United States Court of Appeals
For the First Circuit

Nos. 18-1926
18-1954

JASON T. BERRY,

Plaintiff - Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION; MARK HASTBACKA, Special Agent, Federal Bureau of Investigation, in his individual and official capacities,

Defendants - Appellees.

Before

Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

ORDER OF COURT

Entered: August 18, 2021

Appellant's motion for reconsideration of the denial of his petition for en banc rehearing, construed as a motion to recall mandate, is denied. See Kashner Davidson Secs. Corp. v. Mscisz, 601 F.3d 19, 22 (1st Cir. 2010) (mandate will be recalled "in only the most extraordinary circumstances") (footnote omitted). The Clerk of Court is directed not to accept any further filings in these closed cases.

By the Court:

Maria R. Hamilton, Clerk

cc:
Robert J. Rabuck
Seth R. Aframe
Jason T. Berry

United States Court of Appeals
For the First Circuit

Nos. 18-1926
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JASON T. BERRY,
Plaintiff - Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION; MARK HASTBACKA, Special Agent, Federal Bureau of Investigation, in his individual and official capacities,
Defendants - Appellees.

Before
Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

ORDER OF COURT

Entered: January 29, 2021

Appellant's petition for en banc rehearing, construed as a motion to recall mandate, is denied. See Kashner Davidson Secs. Corp. v. Mscisz, 601 F.3d 19, 22 (1st Cir. 2010) (mandate will be recalled "in only the most extraordinary circumstances") (footnote omitted).

By the Court:
Maria R. Hamilton, Clerk

cc:
Robert J. Rabuck
Seth R. Aframe
Jason T. Berry

United States Court of Appeals
For the First Circuit

Nos. 18-1926
18-1954

JASON T. BERRY,
Plaintiff - Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION; MARK HASTBACKA, Special Agent, Federal Bureau of Investigation, in his individual and official capacities,
Defendants - Appellees.

Before
Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

ORDER OF COURT

Entered: July 9, 2020

The petition for panel rehearing is denied.

By the Court:
Maria R. Hamilton, Clerk

cc:
Robert J. Rabuck
Seth R. Aframe
Jason T. Berry

United States Court of Appeals
For the First Circuit

Nos. 18-1926
18-1954

JASON T. BERRY,
Plaintiff - Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION; MARK HASTBACKA, Special Agent, Federal Bureau of Investigation, in his individual and official capacities,
Defendants - Appellees.

Before
Howard, Chief Judge,
Thompson and Barron, Circuit Judges.

JUDGMENT

Entered: February 27, 2020

Defendant-appellees the Federal Bureau of Investigation and FBI Special Agent Mark Hastbacka move for summary disposition of these consolidated appeals in which pro se plaintiff-appellant Jason Berry seeks review of the Rule 12(b)(6) dismissal of his claims brought under the civil remedies provision of the Privacy Act, 5 U.S.C. § 552a, and Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), and of the denial of his motion for relief under Fed. R. Civ. P. 60(b)(6).

Our review of the dismissal is de novo. Harry v. Countrywide Home Loans, Inc., 902 F.3d 16, 18 (1st Cir. 2018). To survive dismissal under Rule 12(b)(6),

"a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim is facially plausible if supported by 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Eldredge v. Town of Falmouth, MA, 662 F.3d 100, 104 (1st Cir. 2011) (quoting Iqbal, 556 U.S. at 570). That standard does not require probability, but it demands "'more than a sheer possibility that a defendant has acted unlawfully," id. (quoting Iqbal, 556 U.S. at 678), and allegations must rise "above the speculative level[.]" Twombly, 550 U.S. at 555.

To the extent Berry challenges the dismissal of his claim that defendants improperly disclosed personal information in violation of the Privacy Act, we agree with the district court that the second amended complaint failed to adequately allege actual damages as required to state a claim for relief. See F.A.A. v. Cooper, 566 U.S. 284, 291 (2012). Berry's mere invocation of the term "actual damages" was not sufficient to withstand Rule 12(b)(6) dismissal and proceed to discovery where he failed to plead the economic harm allegedly suffered. See, e.g., Cooper, 566 U.S. at 295-96; Iqbal, 556 U.S. at 678 (holding that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient to satisfy minimal pleading standards).

Berry's challenge to the dismissal of his Fourth Amendment *Bivens* claim against Agent Hastbacka is equally unavailing. "To prevail on a claim that a search

or seizure violated the Fourth Amendment, a [party] must show as a threshold matter that he had a legitimate expectation of privacy in the place or item searched." United States v. Battle, 637 F.3d 44, 48-49 (1st Cir. 2011). To make that showing, a party must show that he had a subjective expectation of privacy and that the expectation was objectively reasonable. Id. Here, Berry claimed that Hastbacka illegally searched for and obtained information about him and his family. but the only allegations in the complaint concerning the purported search w ere that Hastbacka "obtained the identity and contact information of [his] parents through some manner of search," and that Hastbacka "somehow acquired [Berry's] personal cell phone number" though Berry had not provided it. Berry suggests in his brief on appeal that Hastbacka obtained his parents' number by searching his "cell phone data," and in his opposition to the motion for summary disposition, he points to his statement in the complaint that "information related to or within an individual's personal cell phone" is "protected under the Fourth Amendment and its privacy provisions[.]" See Riley v. California, 573 U.S. 373 (2014)). But this general legal assertion is not an allegation of fact, and Berry's allegation that an improper search was conducted is entirely speculative and the facts pled are insufficient to support an inference that the contents of his cell phone were searched.

In addition, for the reasons explained by the district court. Berry failed to show that he had any legitimate expectation of privacy in the information he alleges was as improperly obtained – i.e., his parents' identity, telephone number. and address, or Berry's

own cell phone number. See, e.g., Carpenter v. United States, 138 S.Ct. 2206, 2216 (2018) ("a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties, . . . even if the information is revealed on the assumption that it will be used only for a limited purpose" (internal quotation marks and citations omitted)); United States v. Clenney, 631 F.3d 658, 666-67 (4th Cir. 2011) (finding no reasonable expectation of privacy in phone records, including basic information regarding incoming and outgoing calls on that phone line); United States v. Bynum, 604 F.3d 161. 162, 164 (4th Cir. 2010) (holding that website user who voluntarily conveyed information including phone number and physical address to internet company assumed risk that information would be revealed to law enforcement and had no legitimate expectation of privacy in that information). To the extent Berry argues that Riley v. California, 573 U.S. 373 (2014), establishes a legitimate expectation of privacy in a cell phone number, he misreads the case, which held that a search of the *contents* of a cell phone implicates Fourth Amendment privacy interests. See id. at 387-97. Moreover, the mere fact that the allegedly private information Hastbacka obtained – i.e., Berry's parents' contact information and Berry's voicemail – was contained in Berry's cell phone does not support an inference that Hastbacka conducted a search of the cell phone, as the information could have been obtained from other sources.

Finally, Berry seeks review of the denial of his motion seeking relief under Fed. R. Civ. P. 60(b)(6). Appellees argue that the motion is properly construed as one filed under Fed. R. Civ. P. 59(e) because it was filed

within 28 days of the judgment and it challenged the legal correctness of the judgment and argued that the district court overlooked certain facts. See Global NAPs, Inc. v. Verizon New England, Inc., 489 F.3d 13, 25 (1st Cir. 2007) (stating that, irrespective of how titled, post-judgment motion made within ten days of entry of judgment [changed to 28 days in 2008] questioning correctness of judgment is properly construed as Rule 59(e) motion). Berry objects to the characterization of the motion as one filed under Rule 59(e) and insists that it is properly construed as one seeking relief under Fed. R. Civ. P. 60(b)(6).

Rule 60(b) relief is "granted sparingly," and requires a movant to show, inter alia, that "exceptional circumstances . . . favoring extraordinary relief" are present. Fisher v. Kadant, Inc., 589 F.3d 505, 512 (1st Cir. 2009) (internal quotation marks and citation omitted). Berry contends that certain contextual facts overlooked by the district court amount to "exceptional circumstances" warranting relief. Specifically, Berry states that the FOIA request that prompted Hastbacka's response was related to another lawsuit by Berry that involved an FBI Safe Streets Task Force member, and he argued that Hastbacka and others at the FBI office would have been aware of the related litigation. Berry also noted that Hastbacka (1) gave a return phone number with a Florida area code on the voicemail message he left for Berry's parents, and (2) provided Berry with a business card that listed the wrong zip code for the address printed on it. Berry suggested that the cited facts raised questions about Hastbacka's motivation for contacting Berry's parents and the actions he took to obtain that contact information, and Berry that Hastbacka's motive was relevant to the

question whether he acted reasonably and in accordance with the Privacy Act. But Hastbacka's motivation was not relevant to the grounds on which the Privacy Act and Bivens claims were dismissed – i.e., Berry's failure to adequately plead actual damages and demonstrate that he had a privacy interest in the information he said was improperly searched. Further. to the extent Berry argued the contextual circumstances demonstrated that Hastbacka may have obtained information by conducting an improper search of Berry's cell phone data. his allegations were too speculative to provide a factual basis for any claim that an improper cell phone search was conducted, and his allegation that Hastbacka referenced Berry's cell phone number and voicemail was not in itself sufficient to support an inference that an improper cell phone search was conducted. The district court did not abuse its discretion in concluding that the circumstances described did not warrant relief under Rule 59(e) or Rule 60(b)(6). Diaz v. Jiten Hotel Management, Inc., 671 F.3d 78, 84 (1st Cir. 2012) (abuse of discretion standard applies to review of motions filed under Rule 59(e) and 60(b)).

As the appeal presents no substantial issue for review, the motion for summary disposition is granted and the judgment of the district court is affirmed. See 1st Cir. R. 27.0(c).

By the Court:
Maria R. Hamilton, Clerk

cc:
Robert J. Rabuck
Seth R. Aframe
Jason T. Berry

Other Orders/Judgments
1:17-cv-00143-LM Berry v. Federal Bureau of Investigation et al **CASE CLOSED on 07/18/2018**

CLOSED,FILE

U.S. District Court

District of New Hampshire

Notice of Electronic Filing

The following transaction was entered on 9/6/2018 at 3:52 PM EDT and filed on 9/6/2018

Case Name: Berry v. Federal Bureau of Investigation et al

Case Number: 1:17-cv-00143-LM

Filer:

WARNING: CASE CLOSED on 07/18/2018

Document Number: No document attached

Docket Text:

ENDORSED ORDER re: [45] Response/Reply. ***Text of Order: Plaintiff's motion was erroneously deemed ripe prior to the deadline for him to file his reply, and the court denied his motion. Plaintiff subsequently filed his reply after the court issued its order. The court has reviewed plaintiff's reply, and the arguments therein do not change the court's ruling.*** **So Ordered by Judge Landya B. McCafferty.(de)**

1:17-cv-00143-LM Notice has been electronically mailed to:

Robert J. Rabuck rob.rabuck@usdoj.gov, CaseView.ECF@usdoj.gov, david.plourde@usdoj.gov, faye.guilmette@usdoj.gov, francine.conrad@usdoj.gov, judy.prindiville@usdoj.gov, USANH.ECFCivil@usdoj.gov

1:17-cv-00143-LM Notice, to the extent appropriate, must be delivered conventionally to:

Jason T. Berry
37 Fenton Ave
Laconia, NH 03246

Orders on Motions
1:17-cv-00143-LM Berry v. Federal Bureau of Investigation et al **CASE CLOSED on 07/18/2018**

CLOSED,FILE

U.S. District Court

District of New Hampshire

Notice of Electronic Filing

The following transaction was entered on 9/5/2018 at 12:21 PM EDT and filed on 9/5/2018

Case Name: Berry v. Federal Bureau of Investigation et al

Case Number: 1:17-cv-00143-LM

Filer:

WARNING: CASE CLOSED on 07/18/2018

Document Number: No document attached

Docket Text:

ENDORSED ORDER denying [43] Motion for Relief Under Federal Rule 60(b)(6) from the July 17th, 2018 Order Granting Motion to Dismiss. *Text of Order: Denied*, So Ordered by Judge Landya B. McCafferty.(gla)

1:17-cv-00143-LM Notice has been electronically mailed to:

Robert J. Rabuck rob.rabuck@usdoj.gov, CaseView.ECF@usdoj.gov, david.plourde@usdoj.gov,

faye.guilmette@usdoj.gov, francine.conrad@usdoj.gov, judy.prindiville@usdoj.gov, USANH.ECFCivil@usdoj.gov

1:17-cv-00143-LM Notice, to the extent appropriate, must be delivered conventionally to:

Jason T. Berry
37 Fenton Ave
Laconia, NH 03246

U.S. District Court

District of New Hampshire

Notice of Electronic Filing

The following transaction was entered on 7/18/2018 at 8:28 AM EDT and filed on 7/17/2018

Case Name: Berry v. Federal Bureau of Investigation et al
Case Number: 1:17-cv-00143-LM
Filer:
Document Number: 41

Docket Text:
///ORDER granting [35] Motion to Dismiss for Failure to State a Claim. Clerk shall enter judgment and close the case. So Ordered by Judge Landya B. McCafferty.(gla)

1:17-cv-00143-LM Notice has been electronically mailed to:

Robert J. Rabuck rob.rabuck@usdoj.gov, CaseView.ECF@usdoj.gov, david.plourde@usdoj.gov, faye.guilmette@usdoj.gov, francine.conrad@usdoj.gov, judy.prindiville@usdoj.gov, susanne.alexander@usdoj.gov, USANH.ECFCivil@usdoj.gov

1:17-cv-00143-LM Notice, to the extent appropriate, must be delivered conventionally to:

Jason T. Berry
37 Fenton Ave
Laconia, NH 03246

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Jason Berry

v.

Federal Bureau of Investigation, et al.

Civil No. 17-cv-143-LM
Opinion No. 2018 DNH 142

ORDER

Jason T. Berry brings claims for violation of the Privacy Act, 5 U.S.C. § 552a, against the Federal Bureau of Investigation ("FBI") and one of its agents, Mark Hastbacka, alleging that Hastbacka improperly disclosed information about him to third parties. Berry also brings a Bivens claim against Hastbacka based on the same alleged conduct. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Defendants move to dismiss Berry's second amended complaint (doc. no. 34), arguing that Berry's claims fail as a matter of law. Berry objects.

STANDARD OF REVIEW

Under Rule 12(b)(6), the court must accept the factual allegations in the complaint as true, construe reasonable inferences in the plaintiff's favor, and "determine whether the factual allegations in the plaintiff's complaint set forth a plausible claim upon which relief may be granted." Foley v. Wells Fargo Bank, N.A., 772 F.3d 63, 71 (1st Cir. 2014) (internal quotation marks omitted). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to

draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

BACKGROUND

I. Factual Background[1]

Berry is a former probation and parole officer for the state of New Hampshire. In this role, Berry assisted members of the FBI's Safe Streets Task Force in arrests and other tasks. On February 23, 2017, Berry sent a request under the Freedom of Information Act ("FOIA") to the FBI office in Bedford, New Hampshire, seeking "any information regarding his personal information and historical documentation of his past involvement in the activities of the Safe Streets Task Force in New Hampshire." Doc. no. 34 at ¶ 16.

In response to Berry's FOIA request, Hastbacka called Berry's parents and left a voicemail on their home phone. In that voicemail, Hastbacka said that he was calling about some correspondence that Berry had sent. Hastbacka added that he had "tried to call [Berry] a couple of times, he's not picking up, and there's no voicemail." Doc. no. 34 at ¶ 21. Hastbacka requested that he be called back and left a telephone number where he could be reached.

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[1] The allegations in this section are taken from Berry's second amended complaint, which is the operative complaint in this action. See doc. no. 34.

Berry's parents were not aware that he had sent a FOIA request to the FBI. Upon hearing the voicemail, Berry's parents "were confused and concerned about being contacted by the Federal Bureau of Investigation about their son." Doc. no. 34 at ¶ 23. Berry wrote Hastbacka and informed him that his call "has resulted in a 'confusing' effect on him and his parents." Id. at ¶ 26. In that letter, Berry also requested that Hastbacka tell him how he knew the identity of his parents and their contact information. Hastbacka, however, did not respond to this letter.

II. Procedural Background

Berry filed this lawsuit, proceeding pro se, against the FBI and Hastbacka in April 2017, alleging that Hastbacka and the FBI violated the Privacy Act by disclosing the existence of his FOIA request to his parents. Berry also brought a Bivens claim against Hastbacka, alleging that Hastbacka violated his privacy rights by disclosing his FOIA request. Berry amended his complaint in October 2017. That amendment added no new substantive allegations but did append a copy of the voicemail that Hastbacka left Berry's parents.

Defendants moved to dismiss Berry's amended complaint, arguing that each of Berry's claims failed as a matter of law. The court granted defendants' motion to dismiss, holding that Hastbacka was not a proper defendant under the Privacy Act, the remedies that Berry sought against the FBI (damages for emotional

distress and injunctive relief) were not available under the statute, and that no Bivens remedy existed for the disclosure of a person's private information. Doc. no. 31. The court, however, observed that Berry's complaint alluded to several other theories of liability. Because Berry is a pro se litigant, and because Berry had not had the opportunity to amend the substantive allegations in his complaint, the court granted defendants' motion to dismiss without prejudice to Berry filing another complaint that stated legally sufficient claims against Hastbacka or the FBI.

On March 5, 2018, Berry filed his second amended complaint, which defendants now move to dismiss. See doc. no. 35.

DISCUSSION

In his second amended complaint, Berry alleges two claims for violation of the Privacy Act, 5 U.S.C. § 552a (Counts I and II). Berry brings Count I against the FBI and Count II against both Hastbacka and the FBI. In addition, Berry brings a Bivens claim against Hastbacka for violation of his Fourth Amendment rights (Count III).

Defendants move to dismiss Count I, arguing that Berry has failed to allege any damages that would be available under the Privacy Act. Defendants also contend that Count II, which is brought under the Privacy Act's criminal penalties provision, 5 U.S.C. § 552a(i), fails because there is no private right of action under that provision. Finally, defendants move to dismiss the

Bivens claim against Hastbacka, arguing that Berry has failed to allege a constitutional violation and that Hastbacka is entitled to qualified immunity. In response, Berry contends that he has sufficiently pled the claims in his second amended complaint.

I. Privacy Act Claims (Counts I and II)

In Count I, Berry asserts a claim against the FBI for violating section (b) of the Privacy Act, which generally prohibits agencies from disclosing records about a person without his prior consent. In Count II, Berry asserts a claim against the FBI and Hastbacka under section (i) of the Privacy Act, which makes it a criminal misdemeanor punishable by a fine of up to $5,000 to disclose records in violation of the Act's requirements. § 552a(i)(1). Both claims are based on the allegation that Hastbacka violated the Privacy Act by contacting Berry's parents and disclosing to them that he had sent the FBI a FOIA request.

Defendants argue that Berry has failed to state a plausible Privacy Act claim in Count I because he has not alleged that he suffered actual damages, which are the only damages available under the Act. In addition, defendants argue that Count II fails because § 552a(i) does not contain a private right of action that would allow Berry to bring suit.

In response, Berry contends that he has suffered actual damages and that he should be permitted to proceed to discovery and trial on the issue of damages.

Berry further contends that he is at least entitled to the statutory minimum damages of $1,000.

A. Count I

The Privacy Act contains a civil remedies provision, which permits an individual harmed by a violation of the Act to bring a civil lawsuit. See 5 U.S.C. § 552a(g)(1). Under § 552a(g), when an agency commits an "intentional or willful" violation of the Act, the United States is liable for "actual damages" caused by that violation. F.A.A. v. Cooper, 566 U.S. 284, 291 (2012) (quoting 5 U.S.C. § 552a(g)(4)(A)).

In the court's order on defendants' first motion to dismiss, it held that Berry's Privacy Act claim for damages failed as a matter of law because the only injury he alleged, emotional distress, was not recoverable as "actual damages" under the Act. See doc. no. 31 at 10-13. As the court explained, the Supreme Court in Cooper interpreted the phrase "actual damages" in § 552a(g) as authorizing only damages for actual pecuniary harm. See id. at 11 (citing Cooper, 566 U.S. at 298, 302-304). In coming to this conclusion, the Cooper court reasoned that the term "actual damages" was synonymous with "special damages," a category of damages available in slander and libel per quod cases. Cooper, 566 U.S. at 295-98. The court distinguished this type of damages from general damages, a category of damages not available under the Privacy Act, which includes damages for "loss of reputation, shame,

mortification, injury to the feelings and the like." Id. at 295-96.

