[ORAL ARGUMENT REQUESTED]
No. 08-4207

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JESSE C. TRENTADUE,

Plaintiff-Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION;
FEDERAL BUREAU OF INVESTIGATION, OKLAHOMA CITY FIELD OFFICE,

Defendants-Appellants.

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

BRIEF FOR THE FEDERAL DEFENDANTS

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STATEMENT OF RELATED CASES

Pursuant to 10th Circuit Rule 28.2(C)(1), appellants certify that they are unaware of any related cases pending in this Court or any other court of appeals. Appellee has appeared before this Court twice in connection with a Federal Tort Claims Act suit against the United States, see Estate of Trentadue v. United States, 397 F.3d 840, 857 (10th Cir. 2005); 244 Fed.Appx. 874 (10th Cir. 2007) (unpublished), and once in connection with a Freedom of Information Act suit against the Integrity Committee, Trentadue v. Integrity Committee, 501 F.3d 1215 (10th Cir. 2007).

/s
Nicholas Bagley

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JESSE C. TRENTADUE,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JUDGE DALE A. KIMBALL

BRIEF FOR THE FEDERAL DEFENDANTS

STATEMENT OF JURISDICTION

The district court had jurisdiction over plaintiff's claims under the Freedom of Information Act and 28 U.S.C. § 1331. On September 25, 2008, the district court closed the case and terminated this litigation. JA 1312. The federal defendants filed a notice of appeal on November 4, within the time provided by the Federal Rules. See Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court, in this Freedom of Information Act suit, properly ordered the depositions of two maximum security federal inmates concerning the Oklahoma City bombing.

STATEMENT OF THE CASE

In July 2004, plaintiff Jesse Trentadue submitted a Freedom of Information Act (FOIA) request to the Federal Bureau of Investigation (FBI) seeking, as relevant here, documents referencing the Southern Poverty Law Center, a non-profit advocacy organization, in connection with the 1994 Oklahoma City bombing or various individuals purportedly connected with the bombing. Plaintiff filed this FOIA suit one month later.

After the district court held that the FBI's initial computer search was inadequate, the agency conducted a manual search of portions of its records and disclosed seventeen documents. In March 2006, the district court ordered two further searches, which yielded one additional document. At the same time, the court rejected plaintiff's objections to the redactions in the disclosed documents and concluded that the FBI had satisfied its FOIA obligations.

Eleven months later, plaintiff filed a motion to depose Terry Lynn Nichols and David Paul Hammer and to videotape those depositions. Nichols is serving a life sentence at a federal prison in Florence, Colorado for his role in the Oklahoma City bombing. Hammer has been sentenced to death for killing his cellmate and is on death row in Terre Haute, Indiana, where he allegedly discussed the Oklahoma City bombing with Nichols's accomplice, Timothy McVeigh. Plaintiff argued that he might be

able to infer the existence of additional FBI records from the inmates' testimony and that this inference might demonstrate that the agency had not acted in good faith in responding to his FOIA request. The district court granted the motion in September 2007, and denied the government's subsequent motion for reconsideration in September 2008. The court then proceeded to close the case, and the FBI appealed.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND.

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, provides access to certain agency records, subject to protections from disclosure established by nine exemptions and three special law enforcement exclusions. See id. § 552(a) & (b). FOIA provides for judicial review of agency determinations "withholding agency records," and authorizes the federal district courts "to order the production of any agency records improperly withheld from the complainant." Id. § 552(a)(4)(B).

II. PROCEDURAL HISTORY.

A. Plaintiff's FOIA Request.

This suit arises from a July 2004 request from plaintiff Jesse C. Trentadue to the FBI under FOIA. As relevant here, the request sought all records relating to involvement by the Southern Poverty Law Center (or one of its founders, Morris Dees) with the Oklahoma City bombing or various individuals allegedly

associated with the bombing. JA 23. Before the FBI responded to his request, Trentadue filed suit. JA 15.

