UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WESTERN SECTION
CIVIL ACTION
No.: 00-30121-FHF

	)
GRAEME SEPHTON,	)
Plaintiff	)
	)
v.	)
	)
FEBERAL BUREAU OF	)
INVESTIGATION,	)
Defendant	)
	)

PLAINTIFF'S SECOND OPPOSITION TO THE DEFENDANT'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. SUPPLEMENTAL PROCEDURAL HISTORY

On January 24, 2003, the plaintiff filed his Opposition to the Defendant's Supplementary Memorandum of Law in Support of Its Motion for Summary Judgment. In his opposition, the plaintiff described newly released documents sent to other requesters which are responsive to his FOIA request. According to information provided to these requesters by defendant FBI these records were found in the same sub-file of the Central Record System of the New York Field Office supposedly searched page-by-page by defendant FBI in response to plaintiff Sephton's request. These documents evidence the inadequacy of defendant FBI's search of its records for documents responsive to the plaintiff's request.

In his opposition, plaintiff Sephton also described two alternative record storage systems which contain records responsive to his request. One, created in response to problems retrieving laboratory records from the Central Records Systems, is a records management system in which forensic results, reports, and analyses from all FBI criminal investigations are stored. The

second database, maintained by the FBI's Scientific Analysis Section, "contains images of every document from every bombing or suspected bombing investigation conducted by personnel from the FBI's Explosives Unit since the beginning of the unit in 1972." Exhibit 1, Whitehurst Aff. at 3-4, ¶ 7. The plaintiff argued that defendant FBI's neglecting to search either of these easily accessible databases is further evidence that its search for responsive records was inadequate.

In response to the plaintiff's evidence that it had overlooked records stored in the files that it had claimed to search, page-by-page, defendant FBI conducted a new search, line-by-line, of the relevant files. Exhibit 2, Rawlinson Declaration at 4, ¶ 9 As a result of this new search, defendant FBI released to the plaintiff approximately 550 pages of records discovered in the New York Field Office files it had already searched or in other New York Field Office files located through references in the original files. Amazingly, of the almost six hundred pages of records that defendant FBI sent to the plaintiff, including the newly released documents, only one contains any analysis of the foreign bodies located on the victims. (Exhibit 3, Sephton Affidavit at 2, ¶ 9) All the newly retrieved records, like the original twenty-eight pages of documents sent to the plaintiff, simply document that hundreds of foreign objects had been removed from the victims' bodies and turned over to defendant FBI for analysis. Id. With the one exception, none of the records released to the plaintiff contains the information originally requested by the plaintiff, i.e., the results of the forensic analysis of the physical characteristics of all the foreign material/objects recovered from the bodies of the victims of the crash of TWA flight 800 including: the matter/object's dimensions and weight; the matter/object's general condition; the matter/object's physical composition; and any other analytic results of tests on these foreign materials and/or objects performed by the FBI.

II. ARGUMENT

In its response to the plaintiff's allegation that defendant FBI's search was inadequate because it had not searched easily accessible, relevant files, defendant FBI argued for the first time that because plaintiff Sephton had directed his FOIA request to the New York Field Office of the FBI, defendant FBI had no duty to search any files beyond those located at the New York Field Office. This argument lacks merit. First, the Code of Federal Regulations does not mandate that a field office of the FBI which receives a FOIA request has no duty to refer requests to other components of the agency to have files, not located at the field office, searched. Secondly, case law is clear that even if an agency does not have a duty to search all files in which responsive records **might** possibly be stored, it does have a duty to search all easily accessible files where responsive records are **likely** to be stored. Moreover, defendant FBI's release of approximately 550 pages of new records two and one half years after it had its agent declare under penalty of perjury that responsive records had been produced coupled with its on-going refusal to search for and release any actual analysis of the foreign bodies/material it had in its possession are clear evidence of defendant FBI's bad faith. For these reasons, the plaintiff respectfully requests that the court refuse to grant defendant FBI summary judgment and order it to search all easily accessible files for records likely to contain documents responsive to the plaintiff's original request.

A. CODE OF FEDERAL REGULATIONS DOES NOT MANDATE THAT A FIELD OFFICE ONLY SEARCH ITS OWN FILES UPON RECEIVING A FOIA REQUEST.

