UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5296 **September Term 2011**

James Lutcher Negley,
Appellant
v.

Federal Bureau of Investigation,
Appellee

APPELLANT'S PETITION FOR REHEARING EN BANC

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

NOW COMES James Lutcher Negley and files this Petition for Rehearing En Banc as follow:

I. STATEMENT REQUIRED BY FED. R. APP. P. 35(b)(1)

The proceeding involves one or more questions of exceptional importance, specifically, whether it is reasonable for a government agency to use the date of a FOIA request as a cut off for its production under *Public Citizen v. Dep't of State*, 276 F. 2d 634, 643-644 (D.C. Cir. 2002), in reliance, in whole or in part, on the representation that responsive documents in existence after the cut off were the subject of a subsequent FOIA request submitted by the same requestor.

II. INTRODUCTION

This case is an appeal from three orders of the United States District Court entered in Mr. Negley's Complaint against the Federal Bureau of Investigation ("FBI") under the Freedom of Information Act, 5 U.S.C. § 552 concerning the FBI's

response to and performance under a September 24, 2009 Order entered by the District Court requiring certain specific action by the FBI. A panel of this Court entered an Order on March 28, 2012 granting a motion filed by the FBI for summary affirmance of the district court's orders, necessarily finding that the merits of this case were so clear as to justify expedited action without full consideration of the merits upon briefing by the parties. *Taxpayers Watchdog, Inc. v. Stanley*, 819 F. 2d 294, 297 (D.C. Cir. 1987), *citing Walker v. Washington*, 627 F. 2d 541, 545 (D.C. Cir. 1980)(per curiam), *cert. denied*, 449 U.S. 994 (1980). The questions presented by this appeal include the following:

a. May an agency refuse to produce records responsive to a FOIA request because it anticipates that it may produce those same records pursuant to a subsequent FOIA request? Negley believes that this is a question of first impression.

b. May an agency unilaterally impose limitations on its compliance with a Court Order in searching for and producing records under FOIA?

c. Is an agency entitled to deference in its claims of conducting a reasonable search when it its first response to a FOIA request is that there are no responsive documents and it only produces records after litigation has ensued? This case has resulted in multiple Court Orders requiring the FBI to produce responsive documents. See e.g. Doc. # 43, 1/8/07 Order and Doc. #90, 9/24/09 Order. In addition, the FBI has, in the face of challenges in litigation, revised and limited its exemption claims. See e.g. Doc. # 82-4, Hardy Declaration No. 5.

The above are only some of the issues raised by the more than eight years of

litigation in this case. Attached to this Petition are copies of the Panel Order dated March 28, 2012 (Appendix "A") and the Certificate of Parties required under Circuit Rule 35 (Appendix "B"). The Disclosure Statement under Circuit Rule 26.1 is not applicable.

III. FACTUAL BACKGROUND

Brief Chronology of the Litigation Prior to September 24, 2009 Order (Record references are to the District Court Record)

January 16, 2002	Negley submitted a FOIA request to the FBI for "any records about me maintained at and by the FBI in [the San Francisco] field office [(the "SFFO")]". (Doc. 71, Ex. 1-A).
January 30, 2002	FBI responds that a search of the San Francisco Division files revealed no records responsive to the request. (Doc. 71, Ex. 1-B).
February 14, 2002	Negley appeals FBI's response. (Doc. 71, Ex. 1-C).
April 23, 2002	Negley submits amended FOIA request to include [file no. 149A-SF-10624 Sub S-1575] as well as any others.(Doc. 71, Ex. 1-D).
April 30, 2002	FBI responds admitting that there were records responsive to Negley's FOIA request at the SFFO, but it did not produce any documents. (Doc. 71, Ex. 1-E).
May 13, 2002	Negley again appealed (Doc. 71, Ex. F).
Sept. 30, 2002	FBI responded. This time the FBI produced thirty seven documents (12 pages were redacted) from file no. 149A-SF-10624-SO-3041. The FBI withheld other responsive documents from Serial No. 3041 asserting FOIA exemptions. (Doc. 71, Ex. 1-G). Documents from File No. S-1575 were not produced.

