

EXHIBIT

2

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

JAMES LUTCHER NEGLEY,)	
Plaintiff,)	
v.)	Civil Action No. SA-12-CV-00362-OLG
FEDERAL BUREAU OF INVESTIGATION,)	
Defendant.)	

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), formerly at Federal Bureau of Investigation Headquarters (“FBIHQ”) in Washington, D.C., and currently located in Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 276 employees who staff a total of ten (10) FBIHQ units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA, as amended by the

OPEN Government Act of 2007 and the Open FOIA Act of 2009; Privacy Act (“PA”); Executive Order 13526; Presidential, Attorney General and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI’s responses to the June 15, 2009 FOIA/Privacy Act (“FOIPA”) request of James Lutcher Negley seeking access to FBI records pertaining to himself and his business, Davis, Joseph & Negley. In its search for records responsive to this FOIPA request, the FBI identified only administrative and litigation files that had not been previously provided to plaintiff through prior FOIPA requests and litigation. From these administrative and litigation files, the FBI processed a total of 7,427 pages and provided the records to plaintiff in seven releases made between July 2010 and December 2012.¹ Of these 7,427 pages, the FBI released

¹ This number does not include the approximately 163 pages released to plaintiff in connection with prior FOIPA requests made to the FBI’s Sacramento and San Francisco Field Offices that were re-released to plaintiff as part of his June 2009 FOIPA request. Over the years, plaintiff has made multiple FOIA requests to various FBI field offices. Two of these FOIA requests have resulted in prior litigation. On October 7, 1999, plaintiff made a FOIA request to the Sacramento Field Office seeking all records pertaining to himself. (At the time, FBI FOIA regulations required that in order to seek documents from a specific field office, the FOIA inquiry had to be made to the specific field office from which the records were being sought. RIDS modified its policy in Spring 2009 to no longer require targeted FOIA requests to each individual field office. For FOIA requests received after the policy change, searches were automatically conducted for FBI Headquarters and all FBI field offices). The search for records responsive to plaintiff’s October 1999 Sacramento Field Office request located records from the Sacramento Field Office file 149A-SC-C27507-S (Serials 101 and 355 – A serial is a document (which may include enclosures or attachments) that is contained within an FBI file. Each serial in a file is sequentially numbered for ease of identification). This request resulted in litigation in the U.S. District Court for the Western District of Texas, Austin Division in January 2001. The FBI was granted summary judgment and the case was dismissed with prejudice on April 10, 2002. *See Negley v. FBI*, 01-CV-0057 (W.D. TX) (the “Austin Litigation”). While this litigation was still pending, plaintiff

5,139 pages in full; 1,460 pages in part; and withheld 828 pages in full pursuant to applicable FOIA exemptions.² As such, only 2,288 pages provided to plaintiff contain information that was withheld in full or in part.³

(4) The FBI submits this declaration in support of its motion for summary judgment in order to provide the Court and plaintiff with the justifications for the withholding of information from the releases in accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), pursuant to four separate FOIA Exemptions 5, 6, 7(C), and 7(E), 5 U.S.C. §§ 552 (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E).

CORRESPONDENCE HISTORY

made a FOIA request to the San Francisco Field Office in January 2002 also seeking all records pertaining to him. This January 2002 request, which involved responsive records from Sacramento Field Office files 149A-SC-C27507-S (Serials 101 and 355), San Francisco Field Office file 149A-SF-106204-S (Serials 3041 and 3865), and San Francisco file 149A-SF-106204 (ZyImage documents) also resulted in litigation, this time in the U.S. District Court for the District of Columbia. *See Negley v. FBI*, 03-CV-2126 (D.D.C.) (the "D.C. Litigation"). After a lengthy litigation, the D.C. district court ultimately issued summary judgment in favor of the FBI in this case as well, which plaintiff appealed and the judgment was later affirmed by the D.C. Court of Appeals. The only outstanding issue with respect to the D.C. Litigation is attorneys' fees and costs for which the parties are awaiting the Court's ruling. The records in each of these responsive files are essentially duplicates of the same records. Plaintiff Negley was interviewed by the Sacramento Field Office based on a tip received in connection with the FBI's investigation of the Unabomber and Sacramento created two serials that document its efforts and the report sent to the San Francisco Field Office. As such, the Sacramento Field Office serials were re-serialized in the San Francisco Field Office's UNABOMB file such that Sacramento serials 101 and 355 are the same as San Francisco serials 3041 and 3865. The Zyimage documents that were produced are again variations of these same serials. This is the third lawsuit that plaintiff has filed seeking records on himself.

²The FBI did not withhold any documents as duplicates. As such, the pages reviewed and processed in connection with plaintiff's FOIA request include a large number of pages with only minor differences, if any. Additionally, in reviewing the records to prepare this declaration the FBI discovered 22 pages from its litigation file pertaining to the D.C. Litigation – litigation file number 197-SF-A135225 -- that were not previously released to plaintiff. Although the pages were processed in connection with an earlier release made in this case, the pages were mistakenly not released earlier. These pages are being released to plaintiff in conjunction with this declaration and can be found at Exhibit S and are Bates-stamped pages Negley-7381-Negley-7402. The page counts provided herein and the exemptions referenced in this declaration are inclusive of these 22 pages (6 pages released in part, 11 released in full, and 5 withheld in full).

³Of these 2,288 pages, 77 pages were referred to the U.S. Department of Justice's Executive Office for the United States Attorney ("EOUSA") for direct response to plaintiff.

(5) By letter dated June 15, 2009, plaintiff submitted a FOIPA request to FBIHQ, seeking a copy of “all records in the possession of the Federal Bureau of Investigation relating, in any way, to James Lutchter Negley (D.O.B. /45: 3905 Laguna Vista Cove, Austin, TX 78746), to the undersigned.” Plaintiff also sought, “all records related to any permutation of James Lutchter Negley’s name, as well as his business, Davis, Joseph & Negley (591 Redwood Highway, Suite 215, Mill Valley, CA 94941).” In connection with this request, the FBI searched for records at FBI Headquarters and all FBI field offices. This request includes two specific subjects: 1) the plaintiff and 2) plaintiff’s business. As such, RIDS treated the request as two separate FOIPA requests for more efficient and complete handling. (**See Exhibit A**).

(6) The FBI acknowledged plaintiff’s request for information on himself by letter dated July 22, 2009, and assigned the request FOIPA No. 1133487-000. (**See Exhibit B**).

(7) The FBI opened plaintiff’s request for information on his business as FOIPA No. 1134498-000. The FBI acknowledged this request by letter also dated July 22, 2009. (**See Exhibit C**).

(8) By letter dated October 14, 2009, the FBI advised plaintiff that after conducting its search it had not identified any records concerning plaintiff’s business. (**See Exhibit D**).

(9) The searches conducted to locate records responsive to plaintiff’s June 15, 2009 FOIPA request seeking information on himself (FOIPA No. 1133487-000) identified the same 1995 investigatory information previously provided to the plaintiff in prior FOIPA requests. The only additional responsive documents located were administrative files that are typically not processed as part of a FOIPA request.⁴ (**See Exhibit E**). Plaintiff was notified of the search

⁴The previously processed investigatory files, which were the subject of the Austin and D.C. Litigations, were

results by letter dated November 30, 2009. Specifically, the FBI asked plaintiff, through his counsel at the time, if he wished to receive “copies of his prior FOIPA request files, a copy of one serial in an Office of Professional Responsibility general file pertaining to his letter to Director Mueller, a copy of the litigation file related to Mr. Negley’s prior lawsuit in the Western District of Texas, and two serials within a control file concerning the Congressional Inquiry he previously made.”⁵ Again, the FBI advised plaintiff that these types of documents are not routinely processed unless specifically requested. The FBI also asked if plaintiff would like the documents he previously received in connection with his other FOIPA requests (the 1995 investigatory records from the Sacramento and San Francisco Field Offices). The FBI specifically requested that the plaintiff provide his response in writing within 60 days, by mail or fax, to the RIDS Work Process Unit. (**See Exhibit E**).

(10) After not receiving a response from plaintiff to its November 30, 2009 letter, the FBI again inquired, by letter dated January 8, 2010, if plaintiff wished to receive the material outlined in the FBI’s November 30, 2009 letter. (**See Exhibit F**).

(11) Although plaintiff did not respond to the FBI’s multiple inquiries, the FBI’s Work Process Unit forwarded the administrative documents to its Backlog Manager for further

created in connection with the FBI’s investigation of the UNABOMB case. As the records indicate, the FBI received a lead from the UNABOMB tip line regarding plaintiff. Consistent with sound investigatory practices, the FBI interviewed plaintiff and shortly thereafter he was ruled out as a potential suspect in September 1995. The records from this encounter are the only records the FBI has ever located related to any investigatory interest in either plaintiff or his business. All documents located by the FBI subsequent to the investigatory documents contained within the UNABOMB file that are related to plaintiff are related to his subsequent FOIA requests and litigations.