Defendant FBI argued that according to the Federal Code of Regulations, a FOIA requester who addresses his request to a field office is not entitled to have the FBI undertake any search of record files not located at the field office. In making this argument, defendant FBI

referred to 28 CFR 16.3.a of the Code of Federal Regulations which state that although "[i]n most cases, [a requester's] FOIA request should be sent to a component's central FOIA office, "[f]or records held by a field office of the Federal Bureau of Investigation (FBI) . . . [a FOIA requester] must write directly to that FBI . . . field office address." The interpretation of this regulation is clear—the FBI has no duty to access records located in field offices if the requester addresses her request to the central FOIA office. Case law supports this interpretation of the regulation. See e.g., *Marks v. United States Department of Justice,* 578 F.2d 261, 263 (9th Cir. 1978)(no requirement that an agency search every division or field office on its own initiative in response to a FOIA request); *Biberman v. FBI*, 528 F.Supp. 1140, 1144 (S.D.N.Y. 1982)(holding that "it would be unreasonably burdensome to require a search of field offices unless such a search was specifically requested.")

However, defendant FBI's misinterpreted the regulation's requirement that all requests for records in the possession of an FBI field office must be directed to that office to mean that an FBI field office has no duty to extend the search for responsive documents beyond those records in its possession when it receives a FOIA request. To interpret the regulations this way is to make the classical logical error that if p then q necessarily means if q then p.[1] That is, the rule that if p (records are located in an FBI field office) then q (a requester must direct his request to that field office) does not mandate that if q (a requester directs his request to an FBI field office) then p (he can only be given those records located in the FBI field office). Moreover, the plaintiff could discover no case law that supports defendant FBI's interpretation of this regulation.

[1] For example, the statement that all snowy egrets are white birds does not imply that all white birds are snowy egrets.

Further evidence disconfirming the defendant's interpretation of 28 CFR 16.3.a are the exceptions to the general requirement that "the component that first receives a request for access to a record, and has possession of that record, is the component responsible for responding to the request." 28 CFR 16.42.a One exception to this general requirement is that "[i]f the receiving component determines that it is not best able to process the record, then it **shall** either" confer with components or other agencies better able to process the record or it **shall** "refer the responsibility for responding to the request . . . to the component best able to determine whether it is exempt from access, or to another agency that originated the record." 28 CFR 16.42.c In other words, if a component of an agency receives a request for records that other components or other agencies are better able to process,[2] then it is obligated to either consult with those other components or agencies or refer the responsibility of responding to the FOIA request for those records to them. This obligation clearly conflicts with defendant FBI's claim that if a requester addresses her request to an FBI field office, then that field office has no duty or obligation to refer the request to other components of the agency.

In a second exception to the general requirement that the component that first receives a FOIA request is responsible for its processing, the regulations mandate that "[w]henever a request is made for access to a record containing information that relates to an investigation of a possible violation of law and that was originated by another component or agency, the receiving component shall either refer the responsibility for responding to the request regarding that information to that other component or agency or shall consult with that other component or agency." 28 CFR 16.42.d In the current case, plaintiff Sephton contacted the FBI's New York Field Office to learn where he should address a FIOA request concerning the crash of TWA 800.

[2] Two reasons that another component or agency would be better able to process a record are: 1) if the record originated in the other component or agency; or 2) if the other component or agency currently has possession of the record.

The FBI's New York Field Office advised him that his request should be directed to their office. As described in their respective Declarations, Hodes, Kiefer, and Rawlinson all appeared to understand that plaintiff Sephton was requesting forensic analyses of foreign bodies/matter removed from the bodies of the victims of the crash, not verification that defendant FBI had access to these bodies. Yet defendant FBI which has sent him approximately 580 pages of documents confirming that hundreds of foreign bodies/matter were removed from the victims,[3] has only sent him **one page** of an actual forensic analysis of one of these foreign bodies. Exhibit 3, Sephton Affidavit at 2, ¶ 9. In other words, defendant FBI has only sent plaintiff Sephton one record in response to his FOIA request.