In November 2004, the FBI explained that it had uncovered no responsive documents in an automated search of the indices of the files in the agency's Central Records System. JA 77. In May 2005, the district court held that the FBI's computer search was insufficient and ordered the agency to conduct a manual search of its records. JA 155.

The FBI immediately sought modification of the court's order, explaining that the scope of the search required by the court would impose extraordinary and unreasonable burdens. JA 165. The court stayed its order pending its consideration of that motion. JA 238. Notwithstanding the stay, the FBI undertook a partial manual search of its records and produced seventeen responsive documents on July 21, 2005. JA 240. In turn, Trentadue objected that the FBI's redactions to those documents were inappropriate. JA 332.

In March 2006, the district court issued an order addressing the FBI's motion to modify the scope of the manual search as well as Trentadue's objections to the FBI's redactions. JA 881. The court found that the FBI's partial manual search was sufficient to satisfy the agency's duty under FOIA and therefore "relieved" the FBI of any remaining obligations in connection with the FOIA request. JA 902. In addition, the court upheld nearly all the

redactions that the FBI had made to the seventeen documents. JA 893-99. The court found it "troubling that so many of the documents produced by the FBI refer to [forms memorializing FBI interviews] that were or should have been prepared, and the disclosed documents also refer to other attachments that at one time appear to have accompanied the document, yet these documents have not been produced." JA 901. After reviewing the Bureau's submissions, however, the court ordered the FBI to conduct only "two more limited searches" in a single file. JA 900.

The FBI conducted the two additional searches required by the court and, on June 2, 2006, disclosed a single new document, as well as updated versions of records in compliance with the court's ruling on its redactions. JA 903. Trentadue did not appeal from the March 2006 order, and the FBI considered the case closed. See Anderson v. HHS, 3 F.3d 1383, 1384 (10th Cir. 1993) ("Once the government produces all the documents a plaintiff requests, her claim for relief under the FOIA becomes moot.").

B. The Requested Depositions.

The following year, in February 2007, Trentadue filed a motion "to depose Terry Lynn Nichols and David Paul Hammer and to videotape those depositions." JA 1006. In seeking the depositions, Trentadue declared his "belief that if deposed, Nichols and Hammer could provide valuable information related not only to the Oklahoma City bombing but, more importantly, to FBI

Defendants' bad faith response to Plaintiff's FOIA requests." JA 1008. His motion suggested that the two prisoners might offer testimony that the FBI knew in advance of the Oklahoma City bombing. That testimony would, in Trentadue's view, buttress his contention that the FBI had not made a good-faith search in response to his FOIA request.

Trentadue attached declarations from the two inmates to support the motion. The Nichols declaration claims that at least two other conspirators, including an FBI official, aided Nichols and McVeigh in bombing the federal building. JA 1028. Hammer's declaration alleges that McVeigh claimed to be a secret federal agent and told him that others connected to the Oklahoma City bombing were likewise federal agents. JA 1022. Neither declaration makes reference to the Southern Poverty Law Center or Morris Dees.

The government opposed Trentadue's motion for discovery, arguing (1) that the court lacked jurisdiction under FOIA to order the depositions of inmates who knew nothing about the FBI's search, (2) that the case had long since terminated and there was nothing left for the court to do, and (3) that it would be inappropriate to reopen the case pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. JA 1048. Trentadue replied by laying out in exhaustive detail his theory that the Oklahoma City bombing arose out of "a failed Government sting operation at a

white supremacist's paramilitary training compound." JA 1094.

In September 2007, the district court granted Trentadue's motion and ordered the depositions to proceed. The court rejected the contention that the case was over, noting that "[t]his case has not yet been closed by the court and remains on the list of the court's active pending cases." JA 1154. The court declared that by taking 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." JA 1155.

