the initial search, or any other event, the FBI cannot point to a single case that has found acceptable a gap of seven years between the cut-off date used for production and the release of the records. Accordingly, the Court should find that the FBI's use of a 2002 cut-off date for its production is unreasonable under the circumstances.

[3] The FBI accuses Negley of "considerable attempts to muddle the facts and the law pertaining to the FBI's searches and production." See Opp'n Br. at 19. To the contrary, Negley has been very clear that the FBI's search and production are unreasonable because the documents that it *produced* in 2009 in response to the pending FOIA request were limited to those in existence in 2002 – a seven-year gap. In contrast, the FBI has attempted to confuse the issue by repeatedly responding to Negley's argument with the following nonsensical statement: "Mr. Hardy testified that the date of the initial search (*not* the date of the initial FOIA request) was used as a cut-off date for the FBI's production (*not* search) of documents in response to the Court's Order." See Opp'n Br. at 19. This assertion amounts to nothing more than semantic misdirection – it does not respond to the Negley's argument that a *production* cut-off date of seven years prior to the release is unreasonable under FOIA.

B. Negley's 2009 FOIA Request Does Not Excuse the FBI from Complying with Its Obligations Under FOIA in Response to the Pending 2002 FOIA Request.

The FBI attempts to excuse its failure to comply with FOIA (as set forth above, using a 2002 cut-off date for production) in response to the pending 2002 FOIA Request by invoking its production of documents in response to the 2009 FOIA Request. See Opp'n Br. at 20. This assertion is misleading, not only because the FBI has not fully responded to the 2009 FOIA Request (despite the request being made in 2009) and the FBI is charging Negley for its work in conjunction with that request (see Second Declaration of James Lutcher Negley (attached hereto as Exhibit A), at ¶ 16), but because of two other salient facts:

First, the FBI appears to have forgotten what it stated to the Court on the record – that the 2009 FOIA Request should have no bearing whatsoever on the issues in this case. At the January 24, 2011 status conference before this Court, counsel for the FBI stated:

> Ms. Lo: We believe that these records are in response to a 2009 FOIA request that Mr. Negley made to the FBI that is *outside this litigation. It is not the subject of the instant litigation.*

See Transcript of Jan. 24, 2011 Status Conference (attached hereto as Exhibit B), at 8:16-19 (emphasis added). The Court then asked counsel a second time to confirm that the FBI believes that its response to the 2009 FOIA Request is not relevant to this litigation:

> The Court: Ms. Lo? You did say just a few minutes ago that you agree that these productions are outside the parameters of this case.
>
> Ms. Lo: And we believe that to be the case, Your Honor, yes.

See id. at 17:10-14; see also id. at 19:3-6 (the Court noting that: "Well, the government has taken its position, and that position may not serve its interests, but that is not for me to decide. The government has taken that position."). Indeed, Negley has not been given the opportunity to challenge the search, redactions/withholdings, and production of documents in response to the

2009 FOIA Request, precisely because it is "outside this litigation." It is disingenuous, therefore, for the FBI to now use its response to the 2009 FOIA Request as justification for its using a 2002 cut-off date for its production of documents in response to the pending 2002 FOIA Request.

Second, the FBI ignores the circumstances behind Negley's submission of the 2009 FOIA Request. As set forth in the attached Second Declaration, Negley, a Vietnam War veteran who has devoted his entire professional life to the development of photovoltaic technology, has reason to believe that he has been, and continues to be, investigated because of his research. See Ex. A, at ¶¶ 3-7. As a result of this, he submitted his original FOIA request, and later amended it to "assure a search for and production of all responsive records." See id. at ¶¶ 8-10. At the time of making the 2009 FOIA Request (in 2009), Negley had suffered through nearly seven years of litigation with the FBI and, despite numerous favorable Court Orders, continued to face the FBI's repeated obfuscation and refusal to produce all responsive documents. Id. at ¶ 11. Moreover, it had been nearly two years since the parties briefed cross-motions for summary judgment. Id. at ¶ 12. Believing he had no vehicle to force the FBI or the Court to move the case forward and facing some financial difficulties, Negley decided to submit an additional FOIA request. Id. at ¶¶ 12-15. Now, the FBI seeks to take advantage of Negley's then frustration and financial difficulties (caused, in part, by its own behavior) to excuse it from compliance with FOIA, which as previously indicated, prohibits lengthy gaps between cut-off dates for production and the release of documents.

