UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JAMES LUTCHER NEGLEY,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	**Civil Action No. 03-2126 (GK)**
FEDERAL BUREAU OF INVESTIGATION,	)	
	)	
Defendant.	)	
	)	
	)	
	)	

REPLY IN SUPPORT OF PLAINTIFF'S
MOTION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

Plaintiff James Lutcher Negley, by and through undersigned counsel, respectfully submits this reply in support of his Motion for an Award of Attorneys' Fees and Costs against Defendant Federal Bureau of Investigation ("FBI"). In its opposition brief, the FBI makes three broad points; as explained below, all are without merit.

First, the Court need not entertain the FBI's argument that this Motion is premature because it already rejected the identical argument made by the FBI in its Motion to Stay Briefing. Second, as Negley's opening brief amply demonstrates, he is entitled to a fee award – the FBI cannot ignore the vast public benefit from the case when viewing the broader effect of the litigation, or that Negley has obtained Court-awarded relief throughout this case. Third, instead of explaining its calculations in asserting that the requested amount of fees is unreasonable, the FBI misstates facts and attempts to mislead the Court. As set forth in greater detail below and in Negley's opening brief, Negley requests a total award of $208,894.80.

ARGUMENT

I. THE PENDING MOTION IS RIPE FOR THE COURT'S ADJUDICATION.

The FBI asserts that Negley's Motion is premature because "there remains . . . additional discovery in this case and, quite possibly, further briefing" and "final judgment has not been rendered[.]" Opp'n at 7. However, the FBI made these exact same arguments, citing to the exact same cases, in its Motion to Stay Briefing Schedule. See, e.g., Motion to Stay Briefing Schedule dated October 22, 2009 (Doc. #93), at 2 ("Undersigned counsel informed Plaintiff that Defendant did not believe that the time for making a claim for attorneys' fees had begun to run . . . as there had not yet been an entry of judgment in this case"). In that same motion, the FBI asked, in the alternative, for several additional weeks so that the parties could discuss settlement. The Court ruled on the FBI's above assertion, disagreeing that Negley's motion for an award of attorneys' fees and costs was premature, but permitting several additional weeks for the parties to discuss settlement. See Order dated November 5, 2009 (Doc. #96). Thus, it is simply a waste of the parties and Court's time and resources for the FBI to attempt to re-litigate the very same issue.

Even if the Court were to again review the FBI's assertion that Negley's Motion is premature, the FBI has not offered anything new to change the Court's prior ruling. Specifically, the FBI again asserts that because it has been ordered to conduct additional searches and/or clarify prior searches, and make witnesses available for three depositions, that "there remains . . . quite possibly, further briefing should Plaintiff decide to challenge any withholdings and/or exemptions asserted with respect to any disclosures." Opp'n at 7. In other words, the FBI wants Negley to await further relief (after litigating this case for more than six years) on the mere possibility that the FBI will actually produce additional responsive documents, but make

redactions and/or withhold documents, and Negley decides to challenge those redactions and/or withholdings. Not only does this assertion rely exclusively on rampant speculation as to what may happen, it ignores that Negley already is eligible for fees based on having obtained Court-ordered relief at every stage of this case to date.

Prior to this lawsuit, the FBI searched only UNI and produced 37 pages from Serial 3041. After the lawsuit was filed and on remand, the Court ordered the FBI to produce Serial 3041 in its entirety, resulting in an additional 12 pages produced by the FBI. Then, in response to various Court Orders, the FBI produced documents from Serial 3865. The Court also permitted Negley to take depositions in this case. As a result of those Court-ordered depositions, Negley revealed the inadequacy of the FBI's prior search of UNI only, leading the FBI to search nine additional sources. See Memorandum Opinion dated September 24, 2009 (Doc. #91) ("Opinion granting Negley's Motion for Partial Summary Judgment"), at 12 ("[Negley] has, through great diligence and perseverance, learned from the FBI that there are nine other file systems that could have been searched.") (emphasis in original). After briefing on summary judgment, the Court ordered the production of File S-1575, which the FBI has since done. The Court also ordered additional searches, clarifications of prior searches, the production of documents and affidavits, and more depositions. See Order dated September 24, 2009 (Doc. #90). In this regard, the FBI cannot point to a single case that even suggests that some of the Court-ordered relief obtained by Negley is less worthy of making him eligible for attorneys' fees than the other Court-ordered relief obtained by Negley. See Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy, 288 F.3d 452, 456-57 (D.C. Cir. 2002) (citing Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001)) (noting that a party has "substantially prevailed" if it has "been awarded some relief by [a] court, either in a judgment on the merits or

