

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
JAMES LUTCHER NEGLEY,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 03-2126 (GK)
)	
UNITED STATES DEPARTMENT OF JUSTICE,)	
)	
Defendant.)	
_____)	

NINTH DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division, formerly at Federal Bureau of Investigation Headquarters (“FBIHQ”) in Washington, D.C., and currently relocated to Winchester, Virginia. I have held this position since August 1, 2002. Prior to my 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) units and two field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to

the Federal Bureau of Investigation (“FBI”) records and information pursuant to the FOIA; Privacy Act of 1974; 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 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 response to plaintiff’s January 16, 2002 FOIA/Privacy Act (“FOIA/PA”) request made to the FBI’s San Francisco Field Office for information concerning himself, as amended April 23, 2002, that is at issue in this litigation. I am also aware of plaintiff’s June 15, 2009, FOIA/PA request made to FBIHQ for all FBI records related to himself and his business, Davis, Joseph & Negley, the Court’s September 24, 2009 Order, and Plaintiff’s March 15, 2011 Motion for Summary Judgment.

(4) This declaration is being submitted in support of the FBI’s Cross-Motion for Summary Judgment and the FBI’s Opposition to Plaintiff’s Motion for Summary Judgment . This ninth declaration supplements, and hereby incorporates, my previous eight declarations in this case.¹

¹ The First Hardy Declaration is dated January 9, 2004. The Second Hardy Declaration is dated May 1, 2006. The Third Hardy Declaration is dated February 15, 2007. The Fourth Hardy Declaration is dated March 21, 2007. The Fifth Hardy Declaration is dated October 8, 2007. The Sixth Hardy Declaration is dated October 26, 2009. The Seventh Hardy Declaration is dated December 23, 2009. The Supplement to the Seventh Hardy Declaration is dated January 27, 2010, the Eighth Hardy Declaration submitted on April 22, 2010 .

Exemption 2: Internal Personnel Rules and Practices of an Agency

(5) Although plaintiff has not challenged the FBI's assertion of Exemption (b)(2), the FBI withdraws its assertion of this exemption on Bates-stamped pages Negley-18, Negley-19, Negley-71, and Negley-72 in light of the recent U.S. Supreme Court decision in Milner v. Dep't. of the Navy, 562 U.S. ____ (2011). (See Seventh Hardy Decl., Ex.K). 5 U.S.C. § 552 (b)(2) exempts from disclosure information "related solely to the internal personnel rules and practices of an agency." Until March 7, 2011, Exemption 2 encompassed two distinct categories of internal agency records: those involving trivial administrative matters of no public interest ("Low 2"), and those more substantial in nature, the disclosure of which would risk circumvention of a statute or regulation ("High 2"). In this case, the FBI asserted High 2 to protect internal FBI telephone and facsimile numbers. The Milner decision eliminates the distinction between Low 2 and High 2, and narrows the application of Exemption 2 to those records which relate to employee relations and human resource issues. In light of the Milner decision, the FBI re-reviewed the documents in this case and determined that it will no longer assert Exemption 2 for the telephone and facsimile numbers on Bates-stamped pages Negley-17, Negley-18, Negley-71, and Negley-72. This previously redacted information is now being released to plaintiff. (See Exhibit A).

Alleged Processing Inconsistencies & Claims Against Validity of Exemptions

Event Record (Negley-78-FOIPA)

(6) Plaintiff alleges that the FBI's search in response to his 2002 request is inadequate because it failed to uncover an Event Record that appears in a file produced in response to his 2009 request. The Event Record is found in the Sacramento 149A-SC-C27507 file, serial 101, but contains

an administrative marking appearing to be an indexing record of some form to San Francisco file 149A-SF-106204-S-1575.² The FBI has located the original of this document and found that the 149A-SF-106204-S-1575 notation is not original to the document, but appears to be a manually added stamp of the file number "149A-SF-106204," followed by "S-1575" handwritten in blue ink. The plaintiff's concern that it could be a "7575" rather than a "1575" is unfounded, since the original shows that a faded penciled line, distinct from the numbering handwritten in ink, appears behind the numbering creating the appearance of a "7" instead of a "1" but this penciled line is clearly not part of the number handwritten in ink. Considering that this "Event Record" documents the original call that came in from a University Police Department official to the San Francisco Field Office's UNABOM tip line, and that this tip would have been delegated to the Sacramento Field Office for action since the location of the individual and events would have fallen within Sacramento's jurisdiction, the San Francisco Field Office likely forwarded this document to Sacramento for action. An original or copy of this document was not located during the search of the San Francisco 149A-SF-106204 file at issue in this case and a physical review (and later processing) of the 149A-SF-106204-S-1575 file serial did not locate this record. RIDS further contacted the Chief Division Counsel ("CDC") of the Sacramento Field Office, to inquire as to the administrative practice in place at the time this document was created. RIDS was advised that the San Francisco Field Office made a determination of which leads were significant enough to warrant placement into the San Francisco UNABOM investigative file. According to the

