

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

James Lutchter Negley,	§	
Plaintiff,	§	
	§	
vs.	§	Civil Action No. SA-12-CV-00362-OLG
	§	
Federal Bureau of Investigation,	§	
Defendant.	§	

DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION FOR RECONSIDERATION

TO THE HONORABLE ORLANDO GARCIA, U.S. DISTRICT JUDGE:

NOW COMES the Federal Bureau of Investigation (FBI), Defendant herein, by and through the United States Attorney for the Western District of Texas, and respectfully submits this Response to Plaintiff’s Motion for Reconsideration (doc. no. 34). Defendant would show the Court the following:

1. At best, Plaintiff’s Motion is premature, as it was filed less than one month before the FBI would be submitting its Motion for Summary Judgment and Vaughn Declaration. The FBI submits that the Vaughn Declaration (by Mr. Hardy), filed on May 6, 2013, fully answers Plaintiff’s concerns, but will also set forth the relevant details of the Declaration and the FBI’s document retrieval in this Response so that the Court may rule on the Motion for Reconsideration.

2. Much of Plaintiff’s Motion is based on the assumption that the FBI was relying on a **Privacy Act exemption** – 5 U.S.C. § 552a(j) – pertaining to law enforcement investigative materials – to justify the withholding of information. (Motion for Reconsideration at ¶¶ 4-5). In the process of compiling the Vaughn Declaration and its justifications for non-disclosure of certain information, the FBI recognized that the assertion of the Privacy Act exemption was in

error, and the FBI is no longer relying on this exemption. Indeed, after the filing of Plaintiff's Motion for Reconsideration, on April 23, 2013, EOUSA released additional documents¹ to Plaintiff after the FBI advised EOUSA that certain exemptions were no longer being claimed. *See* Declaration of John Boseker at ¶ 8 (Exhibit 1 attached). Accordingly, Plaintiff's concern is moot. The complete list of exemptions relied upon by the FBI is set forth in the Hardy Declaration (Exhibit 2 attached), and the summary table at Paragraph 38 of the Declaration is reproduced below:

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

¹ Because a set of responsive documents (77 pages) originated in the Western District of Texas' U.S. Attorney's Office, as a part of Mr. Negley's first lawsuit, EOUSA rather than the FBI processed these documents. Of this set, 59 pages were released in full, and 18 pages were released in part and withheld in part. EOUSA also did not claim any Privacy Act exemption with respect to these documents.

SUMMARY OF JUSTIFICATION CATEGORIES	
CODED CATEGORIES	INFORMATION WITHHELD
	to the FBI
(b)(6)-4 and (b)(7)(C)-4	Names and/or Identifying Information Concerning Third Parties Merely Mentioned
(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

Not a single withholding, as reflected on the coded withheld pages, was made referencing § 552a(j). Therefore, this issue is moot.

3. The second major thrust of Plaintiff's Motion for Reconsideration is his claim that a recent disclosure by EOUSA suggests that there may be 542,000 pages of responsive documents pertaining to Mr. Negley, rather than the 7, 406 pages identified by the FBI. (Motion for Reconsideration at ¶¶ 6-10). Plaintiff's assumption is based upon two stray handwritten notes on a fax cover sheet from the United States Attorney's Office more than eleven years ago (Plaintiff's Exhibit 33-2, p. 16). From this note, Mr. Negley and his counsel leap to the illogical conclusion that there must be another 500,000 plus pages of documents relating to Mr. Negley, which the FBI is refusing to disclose. Mr. Carroll also assumes that this stale, stray note strongly suggests that the FBI is still investigating Mr. Negley, and Plaintiff's counsel made the

befuddling request on April 9, 2013, that the FBI allow Mr. Negley to testify in whatever criminal prosecution it must be planning against Mr. Negley. Undersigned counsel responded that the FBI was aware of no such investigation. (E-mails attached as Exhibit 3).

4. As the Hardy Declaration attests, the FBI has searched its computer indexes using numerous variations of Mr. Negley's name and has identified all responsive documents. (*See* Hardy Decl. at ¶ 32). The FBI processed 7,425 responsive documents relating to Mr. Negley, not an additional 542,000. Even assuming that Mr. Negley's utterly unsupported speculation about ongoing FBI surveillance of him was correct, the existence of more than half a million pages of documents on one individual who has never been criminally charged is not remotely plausible. Most likely, the stray references to 542,000 pages of documents relate to the entire Unabomber investigation, which lasted more than 15 years, and not to any investigation of James Negley.² (*See* Hardy Decl. at ¶ 70, and n.4).

5. The FBI agrees with Plaintiff that this is a "usual" FOIA case, but not for the reasons Plaintiff has argued. What is truly remarkable about this case is how much unnecessary litigation has occurred regarding a 17 year-old investigation, which lasted for a very brief time. What is also remarkable is that almost all of the documents Plaintiff has obtained do not relate to any investigative activity of the FBI – instead, they relate to the time consuming efforts required to respond to Plaintiff's FOIA requests and FOIA lawsuits. That there may be some "irregularity" when the production of documents from several offices, and two Department of Justice components occurs over a several year period should neither be surprising nor suggestive of foul play. It is well-settled under FOIA, however, that the responding agency is not required

² The only discovery Plaintiff has requested relates to whether the FBI has conducted additional investigations or surveillance of him. (*See* Docket No. 25 at pp 5-6). That issue has clearly been put to bed by the District Court's decision in *Negley II* (825 F. Supp. at 68) (finding that reasonable searches conducted in response to both the 2002 and the 2009 FOIA request found no other investigative information), and the Hardy Declaration. Stray notes on a fax cover sheet from 11 years ago do not create a meaningful lead to follow.

to make a perfect search, but only a reasonable search. *See, e.g., Schiller v. INS*, 205 F. Supp. 2d 648, 656 (W.D. Tex. 2002). The Hardy Declaration and the decision of the District Court in *Negley II* establish that the FBI's search for responsive documents in this case was more than reasonable.

WHEREFORE, PREMISES CONSIDERED, for all the foregoing reasons, as well as the reasons expressed in Defendant's Motion for Protective Order and its Reply, Plaintiff's Motion for Reconsideration should be DENIED.

DATED: May 6, 2013

Respectfully submitted,
ROBERT PITMAN,
United States Attorney

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Response to Plaintiff's Motion for Reconsideration was electronically filed via the Court's CM/ECF system on this 6th day of May, 2013, and was served via ECF as follows:

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/s/ Robert Shaw-Meadow
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Assistant United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

James Lutchter Negley,
Plaintiff,

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vs.

Civil Action No. SA-12-CV-00362-OLG

Federal Bureau of Investigation,
Defendant.

ORDER

The matter before the Court is Plaintiff’s Motion for Reconsideration (docket no. 33), filed April 10, 2013.

After reviewing Plaintiff’s Motion, Defendant’s Response, and the Declarations submitted in support of Defendant’s Motion for Summary Judgment, the Court concludes that the FBI conducted a reasonable and adequate search for documents in this case, and that Plaintiff’s Motion should be in all things DENIED.

SIGNED AND ENTERED this ___ day of _____, 2013.

HON. ORLANDO GARCIA
U.S. DISTRICT JUDGE