in a court-ordered consent decree"). To the contrary, Negley has obtained Court-ordered relief throughout this case, and now seeks an award of attorneys' fees and costs based, not on speculation, but his having substantially prevailed to date.

Even if, however, the FBI is correct and a subsequent fee request is filed by Negley based on future success in challenging redactions and/or withholdings, it would be efficient for the Court to deal with that request separately as it involves an entirely distinct scope of contested issues. Specifically, this Motion relates primarily to Court-ordered relief in the form of additional searches, depositions and the production of documents that the FBI unreasonably refused to produce (because it mischaracterized Negley's request and its obligations under FOIA). Any subsequent motion would relate primarily to the Court ordering the FBI to un-redact or not withhold documents under a FOIA exemption (an issue that has not once come up in briefing for the pending Motion). Indeed, Allen v. FBI, 716 F. Supp. 667 (D.D.C. 1989), cited by the FBI, indicates that piecemeal litigation over attorneys' fees is appropriate "in limited circumstances," similar to that present here, where the first phase of FOIA litigation involves the search for and release of nonexempt documents, and the second phase of the litigation involves claimed exemptions. See id. at 672.

For the above reasons, Negley avers that this motion is ripe for review, as Negley already has substantially prevailed after incurring the costs associated with six-plus years of contested litigation. See Biberman v. FBI, 496 F. Supp. 263, 265 (S.D.N.Y. 1980) (recognizing that an interim fee award is appropriate "in those cases in which it is necessary to the continuance of litigation which has proven to be meritorious at the time of the application").

II. NEGLEY IS ENTITLED TO AN ATTORNEYS' FEE AWARD.

Perhaps recognizing that this Motion is not premature, the FBI attempts to argue that Negley cannot satisfy any of the four factors related to determining entitlement to a fee award. See Burka v. United States Dep't of Health & Human Servs., 142 F.3d 1286, 1288 (D.C. Cir. 1988) (identifying the four factors, none of which is dispositive, that the Court must consider when determining whether a plaintiff is entitled to an award of attorneys' fees). As set forth below, not only is the FBI incorrect, but its arguments in support evince its lack of credibility.

A. FBI's Lack of Reasonable Basis for Improper Withholdings/Searches

Despite a 20-page Opinion and accompanying Order issued by this Court detailing the FBI's "distressing active disregard of its obligations under FOIA" (see Opinion granting Negley's Motion for Partial Summary Judgment, at 13), the FBI continues to argue that its refusal to turn over File S-1575 was predicated upon a reasonable belief and, with respect to its inadequate searches, that "its forthcoming declaration . . . will evidence that [its] interpretation had a colorable basis in law." Opp'n at 14. As Negley discussed in his opening brief, this Court already has found and concluded that the FBI's actions in refusing to produce responsive documents and conducting unreasonable searches demonstrate that the FBI's position is both incorrect as a matter of law and not founded on a colorable basis in law:

- This Court already has found that "[t]he FBI's stubborn refusal to turn over [File S-1575] flies in the face of longstanding principles that favor disclosure in the FOIA context[.]" Opinion granting Negley's Motion for Partial Summary Judgment at 16.
- The Court similarly took issue with the FBI's failure to produce responsive documents from Serial 3041, finding that "[i]nstead of complying with the

Court's order and disclosing these documents to Negley, the FBI carved out its own exception to [this Court's] clearly worded order and elected to withhold production of these duplicates because nothing in them 'suggested additional information would be revealed.'" Id. at 17.

- With regard to the FBI's unreasonable searches, the Court noted that although "Plaintiff made clear that he was not requesting records about himself which were maintained only in 'main' files," the FBI "repeatedly conducted searches of only one record system[.]" Id. at 13. The Court found that "[r]egardless of any policy or conventional operating procedures, it is clear that Plaintiff's requests required Defendant to perform more rigorous searches for responsive documents." Id. at 14; see also id. at 17 ("[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.").

