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

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| CARA LESLIE ALEXANDER, *et al.*, | ) | |
| | ) | Civil Action Nos. |
| Plaintiffs, | ) | 96-2123/97-1288 (RCL) |
| | ) | |
| v. | ) | **CONSOLIDATED ACTIONS** |
| | ) | |
| FEDERAL BUREAU OF INVESTIGATION, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**PLAINTIFFS ALEXANDER AND DUGGAN'S REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Cara Leslie Alexander and Joseph P. Duggan, by counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure, respectfully submit this reply memorandum in support of their cross-motion for summary judgment. As grounds therefor, Plaintiffs Alexander and Duggan state as follows:

## MEMORANDUM OF LAW

### I. Introduction.

Try as it might, the FBI cannot dispute the compelling admissions it made in the aftermath of "Filegate." The FBI admitted that it sent literally hundreds of background investigation files to the Office of Personnel Security ("OPS"), a component of the Executive Office of the President ("EOP"), despite the fact that OPS's requests for the records were, in the FBI's own words, "without justification and served no official purpose." The FBI admitted that it failed to "institute sufficient protections to effectively safeguard" the records and that its conduct constituted a "complete abdication of management responsibility." The FBI also

admitted that this "complete abdication of management responsibility" resulted in "egregious violations of privacy." No amount of additional discovery could have better or more clearly demonstrated that the FBI willfully violated the Privacy Act.

Nor can EOP dispute the fact that, regardless of whether OPS knew it was requesting records of FBI background investigations on persons who had never had any need for access to the Clinton White House, it continued to maintain these records long after it knew it had no lawful reason for doing so. The records should have been returned to the FBI immediately. Knowingly keeping these records also constituted a flagrant violation of Plaintiffs Alexander and Duggan's privacy rights.

It also is just as clear that Plaintiffs Alexander and Duggan suffered actual damages as a result of the flagrant violation of their privacy rights. Contrary to the claims of the FBI and EOP, the evidence that Plaintiffs Alexander and Duggan submit in support of their damages, which consist of out-of-pocket mitigation costs incurred by both Plaintiffs Alexander and Duggan and emotional distress suffered by Plaintiff Duggan, entitles them to an award. Consequently, summary judgment should be granted in favor of Plaintiffs Alexander and Duggan and against both the FBI and EOP.

## II. Argument.

### A. The FBI Willfully Violated the Privacy Act.

Far from creating a genuine dispute of material fact about the FBI's liability for violations of the Privacy Act, the five declarations on which the FBI bases its opposition highlight the FBI's failure to maintain appropriate administrative safeguards to protect the privacy of Plaintiffs Alexander and Duggan and the hundreds of other persons whose FBI background investigation

records the FBI provided to OPS without justification. Indeed, the FBI cannot dispute its own admission that it failed to "institute sufficient protection to effectively safeguard the very real privacy interests that we, as custodians of so many people's files, are responsible for protecting." *See* Report of the FBI General Counsel on the Dissemination of FBI File Information to the White House, dated June 14, 1996 ("FBI Report"), attached as Exhibit 7 to Plaintiff Alexander and Duggan's Local Rule 7(H) Response to the Government Defendants' Renewed Statement of Material Facts and Statement of Undisputed Material Facts in Support of Their Cross-Motion for Summary Judgment (Plfs' Stmt.") at p. 29; *see also id.* at p. 2; Statement of FBI Director Louis J. Freeh, dated June 14, 1996 ("Freeh Statement"), attached to Plfs' Stmt. as Exhibit 8, at pp. 1 and 3. There is no dispute that the privacy interests to which the FBI was referring include Plaintiffs Alexander and Duggan's privacy interests in their background investigation records.

Plaintiffs Alexander and Duggan have never disputed that the FBI had various measures in place to protect the physical security of their background investigation records. However, no high gate or stout lock would have prevented the "egregious violations" of privacy that occurred here. *See* FBI Report at p. 2; *see also* Freeh Statement at p. 1. This undeniably is the case because the FBI was institutionally programmed to turn over records to OPS anytime OPS asked for them.