⁵ The administrative files pertaining to files opened by various field offices to track and manage FOIA requests bear the file classification “190;” the files created to manage civil litigation actions bear the file classification “197;” the Office of Professional Responsibility file bears the file classification “263;” and the file pertaining to the Congressional inquires bears the file classification “62”.

assignment to a FOIPA analyst for processing on January 13, 2010.⁶ On or about April 9, 2010, the FBI began processing of the documents, despite plaintiff's lack of response.

(12) On July 16, 2010, the FBI made its first interim release of documents regarding Negley's 2009 FOIA request to the plaintiff which consisted of 716 pages being released out of 825 pages that were reviewed.⁷ This release included records from the following files:

- 62-HQ-C1077229 (administrative file related to plaintiff's April 2008 Congressional inquiry);
- 190-SD-C60287, serial 64 (administrative file for plaintiff's September 2002 FOIA request to the FBI's San Diego Field Office);
- 190-LA-C2-E serials 597, 598, 611, and 612 (administrative file for plaintiff's October 1999 FOIA request to the FBI's Los Angeles Field Office)
- 190-HQ-C1189353, serials 558 and 603 (administrative file for plaintiff's June and July 1999 FOIA requests to FBI Headquarters);
- 190-NO-C266, serial 1135 (administrative file for plaintiff's March 2000 FOIA request to the FBI's New Orleans Field Office);
- 190-SA-C-14 serials 188 and 189 (administrative file for plaintiff's October 7, 1999 FOIA request to the FBI's San Antonio Field Office);
- 190-MM-C1-B, serial 2406 (administrative file for plaintiff's April 2000 FOIA request to the FBI's Miami Field Office);
- 190-SF-0, serial 3087 (administrative file for plaintiff's January 2002 FOIA request to the FBI's San Francisco Field Office);
- 263-HQ-0, serial 652 (administrative file related to plaintiff's December 19, 2002 letter to FBI Director Mueller)
- 197A-SC-35435 (the litigation file related to the Austin Litigation); and
- 197A-SF-A135225, serial 8 (the litigation file related to the D.C. Litigation)

In addition to these administrative files, the FBI provided plaintiff with the approximately 163 pages of material previously processed and released to him as part of the FOIA requests at issue

⁶ The plaintiff filed the current 2009 FOIPA request while the D.C. Litigation was still being actively litigated. At the time it was unclear whether the Court in that litigation would order the FBI to include these records as responsive to the 2002 San Francisco FOIA request given that they were created outside of the cut-off date for records responsive to the 2002 request. In an effort to be prepared should the Court rule against it, the FBI chose to begin processing the administrative documents responsive to plaintiff's 2009 FOIA request. The Court subsequently ruled that the administrative records were not responsive to plaintiff's 2002 FOIA request.

⁷ Privacy Act Section 552a (d)(5) and Exemption (k)(2) were inadvertently asserted in the release letter mailed to plaintiff dated July 16, 2010.

in the Austin and D.C. Litigations -- file numbers 149A-SC-C27507-S (Serials 101 and 355), 149A-SF-106204-S (Serials 3041 and 3865), and 149A-SF-106204 (ZyImage documents). (**See Exhibit G**).

(13) On December 16, 2010, the FBI made its second interim release of documents to the plaintiff.⁸ The FBI reviewed 1,457 pages and released 1,430 pages in whole or in part. This release consisted of information contained within the FBI's 197 file pertaining to the ongoing D.C. Litigation. The FBI informed plaintiff that he owed \$143.00 for duplication fees for this release. Plaintiff was also informed that if he did not "remit payment within 30 days of a release, we will assume that you are no longer interested in continuing the processing of this request and your case will be administratively closed." (**See Exhibit H**).

(14) After not receiving payment for the December 16, 2010 second interim release, several months passed and the FBI closed this FOIA request due to non-payment on June 30, 2011.⁹ On July 6, 2011, plaintiff's counsel inquired as to why additional interim releases had not been made and claimed that plaintiff had paid the duplication fees for both interim releases. (**See Exhibit I**).

(15) On August 10, 2011, the FBI responded to plaintiff and advised that payment had not been received for the December 10, 2010 release. Plaintiff's counsel was further informed that the request would be re-opened upon receipt of payment or proof that payment had been

⁸ Privacy Act Section (d)(5) was inadvertently asserted in the release letter mailed to plaintiff dated December 16, 2010.

⁹ Each release letter provides the requester with the amount of expected payment and the address to which payment should be directed. Plaintiff was also informed that if payment was not received within 30 days, the request would be closed for non-payment. Due to the time invested in this request, the open D.C. litigation, and the cumbersome steps required to re-open the request within RIDS's processing system should payment be received, the FBI left this request open for several months beyond the usual 30 days. However, when no payment was received, the FOIA was closed.

made. **(See Exhibit J).**

(16) By letter dated August 29, 2011, plaintiff's counsel responded by remitting payment for the December 10, 2010 release. **(See Exhibit K).**

(17) Plaintiff's FOIA request was then re-opened and processing began again. Plaintiff's counsel submitted another status inquiry on October 13, 2011. **(See Exhibit L).**

(18) Plaintiff was provided notification of the re-opened request on October 21, 2011. **(See Exhibit M).**

(19) After the FOIA was re-opened the FBI resumed work on plaintiff's FOIA request. Much of the outstanding material to be processed originated with the FBI's Office of the General Counsel attorneys who worked on the D.C. Litigation. Although the information had been identified, it had to be collected, scanned into the FBI's system for processing and reviewed by FBI agency counsel before it could be released. The FBI made its third release of documents on August 31, 2012, reviewing 1,020 pages and releasing 878 pages of administrative material. Again, all of the material released was from the D.C. Litigation file. **(See Exhibit N).**¹⁰

(20) By letter dated September 25, 2012, the FBI made its fourth release to the plaintiff. The FBI reviewed 924 pages and released 836 pages in full or in part. Again, all of the material released was from the D.C. Litigation file. **(See Exhibit O).**

(21) On November 6, 2012, the FBI made its fifth release of documents to the plaintiff. The FBI reviewed 1100 pages and released 1,007 pages in full or part. Again, all of the material released was from the D.C. Litigation file. **(See Exhibit P).**

¹⁰The FBI's letter was created and stored electronically in the FBI's FOIA Document Processing System in Corel WordPerfect format. As of October 1, 2012, the FBI no longer utilizes WordPerfect, and consequently, the letter has been electronically converted to Microsoft Word so it could be printed and included as an exhibit. Although there might be minor formatting differences, the letter's substance is identical to that released to plaintiff.

(22) By letter dated November 30, 2012, the FBI made its sixth release of documents to plaintiff. The FBI reviewed 878 pages and released 685 pages in full or part. Again, all of the material released was from the D.C. Litigation file. (**See Exhibit Q**).

(23) By letter dated December 28, 2012, the FBI made its seventh interim release of documents to plaintiff. The FBI advised plaintiff that it reviewed 1,201 pages and was releasing 1,030 pages in full or part. Again, all of the material released was from the D.C. Litigation file. (**See Exhibit R**).

(24) After the interim releases were made, the FBI conducted an additional review of the documents and located 77 pages that originated with the Executive Office of United States Attorneys (“EOUSA”) and were referred to that office for direct response to the plaintiff. The FBI received a copy of EOUSA’s initial response of 21 pages and upon review noted certain inconsistencies. Those inconsistencies have since been corrected and the FBI has been informed by EOUSA that a revised copy was sent to plaintiff on April 23, 2013. (**See Boseker Declaration, Exhibit C**). EOUSA has provided the FBI with a revised copy of the release and an index explaining the FOIA exemptions they asserted. (**See Boseker Declaration, Exhibit D**).

(25) Upon review of the documents to prepare this declaration, the FBI discovered that a 22-page section of the 197-SF-A135225 DC FOIA Litigation File was reviewed and processed but was inadvertently excluded from printing during the second interim release. Of these 22 pages, the FBI is releasing 17 pages in full or in part, and withholding five pages in full pursuant to FOIA exemptions (b)(6), (b)(7)(C), and (b)(7)(E). The records are attached and are Bates-stamped Negley-7381-Negley-7402. (**See Exhibit S**).

EXPLANATION OF THE CENTRAL RECORDS SYSTEM

(26) The Central Records System (“CRS”), which is utilized to conduct searches in response to FOIA and Privacy Act requests, enables the FBI to maintain all information which it has acquired in the course of fulfilling its mandated law enforcement responsibilities. The records maintained in the CRS consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes. This system consists of a numerical sequence of files broken down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication, activity, or foreign intelligence matter (or program). Certain records in the CRS are maintained at FBIHQ. Records that are pertinent to specific field offices of the FBI are maintained in those field offices. Although the CRS is primarily designed to serve as an investigative tool, the FBI also utilizes the CRS to conduct searches that are likely to yield documents responsive to FOIA and Privacy Act requests. The mechanism that the FBI uses to search the CRS is the Automated Case Support System (“ACS”) (explained in paragraph 30, *infra*).