² Plaintiff originally received this document in connection with his October 7, 1999 FOIA request to the Sacramento Field Office seeking records about him maintained at and by that Field Office that was litigated in the United States District Court for the Western District of Texas, Civil Action No. 01-CA-57.

CDC of the Sacramento Field Office, although initially the lead received high priority attention by the Sacramento Field Office causing immediate assignment of personnel to the lead, once the FBI completed contact with Negley and determined that he was not a viable suspect, (see Seventh Hardy Decl., Ex. K, Negley-8) it is quite likely that this lead would no longer have been considered significant enough to warrant inclusion in the San Francisco 149A-SF-106204 file.

FOIA Exemption (b)(7)(C)

(7) The plaintiff challenges several instances of the FBI's assertion of FOIA Exemption 7(C) in the previously Vaughn Coded documents. The Seventh Hardy Declaration clearly outlines in pages 26 to 40 the FBI's basis for assertion of this exemption within the documents. In response to plaintiff's motion, the FBI will herein address the specific instances the plaintiff has challenged. The plaintiff challenges the FBI's decision to redact personally identifying information of individuals under FOIA Exemption 7(C) and further asserts that there is no indication that disclosing the redacted information would result in a threat of harassment, humiliation or physical harm to any individual and that because of this, the FBI has failed to meet its initial burden of demonstrating an invasion of privacy, that the exemption was properly invoked, and that a balancing test was conducted. The FBI addressed in the chart below the specific examples that plaintiff takes issue with.

Exem. Code	Vaughn Index Page	Plaintiff's Allegation	FBI's Response
(7)(C)-2	Negley-10 "He advised that Negley had approached his _____ at the library..."	"There is little to no chance that Negley or anyone else could discern the identity of the individual at issue by virtue of the FBI disclosing what is likely the word "boss" or a reference to an undisclosed employee's position 15 years ago."	<ul style="list-style-type: none"> • The passage of time does not ordinarily diminish the applicability of 7(C). • The descriptive term applies directly to the position of the person named in the next redaction. Releasing either would identify the individual, as with any individual, who has a strong interest in not being associated unwarrantedly with alleged criminal activity by having their name appear in connection with an FBI criminal file. • Plaintiff has not demonstrated how this specific individual's name and identifying information would shed light on the FBI's performance of its statutory duties, which can not be obtained from the release of the surrounding text.
(7)(C)-4	Negley-23	"Includes a redaction at the bottom of what appears to be an electronic search form, which appears to have no connection to any individual merely mentioned."	<ul style="list-style-type: none"> • This is the name of third party that came up during the search of the plaintiff's social security number in this database. The FBI is not aware of any connection this individual may or may not have to the plaintiff or to plaintiff's social security number. However, since it is the name of a third party, with no identifiable connection to the investigation or plaintiff, the name must be redacted as a "third party merely mentioned".
	Negley-30	"reflecting an electronic database search of some form, contains a large redaction of what appears to be several items of information that, again, appear to have no connection to any individual merely mentioned."	<ul style="list-style-type: none"> • The list contains 9 names that came up in the search, of third parties that have no connection to the investigation other than the fact that their last names begin with "Neg" and therefore came up in the alphabetical search process. Therefore, they are redacted as "third parties merely mentioned."

