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

JAMES LUTCHER NEGLEY, Plaintiff,	§	
v.	§	Cause No. 5:12-CA-00362-OLG
FEDERAL BUREAU OF INVESTIGATION, Defendants.	§	

ORDER GRANTING SUMMARY JUDGMENT

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

I. BACKGROUND

This case originated in 1995 when plaintiff went to the California State University library and asked for a copy of the Washington Post article reprinting the so-called Unabomber's Manifesto. As a result, the FBI interviewed Plaintiff, conducted a brief investigation, cleared Mr. Negley of any involvement with the Unabomber, and the inquiry was dropped by the FBI. This lawsuit is plaintiff's third seeking documents relating to him and his business. In *Negley I*, the court granted summary judgment in the FBI's favor after the FBI released in part fifty of fifty-one documents located in response to Negley's October 7, 1999 FOIA request. *Negley II* was filed in the District of Columbia by Plaintiff on October 17, 2003, and still remains pending on certain issues regarding attorney's fees. In that case, the FBI eventually prevailed on a

renewed motion for summary judgment contending that it had conducted an adequate search and properly applied exemptions protecting disclosure of law enforcement records that could reasonably be expected to constitute an unwarranted invasion of personal privacy. Although the district court had granted the FBI's first motion for summary judgment in *Negley II*, the decision was reversed by the D.C. Circuit Court of Appeals, and upon remand, the district court ordered the FBI to conduct additional searches of seven sources "conducted to locate records responsive to both plaintiff's 2002 and 2009 FOIA requests." *Negley II*, 825 F. Supp. 2d 63, 68, 71 (D.D.C. Aug. 31, 2011).

Although the FBI has undertaken no new investigative activity of the Plaintiff since 1995, Plaintiff has engaged the FBI in administrative FOIA requests and FOIA litigation continually since September, 1999. In a letter dated June 15, 2009, Plaintiff, submitted a third FOIA request to the FBI, requesting that it provide a copy of all records in its possession relating, in any way, to James Lutcher Negley. The FBI treated the requests for personal and business records separately. The FBI stated that no documents were located pertaining to plaintiff's business.

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

not previously been disclosed in response to plaintiff's two earlier FOIA requests, but only administrative or litigation files. Plaintiff asserts that Defendants did not adequately search for the records and believes that there are still important documents that should be produced to him.

II. STANDARD

Summary judgment is proper when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(a). The burden is on the moving party to show that "there is an absence of evidence to support the nonmoving party's case." *Freeman v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 860 (5th Cir.2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the moving party does so, the opposing party must go beyond its pleadings and designate specific facts showing there is a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*) (*per curiam*). An issue is genuine if the evidence is such that a reasonable jury could return a verdict in the opposing party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court reviews all facts in the light most favorable to the nonmoving party. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 181 (5th Cir. 2009).

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

Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749, 776 (1989). Agencies invoking exemptions must provide the requestor with a document index, known as a Vaughn Index, which lists each withheld document and provides an explanation for why it was withheld. *People for the Am. Way v. NSA*, 462 F. Supp. 2d 21, 30 n.5 (D.D.C. 2006).

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

III. ANALYSIS

A. Exemptions asserted by the FBI and EOUSA

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

exemptions as they apply to the documents uncovered by Defendant, the motion for summary judgment regarding defendant's assertion of exemptions 5, 6, 7(C), and 7(E) is GRANTED.

B. Adequacy of the Search for Records

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

Defendants provide information of the searches for information in the Hardy Declaration in paragraphs 32-35. These paragraphs explain that the searches conducted of automated, manual, and electronic surveillance indices, utilizing a 6-way phonetic breakdown of plaintiff's name. The searches were conducted at various locations by different personnel, to double-check for accuracy. The affidavit was produced by an official. Defendant has met its burden in providing a detailed affidavit. The declarations are awarded a presumption of good faith, which

cannot be rebutted by purely speculative claims about the existence and discoverability of other documents. *SafeCard Servs., Inc.*, 926 F.2d at 1200. Because the FBI has provided adequate affidavits, the burden shifts back to the Plaintiff to demonstrate the lack of a good faith search. *Short*, 593 F. Supp. 2d at 73. Plaintiff must prove that defendant purposefully withheld information to demonstrate bad faith. *Smith* , 1996 WL 696452 (E.D. La. Dec. 4, 1996) *aff'd in part*, 127 F.3d 35 (5th Cir. 1997). Although Plaintiff does not overtly assert a bad faith claim, he makes six arguments alleging that the search conducted by Defendant was not adequate and that summary judgment should be precluded.

