

**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 SUR-REPLY TO DEFENDANT’S REPLY TO RESPONSE TO
MOTION FOR PROTECTIVE ORDER**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Now comes James Lutchter Negley, Plaintiff, and files this Sur-Reply to the Government’s Reply to Plaintiff’s Response to the Government’s Motion for Summary Judgment and in support thereof would show the Court as follows:

1. The Government Reply to the Response to Motion for Summary Judgment essentially reargues the Motion for Summary Judgment. The Reply opens with a reference to the exemptions issue and the Government’s claim that summary judgment should be granted on the exemptions because Plaintiff has not challenged the exemptions in his Response to the Motion for Summary Judgment. However, the exemption claims asserted by the Government, to the extent appropriate, only apply to the documents and records that the FBI has acknowledged exist and are responsive to Plaintiff’s FOIA request. However, the FBI’s presentation of its claimed exemptions only addresses the quantum of records the FBI

has acknowledged recovering as a result of its search. However, the claimed exemptions do not address the failures of the FBI to conduct a reasonable search and the failure to disclose all records pertaining to Mr. Negley. The problem in this case is not what the FBI has produced and what the FBI acknowledges that it has found through its search procedures described in the Hardy Declaration.

2. The FBI suggests that if the exemptions were adequately applied, discovery is unwarranted, citing *Schiller v. INS*, 205 F. Supp. 2d 648, 654 (W.D. Tex. 2002). However, the cited passage in *Schiller* discusses authorities that discuss discovery in the context, not only of exemptions, but also the adequacy of the search. *Id.* at 654-655. In the instant case, the discovery which Mr. Negley has sought to engage in does not go to the question of exemptions. In fact, the exemptions claimed by the FBI in this case, so far, do not appear to relate to the issues on which Mr. Negley has sought discovery (See Doc. # ____, Plaintiff's Response to Motion for Protective Order). Rather, Plaintiff's discovery requests seek to determine whether the FBI has conducted an adequate search for documents and records.

3. The FBI cites the *Vela v. City of Houston*, 276 F. 3d 659 (5th Cir. 2001), case in support of its Motion for Summary Judgment, arguing that the summary judgment standard of review applied in that case applies to the position taken by the Plaintiff in this case. That case does not apply to define the standard of review applicable in the instant case. Here, the FBI seeks summary judgment on issues on which it has the burden of proof. Plaintiff has opposed the Motion, asserting that fact issues exist which preclude summary judgment. The

Vela case involved a failure by one of the parties, City of Houston, to raise issues on its affirmative defense of limitations, an issue on which it had the burden of proof. That is not the situation in the instant case. The burden is on the FBI to show that its search was reasonable and it properly invoked exemptions. Plaintiff has opposed the Motion, contending that fact issues, pointed out specifically in Plaintiff's Response, exist which preclude summary judgment.

4. The FBI claims that the only investigative files were those relating to the UNABOMB investigation in 1995 "and he was quickly dismissed as a potential subject". (FBI Reply in support of Defendant's Motion for Summary Judgment, Doc. # 44, page 5, footnote 16). That statement is not consistent with the document File 1575. The file 149A-SF-106204-S-1575-1, which will be referred to here as File 1575, related to a person living in upstate New York who was investigated as a possible UNABOMB suspect. See Exhibit "A", Negley II-3503-3504. The FBI production of records indicates that it has previously looked into whether that file pertained in any way to Mr. Negley and concluded that it did not. See Document attached as Exhibit "B", Negley II-3544. However, Jim Negley was linked to that file for some reason. See Exhibit C, Deposition of Clifford C. Holly, March 12, 2007, taken in *Negley II* litigation, pages 110-117 144-148). If the only investigative activity regarding Mr. Negley was related to the September 1995 incident in Chico California, there would be no reason for anyone at the FBI to be investigating some possible link between Mr. Negley and the subject of File 1575. The FBI has never explained why Negley was linked

to the File 1575 investigation.

WHEREFORE, Plaintiff respectfully requests that the Court deny the Defendant's Motion for Summary Judgment.

Respectfully submitted,

/s/ John F. Carroll

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff's Sur Reply to Defendant's Reply to 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 23rd day of July, 2013.

/s/ John F. Carroll

John F. Carroll