Despite the fact that defendant FBI has sent the plaintiff almost no records responsive to his request, it has refused to refer the search to components where record storage systems more likely to contain records responsive to plaintiff Sephton's request are located. This refusal violates 28 CFR 16.42.c, directing agencies' components to refer the responsibility of responding to FOIA requests to the component which actually possesses the records. Because the information that plaintiff Sephton requested was related to a law investigation,[4] defendant FBI's refusal to refer the responsibility of responding to the component(s) in which the records originated directly violates 28 CFR 16.42.d, which obligates components which receive requests for information relating to a law investigation to make such a referral. Thus, because defendant FBI's refusal to refer responsibility for responding to plaintiff Sephton's request to the central office violates the Code of Federal Regulations, the plaintiff urges the court to deny the defendant's motion for summary judgment.

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[3] Plaintiff Septhon obviously already knew that defendant FBI had access to foreign bodies/matter removed from the victims when he made his FOIA request.

[4] Defendant FBI originally refused to release any information to plaintiff Sephton in response to his FOIA request because the information he requested was part of an ongoing law investigation.

B. IT WAS NOT REASONABLE FOR DEFENDANT FBI TO RESTRICT ITS SEARCH TO RECORDS IT COULD LOCATE IN THE NEW YORK FIELD OFFICE.

The adequacy of an agency search is evaluated by a standard of reasonableness. See e.g., *Church of Scientology Int'l v. United States Dep't of Justice*, 30 F.3d 224, 230 (1st Cir. 1994); *Maynard v. CIA*, 986 F.2d 547, 559-60 (1st Cir. 1993); *Gillin v. IRS*, 980 F.2d 819, 821-22 (1st Cir. 1992) (per curiam). "The crucial issue is not whether relevant documents might exist, but whether the agency's search was reasonably calculated to discover the requested documents." *Maynard,* 986 F.2d at 559 (internal quotation omitted). Such a determination "is judged by a standard of reasonableness and depends upon the facts of each case." *Id.*

To demonstrate that a search was unreasonable, the requester must produce "'positive indications of overlooked materials.'" *Hunsberger v. FBI*, 1997 U.S. App LEXIS 6516, 3 (1st Cir. 1997)(quoting *Oglesby v. Department of Army*, 79 F.3d 1172, 1185 (D.C. Cir. 1996). One positive indication of unreasonableness is the existence of un-searched databases or record files which are likely to contain responsive records. "An agency 'cannot limit its search to only one record system if there are others that are likely to turn up the information requested.'" *Campbell v. U.S. Dept. of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998)(quoting *Oglesby,* 920 F.2d at 68). A second positive indication of an inadequate search is the production of concrete evidence that a significant number of responsive records have not been supplied to the requester. In his opposition, plaintiff Sephton proffered both evidence of relevant, easily accessible, un-searched databases likely to contain responsive records and concert evidence of a significant number of records that defendant FBI had failed to provide. In spite of its diligent line-by-line effort to locate the responsive records, defendant FBI has still failed to produce any forensic analyses of the foreign bodies as requested by plaintiff Sephton. Nor has defendant FBI searched the

relevant record storage systems located by plaintiff Sephton. These positive indications of overlooked material confirm that defendant FBI's search was inadequate. Therefore, plaintiff Sephton respectively requests the court to deny the defendant's motion for summary judgment.

1. Defendant FBI Must Search All File Systems And Databases Where Responsive Records Are Likely To Be Found.

Courts have repeatedly held that in response to a FOIA request, agencies are not required to do a completely exhaustive search of all record systems and databases that might contain responsive records. "FOIA demands only a reasonable search tailored to the nature of a particular request. When a request does not specify the locations in which an agency should search, the agency has discretion to confine its inquiry to a central filing system if additional searches are unlikely to produce any marginal return; in other words, the agency generally need not "search every record system.'" *Id.* See also *Meeropol v. Meese,* 790 F.2d 942, 952-53 (D.C. Cir. 1986)(search is not presumed unreasonable simply because it fails to produce all relevant material); *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982*)*(agency need not demonstrate that all responsive documents were found and that no other relevant documents could possibly exist.)