October 7, 2002 Negley, through counsel, sought clarification from the FBI regarding the response and specifically questioned the failure to produce File No. S-1575. (Doc. 71, Ex. 1-H).

Nov. 26, 2002 FBI responded stating that File No. S-1575 does not pertain to Negley and that records were being withheld under FOIA exemptions. (Doc. 71, Ex. 1-I). No non-exempt portions were produced and no index pursuant to *Vaughn v. Rosen*, 484 F. 2d 820 (D.C. Cir. 1973), was produced.

October 17, 2003 Negley filed the instant lawsuit to obtain a complete production of agency records responsive to his request. (Doc. # 1)At this point Negley had made four attempts to secure documents under FOIA. The FBI had released-from Serial 3041 of the Main File only-25 non-redacted pages and 12 redacted pages. No documents from File S-1575 were produced.

January 8, 2007 Following an interlocutory appeal by Negley to this Court and an order of remand, the District Court ordered the FBI to produce Serial No. 3041 in its entirety (Doc. # 43).

January 16, 2007 FBI filed Praecipe (Doc. # 45)

January 19, 2007 FBI filed Notice of Correction to Praecipe (Doc. # 47)

The above two filings represented that, in addition to the 37 total pages produced prior to the lawsuit, the FBI had produced an additional 9 redacted pages(one page was withheld in its entirety) and was producing an additional 2 pages from Serial No. 3041. Evidently, the last two pages were "found" following a "hand search", which the FBI had not conducted in the prior five years since Negley's FOIA request had first been made. (Doc. # 47).

March 12, 2007 FBI witness admits in deposition that File No. S-1575 pertains to Negley. (Doc. # 71, pp. 11-13).

August 24, 2007 Negley notifies the Court that, despite the FBI's maintaining a

> number of databases from which documents could be recovered, it had limited searches in response to Negley's request to only one of those databases (Doc. #71, pp. 3-6)

On September 24, 2009, in response to a Motion for Partial Summary Judgment filed by Negley (Doc. # 71), the District Court entered an order granting the Motion and denying the FBI's Second Motion for Summary Judgment (Doc. # 72). The Order (Doc. # 90) provided in pertinent part as follows:

> ORDERED, that within 60 days of the date of this order, Defendant must conduct reasonable searches, in response to Negley's FOIA request, for all documents that relate to or reference Negley in any manner, including any reference to File Number 65-21102 identified in Hardy's Fifth Declaration...
>
> ORDERED, that within 90 days of the date of this Order, Defendant must produce all documents, including duplicates, responsive to Negley's FOIA request, along with a *Vaughn* Index for any redactions and/or withholdings; and it is further
>
> ORDERED, that within 90 days of the date of this Order, Defendant must produce a detailed affidavit explaining the searches conducted in response to Negley's FOIA request, including all search terms used, and the bases for any redactions and/or withholdings from the documents produced in response to Negley's FOIA request...

(Doc. # 90, pp. 2-4)

This order was broad and expansive. Its detail and specificity were necessitated by the FBI's conduct in this case. Negley had to fight for every document and had to return to the Court in order to enforce his rights and to secure relief

requiring the FBI to do that which it was obligated to under FOIA. In its Memorandum Opinion dated September 24, 2009, the district court stated, among other things: "[The FBI] has provided no explanation or justification for its piecemeal approach to identifying and producing documents in compliance with the Court's instructions. Such an approach undermines the agency's credibility, and does little to promote confidence that the FBI has complied with its statutory obligation to conduct a good faith, reasonable search. Doc. # 91, p.17. However, even after entry of the detailed and specific order, the FBI continued to withhold and refuse to produce responsive documents. That is what this appeal is about. In response to the Court's Order of September 24, 2009, the FBI has continued to refuse to produce responsive documents taking two important positions that are material to the issue stated in this Petition for Rehearing:

1. The **search** ordered by the Court was more expansive than the document **production** ordered by the Court.

The district court agreed in overruling the Motion for Contempt. (Doc. # 110, p. 9).The FBI's position, and the district court's conclusion, can be refuted by the language of the Order. It's search and production provisions are identical in each material respect:

Search Provision

ORDERED, that within 60 days of the date of this order, Defendant must conduct reasonable searches, **in response to Negley's FOIA request**,

Production Provision

ORDERED, that within 90 days of the date of this Order, Defendant must produce all documents, including duplicates, **responsive to Negley's FOIA request**...

