

FILED
U.S. DISTRICT COURT

2011 AUG 15 P 6:17

DISTRICT OF UTAH

BY: _____
DEPUTY CLERK

Jesse C. Trentadue (#4961)
8 East Broadway, Suite 200
Salt Lake City, UT 84111
Telephone: (801) 532-7300
Facsimile: (801) 532-7355
jesse32@sautah.com

Pro Se Plaintiff

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.

:
:
: MEMORANDUM IN SUPPORT OF
: PLAINTIFF'S RENEWED RULE
: 56(d) MOTION FOR
: CONTINUANCE PENDING
: DISCOVERY and PLAINTIFF'S
: RESPONSE TO FBI DEFENDANTS'
: SUPPLEMENTAL MEMORANDUM
: RE: SUMMARY JUDGMENT

:
:
: Case No.: 2:08cv788 CW
: Judge Clark Waddoups
: Chief Magistrate Samuel Alba
:
:

Plaintiff, Jesse C. Trentadue, hereby submits this *Memorandum* in response to FBI Defendants' *Supplemental Memorandum In Support Of Motion For Summary Judgment*¹ and in support of his *Renewed Rule 56(d) Motion for Continuance of FBI Defendants' Motion for Summary Judgment* pending discovery.²

I.

INTRODUCTION

Almost a century ago, Supreme Court Justice Brandeis warned the American people that:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be in peril if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; and invites every man to become a law unto himself. . . .

Olmstead v. United States, 277 U.S. 438, 485 (1928). The *Freedom of Information Act* ("FOIA") was undoubtedly enacted into law to address the concerns voiced so

¹ Doc. 83.

² Doc. 90.

long ago by Justice Brandeis.³ However, the continued viability of *FOIA* as an instrument to monitor governmental wrongdoing will be seriously jeopardized if the Court accepts the arguments put forth by FBI Defendants concerning the scope of their obligations to the public under *FOIA*: to do only a computerized search for existing records knowing that those records can only be found by a manual search of the relevant files.

II.

ISSUE PRESENTED

The focus of this lawsuit is upon several videotapes: (1) the surveillance videotapes taken on the morning of April 19, 1995, by the exterior cameras mounted on the Murrah Federal Building; and (2) the original videotape taken by the dashboard camera on Oklahoma Highway Patrolman Charles Hanger's vehicle showing the arrest of Timothy McVeigh a short time later on that same morning.

³ *FOIA* 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. *Virgil v. Andrus*, 667 F.2d 931, 938 (10th Cir. 1982). Moreover, it is recognized that public interest in disclosure under *FOIA* is greatest when there is evidence of governmental wrongdoing. *See Lissener v. United States Custom Service*, 241 F.3d 1220 (9th Cir. 2001).

This is not a case about reports and documents. It is a case about videotapes., missing videotapes.⁴

III.

STATEMENT OF FACTS

Below is a rebuttal to the factual assertions made by the Section Chief of the FBI's Record/Information Dissemination Section, Mr. David M. Hardy, in his *Third Supplemental Declaration*,⁵ and by FBI Defendants in their *Supplemental Memorandum In Support of FBI's Motion For Summary Judgment*.⁶ This rebuttal,

⁴ It is also a case about the most crucial evidence in what was then the biggest criminal investigation ever handled by FBI Defendants: the bombing of the Oklahoma City Alfred P. Murrah Building. FBI Defendants do not present the Court with any admissible evidence that these tapes do not exist. Rather, FBI Defendants claim that the tapes cannot be found despite a computer search for the location of this evidence and, therefore, that their *FOIA* obligations have been met. But that is not enough to satisfy FBI Defendants' *FOIA* obligations in this instance.

The American public has a right to know what happened in Oklahoma City on the morning of April 19, 1995 and, more importantly, why? Yet, it is obvious that for some reason FBI Defendants do not want the truth about the Oklahoma City Bombing made public. Perhaps the reason is as simple as: the Federal Government's prior knowledge of that planned attack and failure to prevent it, or that there were others involved whom the Federal government chose not to expose and/or prosecute. *See, e.g.*, Exhibit 1 discussing a failed FBI/ATF "**sting operation.**"

⁵ Doc. 83-1.

⁶ Doc. 83.

however, will be preceded by a review of the FBI's evidence retrieval and tracking system, including the manual searches that should have been conducted by FBI Defendants for the "missing" videotapes.

A. The Manual Search That Should Have Been Conducted.

Retired FBI agent Emanuel Johnson Jr. has provided the Court with two powerful *Declarations* describing FBI Defendants' evidence collection, records and retrieval systems.⁷

1. Mr. Johnson, a 26 year veteran of the FBI, was assigned to the Oklahoma City Bombing investigation at 8:00 on the morning of April 20, 1995, which was less than 24 hours after that attack.⁸ Mr. Johnson explains how evidence was collected in that case, monitored and easily retrieved by manual searches/reviews of key FBI files and logs.

⁷ Mr. Johnson's initial *Declaration* appears of record as Doc. 70-1. His *Supplemental Declaration* is Exhibit 2 hereto.

⁸ Doc. 70-1 at ¶¶ 1-3; Exhibit 2 ¶ 1.

