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**U.S. District Court**

**District of Columbia**

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**Case Name:** NEGLEY v. FEDERAL BUREAU OF INVESTIGATION

**Case Number:** 1:03-cv-02126-GK

**Filer:** JAMES LUTCHER NEGLEY

**Document Number:** 112

**Docket Text:**

**MOTION for Summary Judgment by JAMES LUTCHER NEGLEY (Attachments: # (1) Memorandum in Support of Plaintiff's Motion for Summary Judgment, # (2) Exhibit A, # (3) Exhibit B, # (4) Exhibit C, # (5) Exhibit D, # (6) Exhibit E, # (7) Statement of Facts As to Which There is No Genuine Dispute, # (8) Text of Proposed Order Granting Plaintiff's Motion for Summary Judgment)(Khetan, Prashant)**

**1:03-cv-02126-GK Notice has been electronically mailed to:**

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**Document description:**Memorandum in Support of Plaintiff's Motion for Summary Judgment

**Original filename:**suppressed

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**Document description:**Text of Proposed Order Granting Plaintiff's Motion for Summary Judgment

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**JAMES LUTCHER NEGLEY,** )  
)  
)  
**Plaintiff,** )  
**v.** )  
)  
**FEDERAL BUREAU OF** )  
**INVESTIGATION,** )  
)  
**Defendant.** )  
)  
)  
)  
\_\_\_\_\_)

**Civil Case No. 03-2126 (GK)**

**PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, James Lucher Negley (“Negley”), by his undersigned attorneys, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves for summary judgment. The grounds for this Motion are set forth in the accompany Memorandum of Points and Authorities.

Negley respectfully requests a hearing for this motion.

Dated: March 15, 2011

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**JAMES LUTCHER NEGLEY,**

**Plaintiff,**

**v.**

**FEDERAL BUREAU OF  
INVESTIGATION,**

**Defendant.**

**Civil Case No. 03-2126 (GK)**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT  
OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Dated: March 15, 2011

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**JAMES LUTCHER NEGLEY,**

**Plaintiff,**

v.

**FEDERAL BUREAU OF  
INVESTIGATION,**

**Defendant.**

**Civil Case No. 03-2126 (GK)**

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This case is not about an ordinary citizen making an extraordinary request under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Rather, Plaintiff James Lucher Negley, has invested considerable time and resources over the past nearly ten years to obtain what he believes are responsive documents in the possession of Defendant, Federal Bureau of Investigation (the "FBI"). Negley, a Vietnam veteran who served as an armed observer on a Scout helicopter with the First CAV in the Vietnam War, has dedicated his professional life to the development and commercialization of Copper Indium Gallium Selenium ("CIGS") thin-film photovoltaic technology. With the intent of conducting advanced research and commercializing thin-film CIGS technology to produce utility scale electricity, Negley incorporated Davis, Joseph & Negley ("DJN") (a California Corporation) in 1987. Negley has been funding the research and development of this energy source for over twenty years, utilizing one of the premier university laboratories in the country located at the University of Delaware Institute of Energy Conversion ("IEC") in Newark, Delaware, as well as the National Renewable Energy Laboratory

("NREL") in Golden, Colorado. The research is significant because it will yield enormous public benefit as a renewable energy source, will have the potential for great financial return and will provide deserving scientists with professional accolades for their work. The operators of NREL hold a royalty interest to the commercialized technology, and thereby are also financial stakeholders. Moreover, the scientists have devoted decades of research to develop the CIGS technology.

As a result of the value of this research, Negley has reason to believe that he has been and is being investigated. Over the same time frame, Negley has experienced intentional damage to his research equipment, his car has been tampered with and he has experienced numerous unexplained break-ins and wiretaps. Negley has reason to believe that the FBI has been withholding and/or redacting information directly related to the above activities. Whether or not Negley is correct, the purpose of FOIA is not to judge requestors like Negley, but rather to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny" and "afford[] the public access to virtually any federal government record that FOIA itself does not specifically exempt from disclosure[.]"<sup>1</sup>

Here, the FBI's conduct in responding to Negley's FOIA request, and its actions throughout this litigation, demonstrates the value – or lack thereof – that the FBI places on upholding and advancing the goals and purposes of FOIA. This Court is well aware of the factual history of this case, including the FBI's delay and obfuscation in the 9 years since Negley submitted his FOIA request. Instead of simply producing all documents that the FBI discovers in

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<sup>1</sup> McCutchen v. Dep't of Health & Human Servs., 30 F.3d 183, 184 (D.C. Cir. 1994) (citation omitted); Mack v. Dep't of the Navy, 259 F. Supp. 2d 99, 104 (D.D.C. 2003); see also Stern v. FBI, 737 F.2d 84, 88 (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).

its searches, it has repeatedly – and at times inexplicably – refused to produce certain files, relying on tedious and baseless arguments, tying up Court resources and leaving Negley mired in unending, expensive litigation. Now, yet again, it has become clear that the FBI still has not conducted a reasonable search for and production of responsive documents. Not only does the law not support the FBI’s self-imposed limitations to its search/production of responsive documents, but even using those limitations, Negley is aware of responsive documents that the FBI has yet to produce. Thus, this Court should rule that the FBI’s search/production is unreasonable, and order production of all responsive documents within 30 days, with a Vaughn affidavit detailing any redactions/withholdings.

With regard to the 120 pages of documents that the FBI has produced in this litigation in response to Negley’s FOIA request, the FBI relies on extensive use of exemptions to make significant redactions that are unlawful. Although the FBI generally states that all of its redactions were made to protect an individual’s privacy, it is clear that the FBI abuses this mantra in making redactions that have no connection to preventing an unwarranted invasion of privacy. Accordingly, this Court should order production of all documents without unjustified redactions/withholdings.

