

B. Plaintiff's FOIA Request Of April 2014

Plaintiff's FOIA request that is the subject of this lawsuit ("Lawsuit FOIA Request") was submitted in April 2014. See Plf's FOIA Request of April 2014. Plaintiff's FOIA request was submitted to the DOJ's general FOIA/PA Mail Referral Unit and the request was ultimately assigned to the Executive Office of United States Attorneys ("EOUSA" or the "Agency").

C. Plaintiff's FOIA Request Of July 2015

Outside of this litigation, on July 13, 2015, Mr. Negley filed a FOIA Request with the DOJ that has been assigned Request No. FOIA-2016-00039 (the "July 2015 FOIA Request"). The DOJ, through counsel, has informed Mr. Negley that it is in the process of locating documents responsive to Mr. Negley's July 2015 FOIA Request and can soon begin producing such documents. Upon information provided by the DOJ, through counsel, the Parties believe that the documents requested in Mr. Negley's April 7, 2014 FOIA Request, which are at issue in this litigation, may be part of the DOJ's production in response to his July 2015 FOIA Request.

D. Stay Of Proceedings And June 1 Status Hearing

Accordingly, counsel for the Parties previously agreed on a framework for a temporary stay to permit production of documents responsive to the July 2015 FOIA Request, because completion of this production may resolve some of the issues in this litigation. During the course of the Stay, DOJ collected, reviewed, and produced responsive portions of non-exempt documents from the United States Attorney's Office in the Western District of Texas ("USAO-WDTX") (FOIA Request No. 2016-00039) to Mr. Negley, through counsel, in rolling productions. That Stay has since expired, and the Parties appeared before this Court on June 1, 2016 in a status conference to obtain additional guidance on the production of documents. Court also ordered that the parties file a joint status report on September 7, 2016. This report constitutes the statement of both parties with respect to this Court's Order of that date.

II. STATEMENT OF PLAINTIFF JAMES L. NEGLEY

For the sake of brevity and efficiency, Plaintiff James L. Negley respectfully refers this Court to the previous status report filed in April 2016 (Dkt. 27) for the voluminous past history of this case and for context. For the purposes of this report, Mr. Negley focuses instead on the lack of information and documents provided by the Defendant DOJ, and the issues that Mr. Negley previously reserved for adjudication.

A. The DOJ's Failure to Produce the Ordered Documents

Following the June 1, 2016 status hearing, this Court ordered all responsive documents produced by September 1, 2016. Over the past three months, Mr. Negley, through counsel, has made repeated and varied efforts to obtain updates from DOJ counsel regarding the status of - as represented at the hearing and to Mr. Negley's counsel, a fairly large document production. Counsel asked for an update on July 19, 2016, noting that "with the status report due on September 7, having some time to review and digest the documents would be ideal." July 19, 2016 email from Clarence Lee to April Seabrook. Again, on August 16, 2016, Mr. Negley's counsel followed up asking "[a]re we going to receive any documents before the actual deadline? I understood that we were supposed to receive documents on a rolling basis." August 16, 2016 email from Clarence Lee to April Seabrook.

DOJ counsel responded on August 17, 2016, noting that EOUSA had referred approximately 1,500 pages of documents to the FBI for review and potential production, but noting that the FBI would not produce documents that are duplicative of what it previously produced to Mr. Negley. DOJ also stated that there are approximately 7,700 pages of potentially responsive materials. August 17, 2016 email from April Seabrook to Clarence Lee. Then on August 26, 2016, DOJ counsel noted that the FBI would not be producing any documents because they are duplicative. August 26, 2016 email from April Seabrook to Clarence Lee.

Finally, at 10:48 pm on August 31, 2016, counsel for the DOJ informed Mr. Negley's counsel that for various reasons, DOJ would be unable to produce any documents to Mr. Negley before this status report is due.¹

The DOJ's disclosure that they are not in a position to produce any documents by the Court-ordered deadline is disappointing and surprising for several reasons. First, Mr. Negley's FOIA request that is the subject of this lawsuit has been pending since 2014. Second, the broader FOIA request that is also part of the promised production was sent to the DOJ on July 13, 2015 – almost 14 months ago. Third, DOJ counsel represented to this Court in a hearing on June 1, 2016 that the Agency would be able to provide all the requested documents by September 1, 2016 on a rolling basis and noted that there were in excess of 7,000 documents at the time. Not a single document has been produced.