2. Physical evidence in a case originates when it is collected by an FBI agent. The agent who collects a piece of physical evidence prepares a documents known as a “FD-192.”⁹

3. A copy of the FD-192 accompanies the evidence. Another copy is placed in the official case file.¹⁰ The FD-192 is the first step, as required by FBI policy, in establishing a “chain of custody” for evidence.¹¹

4. Also commonly known as a “green sheet” or “bulky sheet,” a FD-192 is required to place evidence in the Evidence Control Center or “ECC.” The FD-192 is a multi-copy document. One copy is always maintained with the physical evidence and another copy is placed in the “1B” sub-file.¹² The 1B sub-file is where all evidentiary chain of custody records are kept.

5. A “serial” is simply a paper document placed in a file or sub-file.¹³ With in the sub-file, FD-192s are serialized or docketed (*i.e.*, numbered) and kept in

⁹ Doc. 70-1 at ¶¶ 39-40.Exhibit 2, ¶ 11.

¹⁰ Doc. 70-1 at ¶¶ 44-45; Exhibit 2, ¶ 12.

¹¹ Exhibit 2, ¶ 10.

¹² *Id.*

¹³ *See* Doc. 70-1. at ¶¶ 15-16.

order of filing.¹⁴ The physical evidence itself is placed in the ECC and entered in the *ECC Log*. Thereafter, the *ECC Log* shows the chain of custody for that evidence.¹⁵

6. The *ECC Log* is used to record everyone who had possession of that evidence, including date and time of removal from the ECC, purpose for removing the evidence from the ECC and return of the evidence to the ECC or the original owner of that evidence.¹⁶

7. An example of an FD-192 is the one prepared when the FBI took possession of Oklahoma Highway Patrolman Charles Hanger's dashboard camera videotape. This FD-192 shows that the FBI acquired that videotape from Patrolman Hanger on April 27, 1995, approximately eight days after the Bombing.¹⁷

8. This FD-192 does not state that a copy of the tape was obtained

¹⁴ *Id.*; Exhibit 2, ¶ 8.

¹⁵ Exhibit 2, ¶¶ 13-21.

¹⁶ *Id.* at ¶ 12.

¹⁷ Exhibit 3.

from Patrolman Hanger rather than the original tape. If so, that would have been noted on the FD-192.¹⁸ Neither would expect the FBI agent to have obtained a copy rather than the original tape since a copy could not be used as evidence in the subsequent prosecutions of the perpetrators of the attack on the Alfred P. Murrah Federal Building.¹⁹ Nor does this document indicate that this tape was ever returned to Patrolman Hanger or the Oklahoma Highway Patrol. In fact, FBI policy requires that if the Hanger videotape had been returned to him or the Oklahoma Highway Patrol, the “released to” box on this form would have been checked with the initials of the person and date.²⁰

9. The second document prepared as part of the FBI’s chain of custody process is an “FD-302.”²¹ The agent obtaining the evidence prepares a FD-302 that identifies the origin of the evidence and from whom it was obtained. A

¹⁸ Exhibit 2, ¶ 9.

¹⁹ See Exhibit 2, ¶ 9. On May 2, 1995, the FBI obtained another Oklahoma Highway Patrol Officers dashboard camera videotape. The agent made a copy of the original but placed that original tape in the ECC. See Exhibit 9 hereto.

²⁰ Exhibit 2, ¶¶ 16 and 22. Likewise, every time the Hanger videotape left the ECC that would have been noted in the ECC Log. *Id* at ¶ 21.. The ECC is the repository for all of the evidence collected by the FBI in a case. Access to the ECC is restricted, and the ECC clerk documents in the *ECC Log* the identity of anyone who reviews the evidence and anyone who removes the evidence from the ECC. Doc. 70-1, ¶¶ 35 through 37.

²¹ Exhibit 2, ¶ 13.

FD-302 is prepared on any matter that may be of a testimonial nature, such as the chain of custody for evidence.²² The FD-302 is likewise placed in the chain of custody records Sub-file 1B.²³

10. An example of a FD-302 would be the one prepared with respect to the Hanger videotape. It describes the videotape and other evidence that the FBI agent obtained from Patrolman Hanger on April 27, 1995.²⁴

11. The Hanger FD-302 also shows that it was dictated on April 28, 1995, **transcribed on May 3, 1995** and placed in “SUB D,” which is a sub-file of the OKBOMB case main file. And the main file contains a listing of all sub-files and the specific purpose for which each sub-file was opened.²⁵

12. The Hanger FD-302 also shows that it has been serialized or docketed and given what appears to be serial number “0337.”²⁶ Sub-file D appears to have been the initial location for FD-302s on the videotapes collected as

²² *See id.* at ¶ 11.

²³ *See id.* at ¶ 25.

²⁴ *See* Exhibit 4.

²⁵ Doc. 70-1, ¶¶ 13-15. Plaintiff respectfully submits that he is should be entitled to discovery with respect to the existence of OKBOMB sub-files and their purposes.