Exem. Code	Vaughn Index Page	Plaintiff's Allegation	FBI's Response
	Negley-47	<p>"The FBI apparently forgot to redact the identity of the first entity listed, Beal Enterprises, Inc. However, the FBI redacted the second entity listed. Not only is it unclear how revealing the identity of an entity that had a similar phone number to (512) 328-7690 <i>fifteen years ago</i> would be an unwarranted invasion of privacy, it is equally unclear why some entities are entitled to protection from alleged harassment, humiliation or physical harm, but others are not."</p>	<ul style="list-style-type: none"> • The FBI did not "forget" to redact the identity of the first entity listed. Under FOIA, the privacy interest protected under 7C is only applicable to "individual" privacy interests, not businesses generally. The redacted information is that of a third party individual who is merely mentioned as the coded category indicates. • The FBI released the telephone number, however releasing the name or address of the individual, who has a strong interest in not being associated unwarrantedly with alleged criminal activity by having their name appear in connection with an FBI criminal file, would be in violation of the individual's privacy interests and the plaintiff has not demonstrated how this specific individual's name and identifying information would shed light on the FBI's performance of its statutory duties.
(7)(C) -5, -6	Negley-100	<p>"document Negley-100 has a large redaction block under the heading Bureau File Number"</p>	<ul style="list-style-type: none"> • The information under this specific redaction is a person's name, not a file number. It is the name of a third party that was of investigative interest to the FBI during the UNABOM investigation and it was not the plaintiff. In fact, the FBI could find no connection between this information and the plaintiff. • In order to receive the information concerning this individual, the plaintiff would need to provide a privacy waiver signed by the individual authorizing release of his information. Even releasing the name of the individual to the plaintiff would be a violation of the individual's privacy interests.

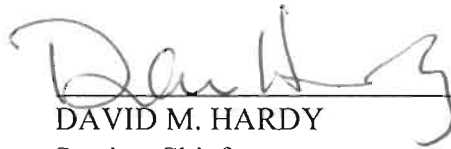
Exem. Code	Vaughn Index Page	Plaintiff's Allegation	FBI's Response
	Negley-102	<p>FBI's broad brush approach is unlawful" For example, document Negley-102 contains a sentence that reads "Referenced teletype furnished information from a _____." <u>See id.</u> The context of this particular redaction suggests that the missing word is the description of a type of interview (e.g., "telephonic").</p>	<ul style="list-style-type: none"> The descriptive term is actually the first name and first initial of the last name of a person interviewed. It is used as a way of reference in the document. It is very specific and personally identifying to the individual interviewed, by name.
	Negley-103	<p>Similarly, document Negley-105 contains a sentence that reads: "[H]e would have to miss a _____ meeting due to his being out of town." <u>See id.</u> Again, the context of this particular redaction suggests that the missing word is the description of a type of meeting (e.g., "status").</p> <p>File S-1575 contains numerous other unjustified redactions, including a month of the year and the name of a university.</p>	<ul style="list-style-type: none"> The descriptive term makes reference to a specific type of organizational/company/business meeting and is not a generic reference as the plaintiff mentions. It would clearly note the plaintiff's position in a group of individuals attending this type of meeting and the type of business/organization involved. Therefore it is far more descriptive than a mere "status" meeting as plaintiff suggests. When combined contextually with the other information released in the file, it could allow identification of the individual and more specifically if this file were to fall in the hands of the subject of investigatory interest it could allow him to discern how the individual who identified him knew him, thus revealing their identity and possibly subjecting them to harassment or danger of retaliation. When combined with other information the plaintiff seeks to release such as month and year of contacts and specific name of a university - the dangers are even more evident.

CONCLUSION

(8) The FBI has conducted a thorough search in response to plaintiff's 2002 FOIA request, as amended, searching in all logical locations and using a search cut-off date calculated to uncover all responsive material in existence at that time located at the San Francisco Field Office. Although plaintiff expresses his desire for the requested redacted information, he has not shown how revelation of these living individuals' personally identifying information would shed light on the FBI's performance of its statutory duties. The information the plaintiff has challenged would not reveal the operations and activities of the government and therefore does not satisfy a public interest requirement.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of May, 2011.



DAVID M. HARDY
Section Chief
Records/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Winchester, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JAMES LUTCHER NEGLEY,)	
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Plaintiff,)	
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v.)	Civil Action No. 03-2126 (GK)
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UNITED STATES DEPARTMENT OF JUSTICE,)	
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Defendant.)	
_____)	

EXHIBIT A

(03/31/ 5)

FEDERAL BUREAU OF INVESTIGATION

Precedence: IMMEDIATE

Date: 9/20/1995

To: Sacramento Attn: SSA [redacted]

From: Butte Information Technology Center (ITC) -
Investigative Information Services Center (IISC)
Contact: [redacted] Phone #: (406) 496-3801

b7C -1

Approved By: [redacted]

Drafted By: [redacted] sp

File Number(s): 149A-SF-106204 (Pending)

Title: JAMES LUTCHER NEGLEY BUTTE ITC RECORD 86754

Synopsis: Attached are copies of printouts setting forth results of inquiries conducted by the IISC. Also attached is a copy of an accomplishment/reply form. It is requested that you record the IISC accomplishments on this form and return it to the IISC. Please maintain an additional copy with the computer printouts as a serial in your case file.