However, for a search to be reasonable (i.e., adequate) an agency (or component of an agency) **must** search all relevant, easily accessible record files or databases in which responsive records are **likely** to be found. See e.g.: *Campbell*, 164 F. 3d at 28("The FBI must search ELSUR (electronic surveillance) in addition to CRS (Central Record System) in response to a general FOIA request for which ELSUR may be relevant."); *Biderman*, 528 F. Supp at 1145(finding that the "defendants have failed to satisfy their obligations under the FOIA to the extent that they have failed to search all available indices which are reasonably likely to contain references to plaintiffs.");*LaRouche v. Webster, et al*., 1984 Us District LEXIS 22547, 8 (S.D.N.Y. 1984)(holding that that the Elsur file, and any other specialized files a requestor is

unlikely to know about, are within the previously discussed reasonable search standard in other FOIA cases; *Jude v. U.S. Customs Service*, 2000 U.S. App LEXIS 7985, 2 (D.C. Cir. 2000)(finding that "by confining its inquiry to the TECS database, Customs improperly limited its search.); *Founding Church of Scientology v. National Security Agency,* 610 F.2d 824, 834 (D.C. Cir. 1979)(If the appellant is able to show circumstances indicating that further search procedures were available without the Department's having to expend more than reasonable effort, then summary judgment would be improper.)

Courts have held that not only does an agency have to search all relevant record files and databases, it has to follow all leads that it finds in the course of its search in order to locate other relevant record files and databases. That is, an agency must "revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry. *Campbell,* 164 F.3d. at 28. See also: *Jude*, 2000 U.S. App LEXIS at 4.(search inadequate because agency did not pursue lead that it had identified that was "likely to produce the information [the plaintiff] requests.); *Pray v. Dept of Justice*, et al., 1996 U.S. App. LEXIS 33607, 4 (D.C. Cir. 1996)(finding that summary judgment on the issue of the adequacy of the search of the ELSUR index was inappropriate because the FBI has failed to address evidence that the agency released numerous documents indicating that ELSUR records exist at FBI Headquarters).

At the very least, a defendant agency which has not accessed all record files likely to contain responsive records must explain in a sworn affidavit why accessing these more specified files was too difficult. See e.g., *Bennett v. Drug Enforcement Administration*, 55 F. Supp. 36, 40 D.D.C. 1999)(faulting agency for not explaining why it "did not search in the specific investigation files for each case to identify any material responsive to Plaintiff's request"); *Church of Scientology of Cal.* 792 F.2d 146, 151 (D.C. Cir. 1986)(At a minimum, the affidavit

"describe at least generally the structure of the agency's file system which makes further search difficult"); *Krikorian v. Depart. of State*, 984, F.2d 461m 468 (D. D.C. 1993)(requiring the defendant "to explain in its affidavit that no other record system was likely to produce responsive documents").

Plaintiff Sephton has proffered evidence that defendant FBI had access to at least two alternation record storage systems likely to contain responsive documents which it could have easily searched. Dr. Frederic Whitehurst, former Special Agent for the FBI, who worked as a forensic chemist in defendant FBI's crime laboratory located in Washington D.C., identified "a new records management system, which stores forensic results, reports, and analyses from all FBI criminal investigations. (Exhibit 1, Whitehurst Aff. at 1-2, ¶ 3). Dr. Whitehurst then presents convincing evidence that this system would likely contain records of the forensic a analysis requested by plaintiff Sephton. First of all, as a general search strategy, this FBI crime laboratory's record system in the "laboratory file room" would be the appropriate place to search for the analytical data/results requested by plaintiff Sephton. Exhibit 1, Whitehurst Aff. at 2, ¶ 4. Moreover, based on conversations that he had with FBI laboratory personnel who were present during the medical examination of bodies from the Flight 800 crash, Dr. Whitehurst has concluded that documentation describing foreign objects/matter collected at the autopsy of the victims "will be in the TWA 800 crash investigation files which exist in the FBI crime laboratory's record retention system . . . which can be easily searched for records of such material found in the bodies of victims of the crash of TWA 800. Exhibit 1, Whitehurst Aff. at 3, ¶

Dr. Whitehurst identified a second searchable computer data base named EXPRESS which is maintained by the FBI's Scientific Analysis Section. This system which "contains

images of every document from every bombing or suspected bombing investigation conducted by personnel from the FBI's Explosives Unit since the beginning of the unit in 1972," would likely contain data from the crash of TWA 800. Exhibit 1, Whitehurst Aff. at 3-4, ¶ 7.