²⁶ However, it is not clear from the handwriting whether the serial number is “0337” or “2337.” Nevertheless, as will shortly hereafter be explained, the serial number was probably 0337. *See infra.* ¶¶ 14 and 15.

evidence during the *Bombing* investigation, and not Sub-file 1B, as required by FBI policy.²⁷

13. It may be that Sub-file D was used as the initial repository for the videotape FD302s and the videotape FD-192s. But it is apparent that for some reason FBI Defendants were placing FD-302s concerning videotape evidence in Sub-file D rather than into Sub-file 1B where these evidentiary chain of custody records were supposed to be filed pursuant to FBI policy.²⁸

14. For example, the FD-302 for the surveillance tape obtained by the FBI from the Southwestern Bell Building on April 19, 1995, was dictated on April 23, 1995, **transcribed on April 30, 1995** and identified as serial number 140 in Sub-file D;²⁹ the FD-302 for the videotape obtained by the FBI on May 3, 1995 from the "Liberty Clark" facility was dictated on May 3, 1995, **transcribed on May 5, 1995**, and identified as serial number 419 in Sub-file D;³⁰ and the FD-302

²⁷ See Exhibits 5-10. Perhaps Sub-file D served the same function as the FBI's "JUNE Files," "Zero Files," "I-Drive" and "S-Drive." That is -- a place to store and screen/cull evidence before placing it in the 1B Sub-file.

²⁸ Plaintiff respectfully submits that he should be entitled to discovery with respect to why Sub-file D was being used in this fashion and the contents of Sub-file D during the first 14 days following the *Bombing*.

²⁹ Exhibit 7.

³⁰ Exhibit 8.

for the ATM videotape obtained by the FBI from the First National Bank of Perry, Oklahoma was dictated on May 5, 1995, **transcribed on May 7, 1995**, and identified as serial number 1117 in Sub-file D.³¹

15. Since the Hanger FD-302 was transcribed on May 3, 1995, its serial number was probably 337 and not 2337. Yet, regardless of the actual serial number given to the FD-302 prepared for the Hanger videotape, it is obvious that the videotape evidence was being rapidly processed and, more importantly, that on May 7, 1995, there were not that many documents in Sub-file D.

16. The logical place for FBI Defendants to have to search for a record of the missing videotapes would have been in Sub-file D for entries during the first two or three weeks following the Bombing. Yet, this was apparently not done. Neither was the Court advised of this fact.

17. More importantly, FBI Defendants search for records on these missing videotapes got substantially easier on January 17, 1996. That was the date on which **“copies of the “video’s”** and **“reports relating to the bombing of the**

³¹ Exhibit 10.

ALFRED P. MURRAH BUILDING, on April 19, 1995, were . . . **placed in evidence storage [and] labeled 1B2554.**³²

18. Therefore, another logical place for FBI Defendants to have to search for a record of the missing videotapes would have been in Sub-file labeled "1B2554". But this also was not done. And neither was the Court advised of this fact. Furthermore, FBI Defendants inability to locate these videotapes appears even more suspect given recent statements by FBI bomb/evidence technician Barry Black.

19. Only July 1, 2011, Mr. Black gave a speech at the Oklahoma City *National Memorial & Museum*. In that speech, Mr. Black stated that during the entire *Oklahoma City Bombing* case the FBI gather approximately 15,600 pieces of physical evidence, **including 900 videotapes**. Mr. Black likewise describes how, by use of the FBI's three data bases, and *Evidence Collection Logs* it was a relatively simple matter for him to retrieve evidence in the *Bombing* case.³³

³² Exhibit 11 (emphasis added). Plaintiff respectfully submits that he is should be entitled to discovery with respect to the contents of items in 1B2554.; why this evidence was sent to Sub-file 1B on January 17, 1996; and where the original materials were being kept.

³³ A DVD of Mr. Black's speech is filed of record. Doc. 87. Mr. Black's discussion of these and other related evidence matters occurs on that DVD at about 11 minutes into the tape and concludes around the 14 minutes and 12 second mark. Interestingly, the FD-302 comprising Exhibit 11 was dictated on January 17, 1996 and it, too, was filed in Sub-file D as serial number 12468. This seems to confirm the fact that documents related to videotapes were initially kept in

20. Mr. Johnson takes issue with FBI Defendants' assertion that in order to locate the missing videotapes it would be necessary for them to look through the 450,000 pages of documents collected/prepared during the first 14 days of the *Oklahoma City Bombing* case. A manual search for this evidence would be quite simple. As previously noted, there would only have been two documents prepared for each of the videotapes: a FD-192 and a FD-302.

21. These documents should be in Sub-file D and/or Sub-file 1B. Since these documents are serialized, it would be a simple matter to review the entries in these Sub-files for the first weeks following the commencement of the *Bombing* investigation to find the FD-192s and FD-302s showing the location of the missing videotapes. Furthermore, the location of these videotapes would also be shown by a simple review of the *ECC Log*.³⁴

Sub-file D and that there are not hundreds of thousands of these documents. Nor would one expect there to be voluminous documents on these videotapes since there were only 900 tapes and just two records prepared regarding the chain of custody for each videotape: a FD-192 and a FD-302. Mr. Black likewise the FBI's use of a "*Photo Log*" to track photographic evidence. Plaintiff respectfully submits that he is should be entitled to discovery with respect to the existence of a similar *Log* for videotapes and the contents of any such *Videotape Log*.

³⁴ See Exhibit 2, ¶ 25. Plaintiff respectfully submits that he is should be entitled to discovery with respect to the contents of the *ECC Log* during the first 14 days following the *Bombing*.