I. **RELEVANT FACTS**<sup>2</sup>

On January 16, 2002, Negley submitted a FOIA request to the FBI for “any records about me maintained at and by the FBI in [the San Francisco] field office [(the “SFFO”)].” See Complaint against FBI dated October 17, 2003, Ex. A (Dkt. No. 1). Negley’s request was sent specifically to the SFFO, rather than the FBI headquarters, because the FBI advised Negley that

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<sup>2</sup> This section is a summary of the accompanying Plaintiff’s Statement of Material Facts as to which there is No Genuine Dispute.

he had to submit requests to specific field offices.<sup>3</sup> In response to being told that there were no responsive records, Negley filed an appeal, noting that documents produced under a prior FOIA request made specific reference to a Main File number (File Number 149A-SF-106204) (the “Main File”), which appeared to denote a file containing information about Negley that would be responsive to his FOIA request. On April 23, 2002, Negley amended his FOIA request to include all files about him, including what is referred to as “File S-1575.” The FBI’s response admitted that there were records responsive to Negley’s FOIA request, but it did not produce any documents. Negley once again appealed. This time the FBI produced 37 documents (12 pages were redacted) from File No. 149A-SF-106204-S0-3041 (“Serial 3041”), a serial from the Main File. Dissatisfied with the FBI’s search for and production of documents responsive to his FOIA request, Negley filed the pending lawsuit to obtain a complete production of agency records responsive to his FOIA request.

This lawsuit already has resulted in multiple Court Orders requiring the FBI to produce responsive documents. See, e.g., Order dated January 8, 2007 (Dkt. No. 43), ¶ 1. In January 2007, the FBI represented that in addition to the 37 pages produced prior to the lawsuit, the FBI had produced (since the inception of the lawsuit) an additional 9 redacted pages (and one page was withheld in its entirety), and was producing an additional 2 pages, from Serial 3041. See Praecipe dated January 16, 2007 (Dkt. No. 45) and Notice of Correction to Praecipe dated January 19, 2007 (Dkt. No. 47). Later, the FBI produced documents from File No. 149A-SF-106204-S0-3865, another serial from the Main File.

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<sup>3</sup> Cf. Maydak v. DOJ, 254 F. Supp. 2d 23, 44 (D.D.C. 2003) (“For records held by a field office of the [FBI] . . . , however, you must write directly to that FBI . . . field office address.”) (citation omitted).

The parties then filed cross-motions for summary judgment. In its Order dated September 24, 2009 (Dkt. No. 90), this Court denied in its entirety the FBI's Second Motion for Summary Judgment and granted Negley's Motion for Partial Summary Judgment. In so ruling, the Court noted the following:

- "Defendant's persistent and inexplicable refusal to search at least the dedicated Zy database . . . actually reflects a distressing active disregard of its obligations under FOIA."
- With respect to the FBI's repeated failure to produce File S-1575: "The FBI's stubborn refusal to turn over this file flies in the face of longstanding principles that favor disclosure in the FOIA context. This refusal is not the first time the FBI has resisted complying with legal mandates in the course of this litigation."
- Referring to the FBI's initial refusal to produce all responsive documents from Serial 3041, despite a Court Order: "Instead of complying with the Court's order and disclosing these documents to Negley, the FBI carved out its own exception to the clearly worded order and elected to withhold production of these duplicates because nothing in them 'suggested additional information would be revealed.'"
- "[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."

See Memorandum Opinion dated September 24, 2009 ("Memorandum Opinion"), at 8-17 (Dkt. No. 91). In response to the September 24, 2009 Order, the FBI searched for and produced *some*

additional documents that were responsive to Negley's FOIA request. To date, the FBI has produced a total of 120 pages (with redactions) to Negley, and has indicated that there are no more documents in response to his 2002 FOIA request. To this end, the FBI continues to impose its own standards and restrictions on searches and productions in response to Negley's FOIA request. Specifically, the FBI indicated that it would produce only documents maintained at and by the SFFO and created after April 2002 (the alleged date of its first search in response to Negley's FOIA request). Some of these restrictions are the subject of Negley's Motion for Reconsideration of Court's March 1, 2011 Order Denying Plaintiff's Motion for Contempt for Defendant's Failure to Comply with the Court's September 24, 2009 Order (Dkt. No. 111). Negley has reason to believe that the FBI is withholding other responsive non-confidential information and therefore files this Motion.

## II. ARGUMENT

### A. Standard for Granting Summary Judgment.

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(a). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original removed). To this end, and although the Court must view the evidence in the light most favorable to the non-movant, "[t]he mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient" to withstand summary judgment. Id. at 252. To the contrary, "[o]nly disputes over facts that might affect the outcome

of the suit under the governing law will properly preclude the entry of summary judgment.” Id. at 248.

**B. Negley is Entitled to Summary Judgment as to the FBI’s Unreasonable Search for and Production of Responsive Documents.**

The FBI has taken a wait-and-see approach to searching for and producing responsive documents in response to Negley’s FOIA request. Specifically, throughout the history of this matter, the FBI has done the bare minimum in searching/producing documents, at least until Negley or the Court points out the inadequacies. For example, prior to the lawsuit, the FBI first indicated that it had no responsive documents; when Negley appealed a second time, the FBI located and produced 37 pages, and indicated that it had no more responsive documents. After the lawsuit began, the FBI located an additional 10 pages, and indicated that it had no more responsive documents. After a January 2007 Court Order, the FBI produced an additional 2 pages, and indicated the same. Subsequently, the FBI produced more pages, bringing the total number of pages produced to 120, and again indicated that it had no more responsive documents. But, Negley once again has determined that the FBI has additional responsive documents. For the reasons set forth below, the Court should rule that the FBI still has not conducted a reasonable search for and production of responsive documents.<sup>4</sup>

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<sup>4</sup> Pending before the Court is Negley’s Motion for Reconsideration (Dkt. No. 111), which seeks reconsideration of the Court’s recent ruling that the FBI’s search/production was reasonable as it relates to the FBI’s decision to produce only documents maintained at and by the SFFO and created after April 2002. Negley does not seek to repeat those arguments and, therefore, incorporates them by reference. With respect to the FBI’s use of an April 2002 cut off date for production, because it is unreasonable under FOIA irrespective of whether it complied with the Court’s September 24, 2009 Order, Negley makes that argument below, though again incorporates by reference the argument made in the recently filed Motion for Reconsideration.