(27) Access to the CRS is obtained through the General Indices, which are arranged in alphabetical order. The General Indices consist of index cards on various subject matters that are searched either manually or through the automated indices. The entries in the General Indices fall into two categories:

(a) A “main” entry – A “main” entry, or “main” file, carries the name corresponding with a subject of a file contained in the CRS. For example, in the UNABOM investigation Theodore J. Kaczynski is listed as a main entry. Theodore J. Kaczynski is the main subject of the UNABOM investigation and is the suspect who was ultimately sentenced to life in prison, as a result of the UNABOM investigation. In the plaintiff’s litigation files, the plaintiff James Lutchter Negley” is listed as a “main” entry as he is the main subject of the litigation.

(b) A “reference” entry – A “reference” entry, sometimes called a “cross-reference,” is generally only a mere mention or reference to an individual, organization, or other

subject matter, contained in a document located in another “main” file on a different subject matter. For example, James Lutch Negley is a reference entry in the UNABOM investigation. As he was not considered a viable suspect, his status did not rise to that of a “main” entry within the UNABOM file but shows up in a search as a “reference” for the file.

(28) Access to the CRS files in FBI field offices is also obtained through the General Indices (automated and manual), which are likewise arranged in alphabetical order, and consist of an index on various subjects, including the names of individuals and organizations. Searches made in the General Indices to locate records concerning a particular subject, such as James Lutch Negley, are made by searching the subject requested in the index. FBI field offices have automated indexing functions.

(29) On or about October 16, 1995, the ACS system was implemented for all field offices, Legal Attaches (“Legats”), and FBIHQ in order to consolidate portions of the CRS that were previously automated. Because the CRS cannot electronically query the case files for data, such as an individual’s name or social security number, the required information is duplicated and moved to the ACS so that it can be searched. Over 105 million records from the CRS were converted from automated systems previously utilized by the FBI. Automation did not change the CRS; instead, automation has facilitated more economic and expeditious access to records maintained in the CRS.

(30) ACS consists of three integrated, yet separately functional, automated applications that support case management functions for all FBI investigative and administrative cases:

(a) Investigative Case Management (“ICM”) – ICM provides the ability to open, assign, and close investigative and administrative cases as well as set, assign, and track leads. The Office of Origin (“OO”), which sets leads for itself and other field offices, as needed, opens a case. The field offices that receive leads from the OO are referred to as Lead Offices (“LOs”) – formerly known as Auxiliary Offices. When a case is opened, it is assigned a Universal Case File Number (“UCFN”), which is utilized by all FBI field

offices, Legats, and FBIHQ that are conducting or assisting in the investigation. Using a fictitious file number “111-HQ-12345” as an example, an explanation of the UCFN is as follows: “111” indicates the classification for the specific type of investigation; “HQ” is the abbreviated form used for the OO of the investigation, which in this case is FBIHQ; and “12345” denotes the individual case file number for the particular investigation.

(b) Electronic Case File (“ECF”) – ECF serves as the central electronic repository for the FBI’s official text-based documents. ECF supports the universal serial concept, in that only the creator of a document serializes it into a file. This provides a single-source entry of serials into the computerized ECF system. All original serials are maintained in the OO case file.

(c) Universal Index (“UNI”) – UNI continues the universal concepts of ACS by providing a complete subject/case index to all investigative and administrative cases. Only the OO is required to index; however, the LOs may index additional information as needed. UNI, an index of approximately 115 million records, functions to index names to cases, and to search names and cases for use in FBI investigations. Names of individuals or organizations are recorded with identifying applicable information such as date or place of birth, race, sex, locality, Social Security number, address, and/or date of event.

(31) The decision to index names other than subjects, suspects, and victims is a discretionary decision made by the FBI Special Agent (“SA”) assigned to work on the investigation, the Supervisory SA (“SSA”) in the field office conducting the investigation, and the SSA at FBIHQ. The FBI does not index every name in its files; rather, it indexes only that information considered to be pertinent, relevant, or essential for future retrieval. Without a “key” (index) to this enormous amount of data, information essential to ongoing investigations could not be readily retrieved. In addition, the FBI files would thus be merely archival in nature and could not be effectively used to serve the mandated mission of the FBI, which is to investigate violations of federal criminal statutes. Therefore, the General Indices to the CRS files are the means by which the FBI can determine what retrievable information, if any, the FBI may have in its CRS files on a particular subject matter or individual, i.e., James Lutchter Negley, Davis, Joseph & Negley.

SEARCH FOR RESPONSIVE FILES

I. James Lutcher Negley

(32) Plaintiff's FBIHQ request dated July 15, 2009, and assigned FOIPA Number 1134498-000, sought records on himself. The FBI searched for and processed all main and cross-references located in connection with its search for records responsive to plaintiff's 2009 request. The FBI searched the automated and manual indices of the CRS on June 24, 2009, June 30, 2009, July, 6, 2009, and September 28, 2009, utilizing a six-way phonetic breakdown of plaintiff's name, including any variations of the first or last name that sound like or are spelled differently than the name. These searches were conducted in various locations and by multiple FBI personnel¹¹, to ensure accuracy – all producing the same results. In each case, the search included the following variations of plaintiff's name: "Negley, James, Lutcher", "Negley, James, L", "Negley, James", "Negley, Lutcher", "Negley, J L", "Negley, J", "Negley, James, Luther" and "Negley, Luther". The FBI also used plaintiff's date of birth, place of birth, and social security number to facilitate the identification of responsive records. These searches were not limited by location or date. The only responsive material located from these searches were serials found within the UNABOM investigation which plaintiff had previously received, and

¹¹ The San Francisco field office of the FBI also conducted updated searches of the ZYIndex on October 13, 2009. The ZyIndex (also referred to as Zybase and ZyImage) is a standalone computer system developed specifically for the storage of duplicate text information from the UNABOMB investigation. It is not a separate system of records from the CRS because the information is merely duplicated text of information already contained in the CRS. The search string used to search ZyIndex was simply, "NEGLEY". Any and all documents that contain the word would appear under such a search. The search located seven documents, of which only six were identifiable with the plaintiff. The seventh was for another individual with the last name Negley who had a different first and middle name and different occupation. As such, this seventh document was deemed non-responsive. The remaining six documents were duplicative of information previously provided to the plaintiff in his prior FOIPA requests and litigation. These pages, along with the other pre-processed material from the FOIA requests at issue in the Austin and the D.C. Litigations were provided to plaintiff in connection with the first interim release made in this case. No new information was located as a result of this search. The search was conducted several times for verification with the exact same results which have not changed from searches conducted in the past. There was no limit made based on date or other factors beyond name.

administrative material that is normally provided only upon request. No other criminal or intelligence files were located on the plaintiff as a result of these searches. Plaintiff was notified of these results and offered the administrative files by letter dated November 30, 2009. (See Exhibit E.)

(33) Although the CRS search located the D.C. Litigation file (197A-SF-A135225), very few records had been indexed to the file in light of the fact that the litigation was ongoing. As a result, on August 5, 2010, the FBI sent a search memorandum to locate additional records pertaining to the D.C. Litigation file. The D.C. Litigation was initially handled by the San Francisco Field Office and subsequently taken over by the FOIA Litigation Unit within FBI's Office of the General Counsel. Accordingly, the search memorandum was directed to those individuals in the San Francisco Field Office and the FOIA Litigation Unit who worked on the D.C. Litigation. This search memorandum requested the named individuals to locate all potentially responsive documents, whether in paper or electronic format, concerning the FBI's handling of plaintiff's pending D.C. Litigation that were created between October 17, 2003 and June 24, 2009 --the first date on which RIDS began to search for documents potentially responsive to plaintiff's request. All records located as a result of the search memorandum were subsequently processed for release to plaintiff.

II. Davis, Joseph & Negley

(34) Plaintiff's FOIPA request assigned FOIPA Number 1134498-000, also sought records regarding his business, "Davis, Joseph & Negley." On July 20, 2009, a search of the automated indices was made of the following variations of the business name: "Davis Joseph & Negley," "Davis Joseph and Negley," "Davis, Joseph, & Negley," "Davis, Joseph, and Negley" and "Davis Joseph Negley." The FBI did not locate any records. There were no

limitations on the location or timeframe made during this search. In a letter dated October 15, 2009, the FBI informed plaintiff that no records responsive to his request regarding his business were located. See Exhibit D.

ADDITIONAL SEARCHES

(35) The plaintiff did not specifically request a search of the FBI's electronic surveillance indices (ELSUR) in his July 15, 2009 FOIA request. However, the FBI took the extra step to search its ELSUR indices to ensure the identification of all existing records relating in any way to plaintiff. Normally, the FBI only conducts such a search when specifically requested. The FBIHQ ELSUR indices are the logical location to search for any potentially responsive electronic surveillance records relating to the plaintiff based on the fact that the FBIHQ ELSUR indices contain the names of all persons whose voices have been monitored through a FBI microphone installation or a telephone surveillance since January 1, 1960 as reported by the respective field offices. Searches of the ELSUR indices for plaintiff's request were conducted on September 28, 2009 and on October 21, 2009. Each time, the search conducted included a six way phonetic breakdown of the plaintiff's name and a breakdown of the plaintiff's business name as listed in paragraphs 32 and 34, *supra*. Additionally, on October 21, 2009 the San Francisco Field Office ELSUR indices was also searched to verify the results, since the UNABOM investigatory records (the only investigatory records located from every search conducted related to plaintiff) originated from that office. Despite these efforts, no records were located. No principal records, proprietary interest records, intercept records, or reference records were located as a result of any of these ELSUR searches.¹² These searches,

¹² The ELSUR Indices are comprised of four types of records: Principal, Proprietary-interest, Intercept, and Reference records. Principal records which identify by true name or best known name, all persons, entities, and

which found no responsive records, indicate that the FBI has not conducted any surveillance or conducted any additional investigation of plaintiff after its brief investigation of him in September 1995 as a result of the hotline tip.