B. Mr. Hardy's Third Supplemental Declaration.

The facts related to the Court's Order of May 13, 2011,³⁵ and Mr. Hardy's response are set forth below:

1. The Court ordered Defendants to affirm whether in this case Mr. Hardy or any other of their affiants had misrepresented information or provided incomplete or otherwise misleading information to the Court under an asserted right to protect the interests of the United States.³⁶ Mr. Hardy states in his *Third Supplemental Declaration* that "I affirm that I have not misrepresented information or provided incomplete or otherwise misleading information to the court under an asserted right to protect the interests of the United States."³⁷ No such affirmation, however, has been submitted by Defendants' five other affiants in this case, including the CIA affiants.³⁸

2. The Court ordered FBI Defendants to search their I-Drive and S-Drive for evidence as to the location of the missing videotapes and, if no search was conducted, to explain why such a search would not be reasonably calculated to

³⁵ Doc. 82.

³⁶ *Id.* ¶ 1.

³⁷ Doc. 83-1, ¶ 5.

³⁸ Martha M. Lutz, Earl J. Chidester, Anne C. Costa, Michael Mullaney and Rena Y. Kim. *Id.*, ¶ 1.

located the missing evidence.³⁹ According to Mr. Hardy, no search was conducted of either the I-Drive or the S-Drive because any materials potentially responsive to Plaintiff's *FOIA Request* would have been located by the computerized searches that FBI Defendants previously did of their ZyIndex and ACS data bases, and because the S-Drive was not in use until after 2001, so there is no reason to believe the S-Drive would contain any responsive documents.⁴⁰ However, as the Court is now aware the data bases searched by FBI Defendants are not comprehensive.

(a) Mr. Hardy has previously admitted that the Central Record System (CRS) is where the FBI maintains the files compiled for law enforcement purposes,⁴¹ and that the mechanism used to search the CRS is the "Automated Case Support" system or "ACS."⁴² Mr. Hardy describes the ACS as an internal computerized subsystem of the CRS.⁴³ FBI Defendants retrieve data from the CRS through the ACS using a "*General Indices*."⁴⁴ The decision to index names in the

³⁹ Doc. 82, ¶ 2.

⁴⁰ Doc. 83-1, ¶¶ 15 and 16.

⁴¹ *Hardy Dec.* (Doc. 61-2, p. 8, ¶ 27).

⁴² *Id.*

⁴³ *Id.* at ¶ 28.

⁴⁴ *Id.* at ¶ 29.

General Indices, however, is a discretionary decision made by the FBI Special Agent or support personnel assigned to the investigation and/or FBI Headquarters.⁴⁵ Mr. Hardy further admits that FBI Defendants do not index every name in an investigation, only that information considered to be pertinent, relevant or essential for future retrieval of the evidence.⁴⁶ Obviously, therefore, the *General Indices* used for FBI Defendants' computerized search represent a selective – not inclusive – database.

(b) Furthermore, in response to another *FOIA* action seeking *Oklahoma City Bombing* records,⁴⁷ Mr. Hardy also submitted a *Declaration* to the United States District Court for the District of Utah that seriously impeaches what he has represented to the Court in the instant case. Namely, that despite his representations in this case to the contrary, not all evidence and records are uploaded into the ACS, that records and evidence not uploaded into the ACS must

⁴⁵ *Id.* at ¶ 30.

⁴⁶ *Id.* at ¶ 32.

⁴⁷ *Trentadue v. Federal Bureau of Investigation*, Civil No. 2:04cv772, Doc. 44.

be retrieved manually, and that the *General Indices* make manual searches relatively easy.⁴⁸

(c) According to the *Declaration* submitted by Mr. Hardy in the prior *Bombing FOIA* action, the *General Indices* is arranged in alphabetical order. “The *General Indices* consist of index cards that contain key words relevant to the record for which each card is created.”⁴⁹ Index cards are physical paper records, not digital files, and they require manual, not computer searches or they are meaningless.⁵⁰

(d) Mr. Hardy goes on to state in his earlier *Declaration* that: ” These key words are selected to facilitate the records’ future recovery by FBI personnel investigating the same or related matters.”⁵¹ Mr. Hardy likewise admits in his *Declaration* that “**the key words in the General Indices may be searched**

⁴⁸ Exhibit 12, hereto. Plaintiff respectfully submits that he is should be entitled to discovery with respect to the contents of the OKBOMB case file’s *General Indices*.”

⁴⁹ *Id.* at ¶ 6.

⁵⁰ *See id.* at ¶ 7.

⁵¹ *Id.* at ¶ 6.

either manually or through the automated indices [or] ACS,”⁵² and that the ZyIndex documents are also index in the ACS system.⁵³

(e) More importantly, Hardy admits, too, that: **“Many documents are not uploaded for various reasons, including the records level of classification, security reasons, or privacy concerns. Records that have not been uploaded in the ECF must be “retrieved manually in paper form from FBI files once appropriate record number (i.e., the serial number) has been identified using the Central Indices or Universal Index.”**⁵⁴ Consequently, it

⁵² Exhibit 12, ¶¶ 5-10. Mr. Johnson reviewed the Hanger FD-302, Exhibit 4, and noted that it had not been marked as having been indexed for uploading into the ACS system, which is required pursuant to FBI policy and, therefore, could not be retrieved by a computerized search. It was Mr. Johnson’s opinion, therefore, that only a manual search of the OKBOMB files would have found this document. Doc. 70-1, ¶¶ 24-29. FBI Defendants argue that since they produced this document and, allegedly found it be a computerized search, their searches were some how adequate. Doc. 83, pp. 11-12, ¶ 13. The fact that this document and perhaps other documents were found does not attest to the adequacy of FBI Defendants’ search in this instance. They may very well have done a manual search and/or this document may have been up loaded without the requisite marking. More to the point, the manual searches discussed herein by Plaintiff would have been the only searches reasonably capable of finding the missing videotapes

⁵³ Exhibit 12, p.5, fn. 3.