Under Federal Rule of Civil Procedure 9(g), "an item of special damages . . . must be specifically stated." This pleading requirement applies to plaintiffs alleging claims for damages under the Privacy Act. Cooper, 566 U.S. at 295 (noting that "special damages . . . must be specially pleaded and proved"); Richardson v. Bd. of Governors of Fed. Reserve Sys., 288 F. Supp. 3d 231, 236 (D.D.C. 2018); Doe v. United States, No. 16-CV-00071-FJG, 2017 WL 3996416, at *4 (W.D. Mo. Sept. 11, 2017) (concluding that Privacy Act plaintiffs must "specifically plead their special damages"). "An allegation of special damages is sufficient when it notifies the defendant of the nature of the claimed damages even though it does not delineate them with as great precision as might be possible or desirable." Sufficiency of Pleading Special Damages, 27 Fed. Proc., Lawyers. Ed. § 62:157. Although a plaintiff need not state the precise dollar amount of damages sought, "the pleadings must demonstrate an actual pecuniary loss." Id.; see also Galarneau v. Merrill Lynch, Pierce, Fenner & Smith Inc., 504 F.3d 189, 203-04 (1st Cir. 2007), as amended (Nov. 30, 2007) (observing that plaintiff alleging special damages must "allege . . . her economic injuries").

Accordingly, courts routinely dismiss claims for damages under the Privacy Act that fail to allege any discernible pecuniary injury. Richardson, 288 F. Supp. at 238; Welborn v. Internal Revenue Serv., 218 F. Supp. 3d 64, 82-83 (D.D.C. 2016) (dismissing Privacy Act

claim because plaintiff failed to allege "actual pecuniary or material damage"), appeal dismissed, No. 16-5365, 2017 WL 2373044 (D.C. Cir. Apr. 18, 2017); Chichakli, 203 F. Supp. 3d at 57-58; Ramey v. Comm'r Internal Revenue Serv., No. 1:14-CV-225, 2015 WL 4885234, at *5 (N.D.W. Va. Aug. 14, 2015) (dismissing Privacy Act claim because plaintiff failed to "allege any facts to support an adverse effect with actual damages"), report and recommendation adopted sub nom. Ramey v. Comm'r of Internal Revenue Serv., No. 1:14CV225, 2015 WL 7313873 (N.D.W. Va. Nov. 20, 2015); Young v. Tryon, 12-CV-6251-CJS-MWP, 2013 WL 2471543, at *6-7 (W.D.N.Y. June 7, 2013); Iqbal v. F.B.I., No. 3:11-CV-369-J-37JBT, 2012 WL 2366634, at *6 (M.D. Fla. June 21, 2012) (dismissing Privacy Act claim because complaint did not allege "some pecuniary harm").

Here, Berry alleges that he is entitled to actual damages, but does not specifically state the actual damages he seeks. Moreover, Berry does not allege that he suffered any pecuniary loss that could support an award for actual damages under the Privacy Act. The only harm that Berry appears to allege in his second amended complaint is that he and his parents were confused by Hastbacka's voicemail. This allegation, however, is the type of emotional harm for which damages are not recoverable under the Privacy Act. Because Berry has failed to allege any pecuniary harm that would entitle him to the actual damages he seeks, he has not alleged a plausible claim for relief under the Privacy Act.

Therefore, Berry's claim under the Privacy Act in Count I must be dismissed.[2]

B. Count II

In Count II, Berry brings a Privacy Act claim under 552a(i), the Privacy Act's criminal penalties provision. Defendants contend that this claim must be dismissed because 552a(i) contains no private right of action that would enable Berry to bring a lawsuit to enforce its provisions. Berry does not respond to the FBI's argument that he is not authorized to bring suit under § 552a(i).

Berry's claim under § 552a(i) fails for two reasons. First, although Berry's claim is brought under § 552a(i), the criminal penalties provision of the Privacy Act, it does not request that the court impose any of the remedies provided in that provision. Rather, Count II seeks actual damages under § 552a(g)(4). As discussed above, however, Berry has failed to allege any

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[2] Berry contends that he is at the very least entitled to the $1,000 minimum in damages provided by the Privacy Act because there is no dispute that the FBI violated the Act. Berry is mistaken. In interpreting the civil remedies provision of the Privacy Act, the Supreme Court has held that the provision "authorizes plaintiffs to recover a guaranteed minimum award of $1,000 for violations of the Act, but only if they prove at least some 'actual damages.'" Cooper, 566 U.S. at 295 (emphasis added) (citing Doe v. Chao, 540 U.S. 614, 620 (2004)). Because Berry has failed to allege any actual damages, he is not entitled to the statutory minimum damages of $1,000.

pecuniary harm that could serve as a basis for actual damages.

Second, to the extent Berry does seek the criminal penalties set forth in § 552a(i), his claim fails because the Privacy Act does not contain a private right of action allowing a private citizen to impose the criminal penalties set forth in that provision. Generally, where a criminal prohibition contains no express private right of action, courts have been reluctant to infer one. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 190 (1994) ("We have been quite reluctant to infer a private right of action from a criminal prohibition alone. . . ."). Consistent with this principle, courts have concluded that the Privacy Act does not contain a private right of action that would allow litigants to pursue the criminal remedies in § 552a(i). See Unt v. Aerospace Corp., 765 F.2d 1440, 1448 (9th Cir. 1985) ("Appellant's attempt to state a claim . . . under [§ 552a(i)(3)] . . . is futile. This section provides for criminal penalties only, and generates no civil right of action."); Ashbourne v. Hansberry, 302 F. Supp. 3d 338, 346 (D.D.C. 2018); Hills v. Liberty Mut. Ins., No. 14-CV-0328S, 2015 WL 1243337, at *2 (W.D.N.Y. Mar. 18, 2015). For this reason, Berry's claim under this provision fails as a matter of law.

Accordingly, the court dismisses Berry's claim under § 552a(i).

II. Bivens 4th Amendment Claim (Count III)

Berry alleges that Hastbacka is individually liable under Bivens, 403 U.S. at 388, which recognizes "an implied private right of action for damages against federal officers alleged to have violated a citizen's constitutional rights." Casey, 807 F.3d at 400. Berry's Bivens claim is premised on the allegation that Hastbacka's conduct violated his Fourth Amendment rights. Specifically, Berry alleges that Hastbacka illegally searched for and obtained information about him and his family. Berry also alleges that Hastbacka conducted an illegal search when he called his parents and left them a voicemail inquiring about him.

Defendants move to dismiss Berry's Bivens claim, arguing that Berry has failed to allege a constitutional violation that could support such a claim.[3] In addition, defendants assert that Hastbacka is entitled to qualified immunity.

A. Fourth Amendment Violation

Defendants assert that Berry has failed to allege a constitutional violation. In support, they argue that Berry does not have standing to bring a claim on behalf of his parents, leaving a voicemail is not a violation of

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[3] Defendants first raised the argument that Berry failed to allege a constitutional violation in their reply. Doc. no. 39 at 2-4. As Berry did not object to defendants raising this argument in their reply, and Berry addressed this issue in his objection and his surreply, the court will consider whether his complaint states a constitutional violation.

the Fourth Amendment, and the complaint's allegation that Hastbacka illegally obtained information about Berry and his family is speculative. In response, Berry argues that he had an expectation of privacy in the information that Hastbacka obtained.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." United States v. Rasberry, 882 F.3d 241, 246 (1st Cir. 2018) (quoting U.S. Const. amend. IV). "To prevail on a claim that a search or seizure violated the Fourth Amendment, a [party] must show as a threshold matter that he had a legitimate expectation of privacy in the place or item searched." United States v. Aiken, 877 F.3d 451, 453 (1st Cir. 2017) (quoting United States v. Battle, 637 F.3d 44, 48 (1st Cir. 2011)). To make such a demonstration, the party must show "both a subjective expectation of privacy and that society accepts that expectation as objectively reasonable." Id. (internal quotation marks omitted).

In addition, "Fourth Amendment rights are personal rights which may not be vicariously asserted." Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 (2014) (internal quotation marks omitted). Although courts often refer to this issue as one of standing, "the Supreme Court has made clear 'that [this] definition of Fourth Amendment rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.'" United States v. Bain, 874 F.3d 1, 13 (1st Cir. 2017), cert. denied, 138 S. Ct. 1593 (2018) (quoting Rakas v. Illinois, 439 U.S. 128, 140

(1978)). The Fourth Amendment's standing principle is embodied in the requirement that a party claiming a Fourth Amendment violation must demonstrate that he, and not someone else, had a legitimate expectation of privacy in the area or thing searched. See Byrd v. United States, 138 S. Ct. 1518, 1526 (2018).

1. Information about Berry and his parents

Berry alleges that Hastbacka violated his Fourth Amendment rights when he searched for and obtained Berry's parents' telephone number and Berry's unlisted telephone number. Defendants argue that the allegations concerning this search are too speculative to plead a Fourth Amendment violation. In support, they observe that Berry's parents' number might have been published and that Berry does not allege that Hastbacka ever called him. In response, Berry argues that he possesses a legitimate privacy interest in information about himself and his family.

Here, Berry's second amended complaint fails to allege any details concerning the purported search that Hastbacka undertook to obtain the relevant information. The most that Berry alleges is that Hastbacka "obtained the identity and contact information of [his] parents through some manner of search." Doc. no. 34 at ¶ 52. This allegation is simply too vague to plead that Hastbacka violated Berry's Fourth Amendment rights. Absent any allegations concerning how Hastbacka obtained the information at issue, there is no factual basis in the complaint to infer that Hastbacka

searched an area or item in which Berry maintained an expectation of privacy.

Nevertheless, Berry appears to argue that he has an expectation of privacy in the information at issue, regardless of how it was obtained. In other words, Berry appears to argue that any means through which Hastbacka obtained the information at issue constitutes an illegal search under the Fourth Amendment. Berry is mistaken. Courts have consistently held that law enforcement may obtain basic information contained in a person's telephone records, such as his telephone number, from a third party. See Smith v. Maryland, 442 U.S. 735, 748 (1979) (defendant has no expectation of privacy in telephone company's records showing what phone numbers he dialed); United States v. Bynum, 604 F.3d 161, 164 (4th Cir. 2010) (defendant has no expectation of privacy in phone subscriber information including his telephone number); United States v. Hudson, 15-CR-3078, 2016 WL 1317090, at *2 (D. Neb. Feb. 19, 2016) ("Under the third-party doctrine, courts have consistently held that individuals lack a reasonable expectation of privacy in basic telephone records."); United States v. Sanford, 12-CR-20372, 2013 WL 2300820, at *1 (E.D. Mich. May 24, 2013) ("[A] cell phone number fits into the category of information that is not considered private and does not implicate the Fourth Amendment.").

This principle applies even when law enforcement acquires information about a person's unlisted telephone number. United States v. Ahumada-Avalos, 875 F.2d 681, 683 (9th Cir. 1989) (concluding that

government did not violate Fourth Amendment by obtaining defendant's unlisted telephone number from telephone company without warrant); In re Cell Tower Records Under 18 U.S.C. 2703(D), 90 F. Supp. 3d 673, 675 (S.D. Tex. 2015); United States v. Solomon, 02-CR-385, 2007 WL 927960, at *3 (W.D. Pa. Mar. 26, 2007). Therefore, Berry's allegation that Hastbacka acquired his or his parents' phone number is not enough, standing on its own, to plausibly plead a violation of his Fourth Amendment rights.

Nor does Riley v. California, 134 S. Ct. 2473 (2014), a case on which Berry relies, alter this conclusion. In Riley, the Supreme Court held that an officer could not search the contents of an arrestee's cell phone pursuant to the search incident to arrest exception to the Fourth Amendment's warrant requirement. Id. at 2485. In doing so, the Supreme Court reasoned that there were elevated privacy interests implicated when police search the contents of a cell phone, which can contain vast amounts of personal data. Id. at 2489-90. Riley is inapplicable here because Berry does not allege that Hastbacka searched the contents of his cell phone-or any other item or area in which he had an expectation of privacy-to obtain the information at issue.[4]

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[4] Berry also cites United States v. Jones, 565 U.S. 400, 404 (2012). In Jones, the Supreme Court held that the government violated the Fourth Amendment when agents, without a warrant, installed a GPS tracker on a defendant's automobile to monitor his movements. Id. Jones is not applicable here because Berry does not allege that Hastbacka used GPS technology or tracked his movements.

Berry also cites Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 158 (2004) to support the proposition that he has a privacy interest in information about his family. In Favish, the Supreme Court concluded that the Freedom of Information Act "recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images." Favish, 541 U.S. at 170. Favish is inapplicable here because it concerned the privacy interests recognized under the Freedom of Information Act. As the Supreme Court noted, the "statutory privacy right [recognized in FOIA] . . . goes beyond the common law and the Constitution." Id. at 170. For this reason, Favish does not support Berry's Fourth Amendment claim.

Finally, Berry cites several cases that discuss the sanctity of familial relationships in other legal contexts. Doc. no. 40 at 3. Those cases, however, do not hold that a person has a reasonable expectation of privacy under the Fourth Amendment in information about his family. Therefore, those cases are inapplicable here.

Accordingly, Berry has failed to plausibly allege that Hastbacka violated his Fourth Amendment rights by acquiring information about him or his parents.

2. Call to Berry's Parents

Berry also argues that Hastbacka conducted an illegal search under the Fourth Amendment when he called Berry's parents and inquired about him. Berry contends that Hastbacka's conduct constituted a

search in violation of the Fourth Amendment because it "was an intrusion upon 'a constitutionally protected area in order to obtain information.'" Doc. no. 34 at ¶ 57.

Defendants argue that Berry has failed to allege a violation of the Fourth Amendment arising out of Hastbacka's voicemail for two reasons. First, the conduct alleged falls short of an encounter that would trigger the protections of the Fourth Amendment. Second, Hastbacka has failed to allege that he has any expectation of privacy in his parents' telephone account and therefore does not have standing to raise a Fourth Amendment claim based on Hastbacka's call to that line. In response, Berry contends that he has alleged a violation of the Fourth Amendment based on Hastbacka leaving the voicemail at issue.

Not all encounters between law enforcement officers and private citizens invoke the protections of the Fourth Amendment. See United States v. Smith, 423 F.3d 25, 28 (1st Cir. 2005). For example, "[p]olice may approach citizens in public spaces and ask them questions without triggering the protections of the Fourth Amendment." United States v. Young, 105 F.3d 1, 6 (1st Cir. 1997). Such conduct "falls short of triggering Fourth Amendment protections when, from the totality of the circumstances, [the court] determine[s] that the subject of any police interaction would have felt free to terminate the conversation and proceed along his way." Id. In other words, an "encounter will not trigger Fourth Amendment scrutiny unless it loses its

consensual nature." Florida v. Bostick, 501 U.S. 429, 434 (1991).

Similarly, "[a] policeman may lawfully go to a person's home to interview him," United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990), "because '[i]t is not improper for a police officer to call at a particular house and seek admission for the purpose of investigating a complaint or conducting other official business,'" United States v. McKenzie, No. CR 08-1669 JB, (D.N.M. Apr. 13, 2010), aff'd, 532 F. App'x 793 (10th Cir. 2013), and aff'd, 532 F. App'x 793 (10th Cir. 2013) (quoting 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 2.3(b), at 475 (3d ed. 1996)). Such an encounter at a person's residence "is no longer consensual if the officer persists in the encounter after the homeowner directs him or her to leave, or otherwise indicates that the officer is not permitted on the homeowner's property." McKenzie, 2010 WL 1795173, at *12 (citing Rogers v. Pendleton, 249 F.3d 279, 28890 (4th Cir. 2001)).

Here, the conduct Berry alleges does not rise to the level of a Fourth Amendment violation. Hastbacka's unsuccessful effort to contact Berry's parents is far less intrusive than the types of consensual encounters discussed above that do not trigger the protections of the Fourth Amendment. Hastbacka was not physically present at Berry's parents' home. Further, the complaint alleges no facts from which the court could infer that Berry's parents were not free to ignore Hastbacka's voicemail. Therefore, Berry has failed to

allege that Hastbacka violated the Fourth Amendment by leaving the voicemail on his parents' telephone line.

In any case, even if Hastbacka's voicemail could be construed as a search that violates the Fourth Amendment, the second amended complaint does not allege facts demonstrating that such a "search" violated Berry's constitutional rights. In other words, there are no allegations in the second amended complaint from which this court could infer that Berry had a legitimate expectation of privacy in his parents' telephone line or residence. Indeed, Berry appears to allege facts contradicting the presence of any such interest. In his second amended complaint, Berry alleges that he has not lived with his parents since 1998, that since then he has maintained a separate primary home address, and that he and his parents "live nowhere near" each other. Doc. no. 34 at ¶ 20. Accordingly, Hastbacka has not alleged that he has standing to challenge the purported violation of his parents' Fourth Amendment rights.

For these reasons, Berry's Fourth Amendment claims must be dismissed.

B. Qualified Immunity

Because the court has concluded that Berry failed to plead a constitutional violation, it need not consider whether qualified immunity applies here.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss (doc. no. 35) is granted. The clerk of court shall enter judgment accordingly and close the case.

SO ORDERED.

/s/ Landya McCafferty
Landya McCafferty
United States District Judge

July 17, 2018

cc: Counsel and Pro Se Party of Record

Other Orders/Judgments
1:17-cv-00143-LM Berry v.
Federal Bureau of Investigation et al

U.S. District Court

District of New Hampshire

Notice of Electronic Filing

The following transaction was entered on 7/24/2017 at 3:52 PM EDT and filed on 7/24/2017

Case Name: Berry v. Federal Bureau of Investigation et al

Case Number: 1:17-cv-00143-LM

Filer:

Document Number: 12

Docket Text:

REPORT AND RECOMMENDATION re [8] Motion for Preliminary Injunction, recommending that the district judge should deny the motion for a preliminary injunction (Doc. No. 8). Any objections to this Report and Recommendation must be filed within fourteen days of receipt of this notice. Follow up on Objections to R&R on 8/7/2017. The court only follow up date DOES NOT include 3 additional days that may apply per FRCP 6(d) and FRCrP 45(c). So Ordered by Magistrate Judge Andrea K. Johnstone.(de)

1:17-cv-00143-LM Notice has been electronically mailed to:

Robert J. Rabuck rob.rabuck@usdoj.gov, CaseView.ECF@usdoj.gov, david.plourde@usdoj.gov, faye.guilmette@usdoj.gov, francine.conrad@usdoj.gov, judy.prindiville@usdoj.gov, susanne.alexander@usdoj.gov, USANH.ECFCivil@usdoj.gov

1:17-cv-00143-LM Notice, to the extent appropriate, must be delivered conventionally to:

Jason T. Berry
37 Fenton Ave
Laconia, NH 03246

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStampID=1045603718 [Date=7/24/2017] [FileNumber=1719558-0] [89c7bba16b15890d7578029903c12cffcbdcd35e5abe64 35e173b12e0bdbafb8de223c3102c6a3ed63e2fa67392d dc22072722fc507f7a81f4de54f7ae880551]]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Jason T. Berry

v. Civil No. 17-cv-143-LM

Federal Bureau of
Investigations and Mark
Hastbacka, FBI Special Agent

REPORT AND RECOMMENDATION

Before the court is the motion for a preliminary injunction (Doc. No. 8) filed by plaintiff, Jason T. Berry. That motion has been referred to the undersigned magistrate judge for a report and recommendation. See July 5, 2017 Order.

Background

Plaintiff, who does not live with his parents, asserts he submitted a request for information under the Freedom of Information Act ("FOIA"), addressed to the Bedford, New Hampshire FBI office on February 23, 2017. See Compl. ¶¶ 8, 16, 20 (Doc. No. 1). Plaintiff did not mention his parents or provide their contact information in that FOIA request. See Compl. ¶ 26.

Plaintiff asserts that the following day, defendant FBI Special Agent Mark Hastbacka left a voicemail on plaintiff's parents' home phone, relating to plaintiff, asking them to return Hastbacka's call. See Compl. ¶ 19 (Doc. No. 1). Plaintiff asserts that after his parents told him about that voicemail, plaintiff wrote

letters to Hastbacka several times in February and March 2017, asking Hastbacka to reply to plaintiff in writing. See Compl. ¶ 24 (Doc. No. 1). Hastbacka responded to some of that correspondence by providing his business card and a printout of directions for contacting the FBI Records Division. See Compl. ¶ 24 (Doc. No. 1). Additionally, plaintiff asserts that he sent Hastbacka a "memo" on March 9, 2017 inquiring how and why Hastbacka had left a voicemail with his parents, in regards to plaintiff. Compl. ¶ 26 (Doc. No. 1); Mar. 9, 2017 Ltr. (Doc. No. 8-2). Hastbacka did not respond to the March 9 correspondence and has had no further contact with plaintiff. Compl. ¶ 27 (Doc. No. 1).

Plaintiff filed this action on April 18, 2017, seeking damages and injunctive relief for defendants' alleged violations of the Privacy Act and for Hastbacka's alleged invasion of plaintiff's private affairs. Plaintiff asserts that Hastbacka's conduct, including leaving a voicemail message on plaintiff's parents' phone, has caused him emotional distress.

