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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

JESSE C. TRENTADUE, Plaintiff, vs. FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF INFORMATION AND PRIVACY, and UNITED STATES CENTRAL INTELLIGENCE AGENCY, Defendants.	**REPLY MEMORANDUM RE: MOTIONS TO COMPEL PRODUCTION OF MURRAH BUILDING SURVEILLANCE VIDEOTAPES, ORIGINAL HANGER DASH BOARD CAMERA VIDEOTAPE AND RELATED EVIDENTIARY DOCUMENTS** Case No.: 2:08cv788 CW Judge Clark Waddoups Chief Magistrate Samuel Alba

Plaintiff, Jesse C. Trentadue, hereby files this *Reply Memorandum* in support of his *Motions* to compel the Federal Bureau of Investigation and United States Department of Justice Office of Information and Privacy (collectively "FBI Defendants") to immediately produce for his review and inspection (1) the videotapes taken on the

morning of April 19, 1995 by the surveillance cameras mounted on the exterior of the Murrah Federal Building; (2) the original VHS videotape taken by the dashboard video camera on Patrolman Hanger's patrol car on the morning of April 19, 1995 showing the arrest of Timothy McVeigh; and the (3) FD-302s, FD-192s and/or all other documents related to the FBI Defendants' acquisition, collection or seizure of this evidence. (Docs. 48 and 51).

SUMMARY OF FACTS

Plaintiff requested the surveillance videotapes taken by the cameras mounted on the Murrah Federal Building on the morning of April 19, 1995, as well as tapes taken by cameras on the buildings surrounding or nearby to the Murrah Building, including the Journal Record Building, Oklahoma City Public Library, the United States Post Office, Southwestern Bell Building and Regency Tower Apartment Complex. FBI Defendants produced the tapes for all of the foregoing buildings except the Murrah Federal Building.[1] Plaintiff has established the existence of the Murrah Federal Building tapes, and FBI Defendants do not assert any exemptions for withholding these tapes.[2]

Plaintiff also requested the videotape taken by the dashboard camera on Oklahoma Highway Patrolman Hanger's vehicle showing the arrest of Timothy McVeigh on the morning of April 19, 1995. In response, FBI Defendants produced a "copy of that

[1] (Doc. 49, Ex. 2).

[2] (Doc. 49, Exs. 3 and 4). Neither have FBI Defendants provided the Court with any proof that these tapes do not exist!

videotape." FBI Defendants, however, did not assert any exemptions for withholding that videotape or any portions of the tape. Nevertheless, the copy produce to Plaintiff by FBI Defendants did not contain footage of McVeigh's arrest. Instead, it contained later shot footage of an inventory search of McVeigh's **pale yellow Mercury** parked along side the freeway. Also missing from the videotape copy produced to Plaintiff was the image of a **brown pickup truck** which pulled over while McVeigh was being questioned by Hanger.

According to Federal officials, sophisticated enhancement techniques were used to improve the video until investigators could read the license plate number. That truck, again according to Federal officials, was registered to Steven Colbern.[3] Colbern, a chemist, was a known associate of McVeigh in the Kingman, Arizona area.[4]

Plaintiff also requested the FD-302s, FD-192s and all other documents related to the FBI Defendants' acquisition, collection or seizure of the Hanger videotape and other videotapes requested, including the Murrah Building surveillance tapes. FBI Defendants produced evidentiary documents for the tapes provided to Plaintiff,[5] but none related to the Hanger video nor the Murrah Building surveillance tapes. Again, FBI Defendants do

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[3] (Doc. 51, Ex.2).

[4] (Doc. 51, Ex. 3). Yet further proof of others being involved in the attack upon the Murrah Building which FBI Defendants, for whatever reasons, do not want disclosed to the American Public.

[5] (Doc. 49, Ex. 2).

not assert any exemption for withholding the Hanger and/or Murrah Building evidentiary documents. Neither do FBI Defendants contend these documents do not exist. [6]

STANDARD OF REVIEW

Admittedly, discovery is not a common litigation tool employed in a *FOIA* suit. Nevertheless discovery is appropriate in a *FOIA* case when, as in the present case, there is reason to believe that the agency is either withholding records or did not conduct an adequate "good faith" search for the materials

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[6] FBI Defendants would have good reason for not wanting to produce these tapes. A *Timeline* of the events and related evidence that occurred on the morning of Wednesday, April 19, 1995 was prepared by the Secret Service. This *Timeline* reveals that:

> A waitress to the explosion named Grossman claimed to have seen a **pale yellow Mercury car with a Ryder truck behind** it pulling up to the Federal Building. Mr. Grossman further claimed to have seen a woman on the corner waving to the truck. ATSAIC McNally noted that this fact is significant due to the fact that the **security video shows** the Ryder truck pulling up to the Federal Building and then pausing (7-10 seconds) before resuming into a slot in front of the building. It is speculated that the woman was signaling the truck with a slot became available.
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> A catering truck driver who was traveling east just prior to the explosion noticed **the Ryder truck in front of the Federal Building and saw two men leaving the vicinity of the truck and crossing the street heading for a brown pickup truck.**
>
> * * *
>
> **Security video tapes** from the area show the truck detonation 3 minutes and 6 seconds after the **suspects**exited the truck

Secret Service *Timeline* (Doc. 48, Ex. 3)(emphasis added). Contrary to FBI Defendants' statements to the American public, there were others involved in the attack on the Murrah Building that morning, a fact they would rather not have the public know.

