No. _____

In the Supreme Court of the United States

JAMES LUTCHER NEGLEY,
Petitioner,
v.
FEDERAL BUREAU OF INVESTIGATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN F. CARROLL
Counsel of Record
Attorney at Law
111 West Olmos Drive
San Antonio, Texas 78212
Telephone:(210) 829-7183
Facsimile:(210) 829-0734
jcarrollsatx@gmail.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the following bright line rule should be applied to searches for documents by government agencies in responding to requests under FOIA: Where a lead in the agency's files to the existence of documents responsive to a FOIA request includes information identifying agency employees who may have knowledge of such documents, the agency must inquire of those employees as to the existence of documents in order for the agency's search to be reasonable.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are listed in the case caption. The Petitioner, James Lutcher Negley is an individual resident of Austin, Travis County, Texas. Respondent, the Federal Bureau of Investigation, is an agency of the executive branch of the United States Government.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion from the United States Court of Appeals for the Fifth Circuit was issued on November 3, 2014. *Negley v. Federal Bureau of Investigation*, No. 13-50912 (submitted herewith as Appendix A). The opinion of the United States District Court for the Western District of Texas, from which the appeal to the Fifth Circuit was taken, was issued July 31, 2013. *Negley v. Federal Bureau of Investigation* in Case No. 5:12-CV-00362-OLG (submitted herewith as Appendix B).

STATEMENT OF JURISDICTION

The date of the judgment of the Court of Appeals, referenced above, was November 3, 2014. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). This Petition seeks review of a final judgment issued by the United States Court of Appeals for the Fifth Circuit in Cause Number 13-50912, *Negley v. Federal Bureau of Investigation*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition relies on the following provisions of the Constitution of the United States:

Article I, Section 1, which provides: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article II, Section 1, which provides, in pertinent part: "The executive power shall be vested in a President of the United States of America. He shall

hold his Office during the Term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows…"

The Petition also relies on the Freedom of Information/Privacy Act, 5 U.S.C. § 552, which is reproduced in the Appendix at Appendix C.

STATEMENT OF THE CASE

a. Introduction

The problem underlying the question for review in this case is that the Court of Appeals has created a rule that will allow government agencies to ignore plainly obvious facts that would reasonably justify further inquiry in conducting a reasonable search for documents under the Freedom of Information/Privacy Act ("FOIA"). In so doing, the Court of Appeals has effectively allowed government agencies to limit the reach of the statutory requirement that an agency conduct a reasonable search. Specifically, the document production by the FBI in response to Petitioner's FOIA request included a facsimile transmission coversheet addressed from an Assistant United States Attorney to an FBI field office official. That document included handwritten notations that appear to refer to the existence of additional documents. The FBI did not conclusively explain the notations. The Court of Appeals did not require the Agency to do so. However, the FBI did not even bother, as part of its "reasonable" search for documents to inquire of either the sender or recipient of the facsimile transmission as to the source or an explanation of the handwritten notations. The Court of Appeals did not criticize this failing on the part of a Government

Agency to follow up on information in responding to a FOIA request.

b. Separation of Powers

The strength and endurance of our federal government results from the foresight of the framers of our Constitution, who created a secure separation of power among the three branches of government. The Constitution assigned distinct powers and responsibilities to the three coordinate branches, devising a system of checks and balances which hinders excessive control by any one of the branches. The aggregation of power in one branch, or the exercise of non-branch authority by another, creates an imbalance which fosters constitutional crisis. The deference shown by the Court of Appeals to the representations and positions of the executive in the instant case has just that effect. In order to bring equilibrium to our governmental system it is requested that this Court examine the role of the judiciary in making determinations regarding the responsibility of the executive to fully and properly respond to inquiries from American citizens and the purposes of the legislative exercise of authority in enacting the Freedom of Information/Privacy Act.

The standard applied by the Court of Appeals in this case of deference to the determination and representations of the executive is an unconstitutional abdication of the responsibilities of the judiciary as enacted by Congress in FOIA. The standard applied compromises the independence of the judicial branch and grants unbridled and excessive authority to the executive branch in applying FOIA.

The doctrine of separation of powers is one of the most important checks on governmental power in the Constitution. The premise of the doctrine was set out by the Court in *Bowsher v. Synar*, 478 U.S. 714 (1986): The Constitution sought to divide the delegation powers of the new Federal Government into three defined categories, Legislative, Executive and Judicial. *INS v. Chadha*, 462 US. 919, 951 (1983). The declared purpose of separating and dividing the powers of government, of course, was to diffuse power to better secure liberty. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)(Jackson, J., concurring)

Structuring government into three separate branches recognizes that the necessary powers wielded by each branch is different, and that those powers should be carefully defined:

> [T]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The Federalist No. 47, at 301 (J. Madison).

The three branches were never intended to be sealed off from one another without any possibility of interaction. *See e.g. Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Buckley v. Valeo*, 424 U.S. 1 (1976). While the Constitution permits some interdependence among the branches, *Missouri, Kan., & Tenn. Ry. Co. v. May*, 194 U.S. 267, 270 (1904)(Justice Holmes stated "some play must be allowed for the joints of the machine…"), that

cooperation cannot be so great as to threaten the independence of the branches.

The executive, except for recommendation and veto, has no legislative power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579.

The separation of powers is the definitive characteristic of American constitutional government. G. Wood, The Creation of the American Republic, 1776-1787, at 51 (1969); *United States v. Bogle*, 689 F. Supp. 1121 (S.D. Fla 1988). The aggregation of legislative, executive and judicial power in the same hands is as threatening to notions of liberty today as it was when Madison recognized the problem.

c. Facts

1. Background of FOIA Requests

On September 19, 1995, James L. Negley traveled to Chico, California to check on his almond orchard. He invested in the orchard in 1984. This is an ongoing operation. Negley was curious about the Unabomber's Manifesto recently published by the Washington Post and tried to purchase the newspaper from two different bookstores. Neither bookstore carried the newspaper. One bookstore employee directed Negley to the Chico State University library to find the article. Upon arriving at the library in the early evening, a librarian informed Negley that there was no copy of the Washington Post at the library as it was to arrive the following day from Sacramento. Negley offered the library attendant $20 to copy the manifesto and put it in his inbox at the Holiday Inn. (App. 2) The librarian said the money was not necessary, that she would do it

anyway. Negley left the library, went out to dinner, returned to the Holiday Inn and went to bed.

Just before midnight, Negley was awakened by a telephone call. A voice on the other end identified himself as an FBI agent and asked him to come down to the lobby for questioning, notifying Negley that he was a possible Unabomber suspect. Mr. Negley voluntarily met with FBI agents and answered their questions. It was apparent that Mr. Negley had nothing to do with the Unabomber case. (App. 2)

Since the late 1990's, Mr. Negley has been seeking information relating to him held by the Federal Bureau of Investigation. In that regard he has made certain requests under the Freedom of Information Act ("FOIA"). On two previous occasions he has filed complaints under the provisions of FOIA seeking to compel the FBI to comply with the FOIA requirements. The first instance was in 1999 when he filed suit to enforce his request for records from the Sacramento field Office. (Rec. 1, pp. 316-317, Case No. A-01-CA-057JRN). The second instance was in 2003 when he filed suit in Washington D.C. seeking records in response to a separate FOIA request for records from the San Francisco field office. *Negley v. FBI*, 825 F. Supp. 2d 63 (D.D.C. 2011). One of the issues that arose in that case was the scope of the request to which the FBI was required to respond. The FBI successfully took the position that it was not required to include in its production, any records created after the April 2002 date of the request. *Id*. at 70-71. The instant lawsuit was filed after Mr. Negley made a request in 2009 for all files relating to him held by the FBI. The 2009 request was, in part, a response to the limitations

found by the Court on the scope of the April 2002 request.