1. **Even using the FBI's parameters for a reasonable search, the FBI either has not located or not produced all responsive documents.**

According to the FBI, it conducted a reasonable search and produced all documents responsive to Negley's FOIA request. Specifically, the FBI asserts that following its 2009 searches, the 120 pages produced to date were the only documents maintained at and by the SFFO and created prior to April 2002. See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Contempt for Defendant Federal Bureau of Investigation's Failure to Comply with the Court's September 24, 2009 Order dated April 22, 2010 ("Def.'s Opp'n to Mot. for Contempt"), at 2 (Dkt. No. 103) ("[A]ll records responsive to Plaintiff's 2002 FOIA request were released. The only records discovered that had not previously been released to Plaintiff were 'administrative' type files that were deemed unresponsive to Plaintiff's 2002 FOIA request in that they were created in the process of responding to his request and/or related to field offices other than San Francisco."). Although Negley disputes the assertion that these limitations are reasonable (as set forth below), even using these self-imposed limitations, Negley has reason to believe that the FBI has not produced all responsive documents. Specifically, attached to this brief is a document that Negley obtained – which is dated September 18, 1995 and contains a San Francisco file number of 149A-SF-106204-S-7575 (or 1575)<sup>5</sup> – but which is not part of the FBI's production of 120 pages.<sup>6</sup> See Ex. A. If, as the FBI so brazenly states, it has produced all responsive documents that were

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<sup>5</sup> The handwriting on this document is not very legible. However, the "Date of Event" (towards the top) is clearly dated in the year "95" and the file number at the bottom right (which is typed) clearly contains a "SF", which the FBI previously had indicated means that it is a San Francisco file.

<sup>6</sup> Negley does not believe that the FBI will contest that this document was not produced in this case (indeed, the labeling on this document contains "FOIPA" and is, therefore, different than the labeling of the 120 pages produced in this case, and reflects documents obtained from another source).

maintained at or by the SFFO and created prior to April 2002, then this document should have been produced.

Negley presumes that the FBI's opposition will include yet another affidavit from David M. Hardy, who will undoubtedly declare that the notations on this document are not accurate or being misread, and that in fact this document either was created after April 2002 or is not maintained at and by the SFFO. And since the FBI knows that only the FBI can confirm or deny its assertion, it can make this statement without much ability for Negley to challenge it. However, given the FBI's history in this case – including its repeated confirmation that all responsive documents have been produced only to locate and produce more responsive documents – as well as its ongoing location and production outside of this lawsuit (in response to Negley's 2009 FOIA request), of thousands of responsive documents (to date twenty times the number of documents produced in this case), the FBI gives the Court no reason to credit what will be yet another unsubstantiated assertion. To the contrary, the very fact that this document exists and has not been produced in this case, despite fitting precisely within the FBI's own limitations to production, shows that either its search or production are unreasonable and do not meet the standards of FOIA.

**2. The FBI's use of April 2002 as the cut-off date for production of documents is unreasonable.**

The FBI readily admits that it applied an April 2002 temporal limitation on its production of responsive documents:

Q ...You said you did limit the time. What limitations on time did the FBI impose?

A April 2002.

Q So no documents after April 2002 would have been produced; is that right?

A Correct.

See Ex. B (Deposition of David M. Hardy dated January 28, 2010 (“Hardy Depo.”)), at 15:13-19. The FBI’s justification for the April 2002 cut-off date has nothing to do with the Court’s September 24, 2009 Order; to the contrary, and as Hardy explained, it “is established FOIA law as to when you set the limits of a search and it is the date that you first search . . . .” See id. at 15:21-16:5. As set forth below (and in Negley’s Motion for Reconsideration), the FBI’s belief that its temporal restriction is in accordance with “established FOIA law” is directly contradicted by established FOIA law.

Courts have repeatedly held that when responding to FOIA requests, temporal limitations on FOIA productions are prohibited where the agency is unable to demonstrate that such cut-offs are reasonable under the circumstances.<sup>7</sup> See, e.g., In Defense of Animals v. Nat’l Institutes of Health, 543 F. Supp. 2d 83, 99 (D.D.C. 2008) (holding that the agency did not meet its burden of demonstrating the reasonableness of a cut-off date of eleven months prior to the production); Public Citizen v. Dept. of State, 276 F.3d 634, 644 (D.C. Cir. 2002) (holding that the agency failed to advance a compelling justification for its use of a uniformly-applied time of request cut-off date on production); McGehee v. CIA, 697 F.2d 1095, 1104 (D.C. Cir. 1983) (holding that search was not reasonable where the agency limited its production to documents in existence two and one-half years prior to the release). In McGehee, for example, this Court considered the reasonableness of an unpublicized CIA rule which limited a FOIA production to materials in the agency’s possession on the date when the initial FOIA request was made. See 697 F.2d at 1097. Specifically, the CIA did not disclose any documents until two and one-half years after the

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<sup>7</sup> Negley does not contend that using the date of the first search as the cut-off date for production is *per se* unreasonable.

original FOIA request was made and only after being compelled to do so by a Court Order. See id. at 1100. In holding that the CIA's search/production was unreasonable, this Court expressly noted that:

one can easily imagine a system that incorporates a cut off date much later than the time of the original request, that results in a much fuller search and disclosure than the procedure presently used by the agency, that forecloses the necessity for an excessive number of supplementary demands, and that does not appear unduly burdensome, expensive, or productive of "administrative chaos."

Id. at 1104. Similarly, this Court has held that an agency did not meet its burden of demonstrating that a time of search cut-off was reasonable where there was an eleven-month gap of time between the start of the search and the final production of responsive documents. In Defense of Animals, 543 F. Supp. 2d at 99. And in Public Citizen, the United States Court of Appeals for the District of Columbia held that the State Department had not met its burden of showing reasonableness where it applied a date of request cut-off for FOIA productions. 276 F.3d at 643. Applying McGehee, the D.C. Circuit stated that "[a]t the very least, we think that with minimal administrative hassle, the [State Department] could apply a *date-of-search* cut-off to the Central File." Id. at 644 (italics in original).

Moreover, this Court has held that where an agency's search is determined to be inadequate by Court Order, a cut-off date for any subsequent production that is earlier than the date of the Order is virtually *per se* unreasonable. See, e.g., Wilderness Society v. U.S. Bureau of Land Mgt., No. Civ. A. 01CV2210, 2003 WL 255971, at \*7 n. 18 (D.D.C. Feb. 4, 2003) ("Given the fact that the Court has determined that the agency did not previously conduct an adequate search for responsive documents, the agency would have a heavy, if not impossible, burden to justify conducting its renewed search subject to a time limitation based upon the date of plaintiffs' initial request."). In fact, in Wilderness Society, this Court held that an agency's

search was inadequate and, in entering an Order for a supplemental search, stated that, “[i]t would therefore be prudent for the defendants *to produce responsive and non-exempt documents they uncover at the time their supplemental search is conducted, regardless of when the documents were created.*” See id. (emphasis added).

