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

JESSE C. TRENTADUE, Plaintiff, vs. FEDERAL BUREAU OF INVESTIGATION, Defendant.	**PLAINTIFF'S REPLY MEMORANDUM RE: MOTION TO CONDUCT LIMITED DISCOVERY INTO SCOPE AND DURATION OF FBI'S SENSITIVE INFORMANT PROGRAM** Case No.: 2:12cv974 Judge Dale A. Kimball Magistrate Evelyn J. Furse **ORAL ARGUMENT REQUESTED**

Plaintiff hereby submits this *Reply Memorandum* in further support of his *Motion to Conduct Limited Discovery*.[1]

BACKGROUND

The FBI devotes a considerable portion of the *Memorandum* that it submitted in opposition to Plaintiff's *Motion* to arguing that this is a typical *Freedom of Information*

[1] Doc. 22.

Act ("*FOIA*") case involving the adequacy of the FBI's search for responsive documents and/or the applicability of the exemptions claimed by the FBI for not releasing the documents/records. But this is not a typical *FOIA* case. Neither is it an isolated or stand alone case. This case, as the FBI well knows, is the latest front in Plaintiff's long war with the Bureau to discover and uncover the truth about the Oklahoma City Bombing and a related matter: the murder of his brother, Kenneth Michael Trentadue.

The first battle in this almost decade long *FOIA* war was fought before this very Court in *Trentadue v. FBI,*[2] which revealed that persons other that Timothy McVeigh, Terry Nichols and Michael Fortier had participated in the Bombing. That first battle, and the documents/records that Plaintiff obtained as a result, also disclosed: (1) the existence of the FBI's I-Drive and S-Drive computer systems wherein evidence related to the Bombing was kept hidden so as not to be subject to a FOIA request and/or not made part of the FBI's official Bombing case file; (2) the CIA's involvement in the Oklahoma City Bombing; (3) "Patriot Conspiracy" or "PATCON" that was a decade or more long FBI undercover operation designed to infiltrate and monitor or perhaps even incite various right-wing organizations; and (4) the existence of a surveillance camera videotape taken on the morning of April 19, 1995, which according to federal government documents purportedly shows not only the destruction of the Alfred P. Murrah Building, but also the

[2] United States District Court, District of Utah Case No: 2:04-CV-00772.

persons who carried out that attack.[3] That first *FOIA* battle also disclosed the existence of the FBI's "*Sensitive Informant Program*," which is at the heart of this current *FOIA* discovery dispute.

The *Sensitive Informant Program* is 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. The *Sensitive Informant Program* is designed to and does result in the circumvention of the protections guaranteed to American citizens by the *Bill of Rights* and the *Separation of Powers Doctrine*.

In response to Plaintiff's *FOIA* request for the policies, rules, protocols and/or procedures governing the FBI's recruitment and use of such informants in this secret surveillance program which spies on United States' citizens on United States' soil, the FBI produced 205 pages, which appear to be but a small portion of its: "*Corporate Policy Directive*" on the use of confidential human sources,[4] "*Confidential Human*

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[3] These documents and discoveries resulted in Plaintiff's second *FOIA* front, *Trentadue v. CIA*, United States District Court, District of Utah Case No: 2:08-CV-00788.

[4] Doc. 14-7.

Source Validation Standards Manual,"[5] "*Confidential Human Source Policy Manual,*"[6] and "*Domestic Investigations and Operations Guide*"[7] (collectively the "*Manual*"). Those portions of the *Manual* that the FBI actually provided to Plaintiff were heavily redacted. The FBI withheld all of these portions of the *Manual* on the basis of various exemptions from disclosure under *FOIA*.

It is Plaintiff's belief, however, that **NO** exemption can be asserted to conceal this unconstitutional domestic spy/surveillance program. Simply put, *FOIA*, which has as its stated purpose the disclosure of the federal government's wrongdoing, cannot and should not be used to shield the FBI's unconstitutional actions undertaken on what appears to be a national scale. However, in order to properly frame and present to the Court his challenge to the FBI's claims of exemption Plaintiff needs to conduct limited discovery into the scope and duration of this *Sensitive Informant Program*.