SAMPLE SELECTION

(36) Given the duplicative nature of the records at issue and in the interest of an efficient resolution to this litigation for the Court and the parties, the FBI has selected a representative sample from the pages withheld in full or in part by the FBI and two pages from the documents referred to EOUSA, totaling 224 pages, that were coded and addressed in this declaration.¹³ An index of the documents included in the sample is attached hereto as **Exhibit T**. In order to justify its withholding of information, the FBI “codes” the information for discussion in its Vaughn declarations. At the time a document is released to plaintiff, the FOIA exemption asserted to withhold any redacted information is noted next to that redacted information. However, in preparing its declarations, the FBI re-reviews each FOIA exemption asserted and

facilities that have been the targets of electronic surveillance coverage sought, conducted, or administered by the FBI pursuant to a court order or other authority. These records include, but are not limited to, persons, entities, and facilities named in an application filed in support of an affidavit seeking a court order to conduct or administer an electronic surveillance. Principal records may also include descriptive data associated with the name appearing on the record. Proprietary-interest records identify entities and/or individuals who own, lease, license, hold a possessory interest in, or commonly use the property or location subjected to an electronic surveillance. Proprietary-interest records may identify individuals involved in the administration of the electronic surveillance. Intercept records identify, by true name or best known name, individuals who have been reasonably identified by a first name or initial and a last name as being a party to a communication monitored/recorded electronically pursuant to an electronic surveillance. Intercept records also identify entities that have been a party to a communication or present in a locale monitored/recorded electronically pursuant to an electronic surveillance. Intercept records may also include descriptive data associated with the name appearing on the record. Reference records identify, by partial name, such as a first name only, last name only, code name, nick name, or alias those individuals who have been a party to a communication or present in a locale monitored/recorded electronically pursuant to an electronic surveillance, and may include descriptive data associated with the individual. If the individual is later identified by a more complete name, *e.g.*, through further monitoring or normal investigative procedures, the reference is re-entered as an intercept record.

¹³ In total, the FBI withheld 2288 pages in full or part. Of these pages, 2211 were withheld in full or in part by the FBI. The remaining 77 pages of these 2288 pages originated with EOUSA and were referred to EOUSA for direct response to plaintiff. EOUSA has accounted for the FOIA exemptions it asserted in these records in a separate declaration submitted by John Boseker. (See Boseker Declaration).

provides each specific redaction a subcategory within that particular FOIA exemption. For example, if “(b)(7)(C)-1” appears on the page, the “(b)(7)(C)” designation refers to “Exemption (b)(7)(C)” of the FOIA concerning “Unwarranted Invasion of Personal Privacy.” The subcategory “1” narrows the main category to the more specific subcategory “Names and/or Identifying Information of FBI Special Agents and Support Personnel.” Due to the time necessary to code each FOIA exemption assertion that appears on a page and given the nature of the records at issue in this case, the FBI chose to select and code only a representative sample of the information withheld in full or in part in this case to try and achieve an efficient resolution to this case.

(37) To compile the representative sample, the FBI selected every 10th page in the production on which information was withheld. Because a large part of the production was released to plaintiff in full, the sample pages will not appear in increments of 10. After review of the selected sample, the FBI determined that 37 pages within the sample consisted of records that were not withheld during the current processing, but were copies of pages redacted in connection with plaintiff’s prior FOIA requests to the Sacramento and San Francisco Field Offices that are contained in the litigation file. In light of this discovery and in order to make certain that the sample was representative of all the FOIA exemptions cited and also reflective of the types of documents contained within the responsive records withheld in full or in part, the FBI selected additional pages for inclusion in the sample as necessary in order to replace the pre-processed copies allowing for the FBI to arrive at a ten percent sample. Specifically, the FBI reviewed the documents and exemptions to select pages from locations where any one of the following situations occurred; (a) a gap in the sample resulted from these 37 pages and replacement pages were needed; (b) exemption codes were adequately represented; or (c) a document type not

previously found within the sample could be located and included in the sample. In addition, the preceding page was added to all e-mails where the tenth page had resulted in merely a signature page. In a few instances, full documents were provided to give an example of an entire document rather than just a page from a document. To further provide Plaintiff with the context of withheld pages, a deleted page sheet (“DPIS”) was included for documents withheld in full to describe the documents in which the page appears rather than just the page selected. Whenever possible the date of the document, purpose, and author has also been provided for documents withheld in full within the sample. Exemptions are noted for the sample page only. For example, if two pages from a 22 page draft declaration were included in the sample and all pages were withheld in full, a DPIS was inserted with the exemptions noted for both sample pages. The document description provided on the DPIS, however, will provide the plaintiff with the information on the entire 22 page document, placing those two pages in a more complete context. These adjustments to the representative sample provide plaintiff and the Court with a larger amount of information about the FOIA exemptions asserted than a rote selection of every tenth page – regardless of context or repetitiveness – would have provided. A copy of the sample pages is attached hereto as **Exhibit U**.

**EXPLANATION OF CODED FORMAT USED
FOR THE JUSTIFICATION OF DELETED MATERIAL**

(38) All documents were processed to achieve maximum disclosure consistent with the access provisions of the FOIA. Every effort was made to provide plaintiff with all material in the public domain and with all reasonably segregable portions of releasable material. No reasonably segregable, non-exempt portions have been withheld from plaintiff.

(39) The FBI has processed a total of 7,425 pages. Of the 7,425 pages, 5,139 pages

have been released in full; 1,460 pages released in part; and 848 pages withheld in their entirety pursuant to applicable FOIA exemptions. Each processed page released to the plaintiff has been Bates-numbered sequentially – “Negley-1-FOIPA” through “Negley-2282-FOIPA” for interim releases one and two, and “Negley II-1183” through “Negley II-7402” for interim releases three through seven.¹⁴ Additionally, pages withheld in their entirety within the sample were replaced by a “Deleted Page Information Sheet” (“DPIS”) which identifies the reason and /or the applicable FOIA exemptions relied upon to withhold the page in full, as well as the Bates-stamp number for the withheld pages and provides the context in which the page or pages are found (i.e., the document description). The 224 pages excerpted from the release for inclusion in the representative sample have been pulled from within the 2,228 pages that were either released in part or withheld in full. Any pages selected for the sample that were withheld in full are represented by the insertion of a deleted page sheet. The sample documents are attached hereto as **Exhibit U**. The documents in **Exhibit U** contain, on their face, coded categories of exemptions which detail the nature of the information withheld pursuant to the FOIA. The coded categories are provided to aid the Court and plaintiff in reviewing the FBI’s explanations of the FOIA exemptions used and should allow the Court to make a ruling on each exemption claimed which can be applied to the FOIA exemptions asserted throughout the entire release.

¹⁴ For the purposes of the declaration, the suffix “FOIPA” and “II” have been dropped when referencing the Bates pages in this declaration. All pages will be referenced in the declaration by “Negley” and the sequential number “1-7402”. In addition, due to a technical malfunction in the FOIA Document Processing System (FDPS) during the 5th interim release, 25 pages that were not intended for release (located between Bates-stamped pages Negley-5020 and 5021) consisting of publicly available court documents (Documents publicly filed in the DC Litigation at Document 92 - Plaintiff’s Motion for an Award of Attorney’s Fees, Memorandum of Points and Authorities, and Declaration of Prashant K. Khetan). These pages mistakenly printed to the release package and were included in the release and the overall page count in the release letter, but they were not Bates-stamped. These documents were released in full. The documents were generated by Plaintiff’s own attorney, are publicly available through the Court, and are beyond the June 24, 2009 search cut-off date. The search cut-off date is designated based on the first date on which the FBI began searching for documents potentially responsive to the 2009 FOIA request.