The FBI's previous actions, which the Court already has found to lack a colorable basis in law, demonstrate that a fee award is appropriate. See Tax Analysts v. United States Dep't of Justice, 965 F.2d 1092, 1097 (D.C. Cir. 1992) (finding fee award appropriate where agency was "recalcitrant in its opposition or otherwise engaged in obdurate behavior"); see also Judicial Watch, Inc. v. DOC, 384 F. Supp. 2d 163, 169 (D.D.C. 2005), aff'd in part and rev'd in part on other grounds, 470 F.3d 363 (D.C. Cir. 2006):

> In addition to the four factors just considered, the Court also considers its previous conclusions that [the agency's] initial search was unlawful and egregiously mishandled and that likely responsive documents were destroyed and removed. If the four factors by themselves did not weigh in favor of a fee award, surely [the agency's] past behavior - demonstrating its lack of reasonableness and lack of respect for the FOIA process - would tip the balance in favor of an award.

The FBI's persistence in arguing that its improper withholdings and unreasonable searches had a colorable basis in law, despite this Court's detailed findings to the contrary, shows that a fee award is warranted here.

B. Other Entitlement Factors

With respect to the first factor, i.e., the public benefit derived from the case, the FBI focuses on its assertion that the documents sought by Negley pertain to himself in arguing that there is no public benefit to the release of those documents. Opp'n at 9-11. According to the United States Court of Appeals for the District of Columbia Circuit, however, the inquiry required for this factor is broader – in fact, the Court must consider "both the effect of the litigation for which fees are requested and the potential public value of information sought[.]" Davy v. CIA, 550 F.3d 1155, 1159 (D.C. Cir. 2008) (emphasis added). And as pointed out in Negley's opening brief, this case has resulted in extraordinary information regarding how the FBI maintains its records and the baseline method by which it will search for and respond to FOIA requests, unless a FOIA requester has information to demand otherwise. By way of example, as noted by this Court, Negley, "through great diligence and perseverance," discovered that the FBI maintains the Zy database. See Opinion granting Negley's Motion for Partial Summary Judgment at 12. Undersigned counsel is not aware of a single federal court opinion (including on LEXIS and Westlaw), other than this one, that mentions, let alone discusses, the existence of the Zy database. Similarly, and as this Court noted, "[i]n this case, Plaintiff has, through great diligence and perseverance, learned from the FBI that there are [nine] other file

systems that could have been searched." Id. However, "Defendant repeatedly conducted searches of only the one record system, UNI, and challenged Plaintiff's efforts at every turn." Id. at 13. As with the Zy database, undersigned counsel is not aware of a single federal court opinion (including on LEXIS and Westlaw), other than this one, that mentions, let alone discusses, the existence of another database uncovered in this case – the SFFO card index. And while prior federal court opinions have mentioned databases such as ELSUR, ACS, and ICM, none have discussed, as this case revealed, how those databases are maintained (*i.e.*, indexed) such that they can be effectively searched for responsive documents. The FBI makes no attempt, because it cannot, to assert that the above revelations, uncovered in this case, do not further the purpose of FOIA, which is to "facilitate public access to Government documents" and is "meant to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." McCutchen v. Dep't of Health & Human Servs., 30 F.3d 183, 184 (D.C. Cir. 1994) (citation omitted).[1]

Turning to the potential public value of the information sought, the documents sought by Negley from the FBI relate to its investigation of Negley and his company. Negley anticipates that the documents will show the Government's interest in his research in CIGS thin film photovoltaic cells, which research has enormous environmental and other benefit to the public. Even if the documents do not so reveal, when weighed in conjunction with the broader effect of the litigation, there is no doubt that this case has resulted in enormous public benefit.

[1] Notably, none of the cases cited by the FBI resulted in the discovery of information regarding the manner in which an agency conducts searches and/or responds to FOIA requests, such that the case impacted future FOIA requestors. To the contrary, those cases related primarily to exemptions invoked by an agency to withhold documents; thus, the Court focused primarily on the potential public value of the information sought. As Davy makes clear, however, where applicable (as here), the Court should conduct a broader inquiry into the effect of the litigation, in addition to the value of the documents sought.