The 2009 FOIA Request is, as admitted by the FBI, entirely outside the scope of this litigation and it is inappropriate for the FBI to use it as a sword and shield to avoid compliance with established FOIA law in response to Negley's pending 2002 FOIA Request.

C. The FBI's Search, Based on Self-Imposed Limitations, was not Reasonably Calculated to Uncover All Relevant Documents.

In addition to the FBI's improper use of temporal limitations on its production, and even assuming that the Court allows the FBI to utilize its self-imposed limitations, the FBI did not adequately search for all responsive documents. The FBI dismisses Negley's identification of an example of such documents – the "Event Record" (see Negley's Motion for Summary Judgment (Dkt. No. 112), Ex. A) – as without relevance in determining the adequacy of the FBI's search. See Opp'n Br. at 18 (asserting that Negley's "pointing to the absence of a single document from the production is at odds with established precedent" that "the results of a search do not determine whether the search is adequate"). However, this Court previously noted in this case that a determination of the adequacy of a search is "dependent on the circumstances of the case." See Order dated September 24, 2009 (citing Weisberg v. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). To this end, and as this Court pointed out two years ago in ruling that the FBI's then-searches were inadequate, "[w]here, as is the case here, the requester submits additional information to supplement the initial request, the agency is obliged to incorporate that information in crafting the scope of its search." See id. (citing Campbell v. United States Dep't of Justice, 164 F.3d 20, 27 (D.C. Cir. 1998)).

Here, however, the FBI makes no attempt to incorporate into new searches the fact that Negley was able to obtain an example of responsive documents that the FBI's searches did not uncover when using its self-imposed limitations. Indeed, the "Event Record" document states on its face (which the FBI does not dispute) that it was created prior to 2002 and originated in the San Francisco Field Office (the "SFFO") – the two primary self-imposed limitations for the FBI's search. Yet, the FBI has taken the position that the mere suggestion that this document is of any relevance at all amounts to nothing more than "baseless conjecture." See Opp'n Br. at 18.

It would appear, however, that conjecture best describes the FBI's convoluted explanation of how the "Event Record" document originated at the SFFO but was "*likely* forwarded . . . to Sacramento for action" and that it is "*likely* that this lead would no longer have been considered significant enough to warrant inclusion in the [San Francisco file]." See id. at 17 (emphasis added). Clearly, the FBI cannot explain why the document was not produced in response to Negley's pending 2002 FOIA Request. Particularly given the FBI's history of conducting inadequate searches until Negley or the Court discovers the inadequacy, the failure to locate and/or produce the "Event Record" document shows that the FBI's search in 2009 was inadequate as a matter of law.[4]

II. The FBI's Use of Redactions is Excessive and, Even Now, Most Are Not Explained in a Manner Sufficient for Negley or the Court to Assess Their Validity.

Negley does not dispute that certain privacy interests must be protected through the use of statutory redactions (e.g., to protect names and addresses of FBI agents or informants). Here, however, the FBI abused this privilege to redact portions of the responsive documents without adequately establishing, or at least explaining, why revealing such information would infringe upon a privacy interest. And because the FBI previously did not provide a sufficient explanation