(40) Most withholdings of information are accompanied by a code that corresponds to the categories listed below. For example, if “(b)(7)(C)-1” appears on the page, the “(b)(7)(C)” designation refers to “Exemption (b)(7)(C)” of the FOIA concerning “Unwarranted Invasion of Personal Privacy.” The subcategory “1” narrows the main category to the more specific subcategory “Names and/or Identifying Information of FBI Special Agents and Support Personnel.” The coded categories of exemptions used in the processing of documents responsive to plaintiff’s requests are as follows:

SUMMARY OF JUSTIFICATION CATEGORIES	
CODED CATEGORIES	INFORMATION WITHHELD
Category (b)(5)	PRIVILEGED INFORMATION
(b)(5)-1	Attorney Client Privilege
(b)(5)-2	Attorney Work Product
Categories (b)(6) and (b)(7)(C)	CLEARLY UNWARRANTED AND UNWARRANTED INVASION OF PERSONAL PRIVACY
(b)(6)-1 and (b)(7)(C)-1	Names and/or Identifying Information of FBI Special Agents and Support Personnel
(b)(6)-2 and (b)(6)(C)-2	Names and/or Identifying Information of Non-FBI Federal Government Personnel
(b)(6)-3 and (b)(7)(C)-3	Names and/or Identifying Information of Third Parties Who Names and/or Identifying Information Concerning Individuals Who Provided Information to the FBI
(b)(6)-4 and (b)(7)(C)-4	Names and/or Identifying Information Concerning Third Parties Merely Mentioned

SUMMARY OF JUSTIFICATION CATEGORIES	
CODED CATEGORIES	INFORMATION WITHHELD
(b)(6)-5 and (b)(7)(C)-5	Names and/or Identifying Information Concerning Third Parties Of Investigative Interest
(b)(6)-6 and (b)(7)(C)-6	Names and/or Identifying Information Concerning State University Employees
Category (b)(7)(E)	INVESTIGATIVE TECHNIQUES AND PROCEDURES
(b)(7)(E)-1	Internal databases, procedures
(b)(7)(E)-2	Internal web addresses, intranet websites
(b)(7)(E)-3	Internal security procedures, protocols
(b)(7)(E)-4	Electronic Surveillance Search Slips

JUSTIFICATION FOR NON-DISCLOSURE

UNDER THE PRIVACY ACT (j)(2)

(41) The analysis for whether records may be disclosed in response to a first-party request made pursuant to both the FOIA and the Privacy Act always begins by examining whether access to potentially responsive records is permissible under the Privacy Act.¹⁵ The Privacy Act applies to “a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.” 5 U.S.C. § 552a(a)(5). Moreover, Section (d)(1) of the Privacy Act provides individuals with a right of access to their own records:

¹⁵ An individual’s access request for his own record maintained in a system of records should be processed under both the Privacy Act and the FOIA, regardless of the statute(s) cited. *See* 5 U.S.C. § 552a(t)(1).

“[e]ach agency that maintains a system of records shall . . . upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual’s record in the accompanying person’s presence.” 5 U.S.C. § 552a(d)(1).¹⁶

(42) The FBI has wholly exempted its entire system of records from any applicable provisions of the Privacy Act, however. Privacy Act Section (j)(2) authorizes law enforcement agencies such as the FBI to promulgate rules to exempt any system of records from any part of the Privacy Act if the system of records is “maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals” Thus, section (j)(2) provides a government agency with the ability to “exempt” its system of records from certain provisions of the Privacy Act, including the access provision - subsection (d). The FBI’s CRS is a system of records under the Privacy Act which the FBI has “exempted” from the access provisions of the Privacy Act pursuant to 28 C.F.R. § 16.96. This regulation

¹⁶ The Privacy Act provides individuals with a means of access similar to that of the Freedom of Information Act. The statutes do overlap, but not entirely. The FOIA is entirely an access statute; it permits “any person” to seek access to any “agency record” that is not subject to any of its nine exemptions or its three exclusions. By comparison, the Privacy Act permits only an “individual” to seek access to only his own “record,” and only if that record is maintained by the agency within a “system of records” – *i.e.*, is retrieved by that individual requester’s name or personal identifier – subject to ten Privacy Act exemptions (see the discussion of Privacy Act exemptions, below). Thus, the primary difference between the FOIA and the access provision of the Privacy Act is in the scope of information accessible under each statute.

exempts the FBI's CRS from numerous sections of the Privacy Act, including the access provision of Privacy Act subsection (d). Specifically, the FBI's regulation indicates that the records within the CRS, including non-criminal investigative records, are exempt from the Privacy Act because:

. . .these provisions concern individual access to investigative records, compliance with which could compromise sensitive information classified in the interest of national security, interfere with the overall law enforcement process by revealing a pending sensitive investigation, possibly identify a confidential source or disclose information which would constitute an unwarranted invasion of another individual's personal privacy, reveal a sensitive investigative technique, or constitute a potential danger to the health or safety to law enforcement personnel.

(ii) Also, individual access to non-criminal investigative records, e.g., civil investigations and administrative inquiries . . . could also compromise classified information related to national security, interfere with a pending investigation or internal inquiry, constitute an unwarranted invasion of privacy, reveal a confidential source or sensitive investigative technique, or pose a potential threat to law enforcement personnel. . . .

The FBI's release letters in this case indicate that section (j)(2) of the Privacy Act was applied to the processed material in this case only to indicate that the records being processed were not accessible under the Privacy Act. No information was withheld under Privacy Act section (j)(2) as it does not relate to redacting information but exempting systems of records.

(43) Even if the FBI's CRS was not exempt from the Privacy Act, such that the FBI was required to review and process plaintiff's records under the Privacy Act, plaintiff would not have received the majority of the documents responsive to this request given that most of the records pertain to the civil litigation files from his prior lawsuits. For example, pursuant to section (d) of the Privacy Act permitting individuals access to their records, section (d)(5) indicates that "nothing in this section shall allow an individual access to any information

compiled in reasonable anticipation of a civil action or proceeding.” Accordingly, the investigative records related to plaintiff’s interview connected with the UNABOMB case are clearly investigative records that are exempted from access through the Privacy Act. Similarly, plaintiff is not entitled to access to the administrative or litigation files under the Privacy Act. Even if it was argued that the nature of the files are not contemplated by the regulation exempting the CRS from the Privacy Act, on its face, the language of the Privacy Act would deny plaintiff access to a large portion of the documents released in this case. As such, plaintiff achieves maximum access to his records through the FOIA. Accordingly, although the FBI denied access to these records under the Privacy Act, plaintiff’s records were processed under the disclosure provisions of the FOIA which allows the FBI to achieve maximum disclosure.

EXEMPTION (b)(7) THRESHOLD

(44) Exemption (b)(7) of the FOIA protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that disclosure could reasonably be expected to cause one of the six sets of harms enumerated in the subpart of the exemption. See 5 U.S.C. § 552 (b)(7). In this case, the harm that could reasonably be expected to result from disclosure concerns the invasion of personal privacy, and law enforcement techniques that, if revealed, could be used to circumvent the law.

(45) Before an agency can invoke any of the harms enumerated in Exemption (b)(7), it must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Law enforcement agencies, such as the FBI, must demonstrate that the records at issue are related to the enforcement of federal laws and that the enforcement activity is within the law enforcement duty of that agency. The investigatory records at issue, which are responsive to Negley’s 2009 FOIA request, are part of the FBI’s CRS and were compiled as a

result of the UNABOMB investigation, a criminal investigation conducted by the FBI into the identity of the individual who mailed or placed 16 improvised bombs and injured 23 people and killed three during a 17-year period beginning May 25, 1978, and ending approximately June 18, 1996. Accordingly, the information stemming from these files, which consisted of cross-references, were generated pursuant to the law enforcement duties of the FBI. Furthermore, the administrative and litigation files created in connection with requests for these records are also done so in furtherance of and consistent with the law enforcement duties of the FBI. Therefore, the information was compiled for a law enforcement purpose and readily meets the threshold requirement of Exemption (b)(7). The remaining inquiries are whether disclosure could reasonably be expected to reveal privileged information, would constitute an unwarranted invasion of personal privacy; or could reveal investigative techniques and procedures.

Exemption (b)(5)
Privileged Information

(46) Exemption (b)(5) of the FOIA protects from mandatory disclosure records or information contained in “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.” This exemption has been construed to exempt those documents or information normally privileged in the civil discovery context, including, as is the case here, the attorney-client privilege and attorney work product. Generally, the attorney-client privilege protects confidential communications between an attorney and his/her client relating to a legal matter for which the client has sought professional advice. This privilege encompasses any opinions given by an attorney to his/her client based upon and reflecting those facts, as well as communications between attorneys that reflect client-supplied information. Documents responsive to the

plaintiff's current FOIPA request include materials prepared as a result of his prior administrative FOIPA requests, appeals of those requests, administrative inquiries/complaints, and FOIPA litigation files.