Details: Credit bureau checks developed SSAN 457-76-8235. This SSAN is a valid number issued in 1962 in the state of Texas. Most current address listed is the 3905 Laguna Vista, Austin, Tx. Address check came back with a change of address listed as 14062 Denver PKW. W. Golden, CO. Possible assets, docket and drivers license information verified the 3905 Laguna Vista address. No information on the phone numbers located.

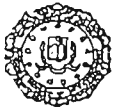
◇◇
CC: 1 - 149 Special Agent Supervisor
1 - SSA [redacted]

b7C -1

Note: Copy forwarded to Case Agent via fax on 9/19/95.

SEARCHED _____	INDEXED _____
SERIALIZED _____	FILED _____
SEP 21 1995	
FBI-SACRAMENTO	

FD-809 (Rev. 12-23-94)



INVESTIGATIVE INFORMATION REQUEST FORM

FBI, Butte Information Technology Center
400 North Main Street, Room #115
Butte, Montana 59701

- Commercial Telephone (406) 782-2304
FTS: 700-585-2391 FAX: (406) 782-9504, 782-9507 & 782-7418
Secure FAX & STU III: (406) 782-2304, Ext. 26

ITC Use Only: SITC Record #: 86754
Date/Time In: 9/19/05
Date/Time Out: 9/19/05
Database(s) Used:
1. MW 5. 9. OMC
2. TU 6. 10.
3. EP 7. UN 11.
4. MU 8. CA 12.

TO: FBI BUTTE INFORMATION TECHNOLOGY CENTER
Date: 9-19-05

Forfeiture/Seizure Related: [] Type of Request: [X] FAX [] Telex [] Mail [] Reply: [X] FAX [] Telex []
Requestor: SSA [] Phone #: 481-9110 FAX #: 978-8300 UCFN: 1494-SF-104
Office/RA: SACRAMENTO UTP Precedence: [] ROUTINE [] PRIORITY [X] IMMEDIATE
Approximate turnaround times (48 hrs) (24 hrs) (2 hrs)

SEARCH CRITERIA (Attach additional sheets if necessary)

Name - Last: NEGLEY First: James Middle: Lutch
Alias: Sex: M DOB1: 2/12/45 DOB2: 1/1
SSAN1: - - SSAN2: - - Spouse:
Fugitive: [] Yes [] No Driver's License #: State:

RESIDENCE

Street Address: 3905 LAGUNA VISTA City/State: Austin, TX Zip: 78746 Phone:

BUSINESS

Business Name: Street Address:
City/State: Zip: Phone: Business ID#:

CHECK DESIRED SEARCH PARAMETERS (Please check only those that are needed)

- [] 1. Specific Information Desired
[X] 2. Determine All Individuals Associated with Social Security Number(s)
[X] 3. Report Validity of Social Security Number
[] 4. Employment Report (subject to availability) INQUIRY WILL POST TO CONSUMER'S ACCOUNT
[] 5. Determine Who is Associated with Telephone Number(s)
[X] 6. Determine Address of Business/Person (U.S. , , State(s))
[] 7. Determine Property Owned by Individual (U.S. , , State(s))
[X] 8. Determine Who Owns Property Listed Above
[] 9. Determine Who Resides at Address Listed Above
[X] 10. Determine Financial Background Info, Financial Associates/Institutions (NOT FULL CREDIT REPORTING)
[] 11. Determine Corporate Business Info/Institutions Associated with: (Person/Business)
[] 12. Border crossings into the United States (subject to availability)
[] 13. Federal Prison Inmate Information

Reply From: FBI, Butte Information Technology Center (SITC)
Return Reply To: SAC, SACRAMENTO
Attention:
Based on search criteria, marked records are attached:
[X] Possible Identifiable Records [] Brief Synopsis of Information Found
[] Other Peripheral Information [] No Information Found

(03/31/95)

FEDERAL BUREAU OF INVESTIGATION

Precedence: IMMEDIATE

Date: 9/20/1995

To: Sacramento Attn: SSA [redacted]

From: Butte Information Technology Center (ITC) -
Investigative Information Services Center (IISC) b7C -1
Contact: [redacted] Phone #: (406) 496-3801

Approved By: [redacted]

Drafted By: [redacted] sp

File Number(s): 149A-SF-106204 (Pending)

Title: JAMES LUTCHER NEGLEY BUTTE ITC RECORD 86754

Synopsis: Attached are copies of printouts setting forth results of inquiries conducted by the IISC. Also attached is a copy of an accomplishment/reply form. It is requested that you record the IISC accomplishments on this form and return it to the IISC. Please maintain an additional copy with the computer printouts as a serial in your case file.