The FBI previously relied (and the Court cited in its Order dated March 1, 2011 (Dkt. No. 110)) on Jefferson v. Bureau of Prisons, 578 F. Supp. 2d 55 (D.D.C. 2008), for the proposition that it is reasonable to use the date of search as the cut-off date for production. In Jefferson, the plaintiff requested records from the FBI regarding a former Captain at a United States Penitentiary in Atlanta, Georgia. See id. at 60. This Court stated that “the proper question here is whether the cut-off date used was reasonable in light of the specific request Plaintiff made.” Id. In holding that the search/production was reasonable in that case, this Court noted that the FBI and the requestor knew that the investigation of the Captain’s conduct had been completed, that his criminal trial also had been concluded, and that he was no longer a Bureau of Prisons employee, so all potentially responsive information would have pre-dated, not post-dated, the FOIA request. Id. The facts and circumstances here, however, demand a different result. Notably, there is no indication in Jefferson that there was anything even remotely close to the seven year gap between the cut-off date and the production, as the FBI has done here. Indeed, the plaintiff’s challenge in Jefferson was to the FBI’s search/production of the initial request, so presumably the subsequent production was close in time to that search. Here, however, the FBI has been ordered to conduct numerous searches throughout this case, and the search being challenged was conducted seven years after the date of the first search (and cut-off date used for the production of documents). If the FBI really wanted to follow this Court’s holding in Jefferson, then the FBI should have used a production cut-off date of the search being challenged

– in 2009 – not of a search done seven years earlier and which had since been superseded by subsequent searches.

Here, the FBI imposed an April 2002 cut-off date for its production of responsive documents, which is *more than seven years* prior to its search for responsive documents. This extraordinary gap in time, three times as long as in McGehee and seven times as long as in In Defense of Animals, does not satisfy the burden that the FBI bears to justify using the April 2002 cut-off date for production. Indeed, the FBI has not advanced any legitimate justification for why such a limitation is reasonable under the circumstances. Accordingly, the Court should hold that the FBI's search/production, which relied on a cut-off date for production that was seven years prior to its search, is unreasonable under the circumstances.

**C. Negley is Entitled to Summary Judgment as to the Redactions Made by the FBI in its Production of Responsive Documents.**

To date, the FBI has produced 120 pages of documents in this case. From that production, the FBI has made redactions to 54 pages of documents. While the FBI uses self-serving categorizations of FOIA exemptions to support these redactions (and the FBI is the only one that knows what is being withheld), even a cursory review of some of those redactions shows that the FBI has used a broad brush to yet again defeat one of the purposes of FOIA.

As recently noted by the Supreme Court in Milner v. Dept. of the Navy, one of the goals of FOIA is “broad disclosure.” No. 09-1163, 2011 U.S. LEXIS 2101, at \*16 (Mar. 7, 2011) (citation omitted). In this regard, FOIA exemptions must be “given a narrow compass” and be “narrowly construed.” Id. at \*6 & \*16. (citations omitted). Where, as here, an agency claims an exemption, the burden is on that agency to support its exemption. See DOJ v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 755 (1989). The most common, and excessively, invoked exemptions by the FBI are subcategories of 5 U.S.C.S § 552 (b)(7)(C)

(“Exemption (7)(C)”), which exempts from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” In order to invoke Exemption (7)(C), the FBI must first establish that the records at issue were compiled for law enforcement purposes. See Robinson v. Attorney Gen. of the United States, 534 F. Supp. 2d 72, 81 (D.D.C. 2008). Then, the FBI must show the potential for an unwarranted invasion of privacy, which is determined by balancing an established privacy interest of individuals mentioned in the records against the public interest in disclosure. Beck v. DOJ, 997 F.2d 1489, 1491 (D.C. Cir. 1993). To this end, if the FBI meets its burden, and if the Court reaches the balancing test, the public interest to be considered is “the citizens’ right to be informed about what their government is up to.” Robinson, 534 F. Supp. 2d at 81.

In the Seventh Declaration of David M. Hardy dated December 23, 2009, Hardy generally states, as support for all of the redactions based on Exemption (7)(C), that after balancing the privacy interest of the individuals mentioned in the documents against the public interest of the disclosures, the FBI exempted information where an individual’s privacy interests were paramount. See Def.’s Opp. to Mot. for Contempt (Dkt. No. 103), Seventh Declaration of David M. Hardy dated December 23, 2009 (“Hardy Decl.”), at ¶ 60. Notably, the FBI did not invoke Exemption (7)(C) to redact names only; to the contrary, the FBI redacted what it describes as “personal identifying information” or “additional identifying information” on the grounds that such redactions are necessary to prevent an unwarranted invasion of privacy of the individuals to which the information relates and to prevent possible “harassment, humiliation or physical harm.” See id. at ¶¶ 63 & 66. When asked in his deposition to explain this broad proposition, Hardy defined “other personally identifying information” as “information which

would allow you to, if you read it, to have an idea who this person would be.” See Ex. B Hardy Depo. at 61:5-8. Refusing to discuss this broad proposition in the context of specific redactions, Hardy added:

Again not wanting to go underneath the redactions and speaking in general terms, certain information which is *not* a name, address, telephone number, date of birth, driver’s license number, employment information, in the context of a document would allow you to know who it is, but it doesn’t fall into one of these above categories. So essentially it is the context of that document that would allow you to identify who that person is.

See id. at 61:14-22 (emphasis added).