2. The Instant FOIA Request

By letter dated June 15, 2009, Negley, through authorized counsel, requested that the FBI "provide a copy of all records in the possession of the Federal Bureau of Investigation relating, in any way, to James Lutcher Negley (date of birth and address redacted), to the undersigned....This request includes all records related to any permutation of James Lutcher Negley's name, as well as his business-Davis, Joseph & Negley …" (Rec. Vol. 2, p. 753)

One year and one month after the submission of the 2009 FOIA request, the FBI issued its first release of documents, stating that it had reviewed 825 pages and that 716 pages were being released. (Rec. 1, p. 394) The FBI further notified Mr. Negley that 3000 pages remained to be processed, for a total of 3,825 pages. A second release of documents stating that 1457 pages had been reviewed and 1,430 released, was made on December 16, 2010. (Rec. 1, p. 398) After the 1,457 pages referenced in the December 16, 2010 letter, there remained 1,543 additional pages to be processed.

After that release, no further documents were produced. Correspondence indicates that the FBI had stopped processing the request for non-payment of $143.00 in copying charges. (Rec. 1, p. 406) The correspondence further shows a misunderstanding as Mr. Negley's counsel had previously written to the FBI stating that the funds had been paid. (Rec. 1, p. 402) In order to resolve the issue, Mr. Negley forwarded the requested payment on August 29, 2011. (Rec. 1, p. 408)

No further production of records in response to the 2009 request was received by Mr. Negley. Mr. Negley waited approximately 8 months without receiving an additional disclosure. He filed the instant lawsuit on April 28, 2012. (Rec. 1, p. 8) After the lawsuit was filed, the FBI began further production on August 31, 2012. (Rec. 2, p. 415) Mr. Negley filed the Complaint in this case in response to the lack of a timely response to his June 2009 request and to secure the compliance of the FBI with its disclosure obligations under FOIA. Eventually, the FBI identified over 7400 pages of documents as responsive to the FOIA Request (mostly administrative and litigation files). (Rec. 1, pp. 336-337; Rec. 3, pp. 930-931)

3. March 2013 Disclosure of EOUSA records reference up to 500,000 or more pages

On March 18, 2013, Mr. Prashant K. Khetan, an attorney acting on behalf of Mr. Negley, received a FOIA disclosure from the United States Department of Justice. The response disclosed 21 pages of documents with redactions. (Rec. 2, p. 679) Then, on April 23, 2013, John F. Carroll received a disclosure from the same office in Washington indicating that it was revised from the March 18, 2013, release, disclosing 77 pages of documents and indicating that 18 pages were being released in part. (Rec. 2, p. 681)

One of the pages from that production raised additional questions about the volume of records held which relate "in any way" to Mr. Negley. Specifically, the page numbered Negley-437-FOIPA. (R. 2, p. 690) That document is a fax cover sheet dated January 22, 2002, and apparently faxed on that same date according to the fax legend. Curiously, there is a

handwritten notation that is dated 1/17/02. It is not understood how a handwritten note could have been made on January 17, 2002 on a document that was not created until January 22, 2002. Petitioner has inquired as to the genuineness of the notation but did not receive a response to the inquiry. (R. 3, p. 815) After the date, the handwritten notation appears to state: "case is still pending 500,000 pp in file (or it could read "info 6") 42,000 misc(appears to be misc) evidence". (Rec. 2, p. 690)

The 77 pages of documents belatedly produced came from the Justice Department and, specifically, from the Executive Office for United States Attorneys in Washington, D.C.("EOUSA") The FBI has stated that the documents were in its possession and were referred to the EOUSA for its review and determination as to release because they were documents from a U.S. Attorney's Office. (R. 1, pp. 374-375) The notations on page Negley-437-FOIPA appear to refer to numerous documents, as many as 542,000 pages. This revelation suggests that the FBI's identification of 7406 pages as responsive may be in error.

If the notation on page Negley-437-FOIPA is correct, Petitioner may reasonably inquire whether in 2002, the file regarding Mr. Negley totaled 42,000 pages, or even 542,000 pages. If that is the case, then the production of information by the Department of Justice in response to Mr. Negley's FOIA requests up to the present has been inadequate and the FBI has not made an adequate search for documents and records. The FBI indicated that it did not know what the notation meant or to what it referred. (Rec. 1, p. 375) Rather, the FBI merely stated that the reference could

not be to records about Petitioner because the search did not reveal a file of that size. (Rec. 1, pp 375-376) The FBI presumed that the notes were made by an FBI employee. (Rec. 1, p. 375) However, there was no reference to any effort to determine who the employee may have been. Petitioner has complained that the failure to follow up and take steps to investigate the reason for the notation shows that the FBI did not conduct an adequate search.

d. District Court Treatment of the Issue

The District Court held that the explanation provided by the FBI was sufficient, citing the Hardy declaration's statement that the "investigation of Plaintiff only took place in 1995 and was thereafter dismissed," (App. Rec. 3, p. 934) and that there were "only 163 pages produced in the investigation..." (App. Rec. 3, p. 934). The District Court relied on the principle that the information in a defendant's declaration cannot be rebutted by purely speculative claims about the existence of other documents (App. Rec. 3, p. 934).

e. Court of Appeals' Decision

The Court of Appeals held that the FBI was under no obligation to take even simple steps to follow up on the leads presented by the handwritten notations. The Court of Appeals, citing *Batton v. Evers*, 598 F.3d 169, 179 (5th Cir. 2010), stated that an agency's affidavits are accorded a presumption of legitimacy that assumes that the agency is telling the truth in their affidavits. (App. 7) The *Batton* case cites to *United States Department of State v. Ray*, 502 U.S. 164, 179 (1991), for that particular proposition. Although *Ray* was a

FOIA case, what the Supreme Court said in that case was not specific to FOIA cases. Rather, the Supreme Court noted that "[w]e generally accord Government records and official conduct a presumption of legitimacy." *Id.* at 179. This statement was in the context of reviewing the propriety of a FOIA request for private and personal information given by Haitian refugees in interviews to State Department personnel. The government had asserted that the material was exempt from disclosure because of the private and personal nature of the information. *Id.* at 176. The parties seeking the information argued that they needed to see the unredacted data so they could test the legitimacy of the interview reports that had been produced. *Id*. at 178. The Supreme Court found this argument unpersuasive because of the presumption of legitimacy of government action and the absence of some evidence of wrongdoing. *Id.* at 179. That statement by the Supreme Court has been used to create this presumption in favor of agencies in responding to FOIA requests.

The Court of Appeals has recognized a rule applied by the D.C. Circuit that an agency is required to search a place if the agency has reason to know that certain places may contain responsive documents. (App. 10, *citing Campbell v. United States Department of Justice*, 164 F.3d 20 (D.C. Cir. 1998) The Court went on to state that "such leads must contain sufficient information to indicate the type of record or location that the agency must search." (App. 11) In the instant case, while the lead does not indicate the location of potential additional records, it does clearly identify individuals who may have knowledge regarding the lead. The Court of Appeals expressed concern in

requiring an agency to prove a negative. (App. 11) But, the requirement that an agency merely follow up on a lead as part of a reasonable search does not require the agency to disprove the existence of documents. The agency would simply be required to inquire of an identified employee of the agency on the basis of a lead. The agency would not be required to go beyond merely making the inquiry, unless the inquiry resulted in the identification of a specific record or location the agency must search.