Plaintiff filed the instant motion for a preliminary injunction (Doc. No. 8) after defendants moved to dismiss the complaint for failure to state a claim.[1] Plaintiff has requested a preliminary injunction enjoining the FBI and Hastbacka, defendants in this action, from having any further contact with plaintiff's family

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[1] Defendants' motion to dismiss (Doc. No. 7) remains pending. Plaintiff has objected to that motion (Doc. No. 11). The deadline for defendants to file a reply to that objection is July 28, 2017, and a surreply may be filed by August 4, 2017. See July 20, 2017 Order.

while this action is pending. Defendants have objected (Doc. No. 10) to the motion for a preliminary injunction.

Discussion

I. Preliminary Injunction Standard

"'A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" Glossip v. Gross, 135 S. Ct. 2726, 2736 (2015) (citation omitted). The likelihood of success and irreparable harm are the factors that weigh most heavily in the analysis. See Esso Std. Oil Co. v. Monroig-Zayas, 445 F.3d 13, 18 (1st Cir. 2006); see also Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011) ("'[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered'" (citation omitted)). The burden of proof is on the movant. See Esso Std. Oil Co., 445 F.3d at 18.

The court may rule on a motion for a preliminary injunction on the papers if it has before it "'adequate documentary evidence upon which to base an informed, albeit preliminary conclusion,'" and the parties have been afforded "'a fair opportunity to present relevant facts and arguments to the court, and to

counter the opponent's submissions.'" Campbell Soup Co. v. Giles, 47 F.3d 467, 470-71 (1st Cir. 1995) (citations omitted). The parties have had such an opportunity to date, and an additional opportunity is provided by the objection period that follows the issuance of this Report and Recommendation.

II. Irreparable Harm

"A finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store." Charlesbank Equity Fund II, Ltd. P'ship v. Blinds To Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004). Plaintiff seeks to enjoin the FBI and Hastbacka from contacting his parents during this lawsuit. Plaintiff bases that request on allegations that Hastbacka left a voicemail on plaintiff's parents' phone once, prior to the date when this lawsuit was filed, without plaintiff providing Hastbacka with his parents' contact information. "The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again – a 'likelihood of substantial and immediate irreparable injury.'" City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983); see also Asociasion De Periodistas De P.R. v. Mueller, 680 F.3d 70, 84-85 (1st Cir. 2012).

Assuming, without deciding, that Hastbacka's conduct could give rise to liability under any federal law, plaintiff's allegations do not suggest that there is any

likelihood of such conduct recurring while this lawsuit is pending. Plaintiff's fears about further contacts between defendants and plaintiff's parents are entirely speculative. Plaintiff has not grounded his request for relief in any evidence showing a likelihood that such contacts will happen again unless this court issues the requested injunction. Accordingly, plaintiff has not carried his burden of establishing irreparable harm, and for that reason, the district judge should deny the motion for a preliminary injunction (Doc. No. 8).

Conclusion

For the foregoing reasons, the district judge should deny the motion for a preliminary injunction (Doc. No. 8). Any objections to this Report and Recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). The fourteen day period may be extended upon motion. Failure to file objections within the specified time waives the right to appeal the district court's order. See Santos-Santos v. Torres-Centeno, 842 F.3d 163, 168 (1st Cir. 2016).

/s/ Andrea K. Johnstone
Andrea K. Johnstone
United States
Magistrate Judge

July 24, 2017

cc: Jason T. Berry, pro se
Robert J. Rabuck, Esq.

United States Court of Appeals
For the First Circuit

No. 18-1926, No. 18-1954

JASON T. BERRY

Plaintiff - Appellant

v.

FEDERAL BUREAU OF INVESTIGATION;
AGENT MARK HASTBACKA, Special Agent,
Federal Bureau of Investigation,
in his individual and official capacities,

Defendants - Appellee

APPELLANT'S SUPPLEMENTAL MOTION UNDER RULE 60(B)2 TO MARCH 22ND, 2021 MOTION

On January 29th, 2021, the Court entered judgment denying the appellant's petition for re-hearing. The appellant subsequently filed a motions for reconsideration under Rule 60(B)2 for new evidence on March 13th, and March 22nd, 2021, which are currently pending judgment. Under Rule 27 the appellant hereby files a motion under Federal Rule of Civil Procedure 60(B)2 displaying further recent evidence of his claims that arose subsequent to the January 29th dismissal and (or) the recent March motions. The information in this motion reinforces the appellant's original Fourth Amendment claims and FOIA claims regarding over-reach and inappropriate investigatory actions in response to appellant's exercise of legal

procedures and legal rights. Specifically, the supplemental or "new" information the appellant petitions to submit as supplement to his recent motion displays evidence of more possible intrusion or delay into his mail by a third party even to the present day. In addition, appellant petitions for reconsideration of the circumstances described in the "March 1st, 2017" memo to the FBI office in Bedford, N.H., outlined in Exhibit A from the previous motion. Appellant asserts that the circumstances, when considered in totality, display that either appellee Agent Mark Hastbacka or another representative of the FBI took the unprecedented and intrusive step of actually *visiting the appellant's home* to return the original FOIA request.

I. PRESENT MAIL DIFFICULTIES AND PREVIOUS EVIDENCE

The appellant included with his March 22nd motion a memo from the United States Postal Service (USPS) from 2017 confirming that some third party law enforcement entity was intruding into the processing of his mail subsequent to his legal actions. These difficulties persist to the present day, and appellant cites historical instances of the same issues.

A. The Appellant indicated in his previous March 22nd memo that he had sent out a loan payment at the start of March that tracking indicated was received on March 5th ahead of deadline, but appellant still received a notice on March 20th that "as of March 13th, 2021" the loan was "past due". Likewise, this past

week the appellant sent out another monthly loan payment via Priority Mail Express – Next-day shipping. The appellant received a notice dated around April 4th that the loan payment was still due. As of the afternoon of April 5th, 2021, the amount of the check sent for payment had still not been cashed. There is still a theoretical chance that this timely payment will be acknowledged and processed on time. However, at present, this appears to be evidence that another important payment this month is inexplicably delayed after passing through some "third party" for "law enforcement purposes" as revealed by the USPS in 2017. (March 22nd, 2021 Motion, Exhibit B).

B. In June of 2020, the appellant ordered a copy of a non-fiction book about the "Financial Resource Mortgage, Inc." scandal in New Hampshire by the late Author Mark Connolly. The book is about an investigation into financial crimes in New Hampshire, and the effects of the crimes on the victims. Both State and Federal authorities investigated the crimes. Appellant received a notice that it would be delivered on July 7th, 2020 and then subsequently received notice it had been "delayed". The book never arrived, having been apparently sent back. The appellant ordered another copy of the same book on August 2nd, 2020. As of August 10th, 2020, the book had not arrived and subsequently never arrived at all. The appellant never received the copy of this book despite ordering it twice in the Summer of 2020. On August 20th, 2020, appellant filed his request for rehearing *en banc* within the 45 day deadline for response.

C. Exhibit A to the recent March 22nd, 2021 motion specifically describes a "March 1st, 2017" memo from the appellant to appellee Agent Mark Hastbacka. That 2017 memo stated that:

> "Yesterday afternoon, February 28th, 2017, I found the original Priority Mail Express Envelope I had sent paid for on February 23rd, 2017 in between the doors at my home address. The original Priority Mail envelope was opened, and the original FOIA request from February 23rd, 2017 was inside. The original envelope was opened and the original request was in the opened and unsealed Priority Mail Express envelope, along with your business card.. I have included with this letter a scanned picture of the opened and unsealed original Priority Mail Express Envelope containing the opened FOIA Request for Responsive Records from February 23rd, 2017 that was left in between my doors. By all appearances, my original request was opened and unsealed, and then returned. . . ."

In Exhibit A to the recent memo, appellant reiterated his original question to appellee Hastbacka as to why the FOIA request was "sent back in that manner with the U.S. Postal Service." However, the appellant officially asserts these circumstances recently described deserve reconsideration. Appellant has never before or after this incident received mail that has been opened and unsealed with items added by the person it was sent to. It is also "common knowledge" that the USPS does not send or process mail that is

opened and unsealed. An opened and unsealed envelope or package is *prima facie* evidence that it was not delivered by the U.S. Postal Service. Appellant asserts with this motion that this aforementioned circumstance from recently filed "Exhibit A" deserves reconsideration as evidence of further intrusion by the appellees.

The appellant had first concluded in 2017 that this item was somehow sent back through the Postal Service. However, further consideration of this circumstance leads to the conclusion that the evidence displays that either Agent Hasbacka himself or another third party from his office actually *visited the appellant's home* and left the original request between his doors. The implication that a member of or representative of the FBI actually *visited* the home of the appellant in response to his FOIA request is troubling in and of itself, and appellant asserts this does not even merit further elaboration as to why it is troubling. Standard procedure is to send back a written response by mail. It is evidence of another unjustified intrusion into the appellant's private life.

a. PROXIMITY TO LAWSUIT AND PRIOR LITIGATION

It is important to reaffirm that the original FOIA request specified that the information requested was relevant to "pending legal matters". The appellant had recently filed a lawsuit naming a member of an FBI task force, which in turn was an extension of years of

litigation related to appellant's legal actions. These actions therefore took place within close temporal proximity following a lawsuit naming an FBI agent, and followed years of related litigation.

II. CURRENT PUBLIC INTEREST IN FBI "TARGETING"

The appellant stated in his April 9th, 2020 motion that the "problematic official actions taken by the defendants are more relevant, timely, and critical than they were when the suit was filed in early 2017". This point is affirmed in the present day. The evidence in all the pleadings and submissions in this case display that the appellant and his family have continued be subject to significantly more scrutiny and assertive actions than criminals or violent individuals. The March 22nd motion displays evidence of official intrusion into the appellant's privacy that occurred contemporaneous to a violent individual with a history of assault acquiring an assault weapon without any official action or prevention. One day after the appellant's March 22nd motion, on March 23rd, a violent individual with a criminal history already known to the FBI killed several people in a mass shooting. According to an ABC News report from March 23rd he "bought the weapon on March 16th, just six days before the attack". The ABC News article revealed that in 2018 the criminal "was found guilty of assaulting a fellow student". The New York Times reported on Tuesday, March 23rd that the criminal was directly connected to another person who was under investigation by the FBI.

It is a matter of record that the appellant has no criminal history or history of violence whatsoever. (See Exhibit A, Affidavit to March 22nd Motion) Yet, during the same time period as the appellant was unable to successfully utilize the Postal Service without obstruction for routine matters like paying bills, a man with a criminal record was acquiring an assault weapon, without any obstruction, that he would soon use to commit murder. These circumstances display evidence that during these recent weeks the appellant was being targeted at least through his routine use of the mail, while a criminal with a history of violence and assault who had just bought an assault weapon was not being "targeted" or scrutinized at all.

As the aforementioned April 9th, 2020 motion referenced:

> "here are 4 recent significant and publically recognized investigations, 3 that establish robust political targeting by government agencies, and 1 from last month that concludes known terrorism suspects were routinely ignored while the aforementioned political investigations ran concurrently. It is troubling and a matter of public interest that the FBI put so much unjustified scrutiny into the appellant's private life after he took legal actions involving an FBI Task Force member, while known terrorists and violent offenders were consistently overlooked at the expense of their eventual victims."

III. CONCLUSION

The record and pleadings in this case display almost a decade of intrusions and difficulties that continue to today's date. In response to a simple request for information in 2017, the appellees took the unjustified *reflexive* actions of not only locating and contacting the appellant's family, but also visiting his home address and leaving the request in between his doors. The fact of physically returning the request to appellant's home address, discussed in the affidavit accompanying the previous motion, deserves deeper consideration. Very shortly after his request for records under the law, the appellees had made it known to the appellant that they knew who his parents were and where they lived, and that they had been to his home address. As stated in the District Court pleadings, any "unexplained and unauthorized invasion of this part of an individual's existence, particularly by an agent of an agency with vast and prolific powers and authorities, in relation to contested matters in which the individual has sued one of its members, is at the least chilling, and if unresolved, potentially horrifying". (District Court Document Number "DCDN" 8)

Respectfully Submitted,

Jason T. Berry, Pro Se
37 Fenton Avenue
Laconia NH 03246

Dated: April 6th, 2021

CERTIFICATE OF SERVICE

I certify that on this day of April 6th, 2021 a copy of this Petition was delivered to the Appellees through Counsel, postage prepaid through priority mail express, to the US Attorney, Civil Process Clerk, 53 Pleasant Street, 4th Floor, Concord NH 03301

Jason T. Berry, Pro Se

United States Court of Appeals
For the First Circuit

No. 18-1926, No. 18-1954

JASON T. BERRY

Plaintiff - Appellant

v.

FEDERAL BUREAU OF INVESTIGATION;
AGENT MARK HASTBACKA, Special Agent,
Federal Bureau of Investigation,
in his individual and official capacities,

Defendants - Appellee

PLAINTIFF'S SUPPLEMENTAL MOTION UNDER RULE 60(B)2 TO MARCH 13TH, 2021 MOTION

On January 29th, 2021, the Court entered judgment denying the appellant's petition for re-hearing. The appellant subsequently filed a motion for reconsideration on March 13th, 2021, which is currently pending judgment. Under Local Rule 27 the appellant hereby files a motion under Federal Rule of Civil Procedure 60(B)2 displaying evidence of his claims that arose subsequent to the January 29th dismissal and (or) the recent March 13th motion. The motion displays further intrusions into the appellant's privacy that merit grounds for relief under his Fourth Amendment claims, citing evidence from previous to litigation and after the recent dismissal. Specifically, the appellant cites three distinct obstructions in his use of the U.S. mail that occurred subsequent to the January 29th

dismissal, and a 2016 letter confirming some form of interdiction into the appellant's mailing process by a third party whose identity was restricted. (Exhibit A, B) The appellant asserts that based on the facts of this case and the mail obstructions occurring right after a favorable legal outcome for the FBI, there are conclusive indications that the intervening party is the FBI, and that this question should be open for judicial inquiry and trial.

I. RELEVANT BACKGROUND

The appellant has consistently articulated the likelihood of further intrusions into the life of he and his family if the offenses cited in his litigation are not addressed. On July 3rd, 2017, the appellant requested an Injunction prohibiting the FBI from contact as "guarantee that his family will not be subjected to any further contact, potential scrutiny, or burden". These concerns were elaborated on in his September 2017 request for preliminary injunction:

> "It is still unknown and unexplained how and why Agent Mark Hastbacka obtained the identities and personal information of the Plaintiff's family, and whether or not he already had it, and for what reason. It is also an open question as to, aside from personal information regarding the Plaintiff's parents, what other personal information Agent Hastbacka or the FBI may have at their disposal (Identifying information about other family and friends, Plaintiff's employment information,

> Plaintiff's financial and banking information, etc.). There is currently nothing restricting Agent Hastbacka or the FBI from further contact with the Plaintiff's family, even as a concurrent legal action against a fellow member of the FBI proceeds, a fact which continues to cause the Plaintiff concern and distress." The Appellant further stated in his August 2020 motion that "it is not unlikely that the appellant's routine life events such as daily employment activity, banking activity, I.R.S. tax filings, and car inspections and registrations may be occurring under some form of FBI scrutiny". As the appellant predicted, these previously stated concerns continue to be validated, even as of today's date.

II. RELEVANT LEGAL STANDARDS

The Supreme Court definitively established in Ex Parte Jackson, 96 U.S. 727, 733 (1877) that the "constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers thus closed against inspection" and that guarantee still holds for such papers "[w]hilst in the mail". Thus "letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection" under the Fourth Amendment and "can only be opened and examined under like warrant". Id. Any letter or "other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively

unreasonable". U.S. v. Jacobsen, 466 U.S. 109, 114 (1984). The Fourth Amendment establishes the requirement of "a warrant before examining the contents of such a package" that also applies to the ability to "lawfully seize such a package". (Id) Any individual has "a reasonable privacy interest in mail" in which they are "listed as addressee or addressor". U.S. v. Stokes, 829 F.3d 47, 52 and 53 (1st Cir.2016) The appellant has never at any time been arrested, charged, indicted, or served any warrant regarding any legal matter that might justify intrusion into his mail.

III. 2016 U.S. MAIL ISOLATION AND CONTROL TRACKING REQUEST

In May of 2013 the appellant was required to write an incident report which involved the conduct of FBI Task Force Member Thomas Harrington, mentioned frequently in the original complaints and briefings. This incident report was later filed as evidence in the "pending legal matter" referenced as the reason for the original February 2017 FOIA request to the Bedford Office of the FBI. (District Court Document 34) Starting in July of 2013, appellant started to experience unexplained delays and obstructions in mailing. (Exhibit A) Appellant documented this in September 2013, as it began to effect his legal filings in the course of his duties at that time. (ID) This phenomena continued. (ID) Appellant's original brief for appeal stated he "had sent previous and similar requests under the FOIA to the Record/Information Dissemination Section of the FBI in Winchester, Virginia in May of 2016, and

received no response". Appellant sent a May 2016 FOIA request to the U.S. Postal service citing evidence of mailing delays and obstructions and inquiring if his mail was going through the Mail Isolation Control and Tracking Program subsequent to his litigation. (Exhibit B) The response was vague, but in the affirmative. (Exhibit B) The difficulties in mailing continued in the 2017 correspondences with Agent Hastbacka, which was referenced in those correspondences. (Exhibit A) This phenomena continued. The most significant concentration of these difficulties occurred directly after the recent dismissal of this case. (Exhibit A)

Incidents involving the U.S. Mail began in 2013 directly following appellant's submission of an incident report related to an FBI Task Force member. (Exhibit A) They continued into 2016, when the USPS confirmed some third-party interference in his mail. (Exhibit B) In 2017, FBI Agent Mark Hastbacka somehow had unexplained knowledge of the appellant's parent's identities and unnecessarily contacted them at their home address on their home phone. Immediately following the favorable decision for the FBI in this case at the end of January 2021, the appellant's problems with his mail increased exponentially at the same time like never before. The facts and evidence from 2013 until the present date all point toward the FBI as an active party in these issues.

IV. INCIDENTS WITH U.S. MAIL SUBSEQUENT TO JANUARY 29TH

It has been well plead that the appellant is unable to afford hiring an attorney, and at his own cost "has been proceeding, from the litigation's outset, without counsel." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007). Due to the costs of litigation, the appellant has for years been unable to afford monthly internet access. As a result, the appellant has utilized his phone in paying bills through automated telephone payment options. In discussing his claims in his recent motion, the appellant reported that "Incidentally, the appellant's cell phone has been completely disabled since the first week of February, this past month". In February of 2021, the appellant was forced to utilize U.S. mail for bill payments for the first time in years.

A. LOAN PAYMENT

As a result of the costs and expenses of litigation, the appellant took out two loans in 2017 and 2020, and has been diligent in never being late with a payment. In the first week of March the appellant sent out a payment via certified mail one week prior to payment deadline. The appellant kept a copy of the receipts, and later received a return receipt that was signed and dated in March 2021 indicating the payment was received on time. The appellant continued to observe that the check was not being processed and the payment amount remained in his bank account. On this past evening of Saturday, March 20th, 2021, the appellant received a formal notice in the mail that despite his

timely mailing of payment, "as of March 13, 2021" his loan was officially "past due". (Ironically, March 13th, 2021 is also the date of his recent motion in this case) Appellant was able to access the internet and USPS tracking indicated the payment arrived on March 5th but somehow has inexplicably never left the post office. At present, the appellant is overdue in a loan payment for the first time in his life despite diligent action and at no fault of his own. Resolution of this issue will be a further expense.

B. CREDIT CARD PAYMENT

In February, the appellant utilized certified mail to send out a monthly credit card payment well ahead of the due date. Despite this, appellant received a March 2nd, 2021 notice that his "account is past due". This situation has been recently resolved with the appellant receiving credit for his timely payment and his account was updated to reflect the same.

C. INABILITY TO RETURN AN ORDER

On the evening of January 28th, 2021, the appellant received two packages in the mail. One was an item recently ordered by the appellant. The second, though addressed to the appellant on the front of the package, was not any item ordered by the appellant. Subsequently, the appellant noticed another person's address from another state on the reverse side at the bottom of the package. On February 1st, 2021 the appellant sent back the item to the sending company via

certified mail, along with a memo indicating he did not order it and one bill of U.S. currency to account for any inconvenience. The original package with another person's address on the back was also returned at the same time. Return receipt for the package was received soon after. Surprisingly, after well over one month's time the appellant received a notice to pick up unspecified certified mail which subsequently was revealed as the same item. The certified mail was actually in the *same packaging* the appellant had returned the item in, which had clearly been opened. The exterior was marked "Attempted – Not Known" despite the fact that the package had clearly arrived somewhere, been opened and then repackaged, and the contents rearranged. The one bill of U.S. currency appeared to have been imprinted with an unexplained large red marking. Based on the appellant's career in the legal system and law enforcement background, the marking appeared to denote a "marked bill" typically used for investigatory purposes. The continued mailing of this item back to the appellant necessitated that he return it again at his own expense. There is no reasonable justification for any law enforcement or investigatory intervention in a U.S. citizen returning an item by mail that he did not order, or in a long delayed return to him of the said item when he had provided in writing that he did not order it.