As demonstrated below by way of examples, the FBI has not established that the redactions are necessary to protect against an unwarranted invasion of privacy (*i.e.*, the redacted information could not be utilized to identify an individual). Similarly, there is no indication that disclosing the redacted information would result in a threat of harassment, humiliation or physical harm to any individual, the FBI’s expressed goal of invoking these exemptions. Where an agency was unable to meet its initial burdens demonstrating an invasion of privacy, this Court has held that the exemption was improperly invoked without conducting a balancing test.<sup>8</sup> See Chesapeake Bay Found., Inc. v. U.S. Army Corps of Eng’rs, 772 F. Supp. 2d 66, 71-72 (D.D.C. 2010) (where the redaction of names previously released in the public domain did not result in invasion of privacy, holding that exemption was improperly invoked without conducting the balancing test). Accordingly, the FBI should be ordered to remove all redactions based on the broad and unsubstantiated invocation of Exemption (7)(C). In the alternative, and given that

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<sup>8</sup> Even if the Court finds that the FBI has established the potential for invasion of privacy, this privacy interest is so attenuated and narrow, that it is outweighed by the public interest of citizens’ rights to know what their government is up to. Particularly with regard to an investigation of an individual such as Negley, whose energy research activities are of great significance to the public.



there are only 120 pages of documents at issue and the FBI's prior abuse of FOIA in this case, the FBI should be ordered to produce the documents for an *in camera* review by the Court.

**1. Exemption (7)(C)-2**

The FBI defines Exemption (7)(C)-2 as: "Names of and/or Identifying Information Concerning an Individual Who Furnished Information to the FBI under an Implied Assurance of Confidentiality." See Hardy Decl., at ¶ 49. By way of example, the document labeled Negley-10<sup>9</sup> (and its duplicates Negley-58 and 63) includes a redaction that reads "He advised that Negley had approached his \_\_\_\_\_ at the library . . . ." <sup>10</sup> See Ex. C (select documents from the FBI's production of documents, with identification of examples of unsubstantiated redactions). Hardy's Declaration does not explain how removing this redaction, presumably a noun, would result in "an unwarranted invasion of privacy," even when taken in the context of the remaining text in the document. Indeed, there is little to no chance that Negley or anyone else could discern the identity of the individual at issue by virtue of the FBI disclosing what likely is the word "boss" or a reference to an undisclosed employee's position 15 years ago.

**2. Exemption (7)(C)-4**

The FBI defines Exemption (7)(C)-4 as: "Name(s) and/or identifying information concerning third parties who were merely mentioned." See Hardy Decl., at ¶ 49. As an initial matter, the FBI makes no attempt to define what is meant by "merely mentioned." Rather, it appears that the FBI used this broad self-serving categorization to make numerous unjustified redactions.

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<sup>9</sup> The FBI's production in this case was labeled as Negley-1 through Negley-120.

<sup>10</sup> Redacted information is represented by a "\_\_\_\_\_."

For example, document Negley-23 (and its duplicate Negley-76) includes a redaction at the bottom of what appears to be an electronic search form, which appears to have no connection to any individual merely mentioned. See Ex. D. Similarly, document Negley-30 (and its duplicate Negley-83), also reflecting an electronic database search of some form, contains a large redaction of what appears to be several items of information that, again, appear to have no connection to any individual merely mentioned. See id.

Document Negley-47 (and its duplicate Negley-88) shows the inconsistent approach invoked by the FBI. This document contains a section that reads “An exact match for the phone number inquiry (512)-328-7690 was not found. Please check and reenter the phone number or view the close matches.” See id. Below this paragraph is a list of two “close matches.” See id. The FBI apparently forgot to redact the identity of the first entity listed, Beal Enterprises, Inc. However, the FBI redacted the second entity listed. Not only is it unclear how revealing the identity of an entity that had a similar phone number to (512)-328-7690 *fifteen years ago* would be an unwarranted invasion of privacy, it is equally unclear why some entities are entitled to protection from alleged harassment, humiliation or physical harm, but others are not.

**3. Exemptions (7)(C)-5 and -6**

The FBI has defined Exemption (7)(C)-5 as “Name(s) and/or identifying information of individuals interviewed by the FBI” and Exemption (7)(C)-6 as “Names and/or identifying information of a third party of investigative interest.” See Hardy Decl., at ¶ 49. Curiously, the FBI has invoked these two exemptions to make redactions to File No. 149A-SF-106204-S-1575

(“File S-1575”) that are more excessive than redactions to any other documents in its production.<sup>11</sup>

For example, document Negley-100 has a large redaction block under the heading “Bureau File Number.” See Ex. E. There has been no indication by the FBI as to why it is necessary to keep this file number secret. Indeed, the FBI cannot support the assertion that disclosing an internal FBI file number, and only that file number, would invade the privacy of that individual.

The remaining documents in File S-1575 contain examples of redactions that are clearly inappropriate, showing that the FBI’s broad brush approach is unlawful. For example, document Negley-102 contains a sentence that reads: “Referenced teletype furnished information from a \_\_\_\_\_ interview . . . .” See id. The context of this particular redaction suggests that the missing word is the description of a type of interview (*e.g.*, “telephonic”). Similarly, document Negley-105 contains a sentence that reads: “[H]e would have to miss a \_\_\_\_\_ meeting due to his being out of town.” See id. Again, the context of this particular redaction suggests that the missing word is the description of a type of meeting (*e.g.*, “status”). The FBI makes no attempt to explain why revealing these redactions (references to types of interviews and meetings from 15 years ago), even when read in the context of the entire document, would result in an unwarranted invasion of privacy, or harassment, humiliation or physical harm. File S-1575 contains numerous other unjustified redactions, including to a month of the year and the name of a university. See id.

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<sup>11</sup> File S-1575 was the subject of the parties’ prior cross-motions for summary judgment, and which Negley fought for seven years to obtain. See Memorandum Opinion, at 16 (“The FBI’s stubborn refusal to turn over this file flies in the face of longstanding principles that favor disclosure in the FOIA context.”).

These examples evidence what Negley believes the FBI did here – use the broad assertion of protecting an individual’s privacy to redact information that is so attenuated both temporally, and with regard to subject matter, that no cognizable threat to individual privacy or safety would result if such information was revealed. Accordingly, the FBI should be ordered to produce the 120 pages of documents with no redactions or provide them to the Court for an *in camera* review.

**III. CONCLUSION**

For these reasons, Negley respectfully requests that the Court enter the attached order granting summary judgment in favor of Negley.