(b)(5)-1 Attorney-Client Privilege/Attorney-Work Product

(47) Exemption (b)(5) has been asserted to protect material covered by the attorney-client privilege/Attorney-Work Product. The attorney-client privilege is appropriately asserted when legal advice of any kind is sought from a professional legal adviser in his or her capacity and the communications relating to that purpose are made in confidence to the client. Both, the facts divulged by a client to his attorney, as well as any advice given by the attorney to his client based upon these facts are permanently protected from disclosure by the client or by the legal adviser unless the attorney-client protection is waived. This privilege encompasses confidential communications made to the attorney, not only by decision-making personnel, but also by lower-echelon employees who possess information relevant to an attorney's advice-rendering function. Disclosure of the two-way communications between FBI attorneys and their clients would impede the full disclosure of all of the information that relates to the client's reasons for seeking legal advice, which is necessary if the professional mission is to be accomplished. The documents withheld or containing withheld information as a result of the attorney client privilege pursuant to FOIA Exemption (b)(5)-1 include: a letter at Negley-11, a legal analysis document at Negley-177, an internal appeal directions form at Negley-5192, comments from a call log sheet at Negley-4441, a legal memorandum at Negley-5782, attorney notes at Negley-2263, 2273, 2814, 2858, 3513, and 6929, status reports at Negley-5549, 5560, and 5727, and e-mail discussions rendering advice, opinions, and providing information at Negley-2252, 2784, 3938, 4013, 4116, 4126, 4422, 4432, 4459, 4542, 5183, 5367, 5653, 5662, 5673, 5684, 5716, 5509,

5418, 5428, 5438, 5448, 5409, 5357, 5379, 6103, 6182, 6255, 6458, 6727, 6732, 6743-6744, 6745, 6755, 6770, 7150, 7160, 7168, 7172, 7174, 7184, 7194, 7204, and 7214, and 7220.

(b)(5)-2

Attorney- Work Product Privilege

(48) The Attorney-Work Product Privilege, protects documents and other memoranda prepared by an attorney in contemplation of litigation. As its purpose is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny, the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen. In this instance, the FBI has been in litigation with the plaintiff over his various FOIA requests for over a decade. The FBI is represented by the United States Attorney's Office. The FBI's Office of General Counsel works closely with the US Attorney's office in the litigation. Documents responsive to plaintiff's current FOIA request include materials prepared in response to his multiple FOIA requests, administrative inquiries/complaints, and/or his prior litigation against the FBI. The Attorney-Work Product privilege is not limited to civil proceedings, but also extends to administrative proceedings. In a situation where a document may have been created for more than one purpose, the work-product privilege has been found to apply if the agency can show that the document was created at least in part because of the prospect of litigation. Work Product protection is also accorded to materials prepared by non-attorneys who are supervised by attorneys. Employees of the Litigation Support Unit of the FBI are supervised by the attorneys of the FBI's Office of General Counsel and the materials they prepare are under the direction of those attorneys, and therefore fall under the protection of the attorney work product privilege. The documents withheld or containing withheld information pursuant to FOIA Exemption (b)(5)-2 as a result of the attorney work product privilege include a draft of a letter at Negley-11, a legal analysis document at Negley-177, declaration drafts at Negley-147,

167, 439, 2899, 2909, 3973, 3983, 3993, 4003, 4043, 4053, 4063, 4106, 4552, 4660, 4720, 4730, 4740, 4751, 4761, 4771, 5570, 5580, 5590, 5600, 5742, 5752, 5762, 5772, 5792, 5830, 5840, 6780, 6790, 6800, 6810, 6820, 6830, 6840, 6939, 6949, 6959, 7235, 7245, and 7281, an Investigative Case Management Report at 2931, 2941, 2951, 2961, 2971, 2981, 2991, case information cover sheet at Negley-4413, case reports from the FBI's Automated Case Information System at Negley-3497-3500, criminal case research from the UNABOM investigation at Negley-7297-7298, and Status Reports at Negley-4414-44154458, 5177-5178, 5345-5346, 5549, 5560, and 5727, timelines at Negley-6850, and a legal memorandum at Negley-5782.

EXEMPTIONS (b)(6) AND (b)(7)(C)
CLEARLY UNWARRANTED AND UNWARRANTED
INVASION OF PERSONAL PRIVACY¹⁷

(49) 5 U.S.C. § 552 (b)(6) exempts from disclosure “personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552 (b)(7)(C) exempts from disclosure:

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.

(50) When withholding information pursuant to these exemptions, the FBI is required to balance the privacy interests of the individuals mentioned in these records against any public interest in disclosure. In asserting these exemptions, each item of information was examined to

¹⁷ The practice of the FBI is to assert Exemption (b)(6) in conjunction with Exemption (b)(7)(C). Although the balancing test for Exemption (b)(6) uses a “would constitute a clearly unwarranted invasion of personal privacy” standard and the test for Exemption (b)(7)(C) uses the lower standard of “could reasonably be expected to constitute an unwarranted invasion of personal privacy,” the analysis and balancing required by both exemptions is sufficiently similar to warrant a consolidated discussion. The privacy interests are balanced against the public’s interest in disclosure under the analysis of both exemptions.

determine the degree and nature of the privacy interest of every individual whose name and/or identifying information appears in the records. The public interest in disclosure of the information is determined by whether the information in question would inform plaintiff and the general public about the FBI's performance of its mission to enforce federal criminal statutes and protect the national security of the United States and/or how the information would shed light on the FBI's performance of its mandated statutory duties. In each instance where the FBI withheld information, it determined that individual privacy rights outweighed the public interest. The only recognized public interest is that which sheds light on the operations and activities of the federal government. In this case, revelation of the names and/or identifying information of individuals in the context of the records of an FBI criminal investigation could reasonably be expected to cause harassment, embarrassment and/or humiliation, and thus constitute a clearly unwarranted invasion of personal privacy. Therefore, the FBI concluded that the information should be withheld under Exemptions (b)(6) and (b)(7)(C), and determined that the individuals' privacy interests were not outweighed by any public interest in disclosure. Every effort has been made to release all segregable information contained in these records without invading the privacy interests of these individuals.

**(b)(6)-1 and (b)(7)(C)-1 Names and/or Identifying Information of
FBI Special Agents and Support Personnel**

(51) Exemptions (b)(6)-1 and (b)(7)(C)-1 have been asserted to protect the names of FBI Special Agents ("SAs") who are responsible for conducting, supervising, and/or maintaining the investigative activities reported in the documents that are the subject of the plaintiff's initial FOIPA request and which appear multiple times throughout the production. Some SAs also handle administrative tasks in addition to their investigative duties. An SA's responsibilities

include conducting interviews and compiling the resulting information, as well as reporting on the status of investigations. Assignments of SAs to any particular investigation are not by choice. Publicity (adverse or otherwise) regarding any particular investigation to which they have been assigned may seriously prejudice their effectiveness in conducting other investigations. The privacy consideration is also to protect FBI SAs, as individuals, from unnecessary, unofficial questioning as to the conduct of this or other investigations, whether or not they are currently employed by the FBI. FBI SAs conduct official inquiries into various criminal and national security violation cases. They come into contact with all strata of society, conducting searches and making arrests, both of which result in reasonable but nonetheless serious disturbances to people and their lives. It is possible for an individual targeted by such law enforcement actions to carry a grudge which may last for years. These individuals may seek revenge on the agents and other federal employees involved in a particular investigation. The publicity associated with the release of an agent's identity in connection with a particular investigation could trigger hostility toward a particular agent. The FBI could identify no discernible public interest in the disclosure of this information because the disclosure of the names and identifying information of FBI SAs would not shed light on the operations and activities of the FBI. Thus, disclosure of this information would constitute a clearly unwarranted and an unwarranted invasion of their personal privacy. The FBI has properly protected this information pursuant to FOIA Exemptions (b)(6)-1 and (b)(7)(C)-1.

(52) The names and other identifying information, such as phone numbers, of FBI support employees appear in e-mails, fax cover sheets, as well as the multiple copies of the FOIA release of investigatory documents from the original release that was the substance of plaintiff's multiple FOIPA and litigation files, are also withheld pursuant to Exemptions (b)(6)-1 and

(b)(7)(C)-1. Support personnel are assigned to handle tasks related to the inquiry into the allegations made against the plaintiff as reflected in the documents responsive to his request. They were, and possibly are, in positions of access to information regarding official law enforcement investigations, and therefore, could become targets of harassing inquiries for unauthorized access to investigations if their identities were released, similar to those harms articulated previously for SAs. These support employees maintain substantial privacy interests in not having their identities disclosed.

(53) Next, the FBI balanced the privacy interests of the FBI support employees against the public interest in disclosure. Disclosure of the names and related identifying information of FBI support employees in the documents at issue would not shed light on the performance of the FBI's statutory duties. Accordingly, after balancing the competing interests, the FBI concluded that no public interest would be served by disclosing the identities of these FBI support employees to the general public. The disclosure of the names and related identifying information of the FBI support personnel would constitute a clearly unwarranted and an unwarranted invasion of their personal privacy, which the FBI has properly withheld pursuant to Exemptions (b)(6)-1 and (b)(7)(C)-1. Exemptions (b)(6)-1 and (b)(7)(C)-1 have been cited on the following pages: Negley-21, 157, 308, 485, 522, 652, 662, 746, 2252, 2524, 2661, 2784, 2795, 2836, 2858, 2931, 2941, 2951, 2961, 2971, 2981, 2991, 4908, 3544, 3642, 3694, 3918, 3928, 3938, 3963, 4013, 4033, 4116, 4126, 4230, 4413-4414, 4422, 4432-4433, 4441, 4444, 4448, 4458-4459, 4540, 4542, 4560, 4644, 4660, 4908, 5062, 5300, 5177-5179, 5183, 5222, 5295, 5308, 5319, 5330, 5340, 5357, 5367-5368, 5390, 5396, 5403, 5409, 5418, 5428, 5438, 5448, 5458, 5501, 5539, 5549, 5560, 5514, 5509, 5653, 5662-5663, 5673, 5684, 5693-5694, 5704, 5716, 5727, 5819, 5806, 5999, 6019, 6103, 6132, 6143, 6182, 6255, 6458, 6716, 6732, 6727, 6735,

6743-6744, 6745, 6755, 6770, 7150, 7160, 7168, 7172, 7184, 7194, 7174, 7204, 7214, 7220, 7225, 7270, and 7296. Exemption (b)(7) alone has been cited on pages: Negley-560, 689, 826, 849, 881, 900, 3071, 3118, 3150, 3167, 3198, 3213, 3245, 3274, 3407, 3525, and 3598 due to processing protocols at the time these specific documents were originally processed.

