IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES LUTCHER NEGLEY,	)	
	)	
Plaintiff,	)	
v.	)	**Civil Case No. 03-2126 (GK)**
	)	
FEDERAL BUREAU OF INVESTIGATION,	)	
	)	
Defendant.	)	
	)	

REPLY IN SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

After litigating this case for nearly five years (and waiting nearly six years for Defendant Federal Bureau of Investigation (the "FBI") to make a serious attempt to comply with FOIA in responding to his request), Plaintiff James Lutcher Negley ("Negley") finally is moving closer to resolution in this matter. Indeed, in the midst of summary judgment briefing, the FBI has changed course dramatically, indicating that it has finally conducted some additional searches for documents responsive to Negley's FOIA request. In so doing, the FBI tacitly admits that its prior searches were inadequate because it should have, but simply chose not to, search these other sources. In addition, the FBI finally has produced other responsive documents from files that it identified as containing responsive documents as early as last year. Again, in so doing, the FBI admits that it simply chose not to produce these documents prior to now. Negley is entitled to partial summary judgment due to the relief he obtained as a result of these admissions

and enhanced response to his FOIA request by the FBI.[1]

In support of these new searches and productions, the FBI has submitted another declaration by David Hardy. Although this fifth declaration seeks to address all of the deficiencies of his prior declarations, a close review of the record and case law reveals that, in fact, even this fifth declaration is inadequate. Indeed, for some sources, the FBI offers no valid reason for failing to conduct the search; for other sources, the FBI conducts an inadequate search; and for still other sources, the declaration is insufficient as a matter of law.

For these reasons, and as set forth more fully below and in Negley's opening brief,[2] Negley requests that this Court grant his motion and enter partial summary judgment against the FBI.

I. NEGLEY IS ENTITLED TO PARTIAL SUMMARY JUDGMENT FOR HAVING OBTAINED ADDITIONAL SEARCHES AND THE PRODUCTION OF NEW DOCUMENTS AS A RESULT OF THIS LAWSUIT.

At the time that Negley filed the pending lawsuit on October 17, 2003, the FBI searched only UNI and had released – from Serial 3041 of the Main File only – 25 non-redacted pages and 12 redacted pages, for a total of 37 responsive pages. Negley filed this lawsuit, in part, to require additional searches for and to obtain access to other documents that were responsive to his FOIA request.

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[1] As a result of the FBI's 11th-hour new searches and productions, Negley files herewith a revised proposed Order granting him partial summary judgment.

[2] Because the FBI has not submitted a statement of material facts in dispute with its opposition brief, under Local Rule 7(h), the Court may assume that all facts identified in Negley's "Statement of Material Facts Not In Dispute" are admitted.

As set forth in detail throughout this brief, Negley already has obtained significant relief through this lawsuit. Since the inception of this lawsuit, Negley has been successful in obtaining the release of an additional 19 pages from Serial 3041 (as well as the release of a redacted page 47 of Serial 3041, which previously had been withheld in its entirety) and the release of 43 pages from Serial 3865. In addition, the FBI claims that it conducted searches of nine new sources of responsive documents (which revealed the existence of an entire new file that is responsive to Negley's FOIA request – File No. 65-21102, see supra at 11). See Def.'s Opp'n at 6. Therefore, Negley is entitled to partial summary judgment that the FBI's pre-suit search and production were deficient to the extent that they did not include searches conducted by the FBI and documents obtained by Negley in this action.

II. THE FBI'S SEARCHES FOR RESPONSIVE DOCUMENTS IN RESPONSE TO NEGLEY'S FOIA REQUEST WERE INADEQUATE AS A MATTER OF LAW.

The FBI offers nothing new to defeat summary judgment for Negley. Instead, the FBI relies on yet another declaration by David Hardy ("Hardy's 5th Declaration"), who has now submitted five declarations in this case, to attempt to correct the fallacies of his prior declaration. Hardy's 5th Declaration, however, defeats, rather that supports, the FBI's position. Indeed, Mr. Hardy admits that the FBI previously failed to comply with FOIA by failing to conduct a reasonable search for documents responsive to Negley's FOIA request.