The declarations of three FBI employees charged with responding to requests for background information -- Supervisory Research Analyst Peggy J. Larson and Research Analysts Sherry L. Carner and Janice J. George -- confirm that they had never been instructed to question the propriety of a facially valid request. Declaration of Peggy J. Larson (Defendants' Exhibit 85) at ¶ 15; Declaration of Sherry L. Carner (Defendants' Exhibit 86) at ¶ 13; Declaration of Janice

J. George (Defendants' Exhibit 87) at ¶ 10. Supervisory Research Assistant Larson testified that she never instructed her staff to ask such questions. Declaration of Peggy J. Larson (Defendants' Exhibit 85) at ¶ 15. All three research analysts testified that they "would have considered it inappropriate" to question whether OPS "actually needed the information sought through the request." *Id.* The declarations thus confirm FBI Report's description of a system "institutionally inclined to process facially valid White House requests without reflection and without any effort to assess and balance the inherently competing interests underlying the Privacy Act."[1] *See* FBI Report at p. 13.

Therefore, when the FBI admittedly experienced an unprecedented increase in the number of OPS requests for prior background investigation records, higher management was made aware of the unusual influx, but no action was taken. Indeed, the FBI Report and Director Freeh placed blame for the "egregious violations" of privacy on management, not the analysts: "[T]his inquiry has revealed a complete abdication of management responsibility at the level of [Ms. Larson's] immediate superior, the Unit Chief and the executive level management above him." FBI Report

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[1] The other two declarations on which the FBI relies, the Declaration of David V. Kitchen (Defendants' Exhibit 88) and the Declaration of James A. Bourke (Defendants' Exhibit 89) are irrelevant. In addition to describing the FBI's measures for securing the physical safety of the records, which, again, Plaintiffs Alexander and Duggan do not challenge, Mr. Kitchen's only personal involvement in "Filegate" appears to have occurred on June 6, 1996, when he accompanied FBI General Counsel Howard M. Shapiro to the White House to take possession of several boxes containing background investigation records. *See* Exhibit 88 at para. 12.

Mr. Bourke worked in the FBI's Special Inquiry and General Background Investigation Unit ("SIGBIU"). He testified that SIGBIU employees had "no substantive role in any request for a previous background investigation report." *See* Exhibit 89 at para. 4.

at p. 29.[2] None of the admissions contained in the FBI Report or the Freeh Statement are contradicted or diminished by the FBI's declarations.

The FBI's attempt to minimize the extraordinary nature of the influx of requests it received from OPS between December 1993 and February 1994, and, correspondingly, its admitted awareness of the improper nature of the requests, also fails. As the FBI Report found, amid all of the other requests received by EASU, this particular group of requests was highly unusual because all 481 of the requests bore "the characteristics of a single series." *See* FBI Report at p. 24. They arrived in "nearly perfect alphabetical order" commencing with the letters "Aa" and continuing through the letters "Go." *Id.* In addition, all of the requests sought copies of previous reports and all cited the same justification – "Access (S)." *Id.* This highly unusual series of requests constituted 88% of the requests for "previous reports only" received by EASU during this time period, which was well after the change in administrations that had taken place in January 1993. *Id.* Nonetheless, the requests "were all apparently handled in routine fashion and no particular inquiry was made of the White House." *Id.*

Also without merit is the FBI's "political heat of the moment" argument. The timing of the FBI Report and Freeh's Statement does not diminish the force or effect of the FBI's admissions in those documents about the FBI's "complete abdication of management responsibility" and the "egregious violations of privacy" that resulted. If anything, the timing of the FBI Report and the Freeh Statement, which preceded this litigation by several months, enhances these admissions because they are untainted by litigation posturing. Moreover, all but

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[2] The report also found that the FBI's processing of requests for background investigation reports "has received far too little management or executive oversight." FBI Report at p. 2.

one of the declarations on which the FBI relies were executed in January 1997 specifically for this lawsuit, and neither the declarations nor any other evidence submitted by the FBI provide any indication that a subsequent, more thorough investigation was undertaken after the issuance of the FBI Report and the Freeh Statement. The admissions contained in these documents constitute compelling evidence of a flagrant disregard for Plaintiffs Alexander and Duggan's rights and a willful violation of the Privacy Act.[3] *Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984).

