

Case No. 08-4207

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

JESSE C. TRENTADUE,

Plaintiff/ Appellee,

vs.

**FEDERAL BUREAU OF INVESTIGATION and
FEDERAL BUREAU OF INVESTIGATIONS'
OKLAHOMA CITY FIELD OFFICE,**

Defendants/Appellants.

**ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH
HONORABLE DALE A. KIMBALL**

PLAINTIFF/APPELLEE'S MOTION TO WAIVE ORAL ARGUMENT

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Pro Se Plaintiff/Appellee

On November 26, 2008, the Court granted Defendants/Appellants' *Unopposed Motion to Expedite Appeal*. In that *Order*, the Court also instructed the parties either to file (1) a *Request for Oral Argument* that addresses the issues presented in *Federal Rule of Appellate Procedure 34* and *Tenth Circuit Rule 34*, or (2) a *Motion to Waive Oral Argument* and submit the case on their *Briefs*. In response to that *Order*, Plaintiff/Appellee hereby moves pursuant to *Federal Rule of Appellate Procedure 34* and *Tenth Circuit Rule 34* to waive oral argument and submit this case on the *Briefs*.

Oral argument is unnecessary because the issue on appeal is neither novel nor a difficult question of law. Rather, the issue is quite simple: Whether the District Court abused its discretion in granting Plaintiff/Appellee's *Motion* to depose several witnesses. Those depositions were ordered by the District Court so that Plaintiff/Appellee could probe the adequacy-lawfulness of Defendants/Appellants' *Response* to Plaintiff/Appellee's request for documents under the "*Freedom of Information Act*" (*FOIA*).

BACKGROUND

On Sunday, April 19, 2009, it will have been fourteen years since 168 people, including 19 toddlers, were killed in the attack upon the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. It was and remains the single greatest act of domestic terrorism committed in the United States during the 20th Century, and a matter of great public interest, especially the federal governments prior knowledge of that attack

as the result of a joint informant-sting operation being run by the FBI and the Southern Poverty Law Center (“SPLC”).

This joint undercover operation was focused upon a white supremacist paramilitary training complex in southeastern Oklahoma known as “Elohim City,” and a group of bank robbers known as the “Mid-West bank Robbery Gang” whose members frequented Elohim City along with Timothy J. McVeigh. Consequently Plaintiff filed a request under *FOIA* for documents-records involving this failed sting operation that eventually led to the attack upon the Murrah Building. That *FOIA Request* was filed with Defendants/Appellants Federal Bureau of Investigation and the Federal Bureau of Investigation’s Oklahoma City Field Office (collectively “FBI Defendants”).

However, rather than stepping forward and meeting their *FOIA* obligations in accordance with the law, FBI Defendants’ first response was to claim that there were no documents involving that informant operation. However, FBI Defendants were eventually exposed as having failed to produce responsive documents, which prompted a May 5, 2005, *Order* from the District Court requiring them to search specific files and produce responsive documents and further providing that Plaintiff would be permitted to conduct discovery if FBI Defendants failed to produce documents and/or records responsive to the *FOIA* requests. A copy of that *Order* is attached hereto as Exhibit A.

After many months and further disputes between the parties, FBI Defendants reluctantly produced almost 150 pages of SPLC informant documents which they had

initially told the Court did not exist. Yet, not one of these documents had a date earlier than April 19, 1995, even though the evidence before the District Court was undisputed that this informant sting operation had been in existence since at least the fall of 1994. Under the facts and history of this case, it is not surprising that the District Court granted Plaintiff's *Motion* to depose Terry Lynn Nichols and David Paul Hammer.¹

In granting that *Motion*, the District Court stated:

The Court had also noted in its May 5, 2005 *Order* that '[u]pon *Motion*, the Court will allow Plaintiff to conduct discovery should the FBI fail to produce documents and/or records responsive to this *FOIA* request' in light of (1) the Court's previous finding that the FBI's original search was not reasonably calculated to locate responsive documents; (2) the troubling absence of documents to which other documents referred; and (3) the information that Plaintiff has thus far discovered from Terry Lynn Nichols and David Paul Hammer, the Court is persuaded that it continues to maintain jurisdiction of this action and, furthermore, that by allowing the requested depositions, Plaintiff may be better able to identify the existence of other records responsive to his *FOIA* request that have not yet been produced.

(*Order* p. 3; Doc. 113.) A copy of that *Order* is attached hereto as Exhibit B. It is this *Order*

and the District Court's subsequent *Order* denying FBI Defendants' *Motion to*

Reconsider that are the subjects of this appeal. A copy of the *Order* denying FBI

Defendants' *Motion to Reconsider* is attached hereto as Exhibit C.

¹ Nichols, of course, was the co-conspirator of Timothy McVeigh in the attack on the Murrah Building. David Paul Hammer, on the other hand, spent almost two years on death row with Timothy McVeigh who told Hammer all about the Murrah Building Bombing, including the others involved.

ISSUE ON APPEAL DOES NOT MERIT ORAL ARGUMENT

The issue presented for appellate review is much narrower than FBI Defendants would have this Court believe. The issue is not whether discovery, including depositions, are permitted under *FOIA* because they clearly are, especially when there is reason to believe, as in this case, that the agency is either withholding records or did not conduct an adequate “good faith” search for the materials. *See Information Acquisition Corp. v. Dept. of Justice*, 444 F.Supp. 458 (D.C. 1978). *See also Murphy v. Fed Bureau of Investigation*, 490 F.Supp. 1134 (D.C. 1980); *Giza v. Sec’y of Health, Education and Welfare*, 628 F.2d 748, 751 (1st Cir. 1980); *Niren v. INS*, 103 F.R.D. 10 (D. Or. 1984); *Reisberg v. Dept. of Justice*, 543 F.2d 308 (D.C. Cir. 1976). The discovery permitted under *FOIA* also includes depositions designed to disclose the “malfeasance” of the government. *See Judicial Watch, Inc. v. United States Dept. of Commerce*, 127 F.Supp. 2d 228 (D.C. 2000); *Weisberg v. US DOJ*, 627 F.2d 365 (D.C. Cir. 1980)(even after an agency claims that it has “complied substantially” with its *FOIA* obligations discovery, including depositions, it is permissible to test the veracity of that claim).

The issue for appellate review is whether the District Court abused its discretion in authorizing Plaintiff to depose Nichols and Hammer to explore FBI Defendants’ malfeasance in responding to his *FOIA Request*? Under the record in this case, the

District Court certainly did not abuse its discretion in granting Plaintiff's *Motion* and in subsequently denying FBI Defendants' *Motion to Reconsider*. And it would be a waste of judicial resources to require oral argument on this very narrow question.

DATED this 30th day of November, 2008.

/s/ Jesse C. Trentadue
Jesse C. Trentadue
Pro Se Plaintiff/Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of November, 2008, I caused a true and correct copies of the foregoing **PLAINTIFF/APPELLEE'S MOTION TO WAIVE ORAL ARGUMENT** to be served via first class United States mail, postage prepaid, and by electronic process, upon:

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/s/ jesse c. trentadue

CERTIFICATE OF COMPLIANCE

I further certify that (1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and (2) the digital submissions have been scanned with the most recent version of a commercial virus scanning program (AVG Anti-Virus 7.1, updated April 10, 2006) and, according to the program, are free of viruses.

/s/ jesse c. trentadue

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