Dated: March 15, 2011

Respectfully submitted,

/s/ Prashant K. Khetan

Prashant K. Khetan, D.C. Bar No. 477636

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Tel.: (202) 274-2950

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*Attorneys for Plaintiff,*

James Lutchner Negley



DEC 26 1999 10:45

UNHELD

# EVENT RECORD

8297

b2

b7c

b7c

INFORMATION SOURCE: [Redacted]

ORGANIZATION: [Redacted]

CONTACT #: [Redacted]

### METHOD OF CONTACT

- In Person
- Observation
- Telephone
- Written

DATE OF EVENT: 9/12/95

TIME OF EVENT: 6:22 PM

SC 1043

b7c

NARRATIVE

[Redacted] advised an individual

that looks like the UNABOMBER came into the CALIFORNIA State University AT Chicago, MERIAM LIBRARY, AT APPROXIMATELY 6:00 PM. The individual wanted a young girl AT THE LIBRARY to get him the 35 pages of the manifesto from the WASHINGTON POST, AND MAKE COPIES FOR HIM. The individual said he would give her 25 dollars. The individual said he is staying AT THE HOLIDAY INN. The individual gave the girl a BUSINESS CARD WITH THE FOLLOWING INFORMATION; NAME JAMES LATCHER NEGLEY, ADDRESS 3905 LAGUNA VISTA, AUSTIN TX, TELEPHONE NUMBER (512) 328-7690 (512) 328-0486. The individual is described AS WHITE, 220 LBS, 40 yrs old, BUTTAL STAVED, OXFORD SHIRT, LIGHT BLUE TROUSERS.

### SORT CODES

- 1: \_\_\_\_\_
- 2: \_\_\_\_\_
- 3: \_\_\_\_\_
- 4: \_\_\_\_\_
- 5: \_\_\_\_\_

ACTION TAKEN:

Address 3905 LAGUNA VISTA, AUSTIN TX, Telephone number (512) 328-7690 (512) 328-0486. The individual is described AS WHITE, 220 LBS, 40 yrs old, BUTTAL STAVED, OXFORD SHIRT, LIGHT BLUE TROUSERS.

PREPARED BY

11332

LEAD SET? (Y/N):

(If Y, Assign Lead Number)

b7c

b7

WHITE - COMMAND POST

YELLOW - EVENT CONTROL FILE

Negley-78-FOIPA

49A-SF-106204-5-7525

PINK - OPTIONAL

TOTAL P. 02

76

```

          ##          ##          #
          #          #          #
#####   #####   #   ###   #####   #   #   #   #   #   #   #   #
#   #   #   #   #   #   #   #   #   #   #   #   #   #   #   #   #
#####   #####   #   #   #   #   #   #   #   #   #   #   #   #
          #   #   #   #   #   #   #   #   #   #   #   #   #   #
#   #   #   #   #   #   #   #   #   #   #   #   #   #   #   #
#####   #####   ##   ###   #####   #####   ###   ##   #   #
          #
          #####

```

Job : 224  
 Date: 3/15/2011  
 Time: 4:46:01 PM





(06/01/1995)

FEDERAL BUREAU OF INVESTIGATION

To: San Francisco From: Sacramento  
Re: 149A-SF-106204, 09/21/1995

not be for one or two days. He then reiterated his desire to have the entire manuscript copied and delivered to his room. While the employees were debating whether they could comply with his request, he simply left the library unobserved by them. b7c -2,3,5

One of the employees, [redacted] Chico, California, telephone number [redacted] filed a report concerning the above. He advised that Negley had approached his [redacted] at the library, [redacted] with the above request.

[redacted] arranged for a plain clothes officer to contact the night manager at Holiday Inn. The officer confirmed Negley was registered at the motel; checking in 9/18/95 with a scheduled checkout of 9/21/95. Negley provided home address of 3905 Laguna Vista Cove, Austin, Texas 78746, telephone 512/328-76890, and facsimile 512/328-0486. Negley paid for the hotel using a VISA credit card, account FRCP 5.2/L.R. 5.4(f)(4) in his own name. b7c -3

Interviews were conducted of both Negley and [redacted] by Special Agent [redacted]. Both individuals related essentially the same facts as provided to the Police Department by [redacted] Agents of were dispatched to Chico, California, to surveil Negley and attempt an interview of him on 9/20/95. b7c -1,2,3,5

In the interim, records checks (enclosed or summarized herein), were conducted. It was determined that Negley had no criminal record and had no wants or warrants. He holds Texas a driver's license but has no autos registered to him in either California, Illinois, Utah, Colorado, or Texas. He did have a 1983 Mercedes Benz registered to him in California, with license 2DXP363 at 3905 Laguna Vista Cove, Austin City, Texas. That license expired 4/24/91.

Negley was associated with Social Security Account Number FRCP 5.2/L.R. 5.4(f)(1) issued in Texas in 1962. Social Security checks through credit service bureaus associate him with addresses in Golden, Colorado (May 1994); San Antonio, Texas, (12/89) and Austin, Texas (May 1990). His most current address, at April 1995 at the Laguna Vista Cove address.

Metronet On-Line Information Systems address check also associated Negley with the Laguna Vista Cove address in Austin but indicated a change of address to 14062 Denver Parkway West, Golden, Colorado, effective date not indicated.



\*\*\*\*\* TRW SOCIAL SEARCH \*\*\*\*\*  
\* FBI, BUTTE ITC-INVESTIGATIVE INFORMATION SERVICES \*

\*\*\*\*\* Dept: DEPARTMENT1 / Queued by: SUPERVISOR \*\*\*\*\*

DATE: 09-19-1995 TIME: 23:51:38 SUBJECT ID: SOCIAL SEARCH  
FRCP 5.2/L.R. 5.4(f)(1)  
9- , V-06/042/6.30

PAGE 1 DATE 9-20-95 TIME 0:39:39 PCA19 V606

JAMES L NEGLEY  
3905 LAGUNA VISTA CV  
AUSTIN TX 78746  
RPTD: 7-90 TO 4-95

SSN: FRCP 5.2/L.R. 5.4(f)(1)  
YOB: FRCP 5.2/L.R. 5.4(f)(3)