The FBI similarly mischaracterizes the facts and law related to the second and third factors, whether the plaintiff will derive a commercial benefit from the disclosure and the nature of plaintiff's interest in the records.[2] As previously indicated, Negley seeks documents related to the FBI's investigation of himself and his company. The FBI asserts, however, that Negley brought this FOIA request to uncover documents about himself, not his company. Opp'n at 12. Not only does this assertion ignore the Court's Order to produce File S-1575 (which, according to the FBI, does not relate to Negley), but the FBI is well aware that the scope of Negley's request was broadened to include documents related to both himself and his business. Indeed, even David Hardy, in his most recent deposition, noted that the FBI was searching the various sources for documents related to Negley's business. See Deposition of David M. Hardy dated October 22, 2009, at 60-61 (acknowledging that "[t]he business term was searched using the entire firm name").

In support of its position, the FBI attempts to compare Negley's request with that of the plaintiff in Peter S. Herrick's Customs & Int'l Trade Newsletter v. United States Customs & Border Prot., No. 04-0377 (JDB), 2006 U.S. Dist. LEXIS 77935 (D.D.C. Oct. 26, 2006). See Opp'n at 12-13. In Herrick's, however, this Court concluded that the contents of the manual sought, which included insight into standards and procedures used in seizing property and contraband, were "likely of interest to a relatively small segment of the population" and had only slightly higher than a minimal public benefit. Herrick's, 2006 U.S. Dist. LEXIS 77935, at *21.

[2] The FBI suggests that the failure to satisfy even one of these factors can be dispositive. See Opp'n at 9. To the contrary, and as the D.C. Circuit noted in Davy, a finding of private interest and commercial benefit does not *per se* preclude recovery of attorneys' fees. Davy, 550 F.3d at 1160-61; see also Summers v. United States Dep't of Justice, 477 F. Supp. 2d 56, 69 (D.D.C. 2007) (ruling, based partly on prior court ruling that the mere potential of commercial benefit does not tip this factor against recovery of attorneys' fees, that first and fourth factors outweigh these two factors).

Here, by contrast, the broader public benefit of the case is much more widespread, as it arms all future litigants requesting FBI records under FOIA with unprecedented information concerning what each request should encompass and what sources can and should be searched.

For these reasons and as set forth more fully in Negley's opening brief, Negley is entitled to the requested award.

III. THE REQUESTED AWARD IS REASONABLE.

The FBI makes three arguments in asserting, in the alternative, that the amount sought by Negley should be reduced. As set forth below, these arguments are without merit and Negley is entitled to the full amount sought in attorneys' fees and costs – $208,894.80.

First, the FBI states it has calculated the hours and corresponding fee award using the Exhibits attached to Negley's opening brief. Curiously, the FBI states, with no explanation or documentation in support, that the total amount invoiced by the three timekeepers for which Negley seeks fees is $205,546.[3] The FBI then deducts $30,000 from that amount, to suggest that the maximum award for fees (not costs) should be $175,546. Yet, the FBI provides no mathematical breakdown of its computations, or explains why its computation is different than that reached by Negley, other than its bald assertion. Indeed, the backup documentation and explanation provided by Negley supports Negley's previously provided figures:

[3] The FBI takes issue with Negley's decision not to seek fees for the approximately 50 hours spent by other timekeepers on this case. See Opp'n at 15 n.8. While somewhat illogical for the FBI to bring to the Court's attention Negley's decision to forego certain fees (as the FBI benefits from that decision), to clarify, Negley has reserved his right to seek fees for time spent by someone other than the three primary timekeepers in any subsequent fee request. For example, after briefing on the pending Motion is completed, Negley anticipates filing a notice supplementing his fee request with time spent on the pending Motion and Reply. In so doing, he intends to seek fees for time spent by someone other than the three primary timekeepers (specifically, a junior associate who assisted in the preparation of the Motion and Reply); he did not want his prior concession to be construed as a waiver of his right to seek an award for this junior associate's time.