**B. EOP Willfully Violated the Privacy Act.**

As Plaintiffs Alexander and Duggan have demonstrated, the Court resolved the issue of whether the Privacy Act applies to OPS long ago, and EOP's belated effort to turn its summary judgment into a motion for reconsideration still suffers from a lack of any compelling reason why the Court should readdress its earlier ruling. Contrary to EOP's assertion, there has been no change in the law, significant or otherwise. The Privacy Act is the same as it was years ago when this Court held that OPS was bound by its requirements. The fact that other courts may have taken different views of the applicability of the Privacy Act to other offices within EOP is no reason to reconsider the Court's cogent and compelling analysis. If EOP is inclined to continue to challenge the applicability of the Privacy Act to OPS, it can do so on appeal.

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[3] Also, contrary to the FBI's argument, Plaintiffs Alexander and Duggan have not merely set forth their own view of specific procedures that, had they been in place in 1993 and 1994, would have prevented the "egregious violations of privacy" caused by the FBI's admitted "complete lack of management oversight." The various procedures set forth on pages 15-17 of Plaintiffs Alexander and Duggan's opening memorandum were some of the FBI's own proposed safeguards. *See* Freeh Statement at pp. 2-3.

In addition, if there was any doubt about whether OPS knowingly maintained FBI background investigation records on persons who no longer required access to the White House, EOP has eliminated that doubt. It asserts, "When Mr. Marceca discovered that he had obtained the background reports of persons no longer working at the White House, he segregated them, earmarked them for archival storage, and placed them in a designated drawer within the OPS vault . . . ." *See* Combined Memorandum of Points and Authorities in Opposition to Plaintiffs Alexander and Duggan's Cross-Motion for Summary Judgment and Reply Brief in Further Support of the Government Defendants' Renewed Motion for Summary Judgment (Defs' Combined Memo.") at p. 18. The problem for EOP is that the Privacy Act prohibited OPS from maintaining these records if it had no lawful purpose for having them. 5 U.S.C. § 552(a)(e)(1). Regardless of how it came to possess these records, EOP has not demonstrated that OPS had any lawful purpose for maintaining them. Its claim that OPS retained the records based on a mistaken view that it was required to do so by the Presidential Records Act is belied by the fact that the records were returned to the FBI almost immediately after it was revealed that OPS had obtained and maintained them. It also is belied by the statement of White House Counsel Bernard Nussbaum, who had ultimate supervisory responsibility over OPS, that, if he had know OPS had obtained the records, he "would have stopped it" and he "would have sent the files back." *See* Plfs' Stmt. at Sec. II, para. 54. Even President Clinton has stated that "those files did not belong at the White House" and "should have been isolated and returned immediately." Excerpt from TAYLOR BRANCH, THE CLINTON TAPES, 364-65 (2009). OPS knowingly violated the Privacy Act by maintaining records of Plaintiffs Alexander and Duggan's FBI background investigations. *Albright*, 732 F.2d at 189.

### C. Plaintiffs Alexander and Duggan Have Suffered Actual Damages.

Defendants do not argue, much less demonstrate, that there are any genuine disputes of material fact with respect to Plaintiffs Alexander and Duggan's damage claims. Nor do Defendants refute that Plaintiff Alexander and Duggan's damages can be determined on the papers and without an evidentiary hearing or that this Court has wide discretion in fixing the amount of a damage award. *Peyton v. DiMario*, 287 F.3d 1121, 1126 (D.C. Cir. 2002); *Shepherd v. American Broadcasting Cos.*, 862 F. Supp. 486, 491 (D.D.C. 1994), *vacated on other grounds*, 62 F.3d 1469 (D.C. Cir. 1995). Rather, Defendants raise two purely legal arguments regarding Plaintiff Alexander and Duggan's damage claims. First, Defendants argue that the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has not considered the question of whether non-pecuniary damages are available under the Privacy Act and that sovereign immunity is somehow implicated by such awards. Second, Defendants argue that the damages asserted by Plaintiffs Alexander and Duggan are not sufficient as a matter of law. Defendants are incorrect on both counts.

