



“*Sensitive Informant Program*,”<sup>1</sup> which is used by the Bureau to recruit and/or place informants on the staffs of members of the United States Congress and perhaps even federal judges, in the national media,<sup>2</sup> within other federal agencies as well as the White House, on defense teams in high profile federal and/or state criminal prosecutions,<sup>3</sup> inside state and local law enforcement agencies, and even among the clergy of organized religions.

In response to Plaintiff’s *Freedom of Information Act* (“FOIA”) request for the policies, rules, protocols and/or procedures (collectively the “*Manual*”) governing the FBI’s recruitment and use of such informants in this secret surveillance program, the FBI acknowledged the existence of this program and produced to Plaintiff a small portion of the *Manual*, which was heavily redacted.<sup>4</sup> But the FBI also withheld from Plaintiff what appear to be hundreds of pages from

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<sup>1</sup> Plaintiff further certifies that he and counsel for the FBI have conferred in good faith to resolve this discovery dispute but, despite those efforts, they have been unsuccessful.

<sup>2</sup> The FBI’s use of *Sensitive Informants* in the national news media is well documented in the record of this case. *See, e.g.*, Exhibits 1, 2 and 3, hereto.

<sup>3</sup> As patently unconstitutional as the use of such informants would be, there is evidence that the FBI had such an informant with access to members of the defense team in the prosecution of Timothy McVeigh. *See* Exhibit 4 hereto.

<sup>4</sup> *See* Exhibit 5 hereto. *See also* Doc. Nos. 14-8, 14-9 and 14-10.

the *Manual*. The FBI did so under a claim that this material was exempt from disclosure under *FOIA*.

Counsel for the FBI has advised Plaintiff that the FBI intends to file a *Motion for Summary Judgment*, and that the only purpose of the *Scheduling Conference* is to set the time for the FBI's *Motion* and Plaintiff's response. Plaintiff disagrees with the FBI's position of no discovery, especially in an extraordinary case such as this wherein the FBI acknowledges the existence of an unlawful and unconstitutional domestic spying program, and attempts to use the exemption provided by *FOIA* to not disclose the *Manual* that it uses to carry out this illegal activity.

Plaintiff has brought this lawsuit to obtain those portions of the *Manual* being withheld by the FBI, which will necessarily involve the Court reviewing and determining the applicability, legitimacy and/or lawfulness of the exemptions proffered by the Bureau for withholding this material.<sup>5</sup> Plaintiff submits that the

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<sup>5</sup> The FBI states that it redacted and/or withheld entire portions of the *Manual* from Plaintiff on the basis of 5 *U.S.C.* §§ (b)(1) (exempting documents classified as involving national security); (b)(5) (exempting inter-agency or intra-agency memoranda that would not be available to a party in litigation with that agency); (b)(6)(exempting personnel, medical and similar files the disclosure of which would clearly constitute an unwarranted invasion of privacy); (b)(7)(C) (further exempting material the release of which would be an unwarranted invasion of personal privacy); (b)(7)(D)(exempting

FBI has asserted these exemptions in bad faith because they are, on their face, not applicable to the *Manual*. How, for example, could the FBI's *Sensitive Informant Program* for spying on the media, members of Congress, federal judges, clerics, other federal agencies or defense teams in high profile criminal prosecutions possibly advance national security? It obviously does not! But that is not the only flaw in the FBI's assertion of exemptions from disclosure of the *Manual* under *FOIA*.

Plaintiff submits that the FBI's disturbing practice of using private citizens as spies on the staffs of members of Congress and perhaps even federal judges, in the national media, within other federal agencies, on defense teams in high profile federal and/or state criminal prosecutions, inside state and local law enforcement agencies and even among the clergy of organized religions is designed to and does result in the circumvention of the protections guaranteed to American citizens by the *Bill of Rights*, the *Separation of Powers Doctrine* and/or perhaps a number of

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materials that could be reasonably expected to disclose the identify of confidential sources); and (b)(7)(E) (exempting material that would disclose techniques and procedures used for law enforcement if disclosure could reasonably be expected to risk circumvention of the law).

other federal laws, including the *Smith-Mundt Act of 1948*,<sup>6</sup> which prohibits the federal government, including the FBI, from funding activities to influence and/or propagandize domestic public opinion.<sup>7</sup>

It is likewise Plaintiff's opinion that, as a matter of law, **NO** exemption can be asserted to conceal this illegal and unconstitutional domestic surveillance program. However, in order to properly frame and present to the Court his challenge to the FBI's claims of exemption with respect to the *Manual*, Plaintiff needs to conduct limited discovery into the scope and duration of this *Sensitive Informant Program*. More importantly, the discovery required by Plaintiff consists of eleven (11) *Interrogatories* the answers to which will document the illegality of the FBI's *Sensitive Informant Program*, thereby precluding the application of any *FOIA* exemptions to conceal and/or withhold the *Manual* from Plaintiff and the American public.

