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-OLG**
	§	
FEDERAL BUREAU OF	§	
INVESTIGATION,	§	
Defendant	§	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

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

I.

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...".

2. The first three pages of the Government's Motion for Summary Judgment consist primarily of a hyperbolic personal attack on Mr. Negley. This is typical of the FBI's

dismissive posture in responding to Mr. Negley. Plaintiff will avoid such devices and stick to the real issues in this case. There is one point in those first three pages that needs to be addressed. The FBI states "One must therefore question what the purpose of this third lawsuit is, and what has possibly been accomplished by its filing". The answer to the question is quite simple. The lawsuit had to be filed to compel the FBI to comply with its obligations under the law of the United States, particularly, the Freedom of Information Act, 5 U.S. C. §552. Mr. Negley simply wants the FBI to turn over to him all records it has regarding him. That is all he wants, that is all he ever wanted. However, the FBI has made that task difficult by nitpicking the scope of his requests, dragging its feet, and withholding documents until being forced to comply by litigation. In the final Order granting the FBI's Motion for Summary Judgment in the D.C. District Court litigation, referenced by the FBI in its Motion for Summary Judgment as *Negley II*, entered on August 31, 2011, the District Court stated:

> 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.

Negley v. Federal Bureau of Investigation, 825 F. Supp. 2d 63, 65 (D.D.C. 2011)(Memorandum Opinion of Judge Gladys Kessler in *Negley II* on competing Motions for Summary Judgment). Recently, in *Negley II*, Mr. Negley was awarded $163,309.69 in attorneys fees and costs. **See Exhibit "A",** Memorandum Opinion and Order, May 29, 2013. Delay in compliance with the 2009 FOIA request is what finally forced Mr. Negley to file the instant FOIA action.

3. A change in policy allowed Mr. Negley to submit the 2009 FOIA request, seeking "all records" regarding him in the possession of the FBI in a single request to the FBI rather than requiring him to submit separate requests to individual field offices, as had been required in the past. See Exhibit 3 to FBI Motion for Summary Judgment ("FBI MSJ"), Declaration of David M. Hardy, page 2, footnote 1. The FOIA request which is the subject of the instant action was submitted on June 15, 2009. Ex. 3-A, FBI MSJ. The *Negley II* litigation was based on a request for documents submitted to the San Francisco Field Office of the FBI. Mr. Negley tried, in the *Negley II* litigation, to require the FBI to produce documents beyond those that were the subject of the initial request. He sought to secure documents without geographic limitation and up to 2009, rather than limited to the date of his request in 2002 and limited to the San Francisco Field Office. Part of Negley's rationale was that since the FBI had received the 2009 request and was conducting searches for documents within its broad parameters, it would be appropriate for the FBI to produce documents it was discovering in that broader search. The FBI fought that effort by Mr. Negley and successfully convinced the Court in the District of Columbia that the issues in that case were limited to the geographic and temporal scope of the 2002 request. *See Negley v. Federal Bureau of Investigation*, 766 F. Supp. 2d 190, 193 (D.D.C. 2011); *Negley v. Federal Bureau of Investigation*, 825 F. Supp. 2d 58, 61-63 (D.D.C. 2011).

4. One year and one month after the submission of the 2009 FOIA request, the FBI issued its first release of documents, stating that it had reviewed 825 pages and that 716 pages were being released. Ex. 3-G, FBI MSJ. The FBI further notified Mr. Negley that 3000

pages remained to be processed, for a total of 3,825 pages. A second release of documents stating that 1457 pages had been reviewed and 1,430 released, was made on December 16, 2010. Ex. 3-H, FBI MSJ. After the 1,457 pages referenced in the December 16, 2010 letter, there remained 1,543 additional pages to be processed.

5. After that release, no further documents were produced. Correspondence indicates that the FBI had stopped processing the request for non payment of $143.00 in copying charges. Ex. 3-J, FBI MSJ. The correspondence further shows a misunderstanding as Mr. Negley's counsel had previously written to the FBI stating that the funds had been paid. Ex. 3-I, FBI MSJ. In order to resolve the issue, Mr. Negley forwarded the requested payment on August 29, 2011. Ex. 3-K, FBI MSJ. No further production of records in response to the 2009 request was received by Mr. Negley. Mr. Negley waited approximately 8 months without receiving an additional disclosure. He filed the instant lawsuit on April 28, 2013. After the lawsuit was filed, the FBI began further production on August 31, 2012. Ex. 3-N, FBI MSJ. Mr. Negley filed the instant lawsuit in order to secure the compliance of the FBI with its disclosure obligations under FOIA.