While it may be correct that the D.C. Circuit has not considered the issue of whether non-pecuniary damages are available under the Privacy Act, it clearly and unambiguously has held that "emotional trauma alone is sufficient to qualify as an 'adverse effect' under Section 552a(g)(1)(D) of the Act." *Albright*, 732 F.2d at 186. The only question is whether these "adverse effects" also constitute "actual damages." Defendants themselves acknowledge that the trend among the district court judges in the D.C. Circuit is that the answer is "yes." Defs' Combined Memo. at 22-23.

Defendants' attempt to convert this question into an issue about waiver of sovereign immunity fails as well. The Privacy Act authorizes awards of "actual damages." 5 U.S.C. § 552a(g)(4) (A). The D.C. Circuit's ruling in *Tomasello v. Rubin*, 167 F.3d 612 (D.C. Cir. 1999) merely notes that this particular provision "is a waiver of sovereign immunity and, as such 'must be construed strictly in favor of the sovereign, and not enlarged . . . beyond what the language required.'" *Tomasello*, 167 F.3d at 618, *quoting*, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). It is not an overly broad or otherwise unreasonable reading of the phrase "actual damages" to interpret it to include non-pecuniary damages such as emotional trauma. As Plaintiffs Alexander and Duggan demonstrated in their opening memorandum, emotional trauma, loss of reputation, and embarrassment are traditionally compensated as money damages. *Hobson v. Brennan*, 646 F. Supp. 884, 887 (D.D.C. 1986). There simply is no issue as to whether the Privacy Act authorizes awards of such damages.

Nor is there any issue about whether Plaintiffs Alexander and Duggan have established their entitlement to an award of damages as a matter of law. Through their own testimony, both Plaintiffs Duggan and Alexander have demonstrated that they incurred out-of-pocket expenses, including substantial time investigating, responding to, and otherwise mitigating the FBI's and EOP's Privacy Act violations. *Id.* at Sec. II, paras. 46-48 and 50-52. None of the cases on which the FBI and EOP rely stand for the proposition that a plaintiff cannot recover damages based on his or her own testimony. The opposite is the case. *See, e.g.*, *Houlahan v. World Wide Assoc. of Special Programs and Schools*, 2006 U.S. Dist. LEXIS 71858, **31-32 (D.D.C. September 29, 2006) (finding no requirement that a plaintiff in a libel action provide evidence beyond the plaintiff's own testimony to recover emotional distress); *Liberatore v. CVS New York, Inc.*, 160

F. Supp.2d 122, 120 (D.D.C. 2001) (noting that the plaintiff "was not required to present witnesses to corroborate his own testimony about his emotional distress").

Only Plaintiff Duggan seeks to recover damages for emotional distress. The attempt by the FBI and EOP to mischaracterize Plaintiff Duggan's emotional distress as "vague and inchoate" is belied by any plain reading of his deposition. Plaintiff Duggan testified that he suffered "serious insomnia" for which he sought medical attention in the Fall of 1996. *See* Plfs' Stmt at Exhibit 19, pp. 145-46, 151, and 154 ("It has been difficult. The frustration is very significant . . . Over the course of the fall of 1996, they became so severe that I required medical attention"); *see also* Additional Excerpts from Duggan Deposition, attached hereto as Exhibit 26, at pp. 157-59.[4] He testified that he suffered "intensely" from insomnia "for the first several months after June of '96." *Id.* at p. 158. He further testified that "Medical help has alleviated" his insomnia, and that "I don't suffer much from insomnia any more." *Id.* at p. 158. While the FBI and EOP attempt to rely on *Dong v. Smithsonian Institution*, 943 F. Supp. 69 (D.D.C. 1996) for the proposition that "sleeplessness" must be substantial to give rise to a claim for emotional distress damages, the Court in *Dong* declared that, while not a requirement for establishing emotional distress, medical treatment "is an indication of the existence and severity of the distress." *See* Exhibit 26 at 74. The fact that Plaintiff Duggan sought medical attention for the insomnia he suffered as a result of the violation of his privacy rights demonstrates the severity of that insomnia. *Dong*, 943 F. Supp. at 74.

