UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S MARCH 1, 2011 ORDER DENYING PLAINTIFF'S MOTION FOR CONTEMPT

Plaintiff admits that the Court's "September 24, 2009 Order required the FBI to conduct searches and produce documents 'in response to Negley's 2002 FOIA request.'" Pl.'s Mot. for Recon. at 1. He concedes, too, that the Order "related only to Negley's 2002 FOIA request," not to a 2009 FOIA request that is not before this Court. *Id.* Plaintiff nevertheless persists in seeking an order of contempt against the FBI based upon his contention that the FBI's ongoing disclosure of certain records responsive to his 2009 FOIA request somehow fails to comply with the Court's September 24, 2009 Order.[1] *Id.* at 5. Undeterred by the illogic of his reasoning, Plaintiff contends that reconsideration of the Court's denial of his motion for contempt is warranted because the Court "mischaracterize[d] Negley's 2002 FOIA request as seeking documents only maintained at and by the San Francisco Field Office (the "SFFO")" and misunderstood his 2009 FOIA request. *See* Pl.'s Mot. for Recon. at 1-6. Not surprisingly, it is

[1] As the FBI previously explained, despite Plaintiff's refusal to respond to the FBI's inquiries as to whether he wished to receive administrative and litigation files in response to his 2009 FOIA request, the FBI continues to process and release these files. *See* Mem. Op. at 13 n.9 (citing Def.'s Opp'n to Mot. for Contempt at 3; Eighth Hardy Decl. ¶ 22).

Plaintiff who has mischaracterized his 2002 FOIA request -- his newly crafted argument that "the 2002 FOIA request sought records outside of the SFFO" directly contradicts the factual record as well as his prior sworn testimony. Moreover, Plaintiff is unable to identify how the Court misunderstood his 2009 FOIA request, which was both geographically and temporally broader than his 2002 FOIA request.

The Court's March 1, 2011 Order correctly found that its September 24, 2009 Order "limited Defendant's searches and production of documents to those that were specified in Plaintiff's 2002 FOIA request, which asked for documents 'maintained at and by the FBI [SFFO],' and which existed at the time of Plaintiff's 2002 request." Mem. Op. at 10. The Court further concluded that "[b]ecause Defendant searched for and produced all documents responsive to Plaintiff's 2002 FOIA request, . . . Defendant has not violated this Court's reasonably clear and unambiguous Order." *Id.* at 15. Justice does not warrant a result different from the Court's determination in its March 1, 2011 Order. Defendant respectfully requests that the Court deny Plaintiff's motion for reconsideration.

LEGAL STANDARD

Federal Rule of Civil Procedure 54(b) governs this motion because the challenged order denying Plaintiff's contempt motion did not constitute a final judgment. *Williams v. Johanns*, 555 F. Supp. 2d 162, 164 (D.D.C. 2008) (noting that Rule 54(b) is the appropriate standard to review an order that "adjudicates fewer than all the claims or the rights and liabilities" of the parties); *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005). Rule 54(b) permits the district court to reconsider an interlocutory order "as justice requires." *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011) (citing *Greene v. Union Mut. Life Ins. Co. of Am.*, 764 F.2d 19, 22-23 (1st Cir. 1985) ("the district judge

is in the best position to assess whether or not 'justice requires' [reconsideration]")). Justice may require reconsideration when the Court has "patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the parties, has made an error not of reasoning but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the Court." *Singh*, 383 F. Supp. 2d at 101 (quoting *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004)).

"The district court's discretion to reconsider a non-final ruling is, however, limited by the law of the case doctrine and subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Id.* at 101-02 (quoting *In re Ski Train Fire in Kaprun, Austria, on Nov. 11, 2004*, 224 F.R.D. 543, 546 (S.D.N.Y. 2004)). Where the party seeking reconsideration merely repeats the same arguments previously considered and rejected, the district court does not abuse its discretion by denying a motion for reconsideration. *Capitol Sprinkler*, 630 F.3d at 227.