V. CONCLUSION

The appellant has never had any legal charges or offenses, his legal involvement is his own ongoing

exercise of legal and constitutional protections. No reasonable citizen or jury would find any justification for years of intrusion into his ability to utilize the U.S. postal service. The present mailing difficulties have resulted in adverse financial and economic outcomes for the appellant that certainly constitute the "grave, unforseen contingencies" described as "extraordinary circumstances" in Calderon v. Thompson, 523 U.S. 538, 550 (1998) Significant adverse circumstances directly related to this case have continued to occur following the appellant's August 20th, 2020 and March 13th, 2021 motions that display further grounds for his claims and requests for relief.

Respectfully Submitted,

Jason T. Berry, Pro Se
37 Fenton Avenue
Laconia NH 03246

Dated: March 22nd, 2021

CERTIFICATE OF SERVICE

I certify that on this day of March 22nd, 2021 a copy of this Petition was delivered to the Appellees through Counsel, via express mail, postage prepaid, to the US Attorney, Civil Process Clerk, 53 Pleasant Street, 4th Floor, Concord NH 03301

Jason T. Berry, Pro Se

GENERAL AFFIDAVIT

STATE OF NEW HAMPSHIRE
COUNTY OF BELKNAP

PERSONALLY came and appeared before ire, the undersigned notary, the within named Jason Thomas Berry, who is a resident of Belknap County, State of New Hampshire, and makes his statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts, and things set forth are true and correct to the best of his knowledge:

I, Jason Thomas Berry swear under oath that I have been in ongoing litigation with state and federal authorities since 2013. I have never been arrested, charged, or indicted, or notified of any formal or informal official investigation into my conduct or personal life. In May of 2013, I was required to complete an incident report which related to the conduct of an FBI Task Force Member. Subsequently, around July of 2013, I began to experience unprecedented delays and obstructions in my use of the U.S. Mail. In September of 2013 I sent an official notice that "due to very unusual circumstances, there have been difficulties with all of my VOP's and Parole Warrants for the last 30 days or so". This was related to the mailing of these filings, and this 2013 notice is officially on the record in prior legal proceedings. Difficulties, delays, and inexplicably returned mailings continued throughout the years during litigation. In May of 2016 I outlined these difficulties and sent a FOIA request to the U.S. Postal Service, officially requesting to know whether or

not "my mail and personal communications have come under the processing and scrutiny of the Mail Isolation Control and Tracking Program". The response was in the affirmative, confirming examination of my mail "for law enforcement purposes" and that I am not entitled to any further information because that would be "invasion of the personal privacy of third parties" in law enforcement. It is important that the only legal involvement I had at this time was my own litigation.

Difficulties with mailing continued. In 2017 I officially requested documentation about my own past involvement with the FBI Safe Streets Task Force relevant to a recent lawsuit I had filed in February 2017. FBI Agent Mark Hastbacka took the unusual step of locating and contacting my parents instead of me, and my correspondences with him after that were marked by more unusual difficulties with mailing I specifically addressed these difficulties with him in those correspondences, at one point asking him on March 2017 to "clarify" why my mail to him had been "unsealed, opened, refused, and then sent back in that manner with the U.S. Postal Service". I did not receive any explanation. These difficulties with mail continued.

The most significant concentration of these difficulties occurred in the first week of February and the time period following that of this year. On the evening of January 28th, 2021, I received two packages in the mail. One was clearly an item I had recently ordered. The second, though addressed to me on the front of the package, was not any item I ordered and had another person's address from another state on the reverse side

at the bottom of the package. On February 1st, 2021 I sent back the item to the company along with a memo indicating I didn't order it and one bill of U.S. currency to account for any inconvenience. The original package with another person's address on the back was also returned at the same time. Surprisingly, after more than a month I received a notice to pick up unspecified certified mail which subsequently was revealed as the same item. The certified mail was actually in the *same packaging* I had returned the item in, which had clearly been opened. The exterior was marked "Attempted – Not Known" despite the fact that the package had clearly arrived somewhere, been opened and then repackaged, and the contents rearranged. The one bill of U.S. currency appeared to have been imprinted with an unexplained large red marking Based on my career in the legal system and law enforcement background, the marking appeared to denote a "marked bill" typically used for investigatory purposes. The return of this item to me that I had previously notified I had not purchased necessitated that I return the item again by mail at my own cost. My timely credit card and loan payments via mail during that time were also either delayed or lost inexplicably, requiring extra cost and resolution.

DATED this the 22nd day of March, 2021

/s/ Jason T. Berry
Signature of Affiant

SWORN to and subscribed before me, this 22nd day of March, 2021

/s/ Josephine B. Mcphail
NOTARY PUBLIC

[SEAL]

My Commission Expires:

11/18/2025

[LOGO] OFFICE OF THE INSPECTOR GENERAL
UNITED STATES POSTAL SERVICE

June 16, 2016

Jason T. Berry
37 Fenton Avenue
Laconia, NH 03246-3325

RE: FOIA Case No. 2016-IGFP-00331

Dear Mr. Berry:

This responds to your May 25 Freedom of Information Act (FOIA) request to the U.S. Postal Service Office of Inspector General (OIG) for a verifiable record showing when your May 14th Certified Mail was received by the OIG.

We searched the OIG mailroom records and found a responsive record containing documentation of accountable mail received by the OIG for Certified Mail with USPS tracking number 705 1660 0000 6070 2184. I am releasing the one-page document with excisions made pursuant to FOIA Exemption (7)(C), 5 U.S.C.

§ 552(b)(7)(C), which permits the withholding of records or information compiled for law enforcement purposes, the release of which could constitute an unwarranted invasion of the personal privacy of third parties. This information is not appropriate for discretionary release.

If you are not satisfied with my action on this response to your request, you may administratively appeal this partial denial in writing. However, neither the FOIA nor the Inspector General Act provides FOIA requestors appeal rights concerning how the agency processes complaints and leads it may receive. To appeal a FOIA determination, write to the attention of Gladis Griffith, Deputy General Counsel, Office of Inspector General, 1735 North Lynn Street, Arlington, VA 22209-2020, within 30 days of the date of this letter. Include a copy of your initial request and this response, as well as your reasons and arguments supporting disclosure of the information. Mark both the letter and the envelope "Freedom of Information Act Appeal."

Sincerely,

E-Signed by Paulette Poulsen
VERIFY authenticity with
eSign Desktop

P. E. Poulsen

P. E. Poulsen
Government Information Analyst

Enclosure

United State Court of Appeals
For the First Circuit

No. 18-1926, No. 18-1954

JASON T. BERRY

Plaintiff - Appellant

v.

FEDERAL BUREAU OF INVESTIGATION;
AGENT MARK HASTBACKA, Special Agent,
Federal Bureau of Investigation, in his
individual and official capacities,

Defendants - Appellee

PLAINTIFF'S MOTION FOR CONSIDERATION OF SEPTEMBER 12, 2020 MEMO AND JANUARY 29TH CLINESMITH HEARING

On January 29th, 2021, the Court entered judgment denying the appellant's petition for re-hearing, and the order was received by the appellant on the evening of February 1st, 2021. Under Federal Rule of Civil Procedure 60(b)(2), the appellant also hereby submits new evidence of claims. Additionally, the appellant cites "exceptional circumstances" necessary to "justify extraordinary relief" in "vacating the finality of a judgment". Bouret-Echevarria v. Caribbean Aviation, 784 F.3d 37, 43 and 45 (1st Cir.2015) The appellant respectfully submits this motion within the 45 day time limit allowed when a party is a United States Agency. The appellant outlines the significance of the new circumstances in the context of facts and evidence already brought forward.

I. RULE 60(B) "EXTRAORDINARY CIRCUMSTANCES" AND "NEWLY DISCOVERED EVIDENCE"

In the rules of civil law "Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment". Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988)(affirming a vacated judgment by the Court of Appeals). Rule 60(b)(2) of Civil Procedure states a court "may relieve a party" from any "final judgment" in the event of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial". An appellant motioning under Rule (60)(b)(2) is required to "explain why this evidence could not have been found, well before the entry of judgment". Karak v. Bursaw Oil Corp, 288 F.3d 15, 19 (1st Cir.2002) The recall of a previous court mandate is a power used "in reserve against grave, unforseen contingencies". Calderon v. Thompson, 523 U.S. 538, 550 (1998) The *Oxford Dictionary of English* (Oxford University Press, 2009) defines "grave" in this context as "giving cause for alarm; serious".

II. RULE 60(B) – "RISK OF INJUSTICE", "PUBLIC CONFIDENCE"

Under Federal Civil Procedures, "relief under 60(b)(6) is available only in "'extraordinary circumstances'". Buck v. Davis, 137 S.Ct. 759, 777(2017) The circumstances can include, in "appropriate" cases, a 'risk of injustice to the parties' and 'the risk of

undermining the public's confidence in the judicial process'". Id. at 778. A petitioner under Rule 60(b) is obligated to "give the trial court reason to believe that vacating the judgment will not be an empty exercise". Teamsters, Chauffers, Warehousemen & Helpers, Local No. 59, v. Superline Transp. Co., 953 F.2d 17,20 (1st Cir.1992)

III. SEPTEMBER 12TH, 2020 MEMO TO THE COURT

On September 12th of 2020, the appellant notified the court of the untimely death from illness of his father, who was a "victim and witness" and "would likely be providing some form of testimony, statement, or affidavit regarding the facts of the case". (See Exhibit B) The memo affirmed he was "referenced in the original complaint, throughout the pleadings, and in the petition I recently filed dated August 20th, 2020." (Id.) It is important to state that appellant did not motion for consideration of this circumstance when it occurred because notice was already being submitted on record, and he did not assume his August 2020 motion would be denied. Therefore, this heartbreaking event was submitted to the court prior to judgment in accordance with Karak v. Bursaw Oil Corp. (288 F.3d at 19).

A. THE APPELLANT'S LATE FATHER IN THE PROCEEDINGS

The originating complaint in this matter from April 18th, 2017 cited the FBI and Agent Hastbacka's

"unprecedented intrusion into his personal life, as well as the life of his family, who represent an outside party". (DCDN 1). This was reiterated in the amended complaints. (DCDN 26, 34). The appellant also established at the outset of litigation that his "parents were confused and concerned about being contacted by the Federal Bureau of Investigation about their son" in response to appellant's "simple request". (DCDN 1,26,34) The complaints consistently requested "permanent legal injunctions against any further constitutional violations, and any further contact with the Plaintiff's family". (ID.)

On July 3rd, 2017 the appellant requested a preliminary injunction forbidding FBI contact with his family, citing "serious illnesses, including a prolonged hospitalization, suffered by his parents in months that followed the contact" as grounds for "guarantee that his family will not be subjected to any further contact, potential scrutiny, or burden" (DCDN 8) The "Exhibit A" attachment to the July 2017 request for a preliminary injunction was appellant's original March 9th, 2017 memo to Agent Hastbacka inquiring "[h]ow you knew their names and that they are my parents" and "[h]ow you knew where they lived". (DCDN 8) As indicated in appellant's opening brief, his filing for preliminary injunction became unexpectedly obfuscated:

> "July 3rd, 2017 marked a turning point in early litigation. The appellant filed a motion for preliminary injunction against any further contact with his family at the court early that morning, and the appellees filed a motion to

> dismiss the entire case some time that same day. The history of filing indicates that the appellants' motion was filed on July 3rd, but not entered into the record until July 5th. The history indicates that the appellee's motion was filed on July 3rd and also entered into the record on that same day. On July 24th, 2017, the Magistrate Judge issued a report recommending that the motion for preliminary injunction be denied, and stating that the appellant filed his motion "after the defendants moved to dismiss" instead of on the same day. App. 3."

Appellant added claims to Fourth Amendment constitutional protections, and established legal and constitutional precedents for protecting people's families. On August 20th, 2020, appellant specifically referred to "stress related illnesses" experienced by his parents after the FBI contact in his motion filed within days of his father's untimely death. All of the legal filings therefore demonstrate that a primary purpose of this litigation was to restrict the appellees from intrusion into the life of the appellant's parents or his relationship with them. As has been well plead, the FBI's consistent defense in litigation has been "refusing to explain how he got their information and why he contacted them despite Privacy Act regulations." (DCDN 43 – Rule 60(b)(6) motion)

The appellee's October 19th, 2017 Motion to Dismiss (District Court Document (DCDN) 27) referred specifically to the appellant's related suit against the U.S. Attorney's office for failure to respond to a FOIA request for similar material. That 2017 motion cited "a

related FOIA case filed by him. See Berry v. United States Attorney's Office, No. 17-cv-77 SM, U.S.D.C., D.N.H." That case had just been dismissed from the District Court in August of 2017, and later by this Court in September 2018.

The appellee's conflation of two cases recently dismissed was a sensible strategy, but other significant parallels existed then and still do. The appellant has cited the "plausible inference" of direct communication among the same parties involved in his suits, some of whom were working together at the time of the events or still are. Limone v. Condon, 372 F.3d 39 (1st Cir. 2004) The Appellant has established some of that communication with Exhibit A, submitted previously but attached again here for convenience. The link among parties was also inherent in Berry v. United States Attorney's Office. Former U.S. Attorney John Kacavas was referenced in the 2016 FOIA request by the appellant in Berry v. U.S. Attorney. He was also an acting official at the time of the generating events in these matters around 2013. (Former U.S. Attorney John Kacavas left that position and became Chief Legal Officer for Dartmouth Hitchcock Medical Centers around May 2015).

B. STATEMENTS OF APPELLANT'S LATE FATHER

The appellant submits that the circumstances of his father's death are pivotal in this litigation to "proffer significant new evidence" under rule 60(b)(2) and

60(b)(6) as to damages and grounds for reconsideration. Nkithaqmikon v. Impson, 585 F.3d 495, 498 (2009) The appellant's late father voiced vague but general concerns throughout the years preceding his death regarding fear of retaliation because of this lawsuit, as indicated in the sworn affidavit of the appellant attached here. (Exhibit C) He consistently expressed he did not want to explain his reasoning for these concerns, or what or who generated them. (Id.) These statements always expressed a fear for appellant's mother as well. (Id.) It is significant that he had not expressed any fear of any person or group of people to the appellant at any time in his life prior to this. While he was being treated by Doctors for medical conditions, they were not asserted to be life-threatening. (Id.) He reaffirmed this fear of retaliation in appellant's last conversation with him mere hours before his death. (Id.) The appellant then reinforced the idea of a positive outcome which never came. (Id.)

The appellant respectfully asserts that no reasonable third party would conclude that neither the adverse circumstances outlined in the proceedings or his father's oft stated fear of FBI retaliation (Exhibit C) could not have been a factor in the untimely death of appellant's father. No reasonable third party would argue that the untimely death of a material witness and victim would not definitively represent a "grave, unforseen contingenc[y]", and therefore qualify as "extraordinary circumstances". Calderon, 523 U.S. at 550. The Supreme Court and the legal system have "frequently emphasized the importance of the family", as has the

appellant in his filings. Stanley v. Illinois, 405 U.S. 645, 651 (1972)

IV. JANUARY 29TH, 2021 SENTENCING OF FBI LAWYER CLINESMITH

A. CONCURRENT DECISIONS

The Court's denial of appellant's petition was entered on January 29th, 2021. A Federal District Court order issued by Judge James E. Boasberg (D.C. Circuit) on January 19th, 2021, indicated former FBI lawyer Kevin Clinesmith was also scheduled for "sentencing on January 29th, 2021" for his *false statement* "in connection with the preparation of an application for the renewal of a surveillance warrant". The January 19th order also discussed that Clinesmith's victim Carter Page had "recently filed a civil action in this court against the United States, the Department of Justice, the Federal Bureau of Investigation, and eight named individuals, including Defendant Clinesmith". The January order granted Carter Page the opportunity to testify regarding the "effect of Clinesmith's conduct on him". It is noteworthy that both this appellant and recently now victim Carter Page are both suing the same agency in addition to its employees individually.

The Washington Post reported on January 29th, 2021that Mr. Clinesmith did receive sentencing that day as scheduled, which resulted in "12 month's probation". The appellant's motion was denied the same day. The appellant's August 20th, 2020, motion discussed the case of FBI attorney Kevin Clinesmith as a related

matter of public interest. The August motion directly referenced "Kevin Clinesmith, who plead guilty yesterday, August 19th, 2020 to making a false statement." The motion also stated that "[c]onsideration of FBI conduct has important social and legal implications and is currently at the center of other ongoing cases [and] investigations", citing "the criteria for en banc review" as issues that are "very important and very complex." U.S. v. Wurie 724 F.3d 255, 255 (1st Cir.2013) The contemporaneous resolution of these cases that are based on similar facts suggests that the court did not have adequate opportunity to give consideration to the eventual adverse ruling in the Clinesmith case.

B. JUDICIAL, GOVERNMENTAL, AND PUBLIC INTEREST

The Clinesmith case represented a variety of important legal and constitutional issues, as cited in the August motion. The Washington Post article on the 29th reported that Judge Boasberg admonished that "courts all over the country rely on representations from the Government, and expect them to be correct". A New York Times article from the 29th revealed that Judge Boasberg himself "is also the chief judge of the Foreign Intelligence Surveillance Court, which handled the disputed wiretaps of Mr. Page, although he did not personally sign off on any of them". A December 17th, 2019 public order by presiding FISA Court Judge Rosemary Collyer expressed that Clinesmith "engaged in conduct that apparently was intended to mislead the FBI agent who ultimately swore to the facts in that

application about whether Mr. Page had been a source of another government agency". Clinesmith was at the center of and a decision maker in two of this era's significant investigations. As revealed in a November 22nd, 2019, New York Times article, "Mr. Clinesmith worked on both the Hillary Clinton email investigation and the Russia investigation", but then subsequently "was among the individuals removed by the special counsel, Robert S. Mueller III".

Mr. Clinesmith was not only integral to investigatory actions, he was active in the prosecutions that resulted. As Carter Page revealed in his 2020 book Abuse and Power, "in April 2017, one of my lawyers had spoken to an FBI attorney named Kevin Clinesmith". Mr. Page explained that although "we were not fully aware of it at the time, Clinesmith was one of the people involved in crafting the secret applications for my FISA surveillance warrants before the secret FISA court". As former Attorney General Matthew Whitaker also revealed in his 2020 book Above the Law, "Clinesmith was the lawyer the FBI sent to interview another obscure Trump campaign advisor, George Papadopoulos, in February of 2017." Mr. Papadopoulos elaborated on his initial approach by Mr. Clinesmith in his 2019 book Deep State Target, describing that "one of the investigators is an FBI lawyer named Kevin Clinesmith" and that "he seems to be leading a lot of this inquisition". Former Attorney General Whitaker outlined in his memoir that Papadopoulos was then "arrested that July, pressured for a guilty plea in a secret October hearing, and sentenced for making a false statement to

the FBI, which withheld exculpatory evidence it procured from him in September of 2016".

C. RELEVANCE TO APPELANT'S FACTS AND EVIDENCE

As appellant asserted in his February 25th, 2019 motion to this court: "The circumstances and complex issues in this case are unique and a matter of public interest, and will establish important precedents for the future". Appellant's August 2020 brief observed that the "ongoing decisions in this case discuss Agent Hastbacka's actions as if they occurred in a vacuum, however, they occurred contemporaneously to ongoing legal circumstances that are 'very important and very complex.'" (citing U.S. v. Wurie, at 255 (1st Cir.2013) The Clinesmith case and the present case both discuss FBI misconduct, FBI targeting of non-criminal citizens, and involve the "extraordinary" factors "risk of injustice" and "undermining the public's confidence". Buck v. Davis at 778. The adverse resolution of the Clinesmith case that was decided concurrently with a resolution of this case, which referred to the Clinesmith case as relevant to its arguments, merits further consideration by the Court.

V. "EXTRAORDINARY", "EXCEPTIONAL" STANDARD

This court has observed that "[s]ome cases are of 'exceptional importance because of the potential they have to affect the lives of millions" while others "are of

exceptional importance because of the light they cast on our public institutions". Donahue v. U.S., 660 F.3d 523 (1st Cir.2011) (order on motion for rehearing en banc) Other cases "while not always directly affecting a broad segment of the population, are nevertheless exceptionally important by virtue of what they demonstrate about the trust that we -for better or for worse- put in those institutions". (Id.) Both factors of "exceptional importance" are inherent in this case. (Id.) All the adverse experiences of the appellant and his family that are outlined in this case happened after he sued FBI Task Force Officer Thomas Harrington, but appellant has refrained from casting aspersions onto defendant Mark Hastbacka. However, the ramifications of the official behaviors inherent in this case and the Clinesmith case have consequences of "exceptional importance". (Id) There is a strong legal and public interest in deterring the potential of "official uncontrolled wickedness" by any agent of the government. Donahue v. U.S., 634 F.3d 615 (1st cir. 2011, Torruella, dissenting) Given the governmental and constitutional issues in question, vacating this recent judgment cannot be dismissed as "an empty exercise". Teamsters 953 F.2d at 20.