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[4] For the sake of consistency, Plaintiffs Alexander and Duggan have numbered the exhibits to their opposition to Defendants' motion for summary judgment, their cross-motion for summary judgment, and this reply consecutively.

In addition to his insomnia, Plaintiff Duggan described his emotional distress in the following quite reasonable terms under the circumstances:

> Q: I would ask you with regard to the claim for mental anguish, is there any different way that you would articulate that or have we already covered that?
>
> A: Well, you know, if it hasn't been stated enough, I can tell you that the search for the truth and the answer to the question, who saw the files? Where did they go? Where have they been? Was there any -- was there any staunching, if that is the right word, of the leak? You know, that has been a nagging source of mental frustration and even anguish . . . All of these things have made me very -- have made me very angry and frustrated, and have preoccupied me.

*See* Exhibit 26 at pp. 162-64; *see also id.* at 165-72 (describing the "unwanted attention" and "notoriety" of being "a victim"). Plaintiff Duggan's testimony also is perfectly consistent with then-White House Counsel's statement that "[t]hose whose files were wrongly obtained have every right to be agitated, to be angry, knowing that even one person reviewed their private FBI files when he should not have done so." Plfs' Stmt. at para. 54.

With respect to Plaintiffs Alexander and Duggan's out-of-pocket damages, Defendants claim that Plaintiffs Alexander and Duggans' proof is insufficient. It is well established that one element of damages includes mitigation costs. *See, e.g., May v. Automated Data Management, Inc.*, 1989 U.S. Dist. LEXIS 10760, *14 (D.D.C. September 6, 1989) (Lamberth, J.); *see also Doe v. Chao*, 520 U.S. 614, 626 n.10 (2004) (noting that minor costs such as "fees for running a credit report" or "the charge for a Valium prescription" may constitute "actual damages" and open the door to the statutory minimum of $1,000 in damages). Plaintiff Alexander testified to incurring, among other out-of-pocket expenses, "upwards of $200 in long distance telephone charges with family members to discuss "[a] wide range of things, starting with emotional

distress over the whole affair; what I was to do about it; what was a good course of action each step along the way; how I was to handle it emotionally; strategically, what was best for me; my family." Plfs' Stmt. at Exhibit 12 (Alexander Deposition), p. 101; *see also id.* at pp. 102-05 and 115-16 ("I would start with, again, mentioning the time when I first learned of the violation of privacy, that I spent just simply on the telephone to another state; many, many hours of anguished phone calls in which I was struggling with what to do.") Plaintiff Alexander further testified that she and her family "are very, very dependent on one another for advice and counsel on almost every matter." *Id.* at p. 103. Plaintiff Alexander's out-of-pocket mitigation costs entitle her to an award of actual damages.

In addition to testifying that he incurred approximately $1,000 to $1,200 in out-of-pocket medical expenses, Plaintiff Duggan testified that he devoted in excess of 1,000 hours of his own time investigating and otherwise responding to the FBI and EOP's violation of his privacy rights:

> It entailed some of the things that I have described earlier: Making efforts to track down and then spending time talking with other victims; making efforts to find lawyers to counsel me and possibly represent me, and talking with them; reading everything I could get my hands on in the newspapers about the case and related matters; searching NEXIS and website databases frequently for updates, for comprehensive information; contacting the Congressional committees; writing letters to the Congressional committees; taking part in that demonstration in front of the White House; writing a letter to President Clinton, which, by the way, he never answered, nor did anyone.

Plf's Stmt at Exhibit 19, p. 149. The out-of-pocket costs incurred by Plaintiffs Alexander and Duggan constitute damages they incurred in attempting to mitigate Defendants' unlawful conduct. Consequently, they are compensable as actual damages. *May*, 1989 U.S. Dist. LEXIS at *14; *Doe*, 540 U.S. at 626 n.10.

## IV. Conclusion.

For the foregoing reasons, and for the additional compelling reasons set forth in their opening memorandum, summary judgment should be granted in favor of Plaintiffs Alexander and Duggan.

Dated: November 23, 2009

Respectfully submitted,

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