Wherefore, pursuant to *FOIA*, *Federal Rules of Civil Procedure* 26 and 33, *FOIA* and the Court's inherent powers, Plaintiff request an *Order* requiring the

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<sup>6</sup> 22 U.S.C. § 1461.

<sup>7</sup> The Department of Justice apparently has a long and storied tradition of violating the *Smith-Mundt Act*, and there is no reason to believe that the FBI would not do likewise. *See Exhibit 6* hereto.

FBI to respond to eleven(11) interrogatories about its *Sensitive Informant Program*. **Oral argument is requested.** Plaintiff would likewise respectfully request that this *Motion* be heard during the Court March 21, 2013, *Initial Pre-Trial Conference*.

### **STATEMENT OF FACTS**

The facts necessary for the Court to rule on this *Motion* are set forth below:

1. Prior to bring this *Motion*, Plaintiff requested the FBI to voluntarily agree to answer a few simple *Interrogatories* about the scope and duration of its *Sensitive Informant Program*. In that request, Plaintiff also explained why he needed the answers to those *Interrogatories*, which was to frame a challenge to the exemptions being asserted by the FBI to withhold portions of the *Manual*.<sup>8</sup>

2. The FBI rejected Plaintiff's request for discovery. According to the FBI, the discovery requested by Plaintiff is improper because:

This case is not one where you have asked the Court to declare an alleged 'secret surveillance program' illegal on any ground. . . , nor have you sought to enjoin any activity that you allege any such program might be conducting. Indeed, there is simply no basis on which you could conceivably raise such a challenge or seek such

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<sup>8</sup> Exhibit 7 hereto.

relief.<sup>9</sup> Instead, this case, like the numerous other FOIA cases that you have filed in this Court, is about nothing except for whether the FBI performed an adequate search for records responsive to your FOIA requests, and whether the exemptions that the FBI has asserted with respect to records it may have found, fit into the exemption categories set forth in the FOIA.<sup>10</sup>

3. The FBI, however, is mistaken when it states that the adequacy of its search for the *Manual* is an issue in dispute. The FBI is mistaken because it found and produced portions of the *Manual*, withholding other portions on the basis of exemptions from disclosure set out in *FOIA*. Thus, the issue before the Court is the legitimacy-lawfulness and/or applicability of those exemptions to the FBI's *Manual* for domestic spying.

4. In its response to Plaintiff, the FBI also stated that this issue should be decided by way of a *Motion for Summary Judgment*, which the FBI has stated that it intends to file. The FBI also insists that this *Motion for Summary Judgment* be decided solely upon the sworn *Declarations* that it intends to file in

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<sup>9</sup> It is doubtful whether Plaintiff would have the requisite standing to directly attack this illegal *Sensitive Informant Program*. But under *FOIA*, Plaintiff does have the standing, right and duty to expose the FBI's unconstitutional actions involving its secret domestic spying program.

<sup>10</sup> Exhibit 8 hereto.

support of that *Motion*,<sup>11</sup> and **WITHOUT** any discovery by Plaintiff with respect to the scope and/or duration of the *Sensitive Informant Program* when such discovery is necessary to flesh out the illegality of this activity.

5. Plaintiff submits that the legitimacy-lawfulness and/or applicability of those exemptions advanced by the FBI for withholding its domestic spying *Manual* cannot be determined in a vacuum. In order for Plaintiff to challenge these exemption and for the Court to determine the legitimacy-lawfulness and/or applicability of those exemptions to the portions of the *Manual* being withheld from Plaintiff, discovery is needed into both the scope and duration of the FBI domestic spying *Sensitive Informant Program*.

6. The discovery needed by Plaintiff consists of eleven (11) *Interrogatories* directed at the number **BUT NOT** the identities of the *Sensitive Informants* that the FBI has placed within the targeted but constitutionally protected groups. Plaintiff is likewise **NOT** seeking information that would,

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<sup>11</sup> Those *Declarations* will mostly come from David M. Hardy, who is Section Chief of the FBI's "Record/Information [Non-] Dissemination Section." But Mr. Hardy's reputation for truthfulness under oath is tarnished. *See Islamic Shura Council of Southern California v. Federal Bureau of Investigation*, No. SAC07-1088-CJC, 2011 WL 1576476 (S.D. Cal. April 27, 2011)(**Wherein the federal court found that the federal government, and Mr. Hardy specifically, had provided false and misleading information to the court through sworn statements**).

directly or indirectly, reveal the identity of any *Sensitive Informant*.