There does not seem to be any good reason to excuse an agency from taking the very simple step requested by Petitioner herein. In light of the statute, this simple inquiry is necessary.

REASONS THE COURT SHOULD GRANT CERTIORARI

a. Agencies Now Have a Green Light to Limit the Scope of a Search in Response to a FOIA Request

In this case the FBI did submit a declaration describing a search of databases and sources. The District Court found that the search was adequate. Under *Batton v. Evers*, 598 F.3d 169, (5th Cir. 2010) such a search appearing reasonably calculated to yield responsive documents in response to a FOIA request to the IRS was found to be adequate. However, in the instant case there was specific information that came to the attention of the FBI during the time that it was conducting its search that it chose not to pursue, specifically the facsimile transmission cover sheet referenced above. The FBI relied on its database search and did not pursue reasonable measures to seek

an explanation for the notations. If the "reasonable" search reveals the potential for additional information, the agency should not be permitted to ignore the clues. At a minimum, the agency should be required to articulate a reasonable basis for not pursuing a lead. The procedure sanctioned by the Court of Appeals does not require such measures and reduces FOIA procedure to a robotic response by government agencies.

An explanation for the notations could be found by determining where the document was maintained, and which personnel had access to or responsibility for custody of such a record. In addition, inquiry could be made to the United States Attorney's office, the original generator of the document, to determine what knowledge its personnel, including Mr. Daniel M. Castillo, the stated sender of the facsimile transmission page on which the notes appear, may have regarding the notation and its basis. Inquiry could also be made to the Chief Division Counsel of the Sacramento Division of the FBI, the recipient of the fax transmission from Mr. Castillo. (Rec. 2, p. 690) That person's name was redacted from the document prior to its production. These actions could easily be taken without a great deal of effort and a determination made based on the facts, rather than the FBI's mere speculation that these notations refer to the size of the entire UNABOMBER file. (Rec. 1, p. 303) Here, the FBI itself has engaged in speculation regarding the meaning of the notations. There is not any evidence to suggest those numbers represent an accurate statement of the size of the UNABOMBER file. The FBI supported the adequacy of its search by

speculating as to the meaning of a notation on one of its documents.

In light of the belated disclosure of this document, a document that had been discovered by the FBI very early in its review in response to the 2009 FOIA request, it was unreasonable for the FBI to fail to take certain steps to investigate its meaning. It was not reasonable to simply ignore the page and its notations, even in light of the detailed search for documents described in the Declaration submitted by the FBI. The page disclosed information that was not explained and that may have revealed the existence of additional documents. The leads that would have to be followed in order to discover the meaning of the notation were simple and, significantly, were available to the FBI. Ignoring those possible leads was not reasonable. But the Court of Appeals has approved the procedure and signaled to agencies that they may ignore reasonable leads that do not fit into its cookie cutter formula. Such a rule should not be carried into practice for government agencies.

b. The D.C. Circuit's Decision in *Campbell* has Been Unreasonably Narrowed

The United States Court of Appeals for the Fifth Circuit concluded that no further search or inquiry was necessary. However, as authority for its decision, the Court of Appeals relied on a decision of the District of Columbia Circuit Court of Appeals in which an agency was required to follow up on a lead in order for the search for documents to be reasonable. Specifically, the Fifth Circuit cited *Campbell v. United States Department of Justice*, 164 F.3d 20 (D.C. Cir. 1998). This was a case relied upon by Petitioner as it stands

for the proposition that an agency should not disregard reasonable leads in conducting a reasonable search for documents under FOIA. *Id*. at 28. However, the Fifth Circuit, rather than relying upon that principal, merely distinguished *Campbell* and concluded that its principles were limited to the unique facts of the case in which the lead was to a specific type of file maintained by the agency. This decision of the Court of Appeals allows an agency to ignore specific and articulable facts in its possession and within its knowledge. That is what happened in the instant case and the agency, in this case, the FBI, ignored facts that could have led to additional information. This failing by the FBI was approved by the Court of Appeals in its very narrow treatment of the *Campbell* decision of the D.C. Circuit. The *Campbell* decision involved a construction of the duties of the executive branch under a statute enacted by Congress. The decision in the instant case is a step backwards. It limits the interpretation by the Judiciary of the duties and responsibilities of the Executive Branch under a Congressional mandate, the Freedom of Information Act. It turns over and abdicates to the executive branch the authority to determine whether a search is reasonable under FOIA. It is not a decision for the agencies governed by FOIA to make. That decision was made by Congress and should be properly interpreted by the Courts.

c. The Authority of the Judiciary to Review the Reasonableness of Agency Responses to FOIA Requests has been Abdicated to the Executive

It is important that the Judicial Branch maintain its independence and authority in making

determinations regarding the reasonableness of agency activity in response to FOIA requests. The Court of Appeals for the District of Columbia Circuit recognized factors justifying placing the burden for ensuring a search is reasonable on the agency in *McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983). The Court of Appeals recognized two important considerations in this regard: One is that the information bearing upon the reasonableness of any temporal or other limitation on a search effort is within the agency's exclusive control. The other is that the Act ("FOIA") as a whole is clearly written so as to favor the disclosure of any documents not covered by one of the enumerated exceptions. *Id.* at 1101. In the instant case, there were objective facts in the record. The Court of Appeals was not required to simply rely on the judgment of the agency. The Court could review the facts and make a determination regarding the reasonableness of the agency's efforts in light of the facts in the record. However, the Court of Appeals did not take the step of making such a determination. Instead, it relied upon a narrow reading of the *Campbell* decision to hold that no simple inquiry as proposed by Petitioner was required.

The effect of the decision of the Fifth Circuit is to effectively expand the rule making power of the agencies to conclude what constitutes a reasonable search. That is not a decision the agencies were empowered to make under FOIA. Future cases will raise similar issues regarding how far an agency must go to fulfill its duty under FOIA of conducting a reasonable search. To ensure a uniform treatment of this issue in the future, a bright line rule should be announced providing for specific procedures to be followed by agencies when they encounter a specific

lead showing that the existence and location of information responsive to a FOIA request is within the knowledge of a specifically named employee of the agency. In such a case, as in the instant case, an agency should be required to question the named employees or employees to determine whether they have knowledge of the existence and location of information responsive to the FOIA request in issue. Such an inquiry must be made for the search to be reasonable.

CONCLUSION

ACCORDINGLY, Petitioner respectfully requests that a writ of certiorari issue and that upon review that the Court reverse the decision of the United States Court of Appeals for the Fifth Circuit and direct that this case be remanded to the District Court for further proceedings.

Respectfully submitted,

JOHN F. CARROLL
Counsel of Record
Attorney at Law
111 West Olmos Drive
San Antonio, Texas 78212
Telephone:(210) 829-7183
Facsimile:(210) 829-0734
jcarrollsatx@gmail.com

Counsel for Petitioner

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13-50912

[Filed November 3, 2014]

JAMES LUTCHER NEGLEY,
Plaintiff–Appellant,

versus

FEDERAL BUREAU OF INVESTIGATION,
Defendant–Appellee.