(Doc. # 90)(emphasis added). The district court should have enforced its Order. A court must carry out and enforce an order that is clear and unambiguous on its face. *Negron-Almeda v. Santiago*, 528 F. 3d 15, 23 (1st Cir. 2008). Absent amendment or vacation, a court must carry out an enforce an order that is clear and unambiguous on its face, whether or not the inscribed language reflects the court's recollection of its actual intent. *United States v. Spallone*, 399 F. 3d 415, 421 (2d Cir. 2005)(reference to judgment). In denying the Motion for Contempt, the district court stepped back from its September 24, 2009 order. The district court effectively reinterpreted the meaning of Mr. Negley's amended FOIA request seeking "any others", which, in the Englsih language, refers to any file numbers. Despite the broad language of the request and the broad language of the September 24, 2009 ordering a search and and limiting it to only documents with serial numbers of the San Francisco Field Office (Doc. # 110, pp. 9-10). This is on its face illogical where the September 24, 2009 order directed a search "for all documents that relate to or reference Negly in any

manner," outside the San Francisco field office (those file numbers have the designation "SF") and production of "all documents...responsive to Negley's FOIA request". Doc. 90, p. 3. There were many records discovered by the FBI that were not produced because of the FBI's cut off determination. See, e.g. Doc. # 105, Ex. A.

2. It can refuse to produce records which it was ordered to produce because those records may be responsive to a separate FOIA request made by Negley which is not a part of this litigation.

The FBI's Motion for Summary Affirmance fails to show that these positions are so clearly reasonable as to justify expedited consideration.

The Motions Under Review

Negley filed three motions arising out of the FBI's Response to the September 24, 2009 Order: (1) a Motion for Order of Contempt (Doc. # 102); (2) Motion for Reconsideration of Order Denying Motion for Contempt (Doc. # 109); (3) Motion for Summary Judgment (Doc. # 112). Each of the motions was denied by the district court. In addition, the district court granted the FBI's Motion for Summary Judgment (Doc. # 116).

1. Negley's Motion for Contempt

In the Motion for Contempt, Negley complained that the FBI violated the September 24, 2009 Order because it:

a. Imposed an April 2002 time limitation to the search and production of

responsive documents

b. Did not search for or produce files and responsive information because it unilaterally determined the files or information was not responsive or that Negley would not want it.

Motion for Contempt, Doc. # 102, pp. 7-9.

2. Negley's Motion for Reconsideration of Order Denying Motion for Contempt

After the Court issued an Order denying the Motion for Contempt, Negley filed a Motion for Reconsideration of the Order. (Doc. #111). In his Motion for Reconsideration, Negley showed that:

a. Negley's Amended FOIA Request and the Court's September 24, 2009 Order were not limited to records only maintained at and by the San Francisco Field Office. As a result, it was a violation of the Order for the FBI to limit production to documents from the San Francisco Field Office.

b. The 2009 FOIA request, not in issue in this lawsuit, has no bearing on the reasonableness of the FBI's unilateral decision to use April 2002 as the cut off date for production pursuant the Sept. 24, 2009 Order. As a result it was not proper for the FBI to rely on the existence of that request as justification for limiting its response to the FOIA request in litigation and the September 24, 2009 Order.

Motion for Reconsideration, Doc. # 111, pp. 2-3, 4-6.

3. Negley's Motion for Summary Judgment

Negley filed a Motion for Summary Judgment showing that:

a. FBI has not located or produced all responsive documents;

b. April 2002 was an unreasonable cut off date;

c. Redactions were not proper;

d. The record leaves substantial doubt as to the sufficiency of the search, because of the FBI's temporal limitations on its production;

e. The 2009 request does not excuse the FBI's failure to comply with the 2002 request.