A. The FBI's Search Only of UNI is Unreasonable.

The FBI's only pre-lawsuit (and, indeed, pre-October 2007) search of UNI was inadequate as a matter of law. The FBI does not dispute the relevant law set forth in

Negley's opening brief: to establish that its search was adequate, the FBI must "show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990). An affidavit submitted in support of an agency's search must demonstrate and explain "with reasonable detail[] that the search method . . . was reasonably calculated to uncover all relevant documents." Id.; see Nation Magazine v. U.S. Customs Service, 71 F.3d 885, 890 (D.C. Cir. 1995) ("The affidavits must be reasonably detailed . . . , setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched.") (internal quotation and citation omitted). In evaluating the supporting affidavit, courts apply a "reasonableness" test, keeping in mind "congressional intent tilting the scale in favor of disclosure." Campbell v. DOJ, 164 F.3d 20, 27 (D.C. Cir. 1998).

In asserting that the FBI need only conduct a search of its "central records system," here UNI, the FBI rests its opposition on a handful of cases that provide generalized statements regarding the scope of a reasonable search. See Def.'s Opp'n at 4.[3] While these generalized statements provide good sound bites, it is notable that the FBI makes no attempt to address the several cases that specifically address the FBI's systematically flawed approach to search for documents and respond to FOIA requests by searching only UNI. See, e.g., O'Neill v. DOJ, No. 06C0671, 2007 U.S. Dist. LEXIS

[3] Although the FBI states that, as a general matter, searches start but are not restricted to UNI (see Def.'s Opp'n at 5), the FBI has provided no evidence that it previously (i.e., prior to submitting its opposition brief) searched any sources other than UNI in response to Negley's FOIA request.

37807, at *9-10 (E.D. Wis. May 23, 2007) (in finding Hardy's declaration "insufficient to establish that the FBI conducted a reasonable search for records responsive to plaintiff's request[,]" the Court noted that "even if the CRS does not contain information relating to electronic surveillance, the Hardy affidavit does not assert that the FBI does not have some other third information storage system that could contain responsive documents"); Biberman v. FBI, 528 F. Supp. 1140, 1144-45 (S.D.N.Y. 1982) (in holding that the FBI's search was inadequate until all sources of documents "which are reasonably likely to contain references to plaintiffs" were searched, the Court took issue with the FBI's failure to search other databases and rejected the FBI's position that it "will not use any index other than [CRS] unless the plaintiffs are knowledgeable enough about FBI recordkeeping to request the search of a specific index"); Jefferson v. Bureau of Prisons, No. 05-848, 2006 U.S. Dist. LEXIS 81972, at *19 (D.D.C. Nov. 7, 2006) ("Even if an agency states that it has searched its central file system, the failure to aver that all files likely to contain responsive records were searched, precludes the Court from finding that the search was adequate.").

Moreover, the FBI ignores the multiple cases in which this Court has held, as a matter of law, that affidavits such as Hardy's (that only contain conclusive statements of searches of one record system when others exist) are insufficient to establish that an agency fulfilled its burden under FOIA. See, e.g., Nation Magazine, 71 F.3d at 890 (in ruling that agency "cannot limit its search to only one record system if there are others that are likely to turn up the information requested," court noted that conclusory statements that the agency has reviewed relevant files are insufficient as a matter of law) (internal quotations and citation omitted); Campbell, 164 F.3d at 27-29 (holding that

district court erred in finding adequate search because, after FBI's UNI searches revealed no responsive documents, FBI was required to broaden its searches to explain the existence of documents that it could not locate in main file searches); Oglesby, 920 F.2d at 68 (holding that the adequacy of the search was improper when affidavit stated "[b]ased upon the information contained in Mr. Oglesby's letter . . ., a search was initiated of the Department record system most likely to contain the information . . ., namely, the Central Records") (internal quotations omitted).