The government moved for reconsideration, reiterating its earlier points and noting that the Bureau of Prisons (BOP) "has determined that a video recording poses a threat to the security of the institutions where [Nichols and Hammer] are confined." JA 1162. On September 25, 2008, the district court entered an order accommodating some of BOP's security concerns but otherwise denying the motion without additional explanation. In light of this denial, the court stated that it "will now close this case." JA 1312. The court concluded by noting that "[i]f Plaintiff is correct and through these depositions he discovers the existence of records responsive to Plaintiff's FOIA request, he may file a motion to reopen the case. At that point, the court will determine whether it is appropriate to reopen the case or to direct Plaintiff to file another FOIA request." JA 1313.

SUMMARY OF ARGUMENT

The Freedom of Information Act (FOIA) provides for the disclosure of government records, subject to various exemptions. Because the statute is directed solely to disclosure, discovery in FOIA litigation is rare and limited. In unusual cases, a court may permit discovery into the scope or methodology of an agency's search. Such discovery is inappropriate, however, where an agency has provided detailed declarations describing the steps it took to conduct its search and a court has made no findings impugning the good faith of the government declarants.

Plaintiff in this action sought FBI records involving the Southern Poverty Law Center and one of its founders in connection with the 1994 Oklahoma City bombing. In orders issued in 2005 and 2006, the district court reviewed the adequacy of the FBI's response. After the court held the initial computer search inadequate, the agency conducted a manual search of a portion of its records. The court held that this search, as supplemented by two additional searches, completely satisfied the agency's responsibilities under FOIA.

The court has never revisited that holding to explain whether or in what respect the agency's search was inadequate. Nor has it at any point questioned the good faith of the agency's representations. Under settled law, therefore, plaintiff was entitled to no discovery of any kind.

Even if some limited discovery were appropriate, moreover, the discovery authorized by the district court is without precedent in FOIA litigation. The two inmates can provide no information regarding the scope of the agency's document search, and the court did not suggest otherwise. Instead, the court concluded that plaintiff should be allowed discovery into the FBI's alleged connection to the perpetrators of the Oklahoma City bombings. That ruling fundamentally transforms the nature of FOIA, which permits plaintiffs to request government records--not to conduct discovery into the government conduct that is the subject of a FOIA request. For that reason, no decision from any court provides even remote support for ordering the videotaped depositions of high-profile, maximum security prisoners in connection with a FOIA suit.

STANDARD OF REVIEW

The district court's supervision of discovery in a FOIA suit is reviewed for an abuse of discretion. See Anderson v. HHS, 80 F.3d 1500, 1507 (10th Cir. 1996).

ARGUMENT

I. FOIA PROVIDES NO AUTHORITY FOR PLAINTIFF TO DEPOSE TWO MAXIMUM SECURITY INMATES REGARDING FBI CONDUCT IN CONNECTION WITH THE 1994 OKLAHOMA CITY BOMBING.

A. Discovery under FOIA Is Rare and Is Limited to the Scope of an Agency's Search of its Records.

The Freedom of Information Act (FOIA) provides a means by which individuals may request government records. See NLRB v.

Sears, Roebuck & Co., 421 U.S. 132, 162 (1975) (explaining that FOIA "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create"). Because the sole purpose of FOIA is to obtain production of records subject to release, discovery is rarely appropriate. "While ordinarily the discovery process grants each party access to evidence, in FOIA and Privacy Act cases discovery is limited because the underlying case revolves around the propriety of revealing certain documents." Lane v. Department of Interior, 523 F.3d 1128, 1134 (9th Cir. 2008) (citing Wiener v. FBI, 943 F.2d 972, 977 (9th Cir. 1991)).