Motion for Summary Judgment, Doc. # 112, pp.8-9, 9-13, 13-17.

IV. REASON FOR REHEARING

Unreasonable Limitation on Production-Cut Off Date

1. Cut Off Date Seven Years Prior to September 2009 Was Not Established to be Reasonable

Whether the FBI's imposition of a cut off date for *production* of records is not a matter that should be dealt with on summary affirmance. The idea that the use of a time of request cut-off date is always reasonable was rejected in *McGehee v. CIA*, 697 F. 2d 1095, 1102 (D.C. Cir. 1983). *See Public Citizen v. Dep't. of State*, 276 F. 3d 634, 643 (D.C. Cir. 2002). Each of the three motions referenced above include objections to the determination of the FBI to unilaterally impose the 2002 date of request as the cut off for production of documents in this case. Here, the issue is not a cut off date for a *search* for documents. The FBI has already represented that its search for documents included documents created after the April 2002 FOIA request.

Rather, the issue is the reasonableness of the FBI's unilateral determination that, despite the fact that there were documents in existence after the cut off date, that *production* of documents would be limited to those in existence prior to the April 2002 FOIA request. The FBI argues that it was appropriate to impose an April 2002 time limitation on the production of documents under the Order. Motion for Summary Affirmance, pages 12-15. The District Court approved the FBI's position that it could impose an April 2002 cut-off date on the production of documents pursuant to the September 24, 2009 Order-a period of more than seven years.

2. FBI Searched for Records That it Did Not Produce

On the critical issue of whether the FBI's use of April 2002 date as a cut off for *production,* the Order of this Court granting summary affirmance, found that the FBI's use of the date of the 2002 request as a cut off for its *search* was reasonable under the circumstances. This is significant. The FBI did search for documents in existence after the April 2002 date of request, however, it refused to produce such records, asserting, "it was logical for the FBI to conclude that any records created after and as a result of the 2002 FOIA request and located anywhere in the agency–which in this case included administrative type files pertaining to other field offices and generated as a result of the 2002 FOIA request–were sought by Negley's 2009 FOIA request." See FBI Motion for Summary Affirmance, page 15.

Courts have repeatedly held that when responding to FOIA requests, temporal limitations on FOIA productions are prohibited where the agency is unable to demonstrate that such cut-offs are reasonable under the circumstances. *See e.g. In Defense of Animals v. Nat'l Institutes of Health*, 543 F. Supp. 2d 83, 99 (D.D.C. 2008); *Public Citizen v. Dept. of State*, 276 F. 3d 634, 644 (D.C.Cir. 2002); *McGehee v. CIA*, 697 F. 2d 1095, 1104 (D.C. Cir. 1983). In this case, the FBI has claimed, among other things, that 2002 was a reasonable cut-off date because it was going to have to search for and produce documents after 2002 in response to a separate 2009 FOIA request by Negley that was not in litigation. There is no justification for refusing to produce records responsive to one FOIA request, because the agency may produce such records in response to a subsequent, and separate request under FOIA. Each request under FOIA should be reviewed and responded to separately and considered on its own merits.

3. The Existence of the 2009 Request is Not a Sufficient Basis to Cut Off Production Pursuant to the September 2009 Order

The FBI has not sought relief in the District Court from repetitious FOIA requests. In fact, the FBI has taken the position that the 2009 FOIA Request by Negley is unrelated to this litigation. At a January 24, 2011 status conference before the District Court, the FBI, through counsel, stated:

> We believe that these records are in response to a 2009 FOIA request that Mr. Negley made to the FBI that is outside this litigation. It is not the subject of the instant litigation.

Transcript of 1/24/11 Status Conference at p. 8, ll. 16-19. The District Court inquired regarding the relevance of the 2009 request to this case:

> The Court: Ms. Lo? You did say just a few minutes ago that you agree that these productions are outside the parameters of this case.
>
> Ms. Lo.: And we believe that to be the case Your Honor, yes.