SUMMARY OF ARGUMENT

Plaintiff's need for this discovery is simple. If, for example, the FBI has never embedded a *Sensitive Informant* on the staff of a member of Congress and/or a federal judge, in the national media, within another federal agency, on the defense team in high

[5] Doc. 143-8.

[6] Doc. 14-9. And

[7] Doc. 14-10.

profile federal and/or state criminal prosecution, inside of a state or local law enforcement agency or among the clergy of an organized religion, it will admittedly be difficult for Plaintiff to assert that **NO** *FOIA* exemptions should apply to those portions of the *Manual* being withheld from him. This is so because a rare or isolated violation of the *Constitution* by the use of *Sensitive Informants* may not be sufficient for the Court to override the FBI's exemption claims.

However, if the FBI's *Sensitive Informant* program has been in operation for years and/or involves the placement of many *Sensitive Informants* 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 or among the clergy of organized religions, then it is obvious that the *Manual* is designed to and/or does result in the circumvention of the protections guaranteed to American citizens by the *Bill of Rights* and the *Separation of Powers Doctrine*. If this is so, then it is Plaintiff's position that the FBI cannot lawfully assert any *FOIA* exemption to keep secret a clearly unconstitutional nationwide program of domestic spying.

The information that Plaintiff's seeks by way of this discovery will also be necessary for the Court to determine whether the (b)(1) exemption claimed by the FBI applies. Exemption (b)(1) allows the FBI to exempt certain records provided it declares

them "secret" on the basis of national security **AND** pursuant to an *Executive Order* allowing for that "secret" designation.

In order to obtain information with respect to the scope and duration of the FBI's *Sensitive Informant Program*, Plaintiff has moved to conduct limited discovery consisting of just eleven (11) *Interrogatories*, the answers to which will document the unconstitutionality of the FBI's *Sensitive Informant Program*, thereby allowing Plaintiff to challenge the FBI's assertion of *FOIA* exemptions to conceal and/or withhold the *Manual* from Plaintiff and the American public, and the Court to determine the validity/applicability of those exemptions to the *Manual*. The FBI, however, vehemently opposes that *Motion*.[8]

STANDARD OF REVIEW

FOIA was enacted into law in order 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.[9] The public interest in disclosure under *FOIA* is also at its greatest when there is evidence of governmental wrongdoing.[10] FOIA authorizes discovery to test the lawfulness of the exemptions being

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[8] Doc. 23.

[9] *Virgil v. Andrus*, 667 F.2d 931, 938 (10th Cir. 1982).

[10] *See Lissener v. United States Custom Service*, 241 F.3d 1220 (9th Cir. 2001).

claimed by the agency for withholding documents.[11] And the decision to allow discovery falls within the Court's discretion.[12]

Finally, *FOIA* strongly favors a policy of disclosure, which is why the FBI bears the burden of establishing that a claimed exemption applies. The Court determines the validity/applicability of any exemptions from disclosure claimed by the FBI and, in doing so, narrowly construes any exemptions from disclosure claimed, including resolving all doubts against the FBI and in favor of disclosure.[13]

STATEMENT OF FACTS

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

1. Plaintiff submitted a *FOIA* request to the FBI for any and all documents, including but not limited to policies, rules, protocols and/or procedures which, directly or indirectly, concern or otherwise govern the recruitment and use of informants who are members of or otherwise associated with the defense team in a criminal prosecution; the placement of informants within a criminal defense team; and/or describe, define or otherwise govern how such informants are to be contacted, managed, used, compensated and/or otherwise handled by the FBI, including documents that limit

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[11] See *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);

[12] *See Carney v. U.S. Dep't of Justice,* 19 F.3d 807, 813 (2nd Cir. 1994).

[13] *See Wood v. F.B.I.,* 432 F.3d 78, 82-83 (2nd Cir. 2005).

or restrict the recruitment and/or use of such informants.[14]

2. The FBI did not respond to that request by stating that there were **NO** responsive documents. Instead, the FBI produced part of the *Manual* that is the subject of this lawsuit.