*Must Current Address*

100 MARY D AVE APT 10  
SAN ANTONIO TX 78209  
RPTD: 10-89

14062 DENVER WEST PKY  
GOLDEN CO 80401  
RPTD: 4-94 TO 7-94

1657 C 90049

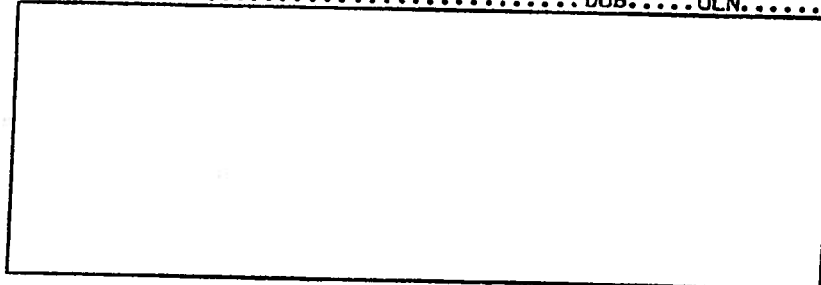
SSN: FRCP 5.2/L.R. 5.4(f)(1)

END -- TRW SOCIAL SEARCH

b7C -4

DR. KSOLN0000  
22:44 09/19/95 05264  
22:44 09/19/95 01464 DCFBIWAX3  
TXT

.....NAME.....DOB.....OLN.....

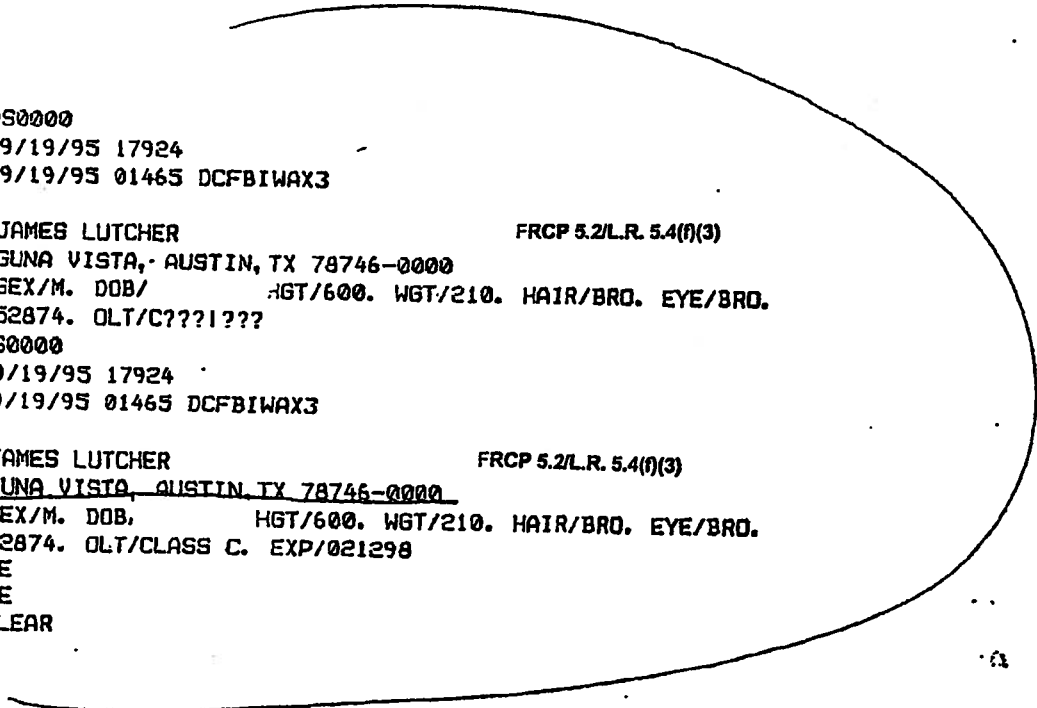


b7C -4



DR. TXDPS0000  
22:44 09/19/95 17924  
22:44 09/19/95 01465 DCFBIWAX3  
TXT  
NEGLEY, JAMES LUTCHER FRCP 5.2/L.R. 5.4(f)(3)  
3905 LAGUNA VISTA, AUSTIN, TX 78746-0000  
RAC/W. SEX/M. DOB/ HGT/600. WGT/210. HAIR/BRO. EYE/BRO.  
OLN/14752874. OLT/C????I???

DR. TXDPS0000  
22:44 09/19/95 17924  
22:44 09/19/95 01465 DCFBIWAX3  
TXT  
NEGLEY, JAMES LUTCHER FRCP 5.2/L.R. 5.4(f)(3)  
3905 LAGUNA VISTA, AUSTIN, TX 78746-0000  
RAC/W. SEX/M. DOB. HGT/600. WGT/210. HAIR/BRO. EYE/BRO.  
OLN/14752874. OLT/CLASS C. EXP/021298  
RSTR:NONE  
ENDR:NONE  
STATUS:CLEAR



DR. OK000000S  
22:44 09/19/95 05564  
22:44 09/19/95 01466 DCFBIWAX3

Negley-30

Welcome to DunsPrint Access

MATCH RATE IS SIGNIFICANTLY IMPROVED WITH THE ENTRY OF A STREET ADDRESS.

PLEASE ENTER YOUR INQUIRY  
(PHONE #, DUNS #, FULL NAME & ADDRESS, OR MNU):  
512-328-7690

AN EXACT MATCH FOR THE PHONE NUMBER INQUIRY (512) 328-7690 WAS NOT FOUND.  
PLEASE CHECK AND REENTER THE PHONE NUMBER OR VIEW THE CLOSE MATCHES  
DISPLAYED BELOW.

b7c -4

1	BEAL ENTERPRISES, INC	5124 BURNET	AUSTIN	TX	H
2	[REDACTED]	[REDACTED]	AUSTIN	TX	S

TO PICK A COMPANY, TYPE ITS LINE NUMBER FROM ABOVE, OR:

- V = VARY YOUR ENTRY, AND TRY AGAIN (PHONE # OR NAME & ADDRESS)
- I = HAVE D&B INVESTIGATE THIS COMPANY WITHIN 1 TO 4 BUSINESS DAYS
- CAN = TO MOVE TO YOUR NEXT INQUIRY

ENTER YOUR SELECTION, THEN PRESS <RETURN>:

Alt-F10-Terminate DunsPrint Access. F3-Toggle printing. print off

Welcome to DunsPrint Access

DIAL 1-800-DNB-DIAL TO HAVE D&B INVESTIGATE WITHIN 1 TO 4 BUSINESS DAYS  
ON THE PREVIOUSLY CANCELED REQUEST.

