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

JAMES LUTCHER NEGLEY	§	
Plaintiff	§	
v.	§	**CIVIL ACTION NO.**
	§	**SA-12-CV-362**
	§	
FEDERAL BUREAU OF	§	
INVESTIGATION,	§	
Defendant	§	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Now comes James Lutcher Negley, Plaintiff, and files this Response to the Defendant's Motion for Protective Order and in support thereof would show the Court as follows:

Introduction and Background

1. This is a lawsuit filed pursuant to the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff has requested that the Federal Bureau of Investigation ("FBI"), be directed to fully and timely respond to his FOIA Request dated June 15, 2009 for "all records in the possession of the Federal Bureau of Investigation relating, in any way, to James Lutcher Negley...". So far, the Government has responded as follows to the June 15, 2009 request:

Date	Event
July 20, 2010	FBI announced it had reviewed 825 pages and that 716 pages were being released. An estimated 3000 pages remained to be processed
December 16, 2010	FBI announced that 1457 pages had been reviewed and 1430 pages were being released. This left an estimated 1543 pages to be processed
April 18, 2010	Plaintiff's FOIA Complaint filed in instant case
July 17, 2012	FBI revises responsive documents estimate-now 7450 documents may be responsive to the request (Doc. # 17, Defendant's Unopposed Motion to Extend Dispositive Motion Deadline, p. 1)
August 31, 2012	1020 pages were reviewed and 878 pages were released
September 25, 2012	924 pages were reviewed and 836 pages were released

2. Now, the FBI believes there may be 7450 pages subject to possible production. That is an increase over the original estimate of 3625 pages. That is not a rounding error. That is a major difference between the FBI's initial expressed understanding and the facts as they have come to be represented by the FBI.

3. Plaintiff has served on the Defendant, the "Plaintiff's First Requests for Admission and Requests for Production to Defendant Federal Bureau of Investigation". They consist of twenty requests for admission of facts and nineteen conditional requests for production of documents related to each of the first nineteen requests for admission. Contrary to the assertions in the Government's Motion for Protective Order, the discovery requests served by Plaintiff do not constitute an impermissible fishing expedition. The requests are limited and very specific. The requests do not seek to circumvent FOIA, rather,

they seek appropriate threshold information necessary to a determination of the issues in this case. The FBI has taken the position that the only documents responsive to Mr. Negley's FOIA request which have not already been produced are administrative in nature. The requests for discovery seek responses that will shed light on a simple threshold question:

> Are there other documents that exist that have not been identified by the FBI as potentially subject to disclosure?

That threshold question needs to be answered before Mr. Negley can proceed further in this case. The answer to that question is material to the issue of what final judgment is to be rendered in this case.

Court Should Not Bar Discovery

4. It is clear from the filings in this case that the Government intends to proceed in the following manner:

a. produce, over a number of months, the "administrative" records the Government has identified as responsive to Plaintiff's FOIA request;

b. move for summary judgment finding that the FBI produced all responsive records.

5. Before the Government moves for summary judgment, Plaintiff needs responses to his discovery requests. Plaintiff does not know the extent to which the FBI has documents that are responsive to his FOIA request. It makes sense that, in a lawsuit filed under the Federal Rules of Civil Procedure, that he should have an opportunity to seek discovery, on a limited basis, regarding the threshold question in this lawsuit: does the FBI hold documents that he may be entitled to under FOIA? With all due respect, the FBI's

simple blanket denial is simply not sufficient. In his requests for admission, Plaintiff seeks very limited information about certain specified activity. Plaintiff has given the FBI very specific information as to date, location and type of activity which is the subject of the inquiries.

6. The Government's Motion for Protective Order reveals that the Government does not know the answers to the questions. See Motion, para. 5d, p. 5: "the Court should not require the FBI...to survey current and retired agents over the last 17 years to determine if any additional surveillance or investigation was conducted...". That the Government does not know is itself justification for the Government to go through the discovery process and learn the answers to the questions before it can make a representation to the Court and to the Plaintiff that it has no additional, non-administrative documents. How can the Government possibly make such a representation in good faith if it does not even know how to respond to the Requests for Admission? The Government cites the *Flowers* case for the proposition that an agency's affidavits are presumed to be in good faith. *Flowers v. IRS*, 307 F. Supp. 2d 60, 72 (D.D.C. 2004). Here, where the Government has essentially admitted that it does not know the answers to the questions, how can affidavits denying the existence of additional records be in good faith. Frankly, it is unfathomable that the FBI would have engaged in any of the activity referenced in the requests for admissions, and not know about it. There would be records of such activity. Mr. Negley's name would be on the records, and the FBI's exhaustive search for documents responsive to a FOIA request would reveal them.