⁵⁴ Exhibit 12, p. 4, ¶ 10 (emphasis added). Plaintiff respectfully submits that he is should be entitled to discovery with respect to the contents of the OKBOMB case file’s “*Central Indices*” and “*Universal Index*”. In addition, following up on Mr. Hardy’s statement that some sensitive information/evidence is not up loaded into the ACS system, it is noteworthy that early on in the OKBOMB investigation, FBI Defendants were concerned about media stories involving their possible prior knowledge about a plan to bomb the Murrah Building and their failure to prevent that attack. *See* Exhibit 13 hereto. Those concerns seem to have been well founded. Exhibit 14 hereto are the relevant portions of a transcript of federal court proceedings that took place on April 24, 1997. The proceeding involved the testimony of Angela Graham, a Special Agent with the Bureau of Alcohol, Tobacco and Firearms (“BATF”). Graham testified about

cannot be honestly said that the computerized searches conducted by FBI Defendants in this case were reasonably calculated to locate the missing videotapes.⁵⁵

3. The Court ordered FBI Defendants to search the ECCs located

BATF informant, Carol Howe who had warned the Government about a plan to blow up a federal building in Oklahoma City. Graham said that this threat was made several months before the Oklahoma City Bombing. *Id.* at pp. 30-32.

Graham's testimony resulted in the Government asking that the transcript of those proceedings be "**sealed.**" The Government's attorney asked that it be sealed to prevent the information from falling into the hands of the McVeigh defense team. The Court granted that *Motion* stating that: "With that McVeigh trial going on, I don't want anything getting out of here that would compromise that trial in any way." *Id.* at p. 51. Defense counsel immediately asked: "**What do you mean by compromise? Do you mean shared with the McVeigh lawyers?**" *Id.* at p. 63. To which the Court responded:

Yes, or something that would come up, you know. We have got evidence that the ATF took a trip with somebody that said buildings were going to be blown up in Oklahoma City before it was blown up or something of that nature and try to connect it with McVeigh in some way or something.

Id. at p.63.(emphasis added).

⁵⁵ Nevertheless, in his Declaration Mr. Hardy assures the Court that there are no "gaps" in the CRS and ACS evidence tracking and retrieval system that could possibly be relevant to this case. Doc. 83-1, ¶ 13. Mr. Hardy insists that this is so because "CRS and ACS are where the FBI electronically files and indexes *all* material that it deems relevant to investigations." *Id.*(emphasis in original). But this is clearly not so. Mr. Hardy freely admits that some records are considered too sensitive to be up loaded to the CRS or ACS and evidence the FBI deems "irrelevant" apparently never finds its way into these two data bases either. And this raises another concern, Mr. Black stated in his speech that the FBI uses three data bases to locate evidence. Mr. Hardy has only describe two. Consequently, Plaintiff respectfully submits that he is should be entitled to discovery with respect to all OKBOMB evidence tracking/retrieval data bases, including their contents and how they are used.

at FBI Headquarters, the Oklahoma City Field Office and the FBI Crime lab.⁵⁶ Mr. Hardy states that the ECC at the FBI Crime Lab was searched but not the ECC at the Oklahoma City Filed Office. According to Mr. Hardy, instead of searching the FBI's Oklahoma City Field Office ECC a search was done of the "Evidence Control Room" in the warehouse where all Bombing materials are currently located. Also according to Mr. Hardy, both searches failed to locate the missing videotapes.⁵⁷

(a) A search was also not done of the FBI Headquarters ECC because Headquarters does not have an ECC⁵⁸, which is very surprising. It is surprising because in 1998, for example a reporter named David F. Hoffman sought to obtain the same videotapes in a *FOIA* suit filed in the Western District of Oklahoma.⁵⁹ The request was eventually denied because of the ongoing criminal proceedings at that time involving both Terry Nichols and Timothy McVeigh. But in the *Order* denying the *Motion for Summary Judgment*, the Court noted that one videotape and 300

⁵⁶ Doc. 82, ¶ 3.

⁵⁷ Doc. 83-1, ¶¶ 7-9.

⁵⁸ Doc. 83-1, ¶ 6.