Mr. Negley has waited patiently for the DOJ's promised production as required by this Court's order, and expended significant resources in pursuing these documents through counsel. As Mr. Negley personally noted to DOJ counsel, he is a 71-year old man who has been waiting a significant amount of time for documents to which he is legally entitled. Mr. Negley therefore reserves the right to seek compensation and/or additional relief at the appropriate time.

B. Additional Issues with DOJ's Production

(1) DOJ's Refusal to Produce Duplicate Documents

In addition to the DOJ's failure to produce any documents, DOJ has also stated a refusal to produce any of the FBI documents that it claims are duplicative of a previous FBI investigation:

The FBI has reviewed the materials and confirmed that the documents are, in fact, materials that Mr. Negley previously received in response to a

¹ Among the reasons cited by DOJ are: a) technical problems; b) they were surprised to find out there were nearly 8,000 pages of material; c) the need to have dual-level review.

FOIA request. Thus, they will not be producing any documents. They will be sending you a letter with a bit more detail, but I wanted to let you know about the status of this production as soon as I received the information.

August 26, 2016 email from April Seabrook to Clarence Lee.

As of the date of this Status Report, no letter has been received by Mr. Negley from the FBI. DOJ cites no valid case law or regulation that prevents the production of duplicate documents. Nor does it provide any evidence, aside from the statement, that the documents are duplicative.² Accordingly, Mr. Negley will challenge the DOJ's assertion that the FBI has no obligation to produce duplicative documents.

(2) Lack of Documents Outside of One U.S. Attorney's Office ("USAO")

Despite requesting information from the entirety of the DOJ, and then specifying certain districts in which information might/should be available, to date, Mr. Negley has only received documents from the Western District of Texas. This is particularly concerning because the origin of Mr. Negley's involvement with the government began in Chico, California and involved, at a minimum, the Central District of California and the Sacramento division. Nothing has been produced from any California USAO. It is difficult to believe that there are no documents referenced Mr. Negley in any AUSA in the state of California, or, that such documents are not ascertainable over the course of several months.

It is not clear from the DOJ's updated position whether documents from the above-stated districts are being collected, reviewed, and/or produced. Mr. Negley has, on multiple occasions, informed DOJ of his concerns with respect to the adequacy of the thoroughness and correctness

² On September 6, 2016, Mr. Negley's counsel received a one-paragraph letter from the FBI stating: "The FBI has reviewed the 1,519 pages of referred documents and determined it is the same information the FBI already provided to Mr. Negley in previous releases under FOIA No. 1133487." August 26, 2016 Letter from David Hardy to Clarence Lee.

of the DOJ's searches, and attempted to direct the DOJ to the proper jurisdictions and search terms.

C. Failure to Produce Documents from the Western District of New York

Mr. Negley is troubled by the DOJ's failure to produce documents from the Western District of New York. As this Court is aware, in the previous FBI Lawsuit, documents were produced to Mr. Negley by the FBI – a division of DOJ – that indicated that Mr. Negley's FBI file was labeled as "SUB S-1575." *See* Negley-100 (produced by the FBI). That was confirmed by the deposition testimony of FBI Assistant Special Agent in Charge Clifford Holly taken in the FBI Lawsuit:

Q: But would you anticipate that that [sic] Sub S 1575 would relate to Mr. Negley or could that relate to someone else?

A: No, I would – because it's on Exhibit Number 4 relative to the investigation conducted and the interview conducted with Mr. Negley, that that would be attributed to Mr. Negley, 1575. I didn't see that.

...

A: That's what – I had seen that and that's what was most confusing to me is I'm seeing an S with 7575 and then I've got Exhibit 3 1575 but now that you point out on what's Exhibit 4, now it makes sense. 1575 as a suspect sub file makes sense.

Q: For Mr. Negley?

A: For Mr. Negley.

Deposition of Clifford Holly, P. 115-116 (bold in original).