6. Mr. Negley, in effect, tried to have the broader 2009 request resolved in the *Negley II* litigation, however, that effort was opposed by the FBI. Although the Court approved the FBI's position, had the FBI, in the interest of fairness and full disclosure, simply agreed to produce the expanded categories of documents sought by Mr. Negley, the issues that have been addressed in the instant action could have been dealt with by the District Court in Washington D.C. But that did not happen. Instead, Mr. Negley was forced

to wait for the FBI to respond to his request on its timetable, on its terms. So he waited for the FBI to act in conformity with its obligations under FOIA.

II.

History of Request and Response

7. By letter dated June 15, 2009, Negley, through authorized counsel, requested that the FBI "provide a copy of all records in the possession of the Federal Bureau of Investigation relating, in any way, to James Lutcher Negley (date of birth and address redacted), to the undersigned....This request includes all records related to any permutation of James Lutcher Negley's name, as well as his business-Davis, Joseph & Negley (591 Redwood Highway, Suite 2155, Mill Valley, CA 94941). Ex. 3-A, FBI MSJ.

8. So far, the Government has responded as follows to the June 15, 2009 request:

Date	**Event**
July 20, 2010	FBI gave notice it had reviewed 825 pages and that 716 pages were being released. An estimated 3000 pages remained to be processed. Ex. 3-G, FBI MSJ.
December 16, 2010	FBI gave notice that 1457 pages had been reviewed and 1430 pages were being released. This left an estimated 1543 pages to be processed. Ex. 3-H, FBI MSJ.
April 18, 2012	Plaintiff's FOIA Complaint filed in instant case. Doc. #1.
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	FBI gave notice that 1020 pages were reviewed and 878 pages were released. Ex. 3-N, FBI MSJ.
September 25, 2012	FBI gave notice that 924 pages were reviewed and 836 pages were released. Ex. 3-O, FBI MSJ.

November 6, 2012	FBI gave notice that 1100 pages were reviewed and 1007 pages were released. Ex. 3-P, FBI MSJ.
November 30, 2012	FBI gave notice that 878 pages were reviewed and 685 pages were released. Ex. 3-Q, FBI MSJ.
December 28, 2012	FBI gave notice that 1201 pages were reviewed and 1030 were released. FBI stated that this was the final release of records. Ex. 3-R, FBI MSJ.
March 18, 2013	21 pages of documents are disclosed to Mr. Negley's D.C. counsel from the Executive Office for U.S. Attorneys. Ex. 4-B, FBI MSJ.
April, 2013	A more expansive disclosure of 77 pages is made by the EOUSA to John Carroll, Mr. Negley's San Antonio counsel. Ex. 4-C, FBI MSJ.
May 6, 2013	Notice included with Motion for Summary Judgment of 22 pages reviewed and 17 pages released. Ex. 3-S, FBI MSJ.

9. The FBI's initial estimate was that there were 3625 pages that needed to be reviewed. The estimate was less than one-half of the documents the FBI eventually reported that it reviewed in this matter.

10. The FBI's lack of a timely response is all the more egregious when viewed in light of its representations in the prior FOIA lawsuit, *Negley II*. In that case, the FBI successfully took the position that it was not required to include in its production, any records created after the April 2002 date of the request. The FBI represented to the District Court in that case, on May 2, 2011, in its Motion for Summary Judgment that the records responsive to the 2009 request (which is the subject of the instant case) had been located and collected for processing and release:

IV. PLAINTIFF'S 2009 FOIA REQUEST

By letter dated June 15, 2009, Plaintiff submitted a FOIA request for "all records in the possession of the Federal Bureau of Investigation relating, in any way, to James Lutcher Negley (D.O.B. [ ]/[ ]/[ ]: 3905 Laguna Vista Cove, Austin, Texas 78746)." *See* Eighth Declaration of David M. Hardy ("Eighth Hardy Decl.") Ex. A. Three serials were from Plaintiff's prior FOIA/FOIPA requests to the Miami, Los Angeles and San Antonio field offices. The fourth was a serial found not to concern Plaintiff. Seventh Hardy Decl. ¶ 39(b). Plaintiff stated that "[t]his request includes all records related to any permutation of James Lutcher Negley's name, as well as his business – Davis, Joseph & Negley (591 Redwood Highway, Suite 2155, Mill Valley, CA 94941)." *Id.* The FBI conducted searches in response to Plaintiff's June 15, 2009 FOIA request at the same time that it was conducting the additional searches in response to the Court's September 24, 2009 Order. *Id.* ¶ *14.* The FBI applied a search cut-off date of June 24, 2009 to determine which records would be deemed responsive to Plaintiff's 2009 request, *Id.* ¶ 13, but did not impose a temporal limitation on the searches themselves. Although some searches were conducted for Plaintiff's 2009 request prior to the issuance of the Court's September 24, 2009 Order, all searches performed after the issuance of the Court's Order were conducted to find records responsive to both Plaintiff's 2002 and 2009 requests. *Id.* ¶ 14. The searches conducted in response to Plaintiff's 2009 request and the Court's Order did not located any responsive FBI investigatory records that had not been previously released to Plaintiff. *Id.* ¶ 16. The only records discovered that had not previously been released to Plaintiff were "administrative" type files that are typically not processed as part of a FOIA request because most requestors typically do not want a copy of their request and in fact object to paying for it. *Id.;* Def.'s Ex. 3 at 27:19-28:21. In response to Plaintiff's June 15, 2009 FOIA request, on November 30, 2009, the FBI sent a letter to Plaintiff's counsel inquiring whether Plaintiff wished to "receive copies of his prior FOIA/PA request files, a copy of one serial in an Office of Professional Responsibility general file pertaining to his letter to Director Mueller, a copy of the litigation file related to Mr. Negley's prior lawsuit in the Western District of Texas, and two serials within a control file concerning the Congressional Inquiry he previously made," as well as "the materials he previously received in response to his prior FOIA/PA requests." *See* Eighth Hardy Decl. ¶ 17 & Ex. E. The FBI explained that it "does not routinely process this type of material unless it is specifically requested." *Id.* Plaintiff did not respond to the FBI. *See* Def.'s Ex. 3 at 127:22-128:10. On January 8, 2010, the FBI sent a follow-up letter advising Plaintiff that it was still awaiting a response as to whether he wished to obtain the records described in the November 30, 2009 letter. *See* Eighth Hardy Decl. ¶ 18 & Ex. F. Plaintiff again did not respond to the FBI. *See* Eighth Hardy Decl. ¶ 19. Despite the fact that Plaintiff failed to respond to either of the FBI's two inquiries regarding whether Plaintiff wished to receive the administrative and litigation files referred to in the November 30, 2009 letter, the FBI nevertheless collected these administrative and litigation files for processing and release. *Id.* ¶¶ 17-22.(emphasis added).

See Exhibit "B": *Negley II* Document # 116, FBI's Motion for Summary Judgment and Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, Pages 7-9.

11. That reference appears to state that the records responsive to the 2009 FOIA request had been located, collected and were ready for processing and release. Yet, after the first two disclosures, and after making the requested payment for copies, no further action was taken by the FBI until after this FOIA lawsuit was filed in April of 2012.

III.

Standards For Agency Compliance with FOIA

12. In order to fulfill its obligations under FOIA, an agency bears the burden of demonstrating beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Bloeser v. U.S. Department of Justice*, 811 F. Supp. 2d 316, 320 (D.D.C. 2011); *Skinner v. United States Department of Justice*, 744 F. Supp. 2d 185, 197 (D.D.C. 2010). The purpose of FOIA is to "facilitate public access to Government documents" and it is "meant to pierce the veil pf administrative secrecy and open agency action to the light of public scrutiny." *McCutchen v. Dept. of Health & Human Services*, 30 F.3d 183, 184 (D.C. Cir. 1994); *Stern v. FBI*, 737 F. 2d 84 (D.C. Cir. 1984)("The central purpose of FOIA is to 'open[] up the workings of government to public scrutiny' through the disclosure of government records.")(citation omitted); *Mack v. Dep't of the Navy*, 259 F. Supp. 99, 104 (D.D.C. 2003)(noting that the purpose of FOIA is to "afford[] the public access to virtually any federal government record that FOIA itself does not specifically exempt from disclosure"). To this end, FOIA itself expresses a presumption favoring