7. FOIA, authorizes discovery to test the lawfulness of the exemptions being claimed by the agency for withholding documents.<sup>12</sup> Set out below are the *Interrogatories* that Plaintiff respectfully requests the Court to *Order* the FBI to answer prior to hearing the FBI's *Motion for Summary Judgment*:

(a) **INTERROGATORY NO. 1:** At any time since January 1, 1995, did *you* ever have a *Sensitive Informant*<sup>13</sup> who

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<sup>12</sup> See *Giza v. Sec'y of Health, Educ. & Welfare*, 628 F.2d 748, 751 (1<sup>st</sup> Cir. 1980); *Niren v. INS*, 103 F.R.D. 10 (Or. 1984);

<sup>13</sup> In these Interrogatories, the term "*Sensitive Informant*" is defined as anyone acting, directly or indirectly and with or without any compensation, on behalf of the **FBI** as a member of, person associated with or otherwise a participant in or observer of the activity or activities of an entity, organization, group, governmental agency or unit, association of organizations or individuals, public official, member of Congress, judge, cleric and/or religious or political organization **AND** who does not disclose or reveal to such entity, organization, group, governmental agency or unit, association of organizations or individuals, public official, member of Congress, judge, cleric and/or religious or political organization his or her **FBI** affiliation. A *Sensitive Informant* is, in other words, some one who is acting, directly or indirectly, on behalf of the **FBI** as an undisclosed participant in or observer of the activity or activities of an entity, organization, group, governmental agency or unit, association of organizations or individuals, public official, member of Congress, judge, cleric and/or religious or political organization. The term "*Sensitive Informant*" likewise includes what the FBI's current terminology refers to as a "**Confidential Human Source**" including any and all sub-categories of *Confidential Human Sources* such as, but not limited to, what the FBI refers to as a "**Privileged Confidential Human Source**," who is someone reporting confidential information to the FBI in violation of a privilege such as an attorney reporting his client's confidential communications, a physician reporting upon his patient's medical or mental condition, a cleric informing on a member of his or her church or other religious organization, etc.

was on the staff of a United States District Court Judge, a United States Court of Appeals Judge or a United States Supreme Court Justice? If so, during this time period **how many** such ***Sensitive Informants*** did **you** have? In answering this *Interrogatory*, you are only required to provide the total number of such *Sensitive Informants*, you are not required to identify any specific United States District Court Judge, United States Court of Appeals Judge and/or United States Supreme Court Justice on whose staff you had and/or have placed a *Sensitive Informant*.

(b) **INTERROGATORY NO. 2:** At any time since January 1, 1995, did **you** ever have a *Sensitive Informant* who was on the staff of a member of the House of Representatives of the United States Congress? If so, during this time period **how many** such ***Sensitive Informants*** did **you** have? In answering this *Interrogatory*, you are only required to provide the total number of such *Sensitive Informants*, you are not required to identify any specific member of the House of Representatives on whose staff you had and/or have placed a *Sensitive Informant*.

(c) **INTERROGATORY NO. 3:** At any time since January 1, 1995, did **you** ever have a ***Sensitive Informant*** who was on the staff of a United States Senator? If so, during this time period **how many** such ***Sensitive Informants*** did **you** have? In answering this *Interrogatory*, you are only required to provide the total number of such *Sensitive Informants*, you are not required to identify any specific United States Senator on whose staff you had and/or have placed a *Sensitive Informant*.

(d) **INTERROGATORY NO. 4:** At any time since January 1, 1995, did **you** ever have a *Sensitive Informant* who was on the staff of, employed by or part of the management of any

news organizations, including but not limited to any of the following news organizations: Associated Press, ABC, CBS, CNN, FOX, MSNBC, NBC, NPR, PBS, Reuters or Scripps-Howard? If so, during this time period **how many** such ***Sensitive Informants*** did **you** have? In answering this *Interrogatory*, you are only required to provide the total number of such *Sensitive Informants*, you are not required to identify any specific news organization within which you had and/or have placed a *Sensitive Informant*.