7. The Government has cited many cases and principles in support of its position, however, none of the authorities go to the question of the propriety of a series of simple requests for admission, as in this case:

Discovery is Not Prohibited in FOIA Cases

8. In paragraph 5a the Government cites three cases for the general proposition that discovery is strictly limited in FOIA cases. The authorities cited in Government's Motion, *Lane*, *Wheeler* and *Katzman*,(See page 2 of Government's Motion for Protective Order) do not support a complete bar to discovery in a FOIA case. Rather, they support the position that the Courts have authority to place limits on discovery in FOIA cases, which limitations may be greater than in other litigation matters. Mr. Negley does not disagree with that legal principle. He does not seek to circumvent the FBI's right to withhold documents that are privileged or otherwise exempt from disclosure. However, the FBI has sought in this case to bar any discovery. That is not appropriate. The Government goes on in paragraph 5a to state the rationale for restrictions on discovery: "The reason for this prudential limitation is that in the vast majority of FOIA cases, the Court determines on motions for summary judgment *what documents are subject to production*."(emphasis added). That is the problem in this case and the reason that the principles cited by the Government are inapplicable. We are trying to discover what documents are in existence. Only then, can the Court make a fully informed determination of what documents are subject to production. How can we possibly make a fair determination of what documents are subject to production if we do not have

disclosure as to what documents are in existence. Not one of the cases cited by the Government prohibits the type of discovery requests at issue here.

Plaintiff's Requests are Necessary

9. In paragraph 5b the Government complains that the requests are redundant of the FOIA request seeking all documents relating to Mr. Negley. This argument only applies to the Requests for Production. Plaintiff has made it clear to the Government in correspondence regarding this issue, that he does not seek to circumvent the FBI's right to withhold documents that are privileged or otherwise exempt from disclosure. See Exhibit 4 to Government's Motion for Protective Order, John Carroll's September 10, 2012 letter to Robert Shaw-Meadow. Plaintiff's overriding concern about the Government's position has always been that the Government seeks a complete ban on discovery. Such a ban is not appropriate. Especially where, as here, Plaintiff's requests for admission are specific, detailed and limited.

The Scheduling Order Allows for Discovery-Such Discovery Should Not be Prohibited

10. The same argument applies to the point raised in paragraph 5c. The Government complains that the requested discovery will interfere with its plan to slowly roll out responsive documents. This is incorrect. In fact, the admissions will facilitate the FBI's exhaustive search for documents. It is unfair for the Government to use the Plaintiff's cooperation in allowing it additional time before the summary judgment deadline to try to deny him the right to discovery. In negotiations between the parties over the submission of

a proposed scheduling order, Plaintiff made reasonable concessions, but never wavered on his insistence that a discovery deadline be included. The Government sought to bar discovery as part of the scheduling order. Plaintiff refused to agree to that. This motion for protective order is simply another bite at the apple by the Government. It was not able to eliminate the right to discovery in the scheduling order, so now it is trying to do it through objections.

Plaintiff's Limited and Specific Requests are Not a Fishing Expedition

11. In paragraph 5d, the Government complains that the requests represent a fishing expedition. To the contrary, the requests seek nothing more than a mere admission or denial regarding 20 specific points. Each question is detailed and very specific. These requests are the opposite of a fishing expedition. The Government then argues that Plaintiff cannot make these requests without establishing a factual basis. That is not supported in the law. FOIA does not require a person to establish a factual basis before making a request for information. The Government seeks to turn FOIA on its head.

Plaintiff does Not Seek Rationale for Activity, Only the Existence of Activity

12. In paragraph 5e the Government actually states that Plaintiff is not entitled to answers to his questions. This assertion is allegedly supported by two cases which state that a party in a FOIA case is not entitled to seek discovery regarding the rationale for the Government's actions. Plaintiff does not seek to discover the reasons underlying FBI activity. He simply seeks to discover whether there has been FBI activity that a reasonable person would expect to result in the creation of documents. If so, such documents may be subject

to disclosure under FOIA. They may be subject to some privilege or exemption. But we cannot make any such determination unless we know the answer to the threshold question, do any such documents exist? Rather than granting Mr. Negley the final relief he seeks, (a practice not allowed in the *Tax Analysts* case cited in the Government's Motion) these specifically tailored discovery requests merely seek to inform Mr. Negley of what sort of relief he may request.