1. Handwritten notation on Negley 437

Plaintiff is requesting that the Court authorize discovery to allow him to understand the meaning of the notations on the document known as Negley 437. Plaintiff believes that there might nearly 500,000 pages of documents that are possibly related to him and that the FBI should be required to turn them over. The Hardy Declaration states that the investigation of Plaintiff only took place in 1995 and was thereafter dismissed. The declaration further states that there were only 163 pages produced in the investigation and that no document regarding plaintiff was of that great of a size. The information in a defendant's declaration cannot be rebutted by purely speculative claims about the existence and discoverability of other documents. *SafeCard Servs., Inc.*, 926 F.2d at 1200. The question is not whether there may be documents, but whether the search by the agency was adequate. *Perry*, 684 F.2d at 128. Defendant has addressed the notation in the Hardy Declaration and given an explanation for it.

Plaintiff is relying on remote possibilities that there are more documents that relate to him, but he has not rebutted the information with more than speculative claims. In *Rugiero v. U.S. Dept. of Justice*, 257 F.3d 534, 547 (6th Cir. 2001), the court held that an agency's search

was adequate after conducting three separate searches from three different offices for information regarding the requestor. An agent in that case testified that there were no other files regarding the requestor and he had not been under any more investigation after the requester made a speculative claim regarding possible documents. *Id.* The *Rugiero* court held that summary judgment was appropriate because the legal standard focuses on the actual search and not whether the documents may exist. *Id.* at 547–48.

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

Plaintiff argues that defendant's referral of EOUSA documents to the EOUSA lacked notice to him and he was not made aware of the referral. According to 28 C.F.R. § 16.4(f), when an agency refers all or part of a request to another agency, it "ordinarily shall notify the requestor of the referral." The first time plaintiff allegedly learned of the referral was when the attorney who represented him in *Negley II* notified him of his receipt of the disclosure of twenty-one pages from the EOUSA in March 2013 after the referral took place in January 2013. Plaintiff believes the notification was untimely. Plaintiff's counsel, however, admits that the directive for notice is not unconditionally mandatory. This issue does not appear to be relevant to whether Defendants conducted an adequate search. Plaintiff then reframes this issue by stating that it was unreasonable for the referral to be made in January 2013 in response to the 2009 request made in July 2010. Plaintiff is asking why it took defendant so long to refer the documents to EOUSA. The question of why the defendant referred the documents at a later time is immaterial because the statute merely deals with notification at the time the document is actually referred. *See* 28 C.F.R. § 16.4(f) (stating that notification should occur when the documents are referred). There is no justiciable issue regarding the notification of the referral due to its non-mandatory nature and the timeframe in which notice was given to Plaintiff about the referral.

3. Withdrawal of the Privacy Act privilege/exemption

Plaintiff argues that defendant previously relied on the Privacy Act exemption to withhold information. This exemption is related to law enforcement matters. Defendant states that it withdrew its use of the Privacy Act in its response to Plaintiff's motion for reconsideration. Defendant argues that regardless of whether the exemption was used, it was only to withhold information after the FBI conducted its searches. The former use and later withdrawal of the exemption do not seem to be relevant to whether the defendant conducted an adequate search. The Hardy Declaration states that no information was withheld under the Privacy Act exemption. On April 23, 2013 EOUSA released information to Plaintiff after being informed that the Privacy Act exemption was no longer being evoked. Plaintiff's concern and this issue are moot.

4. The matter of *res judicata*

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

uncover any new investigatory material. *Id.* at 68. It seems that the court believed the search of the 2009 request was reasonable as well.

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

5. The erroneous file number

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

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

The FBI has submitted a representative sample of withheld documents, which compromises 10% of the total number of documents containing any withheld information. Defendant has also provided a Vaughn Index containing codes of the information including the exemptions. Plaintiff does not believe that the use of a sample is appropriate, but does not point to any case law that supports his argument. In fact, it has been held that when the number of

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

Plaintiff believes that two special masters should be appointed to review all of the pages of previously reviewed FBI files. Federal Rule of Civil Procedure 53(a) authorizes the involuntary appointment of a special master to make or recommend findings, but only if there is "some exceptional condition," or the "need to perform an accounting." The Court has discretion to appoint a master, but plaintiff has not pointed to any exceptional condition that would compel this Court to do so. Plaintiff argues that a review of all the records could detect notes and other recording of information relevant to the existence of records relating to him. However, again, "[t]he issue is not whether the any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d at 128. Plaintiff made no specific challenge to the representative sample other than saying that it was inappropriate to justify the claimed exemptions. However, the validity of the exemptions was conceded by the plaintiffs in relation to the documents already known to exist. Moreover,

oftentimes, the appointment of a master can be more troublesome than helpful. *Meeropol v. Meese*, 790 F.2d 942, 961 (D.C. Cir. 1986) (holding that if a master makes decisions without the trial judge, judicial authority has been delegated to someone "who has not been appointed pursuant to article III of the Constitution" and that it can be an inefficient use of judicial time or resources).

IV. CONCLUSION

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

IT IS SO ORDERED.

SIGNED this 31 day of July, 2013.

United States District Judge Orlando L. Garcia