(b)(6)-2 and (b)(7)(C)-2 **Names and/or Identifying Information of Non-FBI Federal Government Personnel**

(54) Exemptions (b)(6)-2 and (b)(7)(C)-2 have been asserted to protect the names and/or identifying information of non-FBI federal government personnel such as Assistant U. S. Attorneys' support personnel. The relevant inquiry here is whether public access to this information would violate a viable privacy interest of these individuals and whether there is a public interest in releasing their identities. Disclosure of their identities and identifying information could subject these federal law-enforcement employees to unauthorized inquiries and harassment which would constitute a clearly unwarranted invasion of their personal privacy. The rationale for protecting non-FBI federal employees is the same as that for FBI employees, supra.

(55) In balancing the legitimate privacy interests of these individuals against any public interest in disclosure, the FBI determined that there is a complete lack of bona fide public interest in this information because its disclosure will not shed light on the operations and activities of the Federal Government. Accordingly, the FBI has concluded that the disclosure of this information would constitute a clearly unwarranted and unwarranted invasion of their personal privacy. The FBI properly withheld this information, pertaining to the names and identifying information of support staff of the Assistant US Attorney, pursuant to Exemptions (b)(6)-2 and (b)(7)(C)-2. This information has been withheld on the following pages: Negley-

308, 3694, 5062, 5179, 5716, and 6770.

(b)(6)-3 and (b)(7)(C)-3 **Names and/or Identifying Information Concerning
Third Parties Who Provided Information to the FBI**

(56) Exemption (b)(6)-3 and (b)(7)(C)-3 have been asserted to protect the names and/or identifying information of individuals who were interviewed by the FBI during the course of investigating the allegations made against the plaintiff. The FBI interviewed various individuals.

(57) The FBI has found that information provided by individuals during interviews is one of the most productive investigative tools used by law enforcement agencies. The largest roadblock to successfully obtaining the desired information through an interview is fear by the interviewee that their identity will possibly be exposed and consequently they could be harassed, intimidated, or threatened with legal action, economic reprisal, possible physical harm, or even death. This fear is particularly valid when the investigation concerns serial bombers, as was the situation with the UNABOM investigation at the time of the release of the UNABOM “Manifesto” that gave rise to the FBI implementing the “tip line”. Following up on the submission of tips through interviews was a valuable tool the FBI used in the UNABOM investigation, a tool the FBI continues to use in such large investigations today. If individuals were to find that their interview information were to be released, they may be less likely to submit information to such tip lines or cooperate when a follow-up interview is requested by an agent. In order to surmount these obstacles, persons interviewed by the FBI must be assured that their names and personally-identifiable information will be maintained in the strictest confidence, even when that particular tip (as in this situation) does not result in apprehension of a suspect. The continued access by the FBI to persons willing to honestly relate pertinent facts

bearing upon a particular investigation far outweighs any benefit plaintiff might derive from being furnished the names of those who cooperated with the FBI.

(58) The FBI has determined that the third parties who provided information to the FBI maintain a substantial privacy interest in not having their identities disclosed. After identifying the substantial privacy interests of the third parties, the FBI next balanced their right to privacy against the public interest in the disclosure of the information. The FBI could identify no discernible public interest in the disclosure of this information, as disclosure of the third parties' names and identifying information would not shed light on the operations and activities of the FBI. Accordingly, the FBI concluded that the disclosure of this information would constitute a clearly unwarranted and unwarranted invasion of their personal privacy. The FBI properly withheld this information pursuant to Exemptions (b)(6)-3 and (b)(7)(C)-3 on the following pages: Negley- 652 and 5177-5178, 5183. This information has been withheld pursuant to Exemption (b)(7)(C)-3 only, on the following pages: Negley-126, 187, 610, 689, 721, 826, 849, 881, 900, 935, 3096, 3118, 3150, 3167, 3198, 3213, 3245, 3299, 3407, 3439, 3525, 3598, 3630, and 5525.

(b)(6)-4 and (b)(7)(C)-4 Names and/or Identifying Information Concerning Third Parties Merely Mentioned

(59) Exemptions (b)(6)-4 and (b)(7)(C)-4 have been asserted to withhold the names and/or identifying information of third parties merely mentioned. The redacted names are the names of individuals not tied in any way to the plaintiff. Negley-5549, 5560, and 5727 are Status Reports containing multiple litigation case updates prepared by a Litigation Support Employee on several cases, including but not limited to plaintiff's. The withheld information pertains to litigation matters other than plaintiff's. Additionally, at Negley-3464, plaintiff was

provided a printout where his name appeared alongside several others that came up when the report was run. The other names do not have anything to do with the plaintiff. Therefore the information has been redacted. Besides names, identifying information includes addresses and employer names. Other third party information withheld at Negley-187-FOIPA, includes the name of a hotel desk clerk who merely supplied information in the performance of his job duties upon the request of the Special Agent. The FBI obtained information from third parties regarding the plaintiff to determine the veracity of the suspicions about plaintiff. These individuals were not of investigative interest to the FBI. These third parties maintain legitimate privacy interests in not having this information disclosed. If the FBI disclosed their names and other personal information, the disclosure would reveal that these third parties were connected with the FBI's activities in some way. Disclosure of the third parties' names and identifying information in connection with the FBI may carry a negative connotation. Disclosure of their identities could subject these individuals to possible harassment or criticism and focus derogatory inferences and suspicion on them. Accordingly, the FBI determined that the third parties maintain a substantial privacy interest in not having information about them disclosed.

(60) After identifying the substantial privacy interests these individuals maintain, the FBI balanced their right to privacy against the public interest in the disclosure. The FBI determined that there is no public interest in the information, because disclosure of the name of a third party merely mentioned would not shed light on the operations and activities of the FBI, and disclosure would constitute a clearly unwarranted and unwarranted invasion of their personal privacy. Accordingly, the FBI properly protected this information pursuant to FOIA Exemptions (b)(6)-4 and (b)(7)(C)-4 at Negley-187, 486, 2931, 2941, 2951, 2961, 2971, 2981, 2991, 3498, 3500, 3948, 4230, 5345-5346, 5727, 5549, 5560, 5409, 5340, 7225, and 7270. Information has

been protected pursuant to Exemption (b)(7)(C), only, at Negley-595, 849, 3096, 3245, 3299, and 3464.

(b)(6)-5 and (b)(7)(C)-5 **Names and/or Identifying Information of Third Parties of Investigative Interest**

(61) Exemptions (b)(6)-5 and (b)(7)(C)-5 has been asserted to protect the names and identifying information of third party individuals who were of investigative interest to the FBI and/or other law enforcement agencies. Identifying information withheld concerning these individuals includes addresses, dates of birth, license numbers, social security numbers, and other personal data. Being linked with any law enforcement investigation can carry with it a strong negative connotation and stigma. To release the identities of these individuals to the public could subject them to undue harassment or embarrassment, as well as undue public attention. At Negley-2931, 2941, 2951, 2961, 2971, 2981, and 2991 the FBI has withheld the names of individual suspects, other than the plaintiff, that were investigated in the UNABOM investigation. Accordingly, the FBI has determined that these individuals maintain a substantial privacy interest in not having their identities disclosed. In making a determination whether to release the names and personal information concerning these third parties, the public's interest in disclosure was balanced against the individual's right to privacy. It was determined that this information would not enlighten the public on how the FBI conducts its internal operations and investigations. Accordingly, the FBI concluded that the disclosure of this information would constitute a clearly unwarranted and unwarranted invasion of their personal privacy. The FBI properly withheld this information pursuant to Exemptions (b)(6)-5 and (b)(7)(C)-5 at Negley-126, 2931, 2941, 2951, 2961, 2971, 2981, 2991, and 7270.