(e) **INTERROGATORY NO. 5:** At any time since January 1, 1995, did **you** ever have a ***Sensitive Informant*** who was on the staff of, employed by or part of the management of any newspaper, including but not limited to any of the following newspapers: Boston Globe, Chicago Tribune, Los Angeles Times, Miami Herald, New York Times, Wall Street Journal and/or Washington Post? If so, during this time period **how many** such ***Sensitive Informants*** did **you** have? In answering this *Interrogatory*, you are only required to provide the total number of such *Sensitive Informants*, you are not required to identify any specific newspaper within which you had and/or have placed a *Sensitive Informant*.

(f) **INTERROGATORY NO. 6:** At any time since January 1, 1995, did **you** ever have a ***Sensitive Informant*** who was on the staff of, employed by or part of the management of any news magazines, including but not limited to any of the following news magazines: The Dailey Beast, Mother Jones, New American, Newsweek, Time and/or U.S. News & World Report? If so, during this time period **how many** such ***Sensitive Informants*** did **you** have? In answering this *Interrogatory*, you are only required to provide the total number of such *Sensitive Informants*, you are not required to identify any specific news magazine within which

*you* had and/or have placed a *Sensitive Informant*.

(g) **INTERROGATORY NO. 7:** At any time since January 1, 1995, did *you* ever have a *Sensitive Informant* who was on the staff of, employed by or appointed to another federal agency, its bureaus or sub-divisions, including but not limited to: Department of Defense, Department of Homeland Security, Department of Justice, Department of State, the Executive Office of the President, CIA, BATFE, Peace Corps and/or the White House? If so, during this time period *how many* such *Sensitive Informants* did *you* have? In answering this *Interrogatory*, *you* are only required to provide the total number of such *Sensitive Informants*, *you* are not required to identify any specific federal agency within which *you* had and/or have placed a *Sensitive Informant*.

(h) **INTERROGATORY NO. 8:** At any time since January 1, 1995, did *you* ever have a *Sensitive Informant* who was on the staff of, employed by, a member of or otherwise, directly or indirectly, associated with the defense team in a federal criminal prosecution? If so, during this time period *how many* such *Sensitive Informants* did *you* have? In answering this *Interrogatory*, *you* are only required to provide the total number of such *Sensitive Informants*, *you* are not required to identify any specific criminal prosecution defense team within which *you* had and/or have placed a *Sensitive Informant*.

(i) **INTERROGATORY NO. 9:** At any time since January 1, 1995, did *you* ever have a *Sensitive Informant* who was on the staff of, employed by, a member of or otherwise, directly or indirectly, associated with a State, county or municipal law enforcement agency? If so, during this time period *how many*

such *Sensitive Informants* did *you* have? In answering this *Interrogatory*, *you* are only required to provide the total number of such *Sensitive Informants*, *you* are not required to identify any specific State, county or municipal law enforcement organization within which *you* had placed a *Sensitive Informant*.

(j) **INTERROGATORY NO. 10:** At any time since January 1, 1995, did *you* ever have a *Sensitive Informant* who was a cleric or member of the clergy in any religious organization? If so, during this time period *how many* such *Sensitive Informants* did *you* have? In answering this *Interrogatory*, *you* are only required to provide the total number of such *Sensitive Informants*, *you* are not required to identify any specific religious organization within which *you* had and/or have placed a *Sensitive Informant*.

(k) **INTERROGATORY NO. 11:** At any time since January 1, 1995, did *you* ever have a *Sensitive Informant* who was on the staff of a State Supreme Court Justice or State Court of Appeals Judge? If so, during this time period *how many* such *Sensitive Informants* did *you* have? In answering this *Interrogatory*, *you* are only required to provide the total number of such *Sensitive Informants*, *you* are not required to identify any specific State Supreme Court Justice or State Court of Appeals Judge on whose staff *you* had and/or have placed a *Sensitive Informant*.

## ARGUMENT

As previously noted, the issue in this dispute between the parties is not the adequacy of the FBI's search for the *Manual*. The FBI found the *Manual*. The issue for the Court to decide is (1) whether the *FOIA* exemptions advanced by the FBI for withholding portions of the *Manual* apply and (2), even if they do apply, can those exemptions be lawfully asserted to conceal FBI activities that are unconstitutional and/or otherwise illegal? Plaintiff submits that the answers to this two part question are "NO."

With respect to the applicability of the claimed exemptions being asserted by the FBI to withhold portions of the *Manual* from Plaintiff, those exemptions appear to be facially defective. The FBI, for example, states that it redacted and/or withheld entire portions of the *Manual* from Plaintiff on the basis of 5 *U.S.C.* § (b)(1) (exempting documents classified as involving national security), but it is difficult to see how spying on the media, members of Congress, federal judges, other federal agencies or criminal defense teams advances national security. Another exemption from disclosure claimed by the FBI was 5 *U.S.C.* § (b)(5) (exempting inter-agency or intra-agency memoranda that would not be available to a party in litigation with that agency), but it is also difficult to see how

any inter-agency or intra-agency memoranda would be contained in FBI Defendants' domestic spying *Manual*.