In fact, even the sound bite chosen by the FBI defeats the FBI's argument – the FBI cites to Campbell for the proposition that under certain circumstances, "the agency generally need not search every record system." Def.'s Opp'n at 4. Negley does not dispute this general proposition. But this generality, by itself, ignores the lone case cited in the FBI's second motion for summary judgment (which case the FBI appears now to have abandoned for the reasons set forth in Negley's opposition brief, and repeated below). See Raulerson v. Ashcroft, 271 F. Supp. 2d 17 (D.D.C. 2002). In Raulerson, this Court advised:

> [I]f [an agency] discovers that relevant information might exist in another set of files or a separate record system, the agency must look at those sources as well.

Id. at 22 (emphasis added). Because the plaintiff in Raulerson "did not request that the FBI consult additional records systems" and (unlike in the pending case) the FBI did not discover that additional information might exist in other databases, the Court determined that the FBI's search was adequate. See id.

Here, discovery has revealed that the FBI knew that other relevant information might exist, yet did not search other available sources. The FBI's failure under Raulerson

is particularly egregious with respect to the Zylmage Database (the "Zy"). Negley was questioned (at least) in connection with the UNABOM investigation. The Zy contains all FBI computer-generated documents associated with that investigation and is full-text searchable. As a result, it is indisputable that "relevant information might exist in" the Zy and, thus, the FBI "must look at those sources as well." See Raulerson, 271 F. Supp. at 22. In addition, some of the FBI documents that Negley possesses and that were provided to the FBI (see Ex. 2-C[4]), which are clearly responsive to Negley's FOIA request, still have not been produced in this case (see Ex. 3-I), thereby indicating that "relevant information might exist in another set of files or a separate record system[.]" See also Ex. 6 at 188-93. In this regard, that Negley has provided the FBI with a sampling of other "relevant information" goes far beyond the "speculative allegations" that the cases cited by the FBI warn against. See Def.'s Opp'n at 4. Moreover, and as set forth above, there is ample testimony that the FBI did not (until now) search other record systems despite Negley's insistence that other sources of responsive documents might exist.

In response, the FBI argues that because Negley's request was "general," it does not warrant an exhaustive search. See Def.'s Opp'n at 5. Not only is this nonsensical, but it demonstrates that the FBI either does not understand FOIA or cavalierly chooses to disregard its requirements (which is likely why the FBI does not cite to any cases in support of this proposition). Negley's request was for all documents about him and File S-1575, without any limitation as to which databases the FBI should search. To require

[4] Citations in this reply brief refer to the exhibits that were attached to Negley's opening brief and opposition to the FBI's second motion for summary judgment.

requestors, like Negley, to specify with particularity which sources are to be searched prior to taking any discovery as to what sources exist is antithetical to the purpose of FOIA. See, e.g., McCutchen v. Dep't of Health & Human Servs., 30 F.3d 183, 184 (D.C. Cir. 1994) (noting that the purpose of FOIA is to "facilitate public access to Government documents" and is "meant to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny") (citation omitted); 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).

The fact is that despite Negley's broad request for all documents about him, the FBI previously chose only to search UNI, and not any of its other sources of searchable documents. Under the law set forth above and more fully in Negley's opening brief, this does not satisfy the FBI's obligations under FOIA and, therefore, Negley is entitled to partial summary judgment on the ground that the FBI failed to conduct an adequate pre-lawsuit search as a matter of law.

B. Hardy's 5th Declaration does not Support the FBI's Assertion that its New Searches Satisfy the Mandates of FOIA.

Incredibly, in a last-ditch effort to avoid summary judgment, the FBI claims that Negley's recitation of the FBI's numerous search deficiencies constitutes new FOIA requests mid-litigation. The FBI makes this claim even though Negley's allegedly new requests seek the same documents as the January 2002 FOIA request.