[4] Moreover, neither the Opposition Brief nor Hardy's Ninth Declaration explain the obvious gaps in the searches conducted of the various databases. *For example*, with regard to the "ECF Function of ACS," the FBI explains that it used various derivatives of Negley's name and File Number 65-HQ-21102 in conducting a search of that database. See Opp'n Br. at 10. There is no indication, however, that the FBI conducted a search of that database using File Number 149A-SF-106204-S-1575, or any of the other files/sub-files at issue in this litigation. This is particularly troublesome because the Court previously took issue with the FBI's failure to adequately search sources of information using all available file/sub-file numbers. See generally Memorandum Opinion dated September 24, 2009 (Dkt. No. 91). Moreover, Mr. Hardy has submitted nine declarations in this case, each time offering explanations of purportedly new searches being conducted to fully respond to Negley's FOIA Request; yet, each of the nine times, it seems that the FBI leaves unexplained gaps in its latest round of searches. It simply cannot be that an agency is permitted to act in this manner so long as a requestor, such as Negley, does not figure out and explain how the FBI can conduct an adequate search of its own databases.

of the specific redactions (and, even now, only provided an explanation of the examples raised by Negley in his Opening Brief), Negley is unable to assess whether, for each redaction, the information being redacted is necessary to protect a privacy interest.

As explained in the Opening Brief, the FBI appears to have redacted portions of the records released to Negley that are not names, phone numbers, addresses or otherwise explicit reference to an individual with a privacy interest. Rather, the FBI redacted portions of the documents that it considers to be "personal identifying information" or "additional identifying information" without sufficiently descriptive justification for the use of such redactions. While the FBI maintains the sufficiency of its non-specific, general justifications for the use of exemptions contained in previously submitted declarations (most notably, Hardy's Seventh Declaration, which was submitted per Court Order), for the first time in this litigation, the FBI has attached a declaration and Vaughn Index (Hardy's Ninth Declaration) that specifically addresses the purported privacy interest associated with select redactions. In no prior briefing, deposition, or any of the eight Hardy Declarations submitted in this litigation, has the FBI provided this kind of specificity with regard to the individual redactions. And even though the FBI argues that its prior explanation of exemptions is sufficient, in its Opposition Brief, it cites almost exclusively to Hardy's Ninth Declaration when quoting justifications for specific redactions. Negley appreciates that the FBI has finally attempted to provide the information required for invoking exemptions under FOIA, but notes that even now, the FBI has not provided the requisite information for all of the redactions made by the FBI. Moreover, the Court previously ordered the FBI to provide this level of explanation and permitted Negley to depose an affiant of that information; the FBI failed to do so at the time and only now has it chosen to

comply with the law and the Court's explicit requirements. Based on the foregoing, and as set forth below, the FBI's use of redactions does not comply with the requirements under FOIA.

A. The FBI Has Provided Insufficient Explanation to Justify Its Redactions.

A declaration purporting to justify the invocation of FOIA Exemptions must be "sufficient to afford the FOIA requestor a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." See Campbell v. United States Department of Justice, 164 F.3d 20, 30 (D.C. Cir. 1998). Reasons that a declaration might be held to be insufficient are "lack of detail and specificity, bad faith, and failure to account for contrary record evidence." Id. To this end, the United States Court of Appeals for the District of Columbia has held that affidavits justifying the use of statutory exemptions "will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." See id. Additionally, "[a]n affidavit that contains merely a 'categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.'" See id. Hardy's Seventh Declaration, as cited below and in the Opposition Brief, contains, at best, a "categorical description" of the redacted material and a general description of the "anticipated consequences of disclosure" and, more appropriately characterized, it contains only a generic description of when the FBI believes exemptions can be invoked in response to any FOIA request.

In his Opening Brief, Negley provided examples of the FBI's use of redactions in instances where it appeared that the FBI had redacted information that could not reasonably be said to identify a particular individual or otherwise be used to infringe upon a legitimate privacy interest. At the time, the FBI had not provided sufficient explanation of the use of the specific redactions, but instead relied on a broad, boilerplate explanation of how such "identifying

information" could result in "harassment, public embarrassment, and retaliation." See Hardy's Seventh Decl., at ¶¶ 61-70. Although the FBI responded that its explanation of each redaction was specific to each redaction, the portions of Hardy's Seventh Declaration that the FBI pointed to, and accused Negley of "omit[ing] any mention of," were nothing more than broad-brush statements that do not justify the use of the redactions in each specific instance. See Opp'n Br. at 26-27. For example, the FBI cited to the following from Hardy's Seventh Declaration:

> Exemptions (b)(6)-2 and (b)(7)(C)-2 have been asserted in conjunction with Exemption (b)(7)(D) to protect the names and identifying data of individuals who provided information to the FBI under an implied assurance of confidentiality. . . .
>
> . . .
>
> [Exemption (b)(7)(C)-4 was asserted] to withhold the names and descriptive data which could identify individuals who were only mentioned because fragments of their personal data is similar to that of plaintiff. . . .