As a general rule, the submission of detailed declarations explaining the scope of an agency's search renders discovery unwarranted. "Discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains." Baker & Hostetler LLP v. Dept. of Commerce, 473 F.3d 312, 318 (D.C. Cir. 2006) (internal quotation omitted). "Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." SafeCard Services, Inc. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991); see also Founding Church of Scientology, v. NSA, 610 F.2d 824, 836-37 n.101 (D.C. Cir. 1979) (discovery is not to be granted when the discovery is sought for the "bare hope

of falling upon something that might impugn the affidavits" submitted by the agency); Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978) ("[E]ven if the documents do exist and the CIA does have them, the Agency's good faith would not be impugned unless there were some reason to believe that the supposed documents could be located without an unreasonably burdensome search."); Carney v. DOJ, 19 F.3d 807, 812 (2d Cir. 1994) ("In order to justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations * * * ." (citation omitted)).

On the rare occasions that a court countenances discovery into the conduct of an agency's search, the only proper object of discovery is to allow a court to determine whether the agency has demonstrated that its search for documents was "reasonably calculated to uncover all relevant documents." Weisberg v. DOJ, 705 F.2d 1344, 1351 (D.C. Cir. 1983); DiViaio v. Kelley, 571 F.2d 538, 542 (10th Cir. 1978) (rejecting discovery demands that "are clearly demands not countenanced by the scope and reach of the Freedom of Information Act"). As the courts have emphasized, "'[w]hen a plaintiff questions the adequacy of the search an agency made in order to satisfy its FOIA request, the factual question it raises is whether the search was reasonably calculated to discover the requested documents, not whether it

actually uncovered every document extant.'" Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 489 (2d Cir. 1999) (quoting SafeCard Services, Inc., 926 F.2d at 1201). See also Public Citizen Health Research Group v. FDA, 997 F. Supp. 56, 72 (D.D.C. 1998) ("Discovery is to be sparingly granted in FOIA actions" and is typically "limited to investigating the scope of the agency search for responsive documents, the agency's indexing procedures, and the like."), affirmed in part and reversed in part on other grounds, 185 F.3d 898 (D.C. Cir. 1999).

In Weisberg v. DOJ, 627 F.2d 365, 371 (D.C. Cir. 1980), for example, the D.C. Circuit found that an FBI affidavit describing the agency's search was insufficiently detailed and, for that reason, ordered a deposition of the FBI employee who oversaw the search. But this limited opportunity for discovery did not authorize depositions unrelated to the adequacy of that search. To the contrary, the court noted with disapproval in a subsequent appeal that "much of [the] discovery [that] the agency has patiently endured * * * has borne only the slightest relation to whether the FBI has failed to release pertinent documents and more closely resembled a private inquiry * * * ." Weisberg, 705 F.2d at 1358.

Similarly, in Church of Scientology v. IRS, 991 F.2d 560 (9th Cir. 1993), the Ninth Circuit reversed a district court's refusal to permit discovery "regarding the adequacy of the IRS's

response to the [plaintiffs'] FOIA requests," id. at 561, in light of the IRS's "apparent evasiveness" and its "slim showing of a need for as extensive a cloak of secrecy as the Government claimed," id. at 563. In reversing the district court's order, however, the Ninth Circuit in no way intimated that it would have been appropriate to order the depositions of private individuals who knew nothing about "the adequacy of the IRS's response." Id.

B. FOIA Does Not Authorize Depositions into the Underlying Agency Conduct That Is the Subject of the FOIA Request.

The depositions sought in this case cannot plausibly be brought within the narrow scope of discovery available to ascertain the adequacy of an agency's document search. For that reason alone, the district court's order mandating the depositions was a manifest abuse of discretion.

1. As an initial matter, the district court addressed and resolved issues pertaining to the scope of the agency's search in orders issued in 2005 and 2006. In May 2005, the district court held that the FBI's initial computer search was insufficient and ordered the agency to conduct a manual search of its records. JA 155. The Bureau sought reconsideration of the order, explaining that the scope of the search required by the court would impose extraordinary and unreasonable burdens. JA 165. At the same time, the FBI undertook a partial manual search of its records that resulted in the production of seventeen responsive documents

on July 21, 2005. JA 240 (FBI notification of document disclosure); JA 494 (providing 36-page affidavit detailing search). In March 2006, the court addressed the adequacy of the FBI's partial manual search, and, after ordering two additional limited searches, "relieved" the FBI of any remaining FOIA obligations. JA 902; JA 903 (FBI notification of document disclosure in connection with the supplemental searches); JA 907 (providing a 13-page affidavit detailing search).