Transcript of 1/24/11 Status Conference at p. 17, ll. 10-14. To assert that the 2009 request is not a part of this litigation makes it unreasonable to use that request as a basis for cutting off production of records to a date more than seven years in the past. The FBI has not shown that it is proper to judge compliance with a FOIA request by taking into consideration the fact that the requestor has submitted a separate request and that the FBI's response to that request may include records that should have been produced pursuant to the first FOIA request. The FBI's basis for limiting its production to April 2002 raises the following question:

Is it appropriate for the FBI to refuse to produce material that is responsive to a FOIA request, and which it has been ordered to produce, for the reason that the FBI may produce that same material in response to a separate, subsequent FOIA request that is not a part of the litigation?

There is no basis in the FOIA statute or in case law for such a result.

4. Production Pursuant to the 2009 Request has Not Cured the Lack

of Production Under the September 2009 Order

The FBI claims on page 15 of its Motion for Summary Affirmance, that "the FBI's searches in response to both the 2002 and 2009 FOIA requests did not locate any FBI investigatory records about Negley that had not been previously released. See Motion for Summary Affirmance, p. 15, n. 3. This claim is rebutted by the FBI's own response to the 2009 FOIA Request which included more than 500 pages of documents from more than 10 file/serial numbers never before identified or produced by the FBI in the instant lawsuit(and references an additional 3000 pages to be processed). Doc. # 105, Ex. A. By letter dated July 16, 2010, the FBI produced 716 pages of documents (and withheld an additional 100 pages) relating to Negley. Subsequent production has not been represented by the FBI as complete.

Despite the unambiguous terms of the September 24, 2009 Order, the FBI did not produce the identified files/serials or produce over 500 responsive documents by December 23, 2009. Moreover, the FBI has indicated that it still needs to process and potentially release another approximately 3000 pages of responsive documents. Doc. # 105, Ex. A. This is based on the FBI's position as to a cut off date for production approved by the district court and now approved, by a statement in this Court's Order granting summary affirmance that the FBI's "cut-off for its search was reasonable under the circumstances". Order of March 28, 2012(Doc. # 1366067).

In this case, the cut off for production is also unreasonable because there is no guarantee that the FBI will fully, timely and reasonably comply with the 2009 FOIA request. As shown by the discussion above, there remain many documents, that are apparently responsive and that have been found, that have not yet been produced to Negley. In fact, Negley has initiated litigation in the United States District Court for the Western District of Texas in Civil Action No. SA-12-CV-362-OG, *James Lutcher Negley v. Federal Bureau of Investigation* seeking to enforce his rights under FOIA to a timely and complete production of records in response to his 2009 FOIA request. In that case, Negley has complained:

> It has now been more than two years and eight months since Plaintiff made his request under FOIA to the FBI. The FBI waited almost one full year before producing the first set of pages pursuant to the request. A second release was made in December 2010. Since that time, there has been no further production from the FBI. This despite the fact that, by its own admission, the FBI is aware of an additional estimated 1,543 pages of records responsive to Plaintiff's request. (Complaint, para. 9)

If the FBI had agreed to more expansive production of documents that it had searched for anyway in connection with complying with the order of the district court in connection with the 2002 FOIA request, it is likely that this additional litigation would have been unnecessary. A mere representation by an agency that it will produce the documents later is not sufficient to satisfy the agency's burden that the cut off is reasonable under the circumstances.

WHEREFORE, Appellant, James Lutcher Negley, respectfully requests that the Court grant this Petition for Rehearing, set aside the Order granting the Motion for Summary Affirmance and order full briefing on the merits of this appeal.

Respectfully Submitted

/s/ John F. Carroll
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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2012, I electronically filed the foregoing Petition for Rehearing En Banc using the CM/ECF system which will send notification of such filing to the following:

Michelle Lo
Assistant United States Attorney
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Washington, D.C. 20530

By: /s/ John F. Carroll