13. Unlike the *Flowers* and *Williams* cases cited by the Government (*Flowers*, 307 F. Supp. 2d at 72; *Williams v. FBI*, 1991 WL 163757, at 3), the requests made by Mr. Negley do not seek the rationale for the FBI's activities, but rather, whether there have been any activities and whether they resulted in the creation of any documents that may be discoverable under FOIA.

The Time for Discovery is Ripe

14. In paragraph 5f, the Government alleges that the requests are premature and should wait until after the Government has an opportunity to make its case regarding the applicability of FOIA exemptions. However, moving on to exemptions before we know what is the universe of responsive documents is what is premature. How can we turn to the issue of exemptions when we don't even know if the Government has found all the responsive documents? These limited discovery requests are appropriate and timely.

15. The Government asserts that to the extent the Court allows any discovery in this case, it should be delayed until the Government has moved for summary judgment.

However, in most cases it is doubtful that the Government is given 9 months to file a Motion for Summary Judgment. Here, the Government has requested that the Court give it time to complete its review of what is now estimated to be 7450 documents, before it is required to file a motion for summary judgment. This is extraordinary. The Government has not made a sufficient showing, for example, as to why it needs until April 2013, to respond to a request that it received in 2009.The Government has established a pattern of "foot dragging" in responding to Mr. Negley's requests. See Memorandum Opinion of Judge Gladys Kessler in D.C. District Court FOIA lawsuit involving Plaintiff and the FBI, *Negley v. Federal Bureau of Investigation*, 2011 WL 3836465, at 5 (D.D.C. 2011):

> However, the FBI should take no comfort in prevailing on its Motion for Summary Judgment. It has taken almost 10 years for Mr. Negley to get the documents to which he is legally entitled under FOIA. The FBI has stonewalled, has delayed, has repeatedly "found" responsive documents long after it should have, and has on numerous occasions failed to meet its obligations under FOIA.

Plaintiff hopes to avoid a repeat of the District of Columbia case.

<u>The Meese Memo-An Uncodified "Policy"</u>

16. Discovery inquiries into the possible existence of records is also justified in light of the FBI's previous use of the Memorandum from Edwin Meese, III, U.S. Attorney General, on the 1986 Amendments to the Freedom of Information Act to the Executive Departments and Agencies (Dec. 1987)("Meese Memo") in withholding documents otherwise subject to disclosure. Request for Admission 20 asks:

> Admit or Deny that, in responding to requests from James L. Negley under the

> Freedom of Information Act, the Federal Bureau of Investigation has withheld records from James L. Negley or has refused to acknowledge the existence of records, in reliance upon the Memorandum from Edwin Meese, III, U.S. Attorney General, on the 1986 Amendments to the Freedom of Information Act to the Executive Departments and Agencies (Dec. 1987).

The Meese Memo set forth a framework whereby a Government agency could deny the existence of a document that did in fact exist in response to a FOIA request if the revealing the existence of the document raised certain national security concerns. The Meese memo was considered for inclusion in the Government's regulations in FOIA cases, but was rejected. Prior to the issue being raised as a possible regulation, the Meese Memo had presumably been followed by the FBI since its inception. See November 3, 2011 letter from Ronald Weich, Assistant Attorney General to Senator Charles E. Grassley, Ranking Minority Member, Committee on the Judiciary, attached as Exhibit "A". It is appropriate that Plaintiff be permitted to inquire of the FBI whether and to what extent is has applied the Meese Memo in responding to his FOIA request.

WHEREFORE, Plaintiff respectfully requests that the Court deny the Government's Motion for Protective Order.

Respectfully submitted,

/s/ John F. Carroll

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ATTORNEY FOR PLAINTIFF
JAMES LUTCHER NEGLEY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's Response to Defendant's Motion for Protective Order was ELECTRONICALLY FILED with the Clerk of the Court using the CM/ECF system which will send notification to the following:

Mr. Robert Shaw-Meadow
Assistant United States Attorney
601 N.W. Loop 410, Ste. 600
San Antonio, Texas 78216

on this the 5th day of October, 2012.