Appeal from the United States District Court
for the Western District of Texas
No. 5:12-CV-362

Before REAVLEY, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:[*]

The Federal Bureau of Investigation ("FBI") interviewed James Negley one night in 1995 as part of its investigation into the Unabomber, precipitating a series of Freedom of Information Act ("FOIA") requests

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and related lawsuits that continue to this day. Negley appeals a protective order and summary judgment in a suit alleging the FBI inadequately responded to his FOIA request. Because Negley has not identified a genuine dispute as to a material fact regarding the adequacy of the FOIA search, we affirm.

I.

In 1995, the *Washington Post* printed a manifesto written by a domestic terrorist commonly referred to as the Unabomber. Negley went to the Chico State University library the day the manifesto was scheduled to be published and offered the librarian twenty dollars to copy the article and leave it for him at his hotel. After Negley left, the librarian called the authorities and reported Negley's suspicious behavior; the FBI contacted him by phone and sent an agent to interview him at his hotel. After the interview, the FBI ruled Negley out as a suspect.

In 1999, Negley submitted a FOIA request to the FBI's field office in Sacramento, California, then sued ("*Negley I*") challenging the adequacy of the FBI's production. The district court granted summary judgment to the FBI. Negley submitted another FOIA request in 2002, this time to the FBI's field office in San Francisco. Negley sued ("*Negley II*"), again questioning the adequacy of the production. That matter worked its way through the federal courts until 2012, when the District of Columbia Circuit affirmed the summary judgment.

During the *Negley II* litigation, Negley filed another FOIA request with the FBI seeking all of its records relating to him. He eventually sued on this as well,

arguing that the FBI had not adequately responded to his FOIA request. He served a request for admissions and productions on the FBI, asking it to confirm or deny a wide variety of investigative actions aimed at him, including surveillance, breaking into his house, and seizing possessions there. In response, the FBI successfully asked the district court for a protective order. The court granted the FBI's motion for summary judgment, finding that it had performed an adequate search in response to Negley's FOIA request.

II.

A threshold issue is whether claim preclusion or issue preclusion bars the district court from determining that the FBI's search was unreasonable. The FBI invoked res judicata, commonly referred to as claim preclusion,[1] and the district court arguably based its decision in part on that doctrine. On appeal, the FBI contends that collateral estoppel (issue preclusion) bars the court from addressing the reasonableness of the FBI's search. The FBI's attempt to change horses midstream is unavailing, however, because neither doctrine applies.

At issue is the district court's decision in *Negley II*. Negley was suing the FBI for not complying with its obligations regarding his 2002 FOIA request. During

---

[1] "Res judicata" is also sometimes used as a broader term to encompass both claim preclusion and issue preclusion. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'"). The parties' briefs, however, treat the district court deciion as invoking only claim preclusion.

that litigation, Negley filed the 2009 FOIA request that is the subject of this appeal; the court ordered the FBI to conduct a search in response to the 2002 request and eventually held, in response to a contempt motion, that the agency was justified in limiting that search to only those documents in existence at the time of the 2002 request. *Negley v. FBI*, 766 F. Supp. 2d 190, 194 (D.D.C. 2011). The court later granted summary judgment, stating that the "search and production in response to the 2002 request were reasonable under the specific circumstances of this case." *Negley v. FBI*, 825 F. Supp. 2d 63, 71 (D.D.C. 2011). The FBI claims that, because it also conducted a search in response to the 2009 request during the *Negley II* litigation, the district court's decision established the adequacy of the search that was motivated by the 2009 request.

It is that limitation on the previous case that keeps preclusion from applying. For issue preclusion to apply, the previous determination must have been, among other things, "necessary to the decision."[2] The *Negley II* court was not faced with a challenge to the adequacy of the FBI's search in response to Negley's 2009 FOIA request, which the district court itself acknowledged had been made without that court's knowledge and which more expansive than the 2002 request. *Negley*, 766 F. Supp. 2d at 191–92. Even if the FBI had identified some unequivocal expression of confidence from the district court about the adequacy of the search in response to the 2009 request, the FBI has not shown how such a determination was at all necessary to the

---

[2] *Bradberry v. Jefferson Cnty., Tex.*, 732 F.3d 540, 548 (5th Cir. 2013) (quoting *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005)).

court's decision on the adequacy of the search initiated in response to the 2002 request. At most, in holding that the FBI was justified in limiting its search on the 2002 request to documents existing in 2002, that court relied on the fact that the FBI was also responding to Negley's 2009 FOIA request, *see Negley*, 825 F. Supp. 2d at 71–72, but any statement of the district court about the adequacy of the presently disputed search is irrelevant to that analysis.

Claim preclusion is likewise inapplicable: It requires that the previous suit involved "the same claim or cause of action,"[3] meaning both actions must be based on "the same nucleus of operative facts."[4] Here, the two actions are based on two different FOIA requests of different scope made years apart. Those requests might seek information related to a common nucleus of operative facts (whether the FBI performed any as-of-yet undisclosed surveillance of Negley), but the suits are in response to distinct FOIA requests and the alleged failures of the FBI flowing from those requests. This is the same conclusion that the D.C. Circuit reached in *Negley II*, in which the district court had erroneously applied claim preclusion based on *Negley I*. *See Negley v. FBI*, 169 F. App'x 591, 593–94 (D.C. Cir. 2006). Neither issue preclusion nor claim preclusion applies to this case.

---

[3] *In re Southmark Corp.*, 163 F.3d 925, 934 (5th Cir. 1999) (quoting *Swate v. Hartwell*, 99 F.3d 1282, 1286 (5th Cir. 1996)).

[4] *Southmark*, 163 F.3d at 934 (quoting *In re Baudoin*, 981 F.2d 736, 743 (5th Cir. 1993)).

III.

Negley's main claim on appeal is that the district court erred in granting summary judgment because the FBI did not establish that its search was reasonable. FOIA does not require an agency to show that it has identified every document that is responsive to a request, but only that "it performed a search reasonably calculated to yield responsive documents." *Batton v. Evers*, 598 F.3d 169, 176 (5th Cir. 2010). The agency can satisfy that requirement with affidavits that provide a detailed description of its search methods.[5] Some courts have stated that satisfying this requirement shifts the burden to the plaintiff to demonstrate bad faith,[6] and that is the rule the district court applied. Negley contends that the court erred in requiring him to show bad faith, claiming that his evidence goes to the adequacy of the search.

The burden-shifting statement relied on by the district court is an incomplete statement of the rule. The court was correct that the agency's affidavits are entitled to a "presumption of good faith," but that does not mean that the agency is entitled to a presumption that its search was adequate. Instead, an agency's affidavits are accorded a "presumption of legitimacy" that "assume[s] that the [agency] is telling the truth in

---

[5] *See Batton*, 598 F.3d at 176; *Maynard v. CIA*, 986 F.2d 547, 559 (1st Cir. 1993); *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

[6] *See, e.g.*, *Sanders v. Obama*, 729 F. Supp. 2d 148, 155 (D.D.C. 2010) ("Once an agency has provided adequate affidavits, the burden shifts back to the plaintiff to demonstrate a lack of a good faith search.").

its affidavits." *Batton*, 598 F.3d at 179. Absent countervailing evidence by the plaintiff, the court will assume that the agency is telling the truth about its search, but that does not mean that the court must accept the agency's assertion that the search was adequate.