VI. APPELLANT'S CLAIMS AND CLAIM TO DAMAGES

The circumstances generating the fact of this case are integral to appellant's claims to damages, and to questions of privacy for Americans in general. In discussing the privacy interests in cell phones, the

Supreme Court in Riley v. California, 573 U.S. 373 (2014) established that modern "smart" phones are "a pervasive and insistent part of daily life". (Incidentally, the appellant's cell phone has been completely disabled since the first week of February, this past month.) In terms of his original FOIA request, appellant only provided his address to the FBI for FOIA returns, so the information the FBI inexplicably sought about his cell phone and his family is not representative of "information he voluntarily turns over to third parties". Carpenter v. U.S., 138 S.Ct. 2206, 2216 (2018) Federal courts have held that "there is a meaningful privacy interest in home addresses", so finding the home addresses and identities of the immediate family of a FOIA requestor is a significant over-reach. Quinn v. Stone, 978 F.2d 126, 132 (3rd Cir.1992) Taken together, the varied elements of the evidence in this case provide "factual enhancement" that surpasses mere "labels and conclusions" that is required "to provide the grounds of his entitlement to relief" Bell Atlantic v. Twombly, 550 U.S. 544, 555, 556 (2007)

VII. CONCLUSION

There have been significant changes in circumstances related to the facts and arguments of this case since the Court first "heard the action and entered judgment" dismissing the case. Liljeberg, 486 U.S., at 850. The appellant recognizes that recalling an earlier mandate is an "unusual step" and that the Court has "exercised that power sparingly over the course of many years" Kashner, 601 F.3d at 22. The events

discussed are very recent, therefore the appellant has not at any time "failed to take advantage of numerous opportunities" to raise arguments in filngs over the years. Id. at 23. As John Adams expressed during a famous defense in December of 1770: "Facts are stubborn things", and despite any other party's wishes, activities, or intentions "they cannot alter the state of facts and evidence." The legal opposition of Adams and others of the "Founding generation" to the "arbitrary claims" of British authority that allowed "unrestrained search" by " 'writs of assistance' " is directly referenced in Carpenter v. U.S. (138 S.Ct. at 2213) as the conflict that "crafted the Fourth Amendment". Thomas Jefferson would later write to John Adams on August 1st of 1816 that "I like the dreams of the future better than the history of the past." The troubles caused by the appellees in the past and present of the appellant and his family are exemplified here in the "state of facts and evidence" that Adams validated as inalterable, and if these practices continue undeterred they will not bode well for Jefferson's "dreams of the future" of the nation. The "state of facts and evidence" now includes the untimely death of the appellant's father, a witness to and victim of the circumstances that gave rise to the case. Arbitrary expansion and abuse of authoritative powers such as search and surveillance do not correct themselves, they require official reform and contraction. As stated by the appellant at the outset of this litigation, if the "intrusions upon the privacy of individuals" discussed here and in earlier filings continue, they will

leave "a chilling and adverse effect on the public", possibly forever. DCDN 34 at 29.

Respectfully Submitted,

Jason T. Berry, Pro Se
37 Fenton Avenue
Laconia NH 03246

Dated: March 13th, 2021

CERTIFICATE OF SERVICE

I certify that on this day of March 13th, 2021 a copy of this Petition was delivered to the Appellees through Counsel, via US mail, Priority Mail Express, postage prepaid, to the US Attorney, Civil Process Clerk, 53 Pleasant Street, 4th Floor, Concord NH 03301

Jason T. Berry, Pro Se

[SEAL] U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No.

15 Constitution Drive,
Ste 21
Bedford, NH 03110
603-472-2224
January 14, 2013

Scott F. Harrington
Chief Probation/Parole Officer
Manchester District Office
60 Rogers St.
Manchester, NH 03103

RE: Memorandum of Understanding/
Cost Reimbursement

Dear Chief Harrington:

Pursuant to your request for a new Memorandum of Understanding (MOU) [redacted] the annual overtime and monthly cap are not normally specified in the MOU, as funding is addressed separately as part of our Cost Reimbursement Agreement (CRA). Enclosed please find the most recent CRA. between the Federal Bureau of Investigation and the New Hampshire Department of Corrections. Hence, with your agency's concurrence, this letter will serves as an addendum to our current CRA. For fiscal year 2013 (beginning October 2012), funding for the FBI Safe Streets Task Force has been approved for Task Force [redacted], with the maximum allowable overtime reimbursement being $17,202.25 annually, with a monthly cap of $1,433.52. The proposed

addition of [redacted] is currently being secured through a funding mechanism of the New England High Intensity Drug Trafficking Area (NE HIDTA) office. The eligible overtime reimbursement amount for [redacted] if approved by your agency, would be the same. Should you have any questions. please contact me directly at 603-472-2224.

APPROVED 1/29/13
/s/ William [Illegible]
Commissioner

Sincerely,

Richard Deslauriers
Special Agent in Charge

By: /s/ Kieran L. Ramsey
Kieran L. Ramsey
Supervisory Senior Resident Agent

KLR:taw

U.S. Court of Appeals
John Joseph Moakley U.S. Courthouse
1 Courthouse Way
Attn: Clerk of Court
Suite 2500
Boston MA 02210

September 12th, 2020

Re: Appeal nos. 18-1926, 18-1954
Berry v. FBI and Agent Mark Hastbacka
Party to the legal matter

Dear Clerk:

I am representing myself *Pro Se* in the aforementioned appeal, *Berry v. FBI*, which recently had a filing

dated August 20th, 2020. It is my understanding that I am required to notify the court of any changes in the legal circumstances of the case or the parties involved. My father is referenced as a party to the litigation as a victim and witness. He is referenced in the original complaint, throughout the pleadings, and in the petition I recently filed dated August 20th, 2020. As I have recently filed a petition for Rehearing En Banc, in the event it is granted, my father would likely be providing some form of testimony, statement, or affidavit regarding the facts of the case. I must inform with deep regret that he was unexpectedly found deceased by my mother on September 6th, 2020. It is my understanding I must inform of these circumstances.

Respectfully Submitted:

/s/ Jason T. Berry
Jason T. Berry
September 12th, 2020

9/12/20

CC:
Robert J. Rabuck
Seth R. Aframe

GENERAL AFFIDAVIT

STATE OF NEW HAMPSHIRE
COUNTY OF BELKNAP

PERSONALLY came and appeared before me, the undersigned notary, the within named Jason Thomas

Berry, who is a resident of Belknap County, State of New Hampshire, and nukes his statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts, and things set forth are true and correct to the best of his knowledge:

I, Jason Thomas Berry swear under oath that I have been in ongoing litigation with state and federal authorities since 2013. It is a matter of record that following more serious circumstances related to this litigation in early 2017, I filed *Pro Se* lawsuits in February and April of that year. The April 2017 suit was specifically filed because of unexplained and inappropriate contact with my parents by authorities related to litigation that I had recently filed, and official requests I had made for relevant information. It is documented that my parents, including my father, suffered illnesses after that would be considered "stress related". Starting in a July yd, 2017 document, I cited "serious illnesses" suffered by my parents following the aforementioned contact. As recently as August 20th, 2020, approximately 16 days before my father's untimely death, I cited "stress related illnesses" following the aforementioned contact in an official document. Incidentally, on August 27th, 2020, a week later, my father informed ne of unexpected adverse circumstances that upset him so much he could hardly speak. I suggested we remain positive and mentioned treatment for anxiety for him. It is important to note that though my father's illnesses were considered serious, they were

never discussed or referred to as potentially life-threatening in any conversation.

Starting in Spring 2019, I suggested going public regarding the information from my cases in order to protect my parents. My father specifically told me he feared retaliation from people involved in my lawsuits if I did so, but he would never say who, or why he felt this way. On two occasions he said he feared he and my mother would be left homeless and destitute out of retaliation for my lawsuits if I discussed them publicly. My last text message to my father was sent to him at 207PM on September 5th, 2020. I would unknowingly talk to him by phone for the last time at 409PM on September 5th, 2020. He once again mentioned his fear of the FBI and individuals I had sued, and I affirmed again that I would not go public with the details of my case. He affirmed again that he feared retaliation from the individuals I had sued and the safety of himself and my mother if I went public with the information. I assured him to rest easy, and suggested we seek to have his treatment for anxiety resumed by contacting medical professionals on the next business day in an effort to improve his ongoing anxiety and health. My nether later found my father unexpectedly deceased in the living room of their home in the early morning of September 6th, 2020. It is noteworthy that both my father's parents lived past 90 years of age, and he did not.

I immediately requested an autopsy for my father within hours of his death. My mother and I both continued to request an autopsy for days after, however,

we were soon informed authorities had officially "passed" on an autopsy. However, any objective analysis would consider that the natural causes listed on the certificate of his death could be considered "stress related".

My father stated numerous times he feared some form of retaliation from individuals involved in my lawsuits, but would never say who or why. It is unknown if his fear was based on real, tangible threats, contacts and events or hypothetical concerns. I never pressed him on this subject because it upset him. He did, however, mention fear of being left homeless and destitute out of retaliation on more than one occasion prior to his death.

DATED this the 9th day of March, 2021

/s/ Jason T. Berry
Signature of Affiant

SWORN to and subscribed before me, this 9th day of March 2021

/s/ Josephine B. Mcphail
NOTARY PUBLIC

[SEAL]

My Commission Expires:

11/18/2025

United States Court of Appeals
For the First Circuit

No. 18-1926, No. 18-1954

JASON T. BERRY

Plaintiff - Appellant

v.

FEDERAL BUREAU OF INVESTIGATION;
AGENT MARK HASTBACKA, Special Agent,
Federal Bureau of Investigation, in his
individual and official capacities,

Defendants - Appellee

PLAINTIFF'S PETITION FOR REHEARING
EN BANC UNDER RULE 35

On February 27th, 2020 the Court entered judgment approving the appellee's motion for summary affirmance. On Ap ril 9th, 2020, the appellant petitioned for a panel rehearing under Local Rule 40 based on any "point of law or fact that the petitioner believes the court has overlooked or misapprehended". On July 9th, 2020, a panel of three judges denied the appellant's petition for panel rehearing in a single – sentence judgment. The appellant respectfully moves for a petition for rehearing *en banc* under Rule 35, within the 45 day time limit allowed when a party is a United States Agency and a United States employee sued in an official capacity under Rule 40(a)(1)-(B)and(C). The appellant moves based on issues already brought forward. Appellant presents the following issues as grounds for rehearing – 1) the case sets an unfavorable precedent

for all future FOIA requesters; 2) the Court has applied an improper standard for dismissal of 4th Amendment claims; and 3) serious review of FBI conduct has important social and legal implications at present and is congruent with other current cases and investigations.

I. FACTS OF THE CASE

As indicated in the appellant's opening brief, the facts are based on "legal issues dating back several years" involving FBI Task Force Officer (TFO) Thomas Harrington, whose conduct was related to appellant's complaints to N.H. Department of Corrections (NHDOC) administration in 2012 and 2013. Plaintiff's Brief (P.Br.) at 4. The appellant was subjected to adverse employment actions by NHDOC for the 2013 complaint, leading to an ongoing legal dispute. In May of 2016, the appellant "sent Freedom of Information Act requests to the Record/ Information Dissemination Section" of the FBI in Virginia, and "never received any response." District Court Document Number (DCDN) 1. In February of 2017, the appellant filed a civil suit "naming FBI Safe Streets Task Force member Thomas Harrington as a party." DCDN 1. After never receiving any response from the FBI to his 2016 FOIA request, appellant sent a request directly to the Bedford, New Hampshire Resident Agency of the FBI on February 23rd, 2017. DCDN 1. The FBI's immediate response upon delivery of the request was not a traditional memo, but a voice mail left at the appellant's parents home by Veteran Special Agent Mark Hastbacka,

stating that he had tried to call the appellant's cell phone and that there was no voice mail capability. DCDN 34, Exhibit A. The appellant had never received any phone calls from Agent Hastbacka, had active voicemail that was not full, and had never provided any information regarding the identity or contact information of his parents. Agent Hastbacka never responded to the Appellant's polite letters requesting to know why he took these actions, and a civil suit followed on April 18th, 2017.

II. STANDARD FOR REHEARING *EN BANC*

Federal Rule of Appellate Procedure 35(a)(2) states that a rehearing *en banc* "will not be ordered" unless "the proceeding involves a question of exceptional importance." Rule 35(b)(1)(B) states a party may petition for rehearing *en banc* when "the proceeding involves one or more questions of exceptional importance". In general, a case will "meet the criteria for en banc review" only when 'the issues are very important and very complex." U.S. v. Wurie 724 F.3d 255,255 (1st Cir.2013). In evaluating whether a case is of "exceptional importance" under the Rule 35 standard, the "most important criterion for granting an in banc hearing is whether the case involves an issue likely to affect many other cases." Walters v. Moore-McCormack Lines, Inc. 312 F.2d 893, 894 (2nd Cir.1963) The question of "public importance" is also congruent with the established criteria for *en banc* review. Lau v. Nichols 414 U.S. 563, 565 (1974)

III. THE SPECIFIC FACTS AND CIRCUMSTANCES OF THE CASE MERIT EN BANC REVIEW

This court has historically granted *en banc* review in cases that involve social or constitutional questions that will affect countless citizens and future cases. Consider: Kolbe v. Bac Home Loans Servicing, LP, 738 F.3d 432 (1st Cir.2013)(convening a hearing en banc to consider the guarantees of flood insurance), U.S. v. Pleau, 680 U.S. F.3d 1, 4 (2012) (rehearing en banc granted to consider "what is supposed to be an efficient shortcut to achieve extradition of a state prisoner to stand trial in another state".), Aronov v. Napolitano, 562 F.3d 84, 86 (1st Cir.2009)(granting en banc review because "the potential economic consequences were quite large"), U.S. v. Textron Inc. And Subsidiaries, 577 F.3d 21, 32 (1st Cir.2009) (granting en banc review to consider the "legitimate, and important, function of detecting and disallowing abusive tax shelters."), U.S. v. Giggey 551 F.3d 27, 29 (1stCir.2008) (granting en banc review "to reconsider whether non-residential burglary is per se a "crime of violence'"), Conley v. U.S. 323 F.3d 7, 15 (1st Cir. 2003)(granting en banc review "in a criminal case with liberty and honor at stake" asserting the Court's "main concern is *always* the achievement of justice"), Savard v. Rhode Island, 338 F.3d 23 (1stCir.2003) (rehearing en banc to consider constitutionality of specific kinds of searches inside correctional institutions), Costa v. Markey, 706 F.2d 1 (1982)(examining police hiring practices that discriminate against women), U.S. v. Pappas, 613 F.2d 324, (1st

Cir.1980)(granting a rehearing en banc to consider constitutional standards for warrantless searches and seizure of evidence by police).

Likewise, the Supreme Court also has a similar history of viewing the purpose of a rehearing en banc in the context of social or legal issues which will affect many future citizens and cases: Puget Sound Co. v. King County, 264 U.S. 22 (1924) (Decision on an en bank judgment by a State Supreme Court examining if there are any circumstances or facts "of an unusual character"), Western Pacific Railroad Corp. v. Western Pacific Railroad Co. 345 U.S. 247, 249 and 263 (1953)(granting review of a request for rehearing en banc that was denied, concluding "further consideration by that court is appropriate" in suit alleging that respondents had "unjustly enriched themselves".) Lau v. Nichols 414 U.S. 563, 565 (1974) ("We granted the petition for certiorari because of the public importance of the question presented."), Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988)("Petitioners then filed a petition for rehearing en banc, but this was denied by a divided court. Given the importance of the constitutional issues involved, we granted certiorari.") *En banc* review is appropriate in the present case considering that "in this instance the circumstances are unusual", and therefore because of "the peculiar circumstances of this case a fresh look is warranted" Conley v. U.S. 323 F.3d 7, 15 (1st Cir. 2003) (opinion en banc). Furthermore, the case includes a "constitutional claim" and the decision will affect many individuals. Igartua-De La Rosa v. U.S. 417 F.3d 145 (1st

Cir.2005)(hearing en banc to consider the right to vote).

IV. THE DECISIONS AND ALLOWANCES IN FAVOR OF THE FBI AND AGENT HASTBACKA AFFECT ALL FUTURE FOIA REQUESTORS

The FOIA process "is the legislative embodiment of Justice Brandeis's famous adage, '[s]unlight is . . . the best of disinfectants". N.H. Right to Life v. Dept. of Health and Human Serv's 778 F.3d 43, 48-49 (1st Cir.2015). The basic purpose of the FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242. (1978) The Supreme Court has held that an FOIA claimant has "constitutional interests". Doe v. Gonzales 546 U.S. 1301,1305 (2005) (quoting Mcghee v. Casey, 718 F.2d 1137, 1147 (CADC 1983), discussing "statutory entitlement" and "the constitutional interests held by a FOIA claimant".) The government website www.justice.gov released a statement on June 1st of this summer stating that "for the third consecutive year, the government received over 800,000 FOIA requests. The federal government reported 863,729 FOIA requests received by federal agencies in the fiscal year 2018. Based on the federal government's own reports, there are on average close to a million U.S. citizens utilizing the FOIA process every fiscal year. The public has increased its usage of the FOIA process, and therefore sees increased value and need in the statute.

Based on the ongoing decisions in this case, however, it is acceptable for a government official or agency to utilize private information about any requestor that they have not conceded, and then unnecessarily contact their family or loved ones without any repercussion. The court's decision affirms that there is no legal prohibition against the "unexplained and unprecedented intrusion into his personal life, as well as the life of his family, who represent an outside party in the Plaintiff's original FOIA request and in the matter in general". DCDN 1. FOIA requests are a legal process and a "statutory entitlement" (Mcghee v. Casey at 1147), and therefore this decision offers no deterrent against other federal agencies or employees taking similar actions against future requesters. This case therefore is of "extraordinary" consequences for the FOIA process, as it "presents an issue of sufficient concern to enough litigants who are or may become involved in similar situations so that the even-handed administration of justice will be benefitted by a decision by the entire court." (Walters v. Moore-McCormack at 894) In question is the future treatment of any and all FOIA requesters by government agencies and employees. The Court states the appellant's claim of actual damages are "insufficient to satisfy minimal pleading standards", but the case never proceeded to discovery so that financial documentation could be gathered and submitted.

V. THE COURT MISINTERPRETS THE PRIVACY EXPECTATION STANDARD OF THE SUPREME COURT AND APPEALS COURTS

The Court's February decision asserts the appellant's Fourth Amendment claim is a "general legal assertion" and that he "failed to show that he had any legitimate expectation in the information he alleges was improperly obtained", citing Carpenter v. U.S. 138 S.Ct 2206, 2216 (2018). The appellant has never been arrested, charged, or indicted for any crime, been served a subpoena or a warrant, or subjected to any criminal investigation or law enforcement questioning or interview. As has been plead by the appellant extensively in this court and the district court, all of the decisions dismissing his Fourth Amendment claim use case law and precedent that approach the facts of the case as if he had been the subject of criminal charges. DCDN 43. All of the privacy intrusions cited in the Court's February judgment are part of criminal investigations: See United States v. Battle, 637 F.3d 44 (1st Cir.2011)(a warrantless search of an apartment following a formal report to police of the illegal use of firearms), U.S. v. Clenney, 631 F.3d 658 (4th Cir.2011) (involving a criminal investigation and a search warrant), U.S. v. Bynum, 604 F.3d 161 (4th Cir.2010)("the FBI served an administrative subpoena on Yahoo" as part of a child pornography investigation). The court cites *Bynum's* decision that citizens who turn over information to third parties by using their digital communications platform "assumed risk that information would be revealed to law enforcement and had no

legitimate expectation of privacy." (Bynum at 162, 164) The court is making an inaccurate assertion however, because such information can only be turned over through formal legal processes such as "court orders under the Stored Communications Act to obtain cell phone records". Carpenter v. U.S. 138 S.Ct. 2206, 2212 (2018). The Supreme Court in Riley v. California, 134 S.Ct. 2473 (2014) concluded that even incidental to a justified arrest, the police "generally may not, without a warrant, search digital information on a cell phone seized from an individual." If in fact the FBI has taken or is taking official investigative action against the appellant, he has never been properly notified or given due process, which would necessitate further litigation by the appellant.