⁵⁹ *Hoffman v. United States Dept. of Justice*, Western District of Oklahoma, 5:98 CV 1733.

documents requested by Hoffman were being stored at the FBI Headquarters.⁶⁰ Since all evidence, for chain of custody reasons, is required to be maintained in an ECC one has to wonder why this lone tape was being secreted away at FBI Headquarters; is it still there and, if not, where is it now located?⁶¹

4. The Court ordered FBI Defendants to manually search OKBOMB physical files for entries during the first 14 days following the Oklahoma City Bombing for documents showing the location of the missing videotapes or provide evidence as to why such a search would be too burdensome.⁶² In response, Mr. Hardy represents to the Court that no manual search was done because it would take an employee 18 months to review the 450,000 pages of documents gathered during the two week period immediately following the *Bombing*.⁶³ Yet, as previously shown this statement is misleading. Rather than review the entire case file, the

⁶⁰ Exhibit 15, p. 9. However, because of its length only the relevant portions of that *Order* are attached hereto.

⁶¹ Plaintiff respectfully submits that he should be entitled to discovery with respect to this FBI Headquarters videotape, including why this tape was being kept out side of the FBI's normal chain of custody process, as well as the contents of this videotape and its present location.

⁶² Doc. 82, ¶ 4.

⁶³ Doc. 83-1, ¶11.

manual review should be of the *ECC Log* and the materials in Sub-files D and 1B, including the items labeled "1B2554" in Sub-file 1B.⁶⁴

5. Finally, the Court ordered Mr. Hardy to submit a *Declaration* stating that he does not know of either the existence or likely locations of the missing videotapes, and that he is otherwise unaware of anyone else who may know of the existence of likely locations of the videotapes.⁶⁵ Mr. Hardy responds by stating that "I am unaware of the existence or likely location of additional tapes responsive to the plaintiff's FOIA request, including tapes from the Murrah Building or any additional Hanger tape other than the tape that plaintiff already received, and do not know of anyone who would know where additional tapes would be located."⁶⁶ Yet, knowing about the existence and contents of Sub-Files D and 1B, especially the items labeled "1B2554", Plaintiff is obviously suspicious of Mr. Hardy's statements. Plaintiff is especially suspicious of Mr Hardy's statement that:

While it is always a possibility that responsive documents might have been misfiled and thus could be located some where other than in the OKBOMB file (**though it would be impossible to know where**). I am not aware that this is the case, and a reasonable search did not and would not locate

⁶⁴ See Exhibit 11.

⁶⁵ Doc. 82, ¶ 5.

⁶⁶ Doc. 83-1, ¶ 20.

any such documents (if they exist) because they would not be in a location likely to contain responsive documents.⁶⁷

Plaintiff would suggest that Mr. Hardy might look for evidence of the missing videotapes in the OKBOMB case I-Drive, S-Drive, Sub-file D, Sub-file 1B, the items labeled "1b2554" and the *ECC Log*.

C. FBI Defendants' Factual Assertions.

In their Supplemental Memorandum, FBI Defendants include 30 paragraphs of "facts," many of which are single spaced and almost all of which are argument rather than a statement of fact. Nevertheless, Plaintiff submits the following response to the alleged facts set out by FBI Defendants' in their *Supplemental Memorandum*.

1. The facts set forth by FBI Defendants in paragraphs 1, 2, 3, 10, 11 17, 18, 19 20, 21,22, 23 24 and 25 give their view of the history of this case. However, the docket and filings reflect the history of this case, and there is no need for Plaintiff to provide his interpretation of that history.

2. The facts set forth by FBI Defendants in paragraphs 4, 9, 12 13 and 16, give their view of the FBI's evidence tracking and retrieval system as well as the claimed adequacy/lawfulness of their computerized searches for the missing

⁶⁷ Doc. 83-1, ¶ 20.(emphasis added).

videotapes. These facts have been rebutted by the facts set out by Plaintiff in this *Memorandum, supra*, and more particularly by the *Declarations* of Mr. Johnson.⁶⁸

3. The facts set out by FBI Defendants in paragraphs 26 through 30 deal with their response to the Court's May 13, 2011, *Order*. Those have also been rebutted by Plaintiff.⁶⁹

4. The facts set out by FBI Defendants in paragraphs 6, 7, 8 and 15, however, do merit an additional response from Plaintiff. These paragraphs represent an attempt by FBI Defendants, albeit a very weak attempt, to argue that the videotapes do not exist.

5. With respect to the Hanger videotape and the brown pickup truck possibly belonging to Steven Colbern, a chemist and known associate of McVeigh in Kingman, Arizona, FBI Defendants contend that there is no evidence that Colbern's truck was in fact associated with McVeigh in the bombing of the Murrah Building. FBI Defendants argue that references to this pickup truck comes solely

⁶⁸ *See supra*. pp. 4-11.

⁶⁹ *See supra*. pp. 11-18.

from a newspaper article.⁷⁰ However, that is an incorrect statement of the record in this case.

6. Contemporaneous records prepared by FBI Defendants and other Federal agencies overwhelmingly support the presence of that pickup truck traveling with Timothy McVeigh on the morning of April 19, 1995, including its presence at the arrest of Timothy McVeigh shortly after the bombing by Oklahoma Highway Patrolman Charles Hanger.⁷¹

7. An evidentiary *Timeline* of what occurred on the morning of Wednesday, April 19, 1995 was prepared by the Secret Service. This *Timeline*

⁷⁰ Doc. 83, ¶ 7.