Ms Rawlinson, in her Declaration stated that she had not searched in either the FBI laboratory record retention system or the EXPRESS database maintained by the FBI's Scientific Analysis Section where such records would likely be found. Exhibit 2, Rawlinson Declaration at 7-8, ¶ 21. In fact, she even suggested that she did not believe they existed. Id. Her rational for not searching them was not that they were difficult to use or access,[5] but that they were not located at the New York Office. Id. Therefore, her Declaration, like those of Hodes and Kiefer, does not adequately explained why searching these two, easy to use, readily accessible, computerized record storage systems would be difficult[6]. Thus, the Whitehurst Affidavit offers clear and convincing evidence that defendant FBI's search was inadequate because it did not search two, easily accessible records files where responsive records were more likely to be found than the record file it searched.

2. The Plaintiff Has Concrete Evidence That Because Defendant FBI Failed to Produce a Significant Number of Records, Its Search Was Inadequate.

Claims that an agency has failed to produce documents do not automatically convince a court that the agency's search of its record was inadequate. Courts disregard claims that are purely speculative. See e.g., *Hunsberge*r 1997 U.S. App LEXIS at 3(the plaintiff insistence that the FBI must have records pertaining to his 1969 drug prosecution in Rhode Island state court is purely speculative); *Hart v. FBI*, 1996 U.S. App. LEXIS 17684 , 10 n 7 (7th Cir. 1996)(Hart's

[5] In fact, the FBI laboratory record retention system was developed because "FBI laboratory files which were placed in the FBI's central records storage were difficult to retrieve when laboratory examiners needed them for review and for trial preparation." Exhibit 1, Whitehurst Aff. at 2, ¶ 4.
[6] Surely utilizing sophisticated computer databases to search for relevant records would be easier than scanning 2000 pages page-by-page or line-by-line.

strong belief that responsive material must exist because of his involvement with numerous Chinese citizens and because of his application for federal employment is nothing more than speculation").

Courts have also disregarded claims of inadequacy when the plaintiff has uncovered only a few, insignificant omissions, e.g., *Stern v. United States Department of Justice*, 1980 Dist. LEXIS, 132261 (D. Mass. 1980)(allowing summary judgment when the only evidence the plaintiff produced to challenge the adequacy of the agency's search was a five word reference contained in a document from a file not search by the defendant); *Campbell*, 164 F. 3d at 28, n7 ("While any omission in a FOIA search is potentially troubling, the inadvertent omission of three documents does not render a search inadequate when the search produced hundreds of pages that had been buried in archives for decades.)

Other Courts, however have found agencies' searches inadequate when the plaintiff has uncovered well documented omissions, even if they are few in number. See e.g., *Weisberg v. United States Department of Justice*, 627 F.2d 365 (D.C. Cir. 1980)(Plaintiff's evidence that various objects had been tested by the FBI (e.g., President Kennedy's shirt), defeated defendant FBI's argument that it had conducted a thorough, non-responsive search); *Founding Church of Scientology v. National Security Agency*, 610 F.2d 824 (D.C. Cir. 1978)(holding that the disclosure by the CIA that defendant NSA had in its possession, six documents responsive to the plaintiff's request, contradicted the defendant's claim that it had conducted an adequate search that uncovered no relevant records): *Powell*, 927 F.2d at 1239 (finding that a subsequent release by the defendant to another FOIA requester of documents denied to the plaintiff defeats summary judgment).