> Discovery in a Federal *FOIA* action is permitted in order to determine whether complete disclosure of documents has been made and whether those withheld are exempt from disclosure. Whether a thorough search for documents has taken place and whether withheld items are exempt from disclosure are permissible avenues for discovery. **If the Plaintiff or the Agency's response raises serious doubts as to the completeness and good faith of the Agency's search, discovery is appropriate.**

(37A *Am.Jur.2d* Freedom of Information Acts, § 503)(emphasis added). [7]

ARGUMENT

FBI Defendants' response to Plaintiffs' *Motion to Compel* is novel. Essentially, their response is that the *Motions to Compel* are premature. That is – the Court should deny the *Motions to Compel* and instead allow FBI Defendants to file a *Motion for Summary Judgment*. FBI Defendants state that in their proposed *Motion for Summary Judgment* they will allege that they have conducted a reasonable search and despite that reasonable search were unable to find the videotapes and other records Plaintiff requested.

According to FBI Defendants, the fact that Plaintiff may have proven: "**that the Hanger videotapes should contain additional footage that was not included in**

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[7] *See Info. Acquisitions Corp. v. Dept. of Justice*, 444 F.Supp. 458 (D.C. 1978); *Murphy v. Fed. Bureau of Investigation*, 490 F.Supp. 1134 (D.C. 1980); *Giza v. Sec'y of Health, Educ. & Welfare*, 628 F.2d 748, 751 (1st Cir. 1980); *Niren v. INS*, 103 F.R.D. 10 (Or. 1984); *Weisberg v. Dept. of Justice*, 543 F.2d 308 (D.C. Cir. 1976); *Van Strum v. U.S. E.P.A.,* 680 F.Supp. 349 (D. Or. 1987). More importantly, even after an Agency claims that it has "complied substantially" with its *FOIA* obligation discovery, including depositions, are permissible to test the veracity of that claim. *Weisberg v. USDOJ*, 617 F.2d 365 D.C. Cir. 1980). The discovery permitted under *FOIA* is designed to disclose the "malfeasance" of the government. *See Trentadue v. FBI*, 572 F.3d 795 (10th Cir. 2009); *Judicial Watch, Inc. v. United States Dept. Of Commerce*, 127 F.Supp.2d 228 (D.C. D.C. 2000.)

the copy that Plaintiff received and that videotapes from Murrah Federal Building should exist, are of limited, if any, relevance to any issue that is legitimately before the Court in a *FOIA* case." (Doc. 56, p. 11.)(emphasis added). FBI Defendants go on to explain that: "The only issues that can appropriately be the subject of dispute in regard to an Agency's *FOIA* response are, first, whether the Agency conducted an adequate search for responsive records and, second, whether any exemptions that the Agency claimed pursuant to 5 *U.S.C.* 552(b) in order to redact material from its release, were properly invoked." (*Id*. at p. 12.). Apparently, it is FBI Defendants' position they can meet their *FOIA* obligations with a sworn statement from one of their employees that "**you can trust us, we looked real hard but found nothing**."

FBI Defendants refer the Court to a number of cases for the proposition that "A plaintiff in a *FOIA* case cannot seek to compel, through discovery, the contents of the records that are the subject of the underlying *FOIA* request." (*Id*. at Doc. 56, p. 13.) These cases, however, do not hold as FBI Defendants contend. This case law essentially states that a District Court has wide latitude in controlling discovery and its rulings will not be overturned in the absence of a clear abuse of discretion.

More importantly, this authority goes on to say that while ordinarily the discovery process grants each party access to evidence, in a *FOIA* case discovery is **sometimes limited** because the underlying case revolves around the propriety of revealing certain documents. Accordingly, in these cases Courts "**may allow**" the

government to move for summary judgment before the plaintiff conducts discovery. *See Lane v. DOI*, 523 F.3d 1128, 1134 (9th Cir. 2008)(emphasis added). This case law does not say, as FBI Defendants' contend, that pre-summary judgment discovery is never allowed. To the contrary, these cases hold that it is up to the District Court to decide under the circumstances of each case whether to go forward with discovery or wait for a *Motion for Summary Judgment* to resolve exemptions to production and similar claims.

Consider, for example, *Nolan v. United States*, DOJ, 973 F.2d 843 (10th Cir. 1992), which holds that in a *FOIA* case the District Court has broad discretion in controlling the discovery process under the *Federal Rules of Civil Procedure*.[8] Consequently, the District Court in *Nolan* acted well within its discretion in deferring discovery until after the exemptions from production claimed by the Department of Justice had been resolved. (*Id*. at 973 F.2d 849.) Furthermore, neither does *Trentadue v. FBI*, 572 F.3d 795 (10th Cir. 2009) preclude discovery as FBI Defendants contend.