⁷¹ When Plaintiff requested to see the original Hanger videotape, FBI Defendants refused. In their *Motion for Summary Judgment*, FBI Defendants suddenly claimed that they only have an edited copy of that tape and that “the original Trooper Hanger video is maintained by the Oklahoma Highway Patrol. In fact, Mr. Hardy represented to the Court that “The original Hanger video is retained by the Oklahoma Highway Patrol.” Doc. 61-2, ¶ 36. In a footnote in his subsequent *Declaration*, Mr. Hardy also says that his staff “have no reason to believe that the tape that was located is not a duplicate of the original Hanger tape, which was returned to the Oklahoma Highway Patrol.” He immediately goes on to say that “no documentation was found regarding this tape.” Doc. 66-1, p. 4 fn. 2. Despite Mr. Hardy’s assertions, the FD-192, Exhibit 2, shows that FBI Defendants took possession of the Hanger videotape and there is no evidence that it was ever returned. Besides, it is simply not credible that (1) FBI Defendants would have returned this crucial evidence to the Oklahoma Highway Patrol and, rather (2) had they done so, FBI Defendants have no record of returning this tape! This is not credible because that videotape was key evidence in the prosecution of then the worst terrorist attack on United States soil and it would be tracked through the ECC according to Mr. Johnson.

reveals videotape surveillance camera evidence of McVeigh in the company of an accomplice or accomplices who never have been identified:

A witness 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.

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** [plural] exited the truck.⁷²

8. FBI records reveal, too, that on April 18, 1995, Tim McVeigh purchased gasoline from a Star Mart Conoco in Guthrie, Oklahoma. Ms. Willmorth, who witnessed the gasoline purchase, described the **Ryder truck** in which the bomb

⁷² Exhibit 16 (emphasis added).

was delivered to the Murrah Federal Building, an **“old yellow car”** and a **“brown pickup truck”** traveling with McVeigh.⁷³

9. Immediately prior to the bombing, a Mr. Gage observed the brown pickup truck and a Ryder truck in front of the Murrah Building.⁷⁴ FBI documents also reveal that on April 19, 1995, immediately following the bombing of the Murrah Building, John Kuper observed McVeigh in his **“yellow Mercury”** and a **“brown pickup truck”** leaving the area.⁷⁵ More importantly, later that morning, another witness, Kevin Brown, observed Highway Patrolman Hanger pull over McVeigh and noted that a **“brown pickup truck”** also stopped in response to the Officer’s signal. Brown admitted that it was **“speculation”** on his part, but he thought that Timothy McVeigh and the brown pick up truck were **“traveling together.”**⁷⁶

⁷³ Doc. 70-10 (emphasis added).

⁷⁴ Doc. 70-11.

⁷⁵ Doc. 70-12 (emphasis added)

⁷⁶ Doc. 70-13 (emphasis added).

10. With respect to the videotapes from surveillance cameras mounted on the Murrah Building, FBI Defendants essentially claim that an “FBI investigative report” proves that the Murrah Building surveillance cameras had been disconnect approximately two years before the Bombing.⁷⁷ Hence, there are no tapes. But this “investigative report” is from an unidentified individual and not under oath.⁷⁸ Furthermore, it was a report prepared by defense counsel’s investigator, which raises questions as to how FBI Defendants came into possession of this document.⁷⁹ In the face of this investigative report, Plaintiff has presented the Court with the *Declarations* of Joe Cooley and Don Browning⁸⁰ to the effect that the Murrah Building surveillance tapes exist. These men have first hand personal knowledge about the Murrah Building surveillance cameras and Cooley had even witnessed those cameras in operation, including recording, shortly before the *Bombing*.⁸¹

⁷⁷ Doc. 83, p. 6.

⁷⁸ See Exhibit 17 hereto.

⁷⁹ There are many possibilities as to how FBI Defendants came in to possession of this defense team document, including the fact that FBI Defendants had apparently penetrated the McVeigh defense team with a “mole.” See Exhibit 18 hereto. That is a very real possibility because as part of the McVeigh prosecution FBI moles had apparently penetrated the highest levels within ABC News. See Exhibits 19, 20, and 21.

⁸⁰ Doc. Nos. 49-3 and 49-4.

⁸¹ Doc. 49-3, ¶¶ 3, 7, 10 and 11. Cooley’s *Declaration* is direct evidence as to the existence of the Murrah surveillance camera tapes. Browning’s *Declaration* is, too. Browning

IV

**UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST,
PLAINTIFF HAS MADE THE NECESSARY SHOWING
OF BAD FAITH FOR DISCOVERY**

When, as in the instant 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, discovery is allowed under *FOIA*.

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.**⁸²

witnessed FBI agents seizing the Murrah Building surveillance cameras on the afternoon of April 19, 1995. Doc. 49-4, ¶¶ 8 and 9. Yet, there is other evidence that these tapes exist and are in the possession of FBI Defendants. There is, for example, the Secret Service *Timeline*. Exhibit 16 hereto. FBI Defendants seem to concede that the *Timeline* exists but insist that “the government knows of no videotape.” Doc. 83, p. 6, fn. 4. There is likewise the FD-302 prepared of FBI Defendants’ interview of Ronald E. Stakem.

Stakem had driven by the Murrah Building on the morning of April 19, 1995, just before the Bombing. In the early afternoon of April 19, 1995, Stakem was contacted by an FBI agent by the name of “Kaminski,” who wanted to know what Stakem had observed. The FBI agent never explained to Stakem how he had known that Stakem had driven by the Murrah Building that morning. Kaminski reports that Stakem “**assumed that his license plate number had been retrieved from a video camera near the Federal Building.**” If Mr. Stakem was mistaken, Kaminski never disabused him of that assumption. See Exhibit 22 hereto.