On Negley-100, the FBI document previously produced, the file is clearly marked as "S-1575" meaning it is a file that pertains to Mr. Negley, as confirmed by Mr. Holly of the FBI. On the next page, Negley-101, under the DOJ seal, there is a Memorandum discussing referencing the "Buffalo teletype to San Francisco/UTF dated January 7, 1994" which presumes to mean the

document directly following, Negley-102. Without re-stating the teletype in its entirety, it appears that the FBI investigated a *different suspect in the Buffalo, New York area* who was also assigned the suspect number S-1575. As the original DOJ/FBI memorandum concludes, that “[redacted] has been fully identified, and the information provided does not meet the predication to initiate a specific suspect investigation. Unless new information is developed regarding [redacted] this will remain unassigned in a suspect dead file. Buffalo division will be advised separately by UTC regarding this.” Negley 102.

The FBI file never explained how a suspect in Buffalo to whom Mr. Negley had no connection of any kind ended up with the same suspect number – 1575 – as Mr. Negley. Nor has the FBI explained how Mr. Negley’s name has turned up in a file number – 1575 – in the Western District of New York, **almost two years before Mr. Negley was investigated as part of the Unabomber investigation in September 1995 in Chico, California.**

While none of these documents explicitly reference DOJ files in the Western District of New York, it is reasonable to assume that Mr. Negley’s S-1575 FBI file had some analog or correspondence with the USAO in Buffalo. As with the failure to produce documents relating to the Fax Cover Sheet in more than one jurisdiction, it is difficult to believe that the USAOs of jurisdictions actively investigating Mr. Negley do not have any responsive documents. Mr. Negley has concerns about the adequacy of the searches done in this jurisdiction.

Mr. Negley has, on multiple occasions, requested that the DOJ search these files, and produce the un-redacted contents of the FBI – a division of the DOJ – file -1575. Mr. Negley does so again. Given his past history of over-zealous and un-warranted persecution from the FBI, Mr. Negley believes that the production of a mostly un-redacted file -1575 as well as an un-

redacted copy of the FBI file in the San Francisco office styled 149A-SF-106204 should explain the confusion between Mr. Negley and the un-named suspect in Buffalo, New York.³

(3) Failure to Produce Documents from the District of Colorado

Equally troubling is the failure of DOJ to produce *any* documents from the District of Colorado. On February 26, 2016, we received correspondence from the USAO for the District of Colorado, informing Mr. Negley that no documents were found.

This is troubling because Mr. Negley and his energy company, JLN Solar, Inc., were issued a subpoena that involved AUSA Chris Larson in the USAO in Colorado. Correspondence between the USAO in Colorado and Mr. Negley's counsel evidences the fact that Mr. Negley and his company were trying to comply with a subpoena originated by the Department of Energy ("DOE") and clearly involved the USAO in Colorado. Mr. Negley is the founder and CEO of JLN Solar and his name appears, at a minimum, in e-mails, various documents, and in the log that was produced by JLN Solar to the USAO in Colorado.

Thus, the failure to produce a single document – out of an office that clearly has been involved in prior investigation/litigation with Mr. Negley and his company – is concerning. Mr. Negley has appreciated DOJ counsel's willingness to attempt to resolve his pending FOIA requests, but the failure to produce documents – both in California and Colorado – where Mr. Negley knows documents exist, calls into question (1) whether a good faith effort is being made by those conducting the searches; and (2) whether methods which can reasonably be expected to produce the requested information are being used. As such, Mr. Negley questions whether the searches being done in response to his FOIA requests are adequate.

³ Mr. Negley does not seek identifying information regarding the un-named Buffalo suspect and thus would assume that such information would continue to be redacted.

(4) Mr. Negley Has a Right to the Requested Information

Lastly, Mr. Negley simply wants to ascertain what information his government possesses regarding him stemming from the initial mistaken belief that Mr. Negley was the Unabomber, and the FBI's resulting harassing and over-zealous investigation. Mr. Negley has expended significant resources over more than a decade attempting to obtain access to this information, only to encounter roadblocks at every turn. The failure to produce documents, despite Mr. Negley's cooperation, assistance, and agreement to stay the case, raises serious concerns for Mr. Negley.