In U.S. v. Wurie 724 F.3d 255, 256 (1st Cir.2013), this court expressed that "cell phones sit at the intersection of several different Fourth Amendment doctrines". However, based on the Court's reasoning in the present case, no U.S. citizen has a "subjective expectation of privacy" in their digital data at any time, even in the absence of an official warrant, subpoena, or investigation. This reasoning leaves all smartphone users without the "privacy and security of individuals against arbitrary invasions by governmental officials", a constitutional right that is the "basic purpose" of the Fourth Amendment. Camara v. Muncipal Court 387 U.S. 523, 528 (1967) Statista.com reported on April 23rd, 2020 that the number of smartphone users in the U.S. is around 275 million in 2020, and growing. The U.S. Supreme Court has affirmed that Government

intrusion upon the private telephone activity of an individual citizen who is not involved in any criminal investigation "amounts to an injury that is 'concrete and particularized' Clapper v. Amnesty Intern. USA 133 S.Ct. 1138 (Breyer, dissenting at 1155) (2013) The extent to which any FBI agent may arbitrarily intrude into any citizens cell phone outside of a legitimate criminal investigation "deserves consideration by the full court because it fundamentally affects the constitutional rights of several million citizens, a quintessential question of "exceptional importance." Igartua v. Trump 868 F.3d 24 (1st Cir. 2017) (27, Torruella, dissenting)

A. THE FBI HAS NEVER DENIED THAT THEY HAVE "TARGETED" THE APPELLANT OR HIS PARENTS

The FBI and Agent Hastbacka have never denied that they subjected the appellant and his parents to some form of search, surveillance, or investigation following and contemporaneous to the appellant's legal actions. As explained by the appellant in his opening brief:

"It is crucial to consider that a simple answer from the appellees to the appellant's March 9th, 2017 inquiry (App. 26) about how and why Agent Hastbacka had obtained so much information would have precluded any litigation. Likewise, at any point in the pleadings and motions, Agent Hastbacka would have had the "presumption of good faith" in any affidavit or declaration presented to give reasonable explanation

for his actions. *Church of Scientology Intern. v. U.S. Dept. Of Justice*, 30 F.3d 224, 233 (1st Cir. 1994). Any such sworn statement affirming his "permissible intentions", and that his actions and search were not political or investigatory in nature, would have also allowed an element of "good faith immunity" to his acts. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Any such pleading justifying the search and actions would have ended all legal argument and litigation upon submission. Instead, appellees chose to expend excessive time, money, and resources of all the parties arguing for dismissal."

In their October 19th, 2017 Motion to Dismiss, in discussing the appellant's claims to relief, the appellees referenced "a related FOIA case filed by him. See Berry v. United States Attorney's Office," DCDN 27. Summary Judgment in that case had recently been granted in the Government's favor in August of 2017. That case was related to the same circumstances and litigation, and a similar FOIA request for related information from the Office of the U.S. Attorney in July of 2016. The Office of the U.S. Attorney never responded, and the appellant filed a FOIA suit. The appeal for that case was dismissed by this Court on May 23rd, 2018, and a petition for rehearing was denied on September 13th, 2018. Summary Judgment was granted based on the submission of sworn affidavits and declarations by government officials admitting multiple mistakes, and even misplacement of the request. An attorney from the Executive Office of the U.S. Attorney in Washington D.C. submitted a copy of a FOIA response document with the date removed and subsequently

admitted to making an inaccurate sworn statement about when he had sent it. (See Berry v. Office of the U.S. Attorney, No. 17-1946)

Incidentally, in the present case, judgment is granted to the FBI without any declaration, affidavit, or statement explaining Agent Hastbacka's actions in regard to the appellant and his parents. Agent Hasbacka first revealed he had obtained undisclosed personal information about the appellant's cell phone and parents in 2017. The litigation necessitating the FOIA request involved an FBI Task Force officer and matters adverse to the appellant that had ensued over previous years. By extension, it is not unlikely that the appellant's routine life events such as daily employment activity, banking activity, I.R.S. tax filings, and car inspections and registrations may be occurring under some form of FBI scrutiny. In July of 2017, the appellant cited "ongoing stress that this has caused the Plaintiff' in large part due to stress related illnesses "suffered by his parents in the months that followed the contact" and requested that an "injunction should be granted against any further contact in order to avoid any further harm". DCDN 8. An injunction preventing further FBI contact was denied (DCDN 17) and there has been no resolution or explanation.

VI. QUESTION AS TO WHETHER FBI CONDUCT IS LEGAL OR POLITICAL

Consideration of FBI conduct has important social and legal implications and is currently at the center

of other ongoing cases, investigations, and "major, recurring issues." Gilliard v. Oswald 557 F.2d 359 (2ndCir.1977). The December 2019 Review of Four Fisa Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation by the DOJ OIG concluded that "current Department and FBI policies are not sufficient to ensure appropriate oversight and accountability when such operations potentially implicate sensitive, constitutionally protected activity". (pg. 411) The OIG further discovered that an FBI Attorney "altered the email that the other U.S. Government Agency had sent" in order to conceal an important fact that would not justify any further FISA Court Surveillance warrants against U.S. citizen Carter Page. (id. at 160) As a result, an FBI Supervisor "signed the third renewal application" for continued surveillance of a U.S. citizen. (Id. at 372) The FBI lawyer discussed is Kevin Clinesmith, who plead guilty yesterday, August 19th, 2020 to making a false statement.

The ongoing decisions in this case discuss Agent Hastbacka's actions as if they occurred in a vacuum, however, they occurred contemporaneously to ongoing legal circumstances that are "very important and very complex." (Wurie at 255) Locating the appellant's parents and discussing his request for information is an "unwarranted and unjustifiable action that clearly runs contrary to the law". Igartua v. Trump 868 F.3d 24, 25 (1st Cir. 2017)(Torruella, dissenting). In this case, the law relates to the Privacy Act and the Fourth Amendment. Exhibit A to the appellant's previous petition for rehearing "displays further grounds for trial

already referenced, money directly allocated from the Bedford office of the FBI to the Agency and specific individuals who were named in the appellant's related lawsuit[s]." Exhibit A is resubmitted for convenience. (Kieran Ramsey, whose signature appears on the document along with former NHDOC Commissioner William Wrenn, was subsequently assigned to Rome, Italy as FBI Legal Attache for Italy in March of 2016).

VII. CONCLUSION

All of Agent Hastbacka's and the FBI's unprecedented actions regarding the appellant and his family occurred after years of legal dispute related to the conduct of FBI FTO Thomas Harrington. The facts and evidence in this case are in the favor of the appellant, and therefore the complaint "stated enough to withstand a mere formal motion". Dioguardi v. Durning, 139 F.2d 774, 775 (2nd Cir.1944). A panel hearing *en banc* is requested.

Respectfully Submitted,

/s/ Jason T. Berry

Jason T. Berry, Pro Se
37 Fenton Avenue
Laconia NH 03246

8/20/20

Dated: August 20th, 2020

CERTIFICATE OF SERVICE

I certify that on this day of August 20th, 2020 a copy of this Petition was delivered to the Appellees through Counsel, via US mail, first class, postage prepaid, to the US Attorney, Civil Process Clerk, 53 Pleasant Street, 4th Floor, Concord NH 03301

/s/ Jason T. Berry
Jason T. Berry, Pro Se

[SEAL] U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No.

15 Constitution Drive,
Ste 21
Bedford, NH 03110
603-472-2224
January 14, 2013

Scott F. Harrington
Chief Probation/Parole Officer
Manchester District Office
60 Rogers St.
Manchester, NH 03103

RE: Memorandum of Understanding/
Cost Reimbursement

Dear Chief Harrington:

Pursuant to your request for a new Memorandum of Understanding (MOU) [redacted] the annual overtime and monthly cap are not normally

specified in the MOU, as funding is addressed separately as part of our Cost Reimbursement Agreement (CRA). Enclosed please find the most recent CRA between the Federal Bureau of Investigation and the New Hampshire Department of Corrections. Hence, with your agency's concurrence, this letter will serves as an addendum to our current CRA. For fiscal year 2013 (beginning October 2012), funding for the FBI Safe Streets Task Force has been approved for Task Force [redacted], with the maximum allowable overtime reimbursement being $17,202.25 annually, with a monthly cap of $1,433.52. The proposed addition of [redacted] is currently being secured through a funding mechanism of the New England High Intensity Drug Trafficking Area (NE HIDTA) office. The eligible overtime reimbursement amount for [redacted] if approved by your agency, would be the same. Should you have any questions. please contact me directly at 603-472-2224

APPROVED 1/29/13
/s/ William [Illegible]
Commissioner

Sincerely,

Richard Deslauriers
Special Agent in Charge

By: /s/ Kieran L. Ramsey
Kieran L. Ramsey
Supervisory Senior Resident Agent

KLR:taw

United States Court of Appeals
For the First Circuit

No. 18-1926, No. 18-1954

JASON T. BERRY

Plaintiff - Appellant

v.

FEDERAL BUREAU OF INVESTIGATION;
AGENT MARK HASTBACKA, Special Agent,
Federal Bureau of Investigation, in his
individual and official capacities,

Defendants - Appellee

PLAINTIFF'S PETITION FOR
PANEL REHEARING UNDER RULE 40

On February 27th, 2020 the Court entered judgment approving the appellee's motion for summary affirmance. Under Local Rule 40, an appellant may petition for a panel rehearing on their appeal based on any "point of law or fact that the petitioner believes the court has overlooked or misapprehended". The appellant respectfully moves for a petition under Rule 40 within the 45 day time limit allowed when a party is a United States Agency. The appellant moves based on issues already brought forward.

I. STANDARD FOR MOTION TO DISMISS UNDER 12(B)(6)

The Supreme Court established "the accepted rule that a complaint should not be dismissed for failure to

state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson 355 U.S. 41, 45 (1957) A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) The standard "demands more than an unadorned, the-defendant -unlawfully-harmed-me accusation" id. A complaint may not survive if it submits "naked assertions" unsupported by any "further factual enhancement". Bell Atlantic v. Twombly, 550 U.S. 544, 557 (2007)

A. STANDARD OF CONSIDERATION FOR *PRO SE* LITIGANTS

The standard for federal courts is that the "system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes" Federal Exp. Corp. v. Holowecki, 128 S.Ct. 1147, 1158 (2008) The standard dictates that "even in the formal litigation context, pro *se* litigants are held to a lesser pleading standard than other parties." id. Therefore, there are specific standards for the "allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520-521 (1972). Any instance of a court's "departure from the liberal pleading standards" is to be considered "even more pronounced" in any case in which a "petitioner has been proceeding, from the litigation's outset,

without counsel." Erickson v. Pardus., 127 S.Ct. 2197, 2200 (2007)

II. THE FACTS, EVIDENCE, AND PLEADINGS ARE SUFFICIENT TO SURVIVE A DISMISSAL UNDER 12(B)(6)

This court's February 27th Judgment on page 1 acknowledges that the Rule 12(b)(6) "standard does not require probability". The Court quotes Bell Atl. v. Twombly in stating the standard "demands" that "allegations must rise 'above the speculative level" (Twombly, 550 U.S. at 555), and on the final page asserts the appellant's "allegations" are "too speculative to provide a factual basis." However, the claim provides not only facts but relevant evidence that "amplify a claim" beyond the "appropriate pleading standard" specifically "in those contexts where such amplification is needed to render the claims plausible". Ascroft v. Iqbal., 556 U.S. 662, 673-674 (2009). This includes an audiorecording of Agent Hastbacka's voicemail on the appellant's parent's home phone, in which Hastbacka made statements, some of which are not true, stating "that he had somehow acquired the plaintiffs personal cell phone number, that he had tried calling, and statements regarding the status of the plaintiff's voicemail account". DCDN 34, at 54 and Exhibit A. The appellant respectfully asserts that it is more "speculative" to infer that Agent Hastbacka made an illegal response to a legally protected Privacy Act request out of overzealous desire to assist a stranger, as opposed to legal maneuvering in response to a litigant's stated litigation.

Furthermore, the record reflects that the appellant, of very limited finances, has proceeded *Pro Se* at all times "from the litigation's outset, without counsel." Erickson v. Pardus., 127 S.Ct. 2197, 2200 (2007) There is no indication that the standards for consideration of *Pro Se* litigants for a a motion to dismiss under Rule 12(b)(6) have consistently been applied in this case, and the standard is not referenced in the dismissal of his amended complaint. See DCDN 41.

A. CASE DISMISSED UNDER CRIMINAL LAW PRECEDENTS

The ongoing litigation is a civil law matter. However, as already plead, the cases cited in the judgments against him "are significantly and substantively dissimilar from the plaintiff's civil suit for violations of privacy" and most "are also obscure". DCDN 43, pg 6. As discussed by the appellant in District Court pleadings:

"Smith v. Maryland, 442 U.S. 735 (1979) involves a criminal defendant under indictment for robbery, and police obtaining a pen register after the defendant made obscene phone calls. U.S. v. Bynum (4th Cir. 2010) involves a criminal defendant indicted for child pornography after the F.B.I. obtained a search warrant. U.S. v. Hudson (D. Neb. Feb 19, 2016) involves a criminal defendant for robbery, and police obtaining a search warrant for the defendant's cell phone information. United States v. Sanford (E.D. Mich. May 24, 2013) involves a criminal defendant whose cell phone was seized on his person when he was arrested for drug trafficking. U.S. v Ahumada-Avalos (9th Cir. 1989)

involves a criminal defendant convicted of the sale and distribution of cocaine, and the government subpoenaing telephone records. In re Cell Tower Records under 18 U.S.C 2703 (S.D. Tex 2015) involves "an order compelling seven different cell phone service providers to release historical cell tower data for specific towers providing service to a crime scene within Houston city limits at the hour of the crime". The most surprising citation in dismissing the plaintiff's Fourth Amendment claim is U.S. v. Solomon (W.D. Pa. Mar 27th, 2007), which involves a criminal defendant killing someone during drug trafficking activities. This was actually a *death penalty* case." id., pg 6-7

The court's current judgment repeats the lower court's Bynum reference, and also adds U.S. v Clenney (631 F.3d 658 (4th Cir. 2011)) as precedent for dismissal. Clenney is a criminal case in which a search warrant was obtained to investigate the criminal use of information obtained from procured tax returns to extort people, and the indictment of the target for possession of a firearm in violation of 18 U.S.C. 922(1) (receiving or importing any firearm in interstate or foreign commerce). Bynum, coincidentally, involves a criminal's activities "at his parent's home", but also factually involves child pornography, a search warrant, and 'secret' administrative subpoenas" which have no relation to the appellant's Privacy Act lawsuit against the FBI. Bynum at 164, 166. Both courts expansively conflate criminal case law with Privacy Act rights designed for the United States citizenry to dismiss the appellant's case. The courts also exclusively rely on case law from criminal prosecutions to dismiss the

Appellant's Fourth Amendment complaint in this civil case. Hastbacka's search was for a civil records request, therefore a non-criminal, non-investigatory, warrantless search – unnecessary since he had the appellant's return address for correspondence at the outset. The decisions therefore applied the wrong standard in dismissing the complaint. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

III. FOURTH AMENDMENT VIOLATION

The defendants have not at any time provided statement or affidavit, and have therefore never denied that they targeted the appellant and his family, or accessed the information in his cell phone. The court's recent judgment states the appellant failed to adequately "demonstrate that he had a privacy interest in the information he said was improperly searched". However, the Supreme Court has concluded that "the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection" since "whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy." Carpenter v. U.S. 138 S.Ct 2206, 2217 (2018)(declining to apply Smith v. Maryland standards to "novel circumstances" of digital cell phones, and referencing U.S. v. Jones, 565 U.S.400 (2012) which held the use of an electronic GPS tracking device to monitor an individual's movements was a search under the 4th Amendment) The appellant's

phone is a "'smart phone,' a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity" that will "implicate privacy concerns far beyond those implicated" by the search of routine physical items. Riley v. California, 134, S.Ct. 2473, 2480, 88-89 (2014)

There is no "valid" reason to go beyond replying to the address provided by a Privacy Act requestor and gathering an "unreasonable" amount of information about his cell phone or private life, nor have the defendants ever offered one. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 391 (1971) The defendants' actions were not "part of a regulatory scheme" in providing a simple response to an information request that is "essentially civil rather than criminal in nature", they were an "arbitrary invasion" of the requestor's privacy following his notice of pending litigation. Camara v. Municipal Court, 387 U.S. 523, 528 (1967) The actions employed were not "'objectively reasonable' in light of the facts and circumstances" in any "Fourth Amendment context". Graham v. Connor, 490 U.S. 386, 397 (1989)

As expressed in the appellant's September 18th, 2017 Reply to the Court's Order denying his request for preliminary injunction restricting Agent Hastbacka and the FBI from further bothering his parents or any one else in his life:

"It is also an open question as to, aside from personal information regarding the Plaintiff's parents,

what other personal information Agent Hastbacka or the FBI may have at their disposal (Identifying information about other family and friends, Plaintiff's employment information, Plaintiff's financial and banking information, etc.). There is currently nothing restricting Agent Hastbacka or the FBI from further contact with the Plaintiffs family, even as a concurrent legal action against a fellow member of the FBI proceeds, a fact which continues to cause the Plaintiff concern and distress."

IV. THE APPELLANT HAS PROPERLY PLEAD VIOLATION OF THE PRIVACY ACT AND ACTUAL DAMAGES

The Supreme Court stated in DOJ v. Reporters Comm. for Free Press., 489 U.S. 749, 756 (1989) that "the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files." The recent version of the EOUSA (Executive Office of the U.S. Attorney) Resource Manual on the Department of Justice Website at "Offices of the United States Attorneys"includes a section at "142. Judicial Remedies and Penalties for Violating the Privacy Act". This defines *actual damages.* The EOUSA Manual states that "Actual damages may be awarded to the plaintiff for intentional or willful refusal by the agency to comply with the Act." The Manual affirms that the "Act specifically provides civil remedies, 5 U.S.C. Sec. 552a(g), including damages" for any "violations of the Act." It also states

that if an "individual substantially prevails, the court may assess reasonable attorney fees and other litigation costs against the agency."

The amended complaint requests relief under 5 U.S.C. 552a(g). DCDN 34 at 41. The FBI is sued specifically for "violations of the Privacy Act suffered by the plaintiff, for actual damages, costs of this action, and reasonable attorney fees". The Supreme Court in F.A.A. v. Cooper stated that the "basic idea is that Privacy Act victims, like victims of libel per quod or slander, are barred from any recovery unless they can first show actual – this is, pecuniary or material – harm". 566 U.S. 284 (2012). Cooper affirmed that "upon showing some pecuniary harm, no matter how slight, they can recover the statutory minimum of $1,000.00, presumably for any unproven harm." id.

The appellant was already in economic distress at the time of defendants' violations, and the litigation never proceeded to discovery to allow proof of "economic injury" id. As stated in the opening brief, any "simple answer from the appellees to the appellant's March 9th, 2017 inquiry (App. 26) about how and why Agent Hastbacka obtained so much information would have precluded any litigation" but instead "appellees chose to expend excessive time, money, and resources of all the parties arguing for dismissal".

V. RULE 60(B)(6) ELEMENTS COVER PUBLIC INTEREST

The appellant specifically cited "public interest", "public confidence in the judicial process" and risk of "injustice in other cases" as a grounds for "exceptional circumstances" under Rule 60(b)(6) in the opening brief on page 26. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863-864 (1988) states "extraordinary circumstances" under Rule 60(b)(6) include "risk of injustice to the parties" and "risk that the denial of relief will produce injustice in other cases", as well as "risk of undermining the public's confidence in the judicial process". The Privacy Act protects the public by limiting the extent to which government agencies can collect, retain, disclose, and disseminate information about individuals, and provides statutory protection and the ability to sue the Government when the statute is violated. Doe v. Chao, 540 U.S. 614, 618 (2004). There is inherent "strong public interest in monitoring the conduct and actual performance of public officials" particularly in matters involving an "unwarranted invasion of personal privacy". Baez v. United States Dept. Of Justice., 647 F.2d 1328, 1338-1339 (D.C. Cir. 1980). The decisions in this case have now created legal precedent that it is acceptable for an agency to investigate the life of a citizen requesting records for their litigation, and then contact their family for no good reason in response – creating a considerable risk of "injustice in other cases". Liljeberg at 864.

A. *LIMONE V. CONDON* "PLAUSIBLE INFERENCE" STANDARD

The judgment states "Hastbacka's motivation was not relevant" to dismissal, nor was the fact that he and other FBI officials would have been aware of appellant's litigation. Limone v. Condon, 372 F.3d 39, 49 (2004) stated that "plausible inferences . . . must be drawn in the defendant's favor" and "suffice to survive a motion to dismiss". Exhibit A to this motion displays further grounds for trial already referenced, money directly allocated from the Bedford office of the FBI to the other Agency and specific individuals who were named in the appellant's related lawsuit. There is a more than "plausible inference" that direct communication and documented financial (and legal) gain between the parties named in appellant's lawsuits demonstrate grounds for a claim that are beyond mere speculation. id.