In *Trentadue*, the issue was whether the Plaintiff would be allowed to take the deposition of two federal inmates with knowledge concerning the Oklahoma City Bombing. The District Court granted Plaintiff leave to conduct those depositions. FBI Defendants appealed. The Tenth Circuit explained that discovery relating to the Agency's search and exemptions it claims for withholding records generally is unnecessary if the Agency's submissions are adequate on their face and a District Court

[8] This would appear to call into question FBI Defendants' argument that the discovery provided for under the *Federal Rules of Civil Proceddure* are in applicable to a FOIA case.

may forego discovery and award summary judgment on the basis of submitted Affidavits or Declarations. (*Id*. 572 F.3d at 807.)

But *Trentadue* was a case in which FBI Defendants contended that they had conducted an adequate search for responsive records but were unable to locate records that should otherwise have existed. And the purpose of the inmate depositions was to document the possible existence of these records. In reversing the District Court's *Order* for the depositions, the Tenth Circuit relied upon the fact that the discovery being sought could not possibly produce relevant evidence because these inmates clearly had no knowledge regarding FBI Defendants' procedures in filing and searching for records. (*Id*. at 808.) Obviously, had these inmates been able to provide "**relevant evidence**," discovery would have been allowed and *Trentadue* does not state or imply anything to the contrary. *See Trentadue*, 572 F.3d at 808(emphasis added).

The holdings in *Nolan* and *Trentadue* are likewise rational and distinguishable from the matter at bar. That is – the validity of any exemptions being asserted by the Agency should be determined before records are produced or, in the absence of evidence that nonexempt records exist and are being withheld, discovery is not allowed in a *FOIA* case. Neither of these situations exist in the instant case, however. In the instant case, the evidence is undisputed that FBI Defendants, without a claim of exemption, failed to produce the Murrah Building surveillance video tapes, the entire (unedited) Hanger videotape and records related to their seizure of this evidence. In cases such as this,

discovery is allowed under *FOIA*. *See, e.g., Southam News v. United States,* 674 F. Supp. 881, 890-91 (D.D.C. 1987)(holding that FBI should be ordered to conduct another *FOIA* search for documents it claimed did not exist but were produced in response to an unrelated *FOIA Request* because this fact "strongly suggest that responsive documents remain to be located").

Nevertheless FBI Defendants contend that, with the Court's assistance, they can avoid producing these tapes and records by simply moving for summary judgment and submitting a *Declaration* to the effect that despite a reasonable search, nothing was found. According to FBI Defendants, that will fulfill their duties under *FOIA* and they are asking the Court to allow that to happen by denying Plaintiff's *Motions to Compel*. [9] But that is a disingenuous argument because this is a case of partial disclosure involving the withholding of other records without a claim of exemptions.

FBI Defendants already have located the Hanger videotape and associated with that tape was certainly the evidentiary or chain of custody records Plaintiff seeks. It is hard to believe that FBI Defendants can no longer locate the Hanger videotape so as to

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[9] What FBI Defendants propose would make a mockery of *FOIA,* that was designed to insure an informed citizenry which is so vital to the functioning of a democratic society, in order to guard against governmental corruption and to hold the government accountable for its actions. *Vigil v. Andrus,* 667 F.2d 931, 938 (10th Cir. 1982). If the involvement of others in the bombing of the Murrah Federal Building does not meet the public interest test under *FOIA*, then nothing would. *See Lissener v. United States Custom Service,* 241 F.3d 1220 (9th Cir. 2001)(Public interest in disclosure is greatest when there is evidence of governmental wrong doing). And it is not enough for FBI Defendants to say with a wink and a nod that: "because we looked real hard but could not find any responsive records, we have fulfilled our legal obligations under *FOIA*!"

produce the entire unedited tape for Plaintiff's inspection or the chain of custody evidence records associated with the Hanger videotape. The same would be true for the Murrah Building tapes and associated evidentiary records. That is – video surveillance tapes which Plaintiff requested from the buildings surrounding the Murrah Building were located and produced by FBI Defendants along with evidentiary records. Moreover, the notion that tape from the most important surveillance cameras, those on the Murrah Building, cannot be located is simply not credible.

CONCLUSION

Under these circumstances, Plaintiff respectfully requests the Court to order FBI Defendants to produce for his inspection and review the original VHS videotape taken by the dashboard video camera in Patrolman Hanger's patrol car on the morning of April 19, 1995 when he arrested Timothy McVeigh, the surveillance tapes taken by exterior cameras on the Murrah Federal building on the morning of April 19, 1995 and the related evidentiary or chain of custody documents prepared when these tapes were seized or acquired by FBI Defendants.

DATED this 12th day of May, 2010.

/s/ jesse c. trentadue
Jesse C. Trentadue
Pro Se Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that this 12th day of May, 2010, the foregoing **REPLY MEMORANDUM RE: MOTION TO COMPEL PRODUCTION OF ORIGINAL HANGER DASH BOARD CAMERA VIDEOTAPE, MURRAH BUILDING SURVEILLANCE VIDEOTAPES, AND RELATED EVIDENTIARY DOCUMENTS** was served by electronic process upon:

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