D. Plaintiff's Proposal for Further Resolution

Mr. Negley has awaited the DOJ's production over, at a minimum, the past 15 months, with limited results. Even following this Court's Order to produce documents by September, 2016, no documents were produced. Accordingly, Mr. Negley proposes that he be allowed to pursue the following:

- 1) a motion for appropriate relief before this Court for the failure to produce documents by the promised date;
- 2) depositions of appropriate custodian of documents to ascertain the scope and details of the searches being conducted;
- 3) this Court's Order for the un-redacted production of the documents referenced herein relating to Mr. Negley's FBI file -1575 and related documents;
- 4) the production of documents and/or depositions of the custodian of documents in the districts for which Mr. Negley has requested documents without response; and
- 5) a Court Order for the expedited production of documents in possession of both the FBI and DOJ.

III. STATEMENT OF DEFENDANT DOJ

As reflected in the Parties' April 15, 2016 status report [ECF No. 27], EOUSA has conducted searches of fourteen USAOs⁴; only two of those offices located documents potentially responsive to Mr. Negley's July 2015 FOIA request: United States Attorney's Office in the Western District of Texas ("USAO-WDTX") (FOIA Request No. 2016-00039) and United States Attorney's Office in the District of Columbia ("USAO-DC") (FOIA Request No. 2016-01519/DDC).

A. USAO-WDTX Materials

During the June 1, 2016, Status Conference, the Court asked DOJ's counsel for an overview of the document production conducted by Defendant. With respect to materials located within the search of the USAO-WDTX, DOJ's counsel informed the Court that EOUSA was making rolling productions of documents to Plaintiff, that documents would be referred from EOUSA to the Federal Bureau of Investigation ("FBI") for review and production (because the documents had originated with the FBI), and that DOJ would be able to produce all USAO-WDTX documents before the Parties' status report was due in September.

Consistent with counsel's statements made to the Court, in June 2016 EOUSA issued its fourth and final production of documents from the USAO-WDTX. Additionally, in August 2016, the FBI completed its review of the 1,519 pages of referred materials that were retrieved from the USAO-WDTX. By letter dated August 26, 2016, FBI notified Plaintiff that it had

⁴ The searches were assigned the tracking numbers listed below and EOUSA has issued to Plaintiff an acknowledgement letter corresponding to each request number. The searches were conducted at:

- the three USAOs in Texas (with tracking numbers 2016-01512/TXE, 2016-01513/TXS, 2016-01514/TXN);
- the three USAOs in California (with tracking numbers 2016-01515/CAE, 2016-01516/CAN, 2016-01517/CAS, 2016-01525/CAC);
- the one USAO in Colorado (with tracking number 2016/01518/DCO);
- the two USAOs in Michigan (with tracking numbers 2016-01521/MIW, 2016-01520/MIE);
- the three USAOs in New York (with tracking numbers 2016-01522/NYE, 2016-01523/NYS, and 2016-01524/NYW); and
- the USAO in Washington, D.C. (with tracking number 2016-01519/DDC).

completed its review of the pages referred to it by EOUSA; among other things, the FBI's letter stated:

The FBI has reviewed the 1,519 pages of referred documents and determined it is the same information the FBI already provided to Mr. Negley in previous releases under FOIA No. 1133487. The records provided were adjudicated in Civil Action No. SA-12-cv-362 in the U.S. District Court for the Western District of Texas, and in the Fifth Circuit Court of Appeals in Case No. 13-50912.

See FBI Letter of 8/26/2016 (attached as Exhibit A). Despite being informed by DOJ's counsel on August 26 that the FBI did not intend to produce duplicative pages, Plaintiff's first objection to this was voiced in this status report.

B. USAO-DC Materials

During the June 1 Status Conference, DOJ's counsel informed the Court that, although the materials from USAO-DC had been requested from storage, EOUSA had not yet been able to determine how many pages of potentially responsive materials were retrieved in that search and, thus, Defendant could not guarantee that all documents from the USAO-DC would be produced before September 2016.⁵

EOUSA could not begin reviewing the USAO-DC documents until August 2016 due to an error that resulted in the delay of the materials being shipped from DOJ's storage facility to USAO-DC for inclusion in the FOIA review system, followed by computer system errors that prevented the materials from being added to EOUSA's FOIA review system due (in part) to their size. After the materials were fully loaded into the system, EOUSA then learned that the search of records in the USAO-DC had retrieved over 7700 pages of potentially responsive materials that would need to be reviewed. EOUSA is now actively reviewing those records and will be

⁵ EOUSA cannot estimate – let alone provide an accurate count of – the number of pages retrieved in a search until the materials are in the possession of the USAO; this had not yet occurred at the time of the June 1 2016 hearing.

able to make its first production of materials by September 28, 2016. As it has done in the past, EOUSA intends to make rolling productions of documents to Plaintiff.