A plaintiff can overcome the presumption of legitimacy only by showing that the agency acted in bad faith, *see id.*, but he can defeat summary judgment on the adequacy of the search by presenting evidence that the affidavits do not describe an adequate search. A contrary rule would impose too high a burden on the plaintiff and would be contrary to the summary-judgment standard, allowing an agency affidavit definitely to settle the adequacy of a search in the face of evidence that the search was inadequate. Instead, the plaintiff can prevent summary judgment by introducing evidence that creates a genuine dispute as to the adequacy of the search.

This approach is consistent with the approach taken by the D.C. Circuit, which has stated that a plaintiff can provide countervailing evidence about a search to call into question its adequacy and thereby render summary judgment inappropriate. *See Founding Church of Scientology of Wash., D.C., Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 836 (D.C. Cir. 1979). As the D.C. Circuit explained in *Oglesby*, 920 F.2d at 68, the affidavit describing the search needs to be detailed partly because such detail "is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search." Other courts are also careful to separate the issues, stating that the plaintiff has the burden to show bad faith once the agency has

established that its search was reasonable, not just once the agency has provided affidavits that would be enough to establish reasonable searches standing alone.[7]

A plaintiff cannot call into question the adequacy of the search by engaging in "[m]ere speculation that as yet uncovered documents may exist." *Safe-Card Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). To justify reversal, Negley needs to point to some genuine dispute as to a material fact that made summary judgment inappropriate. He identifies two arguments he made in the district court, but neither is sufficient.

The first set of facts to which Negley points can be grouped together as those facts that are not relevant to the adequacy of the search. One of them is the FBI's decision no longer to rely on the Privacy Act to justify certain withholdings. The district court correctly concluded that that decision does not bear on the adequacy of the search. Negley has not identified the relevance of that fact or any relevant inference to which it gives rise, and we can think of none. Negley's argument that the FBI failed timely to notify him of their referral of documents fails for the same reason: Negley has identified FBI practices with which he disagrees, but that is not sufficient to survive summary judgment.

---

[7] *See*, *e.g.*, *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1383 (8th Cir. 1985) ("[O]nce the agency has shown by convincing evidence that its search was reasonable, . . . then the burden is on the requester to rebut that evidence by a showing that the search was not in fact in good faith. Summary judgment would be improper if the adequacy of the agency's search were materially disputed on the record.") (citations omitted).

Negley's second main argument in contesting summary judgment is that the FBI's search was inadequate because it failed to follow up on a lead that it discovered while processing the request. On March 18, 2013, Negley's attorney received as part of a disclosure a copy of a 2002 fax transmittal sheet containing a handwritten notation that appears to read "case is still pending 500,000 pp in file 42,000 misc evidence."[8] Negley contends that this notation indicates there may be hundreds of thousands of pages that were not discovered as a part of the previous search.

Even if we accept *arguendo* that the notation indicates that there are potentially 500,000 documents not discovered during the earlier search, that would not affect whether the FBI conducted an adequate search. For a search to be adequate, the law requires only that it be "reasonably calculated to yield responsive documents." *Batton*, 598 F.3d at 176. *Post hoc* evidence that the search missed responsive documents does not render it inadequate.

Negley relies on a line of cases from the D.C. Circuit holding that an agency searching for documents responsive to a FOIA request has not performed an adequate search if its initially reasonable search turned up leads that it did not investigate further. The Fifth Circuit has not yet considered whether to adopt this additional requirement for FOIA searches, and such a doctrine would not help Negley anyway.

---

[8] The handwriting makes it difficult to tell what exactly the note says, but this reading has not been disputed by the parties.

The principal case for this doctrine is *Campbell v. United States Department of Justice*, 164 F.3d 20 (D.C. Cir. 1998). There, the FBI searched its Central Records System but not its "tickler" files, which are "duplicate file[s] containing copies of documents, usually kept by a supervisor," because they rarely produce additional responsive documents. *Id*. at 27. Some of the documents that the FBI did discover, however, made reference to tickler files, indicating that those files may have had responsive documents. The D.C. Circuit held that the FBI's search was inadequate because it did not search the tickler files for relevant documents in response to this lead. *Id*. at 28.

The D.C. Circuit limits this requirement in a way relevant here. In *Campbell*, the court said the plaintiff is required to establish "a sufficient predicate to justify searching for a particular type of record." *Id*. The plaintiff in *Campbell* had a clear lead identifying a particular type of record that could be searched, namely, the tickler files. Likewise, in *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321 (D.C. Cir. 1999), the court described *Campbell*'s relevant holding as obliging an agency to search a place "if the agency has reason to know that certain places may contain responsive documents." *Id*. at 327 (citing *Campbell*, 164 F.3d at 28).[9]

---

[9] *Valencia-Lucena*, 180 F.3d at 328, also discusses an affirmative obligation on the part of the agency to contact agency personnel "if there is a close nexus . . . between the person and the particular record." That does not require the FBI in this case to contact whoever wrote the notation on the fax sheet. *Valencia-Lucena* involved a FOIA request to a particular, physical logbook that had already been identified as a likely source of responsive

Under this caselaw from the D.C. Circuit, even if we adopted the requirement that agencies responding to FOIA requests investigate leads that arise during their investigations, such leads must contain sufficient information to indicate the type of record or location that the agency must search. A naked suggestion that additional files exist is not sufficient. The lead must include some information that tells the agency how to change its search to make it reasonable again. The contrary construction of the rule would undermine our requirement that an agency establish only that its search was reasonable. Allowing an indication that more records exist, without requiring an indication of the types of records or their location, would change the agency's obligation from showing a reasonable search to proving a negative, namely, that there existed no more responsive documents.

IV.

Negley maintains that the district court erred in granting the FBI's motion for a protective order under Federal Rule of Civil Procedure 26(c). We review the

---

information. The Coast Guard could not locate the book, but the court held that the Coast Guard should have contacted the lieutenant who had been in possession of the book at trial. The logbook still satisfied the requirement that a particular type of record or location be identified. And the D.C. Circuit even recognized the limited nature of the obligation to contact, stating that it applied "[a]bsent any indication that an inquiry of [the agent] would be fruitless . . . because the storage of the logbook was controlled by other persons or by internal procedures." *Id*. Expanding the contact obligation beyond these limited circumstances would unjustifiably expand the scope of what an adequate search requires.

grant of a discovery order for abuse of discretion. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1394 (5th Cir. 1994).

It is within a district court's sound discretion to halt discovery in a FOIA case until after action on a motion for summary judgment.[10] As in many FOIA cases, Negley was faced with uncontroverted agency affidavits establishing the reasonableness of the search, and he could point to nothing creating a genuine dispute as to a material fact that would bear on the adequacy of the search. As the district court concluded, Negley's discovery would have asked the FBI whether it had conducted investigations of him and to produce related documents, essentially using discovery to replace FOIA. Negley has not identified any way in which the district court abused its discretion in so limiting discovery.

AFFIRMED.

---

[10] *See, e.g.*, *Maynard*, 986 F.2d at 556 n.8; *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994); *Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-50912
D.C. Docket No. 5:12-CV-362

[Filed November 3, 2014]

JAMES LUTCHER NEGLEY,
Plaintiff–Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION,
Defendant–Appellee.

Appeal from the United States District Court for the Western District of Texas, San Antonio

Before REAVLEY, SMITH, and SOUTHWICK, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX B

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

Cause No. 5:12-CA-00362-OLG

[Filed July 31, 2013]

JAMES LUTCHER NEGLEY,
Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT

Presently before the Court is Defendant's motion for summary judgment (docket no. 38), Plaintiff's response thereto (docket no. 43), Defendant's reply (docket no. 44), and Plaintiff's sur-reply (docket. 46). This lawsuit was filed pursuant to the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and arises out of Plaintiff's request for documents from the Federal Bureau of Investigation ("FBI"). Defendant asserts that it is entitled to summary judgment because there is no genuine dispute as to any material fact.