/s/ John F. Carroll
John F. Carroll

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 3, 2011

The Honorable Charles E. Grassley
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

This responds to your letter dated October 28, 2011, in which you expressed concerns with one of the provisions concerning statutory exclusions that is contained in the Department's proposed revisions to its Freedom of Information Act (FOIA) regulations. Since issuance of Attorney General Holder's March 2009 FOIA Guidelines, the Department has taken a number of steps to become more transparent in its handling of records that are, by statute, excluded from the FOIA. Having now received a number of comments on the Department's proposed regulations in this area, the Department is actively considering those comments and is reexamining whether there are other approaches to applying exclusions that protect the vital law enforcement and national security concerns that motivated Congress to exclude certain records from the FOIA and do so in the most transparent manner possible. If the proposed regulations can be improved in these respects, we will work to improve them. We believe that Section 16.6(f)(2) of the proposed regulations falls short by those measures, and we will not include that provision when the Department issues final regulations.

Exclusions, which by statute can be applied only in very specific contexts, are different from exemptions, which are more common. Congress excluded certain records from the FOIA in 1986 to protect three narrow categories of law enforcement and national security information that, if disclosed, could compromise vital interests. To take the simplest example, Section 552(c)(1) of the FOIA recognizes that if a requester seeks information relating to an ongoing criminal investigation, of which the target is unaware, and when even acknowledging the existence of responsive documents would tip off the criminal to the ongoing investigation, those records are not subject to the FOIA.

Since 1987, the Department has handled records excluded under these provisions according to guidance issued by Attorney General Meese. The Meese Guidance provided, among other things, that where the only records responsive to a request were excluded from FOIA by statute, "a requester can properly be advised in such a situation that 'there exist no records responsive to your FOIA request,'" and that agencies must ensure that its FOIA responses to requests that involve exclusions and those that do not involve exclusions "are consistent throughout, so that no telling inferences can be drawn by requesters." The logic is simple: When a citizen makes a request pursuant to the FOIA, either implicit or explicit in the

request is that it seeks records that are subject to the FOIA; where the only records that exist are not subject to the FOIA, the statement that "there exist no records responsive to your FOIA request" is wholly accurate. These practices laid out in Attorney General Meese's memo have governed Department practice for more than 20 years.

While the approach has never involved "lying," as some have suggested, the Department believes that past practice could be made more transparent. Accordingly, as part of an effort to update its FOIA regulations and other aspects of its Open Government initiative, the Department took a number of steps designed to bring its handling of exclusions in line with Attorney General Holder's commitment to open government.

- First, to ensure that exclusions are invoked only when absolutely necessary, Section 16(f)(1) of the proposed regulation requires that the head of the FOIA office of any Department of Justice component contemplating use of an exclusion obtain approval for such use from the Office of Information Policy.

- Second, to promote greater public accountability, Section 16.6(f)(3) requires components to maintain records of any uses of an exclusion and its approval, and the Department has, for the first time, required agencies to publicly report in their Chief FOIA Officer Reports on the number of times that they invoke exclusions.

- Third, to promote greater public awareness of exclusions than existed under the 1987 Attorney General Meese policy, Sections 16.4 and 16.6(f)(2) of the proposed regulations sought to advise requesters of how exclusions may be used. Section 16.4 reminded requesters that, under the FOIA, records that are excluded from FOIA are not subject to FOIA's requirements and are not considered responsive to a FOIA request. Section 16.6(f)(2), in turn, sought to remind claimants that the exclusion of records from a particular FOIA response is not noted in the response. As the 1987 Guidance recognized, consistent responses are necessary to avoid disclosing the ongoing criminal investigation or other sensitive law enforcement or national security information that the FOIA excludes.

Taken together, these steps were aimed at shining further light on a practice that, while expressly contemplated by statute and necessary to protect vital law enforcement and national security interests, operated for years with much less transparency. As you know, the initial comment period on these regulations closed earlier this year, with no public comment on the provisions in question. As a result, however, of this Administration's commitment to openness, the Department reopened the comment period on these regulations precisely so that it could receive additional input. That reopened comment period has recently concluded, and the Department is now in the process of reviewing those submissions. We are also taking a fresh look internally to see if there are other options available to implement Section 552(c)'s requirements in a manner that preserves the integrity of the sensitive law enforcement records at stake while preserving our continued commitment to being as transparent about that process as possible.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Chairman

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FEDERAL BUREAU OF	§	
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Defendant	§	

ORDER

On this date the Court considered the Government's Motion for Protective Order and the Response filed by Plaintiff. The Court finds that the Motion should be denied.

IT IS THEREFORE ORDERED that the Government's Motion for Protective Order is DENIED.

SIGNED this _____ day of _____, 2012.

_____
UNITED STATES DISTRICT JUDGE