B. 2018 – 2020 OIG FBI REPORTS ON ABUSES, 2014 IRS REPORT

The problematic official actions taken by the defendants are more relevant, timely, and critical than they were when the suit was filed in early 2017. The June 2018 "Review of Various Actions by the FBI & DOJ in Advance of the 2016 Election" by the DOJ Office of the Inspector General (OIG) concluded that "several FBI employees" took actions that are "not only indicative of a biased state of mind but imply a willingness to take official action" for strictly political and self-serving ends. The December 2019 "Review of Four

Fisa Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation" by the DOJ OIG concluded the FBI "fell short of what is rightfully expected from a premier law enforcement agency entrusted with such an intrusive surveillance tool" and identified "significant investigative decisions that could affect constitutionally protected activity." Just prior to these events, a February 6th, 2014 "IRS Targeting Investigation" hearing before the House of Representatives Committee on Oversight and Government Reform revealed that former IRS official Lois Lerner had "disclosed that systematic targeting took place" of "conservative" U.S. citizens that was "absolutely incorrect, insensitive, inappropriate.' A March 2020 "Audit of the FBI's Efforts to Identify Homegrown Violent Extremists through Counterterrorism Assessments" by the DOJ OIG concluded the FBI has ongoing "weaknesses" including "inadequate investigative steps associated with counterterrorism assessments", with Tamerlan Tsarnaev and the January 2017 Ft. Lauderdale shooter cited as examples of inadequate investigation. Referenced here are 4 recent significant and publically recognized investigations, 3 that establish robust political targeting by government agencies, and 1 from last month that concludes known terrorism suspects were routinely ignored while the aforementioned political investigations ran concurrently. It is troubling and a matter of public interest that the FBI put so much unjustified scrutiny into the appellant's private life after he took legal actions involving an FBI Task Force member, while known terrorists and violent

offenders were consistently overlooked at the expense of their eventual victims.

V. CONSTITUTIONAL PROTECTIONS FOR PEOPLE'S FAMILIES

The Amended Complaint pleads "[I]t is unknown how and why the Defendants acquired the identity and personal information of the plaintiff's immediate family" who "represent an outside party". DCDN 34 at 1, 3. In the opening brief appeal, appellant cited Trammel v. U.S., 445 U.S. 40 (1980) for the legally "recognized privilege against Government invasion into familial relationships". The Supreme Court in National Archives and Records Admin. v. Favish, 541 U.S. 157, 170-171(2004) ruled that the "personal privacy protected by" 5 U.S.C. 552 "extends to family members", and that the "statute directs nondisclosure" and provides protection against "an unwarranted invasion of the family's personal privacy". Favish stated it would be "inconceivable that Congress could have intended" a "narrow" definition of personal privacy. id.

The Supreme Court has a history of precedents regarding unwarranted intrusion of law enforcement or government officials into family relationships, see: Stein v. Bowman., 38 U.S. 209, 210 (1839) (Stating the "rule which protects the domestic relations from exposure rests upon considerations connected with the peace of families.."; describing family relations as "the best solace of human existence"); Hawkins v. U.S., 358 U.S. 74, 75 (1958) (citing precedent against law

enforcement intrusion into the family unit out of historical "desire to foster peace in the family");Stanley v. Illinois, 405 U.S. 645, 651 (1972) (affirming "The Court has frequently emphasized the importance of the family", and that "The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965)")

The Federal Courts established protection as well, see: U.S v. Jones., 683 F.2d 817, 819 (4th Cir.1982) (describing the "private realm of family life, which the state cannot enter"); Under Seal v. U.S., 755 F.3d 213, 218 (4th Cir.2014) (stating "It is well settled that there is a right to privacy associated with family life".); In re Agosto, 553 F.Supp, 1298, 1299 (D.Nev.1983) (discussing parent and child relations and establishing "the privacy which is a constitutionally protectable interest of the family in American society"); Romero v. Brown, 937 F.3d 514, 520 (5th Cir. 2019) (recognizing a "family's clear interest in privacy" and "the right to family integrity"). The plaintiff has therefore plead additional grounds for the defendants' 4th Amendment violation as it relates to his family privacy.

VI. CONCLUSION

The facts and evidence in this case are irrefutable and in the favor of the appellant, and therefore the

complaint "has stated enough to withstand a mere formal motion". Dioguardi v. Duming, 139 F.2d 774, 775 (2nd Cir.1944). There are a variety of problematic legal issues that have not been addressed, and will impact future Privacy Act requesters and their rights. As stated in the complaint, "any further intrusions upon the privacy of individuals making such requests, would have a chilling and adverse effect on the public." DCDN 34 at 29 A panel rehearing is respectfully requested.

Respectfully Submitted,

/s/ Jason T. Berry

Jason T. Berry, Pro Se
37 Fenton Avenue
Laconia NH 03246

Dated: April 9th, 2020

CERTIFICATE OF SERVICE

I certify that on this day of April 9th, 2020 a copy of this Petition was delivered to the Appellees through Counsel, via US mail, first class, postage prepaid, to the US Attorney, Civil Process Clerk, 53 Pleasant Street, 4th Floor, Concord NH 03301

/s/ Jason T. Berry
Jason T. Berry, Pro Se
4/9/20

[SEAL] U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No.

15 Constitution Drive,
Ste 21
Bedford, NH 03110
603-472-2224
January 14, 2013

Scott F. Harrington
Chief Probation/Parole Officer
Manchester District Office
60 Rogers St.
Manchester, NH 03103

RE: Memorandum of Understanding/
Cost Reimbursement

Dear Chief Harrington:

Pursuant to your request for a new Memorandum of Understanding (MOU) [redacted] the

annual overtime and monthly cap are not normally specified in the MOU, as funding is addressed separately as part of our Cost Reimbursement Agreement (CRA). Enclosed please find the most recent CRA between the Federal Bureau of Investigation and the New Hampshire Department of Corrections. Hence, with your agency's concurrence, this letter will serves as an addendum to our current CRA. For fiscal year 2013 (beginning October 2012), funding for the FBI Safe Streets Task Force has been approved for Task Force [redacted], with the maximum allowable overtime reimbursement being $17,202.25 annually, with a monthly cap of $1,433.52. The proposed addition of [redacted] is currently being secured through a funding mechanism of the New England High Intensity Drug Trafficking Area (NE HIDTA) office. The eligible overtime reimbursement amount for [redacted] if approved by your agency, would be the same. Should you have any questions. please contact me directly at 603-472-2224

APPROVED 1/29/13
/s/ William [Illegible]
Commissioner

Sincerely,

Richard Deslauriers
Special Agent in Charge

By: /s/ Kieran L. Ramsey
Kieran L. Ramsey
Supervisory Senior Resident Agent

KLR:taw

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

JASON T. BERRY Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION; AND SPECIAL AGENT MARK HASTBACKA in his individual and official capacities Defendant.	Civil Action No: 17-cv-143-LM

SECOND AMENDED COMPLAINT
with Jury Demand

1. This is a lawsuit and civil action under the Privacy Act, 5 U.S.C. 552a - "Records maintained on individuals", and the "Bivens Remedy" for constitutional violations of the Fourth Amendment under Bivens v. Six, 403 U.S. 388 (1971) that describes how the Federal Bureau of Investigation (FBI) and a Federal Agent invaded the personal life and privacy of an individual exercising his right to seek information through the Freedom of Information Act (hereinafter referred to as "FOIA" request). The suit centers on the unexplained decision by the FBI and an Agent of the New Hampshire Resident Agency of the Federal Bureau of Investigation to immediately respond to a petitioners request for information by acquiring private information and contacting members of the petitioners family by phone at their home address, thereby

disclosing to outside parties that he had sent the request, instead of responding to the petitioner at his own given home address, as is customary and standard protocol. The Plaintiff's original request indicated the information was sought in regard to a pending legal matter, in which another employee of the FBI is a defendant. It is unknown how and why the Defendants acquired the identity and personal information of the plaintiff's immediate family, and information regarding his personal cell phone.

2. FBI agent Mark A. Hastbacka, acting under the color of law, contacted the Plaintiff's parents at their home in response to the Plaintiff's FOIA request, without having first made any contact with the Plaintiff. He has not acknowledged or responded to the Plaintiff's request to know why he took this course of action in response to a simple request, and how and why he obtained the personal information of the Plaintiff and his immediate family

3. The Plaintiff seeks relief for actual damages and legal costs against the FBI for violations of the Privacy Act, and against the individual defendant, acting under the color of law and legal authority, in his individual capacity, for the violation of the Fourth Amendment and the Plaintiff's privacy, and for unexplained and unprecedented intrusion into his personal life, as well as the life of his family, who represent an outside party in the Plaintiff's original FOIA request and in the matter in general. The Plaintiff also seeks permanent legal injunctions against any further constitutional violations, and any further contact with the Plaintiff's family.

JURISDICTION AND VENUE

4. This court has both subject matter jurisdiction of the Privacy Act claim and personal jurisdiction over the parties under 5 U.S.C. 552a.

5. This court has jurisdiction under 28 U.S.C. 1331.

6. Venue lies in the district of New Hampshire under 28 U.S.C. 1391 as the actions, events, and circumstances inherent in the complaint all took place within the said district. The Plaintiff and his parents are residents of New Hampshire.

7. Defendant is a federal agency within the meaning of 5 U.S.C. 552a.

PARTIES

8. Plaintiff Jason T. Berry is a former Probation and Parole Officer for the State of New Hampshire. Plaintiff assisted several arrests and actions in this capacity with Probation and Parole Officer Thomas Harrington, who is a member of the Federal Bureau of Investigation's Safe Streets Task Force in New Hampshire. Plaintiff requested any information or record regarding these events, or any documentation including his name on a Freedom of Information Act Request sent to the FBI at the New Hampshire Resident Agency in Bedford, New Hampshire on February 23rd, 2017. Plaintiff is a gainfully employed lifelong resident of New Hampshire with a home address in Laconia, New Hampshire.

9. Defendant Mark A. Hastbacka is a special agent assigned to the New Hampshire Resident Agency

of the Federal Bureau of Investigation in Bedford, New Hampshire. On February 24th, 2017 and a limited time thereafter, Agent Hastbacka personally responded to the a FOIA request sent to the Bedford Office of the FBI by the Plaintiff.

10. Defendant FBI is a federal agency within the meaning of 5 U.S.C. 552a. The FBI is headquartered in Washington, D.C. and has a Boston Division with a field office and New Hampshire resident agency in Bedford, New Hampshire. The Plaintiff sent the FOIA request that triggered the adverse responses described herein to the New Hampshire Resident Agency in Bedford.

FACTS

11. The following facts are alleged on information and belief:

12. In May of 2016, the Plaintiff sent Freedom of Information Act requests to the Record/ Information Dissemination Section of the Federal Bureau of Investigation in Winchester, Virginia. The requests were composed and sent in compliance with guidelines and procedures for filing such requests.

13. The requests were regarding any information related to the Plaintiff, his law enforcement employment history activities, and his personal information, if they exist.

14. As of this date, the Plaintiff has never received any response to the Freedom of Information Act requests sent to the FBI in Winchester, Virginia in May of 2016.

15. On February 17th, 2017, the Plaintiff filed a civil suit in New Hampshire naming FBI Safe Streets Task Force member Thomas Harrington as a party.

16. On February 23rd, 2017, the Plaintiff sent a Freedom of Information Act request to the New Hampshire Resident Agency in Bedford, New Hampshire. The specific request was for any information regarding his personal information and historical documentation of his past involvement in the activities of the FBI Safe Streets Task Force in New Hampshire, if any such information exists. The request was sent in compliance with procedural guidelines for filing such a request. The February 23rd, 2017 request specified that the information was sought "in relation to pending legal matters." This request was sent Priority Mail Express with a guaranteed delivery date for the next day, February 24th, 2017. (Exhibit B) The Bedford FBI office oversees the funding and activities of the New Hampshire Safe Streets Task Force, and did so at the time of the plaintiff's involvement in its activities. (Exhibit E)

17. The Plaintiff sought the information directly from the New Hampshire Resident Agency as the relevant jurisdiction, and because all requests to the Winchester, Virginia Record and Dissemination Section of the Federal Bureau of Investigation had failed to achieve any response or acknowledgment.

18. The Plaintiff included his current home address in Laconia, New Hampshire, and previous home address in Manchester, New Hampshire.

19. On the Afternoon of February 24th, 2017 the Plaintiff received text messages and had phone contact with his parents indicating that someone from the New Hampshire Office of the Federal Bureau of Investigation had called them at their home address and left a message on their home phone inquiring about the Plaintiff. The agent, who left a message on their home voicemail, was Mark A. Hastbacka, of the Bedford Resident Agency of the Boston Division of the Federal Bureau of Investigation. He requested he be called back, and left a contact number with a Florida area code to call him back at. (See Exhibit A)

20. The Plaintiff has not lived with his parents since 1998, and has since 1998 at all times had a primary home address separate from his parents where all important mail has been delivered. The Plaintiff's parents live nowhere near the Plaintiff, close to an hour and a half from his home address in Laconia.

21. In his February 24th, 2017 voicemail message left on the home phone of the Plaintiff's parents, Agent Hastbacka stated that he was contacting them in regard to "your son" and that the Plaintiff had "sent some correspondence here today". He stated that he had "tried to call him a couple of times, he's not picking up, and there's no voicemail". A copy of this voicemail message has been retained. (Exhibit A)

22. The Plaintiff did not receive any form of contact or communication from Agent Mark A. Hastbacka on February 24th, 2017. The Plaintiff's phone was on in the morning and early afternoon prior to notice

of the contact with his parents, and the Plaintiff's phone has active voicemail that was not full and is checked regularly. The Plaintiff had not included his personal phone number in the February 23rd, 2017 request, and it is unknown how Agent Hastbacka acquired the Plaintiff's personal cell phone number, and why he would have done so, as the Plaintiff had provided only his current home address for correspondence.

23. The sole recipients of any contact or communication regarding the FOIA request sent the previous day were the Plaintiff's parents. The Plaintiff's parents were not aware that the Plaintiff had sent correspondence to the Federal Bureau of Investigation. The Plaintiff's parents were confused and concerned about being contacted by the Federal Bureau of Investigation about their son.

24. Plaintiff responded in writing to Agent Hastbacka's voicemail message at his parents home on February 27th, March 1st, and March 9th of 2017. A February 27th letter requested that he contact the Plaintiff solely in regard to the FOIA request. Agent Hastbacka responded by sending his business card and later a printout of directions for contacting the Records Division of the FBI in Virginia. (Exhibit C). All communications were polite and friendly.

25. The Plaintiff has never received a call from Agent Hastbacka, but in the correspondences he sent the Plaintiff, he requested each time that the Plaintiff call him at the number he provided. Plaintiff indicated that he preferred to communicate in writing in formal matters.

26. In the March 9th, 2017 memo (Exhibit D), the Plaintiff informed Agent Hastbacka that his contacting the Plaintiff's family had resulted in a "confusing" effect on him and his parents, and politely requested to know specifically:

    a. How he had or obtained the Plaintiff's parents home phone number

    b. How he knew they were the Plaintiff's parents

    c. How he knew where they lived and their home address

27. Agent Hastbacka never responded to the March 9th, 2017 memo, and has not communicated with the Plaintiff since that time.

28. The motive and intention in contacting the Plaintiff's parents immediately in response to a request for records is still unknown, and remains unknown and an open question. How this unexplained response may relate to the reality that the Plaintiff had stated that the request was in regard to a pending legal matter, and that the Plaintiff has named a member of an FBI Task Force in New Hampshire in the aforementioned legal matter, is also unknown and an open question. The extent to which Agent Hastbacka and the New Hampshire Resident Agency of the FBI may already have been aware of the pending legal matter, and how this may have influenced and determined the decision to invade the Plaintiff's privacy, is unknown and another remaining and open question.

29. The continued use of such responses to an individual's exercise of their right to request information, and any further intrusions upon the privacy of individuals making such requests, would have a chilling and adverse effect on the public.

CAUSES OF ACTION

COUNT I

Violations of Privacy Act, 5 U.S.C. 552a(b) and (g) - "Records Maintained on Individuals"

30. The Privacy Act states that "No Agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.." 5 U.S.C. 552a(b). None of the exceptions to the aforementioned disclosure prohibition apply in this case.

31. The FBI is an "agency" within the meaning of 5 U.S.C. 552a.

32. The Plaintiff is informed and believes that the FBI maintains a "system of records" in regard to mail correspondences and record requests.

33. The Plaintiff is an "individual" who sent personal and identifying information in a formal correspondence to the FBI in Bedford, New Hampshire for the purpose of a Freedom of Information Act and Privacy Act Request.

34. The Freedom of Information Act/ Privacy Act request sent to the FBI by the Plaintiff is a "record"

within the meaning of 5 U.S.C. 552a(b) as it represents a "grouping of information about an individual". The request sent by the Plaintiff to the FBI included personal information such as his date of birth and present (current) and past home address, and disclosed that he was involved in a pending legal matter.

35. The defendant FBI disclosed the Plaintiff's personal request for information to the Plaintiff's parents immediately upon receiving the request by calling their home on February 24th, 2017, without the Plaintiff's knowledge or consent under 5 U.S.C. 552(a). The defendant contacted the Plaintiff's parents before having any contact with the Plaintiff. The Plaintiff's parents were not aware of the Plaintiff's FOIA request and were confused and concerned by the unexpected communication from the FBI in regard to their son.

36. The Plaintiff had included his current home address with the request, as is customary and in compliance with standard procedure in such requests. There is no legal, administrative, or procedural precedent or reason to make a phone call to an individual's immediate family to discuss their Privacy Act request. The standard for communication would have been to respond to the Plaintiff in writing at his home address.

37. The plaintiff, as "the individual to whom the record pertains", did not provide "prior written consent" to disclose information about his request "to any person" under 5 U.S.C. 552(a).

38. The plaintiff did not provide any identifying information, such as names, address, or phone number,

or his parents. His parents are not a party to his request for information under 5 U.S.C. 552(a).

39. Contacting the Plaintiff's parents and disclosing he had sent the request represents restricted disclosure of "any record which is contained in a system of records by any means of communication to any person" that is not "pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains" under 5 U.S.C. 552a(b).

40. The FBI failed "to comply with any other provision of this section, or any rule promulgated thereunder" under 5 U.S.C. 552a(g)(1)(D).

41. The FBI is sued, as a "Federal agency" under 5 U.S.C. 552a(b) for the "intentional or willful" violations of the Privacy Act suffered by the plaintiff, for actual damages, costs of this action, and reasonable attorney fees as provided for in 5 U.S.C. 552a(g)(4).

COUNT II

Violation of 5 U.S.C. 552a(i) and (g)

42. 5 U.S.C. 552a(i) states that "Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in

any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor".

43. Agent Mark Hastbacka, as a special agent of the New Hampshire Resident Agency of the Boston Division of the FBI, is an "officer or employee of any agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder" under 5 U.S. Code 552a(l).

44. The defendants "willfully" disclosed the plaintiff's privacy act request to his parents, whose personal and identifying information was not provided by the plaintiff, who were not mentioned in his request, and without the plaintiff's consent or knowledge.

45. The plaintiff's parents were "not entitled to receive" information about the plaintiff or the plaintiff's Privacy Act request from the FBI or Agent Hastbacka under 5. U.S.C. 552a(i).

46. For reasons and by methods never explained, defendants searched for and obtained the identities and personal information of the plaintiff's parents and attempted to contact them regarding his request, "knowing that disclosure of the specific material is so prohibited" under 5 U.S.C. 552a(b) and (i).

47. The defendants never responded to the plaintiff's request for the legal grounds for taking the aforementioned actions in regard to his legally protected request under the Privacy Act. (Exhibit D)

48. Agent Hastbacka of the FBI, an "officer or employee of an agency" committed a violation of law under 5 U.S.C. 552a(i) by "willfully" disclosing information about the plaintiff's privacy act request of the F.B.I. to a "person or agency not entitled to receive it" after receiving the information, "knowing that disclosure of the specific material is so prohibited".

49. The defendants failed "to comply with any other provision of this section, or any rule promulgated thereunder" under 5 U.S.C. 552a(g)(1)(D).

50. The defendant FBI is sued for "intentional or willful" violations of the law and the plaintiff's legal protections under 5 U.S.C. 552a(I), for actual damages, costs of this action, and reasonable attorney fees as provided for in 5 U.S.C. 552a(g)(4).

COUNT III

Violation of the 4th Amendment of the U.S. Constitution

51. The Fourth Amendment of the United States Constitution provides the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures".

52. On February 24th, 2017, the day that the Bedford Office of the FBI received the plaintiff's February 23' Privacy Act request for Information, Agent Mark Hastbacka obtained the identity and contact information of the plaintiff's parents through some manner of search, and left a voicemail message at their residence disclosing that the plaintiff

sent the request, and requesting that they either call him or have the plaintiff call him. (Exhibit A)

53. At no time in his request did the plaintiff refer to or provide any information as to the identity or personal information of his parents, their address, or their phone number. (Exhibit B).