Source	What it Shows	
Mot., Ex. B – page 1	Khetan fees - $21,999 Wisenberg fees - $61,920 Total fees for 1034.1 (through first summary judgment) - $83,919	
Mot., Ex. C – page 1	Khetan fees - $112,030 Vitrano fees - $33,378 Total fees for 1034.2 (appeal through pending motion) - $145,408	
	Total fees for client (#1034)	$228,854[4]
	Reduction by Negley	-$30,000
	Fees Sought	**$198,854**

Thus, the starting point, based on the only clear documentation and computations provided by either party, should be $198,854.

Second, the FBI suggests that a reasonable fee award should be 30 percent of the amount sought because "the Court's Order required further action on three of the ten potential sources of information and required further details as to the remaining seven." Opp'n at 16 & n.10. As previously indicated (see supra at 3-4), the FBI's attempt to create a distinction in the Court's Order between the ten databases is nothing but a smokescreen – the Order granting Negley's motion for partial summary judgment provides for relief as to all ten sources of information and the FBI points to no case that distinguishes between the types of relief ordered by this Court in allowing for attorneys' fees. Moreover, the FBI's position ignores that the initial searches conducted of the other seven sources were done only after other Court-ordered relief – depositions. Specifically, based on what was uncovered at those Court-ordered depositions (see Order dated January 18, 2007 (Doc. # 46)), Negley filed his motion for partial summary judgment, in response to which the FBI conducted the initial inadequate searches of the seven sources and submitted the Fifth Declaration of David M. Hardy detailing those inadequate

[4] In re-calculating these figures, it appears that the total fees are actually $229,327. However, because this was an under-calculation by Negley (of $473 in the FBI's favor), Negley agrees to seek only what he previously indicated - $228,854.

searches. Similarly, the FBI's assertion ignores even other relief obtained by Negley, including, for example, production of responsive documents from Serial 3041 (and Serial 3865). Accordingly, the Court can ignore this purported distinction in determining the appropriate fee award.

Third, the FBI points to three specific examples to demonstrate the purported unreasonableness of the amount sought by Negley. To the contrary, if anything, these examples demonstrate the FBI's careless approach taken throughout the past six and one-half years in this case, and further supports why an award should be granted here:

- The FBI takes issue with the fact that two senior attorneys were present at the deposition of David M. Hardy on May 23, 2007, and attaches in support page 3 of that deposition's transcript, indicating that Prashant Khetan and Solomon Wisenberg attended the deposition. See Opp'n at 16, & Ex. B at 3. While it is true that both attorneys attended the deposition, a cursory review of that very page of the transcript would reveal that Mr. Wisenberg had since formed his own firm – Wisenberg & Wisenberg. Here, Negley has not sought any fees for services rendered by Wisenberg & Wisenberg (or, for that matter, for any of Mr. Wisenberg's time after 2004).

- The FBI argues that during that same deposition, Negley's counsel inappropriately asked a series of questions to Mr. Hardy regarding various government officials and Mr. Hardy's employment background. Id. at 16-17. Even if deemed irrelevant to this discovery deposition of Mr. Hardy (in a case where Mr. Hardy has been forced to submit six declarations correcting misstatements or supplementing omissions in each of his prior declarations), that line of questioning comprises less than 10 of 226 pages of the deposition transcript. Moreover, this was just one of a handful of depositions taken in this case, all of which ultimately led to the uncovering of the FBI's pervasive delay and unreasonable search tactics.

- The FBI states that it was inappropriate for Plaintiff to have incurred the costs of having depositions videotaped, as well as ordering expedited transcripts of depositions. See id. at 17. The FBI makes this argument despite knowing that the Court, during a telephonic conference prior to the first deposition taken in this case, agreed to the videotaping due to FBI agents' potential unavailability at trial. Similarly, the deposition transcripts were ordered expedited because of the limited time in which to conduct all of the depositions, each of which uncovered additional information that was imperative to review for the next deposition.

For these reasons, Negley's request for attorneys' fees in the amount of $198,854 and costs of $10,040.80, for a total award of $208,894.80, is reasonable.

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Respectfully submitted,

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