I. BACKGROUND

This case originated in 1995 when plaintiff went to the California State University library and asked for a copy of the Washington Post article reprinting the so-called Unabomber's Manifesto. As a result, the FBI interviewed Plaintiff, conducted a brief investigation, cleared Mr. Negley of any involvement with the Unabomber, and the inquiry was dropped by the FBI. This lawsuit is plaintiff's third seeking documents relating to him and his business. In *Negley I*, the court granted summary judgment in the FBI's favor after the FBI released in part fifty of fifty-one documents located in response to Negley's October 7, 1999 FOIA request. *Negley II* was filed in the District of Columbia by Plaintiff on October 17, 2003, and still remains pending on certain issues regarding attorney's fees. In that case, the FBI eventually prevailed on a renewed motion for summary judgment contending that it had conducted an adequate search and properly applied exemptions protecting disclosure of law enforcement records that could reasonably be expected to constitute an unwarranted invasion of personal privacy. Although the district court had granted the FBI' s first motion for summary judgment in *Negley II*, the decision was reversed by the D.C. Circuit Court of Appeals, and upon remand, the district court ordered the FBI to conduct additional searches of seven sources "conducted to locate records responsive to both plaintiff's 2002 and 2009 FOIA requests." *Negley II*, 825 F. Supp. 2d 63, 68, 71 (D.D.C. Aug. 31, 2011).

Although the FBI has undertaken no new investigative activity of the Plaintiff since 1995, Plaintiff has engaged the FBI in administrative FOIA

requests and FOIA litigation continually since September, 1999. In a letter dated June 15, 2009, Plaintiff, submitted a third FOIA request to the FBI, requesting that it provide a copy of all records in its possession relating, in any way, to James Lutcher Negley. The FBI treated the requests for personal and business records separately. The FBI stated that no documents were located pertaining to plaintiff's business.

Plaintiff filed the instant lawsuit on April 18, 2012. The FBI released responsive documents to plaintiff, in seven rolling releases, between July 16, 2010 and December 28, 2012. A total of 7,427 pages of responsive documents were processed by the FBI, but only 2,288 were provided to plaintiff. Defendants argue that the pages withheld were in response to FOIA exemptions. Seventy-seven pages were referred to the Executiye Office for United States Attorneys ("EOUSA") for processing and released to plaintiff in part or in full. These documents were generated. as part of the *Negley I* litigation, which was successfully defended by the United States Attorney's Office for the Western District of Texas. Defendant states that its search for records to plaintiff's 2009 request did not locate any investigative records which had not previously been disclosed in response to plaintiff's two earlier FOIA requests, but only administrative or litigation files. Plaintiff asserts that Defendants did not adequately search for the records and believes that there are still important documents that should be produced to him.

II. STANDARD

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant

is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(a). The burden is on the moving party to show that "there is an absence of evidence to support the nonmoving party's case." *Freeman v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 860 (5th Cir.2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the moving party does so, the opposing party must go beyond its pleadings and designate specific facts showing there is a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*) (*per curiam*). An issue is genuine if the evidence is such that a reasonable jury could return a verdict in the opposing party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court reviews all facts in the light most favorable to the nonmoving party. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 181 (5th Cir. 2009).

Most FOIA cases are resolved on summary judgment. *Flightsafety Servs. Corp. v. Dep't of Labor*, 326 F.3d 607, 610 (5th Cir. 2003). Courts will generally grant a defendant's motion for summary judgment only if the agency identifies the documents at issue and explains why they fall under the exemptions provided in the statute. *Cooper Cameron Corp. v. U.S. Dept. of Labor, Occupation Safety and Health Admin.*, 280 F.3d 539, 543 (5th Cir. 2002); *see* 5 U.S.C. § 552 (stating the exemptions to the FOIA). In evaluating whether a request for information falls within a FOIA exemption barring disclosure, the district court must balance the public interest in disclosure against the interest Congress intended to protect. *U.S. Department of Justice v. Reporters Comm. For Freedom of* Press, 489 U.S. 749, 776 (1989). Agencies invoking exemptions

must provide the requestor with a document index, known as a Vaughn Index, which lists each withheld document and provides an explanation for why it was withheld. *People for the Am. Way v. NSA*, 462 F. Supp. 2d 21, 30n.5 (D.D.C. 2006).

The defendant must show that it has conducted a reasonable search to uncover all relevant documents. *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). "The issue is not whether the any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982). To demonstrate the adequacy of its search, the agency should provide the court with "affidavits of responsible agency officials which are relatively detailed, nonconclusory, and submitted in good faith." *Greenberg v. Dep't of Treasury*, 10 F. Supp. 2d 3, 12-13 (D.D.C. 1998). The FOIA places the burden on the agency to sustain its disclosure decisions and directs district courts to determine the matter *de novo*. *Cooper Cameron Corp*., 280 F.3d at 543.

III. ANALYSIS

A. Exemptions asserted by the FBI and EOUSA

Defendant argues that it properly invoked FOIA exemptions 5, 6, 7(C), and 7(E) and exemptions 5, 6, and 7(C) by EOUSA in its determination not to disclose documents responsive to Plaintiff's 2009 request. Plaintiff did not challenge the exemptions in his response and concedes that they are appropriate in his sur-reply. Rather, Plaintiff contends that the exemptions "only apply to the documents and records that the FBI has acknowledged exist and are

responsive to plaintiff's FOIA request." Plaintiff further argues that the discovery requested by him is not related to the question of the exemptions. Because Plaintiff does not contest the exemptions as they apply to the documents uncovered by Defendant, the motion for summary judgment regarding defendant's assertion of exemptions 5, 6, 7(C), and 7(E) is GRANTED.

B. Adequacy of the Search for Records

The adequacy of a search is measured by a standard of reasonableness. *Weisberg*, 705 F.2d at 1351. As stated above, the question is not whether other responsive documents may exist, but whether the FBI's search itself was adequate. *Perry*, 684 F.2d at 128. There is no requirement that an agency must search every record system, but the agency must conduct a good faith, reasonable search of those systems of records likely to possess the requested information. *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Once an agency has provided adequate affidavits, the burden shifts back to the plaintiff to demonstrate the lack of a good faith search. *Short v. U.S. Army Corps of Eng'rs*, 593 F. Supp. 2d 69, 73 (D.D.C. 2009). The declarations are awarded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents. *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C. Cir. 1991). "To prove bad faith, a plaintiff must show that the government purposefully withheld documents, not that it merely delayed or was inefficient in producing them." *Smith v. United States*, 95-CV-1950, 1996 WL 696452 (E.D. La. Dec. 4, 1996) *aff'd in part*, 127 F.3d 35 (5th Cir. 1997).

Defendants provide information of the searches for information in the Hardy Declaration in paragraphs 32-35. These paragraphs explain that the searches conducted of automated, manual, and electronic surveillance indices, utilizing a 6-way phonetic breakdown of plaintiff's name. The searches were conducted at various locations by different personnel, to double-check for accuracy. The affidavit was produced by an official. Defendant has met its burden in providing a detailed affidavit. The declarations are awarded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents. *SafeCard Servs., Inc*., 926 F.2d at 1200. Because the FBI has provided adequate affidavits, the burden shifts back to the Plaintiff to demonstrate the lack of a good faith search *Short*, 593 F. Supp. 2d at 73. Plaintiff must prove that defendant purposefully withheld information to demonstrate bad faith. *Smith*, 1996 WL 696452 (E.D. La. Dec. 4, 1996) *aff'd in part*, 127 F.3d 35 (5th Cir. 1997). Although Plaintiff does not overtly assert a bad faith claim, he makes six arguments alleging that the search conducted by Defendant was not adequate and that summary judgment should be precluded.