54. Agent Hastbacka made statements in the voicemail message stating that he had somehow acquired the plaintiff's personal cell phone number, that he had tried calling, and statements regarding the status of the plaintiff's voicemail account. (Exhibit A)

55. At no time did the plaintiff provide his personal cell phone number in his Privacy Act request, request a phone call, or give information about the status of his voicemail account. (Exhibit B)

56. An individual's personal cell phone, and information related to or within an individual's personal cell phone, are protected under the Fourth Amendment and its privacy provisions under the U.S. Supreme Court decision in Riley v. California, 134 S.Ct. 2473 (2014). Riley establishes that such information can only be acquired or obtained with a warrant, and involves searches related only to criminal cases and not a response to a Privacy Act Request. Id.

57. Agent Hastbacka's voicemail message on the plaintiff's parents' home phone at their residence was an intrusion upon "a constitutionally protected area in order to obtain information", as he had no legal grounds to search for or obtain the personal information of the plaintiff's family in

response to a FOIA/Privacy Act request. U.S. v. Jones, 132 S.Ct. 945 (2012)

58. Agent Hastbacka, acting under the color of law, violated the plaintiff's Fourth Amendment right to a "reasonable expectation of privacy" under Katz v. U.S. 389. U.S. 347 (1989).

59. Agent Hastbacka had no legal grounds to search for information regarding the plaintiff or his parents, as the plaintiff's current home address was provided in his request and is the appropriate and accepted form of communication.

60. Agent Hastbacka was acting in an individual capacity under the color of legal authority when he committed the aforementioned violations of the Fourth Amendment of the U.S. Constitution, and is sued for damages and injunctive relief pursuant to Bivens v. Six, 403 U.S. 388 (1971).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Award the plaintiff remedies for "actual damages" for the aforementioned violations of 5 U.S.C. 552a, as provided for by 5 U.S.C. 552a(g)(4).

B. Award the plaintiff "costs of the action together with reasonable attorney fees" as provided for by 5 U.S.C. 552a(g)(4).

C. Award all rights and remedies available to the Plaintiff under 5 U.S.C. 552;

D. Award reasonable and compensatory monetary relief for damages, to be determined at trial, for violations of the Fourth Amendment by Agent Hasbtbacka pursuant to Bivens.

E. Issue a permanent injunction against any further constitutional violations or contact with the plaintiff's family.

F. Award exemplary and punitive damages for the Constitutional violations against the plaintiff, to be determined at trial, and to deter similar violations in the future.

G. Award any other reasonable costs, expenses, and attorney fees.

H. Award any other further relief as the Court deems necessary and proper.

Dated March 5th, 2018 Respectfully Submitted,

Laconia, New Hampshire

By:

/s/ Jason T. Berry

Jason T. Berry
Appearing Pro Se
37 Fenton Avenue
Laconia NH 03246
603-716-7479

March 5th, 2018

CERTIFICATE OF SERVICE

I certify that on this day of March 5th, 2018, a copy of this Amended Complaint was delivered to the Defendants through Counsel, via US mail, first class, postage prepaid, to the US Attorney, Civil Process Clerk, 53 Pleasant Street, 4th Floor, Concord NH 03301

/s/ Jason T. Berry
Jason T. Berry
Pro Se
[3/5/18]

Federal Bureau of Investigation
New Hampshire Resident Agency
Records Division
FOIA/PA Request
15 Constitution Drive
Bedford NH 03110

February 23rd, 2017

To Whom it May Concern:

This is a formal request for responsive records under the Freedom of Information Act (5 USC 552) and the Privacy Act. I hereby request any and all records your agency may have containing reference to me or my personal information:

Jason T. Berry
[redacted]

Current Address:
37 Fenton Avenue
Laconia NH 03246

Former Address (until 3/2016):
562 Montgomery Street
Manchester NH 03102

From 2011 until 2013 I worked in a capacity as a Probation and Parole Officer for the State of New Hampshire in the Nashua District Office, and assisted in multiple activities, arrests, and operations of the FBI Safe Streets Task Force and its members. I am formally requesting any responsive record containing my name or personal information in regard to these, or any other matters. These records, if they exist, are requested in relation to pending legal matters. Under applicable law and guidelines, these records are requested in a timely manner as required by law and mandatory deadlines for response and release of documentation.

Enclosed is a completed DOJ Form 361 certifying my identity. I am requesting that if appropriate, any fees implicit be waived. In the event that fees cannot be waived, I would be grateful if you could inform of the total charges in advance of fulfilling this request.

Thank you in advance for your cooperation.

Respectfully,

/s/ Jason T. Berry
Jason T. Berry
2/23/17
[2/23/17]

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Mark A. Hastbacka
Special Agent
Boston Division

Bedford, NH Resident Agency
15 Constitution Drive
Bedford, NH 03100

Telephone: (603) 472-2224
Fax: (603) 471-[redacted]
Cell: (954) 658-0367
[redacted]

Federal Bureau of Investigation
NH Resident Agency
Attn: Agent Mark A. Hastbacka
15 Constitution Drive
Bedford NH 03110

March 9th, 2017

Re: February 24th, 2017 Voicemail at my Parent's Home

Dear Agent Hastbacka:

I thank you for your response to my Priority Mail sent on March 1st I received the Priority Mail envelope I had sent you on March 1st placed in between the doors at my home a few days later, with the documents I had sent, and a note from you inside about my Freedom of Information Act (FOIA) Request sent to the Bedford Resident Agency on February 23rd, 2017. I thank you for the information.

Going forward, I just have a few questions in regard to the process and any further Freedom of Information Act requests that I may submit.

Upon receipt of my original request dated February 23rd, 2017 FOIA, you left a voicemail for my parents on their home phone number at their home address on the afternoon of February 24th. I listened to the voicemail you left at their home the following weekend. It stated you were contacting them in regard to "your son" and that I had "sent some correspondence here today." They did not know I had sent a FOIA request to the FBI. In discussions with my parents. they had a few questions and so do I.

We are wondering:

1. How you had their home phone number, or any information about them at all, as I had not included it in my FOIA request
2. How you knew their names and that they are my parents
3. How you knew where they lived. They do not live anywhere near my home address that was listed on my memo.
4. If identifying and contacting someone's parents in regard to a FOIA request is standard operating procedure, and if it could happen to them again if I make similar requests.

Your voicemail message at their home left on February 24th, also stated that you had "tried to call him a couple of times, he's not picking up, and there's no voicemail." I did not receive any calls from you on that day, and have not at any time. I also have always had active voicemail, and did on the 24th when the voicemail message was left for my parents. I have not

received any voicemails from you at any time, and have checked. On a personal note, I am politely wondering:

1. How you had my personal cell phone number (my only phone), as I had not included it in my request, only my address.

2. If any further FOIA act requests may result in someone calling my personal cell phone, as it is off when I am working.

I thank you for your continued courtesy in our correspondences, and hope that my continued communication has not been in any way burdensome. The circumstances of recent communications have been confusing for my parents and I, and I appreciate your information. Thanks again.

Respectfully,

/s/ Jason T. Berry
Jason T. Berry
3/9/17
[3/9/17]

[SEAL]

U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No.

15 Constitution Drive,
Ste 21
Bedford, NH 03110
603-472-2224
January 14, 2013

Scott F. Harrington
Chief Probation/Parole Officer
Manchester District Office
60 Rogers St.
Manchester, NH 03103

RE: Memorandum of Understanding/
Cost Reimbursement

Dear Chief Harrington:

Pursuant to your request for a new Memorandum of Understanding (MOU) [redacted] the annual overtime and monthly cap are not normally specified in the MOU, as funding is addressed separately as part of our Cost Reimbursement Agreement (CRA). Enclosed please find the most recent CRA. between the Federal Bureau of Investigation and the New Hampshire Department of Corrections. Hence, with your agency's concurrence, this letter will serves as an addendum to our current CRA. For fiscal year 2013 (beginning October 2012), funding for the FBI Safe Streets Task Force has been approved for Task Force [redacted], with the maximum allowable overtime reimbursement being $17,202.25 annually, with a monthly cap of $1,433.52. The proposed

addition of [redacted] is currently being secured through a funding mechanism of the New England High Intensity Drug Trafficking Area (NE HIDTA) office. The eligible overtime reimbursement amount for [redacted] if approved by your agency, would be the same. Should you have any questions. please contact me directly at 603-472-2224.

APPROVED [1/29/13]
/s/ William [Illegible]
Commissioner

Sincerely,

Richard Deslauriers
Special Agent in Charge

By: /s/ Kieran L. Ramsey
Kieran L. Ramsey
Supervisory Senior
Resident Agent

KLR:taw

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

JASON T. BERRY Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION; AND SPECIAL AGENT MARK HASTBACKA in his individual and official capacities Defendant.	Civil Action No: 17-cv-143-LM

PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Plaintiff moves for the Honorable Court to grant a Preliminary Injunction in this matter, forbidding any further contact between the Defendants and the Plaintiff's family ahead of trial. Because the Plaintiff supplied his return address in his February 24th, 2017 request for information from the Bedford, New Hampshire Office of the Federal Bureau of Investigation, and elected because of his own preference not to provide *any* phone number for response, Agent Mark Hastbacka had no right to ascertain the home phone number of and call the Plaintiff's parents, who had no knowledge of the aforementioned request. Because of the ongoing stress that this has caused the Plaintiff, exacerbated by the Defendant's refusal to respond to

how they even identified his family, along with serious illnesses, including a prolonged hospitalization, suffered by his parents in the months that followed the contact, a preliminary injunction should be granted against any further contact in order to avoid any further harm ahead of trial. The equitable and objective authority of the Court is the only adequate source of remedy in this matter as the case proceeds to trial.

In support of this motion for Preliminary Injunction, the Plaintiff refers the Honorable Court to the accompanying Memorandum of Law in support of the Motion, and the attached exhibit displaying the Plaintiff's prior attempt to resolve the issues in question (Exhibit A, March 9th, 2017 Letter to FBI Agent Mark Hastbacka by Jason Berry).

Therefore, the Plaintiff requests that a Preliminary Injunction be issued by the Court ahead of trial for the reasons specified.

Dated July 3, 2017 Respectfully Submitted,

Laconia, New Hampshire

By:

/s/ Jason T. Berry

Jason T. Berry
Appearing Pro Se
37 Fenton Avenue
Laconia NH 03246
(603) 716-7479

July 3rd, 2017

CERTIFICATE OF SERVICE

I certify that on this 3rd day of July, 2017, a copy of the foregoing motion for Preliminary Injunction and supporting memorandum was delivered to the Defendants through Counsel, via US mail, first class, certified, return receipt requested, postage prepaid, to:

US Attorney
Civil Process Clerk
53 Pleasant Street
4th Floor
Concord NH 03301

/s/ Jason T. Berry
Jason T. Berry
Pro Se
[7/3/17]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

JASON T. BERRY Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION; AND SPECIAL AGENT MARK HASTBACKA in his individual and official capacities Defendant.	Civil Action No: 17-cv-143-LM

MEMORANDUM IN SUPPORT OF PLAINTIFF'S REQUEST FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

The Plaintiff has brought action under the Privacy Act, 5 U.S.C. 552a(b), "Records Maintained on Individuals", seeking relief for the actions of FBI Agent Mark Hastbacka in identifying his parents, contacting them at their home, and leaving a voicemail message in response to the Plaintiff's February 23rd, 2017 Freedom of Information and Privacy Act request for information from the Bedford, New Hampshire Office of the Federal Bureau of Investigation (FBI). Because the Plaintiff never authorized the release of the information regarding his personal request to outside parties, never provided the Defendants any information at all regarding the names and contact information of his parents, and the Defendants have never responded to the Plaintiff's

request to know how information regarding his family was obtained and why they were contacted (Exhibit A), the Plaintiff requests a Preliminary Injunction to alleviate ongoing distress at the unauthorized and unexplained actions of the FBI in this matter.

II. STATEMENT OF FACTS

On February 23rd, 2017, the Plaintiff sent a formal Freedom of Information and Privacy Act request to the Bedford, New Hampshire Office of the FBI requesting any and all information relating to his personal information, and also to any of his previous activities with the FBI Safe Streets Task Force. The Plaintiff has a pending lawsuit naming Probation and Parole Officer Thomas Harrington, a member of the NH FBI Safe Streets Task Force, as a defendant, and indicated in his request that it was in relation to "pending legal matters". The request was sent via Priority US Mail, with guaranteed next day delivery.

In the early afternoon on the following day, February 24th, the Plaintiff received communications from his parents indicating that they had just received a voicemail from an FBI Agent about the Plaintiff. They stated that the caller on the voicemail identified himself as Mark Hastbacka of the FBI, and left a phone number with a Florida area code to call him at. The Plaintiff subsequently listened to this voicemail himself and retained a copy. The Plaintiff's parents live several minutes from him, and his formal and personal

request under the Privacy Act makes no mention of them and is not related to them in any way whatsoever.

The Plaintiff sent polite written responses to Defendant Mark Hastbacka instead of calling him, sent via priority mail. Opened Priority Mail envelopes with the Plaintiff's communications inside were subsequently found by the Plaintiff inside the door of his home. On March 9th, 2017, the Plaintiff sent Agent Hastback a polite memo requesting to know how he had ascertained the personal contact information for this parents, and why he had called them in regard to the basic Privacy Act request by the Plaintiff. See the March 9th, 2017 memo to Mark Hastbacka from the Plaintiff (Exhibit A). The Plaintiff has never received any response to his requests for information regarding Agent Hastbacka's unprecedented actions while acting on behalf of the Bedford FBI Office in response to the original Privacy Act Request. The Plaintiff filed a Civil Action under the Privacy Act on April 18th, 2017. The Plaintiff's distress and concern for his parents over these matters has been exacerbated by their recent illnesses.

III. GROUNDS FOR PRELIMINARY INJUNCTION AND APPLICABLE LEGAL PRECEDENTS AND STANDARDS

The legal standard for granting preliminary injunctions relies on four factors:

> "1) a strong likelihood of success on the merits; 2) the possibility of irreparable injury;

> 3) the balance of hardships in its favor; 4) the advancement of public interest."

Winter v. Natural Resources Defense Council., 555 US 7 (2008).

The Winter decision further extended the requirement from a *possibility* of injury to "likely to suffer irreparable harm" Winter v. Natural Resources Defense Council., 555 US 7 (2008).

The Plaintiff at no time voluntarily revealed his own phone number or the name, address, or phone number of his parents in his request for information. His parents live separately from him, and have no relation to the Freedom of Information and Privacy Act Request from February 23rd, 2017. Whereas the home of the Plaintiff's loved ones represents an aspect of his private life, unauthorized and unexplained attempts to contact them and ask about him represent an "unreasonable and highly offensive intrusion upon another's seclusion." Summers v Bailey., 55 F.3d 1564 (11th Cir. 1995). Phone calls to the home of the Plaintiff's parents represent "unwarranted sensory intrusions" into his privacy, as the Plaintiff's parents had no idea he had even requested information from the FBI. Shulman v. Group W. Productions, Inc., 955 P.2d 469 (1998). Since the Plaintiff did not voluntarily reveal any phone numbers or private or personal information about his parents to Agent Hastbacka, and they have no involvement in his request, Agent Hastbacka's conduct was intrusive and unreasonable as to represent an invasion of the Plaintiff's privacy. Nader v. General Motors Corp., 25 N.Y. 2d 560 (1970) Issues of Privacy and the

unreasonable over-reach of legally invested federal authority are inherently matters of Public Interest.

Agent Mark Hastbacka is specifically liable and subject to the request for Injunction because, for reasons still unknown, he somehow ascertained the identity of the Plaintiff's parents on the day that the request for information arrived, and then called them directly on their home phone line. He did this during the work day, under the color of legal federal authority, and in the course of his duties and under the powers invested in him as an agent of the FBI. His actions violated standard operating procedures in regard to responding to and handling a request for information under the Privacy Act. Privacy Act, 5 U.S.C. 552a(b) - "Records Maintained on Individuals". He did this acting under the authority of his immediate supervisor, and it is unknown how many other members of the Bedford Office of the Federal Bureau of Investigation are aware of the personal information regarding the Plaintiff's family. Therefore the FBI is subject to the request for Injunction also.

In questions of the liability or possible Qualified Immunity of officials acting under the color of law, "inquiry into the reasonableness of an officer's conduct must focus both on what the officer did (or failed to do) and on the state of the law at the time of the alleged act" Limone, et al v Condon, et al., 372 F.3d 39 (1st Cir. 2004). Agent Hastbacka's actions violated the Privacy Act, 5 U.S.C. 552a(b), "Records Maintained on Individuals". Specifically, he had no right to question any other citizen in regard to the Plaintiff's Freedom of Information Act Request, or share the fact that the

Plaintiff had made the request with uninvolved parties. The request inherently included the Plaintiff's own private information, and at no time did he imply, authorize, or consent to the sharing of its substance or content to outside parties. Since it is established that the elements of the Defendants adverse actions represent an invasion of the Plaintiff's privacy, the Defendants are "not thereby necessarily immunized from liability if his action is such that liability would be imposed by the general law of torts" Larson v Domestic and Foreign Commerce Corp., 337 US 682 (1949). Officers and Agents of the Government can only obtain a qualified immunity "if their actions were not objectively unreasonable at the time they were taken" Humphrey v Staszak., 148 F.3d 719 (7th Cir. 1998). Therefore, the actions of the Defendants are subject to this Motion.

IV. CONCLUSION

The loved ones of any individual represent one of the few constant sources of support, relief, and comfort in life. They could in fact be described as the only constant, and the most important. The unexplained and unauthorized invasion of this part of an individual's existence, particularly by an agent of an agency with vast and prolific powers and authorities, in relation to contested matters in which the individual has sued one of its members, is at the least chilling, and if unresolved, potentially horrifying.

The plaintiff suffers daily and ongoing distress over concern of why an FBI Agent would locate and contact his parents in relation to his request for

information related to his pending lawsuit, which names FBI Safe Streets Task Force Officer Thomas Harrington as a defendant. The original request acknowledged "pending legal matters". It remains an open question if Agent Mark Hastbacka was already aware of the Plaintiff's lawsuit naming Thomas Harrington as a Defendant, and how that impacted his decision making The Plaintiff has never received an answer as to why his family was contacted or their personal information was gathered. Absent any guarantee that his family will not be subjected to any further contact, potential scrutiny, or burden, the Plaintiff will continue to suffer distress and emotional harm out of concern for his family. The Federal Bureau of Investigation and Agent Mark Hastbacka will not be burdened, impeded, or harmed in any way by a restriction from contacting the Plaintiff's family.

Therefore, the Honorable Court should grant the Plaintiff's Motion for a Preliminary Injunction, restricting the Defendants from any contact with the Plaintiff's Parents.

Respectfully Submitted,

/s/ Jason T. Berry

Jason T. Berry
Appearing Pro Se
37 Fenton Avenue
Laconia NH 03246
(603) 716-7479

July 3rd, 2017

Federal Bureau of Investigation
NH Resident Agency
Attn: Agent Mark A. Hastbacka
15 Constitution Drive
Bedford NH 03110

March 9th, 2017

Re: February 24th, 2017 Voicemail at my Parent's Home

Dear Agent Hastbacka:

I thank you for your response to my Priority Mail sent on March 1st. I received the Priority Mail envelope I had sent you on March 1st. I placed in between the doors at my home a few days later, with the documents I had sent, and a note from you inside about my Freedom of Information Act (FOIA) Request sent to the Bedford Resident Agency on February 23rd, 2017. 1 thank you for the information.

Going forward, I just have a few questions in regard to the process and any further Freedom of Information Act requests that I may submit.

Upon receipt of my original request dated February 23rd. 2017 FOIA, you left a voicemail for my parents on their home phone number at their home address on the afternoon of February 24th. I listened to the voicemail you left at their home the following weekend. It stated you were contacting them in regard to "your son" and that I had "sent some correspondence here today." They did not know I had sent a FOIA request to the FBI. In discussions with my parents. they had a few questions and so do I.

We are wondering:

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3. How you knew where they lived. They do not live anywhere near my home address that was listed on my memo.
4. If identifying and contacting someone's parents in regard to a FOIA request is standard operating procedure, and if it could happen to them again if I make similar requests.

Your voicemail message at their home left on February 24th, also stated that you had "tried to call him a couple of times, he's not picking up, and there's no voicemail." did not receive any calls from you on that day, and have not at any time. I also have always had active voicemail, and did on the 24th when the voicemail message was left for my parents. I have not received any voicemails from you at any time, and have checked. On a personal note, I am politely wondering:

1. How you had my personal cell phone number (my only phone), as I had not included it in my request, only my address.
2. If any further FOIA act requests may result in someone calling my personal cell phone, as it is off when I am working.

I thank you for your continued courtesy in our correspondences, and hope that my continued communication has not been in any way burdensome. The circumstances of recent communications have been confusing for my parents and I, and I appreciate your information. Thanks again.

Respectfully,

/s/ Jason T. Berry
Jason T. Berry
3/9/17
[3/9/17]