Undaunted, and sticking with this "new request" theory, the FBI states that it finally has searched all sources of responsive documents, and not just UNI. Indeed, although the FBI attempts to convince this Court that it has finally (in October 2007)

searched the other sources that it should have searched when it received Negley's FOIA request (in January 2002), a close examination reveals that the FBI still has ignored the requirements under FOIA to conduct a reasonable search.[5]

The most egregious violation of the FBI's obligations under FOIA relates to its (inadequate) search of the Zy – the database dedicated to the UNABOM case in connection with which the FBI has admitted that Negley was investigated. Hardy's 5th Declaration indicates that the FBI has searched the Zy Database "for documents responsive to [Negley's] request" and that the documents retrieved are duplicates of documents already released.[6] Hardy's 5th Decl., at ¶ (9). In support, Mr. Hardy cites only to 3 pages of Jennifer Wilson's deposition testimony (a witness that admitted she has no personal knowledge of the searches conducted in this case). Although Ms. Wilson did in fact testify that someone else told her that they searched the Zy, the FBI (other than Ms. Wilson) never has asserted that this was done. Indeed, Mr. Hardy, the FBI representative who attested to the searches conducted in response to Negley's FOIA request, never made any reference to searching the Zy in any of his prior four declarations (and the reference in the fifth declaration only refers to Ms. Wilson's

[5] Even if the FBI's after-the-fact searches are deemed timely (which they clearly are not as they have been completed during summary judgment briefing), Negley has been stripped of the opportunity to conduct discovery regarding these searches, which this Court ordered by permitting depositions of Mr. Hardy and others. Accordingly, the FBI should be required to produce at its cost Mr. Hardy (if not all witnesses) for limited questioning regarding these new searches.

[6] It is unclear if the FBI means that these documents are the same documents that already have been identified and released to Negley, or if they are alleged "duplicates" that the FBI is choosing not to produce under its approach to FOIA. But, of course, since the FBI made this revelation after discovery, Negley has no way of determining the meaning of the FBI's statement.

testimony). Therefore, there is serious doubt as to whether a search of the Zy was even done. Regardless, because the FBI does not identify the search terms used (see Nation Magazine, 71 F.3d at 890 ("The affidavits must be reasonably detailed . . . , setting forth the search terms[.]")), the affidavit attesting to the search is grossly inadequate on its face.

Because Negley was investigated in connection with the UNABOM case and the UNABOM-dedicated Zy allows full-text searching, the FBI's search of that source should have been the most thorough. To the contrary, it was the most superficial, if it occurred at all. Negley should be granted partial summary judgment in connection with the FBI's inadequate search of the Zy, and the FBI should be ordered to conduct a new search and thoroughly document the same.

The FBI's searches of its other sources also were inadequate as a matter of law:

- ICM: Hardy's 5th Declaration admits that the FBI has not searched ICM, but offers as its excuse that it "cannot search ICM using only [Negley's] name." Hardy's 5th Decl., at ¶ (6). First, the FBI has enough responsive documents regarding Negley (in addition to the fact that this case has been litigated for nearly five years) that it has in its possession more than just Negley's name upon which to conduct searches.[7] Moreover, Mr. Hardy's declaration is misleading – as Sandra Figoni testified, documents on the ICM can be searched using, among other things, a file number (e.g., No. 149A-SF-106204-S0-3041) or dates. See Ex. 8 at 100, 108. Evidently, no attempt has been made to search ICM using the correct parameters relating to Negley. Therefore, the FBI's failure to search the ICM violates FOIA.

- ECF: Hardy's 5th Declaration indicates that the FBI now has searched the full-text searchable ECF for "James Lutcher Negley." Hardy's 5th Decl., at ¶ (7). Although, on its surface, this appears sufficient; in fact it is not. It simply makes no sense to search documents only for Negley's full name (with his full

[7] Notably, the FBI's tacit admission as to its approach of conducting searches using only Negley's name supports the assertion that the FBI's search of File S-1575 likewise only used Negley's name. See infra Part III.B.

middle name). Documents about him and, therefore, responsive to his FOIA request, could contain his name without "Lutcher" (see, e.g., Ex. 3-I, at 28 (referencing only "James L. Negley")), or not his name at all (but some other reference to him, such as his business or address or other identifying information (see, e.g., id. at 5 (referencing only Negley's business – "David, Joseph & Negley")). Given the breadth of information that the FBI has regarding Negley, it is objectively unreasonable for the FBI to have searched only for his full name (with his full middle name) and, therefore, this search is inadequate.