disclosure. *Founding Church of Scientology v. Smith*, 721 F. 2d 828, 831 (D.C. Cir. 1983) The reasoning behind this presumption is that "the public is entitled to know what its government is doing and why." *Piper v. Dep't of Justice*, 294 F. Supp. 2d 16, 20 (D.D.C.2003). Accordingly, "a federal agency is required to release all records that are responsive to a request for the production of the records." *Maydak v. U.S. Department of Justice*, 254 F.Supp. 2d 23, 32 (D.D.C. 2003). If it fails to do so, the Court is authorized to "enjoin [a federal] agency from withholding records and to order the production of any agency records improperly withheld from the complainant. *Id*. at 32.

13. An agency responding to a FOIA request must search for documents in good faith, using methods that are reasonably expected to produce the requested information." *Mack*, 259 F.Supp. 2d at 105. When presented with a challenge to the adequacy of a search, the principal issue is whether the search was reasonable. *Id*. To demonstrate reasonableness, the agency must set forth sufficient information in affidavits for the court to determine, based on the facts of the case, that the search was reasonable." *Id*. The affidavits must be reasonably detailed and nonconclusory. Piper, 294 F. Supp. 2d at 20. Summary judgment is inappropriate if there is substantial doubt about the adequacy of the search. Maydak, 254 F.Supp. 2d at 39.

IV.

Issues Regarding the Adequacy of the FBI Search for Records Preclude Summary Judgment

14. There are a number of facts that raise substantial questions about the adequacy of the FBI's search for records and production of records in this case which questions

preclude summary judgment.

a. Only in March 2013, has there been a disclosure of a document containing a handwritten notation indicating the possibility of additional records. The FBI has dismissed, rather the investigate, the potential significance of the notations;

b. The document referenced above was not handled in accordance with the FBI's own regulations for dealing with records of other agencies;

c. After invoking the provisions of a law enforcement records exemption set forth in the Privacy Act throughout each disclosure of records in this matter, the FBI now states that no records were withheld under the exemption;

d. The FBI claim of res judicata based on *Negley II* is misplaced;

e. The answer to Plaintiff's questions about the designation of a certain San Antonio file is contradicted by the Summary Judgment evidence;

f. Plaintiff has objected to the presentation of a representative sample of documents for determination of exemptions.

A. **March 2013 Disclosure of EOUSA records reference up to 500,000 or more pages**

15. On March 18, 2013, Mr. Prashant K. Khetan, an attorney acting on behalf of Mr. Negley, received a FOIA disclosure from the United States Department of Justice. The response disclosed 21 pages of documents with redactions. Ex. 4-B, FBI MSJ. Then, on April 23, 12013, John F. Carroll received a disclosure from the same office in Washington indicating that it was revised from March 18, 2013, release, disclosing 77 pages of documents and indicating that 18 pages were being released in part. Ex. 4-C, FBI MSJ.

16. One of the pages from that production raises additional questions about the volume of records held which relate in any way to Mr. Negley. Specifically, the page numbered Negley-437-FOIPA. Ex. 4-C, FBI MSJ, 10th page of the Exhibit and Ex. 3-V, FBI

MSJ. That document is a fax cover sheet dated January 22, 2002, and apparently faxed on that same date according to the fax legend. Curiously, there is a handwritten notation that is dated 1/17/02. It is not understood how a handwritten note could have been made on January 17, 2002 on a document that was not created until January 22, 2002. Plaintiff has inquired as to the genuineness of the notation but has not yet received a response to said inquiry. **See Exhibit "C"**. After the date, the handwritten notation appears to state: "case is still pending 500,000 pp in file (or it could read "info 6") 42,000 misc(appears to be misc) evidence".

17. The 77 pages of documents recently produced came from the Justice Department and, specifically, from the Executive Office for United States Attorneys in Washington, D.C.("EOUSA") The FBI has stated that the documents were in its possession and were referred to the EOUSA for its review and determination as to release they were documents from a U.S. Attorney's Office. Ex. 3, FBI MSJ, Hardy Declaration, para. 68. The notations on page Negley-437-FOIPA appear to refer to numerous documents, as many as 542,000 pages. This revelation suggests that the FBI's identification of 7406 pages as responsive may be in error.