1. Handwritten notation on Negley 437

Plaintiff is requesting that the Court authorize discovery to allow him to understand the meaning of the notations on the document known as Negley 437. Plaintiff believes that there might nearly 500,000 pages of documents that are possibly related to him and that the FBI should be required to turn them over. The Hardy Declaration states that the investigation of

Plaintiff oniy took place in 1995 and was thereafter dismissed. The declaration further states that there were only 163 pages produced in the investigation and that no document regarding plaintiff was of that great of a size. The information in a defendant's declaration cannot be rebutted by purely speculative claims about the existence and discoverability of other documents. *SafeCard Servs., Inc*., 926 F.2d at 1200. The question is not whether there may be documents, but whether the search by the agency was adequate. *Perry*, 684 F.2d at 128. Defendant has addressed the notation in the Hardy Declaration and given an explanation for it.

Plaintiff is relying on remote possibilities that there are more documents that relate to him, but he has not rebutted the information with more than speculative claims. In *Rugiero v. U.S. Dept. of Justice*, 257 F.3d 534, 547 (6th Cir 2001), the court held that an agency's search was adequate after conducting three separate searches from three different offices for information regarding the requestor. An agent in that case testified that there were no other files regarding the requestor and he had not been under any more investigation after the requester made a speculative claim regarding possible documents. *Id.* The *Rugiero* court held that summary judgment was appropriate because the legal standard focuses on the actual. search and not whether the documents may exist. *Id.* at 547-48.

2. The FBI's alleged failure to comply with document referral regulations

Plaintiff argues that defendant's referral of EOUSA documents to the EOUSA lacked notice to him and he was not made aware of the referral. According to 28 C.F.R. § 16.4(f), when an agency refers all or part of a

request to another agency, it "ordinarily shall notify the requestor of the referral." The first time plaintiff allegedly, learned of the referral was when the attorney who represented him in *Negley II* notified him of his receipt of the disclosure of twenty-one pages from the EOUSA in March 2013 after the referral took place in January 2013. Plaintiff believes the notification was untimely. Plaintiff's counsel, however, admits that the directive for notice is not unconditionally mandatory. This issue does not appear to be relevant to whether Defendants conducted an adequate search. Plaintiff then reframes this issue by stating that it was unreasonable for the referral to be made in January 2013 in response to the 2009 request made in July 2010. Plaintiff is asking why it took defendant so long to refer the documents to EOUSA. The question of why the defendant referred the documents at a later time is immaterial because the statute merely deals with notification at the time the document is actually referred. *See* 28 C.F.R. § 164(f) (stating that notification should occur when the documents are referred). There is no justiciable issue regarding the notification of the referral due to its non-mandatory nature and the timeframe in which notice was given to Plaintiff about the referral.

3. Withdrawal of the Privacy Act privilege/ exemption

Plaintiff argues that defendant previously relied on the Privacy Act exemption to withhold information. This exemption is related to law enforcement matters. Defendant states that it withdrew its use of the Privacy Act in its response to Plaintiff's motion for reconsideration. Defendant argues that regardless of

whether the exemption was used, it was only to withhold information after the FBI conducted its searches. The former use and later withdrawal of the exemption do not seem to be relevant to whether the defendant conducted an adequate search. The Hardy Declaration states that no information was withheld under the Privacy Act exemption. On April 23, 2013 EOUSA released information to Plaintiff after being informed that the Privacy Act exemption was no longer being evoked. Plaintiff's concern and this issue are moot.

4. The matter of *res judicata*

Plaintiff argues that the FBI's attempt to claim res judicata is misplaced and should be denied because an adequate search for the 2009 FOIA request has not occurred. It was previously held in *Negley II*, however, that the FBI had responded to the 2002 request by also conducting searches to a much broader request. 825 F. Supp. 2d at 71. After those searches took place there was no investigatory material found that had not been released. *Id*. There were administrative files located, but those are not typically produced for monetary reasons. *See id*. at 68 (explaining that administrative files are not usually requested because requestors do not want to pay for a copy of their own request). The court in *Negley II* held that Defendant's actions regarding the 2002 search was reasonable. *Id*. at 71. The court also held that the FBI had conducted searches that went beyond the 2002 request and held that the 2009 request did not uncover any new investigatory material. *Id*. at 68. It seems that the court believed the search of the 2009 request was reasonable as well.

The defendants have also supported the adequacy of the 2009 request search with the Hardy Declaration. The declaration provides information regarding the 2009 search that describes in detail what the FBI did to search for records. The affidavit is entitled to a presumption of good faith and Plaintiff has not brought any evidence of bad faith in response. *Short*, 593 F. Supp. 2d at 73. Even if the issue was not precluded by res judicata the Hardy Declaration would support a finding of an adequate search for the 2009 request.

5. The erroneous file number

Plaintiff addresses the error made by defendant in the numbering of its files. One of the files was identified as "190-SA-C-14" which number is apparently related to sedition files in the FBI file system. After inquiring with Defendant on the issue it was explained that the designation "14" was in error and the file should have read. "1-4." The error was not corrected in the Hardy Declaration, but defendant addressed the issue in response to Plaintiff's inquiry. A typographical/proof-reading error of one numerical digit in the 42-page declaration does not present an issue of material fact.

6. The sufficiency of the representative sample and appointment of a master to review the documents

The FBI has submitted a representative sample of withheld documents, which compromises 10% of the total number of documents containing any withheld information. Defendant has also provided a Vaughn Index containing codes of the information including the exemptions. Plaintiff does not believe that the use of a

sample is appropriate, but does not point to any case law that supports his argument. In fact, it has been held that when the number of documents is substantial, a district court may resort to a "well-established practice in FOIA of randomly sampling documents in question." *Neely v. FBI*, 208 F.3d 461, 467 (4th Cir. 2000). "Representative sampling is an appropriate measure to test an agency's exemption FOIA claims when a large number of documents is involved." *Bonner v. U.S. Dep't of State*, 928 F.2d 1148, 1151 (D.C. Cir. 1991). A court can make conclusions from a representative sample of documents if they documents are properly selected. *Fensterwald v. U.S. Central Intelligence Agency*, 443 F. Supp. 667, 669 (D.D.C. 1977). The Hardy Declaration goes into detail about how documents were selected for the sample. The declaration states that the FBI was careful in its selection of materials. Plaintiff has not challenged the declaration with any evidence of bad faith. Based on precedent in FOIA cases, a representative sample seems appropriate in determining the adequacy of the search in this case.