- ELSUR: Hardy's 5th Declaration indicates that the FBI now has searched ELSUR indices and that "no references to the plaintiff were found." Hardy's 5th Decl., at ¶ (8). Such a summary statement ignores case law that requires an agency conducting a search to specify the search terms used. See Nation Magazine, 71 F.3d at 890. The FBI gives no indication of what terms it used to search ELSUR and, therefore, the affidavit attesting to the search is inadequate.

- SFFO Card Index: Hardy's 5th Declaration indicates that the FBI now has searched the FBI's index for "Negley, James Lutcher." Hardy's 5th Decl., at ¶ (10). For the same reasons set forth above, limiting the search only to Negley's full name is inappropriate and, therefore, this search is inadequate.

- FBIHQ Card Index: Hardy's 5th Declaration indicates that the FBI now has searched the card index at the FBI headquarters and that one main file – No. 65-21102 – was identified, but cannot be produced because it has been destroyed. Hardy's 5th Decl., at ¶ (11). For the same reasons set forth above, because the FBI does not identify the search terms used (see Nation Magazine, 71 F.3d at 890), the affidavit attesting to the search is inadequate. In addition, having finally identified yet another main file responsive to Negley's six year old FOIA request, the FBI should be ordered to run this new file number (which is a responsive file) in all of its other sources that are searchable using file numbers to determine if other responsive documents exists.

- Handwritten Notes: Hardy's 5th Declaration indicates that the FBI now has searched the ACS for 1-A envelopes containing handwritten notes and that the search did not reveal any 1-A envelopes. Hardy's 5th Decl., at ¶ (12). This is plainly wrong. As Ms. Figoni testified, 1-A envelopes are searchable only on ICM, which, as previously noted, are searchable using, among other things, file numbers or dates. Here, the FBI admitted that it did not search the ICM because the database cannot be searched using Negley's name. Therefore, the FBI's failure to search for any handwritten notes is improper.

- Personal Files: Hardy's 5th Declaration indicates that the FBI need not search personal records because those files fall outside of FOIA. Hardy's 5th Decl., at ¶ (13). Notably, the FBI does not (nor can it) offer any legal support for asserting that files of FBI agents containing notes of investigations conducted on behalf of the FBI are not "agency records" that the FBI has to produce. In any event, the FBI concedes that it did not search any of its offices (including San Francisco, the very office where Negley submitted his FOIA request and where ASAC Holly, the agent that interviewed and investigated Negley, maintained his files) because "there is no indication that FBI records concerning [Negley] exist outside of" UNI. But Negley does not have the burden of showing that other documents exist; it is the FBI's burden in the first instance to prove that it conducted a reasonable search. Indeed, to fail to search other sources because the requestor did not prove that other documents exist in those other sources is to turn FOIA on its head. Even assuming otherwise, the record indicates that ASAC Holly testified it was not unusual for him to have personal files of notes and other items, yet the FBI did not ask ASAC Holly to look for his personal file for his investigation of Negley. See Ex. 7 at 52; Ex. 10 at 51; see also Exhibit 12 (Second Supp. Decl. of James L. Negley), at ¶ 3 (Negley recalling that ASAC Holly took handwritten notes of the interview on September 20, 1995). Therefore, the FBI's failure to search for any personal files is improper.

- Restricted Files: Hardy's 5th Declaration indicates that the FBI searched for restricted files during its UNI search. Hardy's 5th Decl., at ¶ 14. Yet, Ms. Figoni testified that restricted documents, which are not even always on the computer system, are retrievable using ICM. See Ex. 8 at 94-96. Here, the FBI admitted that it did not search the ICM because the database cannot be searched using Negley's name. Therefore, the FBI's failure to search for restricted files is improper.