The district court has at no point revisited its ruling relieving the FBI of any further FOIA obligations in this case. Nor has it ever found that the agency's highly detailed declarations were inadequate or made in bad faith. As the Second Circuit has explained, "[a]ffidavits submitted by an agency are accorded a presumption of good faith; accordingly, discovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions are adequate on their face." See Carney, 19 F.3d at 812 (quotation and citation omitted). Under settled law, then, no further discovery should have been permitted.

Indeed, the district court's decision to close the case even as it authorized the depositions underscores the extraordinary nature of the discovery order. The Federal Rules provide for discovery in pending cases, not in closed cases subject to reopening only under Rule 60(b). Compare Fed. R. Civ. P. 27

(authorizing depositions absent a pending controversy only in very limited circumstances not present here).

2. Breaking from these principles, the district court granted discovery so that "Plaintiff may be better able to identify the existence of other records responsive to his FOIA request that have not yet been produced." JA 1155. This kind of sweeping discovery order has never been contemplated by any court in more than four decades of implementing FOIA. Neither the district court nor plaintiff has suggested that Nichols or Hammer has any relevant information regarding the scope of the FBI's search. Nor does either prisoner have any knowledge of FBI records (except as relevant to their own criminal proceedings). Compare Weisberg, 627 F.2d at 371 (ordering the deposition of the agency employee who oversaw the agency's search).

Plaintiff's proposition, instead, is that the two inmates would be able to testify about events that might have resulted in the creation of FBI records. Such testimony, plaintiff reasons, would permit an inference that additional undisclosed records might exist, an inference that would, in plaintiff's view, possibly cast doubt on the good faith of the agency's search. See JA 1008.

As discussed, in rare instances limited discovery may be available to evaluate "the scope of the agency search for responsive documents, the agency's indexing procedures, and the

like." Public Citizen Health Research Group, 997 F. Supp. at 72. FOIA does not, however, authorize discovery into the agency conduct that is the subject of the FOIA request. To the contrary, "discovery is limited because the underlying case revolves around the propriety of revealing certain documents." Lane, 523 F.3d at 1134. The courts have thus permitted discovery only inasmuch as it relates directly to the production of records, and have never permitted FOIA requesters to use the statute as a means of obtaining free-wheeling discovery untethered to any particular case or controversy. If that were permitted, discovery in FOIA litigation would cease to be "rare." Baker & Hostetler LLP, 473 F.3d at 318. It would become a matter of course.

3. Furthermore, plaintiff has failed even to demonstrate a connection between the two deponents and the underlying FBI conduct that is the subject of the FOIA request. As the district court determined, plaintiff's FOIA request seeks records containing "either Morris Dees' name or the Southern Poverty Law Center's name and at least one of the other listed names." JA 886. Neither of the two prisoners' declarations mention the Southern Poverty Law Center or Dees, see JA 1022, 1028, and it is entirely unclear why the testimony of Nichols or Hammer would suggest, even inferentially, the existence of records concerning them. Indeed, plaintiff acknowledged in district court that he

"does not yet know the specifics of how any of this circle of informants are tied to the SPLC." JA 1065.

Thus, although plaintiff has obtained the declarations of the potential deponents and has failed to establish any connection to the matter he hopes to investigate, he still hopes to compel their videotaped depositions. Even if this were a civil action challenging FBI conduct regarding the Southern Poverty Law Center or Dees, a district court would properly be reluctant to permit videotaped depositions of maximum security prisoners based on such a thin proffer. Giving inmates access to public fora can have the inadvertent effect of conferring celebrity status on an inmate that may affect the dynamics of prison culture. In addition, a prisoner who makes a statement about another inmate--as Hammer frankly admits he intends to do--can provoke inmate-on-inmate violence, which can in turn have serious consequences for the security of federal prisons.