See Hardy's Seventh Decl., ¶¶ 63, 65. These explanations do not define or describe what kind of "identifying data" or "personal data" is being redacted, nor do they justify the use of these redactions in any specific instance.

Moreover, Paragraph 63, for example, explains that the exemption relates to information about "individuals [who] were interviewed regarding a possible UNABOM suspect" and that "[d]isclosure of these names would result in an unwarranted invasion of personal privacy of these individuals." See Hardy's Seventh Decl., ¶ 63. Additionally, Paragraph 63 provides that "disclosure could also subject these individuals to harassment, humiliation or physical harm" and that "there is no public interest in revealing the identities of these individuals." See id. Paragraph 63 concludes by providing a list of the pages upon which the exemption was used, but without any further specificity. See id. ("Exemption (b)(7)(C)-2 is invoked on the following pages of Exhibit K: Negley-6-7, 10, 39-41, 45, 58, 63, 92-94, 98, 107-108, and 114.").

Paragraph 65 provides a similarly general justification, and this format is typical of the rest of Hardy's Seventh Declaration (and prior Declarations). Notably, none of the paragraphs in Hardy's Seventh Declaration explain why any of the exemptions were an appropriate basis to redact a specific portion of a specific page – i.e., the FBI never took the time to explain why a general description of an exemption applies to each specific redaction so that Negley and the Court could assess whether each specific redaction was appropriate. This approach has been routinely disapproved of by courts. See, e.g., Juda v. United States Custom Service, No. 99-5333, 2000 U.S. App. LEXIS 17985, at *4 (D.C. Cir. June 19, 2000) (holding that an affidavit supporting the use of FOIA exemptions is inadequate because "[n]one of the claimed exemptions is correlated to a page or document, *let alone to particular parts of a document*, as is required in order to justify withholding information") (emphasis added).

The FBI, perhaps in an attempt to pull a bait and switch, also includes citations to Hardy's Ninth Declaration in an effort to demonstrate that its explanation of its use of redactions is appropriate. See, e.g., Opp'n Br. at 27-29. There are several problems with this approach. First, this is not the appropriate time to do so. To the contrary, the FBI was ordered to provide detailed explanations in the September 24, 2009 Order, and give Negley the opportunity to depose the affiant (Mr. Hardy) regarding those detailed explanations. Hardy's Seventh Declaration, submitted in response to that Order, did not provide the detail required (as set forth above), and during his deposition, Mr. Hardy outright refused to speak in anything but "general terms." See Opening Br., Ex. B at 61:14-22.[5] While the FBI may wish that it provided this level

[5] The FBI brazenly states that Negley "had the opportunity to depose Mr. Hardy about the contents of his sixth and seventh declarations and could have asked Mr. Hardy for further explication about these specific redactions." See Opp'n Br. at 27. In fact, and by way of example, Hardy's Seventh Declaration did not provide specificity as to what constitutes "indentifying information." When Mr. Hardy was asked for further elaboration as to what

of detail earlier, the fact is that it did not provide it when ordered by the Court, and doing so now does not allow Negley to take Hardy's deposition on the specific explanations as to each of the redactions (as permitted by the Court).