For these reasons, even the last minute alleged searches conducted by the FBI are inadequate.[8] Therefore, as set forth above, Negley is entitled to partial summary judgment and the FBI should be ordered to re-search all of the referenced sources, to submit another affidavit adequately describing the searches, and to produce newly

[8] The FBI makes no attempt to justify why it illogically assumed, after its initial inadequate search, that Negley sought only documents "about himself in the UNABOM file located in the FBI's San Francisco Field Office" and, therefore, limited all of its subsequent searches to the UNABOM file. See Ex. 4, ¶ 3; Ex. 5, ¶ 3.

identified documents.[9]

III. THE FBI'S PRODUCTION OF DOCUMENTS IN RESPONSE TO NEGLEY'S FOIA REQUEST IS INADEQUATE AS A MATTER OF LAW.

A. Negley is Entitled to Partial Summary Judgment as a Result of the FBI's Productions During Litigation.

Much in the same way it attempts to avoid judgment by fictionally deeming Negley's arguments in support of summary judgment as a "new search," the FBI tries to avoid judgment regarding its deficient production of documents by essentially claiming a "do-over." Regardless of the FBI's spin, since Negley obtained the production of additional responsive documents through this litigation, he is entitled to partial summary judgment.

1. The FBI's productions prior to Negley's Motion for Summary Judgment.

The FBI's approach to producing select documents in this case has been to do so in dribs and drabs. First, on September 30, 2002, the FBI produced 37 pages (12 pages were redacted) from Serial 3041. See Ex. 1-G. Then, after litigation commenced and as a part of its first motion for summary judgment, the FBI produced an additional 10 pages (9 pages were redacted and 1 page was withheld in its entirety) from Serial 3041. After

[9] In a desperate attempt to shift the focus of this Court to issues not relevant to summary judgment, the FBI points to a handful of pointed questions that Negley asked witnesses during depositions regarding their interactions with individuals that Negley believes are related to his business. See Def.'s Opp'n at 9-10. Negley was permitted discovery as to a broad range of topics covered by Hardy's multiple declarations; to this end, his questions regarding witness' interactions with individuals that may have had some involvement in an FBI investigation of Negley could have led to additional responsive documents and, thus, were proper.

the D.C. Circuit remanded this case to this Court, the FBI produced an additional 2 pages from Serial 3041. See Correction to Praecipe dated January 19, 2007 (Doc. #47).

In total, prior to the pending summary judgment briefing, the FBI had produced – from Serial 3041 of the Main File only – 27 non-redacted pages and 21 redacted pages, and indicated that one page was being withheld in its entirety, for a total of 49 responsive pages. No documents from any other serials of the Main File or File S-1575 had been produced.

2. After almost six years, the FBI finally produces all responsive documents from Serials 3041 and 3865.

In the midst of summary judgment briefing, the FBI has produced seven pages from Serial 3041 (and page 47, albeit with redactions) and 43 pages from Serial 3865, claiming that Negley only now has requested "duplicate documents from file 149A-SF-106204." Def.'s Opp'n at 7. Negley's request for all documents about him, however, did not contain any limitations. And the FBI has never disputed that all of the pages in these two serials are responsive to Negley's FOIA request. Therefore, the FBI's unilateral decision to produce only select documents until just one month ago is unacceptable and a clear violation of FOIA.

B. The FBI still refuses to produce File S-1575.

In refusing to produce File S-1575, the FBI maintains that File S-1575 "concerns a third party completely devoid of any connection to [Negley]." Def.'s Opp'n at 7 n.3. Even putting aside whether the FBI has an obligation to produce File S-1575 regardless

of its content (which, as set forth in Negley's opening brief, it does[10]), it is telling that the FBI makes no realistic attempt to counter the evidence offered by Negley that File S-1575 is responsive to his FOIA request and, therefore, required to be produced in this case.[11]

In response to the testimony of its own witness, ASAC Clifford Holly (the FBI agent "with the most knowledge regarding the investigation of Mr. Negley"), who testified that File S-1575 "appears to be the suspect file under which we documented and worked on the interview of Mr. Negley" (Ex. 7 at 144), the FBI states that ASAC Holly "has had no contact with this case for years" and "offered his unfounded opinion." Def.'s Opp'n at 8. As the FBI knows, however, the UNABOM investigation has been closed for years, so no one within the FBI has had contact with the case for years. Notwithstanding, ASAC Holly's testimony came after reviewing the documents that he put together during his investigation of Negley as a part of the UNABOM investigation, thereby putting him in the best position to determine whether there was any link between Negley and a particular file that is referenced in some of those documents. See Ex. 7 at 115-16, 166-