PLEASE ENTER YOUR INQUIRY  
(PHONE #, DUNS #, FULL NAME & ADDRESS, OR MNU):  
512-328-0486

AN EXACT MATCH FOR THE PHONE NUMBER INQUIRY (512) 328-0486 WAS NOT FOUND.  
PLEASE CHECK AND REENTER THE PHONE NUMBER OR VIEW THE CLOSE MATCHES  
DISPLAYED BELOW.

1	HOME FINANCING UNLIMITED, INC	110 WILD BAS	AUSTIN	TX	H
---	-------------------------------	--------------	--------	----	---

TO PICK A COMPANY, TYPE ITS LINE NUMBER FROM ABOVE, OR:

- V = VARY YOUR ENTRY, AND TRY AGAIN (PHONE # OR NAME & ADDRESS)
- I = HAVE D&B INVESTIGATE THIS COMPANY WITHIN 1 TO 4 BUSINESS DAYS
- CAN = TO MOVE TO YOUR NEXT INQUIRY

ENTER YOUR SELECTION, THEN PRESS <RETURN>:

Alt-F10-Terminate DunsPrint Access. F3-Toggle printing. print off

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JAMES LUTCHER NEGLEY,

Plaintiff,

v.

FEDERAL BUREAU OF  
INVESTIGATION,

Defendant.

Civil Case No. 03-2126 (GK)

**PLAINTIFF'S STATEMENT OF MATERIAL FACTS  
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to Local Rule 56, plaintiff hereby submits the following statement of material facts as to which there is no genuine issue<sup>1</sup>:

1. On January 16, 2002, Negley submitted a FOIA request to the FBI for "any records about me maintained at and by the FBI in [the San Francisco] field office [(the "SFFO")]."  
See Complaint against FBI dated October 17, 2003 ("Complaint") (Dkt. No. 1), Ex. A.

2. Negley's request was sent specifically to the SFFO, rather than the FBI headquarters, because the FBI advised Negley that he had to submit requests to specific field offices. See id.

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<sup>1</sup> Negley believes that most of the pertinent facts were adequately set forth in his Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment dated August 24, 2007 (Dkt. No. 71) and the Court's Memorandum Opinion dated September 24, 2009 (Dkt. No. 91). Therefore, Negley incorporates by reference those facts (and provides only a brief summary thereto) and adds the subsequent material facts not in dispute.

3. In response to being told that there were no responsive records, Negley filed an appeal, noting that documents produced under a prior FOIA request made specific reference to a Main File number (File Number 149A-SF-106204) (the "Main File"), which appeared to denote a file containing information about Negley that would be responsive to his FOIA request. See Memorandum Opinion dated September 24, 2009 at 2 ("Memorandum Opinion") (Dkt. No. 91).

4. On April 23, 2002, Negley amended his FOIA request to include all files about him, including what is referred to as "File S-1575." See id. at 2-3.

5. The FBI's response admitted that there were records responsive to Negley's FOIA request, but it did not produce any documents. Negley once again appealed. See id. at 3.

6. The FBI then produced 37 documents (12 pages were redacted) from File No. 149A-SF-106204-S0-3041 ("Serial 3041"), a serial from the Main File. See id.

7. Dissatisfied with the FBI's search for and production of documents responsive to his FOIA request, Negley filed the pending lawsuit to obtain a complete production of agency records responsive to his FOIA request. See Complaint.

6. This lawsuit already has resulted in multiple Court Orders requiring the FBI to produce responsive documents. See, e.g., Order dated January 8, 2007 (Dkt. No. 43), ¶ 1.

7. In January 2007, the FBI represented that in addition to the 37 pages produced prior to the lawsuit, the FBI had produced (since the inception of the lawsuit) an additional 9 redacted pages (and one page was withheld in its entirety), and was producing an additional 2 pages, from Serial 3041. See Praecipe dated January 16, 2007 (Dkt. No. 45) and Notice of Correction to Praecipe dated January 19, 2007 (Dkt. No. 47).

8. Later, the FBI produced documents from File No. 149A-SF-106204-S0-3865, another serial from the Main File. See Memorandum Opinion at 4.

9. The parties then filed cross-motions for summary judgment. In its Order dated September 24, 2009 (Dkt. No. 90), this Court denied in its entirety the FBI's Second Motion for Summary Judgment and granted Negley's Motion for Partial Summary Judgment. In so ruling, the Court noted the following:

- "Defendant's persistent and inexplicable refusal to search at least the dedicated Zy database . . . actually reflects a distressing active disregard of its obligations under FOIA."
- With respect to the FBI's repeated failure to produce File S-1575: "The FBI's stubborn refusal to turn over this file flies in the face of longstanding principles that favor disclosure in the FOIA context. This refusal is not the first time the FBI has resisted complying with legal mandates in the course of this litigation."
- Referring to the FBI's initial refusal to produce all responsive documents from Serial 3041, despite a Court Order: "Instead of complying with the Court's order and disclosing these documents to Negley, the FBI carved out its own exception to the clearly worded order and elected to withhold production of these duplicates because nothing in them 'suggested additional information would be revealed.'"
- "[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."

See Memorandum Opinion at 8-17.



10. In response to the September 24, 2009 Order, the FBI searched for and produced *some* additional documents that were responsive to Negley's FOIA request. See Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Contempt for Defendant Federal Bureau of Investigation's Failure to Comply with the Court's September 24, 2009 Order dated April 22, 2010 ("Def.'s Opp. to Mot. for Contempt") (Dkt. No. 103), Seventh Declaration of David M. Hardy dated December 23, 2009, at ¶ 23.

11. To date, the FBI has produced a total of 120 pages (with redactions) to Negley, and has indicated that there are no more documents in response to his 2002 FOIA request. See id. at ¶ 4.

12. The FBI imposed standards and restrictions on searches and productions in response to Negley's FOIA request. Specifically, the FBI indicated that it would produce only documents created after April 2002 (the alleged date of its first search in response to Negley's FOIA request). See Ex. B (Deposition of David M. Hardy dated January 28, 2010), at 15:13-19.

13. Additionally, the FBI restricted its production to documents maintained at the San Francisco Field Office. See Def.'s Opp. to Mot. for Contempt at 2.

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Respectfully submitted,

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