18. If the notation on page Negley-437-FOIPA is correct, Plaintiff may reasonably inquire whether in 2002, the file regarding Mr. Negley totaled 42,000 pages, or even 542,000 pages. If that is the case, then the production of information by the Department of Justice in response to Mr. Negley's FOIA requests up to the present has been inadequate and the FBI has not made an adequate search for documents and records. The FBI indicates that it does not know what the notation means or to what it refers. Rather, the FBI merely states

that the reference cannot be to records about Negley because the search did not reveal a file of that size. Ex. 3, FBI MSJ, Hardy Declaration, para. 70. The FBI presumes that the notes were made by an FBI employee. Ex. 3, FBI MSJ, Hardy Declaration para. 70. However, there is no reference to any effort to determine who the employee may have been. This could be found by determining where the document was maintained, and which personnel had access to or responsibility for custody of such a record. In addition, inquiry could be made to the United States Attorney's office, the original generator of the document, to determine what knowledge its personnel, including Mr. Daniel M. Castillo, the stated sender of the facsimile transmission page on which the notes appear, may have regarding the notation and its basis. Inquiry could also be made to the Chief Division Counsel of the Sacramento Division of the FBI, the recipient of the fax transmission from Mr. Castillo. That person's name was redacted from the document prior to its production. These actions could easily be taken without a great deal of effort and a determination made based on the facts, rather than the FBI's mere speculation that these notations refer to the size of the entire UNABOMBER file. FBI MSJ, p. 11. Here, the FBI is engaging in pure speculation. There is not even any evidence to suggest those numbers represent an accurate statement of the size of the UNABOMBER file. The FBI is supporting the adequacy of its search by speculating as to the meaning of a notation on one of its documents.

B. Failure to Comply with Regulations Regarding Referral of Records to EOUSA

19. The FBI states in paragraph 5 of the MSJ that the EOUSA documents were originally referred to the EOUSA for processing on January 31, 2013. The FBI states that the

referral was made pursuant to 28 C.F.R. § 16.4. That section provides, in part, that an agency possessing a document of another agency should refer the document to the originating agency for a determination of whether the document should be released under FOIA. Although the section does not contain a time limitation, it does not purport to exempt such inter-agency disclosures from the time limits set forth in FOIA. The section does contain a notice provision in paragraph (f) which provides:

> (f) Notice of referral. Whenever a component refers all or any part of the responsibility for responding to a request to another component or agency, it ordinarily shall notify the requester of the referral and inform the requester of the name of each component or agency to which the request has been referred and of the part of the request that has been referred.

20. No such notice was given to Mr. Negley or his attorneys. The first time Plaintiff learned of the referral was when the attorney who represented him in *Negley II* notified him of his receipt of the disclosure of 21 pages from the EOUSA in March 2013. The FBI admits that the referral did not take place until January 31, 2013. That is extremely untimely given the date that such documents were pulled by the FBI as shown by its own records. The FBI has utilized a document numbering system in this matter sequentially numbering the documents it has reviewed. This is apparent as the documents produced are numbered sequentially, but certain of the page numbers are missing, indicating a withheld document or documents. The EOUSA documents include page numbers between 24 up to 506. They also include numbers 5300, 6104-6131. Ex. 3, FBI MSJ, Hardy Declaration para. 69. That page number range, from 24 up to 506, is within the pages identified in the first FBI disclosure in response to the 2009 FOIA request which was made on July 16, 2010. **See**

Exhibit "D", Declaration of John F. Carroll. The FBI has not explained why it waited 30 and one-half months, from July 16, 2010 to January 31, 2013, to make the referral of documents to the EOUSA. That is an unreasonable delay. In further disregard of the rules and regulations, the FBI elected not to inform Plaintiff of the referral. Instead, the FBI simply turned the matter over to the EOUSA for its determination, without notice to Plaintiff, contrary to the directive of 28 C.F.R. § 16.4(f), that "it ordinarily shall notify the requester of the referral..." The FBI has not explained why this referral was not within the category of one that should have been disclosed. While the directive for notice is not unconditionally mandatory, it certainly indicates a preference for notification. The FBI has not explained why no notice was given in this case.