⁸² 37A *Am. Jur. 2d* Freedom of Information Acts, § 503(emphasis added). See *Info. Acquisitions Corp. v. Dept. of Justice*, 444 F.Supp. 458 (D.C. 1978); *Murphy v. Fed. Bureau of*

The bad faith justifying discovery in this instance consists of the following, among other things: by initially representing to the Court that they did not have the Hanger videotape and that the Hanger videotape had been returned to Patrolman Hanger or the Oklahoma Highway Patrol; by not conducting searches of the I-Drive or S-Drive systems; by not conducting manual searches of the ECC at the FBI Oklahoma City Field Office; by not reviewing the *ECC Log*, Sub-file D, Sub-File 1B and items labeled “1B2554;” by telling the Court that all the records are uploaded into the CRS where they can be searched by access to the ACS or ZyIndex systems when that in fact is not true; by representing to the Court that a manual search for the missing videotapes in the Oklahoma City Bombing case file would be an extraordinary and burdensome undertaking; by conducting computer searches for this evidence they knew would be unsuccessful; and by not otherwise fully complying with Court’s May 13, 2011 *Order*.

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.)

V

**PLAINTIFF HAS MADE THE NECESSARY SHOWING
FOR A RULE 56(d) CONTINUANCE**

In a *FOIA* case, the standard for a *Rule 56(d)* continuance is whether the discovery sought by the requester could possibly produce relevant evidence such as: (1) additional reasonable methods by which FBI Defendants could locate the videotapes and associated records; (2) evidence of the location of the videotapes at issue; (3) the unreasonableness of FBI Defendants' search; (4) the existence of readily available alternatives to locating these videotapes; and (5) the burden on FBI Defendants of conducting additional searches by alternative means.⁸³ Therefore, Defendants' *Motion for Summary Judgment* should be denied and/or continued to allow Plaintiff to conduct the discovery he needs to respond to that *Motion*. The discovery necessary for Plaintiff to respond to FBI Defendants' *Motion for Summary Judgment* consists of the following:

1. **Additional Searches**: FBI Defendants should be ordered to conduct additional manual searches/reviews of the *ECC Log*; as well Sub-files D and 1B of the official *Bombing* case file, including reviewing items labeled or contained in 1B2554. These manual searches/reviews of Sub-file D, Sub-file 1B

⁸³ *Trentadue*, 572 F.2d at 798, 806-808.

and the *ECC Log* should be for entries made within 14 days following the *Bombing*. FBI Defendants should again be ordered to conduct searches of the I-Drive, S-Drive, ECC at the Oklahoma City Field Office, *General Indices*, *Central Indices* and *Universal Index* for evidence/records showing the location of the missing videotapes.

2. **Interrogatories:** Plaintiff should be allowed to submit Interrogatories to FBI Defendants directed at their evidence collection, monitoring, retrieval, inventory and storage procedures-protocols, and the identities of their employees with possible knowledge about the Murrah and Hanger tapes, including the existence and/or location of these tapes, as well as the protocols surrounding use of the I-Drives and S-Drives. Plaintiff should also be allowed to inquire by Interrogatory about: the existence of OKBOMB case sub-files, their content and purposes; the contents of Sub-file D during the first 14 days following the *Bombing* and why chain of custody documents related to videotapes were being filed in this Sub-file rather than Sub-file 1B; the contents of items of Sub-file 1B during the first 14 days following the *Bombing*, including why this Sub-file was apparently not being used to house chain of custody documents on videotapes; the contents of items labeled "1B2554," including why copies these documents/ materials were transferred and the locations of the original materials/documents, etc.; the

surveillance camera videotape that was kept at FBI Headquarters outside of normal FBI chain of custody protocols; the possible existence of a *Videotape Log*; the contents of the *ECC Log* during the first 14 days following the *Bombing*; the contents of the OKBOMB case's *General Indices*, *Central Indices* and *Universal Index*; and the three data bases used by FBI Defendants to track/retrieve evidence in the OKBOMB case.

3. **Documents**: FBI Defendants should be required to produce the filings in Sub-File D and Sub-file 1B during the first 14 days following the Bombing; the items labeled "1B2554; the *ECC Log* entries for the first 14 days following the *Bombing*; the *Videotape Log* if one exists; and documents the existence of which is revealed by FBI Defendants' responses to Plaintiff's Interrogatories.

4. **Examination**: Once this discovery has been completed, the Court should require Mr. Hardy to appear before it and be examined as to his sworn statements in this and related *FOIA* cases that have been brought by Plaintiff.

DATED this 15th day of August, 2011.

/s/ jesse c. trentadue

Jesse C. Trentadue

Pro Se Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that this 15th day of August, 2011, the foregoing **MEMORANDUM** was served by electronic process upon:

KATHRYN L. WYER
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
Tel: (202) 616-8475

JARED C. BENNETT,
Assistant United States Attorney
185 South State Street, #300
Salt Lake City, Utah 84111
Tel: (801) 524-5682

Attorneys for Defendants

/s/ jesse c. trentadue