C. DOJ's Response to Plaintiff's Complaints Regarding The Searches And Productions

While Plaintiff asserts his belief that USAOs in California and other locations *should* have responsive records, he has no factual basis for this and his assertions are largely based on a fundamental misunderstanding of the federal government's functioning. Simply because the FBI within a federal district conducts an investigation, it does not indicate that the USAO within that district would receive materials related to the investigation, or even be informed that an investigation was conducted.

Further, while Plaintiff has asserted in prior status reports and in this status report that he is unclear how to dispute any challenges to the adequacy of the search for materials containing his name (*i.e.*, the July 2015 FOIA Request), DOJ's counsel has been very clear about the procedures and how challenges to searches should be addressed. For example, in early 2016, when the Parties discussed agreeing to a Stay to permit Defendant to produce documents related to the July 2015 FOIA Request because the produced documents would likely encompass documents responsive to the Lawsuit FOIA Request, Plaintiff's counsel proposed that the Complaint in this lawsuit be amended to include the July 2015 FOIA Request. DOJ counsel explicitly refused rejected this proposal and reiterated that the July 2015 FOIA Request would be treated as a separate request unrelated to this or any other lawsuit. *See* Email from A. Seabrook, dated 1/16/2016 (attached as Exhibit B).

This issue of Plaintiff's challenges to the adequacy of the searches was raised again in May 2015 when, *after* the USAO in New York and Colorado had conducted a search based on terms provided by Plaintiff, Plaintiff's counsel asked EOUSA to re-conduct the searches using

terms and eliminators that he never previously identified. After EOUSA appropriately declined to conduct these additional searches, Plaintiff's counsel asked DOJ's counsel to have the Agency conduct these additional searches. In response, DOJ's counsel responded to Plaintiff's counsel by stating that:

First, the assertion that the first searches were not adequate is inaccurate. The searches were conducted based on the specific criteria that were provided in the FOIA request. Additionally, on January 12, 2016, I emailed you to confirm the search terms that we should use. You responded by letter, dated February 4, 2016, stating that "Mr. Negley believes that his July 2015 Freedom of information Act ("FOIA") request is clear and provides the Agency adequate guidance" and you then reiterated the terms listed in the July 2015 letter. Accordingly, we ran the search based on what you and your client said was sufficient.

Second,... the search that you ask to be run is unrelated to the litigation FOIA request, because it is unrelated to any search for materials concerning a Unabomber investigation. It is related to the July 2015 FOIA request, which is not the subject of this lawsuit. As such, any objection to the adequacy of the search will need to be appealed administratively, and I am unable to direct the Agency on the issue of whether it can or should re-run the search.

Email from A. Seabrook, dated 5/23/2016 (attached as Exhibit B).

D. DOJ's Proposal for Further Proceedings

In light of the above facts, DOJ proposes the following steps for further proceedings in this action:

- First, DOJ respectfully requests that it be permitted additional time to produce documents response to the USAO-DC search. This timeline would require the first production of documents to be made on September 28, 2016, followed by monthly productions thereafter until all documents have been produced (which EOUSA anticipates taking approximately seven months given the nearly 8000 pages of potentially responsive materials).
- Second, DOJ respectfully requests that Plaintiff *not* be permitted to seek or be awarded any of the relief that he seeks in Section II.D of this Status Report, including (but not limited to) Plaintiff's request for an Order that (i) permits him to conduct depositions of potential custodians of records; (ii) compels the production of unredacted documents; (iii) requires DOJ review and produce materials on an expedited production schedule (which would also require DOJ to

devote an unreasonable amount of its limited resources to the July 2015 FOIA Request for Mr. Negley), and/or (iv) compels DOJ to re-conduct searches that Plaintiff now claims were inadequately performed.

- Third, DOJ respectfully proposes that after all documents from USAO-DC have been produced that would be an appropriate time for the Parties to meet and confer to establish a proposed briefing schedule to resolve this litigation and the Lawsuit FOIA Request.

Date: September 7, 2016

Respectfully Submitted,

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