Absent a strong showing of need for videotaped testimony, both of these factors counsel against providing federal prisoners with a court-sanctioned soapbox.[1] As the Supreme Court explained in Turner v. Safley, 482 U.S. 78, 86 (1987), "judgments regarding prison security are peculiarly within the province and

[1] These very concerns animate a Bureau of Prisons policy barring death-row inmates from giving face-to-face interviews with the media. Hammer, who has given several interviews in the past, is currently involved in litigation in the Seventh Circuit challenging that policy. Hammer v. Ashcroft, 512 F.3d 961 (7th Cir. 2008) (rehearing en banc granted Aug. 19).

professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." See also Beerheide v. Suthers, 286 F.3d 1179, 1184 (10th Cir. 2002) (noting "the Supreme Court's deferential approach in matters of prison administration").

A court should be all the more circumspect in a FOIA suit in which the only issue to which discovery is properly directed "is whether the search was reasonably calculated to discover the requested documents[.]" Grand Central Partnership, Inc., 166 F.3d at 489. That is particularly so here, given that plaintiff's submission of lengthy and detailed affidavits from the two prisoners demonstrates that he already has access to their testimony. See Fed. R. Civ. P. 26(b)(2) (prohibiting discovery, including depositions, when "the party seeking discovery has had ample opportunity to obtain the information sought by discovery in the action"); see also Fed. R. Civ. P. 30(b)(4) (authorizing depositions by telephone).

CONCLUSION

For the foregoing reasons, the Court should vacate the district court's orders of September 20, 2007 and September 25, 2008.

Respectfully submitted,

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DECEMBER 2008

STATEMENT REQUESTING ORAL ARGUMENT

The federal defendants-appellants respectfully request that the Court hear oral argument in this appeal, which raises important issues about the proper scope of discovery in suits brought under the Freedom of Information Act.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 2008, I caused copies of the foregoing motion to be filed with the Court electronically (including attachments in scanned PDF format) and by Federal Express overnight delivery, and served upon the following counsel electronically and by Federal Express overnight delivery:

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/s
Nicholas Bagley

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(5) and (6), I certify that this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect 12 in 14-point Times New Roman font. I further certify that pursuant to Fed. R. App. P. 32(a)(7)(B) that the foregoing brief contains 3,993 words, according to the word count of Corel WordPerfect 12. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s
Nicholas Bagley

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's General Order 5, filed on October 20, 2004, and amended most recently on January 1, 2006, I hereby certify that:

1. all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form is an exact copy of the written document filed with the Clerk, and

2. the digital submissions have been scanned for viruses with the most recent version of the following commercial virus scanning program, which indicates that the submissions are free of viruses.

Program:	Trend Micro OfficeScan
Version:	6.5
Last Updated:	December 14, 2008

/s
Nicholas Bagley

DISTRICT COURT ORDERS
AND NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JESSE C. TRENTADUE, **Plaintiff,** **vs.** **FEDERAL BUREAU OF INVESTIGATION and FEDERAL BUREAU OF INVESTIGATION, OKLAHOMA CITY FIELD OFFICE,** **Defendants.**	**MEMORANDUM DECISION AND ORDER** **Case No. 2:04CV772 DAK**

This matter is before the court on Plaintiff Jesse C. Trentadue's Motion to Conduct Discovery. The court has carefully reviewed the written memoranda submitted by the parties. Pursuant to local rule 7-1(f), the court has concluded that oral argument would not be helpful or necessary, and thus the court will determine the motion on the basis of the written memoranda. *See* DUCivR 7-1(f).