C. The withdrawal of the §552a privilege/exemption claim

21. In response to Plaintiff's 2009 FOIA request and this lawsuit, Defendant has made seven separate disclosures of documents as described above. Each disclosure was accompanied by a letter referencing the production, identifying the number of pages reviewed, produced and withheld and identifying the exemptions used to justify the withholding or redaction of information. The seven disclosure letters are attached to the FBI's MSJ as Exhibits 3-G, 3-H, 3-N, 3-O, 3-P, 3-Q, 3-R. According to the FBI's disclosures, the FBI has reviewed 7406 pages of documents. It has released 5128 pages in full, 1455 in part and has withheld 823 pages in full. The number of completely withheld pages is surprising to Plaintiff and seems unusually high for what the FBI has represented are primarily administrative records. Another issue that is unusual in the FBI production is

the use of the exemption identified in 5 U.S.C. §552a(j). This exemption is cited in each of the seven disclosure letters referenced above by the FBI as one of the bases justifying the withholding of information. However, this exemption is not one that applies to administrative matters but rather is used to justify the withholding of law enforcement investigation material. The referenced statutory section, 5 U.S.C. §552a(j), provides:

> **5 USC § 552a**
>
> **(j) General exemptions**
>
> The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3),©, and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (I) if the system of records is--
>
> (1) maintained by the Central Intelligence Agency; or
>
> (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) **information compiled for the purpose of identifying individual criminal offenders and alleged offenders** and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) **information compiled for the purpose of a criminal investigation,** including reports of informants and investigators, and associated with an identifiable individual; or (C) **reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.** (Emphasis added)

22. The law enforcement investigation and record keeping function identified in § 552a(j) does not seem to be necessary in reference to administrative matters. There is no way for Plaintiff to determine the basis for the broad use of the law enforcement

investigation exemption set forth in § 552a(j). Plaintiff does not understand why a law enforcement exemption was used and claimed by the FBI for almost 3 years to justify the withholding of what Plaintiff has been led to understand are largely administrative files.

23. The FBI has now asserted that the 552a(j) exemption was made in error and the FBI is no longer relying on this exemption. (Response to Motion for Reconsideration, Doc. # 37). However, that does not change the fact that the exemption was cited as a justification by the FBI for the withholding of records in connection with each release of information made by the FBI in response to the 2009 FOIA request. The FBI seeks to explain this in the David M. Hardy Declaration, Ex. 3 to FBI MSJ, by stating that the FBI has exempted itself from the provisions of the Privacy Act. Ex. 3, FBI MSJ, Hardy Declaration, para. 42. He goes on to state that "[t]he FBI's release letters in this case indicate that section (j)(2) of the Privacy Act was applied to the processed material in this case only to indicate that the records being processed were not accessible under the Privacy Act. No information was withheld under Privacy Act section (j)(2) as it does not relate to redacting information but exempting systems of records." That explanation does not comport with the statement in each release letter that Privacy Act section (j)(2) was an exemption used to withhold information. Incredibly, the very same Privacy Act exemption was cited in the FOIA Disclosure dated May 6, 2013 and served with the FBI Motion for Summary Judgment. Ex. 3-S, FBI MSJ. In addition, throughout the interim productions, the FBI restated that the section was used to withhold information on certain Deleted Page Information Sheets that were included within the FBI interim releases of documents indicating the invocation of one

or more exemptions. **See Exhibit "D"**.

D. The FBI's attempt to claim res judicata is misplaced and should be denied

24. The FBI asserts that "[a]t least with respect to investigative files, the *Negley II* court has definitively ruled that an adequate search for investigatory documents in response to Negley's 2009 FOIA request has already occurred. FBI MSJ p. 11. That is not correct. The issue before the D.C. District Court was a 2002 FOIA request to the San Francisco Field Office seeking a " copy of any records about [him] maintained at and by the FBI in the [San Francisco] field office. *Negley v. FBI*, 825 F. Supp. 2d at 66. The Court did not rule on the adequacy of a search in reference to the 2009 request. In fact, the D.C. District Court's March 11, 2011 Order Denying a Motion for Contempt filed by Negley makes clear that the FBI was only required to search for and produce records responsive to the 2002 request. Negley v. FBI, 766 F. Supp. 2d at 193. The summary judgment also approved the FBI's imposition of a cutoff date for production of records as of 2002. *Negley v. FBI*, 825 F. Supp. 2d at 70-71. The adequacy of a search for records beyond those that were the subject of the 2002 request was not before the district court in *Negley II* and was not examined, reviewed and ruled upon. As such, the FBI cannot rely upon the judgment in *Negley II* to approve its search in reference to the 2009 request. The doctrine of res judicata provides that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). The adequacy of the search in response to the 2009 request was not raised in *Negley II.* Further, the Court specifically ruled that the 2009 request was not before it. The

FBI cannot rely on the judgment in Negley II to support its search in response to the 2009 request.