Moreover, even now, the FBI only provides detail as to the *examples* identified by Negley. In so doing, the FBI ignores that it has the burden to justify all of its redactions, not just the ones cited to as examples by Negley, particularly given that there are only approximately 50 pages at issue and the amount of time the FBI had to provide detailed explanations for each redaction. See DOJ v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 755 (1989). With respect the remaining redactions (i.e., all redactions except for the examples provided by Negley (but see infra at II.B (responding to the FBI's explanation as to the redactions for the examples provided by Negley)), the FBI has yet to provide the requisite detail to justify its redactions.[6] While the Opposition Brief summarily repeats Hardy's Seventh Declaration to justify the invocation of the various exemptions for certain pages, as previously indicated, that

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constitutes "identifying information" within the meaning of the challenged redactions, and as set forth in the Opening Brief, Mr. Hardy flatly refused to discuss the exemptions in the context of specific redactions. See Opening Br. at 15. Rather, he provided a categorical justification:

> This is again going into the mosaic and it's all put together. If you take all the (b)-3's that appear in that paragraph and you put them together, that information could be built to identify the individual. So like any mosaic, I guess you can hang around the tile and –the tiny, teeny tile and say I don't see the picture, but it is in fact part of the picture. And so putting together the mosaic and protecting the mosaic is how many times we protect identities.

See Ex. C, at 75:11-20.

[6] The following are the page numbers with redactions that the FBI has yet to provide detailed justification for: Negley 1, 3, 6-9, 18-19, 37-43, 45, 50, 52, 57-58, 62-63, 71-72, 76, 83, 88, 91-96, 98, 101, 104-108, 111-114 and 118-120. The FBI's contention that Negley has waived his ability to challenge these redactions (because not specifically identified in his Opening Brief) is without merit given that Negley explicitly sought summary judgment as to all of the redactions made by the FBI and identified, merely as examples, pages with the most commonly invoked exemptions.

Declaration did not comply with FOIA's requirement to justify redactions. Accordingly, the FBI should be deemed to have waived its use of those exemptions and ordered to produce those documents without redactions, and the Court should deny the FBI's Motion for Summary Judgment regarding those redactions.

B. In addition, the FBI Has Not Met Its Burden of Demonstrating That There is a Privacy Interest In the Redacted Portions of the Exemplar Documents.

With respect to the examples of redactions provided in the Opening Brief and discussed in the Opposition Brief, Negley does not dispute that an individual seeking disclosure of redacted material must demonstrate a public interest that is sufficient to overcome the privacy interest at issue. Negley takes issue, however, with the FBI's blanket assertion that because it deems it so, it has met its initial burden of demonstrating that there is, in fact, a privacy interest in the redacted material. To this end, and as the FBI is well aware, Exemption 7(C) only permits the redaction of material that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Moreover, the FBI mischaracterizes Negley's argument as "urg[ing] the Court to not even engage in a balancing test to determine whether there is a public interest in the information . . ." See Opp'n Br. at 24. Rather, Negley argues that the balancing test as to whether a public interest outweighs a privacy interest is not appropriate or necessary where there is no privacy interest at issue. See Opening Br. at 15.

In this regard, Negley concedes that the detailed justifications provided by the FBI for the first time in Hardy's Ninth Declaration (albeit late, in violation of the Court's September 24, 2009 Order and without giving Negley the opportunity to depose Mr. Hardy on the redactions) are appropriate with respect to documents labeled Negley-23, 30, 47, 100 and 102. However, the remaining redactions made by the FBI with respect to the examples pointed out by Negley (documents labeled Negley-10 and 105) do not appear to involve information that, if revealed,

could reasonably result in an invasion of privacy. With regard to redactions on Negley-10, the FBI has not shown that there is a threat of invasion of privacy in revealing the title of a person who worked at the university library fifteen years ago. See Hardy Ninth Decl., at 6. Nor does the FBI prove that there is a privacy interest in the "type of organizational/ company/business meeting" as described by the FBI in its updated *Vaughn* index with regard to redactions on Negley-105. See id., at 8. Because the FBI has not met its burden to show a privacy interest at issue, the Court should grant Negley's Motion for Summary Judgment and deny the FBI's Motion for Summary Judgment regarding these redactions.

Dated: June 1, 2011

Respectfully submitted,

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