[10] It is unclear what point the FBI seeks to make on page 6 of its opposition brief in citing to the D.C. Circuit's opinion in this case regarding File S-1575. See Def.'s Opp'n at 6. The FBI appears to concede that the D.C. Circuit acknowledged that Negley's request for File S-1575 was an amended FOIA request, and not a new request, as the FBI now asserts – this supports Negley's assertion that the FBI always had an obligation to search for and produce File S-1575. The issue of whether File S-1575 was requested regardless of whether it related to Negley was not before the D.C. Circuit because the FBI did not take the position that File S-1575 did not relate to Negley until after this case was remanded to this Court. Therefore, there is no issue that Negley "attempts to rehash . . . , but should be foreclosed from doing so." See id.

[11] In this regard, because the FBI failed to file a statement of material facts in dispute with its opposition brief, under Local Rule 7(h), this Court may accept as true all facts asserted by Negley related to File S-1575. See supra note 1.

67.

Finally, the FBI points out that Mr. Hardy (and potentially others) "actually reviewed the S-1575 file and determined conclusively that the file does not relate to [Negley]." Def.'s Opp'n at 8. However, and as Negley pointed out in prior briefing (which the FBI does not even attempt to address in its opposition), there were significant flaws with the FBI's conclusion that none of the pages in S-1575 were responsive to Negley's FOIA request: Hardy testified that because one or more of the pages of File S-1575 contained identifying information for an individual that was not Negley, the FBI determined that not a single page of the entire file could in any way be responsive to Negley's FOIA request. See Ex. 11, at 146-160; id. at 151-53 ("I don't think you can take it and look at it a page at a time. I think you look at the whole document as itself, and, if it is about an individual and the entire file is about the individual, then whether or not it has the full identifying data on it or not is irrelevant."). Therefore, when the FBI saw that one of the pages in File S-1575 contained identifying information about another individual, it simply assumed that the entire file had to be about that other individual (and not Negley). It appears, then, that no efforts were made to determine if any of the pages of File S-1575 referred to Negley in any manner (and certainly not in any manner other than by name (see supra note 7)), or if they referred to Negley's business. See Ex. 11, at 157. Indeed, a frustrated Hardy admitted at his deposition that "[the FBI] did not go . . . chasing down other information in that file to see if it was somehow related to Mr. Negley." Id. at 157. Therefore, the FBI has not satisfied its burden of proving that no portion of File S-1575 is responsive to Negley's FOIA request and, thus, Negley is

entitled to partial summary judgment ordering the production of File S-1575.[12]

IV. CONCLUSION

For these reasons, Negley respectfully requests that the Court grant partial summary judgment in favor of Negley as set forth in the attached Order.

Dated: October 30, 2007

Respectfully submitted,

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[12] As set forth above, Negley is entitled to partial summary judgment and an order compelling the production of File S-1575. If this Court finds a dispute of fact precluding summary judgment (which it should not because the FBI did not file a statement of materials facts in dispute), however, Negley is entitled to a trial to allow this Court to make findings of fact and conclusions of law regarding Negley's entitlement to File S-1575.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES LUTCHER NEGLEY,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Case No. 1:03-CV-02126-GK

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT 12

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES LUTCHER NEGLEY,	)	
	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 1:03-CV-02126-GK**
	)	
FEDERAL BUREAU OF INVESTIGATION,	)	
	)	
	)	
Defendant.	)	
	)	

SECOND SUPPLEMENTAL DECLARATION OF JAMES LUTCHER NEGLEY

I, James Lutcher Negley, declare as follows:

1. I am over the age of eighteen (18) years, I am competent to be a witness and have personal knowledge of the facts and matters stated herein.

2. On or about September 20, 1995, I was interviewed by two Federal Bureau of Investigation agents – Agent Clifford Holly and another individual – with regard to the UNABOM investigation.

3. During the interview, Agent Holly took detailed hand-written notes of our conversation.

4. Following the interview, Agent Holly packed up his belongings, including the notes that he took.

* * * * * * * * * * * *

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND ACCURATE. EXECUTED ON OCTOBER 29, 2007.

James Lutcher Negley

James Lutcher Negley