Plaintiff Sephton has presented defendant FBI with two sets of proof that responsive

records have not been sent to him. The first is that the approximately 580 pages of documents sent to plaintiff Sephton by defendant FBI clearly demonstrated that it collected literally hundred of foreign bodies/matter from the victims of the crash of TWA 800. Other documents given to plaintiff Sephton affirm that defendant FBI analyzed these foreign bodies/matter, e.g. in a report dated April 1997, "an unidentified investigator stated that the New York Office of the FBI was Aaware that all foreign matter found in or on the victim body was/were highly scrutinized by FBI bomb techs." This report also stated that the FBI New York Office requested "all documentation and actual samples taken from these tests [simulated missile tests] for use in comparison to actual fragments found in victim bodies." A second report, dated 9/12/97, entitled "TWA 800 Preliminary Statistical Analysis of Victims Injuries and Seat Damage," stated that "89 victims (39%) had foreign bodies (FB's) in their remains. . . . Investigation is continuing to identify FB's of unknown origin." A third report, dated 10/17/97, entitled "Medical/Forensic Group Chairman's Factual Report of Investigation," advised that "[f]oreign material removed from the bodies was immediately released to an FBI technician. . . ." These reports along with common sense confirm that defendant FBI performed numerous analyses on the foreign bodies/matter taken form the victims. In her Declaration, Ms Rawlinson seemed confident that records recording data from the analyses of the foreign bodies are not stored in the files located in the New York field office. Although a random record may be lost or overlooked, it is inconceivable that the mass of records that must have been produced as a result of defendant FBI's analyses of the foreign bodies has been lost or destroyed. Therefore, the logical place to search for these records would be in systems of record storage located in the central office.

In response to a FOIA request made by Jean Gully, defendant FBI released a document, dated 12/08/97, located in the Central Records System under file 265A-NY-259028 SUB FF[2]

which described documents to be included in the case file in the New York Office. (See Plaintiff's Opposition to the Defendant's Supplemental Memorandum of Law in Support Of Its Motion For Summary Judgment, Exhibit JG at 4.) According to the description of these documents released to Ms Gully, they consisted of 185 folders containing records of the identification, movement, and analytical results of 185 items of evidence submitted for metallurgical and chemical analysis during the course of the investigation of Flight 800. Each of the 185 folders provides a complete history of each item of evidence. Each folder contains photographs, electronic communications documenting the movement of the evidence, laboratory results and the FD-192 (green sheet). The FBI, NTSB, Brookhaven, DIA and Boeing laboratories performed the respective analyses. Records released to another FOIA requester, Mr. Collins confirm that at least two, and possibly three of those folders stored are directly responsive to the plaintiff's request. (See Plaintiff's Opposition to the Defendant's Supplemental Memorandum of Law in Support Of Its Motion For Summary Judgment, Exhibit DC) Again, it is inconceivable that 185 folders, each containing at minimum of five pages, could have been destroyed or lost. However, Ms Rawlinson declares that they are not stored at the New York Field Office. The existence of these 185 folders which defendant FBI cannot produce is concrete evidence that it conducted an inadequate search. Therefore, the plaintiff requests the court to deny the defendant's motion for summary judgment.

C. DEFENDANT FBI'S RELEASE OF APPROXIMATELY 550 PAGES OF NEW MATERIAL IN RESPONSE TO PLAINTIFF SEPHTON'S ACCUSATION OF AN INADQUATE SEARCH DESTROYS THE PRESUMPTION OF GOOD FAITH THAT IS NORMALLY ACCORDED TO THE AGENCY'S AFFIDAVITS.

It was the intent of Congress that agency affidavits be accorded substantial weight in national-security cases. See S. Rep. No. 1200, 93d Cong., 2d Sess. 12, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6285, 6290. "These affidavits are equally trustworthy when they aver

that all documents have been produced or are unidentifiable as when they aver that identified documents are exempt." *Goland v. Central Intelligence Agency, 197 U.S. App. D.C. 25, 607 F.2d 339, 367, 370 (D.C. Cir. 1979)* (opinion modified per curiam), cert. denied, 445 U.S. 927, 100 S. Ct. 1312, 63 L. Ed. 2d 759 (1980). At least one court has been reluctant to find bad faith when an agency produced more documents after it had averred that all responsive documents had been produced. In *Miller v. United States Dep't of State,* 779 F.2d 1378, 1384-85 (8th Cir. 1986), the court held that although it was troubling, it was not bad faith when the agency produced more documents after it had stated "that the well was dry and that it had completed its search and released all that it could release." *Id*. at 1385. The court decided that "[w]hile the discovery of additional documents is evidence that the search was not thorough," *Goland,* 607 F.2d at 368, such discovery is not conclusive of agency bad faith. It may be indicative of administrative inefficiency, see *Perry v. Block,* 221 U.S. App. D.C. 347, 684 F.2d 121, 129 (D.C. Cir. 1982), or it may, as in this case, indicate reluctant diligence by the agency under the goad of persistent litigation by a determined plaintiff. However, the court made clear that in reaching this decision, it was taking into account the facts that the number of documents released after it took after the agency declaration "is small when compared with the total" and that "the record also shows that many of these documents were outside the scope of [the plaintiff's] original request but were added later when he apparently broadened his request." *Miller*, 779 F. 2d. at 1386.