E. The changing file number

25. In the Original Complaint filed in this case, Plaintiff detailed the opening explanation offered by the FBI in its original response to the 2009 FOIA request. That explanation included a description of the files from which the information had been disclosed. One of the files was identified as 190-SA-C-14. Plaintiff stated the following about this identification and related disclosure:

> Freedom of Information/Privacy Acts-This file also contains the designation at the end of "14" which, according to the FBI File Classification List, is a sedition file. Plaintiff has not seen any sedition investigation files in the production of FBI files in response to his FOIA request. There is no basis for any sedition investigation of Plaintiff. If this file is indeed a sedition investigation, responsive documents should be produced.

26. The FBI did not address this point in its Answer to the lawsuit. Plaintiff sent a letter to the FBI's counsel inquiring as to this issue. The FBI's response was that the classification was based on the first number, 190, an administrative file, and that the designation 14 was in error, that it should have read 1-4. **See Exhibit "E"**. Mr. Hardy's Declaration in this case in support of the Motion for Summary Judgment is contrary to the error designation. He repeats the identification of the file as 190-SA-C-14, Ex. 3, FBI MSJ, Hardy Declaration, p. 6, para. 12. The FBI should explain the discrepancy and ensure that the correct file is reviewed for production under FOIA.

F. **Objection to Representative Sample and Request for Appointment of Master to Review Documents**

27. Here, where the FBI has made such a broad use of exemptions, withholding 823 pages in their entirety (this number may be reduced by 77 if the 77 pages of EOUSA records were previously designated as withheld) and has made numerous redactions on many of the pages which have been produced, utilizing a representative sample to justify exemptions is, while convenient, not appropriate as so many claimed exemptions will necessarily be excluded form the review process. Mr. Negley objects to presentation of exemptions by representative sample. In order to ensure that a full review of the records can be completed and in consideration of the demands on the Court's schedule, Mr. Negley proposes that the Court appoint special masters to conduct a review of all 7405 pages which the FBI has identified as having been reviewed, unredacted, for the purpose of determining the propriety of the FBI's stated exemptions. It is respectfully proposed that the Court appoint Howard Newton and Michael McCrum as special masters to conduct this confidential review and report to the Court on their findings, conclusions and recommendations. Mr. Negley is willing to bear the cost of the review by paying the fees of Mr. Newton and Mr. McCrum. This review of all the records, rather than a representative sample, is also important in determining the adequacy of the FBI search. Specifically, the review could detect notes and other recording of information relevant to the existence of records relating to Mr. Negley. For instance, had the EOUSA documents been withheld, Mr. Negley would not have learned of the notation referencing 500,000 and/or 42,000 documents.

V.

CONCLUSION AND PRAYER

The facts before the Court show that there are genuine issues of material fact that preclude summary judgment. Plaintiff respectfully requests that the Court deny the FBI's Motion for Summary Judgment.

Respectfully submitted,

/s/ John F. Carroll
John F. Carroll
111 West Olmos Drive
San Antonio, Texas 78212
(210) 829-7183-Phone
(210) 829-0734-Fax
State Bar No. 03888100

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 Summary Judgment 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 June, 2013.

/s/ John F. Carroll
John F. Carroll

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-OLG**
	§	
FEDERAL BUREAU OF	§	
INVESTIGATION,	§	
Defendant	§	

ORDER ON MOTION FOR SUMMARY JUDGMENT

On this day came before the Court the Motion filed by the Defendant, Federal Bureau of Investigation, for Summary Judgment, and the Court, having considered the pleadings and the summary judgment evidence, finds that said motion should be DENIED.

IT IS THEREFORE ORDERED, that the Defendant's Motion for Summary Judgment is DENIED.

SIGNED this _____ day of _____, 2013.

_____
UNITED STATES DISTRICT JUDGE