ARGUMENT

Plaintiff seeks reconsideration based upon (1) his belief that the Court misunderstood his 2002 FOIA request; and (2) his belief that the Court misunderstood his 2009 FOIA request, which he contends has "no bearing" on the reasonableness of the FBI's decision not to produce documents created after 2002. None of the conditions that would warrant reconsideration of a court's order exists in this case.

I. THE COURT'S CHARACTERIZATION OF THE 2002 FOIA REQUEST COMPORTS WITH PLAINTIFF'S SWORN TESTIMONY REGARDING THE SCOPE OF HIS 2002 REQUEST

Plaintiff contends that the Court "mischaracterized" his 2002 FOIA request, insisting that "the 2002 FOIA request sought records outside of the SFFO" because of an amended request that

he submitted on April 23, 2002. Pl.'s Mot. for Recon. at 2. This argument unmistakably contradicts the language of the amended FOIA request and Negley's prior sworn testimony. It is clear on the face of his April 23, 2002 amendment that Plaintiff intended to limit the scope of his 2002 request to records located at the SFFO:

> As you can see[,] my San Francisco FBI file no. is 149A-SF-106204-Sub S-1575. Please amend my 1/16/2002 FOIA request ***to your office*** to include this file no. as well as any others.

Pl.'s Mot. for Recon. Ex. A (emphasis added). In his partial motion for summary judgment filed on August 24, 2007, Plaintiff confirmed that the purpose of his amended request was to add a request for one specific file, not to expand the geographic or temporal scope of his initial request: "Specifically, under the amended FOIA request, ***in addition to all files about him maintained at and by the SFFO***, Negley expressly requested File No. 149A-SF-106204-S-1575 ("File S-1575") in its entirety, regardless of its content." *See* ECF No. 71-2 at 7 (emphasis added). In case there was any doubt, Plaintiff clarified under oath that he amended his FOIA request to seek File S-1575, in addition to all files about himself at the SFFO:

> To the extent that there is any ambiguity in the language of my April 23, 2002 correspondence to the FBI, it was and still is my intent to amend my FOIA request to include, ***in addition to all files about me at the SFFO***, the entire File No. S-1575, regardless of whether or not that file is about me.

See ECF No. 71-3 ¶ 3 (emphasis added) (attached hereto as Exhibit A).

The post-hoc suggestion of Plaintiff's counsel that the 2002 FOIA request sought records about Negley regardless of whether such files were maintain at and by the SFFO is directly contradicted by the unambiguous language of his April 23, 2002 amended request, arguments made in his prior filings, and his prior sworn testimony. The Court's characterization of Plaintiff's 2002 FOIA request is consistent with Plaintiff's own prior representations and testimony. Accordingly, Plaintiff's motion for reconsideration should be denied.

II. IN RESPONDING TO PLAINTIFF'S 2002 REQUEST, THE FBI REASONABLY EXCLUDED UNRESPONSIVE DOCUMENTS AND DOCUMENTS CREATED AS A RESULT OF THE 2002 REQUEST

All searches that the FBI performed after the issuance of the Court's September 24, 2009 Order were conducted to locate records responsive to both the 2002 request and the more expansive 2009 request. *See* Mem. Op. at 5 n.5 (citing Eighth Hardy Decl. ¶ 14). Further, the "*only* records discovered that had not previously been released to Plaintiff were 'administrative' type files that were deemed unresponsive to Plaintiff's 2002 FOIA request in that they were created in the process of responding to his request and/or related to field offices other than San Francisco." *Id.* at 13. Despite this, Plaintiff contends that the Court's determination that the FBI reasonably used an April 2002 cut-off date for productions in response to his 2002 FOIA request "appears to be a misunderstanding of Negley's 2009 FOIA request." Pl.'s Mot. for Recon. at 4.