In this case, Attorney Hodes, in his declaration, averred under pain of perjury that the twenty-eight pages located in the files of the New York Field Office, provided plaintiff "all records pursuant to his FOIA request." See Plaintiff's Opposition to the Defendant's Supplemental Memorandum of Law in Support of Its Motion For Summary Judgment, Exhibit 7, Hodes Declaration at 15, ¶ 30. His testimony is untruthful for two reasons. First of all,

Attorney Hodes should have averred that the twenty-eight pages were all the documents in the New York Field Office that are responsive to the plaintiff's FOIA request. This statement would the clued the plaintiff in 2000 that other documents could conceivable exist at other locations.

More troubling is the fact, however, that the second search thought the same files located almost twenty times the number of pages as the search attested to by Attorney Hodes. Moreover, many of the pages that were located in the line-by-line search clearly should have been located on the page-by-page search described by Ms Kiefer. For example, see the newly released records in Exhibit 4, on which the words "foreign material are clearly displayed. It is equally troublesome that apparently neither Attorney Hodes nor Ms Kiefer knew enough about the files located in the New York Field Office to realize that an adequate search could not have been carried out if only 28 pages had been located. For these reasons, the plaintiff respectfully requests the court to deny defendant FBI its motion for summary judgment pursuant to the bad faith displayed by its agents in their declarations.

D. **DEFENDANT FBI'S CONTINUING REFUSAL TO PROVIDE THE PLAINTIFF WITH THE RECORDS HE HAQS REQUESTED NEGATIVELY IMPACTS THE PUBLIC** S.

Defendant FBI's response to the plaintiff's opposition did not address the devastating effect its refusal to provide the information requested has had on members of the public. Members of the public, other than the plaintiff and his group include, Dr. Charles Wetli, Chief Medical Examiner for Suffoak County, New York, who, although he had legal jurisdiction for finding the cause of death of the victim of the crash of TWA 88, has never been given access to the forensic records. Exhibit 4. Dr, Dennis Shanahan, employed by defendant FBI to recover the foreign bodies/matter from the bodies of the victims of the crash. The investigation and conclusions about 230 untimely deaths in an mysterious explosion warrants proper cause-of-death determinations. As long as defendant FBI continues to withhold the forensic data from the

Suffolk County Medical Examiner and the public, it undermines public confidence in the government's investigation of the crash. This uncertainty is especially hard on the families of the victims, many of whom have contributed to help fund the plaintiff's litigation. Exhibit 3, Sephton Aff. at 2, ¶ 11.

If the court does not take definitive action and sanction defendant FBI, it will effectively encourage agencies to engage in this brief-by-brief, record-by-record release process as a successful delaying strategy. While defendant FBI argues that it has made a more than adequate and reasonable effort to procure the requested records, it has, in fact, pursued a strategy that entails vastly more time, cost, and effort from FOIA search agents, agency and plaintiff's counsels, and the court. Without consequences to the agency, this strategy will be perpetuated and encouraged. For these reasons, the plaintiff respectfully urges the court to deny defendant FBI's motion for summary judgment and order them to conduct a search of the record storage systems identified by Dr. Whitehurst.

DATED: August 1, 2003

Respectfully submitted
The Plaintiff
By his Attorney

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CERTIFICATE OF SERVICE

This will certify that I have served two copies of this document upon counsel for the defendant, Karen L. Goodwin, Assistant U.S. Attorney, 1550 Main Street, Room 310, Springfield, Massachusetts 01103-1422, by First Class mail on August 1, 2003.