The FBI also raises as an exemption justifying its non-disclosure of its “how to undermine and subvert the *Constitution*” *Manual* 5 *U.S.C.* § (b)(6)(exempting personnel, medical and similar files the disclosure of which would clearly constitute an unwarranted invasion of privacy) and 5 *U.S.C.* §(7)(C) (further exempting material the release of which would be an unwarranted invasion of personal privacy). However, files containing such personal information would clearly not be in the FBI's domestic spying *Manual*. Finally, the FBI takes refuge from disclosure on the basis of 5 *U.S.C.* § (7)(D)(exempting materials that could be reasonably expected to disclose the identify of confidential sources) and 5 *U.S.C.* § (b)(7)(E) (exempting material that would disclose techniques and procedures used for law enforcement if disclosure could reasonably be expected to risk circumvention of the law). Yet, neither of these exemption should apply because the *Manual* does not involve any one particular informant it is a “how to spy” document; and because the exposure of the FBI's domestic spying activities on the media, members of Congress or federal judges would not result in a circumvention of the law other than the FBI's illegal and unconstitutional act of spying.

But even if these exemptions otherwise arguably apply to the FBI's withholding of the *Manual* from Plaintiff in almost its entirety, there still remains the question of whether these exemptions can, as a matter of law, be used to shield the FBI's illegal activity? It is Plaintiff's position that *FOIA* exemptions cannot and should not be used as such a shield because, in the words of Supreme Court Justice Brandeis said:

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. . .

<sup>14</sup>

Simply put, *FOIA* was enacted into law to address the concerns voiced so long ago by Justice Brandeis: *FOIA* was clearly 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.<sup>15</sup>

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<sup>14</sup> *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

<sup>15</sup> *Virgil v. Andrus*, 667 F.2d 931, 938 (10<sup>th</sup> Cir. 1982).

The public interest in disclosure under *FOIA* is also at its greatest when there is evidence of governmental wrongdoing.<sup>16</sup> Thus, Justice Brandeis' poignant words are the background against which to view Plaintiff's request for limited discovery, especially in light of the stated purposes and objectives of *FOIA*.<sup>17</sup> More importantly, those laudable purposes and objectives will be rendered meaningless if, as in the instant case, the FBI is permitted to use the exemptions allowed by *FOIA* to hide/conceal its illegal and unconstitutional domestic spying program. *FOIA* exemptions, therefore, like evidentiary privileges, should have exceptions.

The *Attorney-Client Privilege* for example, although powerful, cannot be used to keep secret or otherwise shield from disclosure plans for future illegal activity or ongoing criminal activity,<sup>18</sup> and that is why Plaintiff needs the requested discovery. Depending upon the scope and duration of the *Sensitive Informant Program*, the *Manual* would fall within both ongoing and/or future

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<sup>16</sup> See *Lissener v. United States Custom Service*, 241 F.3d 1220 (9<sup>th</sup> Cir. 2001).

<sup>17</sup> "To ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed. See *NLRB v. Robins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)

<sup>18</sup> *In re September 1975 Grand Jury Term*, 532 F.2d 734, 736 (10<sup>th</sup> Cir. 1976).

criminal activity of the kind that would and should render void as a matter of law all FOIA exemptions to disclosure of the *Manual*. Consequently, in order to properly meet and rebut the FBI's exemption claims to disclosing the remaining portions of the *Manual*, Plaintiff needs to demonstrate, among other things, that the FBI did use and continues to use these *Sensitive Informants*; that pursuant to the *Manual*, these *Sensitive Informants* are knowingly and intentionally being used by the FBI in situations that are clearly in violation of the *Constitution* and/or other federal laws; and that, as a result of the number of groups or prominent individuals targeted for infiltration by the *Manual*, the numbers of *Sensitive Informants* are such that they clearly pose a very real threat to the civil rights of both American citizens and other's who enjoy the protections of the *Constitution*.

DATED this 28<sup>th</sup> day of January, 2013.

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

**CERTIFICATE OF SERVICE**

I hereby certify that this 28<sup>th</sup> day of January, 2013, I electronically filed the foregoing **MOTION TO CONDUCT LIMITED DISCOVERY** with the U.S. District Court. Notice will automatically be electronically mailed to the following individuals who are registered with the U.S. District Court CM/ECF System:

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