Details: Credit bureau checks developed SSAN 457-76-8235. This SSAN is a valid number issued in 1962 in the state of Texas. Most current address listed is the 3905 Laguna Vista, Austin, Tx. Address check came back with a change of address listed as 14062 Denver PKW. W. Golden, CO. Possible assets, docket and drivers license information verified the 3905 Laguna Vista address. No information on the phone numbers located.

00 _____ b7C -1

CC: 1 - 149 Special Agent Supervisor
1 - SSA [redacted]

Note: Copy forwarded to Case Agent via fax on 9/19/95.

FD-309 (Rev. 12-23-94)



INVESTIGATIVE INFORMATION REQUEST FORM

FBI, Butte Information Technology Center
400 North Main Street, Room #115
Butte, Montana 59701

- Commercial Telephone (406) 782-2304
- FTS: 700-585-2391 FAX: (406) 782-9504, 782-9507 & 782-7418
- Secure FAX & STU III: (406) 782-2304, Ext 26

ITC Use Only: SITC Record #: 86754
 Date/Time In: 9/19 12:25 am pm
 Date/Time Out: 9/19 12:38 am pm
 Database(s) Used:
 1. TRU 5. _____ 9. NCIC
 2. TY 6. _____ 10. _____
 3. EF 7. LN 11. _____
 4. MO 8. TR 12. _____
 Handled By: _____

b7c -1

TO: FBI BUTTE INFORMATION TECHNOLOGY CENTER

Date: 9-19-05

Forfeiture/Seizure Related: Type of Request: FAX Telcal Mail Reply: FAX Telcal Ma

Requestor: SSA [redacted] Phone #: 481-9110 FAX #: 978-8300 UCFN: 1494SF-10620

Office/RA: SACRAMENTO UTP Precedence: ROUTINE PRIORITY IMMEDIATE
 Approximate turnaround times (48 hrs) (24 hrs) (2 hrs)

SEARCH CRITERIA (Attach additional sheets if necessary)

Name - Last: NEBLEY First: James Middle: Lutcher

Alias: _____ Sex: M DOB1: 2/12/45 DOB2: 1/1

SSAN1: _____ SSAN2: _____ Spouse: _____

Fugitive: Yes No Driver's License #: _____ State: _____

RESIDENCE

Street Address: 3905 LAGUNA VISTA City/State: Austin, TX Zip: 78746 Phone: _____

BUSINESS Phone 512-328-7690
 Business Name: _____ FAX: 512-328-0484 Street Address: _____

City/State: _____ Zip: _____ Phone: _____ Business ID#: _____

CHECK DESIRED SEARCH PARAMETERS (Please check only those that are needed)

- 1. Specific Information Desired
- 2. Determine All Individuals Associated with Social Security Number(s)
- 3. Report Validity of Social Security Number
- 4. Employment Report (subject to availability) INQUIRY WILL POST TO CONSUMER'S ACCOUNT
- 5. Determine Who is Associated with Telephone Number(s)
- 6. Determine Address of Business/Person (U.S. _____, _____, _____ State(s))
- 7. Determine Property Owned by Individual (U.S. _____, _____, _____ State(s))
- 8. Determine Who Owns Property Listed Above
- 9. Determine Who Resides at Address Listed Above
- 10. Determine Financial Background Info, Financial Associates/Institutions (NOT FULL CREDIT REPORTING)
- 11. Determine Corporate Business Info/Institutions Associated with: _____ (Person/Business)
- 12. Border crossings into the United States (subject to availability)
- 13. Federal Prison Inmate Information

Reply From: FBI, Butte Information Technology Center (SITC)

Return Reply To:
 SAC: [redacted] Attention: _____ b7c -1

Based on search criteria, marked records are attached:
 Possible Identifiable Records Brief Synopsis of Information Found
 Other Peripheral Information No Information Found

2

Negley-72