(b)(6)-6 and (b)(7)(C)-6 **Names and/or Identifying Information of State University Employees**

(62) Exemptions (b)(6)-6 and (b)(7)(C)-6 have been asserted to withhold the names of State University employees. These employees were acting in their official capacities and aided the FBI in their inquiry into the allegations made against the plaintiff. The rationale for protecting the identities of FBI SAs, as discussed in ¶¶ 51, 52, and 53 applies equally to the names of these State University employees. Release of the identities of these State University employees could subject them, as individuals, to unnecessary and unwelcome harassment which would constitute an unwarranted invasion of privacy. The FBI could identify no discernible public interest in the disclosure of this information because the disclosure of the names of State University employees would not shed light on the operations and activities of the FBI. Accordingly, the FBI concluded that the disclosure of this information would constitute a clearly unwarranted and an unwarranted invasion of their personal privacy. The FBI properly withheld this information pursuant to Exemptions (b)(6)-6 and (b)(7)(C)-6 at Negley-5183. The information was withheld pursuant to Exemption (b)(7)(C), only, at Negley-126, 187, 610, 689, 721, 826, 849, 881, 900, 935, 3096, 3118, 3150, 3167, 3198, 3213, 3245, 3299, 3407, 3439, 3525, 3598, 3630, and 5525.

EXEMPTION (b)(7)(E)
INVESTIGATIVE TECHNIQUES AND PROCEDURES

(63) 5 U.S.C. § 552 (b)(7)(E) provides for the withholding of:

law enforcement records which 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.

(b)(7)(E)-1 Information Pertaining to FBI Investigative Techniques and Procedures Relating to Internal Databases, Database Instructions, Database Details & Procedures

(64) Exemption (b)(7)(E)-1 has been asserted to protect procedures and techniques utilized by FBI SAs and support personnel when utilizing certain internal FBI databases. The procedures and inner workings of these databases, and the manner in which the FBI utilizes such databases to store and retrieve case information and data is not generally known to the public. Specifically, the responsive records provide information detailing several types of investigative techniques that were used in gathering information on the plaintiff. Release of the techniques could reasonably be expected to alert potential criminals of the methods used by the FBI and would allow for circumvention of the law. Thus, the FBI has properly withheld details on the inner workings of the Investigative Case Management System pursuant to FOIA Exemption (b)(7)(E)-1 at Negley-2824.

(b)(7)(E)-2 Information Pertaining to FBI Investigative Techniques and Procedures – Internal Web Addresses

(65) Exemption (b)(7)(E)-1 has been asserted to protect internal FBI web addresses. Specifically, the responsive records provide internal intranet file path and webpage information that if known could allow for risk of computer intrusion and hacking. Release of the information the FBI uses on its internal web pages could reasonably be expected to provide criminals with the methods used by the FBI and would allow for circumvention of the law. Thus, the FBI has properly withheld this information pursuant to FOIA Exemption (b)(7)(E)-2 at Negley-2824.

(b)(7)(E)-3 Information Pertaining to FBI Investigative Techniques and Procedures – Internal Security and Storage Procedures

(66) Exemption (b)(7)(E)-3 has been asserted to protect procedures and techniques utilized by FBI SAs and support personnel for the secure storage and safeguarding of sensitive files and/or information. Specifically, the responsive information provides details on the

physical location of an off-site FBI facility where the FBI's files are safely stored and maintained. Release of this information could reasonably be expected to alert criminals of the specific secure locations used by the FBI to safeguard sensitive files/material and could allow for circumvention of the law by providing criminals with internal non-public security information and aiding potential attempts by criminals to locate, acquire, destroy and/or manipulate protected records. Thus, the FBI has properly withheld this information pursuant to FOIA Exemption (b)(7)(E)-3 at Negley-5418.

(b)(7)(E)-4 Information Pertaining to FBI Investigative Techniques and Procedures – Search Slips Pertaining to Electronic Surveillance Records

(67) Exemption (b)(7)(E)-4 has been asserted to protect an internal search slip created by RIDS personnel in the course of searching for responsive records to plaintiff's earlier FOIPA requests. RIDS personnel responsible for processing FOIPA requests are obligated to conduct reasonable searches on the requested subjects in order to locate responsive records for potential processing. Searches for these records are conducted by searching the FBI's CRS. A search slip listing the result of the CRS search is created for each FOIPA request. Potentially responsive files indexed to a particular subject, when located, are listed on the search slips for further review to confirm responsiveness and the potential need for processing. The files indexed in the CRS relate to administrative, applicant, criminal, personnel and other files compiled for law enforcement purposes, including pending criminal, national security, and/or other law enforcement investigations. To selectively process and release only those search slips which do not list any records or list actual records processed and released and to withhold only those search slips that are not subject to the requirements of the FOIA would enable savvy requesters to discern such information as whether an investigation is ongoing; the informant status of

certain individuals; or whether a classified file and could potentially harm an investigation. As such, any release of search slips would undercut the intended protections of these provisions and present the opportunity to circumvent the law. With this knowledge, requesters could use this information, in conjunction with other information known about other individuals and/or facts, to change their pattern of activity to avoid detection, apprehension, or create alibis for suspected activities, etc. Additionally, this would hamper the cooperation efforts in cases involving informants. These undesirable scenarios would hamper the FBI's efforts to investigate and enforce criminal statutes under its jurisdiction. Although FOIA exemption (b)(7)(E) is being applied to records created in the course of searching for records responsive to FOIPA requests, it is being asserted to consistently withhold search slips each time determined to be responsive in order to protect the integrity of FBI investigations. Search slips provide a glimpse into the scope and course of an FBI investigation pertaining to a particular subject. As such, there is a nexus to FBI's law enforcement and national security mission and purpose. By categorically withholding search slips from all FOIA requesters, the existence or non existence of certain records cannot be exploited to reveal investigations unknown to subjects, divulge informant status, or expose the existence of a classified investigation to those looking to undermine an FBI investigation. Thus, the FBI has properly withheld this information pursuant to FOIA Exemption (b)(7)(E)-4 at Negley-5191.

DOCUMENTS REFERRED TO OTHER AGENCIES

(68) In connection with reviewing the sample to be used in this case, the FBI identified 77 pages of records that originated with the Executive Office of United States Attorneys ("EOUSA"). In accordance with Department of Justice regulations, 28 C.F.R. § 16.4, the FBI referred the 77 pages of EOUSA records to EOUSA for direct response to plaintiff. These

referred pages bear Bates-stamp numbers Negley-24-25, 288-291, 301, 307-308, 364-365, 384-396, 412, 437, 442, 450-458, 469, 481, 487, 490, 498-506, 5300, and 6104-6131.

(69) By letter dated April 23, 2013, EOUSA provided plaintiff with these pages asserting FOIA Exemptions (b)(5), (b)(6), and (b)(7)(C). These referred pages are addressed in the Declaration of John Boseker.

(70) Of these referred documents, plaintiff's counsel has used the handwritten notations on one page as the basis for his Motion for Reconsideration of Order Granting Defendant's Motion for Protective Order. The document in question, Negley-437-FOIPA, attached hereto as **Exhibit V** is an EOUSA originated document that was sent to a Chief Division Counsel for the Sacramento Field Office and is contained within the Austin Litigation file that was handled by the Sacramento Field Office— 197A-SC-35435. As indicated on the face of the document, certain handwritten notations were made to the document after receipt by the FBI, a portion of which were withheld pursuant to FOIA Exemptions (b)(6) and (b)(7)(C). Presumably, the handwritten notations are notes made by an FBI employee since the document was located within an FBI file. However, these notes cannot refer to the size or status of a file related to plaintiff because no such sized file related to plaintiff has ever been discovered as a result of any of the searches for records related to plaintiff that have been conducted. As indicated earlier, the only time at which plaintiff was of investigative interest to the FBI was in 1995 in connection with the UNABOMB investigation, and he was quickly dismissed as a potential subject. The records related to the FBI's limited investigatory interest into plaintiff were provided to him and consisted of only approximately 163 pages. Furthermore, the many searches that have been conducted to locate records related to plaintiff have not indicated any investigatory interest in plaintiff other than in connection with the UNABOMB investigation. It

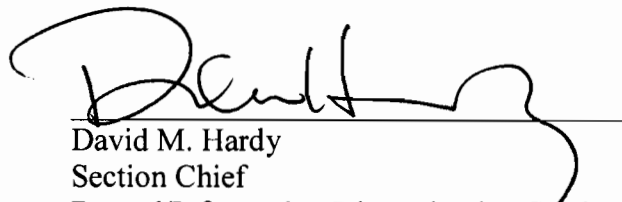
would be impossible for plaintiff to have any pending investigative file given that RIDS found no evidence during its many searches for records responsive to plaintiff's multiple FOIA requests that plaintiff has ever been or is currently the subject of an FBI investigation.

CONCLUSION

(71) The FBI has processed and released all reasonably segregable information from the records responsive to plaintiff's FOIPA request. The exempt information has been withheld pursuant to FOIA Exemptions 5, 6, 7(C), and 7(E), U.S.C. §§ 552 (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). The FBI has carefully examined the responsive documents and has determined that the information withheld from plaintiff, if disclosed, could disclose privileged material, could cause unwarranted and clearly unwarranted invasion of the personal privacy interests of third parties; and could reveal FBI techniques and procedures. Accordingly, all reasonably segregable, non-exempt information has been released within documents produced as a result of plaintiff's FOIPA requests to the FBI.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through V, attached hereto are true and correct copies.

Executed this 6th-day of May, 2013.


David M. Hardy
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Record/Information Dissemination Section
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