Plaintiff believes that two special masters should be appointed to review all of the pages of previously reviewed FBI files. Federal Rule of Civil Procedure 53(a) authorizes the involuntary appointment of a special master to make or recommend findings, but only if there is "some exceptional condition," or the "need to perform an accounting." The Court has discretion to appoint a master, but plaintiff has not pointed to any exceptional condition that would compel this Court to do so. Plaintiff argues that a review of all the records could detect notes and other recording of information relevant to the existence of records relating

to him. However, again, "[t]he issue is not whether the any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d at 128. Plaintiff made no specific challenge to the representative sample other than saying that it was inappropriate to justify the claimed exemptions. However, the validity of the exemptions was conceded by the plaintiffs in relation to the documents already known to exist. Moreover, oftentimes, the appointment of a master can be more troublesome than helpful. *Meeropol v. Meese*, 790 F.2d 942, 961 (D.C. Cir. 1986) (holding that if a master makes decisions without the trial judge, judicial authority has been delegated to someone "who has not been appointed pursuant to article III of the Constitution" and that it can be an inefficient use of judicial time or resources).

IV. CONCLUSION

Finding that the search for documents was adequate and that all non-exempt documents have been produced, Defendant's motion for summary judgment (docket no. 38) is GRANTED. The Clerk of the Court shall enter final judgment in favor of the Defendant. Any motions not otherwise disposed of are DENIED AS MOOT.

IT IS SO ORDERED.

SIGNED this 31 day of July, 2013.

/s/_____
United States District Judge Orlando L. Garcia

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Civil Action No. SA-12-CV-362-OLG

[Filed July 31, 2013]

JAMES LUTCHER NEGLEY)
Plaintiff)
)
v.)
)
FEDERAL BUREAU OF INVESTIGATION)
Defendant)

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

* * *

☒ the plaintiff recover nothing, the action be dismissed.

* * *

This action was *(check one)*:

* * *

☒ decided by Judge Orlando L. Garcia on a motion for (defendant's) summary judgment.

Date: 07/312013

CLERK OF COURT
WILLIAM G. PUTNICKI
/s/
Rosanne M. Garza
Signature of Clerk or Deputy Clerk

APPENDIX C

5 U.S. Code § 552 - Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general

applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the

> nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
>
> (E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each

agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)

(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which

(i) reasonably describes such records and

(ii) is made in accordance with published rules stating the time, place, fees (if any),

and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a (4))) [1] shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

(4)

(A)

(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

(ii) Such agency regulations shall provide that—

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is

> scholarly or scientific research; or a representative of the news media; and
>
> (III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

In this clause, the term "a representative of the news media" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract

would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section—

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That the court's review of the matter shall be limited to the record before the agency.

(viii) An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in

the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed. Pub. L. 98–620, title IV, § 402(2),Nov. 8, 1984, 98 Stat. 3357.]

(E)

(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any

case under this section in which the complainant has substantially prevailed.

(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either—

(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

(F)

(i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall

send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(ii) The Attorney General shall—

(I) notify the Special Counsel of each civil action described under the first sentence of clause (i); and

(II) annually submit a report to Congress on the number of such civil actions in the preceding year.

(iii) The Special Counsel shall annually submit a report to Congress on the actions taken by the Special Counsel under clause (i).

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)

(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

> (i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and
>
> (ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section. The 20-day period shall not be tolled by the agency except—

> (I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably

requested from the requester under this section; or

(II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period.

(B)

(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to

arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests—

(I) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(II) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(III) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having

substantial subject-matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C)

(i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of

any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term "exceptional circumstances" does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing a request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D)

(i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope

of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E)

(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure—

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which

the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review an agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term "compelling need" means—

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and

correct to the best of such person's knowledge and belief.

(F) In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made.

(7) Each agency shall—

(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and

(B) establish a telephone line or Internet service that provides information about the status of a request to the person making the request using the assigned tracking number, including—

(i) the date on which the agency originally received the request; and

(ii) an estimated date on which the agency will complete action on the request.

(b) This section does not apply to matters that are—

(1)

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—

(A)

(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

(A) could reasonably be expected to interfere with enforcement proceedings,

(B) would deprive a person of a right to a fair trial or an impartial adjudication,

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(F) could reasonably be expected to endanger the life or physical safety of any individual;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

(c)

(1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that

(i) the subject of the investigation or proceeding is not aware of its pendency, and

(ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

(d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(e)

(1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include—

(A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(B)

(i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and

(ii) a complete list of all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), the number of occasions on which each statute was relied upon, a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;

(C) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median and average number of days that such requests had been pending before the agency as of that date;

(D) the number of requests for records received by the agency and the number of requests which the agency processed;

(E) the median number of days taken by the agency to process different types of requests, based on the date on which the requests were received by the agency;

(F) the average number of days for the agency to respond to a request beginning on the date on which the request was received by the agency, the median number of days for the agency to respond to such requests, and the range in number of days for the agency to respond to such requests;

(G) based on the number of business days that have elapsed since each request was originally received by the agency—

(i) the number of requests for records to which the agency has responded with a determination within a period up to and including 20 days, and in 20-day increments up to and including 200 days;

(ii) the number of requests for records to which the agency has responded with a determination within a period greater than 200 days and less than 301 days;

(iii) the number of requests for records to which the agency has responded with a determination within a period greater than 300 days and less than 401 days; and

(iv) the number of requests for records to which the agency has responded with a determination within a period greater than 400 days;

(H) the average number of days for the agency to provide the granted information beginning on the date on which the request was originally filed, the median number of days for the agency to provide the granted information, and the range in number of days for the agency to provide the granted information;

(I) the median and average number of days for the agency to respond to administrative appeals based on the date on which the appeals originally were received by the agency, the highest number of business days taken by the agency to respond to an administrative appeal, and the lowest number of business days taken by the agency to respond to an administrative appeal;

(J) data on the 10 active requests with the earliest filing dates pending at each agency, including the amount of time that has elapsed since each request was originally received by the agency;

(K) data on the 10 active administrative appeals with the earliest filing dates pending before the agency as of September 30 of the preceding year, including the number of business days that have elapsed since the requests were originally received by the agency;

(L) the number of expedited review requests that are granted and denied, the average and median number of days for adjudicating expedited review requests, and the number adjudicated within the required 10 days;

(M) the number of fee waiver requests that are granted and denied, and the average and median number of days for adjudicating fee waiver determinations;

(N) the total amount of fees collected by the agency for processing requests; and

(O) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended by the agency for processing such requests.

(2) Information in each report submitted under paragraph (1) shall be expressed in terms of each principal component of the agency and for the agency overall.

(3) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means. In addition, each agency shall make the raw statistical data used in its reports available electronically to the public upon request.

(4) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United

States shall notify the Chairman and ranking minority member of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(5) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(6) The Attorney General of the United States shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term—

(1) "agency" as defined in section 551 (1) of this title includes any executive department, military department, Government corporation, Government

controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes—

(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format; and

(B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

(g) The head of each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including—

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 of title 44, and under this section.

(h)

(1) There is established the Office of Government Information Services within the National Archives and Records Administration.

(2) The Office of Government Information Services shall—

(A) review policies and procedures of administrative agencies under this section;

(B) review compliance with this section by administrative agencies; and

(C) recommend policy changes to Congress and the President to improve the administration of this section.

(3) The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests under this section and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of this section and issue reports detailing the results of such audits.

(j) Each agency shall designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

(k) The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

(1) have agency-wide responsibility for efficient and appropriate compliance with this section;

(2) monitor implementation of this section throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing this section;

(3) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of this section;

(4) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing this section;

(5) facilitate public understanding of the purposes of the statutory exemptions of this section by including concise descriptions of the exemptions in both the agency's handbook issued under subsection (g), and the agency's annual report on this section, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply; and

(6) designate one or more FOIA Public Liaisons.

(l) FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a requester under this section can raise concerns about the service the requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center Staff.

FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.