Plaintiff filed this action in August 2004, alleging that the FBI had failed to provide certain documents that were responsive to his FOIA request. In the instant motion, Plaintiff seeks an Order from the court allowing him to take–and videotape–the depositions of Terry Lynn Nichols and David Paul Hammer. The FBI contends that this court does not have jurisdiction to award such relief because, among other things, after this court issued its Memorandum decision

resolving Plaintiff's FOIA claims, there no longer existed any 'case or controversy' sufficient to confer subject matter jurisdiction on this court.

The court, however, disagrees with the FBI's contention. This case has not yet been closed by the court and remains on the list of the court's active pending cases. In the court's view, the March 30, 2006 Amended Memorandum Decision did not necessarily end this action.

Specifically, on May 5, 2005, the court found that the FBI's search was not reasonably calculated to discover the requested documents, and the court ordered the FBI to search specific case files, to produce unredacted copies of various documents, and to produce other documents responsive to Plaintiff's FOIA request. Subsequently, Plaintiff objected to the redactions contained in the documents and argued that the FBI's search was still inadequate. In response, the FBI claimed that its redactions were appropriate and that it had not even been required to produce these documents because they were not responsive to Plaintiff's FOIA request. The FBI sought reconsideration of the court's previous determination that the FBI's original search was not reasonably calculated to locate responsive documents. In addition, the FBI requested a determination that its manual search of five files, and the ZYIndex search of the OKBOMB file fulfilled the FBI's responsibilities to locate responsive documents under FOIA and that no further search was required.

The court specifically stated in its March 29, 2006 Order that it declined to reconsider its previous determination regarding the reasonableness of the FBI's initial search and the need to conduct additional manual searches. Moreover, the court ordered the FBI to conduct two more

limited searches in the OKBOMB file and noted that "it is troubling that so many of the documents produced by the FBI refer to FD-302s that were or should have been prepared, and the disclosed documents also refer to other attachments that at one time appear to have accompanied the document, yet these documents have not been produced. While the FBI's failure to discover documents is not necessarily an indication of bad faith, it is puzzling that *so many* documents could be referenced but not produced." The court, however, declined to order further searches beyond what the court had already specifically ordered.

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 requests." 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 over 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.

Therefore, for these reasons and the reasons set forth by Plaintiff in his memorandum in support and his reply memorandum, IT IS HEREBY ORDERED that Plaintiff's Motion [docket # 97] is GRANTED. The court notes that it is not compelling Nichols and Hammer to cooperate; rather, the court is permitting Plaintiff to take–and videotape–the depositions, so long as these individuals are willing to cooperate. In addition, the court is ordering the respective

federal correctional institutions to cooperate in allowing Plaintiff to take these depositions.

DATED this 20th day of September, 2007.

BY THE COURT:

DALE A. KIMBALL
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

JESSE C. TRENTADUE, **Plaintiff,** **vs.** **FEDERAL BUREAU OF INVESTIGATION and FEDERAL BUREAU OF INVESTIGATION, OKLAHOMA CITY FIELD OFFICE,** **Defendants.**	**ORDER** **Case No. 2:04CV772 DAK**

This matter is before the court on the Federal Defendants' Motion to Reconsider Discovery Order and Request for Oral Argument. The court has carefully reviewed the written memoranda submitted by the parties. Pursuant to local rule 7-1(f), the court has concluded that oral argument would not be helpful or necessary, and thus the court will determine the motion on the basis of the written memoranda. *See* DUCivR 7-1(f). Now, being fully advised, the court renders the following Order.

On September 20, 2007, the court issued granted Plaintiff's Motion to Conduct Discovery. Specifically, the court stated that it would permit Plaintiff to take–and videotape–the depositions of Nichols and Hammer, so long as these individuals are willing to cooperate.

The Federal Defendants argue (1) that this court's Discovery Order exceeds the permissible scope of discovery under FOIA, (2) that the court lacks jurisdiction because the court

there is no longer an Article III case and controversy, (3) there is no question as to the FBI's good faith sufficient to justify the Discovery Order, and (4) the BOP has determined that a video recording poses a threat to the security of the institutions where these individuals are confined.