It is not entirely clear in what respect Plaintiff believes the Court misunderstood his 2009 FOIA request -- Plaintiff alternately claims that "[t]he 2009 FOIA request was not an attempt to back-door this litigation or overburden the FBI," but that permitting the FBI to separately respond to the 2009 FOIA request "suggests that the FBI is being rewarded for its behavior in this case."[2] *See id.* Significantly, at the time Plaintiff submitted his more expansive FOIA request on June 15, 2009, the Court had not issued its September 24, 2009 Order. Plaintiff could

[2] Plaintiff intimates throughout his brief that he should not have to pay duplication costs for documents responsive to his 2009 FOIA request, decrying that "requestors who utilize additional resources (and are willing to pay out-of-pocket) to submit a subsequent FOIA request will be penalized" by the Court's ruling and that "Negley took the step, at his own cost, to submit the 2009 FOIA request." Pl.'s Mot. for Recon. at 5-6. This reflects a fundamental misunderstanding of FOIA. Plaintiff's 2009 FOIA request is not, as he admits, part of this litigation, and the amount of fees to be assessed in connection with his separate request is governed by 5 U.S.C. § 552(a)(4)(A)(ii)(III) and 28 C.F.R. § 16.11(c)(2). Moreover and in any event, notwithstanding Plaintiff's refusal to respond to the FBI's inquiries as to whether he wished to receive, and pay costs associated with, the administrative-type records (and even though it is not required to produce records if a requester has not paid an outstanding balance, *see* 28 C.F.R. § 16.11(i)(3)), the FBI has been processing and releasing these records. *See* Mem. Op. at 13 n.9.

not have logically expected that the Court would order the FBI to comply with "a FOIA request that the Court did not even know about." *See* Mem. Op. at 9. The Court's March 1, 2011 Order therefore properly concluded that "Defendant's assumption that Plaintiff's 2002 request was limited to documents in existence at the time of his request and within the scope of the request was eminently reasonable" given that both parties were aware that the FBI was also responding to Plaintiff's 2009 FOIA request, which had a broader geographic and temporal scope than his 2002 request. Mem. Op. 12-14; *see Jefferson v. Bureau of Prisons*, 578 F. Supp. 2d 55, 60 (D.D.C. 2008) (concluding that "it was reasonable in this instance for the agency to conclude that the information requested would have pre-dated, not post-dated the FOIA request" based upon extrinsic information that both parties possessed).

Plaintiff's reliance upon *Wilderness Society v. U.S. Bureau of Land Management*, No. 01CV2210, 2003 WL 255971, at *7 n.18 (D.D.C. Feb. 4, 2003), in support of his claim that the FBI's use of a cut-off date for production that is earlier than the date of the September 24, 2009 Order is "virtually per se unreasonable" is unavailing. *See* Pl.'s Mot. for Recon. at 5. In stating that "the agency would have a heavy, if not impossible, burden to justify conducting its renewed search subject to a time limitation based upon the date of plaintiffs' initial request," the district court in *Wilderness Society* was providing guidelines for the renewed search that was to be undertaken. *See Wilderness Soc'y*, 2003 WL 255971, at *7 n.18. Here, as described above, all searches that the FBI conducted after the issuance of the Court's September 24, 2009 Order were designed to locate records responsive to *both* the 2002 and 2009 FOIA requests -- which is precisely how the FBI located, and informed Plaintiff about, records that post-dated the 2002 request and/or related to field offices other than San Francisco. Moreover, unlike Negley, the

plaintiff in *Wilderness Society* had not submitted a subsequent FOIA request for a broader set of documents to which the agency would also be responding at the same time.

Accordingly, because the FBI did not violate the Court's September 24, 2009 Order, Plaintiff's motion for reconsideration should be denied.

CONCLUSION

The Court properly denied Plaintiff's contempt motion because the FBI did not violate the Court's reasonably clear and unambiguous Order of September 24, 2009. Plaintiff has failed to set forth any grounds warranting reconsideration of the Court's March 1, 2011 Order. Accordingly, Defendant respectfully requests that Plaintiff's motion for reconsideration be denied.

Date: March 25, 2011

Respectfully submitted,

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

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

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

Of counsel:

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[PROPOSED] ORDER

UPON CONSIDERATION of Plaintiff's Motion for Reconsideration of the Court's March 1, 2011 Order Denying Plaintiff's Motion for Contempt, Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Reconsideration, and any reply thereto, and for good cause shown, it is hereby

ORDERED that Plaintiff's motion for reconsideration is DENIED.

SO ORDERED.

Date

Hon. Gladys Kessler
United States District Judge