Defendants, however, asserted the first three arguments in their Memorandum in Opposition. The court rejected those arguments previously and will not reconsider them at this point. As to the BOP's concern that a video recording poses a threat to the security of the institutions, the court will limit the usage of the video recording equipment to only the room in which the deposition is taken. The two affidavits submitted by the Federal Defendants express concerns that various aspects of the prison grounds, security systems, equipment storage, offices, staff, other inmates and various other items might be filmed.

While it is doubtful that Plaintiff intended to video anything other than Nichols and Hammer during their actual depositions, the court hereby orders that no video equipment may be used other than in the specific room where each deposition is taking place, and the video equipment may not record the images of any person other than Nichols and Hammer. In addition, if it would allay the security concerns of the respective prison officials, Plaintiff is directed to make arrangements to meet an designated prison official at a predetermined location outside of the correctional facility and so that the prison official may take possession of the recording equipment and transport it to the proper location where the deposition will take place.

Now that the court has declined to reconsider its Discovery Order and made clear that Plaintiff is entitled to conduct this discovery, the court will now close this case. Plaintiff has stated, however, that he "believes that if he is allowed to depose Nichols and Hammer, these men

will be able to provide evidence that will link the informants thus far revealed to the SPLC and, thereby, identify and/or document the existence of records responsive to Plaintiff's FOIA requests that have not been produced." If Plaintiff is correct and through these depositions he discovers the existence of records responsive to Plaintiff's FOIA request, he may file a motion to reopen the case. At that point, the court will determine whether it is appropriate to reopen the case or to direct Plaintiff to file another FOIA request.

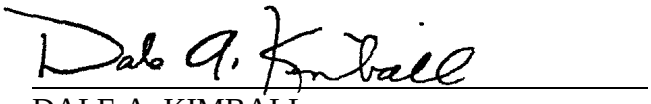
Finally, the Federal Defendants have filed an "Objection" to Plaintiff's filing of a "Notice of Release of Documents," along with attached documents. While the court agrees that they are not relevant to the issue of whether Plaintiff is entitled to depose Nichols and Hammer–and the court has not relied on these documents in making its decision–the court declines to strike them from the record, as requested by the Federal Defendants.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that the Federal Defendants' Motion to Reconsider [docket # 114] is DENIED and their Objection [docket # 130] is OVERRULED. The Clerk of the Court is directed to close this case.

DATED this 25th day of September, 2008.

BY THE COURT:



DALE A. KIMBALL
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

JESSE C. TRENTADUE,	:	2:04 CV 00772 DAK
Plaintiff,	:	
vs.	:	**NOTICE OF APPEAL**
FEDERAL BUREAU OF INVESTIGATION and FEDERAL BUREAU OF INVESTIGATION OKLAHOMA CITY FIELD OFFICE,	:	Hon. Dale A. Kimball
Defendants.	:	

Pursuant to 28 U.S.C. § 1291, the Federal Bureau of Investigation and the Federal Bureau of Investigation Oklahoma City Field Office (collectively "the FBI") hereby appeal to the United States Court of Appeals for the Tenth Circuit from the following orders entered by the Court after its final adjudication of all the underlying issues in this Freedom of Information Act case:

1. The order of September 20, 2007 granting Jesse Trentadue's motion to take and videotape the depositions of two prisoners confined in the Bureau of Prisons' maximum and high security facilities; and

2. The order of September 25, 2008 denying the FBI's motion for reconsideration of the Court's previous order granting the requested depositions.

DATED this 4th day of November, 2008.

BRETT L. TOLMAN
United States Attorney

/s/ Carlie Christensen
CARLIE CHRISTENSEN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on November 4th, 2008, a true and correct copy of the FBI's Notice of Appeal was mailed, postage prepaid and/or electronically to all parties named below:

Jesse C. Trentadue
Suitter Axland
8 E. Broadway, Suite 200
Salt Lake City, UT 84111

/s/ Christine Allred
Legal Assistant