3. Plaintiff submitted a separate request to the FBI **for each** of the following categories of informants: (a) those on the staffs of federal or state judges; (b) those on the staffs of members of Congress; (c) those in the national media, (d) those within other federal agencies, (f) those within state or local law enforcement agencies, (g) those among the clergy of organized religions In each instance, the FBI did **NOT** respond to any of these *FOIA* request by stating that there were **NO** responsive documents. Instead, in each instance the FBI produced part of the *Manual*.[15]

4. In its opposition to Plaintiff's *Motion to Conduct Limited Discovery*, the FBI does not contend that the *Interrogatories* are oppressive or too burdensome to answer.[16] Nor could the FBI make such an argument since it has admitted that each *Sensitive Informant* is "**given an identification number**," [17] which means that the

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[14] *See* Doc. 14-6.

[15] *Id.*

[16] *See* Doc. 23.

[17] Doc. 17, ¶ 7.(emphasis added).

information necessary to answer Plaintiff's *Interrogatories* can be easily obtained since, presumably, all records concerning a particular *Sensitive Informant* should be maintained under his or her identification number and easily retrieved by computer search.

5. The FBI does claim, however, that by responding to Plaintiff's *Interrogatories* it will be providing Plaintiff with "the very information" that is the subject of his *FOIA* request, which is improper.[18] But that is not so. The following is an example of Plaintiff's proposed *Interrogatories*:

> **INTERROGATORY NO. 1.**: At any time since January 1, 1995, did ***you*** ever have a ***Sensitive Informant*** who 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.*

Each of Plaintiff's proposed *Interrogatories* is similarly drafted so as not to reveal the identities of any *Sensitive Informant*. More importantly, the *Interrogatories* can by answered without revealing the contents of the *Manual*.

6. The likewise FBI claims that Plaintiff's request for discovery is "premature." It is allegedly premature because, according to the FBI, this is a "typical case" and the FBI's *Motion for Summary Judgment* "will provide both the plaintiff and

[18] Doc. 23, pp. 5 and 8.

the court with all the information necessary to assess the validity of . . .[its] FOIA response." Plaintiff disagrees.

7. Without knowing the scope and duration of the FBI's *Sensitive Informant Program*, Plaintiff cannot effectively frame a challenge to the exemptions being asserted by the FBI for withholding portions of the *Manual*.[19] And, more importantly, Plaintiff submits that Court cannot and should not rule upon this matter without knowing the scope and duration of the FBI's *Sensitive Informant Program*. It is an issue that is far too important to be decided, as the FBI would have it, in the dark and without all of the relevant facts about this disturbing *Sensitive Informant Program* before the Court.

ISSUE

The issue in this case 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

[19] Permitting the discovery that Plaintiff needs to respond to the FBI's *Motion for Summary Judgment* will alleviate the need for Plaintiff to move for a continuance and discovery under *Federal Rule of Civil Procedure* 56(d) when that *Motion for Summary Judgment* is eventually filed. More importantly, allowing Plaintiff discovery before the filing of the FBI's *Motion for Summary Judgment* is likewise consistent with the purpose of the *Federal Rules of Civil Procedure*, which is "to secure the just, speedy, and inexpensive determination of every action and proceeding." *Fed. R. Civ. P.* 1.

that clearly subvert the *Constitution*? Furthermore, this issue cannot and should not be decided without the discovery that Plaintiff is seeking to obtain through his *Motion to Conduct Limited Discovery*.

ARGUMENT

The FBI argues that the discovery Plaintiff's seeks would be futile since "illegal" activity by the federal government is shielded from disclosure under *FOIA* if covered by an exemption. Plaintiff disagrees. The FBI's futility argument is flawed because the question before the Court on this *Motion* is not about whether Plaintiff is entitled to disclosure of information the FBI may have obtained as a result of this unconstitutional domestic spying program involving *Sensitive Informants*. Plaintiff has not asked for that information either in his *FOIA* requests or proposed *Interrogatories*. Neither is the question before the Court on this *Motion* about revealing the identity of any *Sensitive Informant*. Again, Plaintiff has not asked for that information either in his *FOIA* requests or proposed *Interrogatories*. Rather, the question now before the Court is one of *due process* and Plaintiff's ability to provide the Court with the information that it will need to determine if the exemptions asserted by the FBI apply.

The Court is tasked with determining the validity and applicability of the exemptions claimed by the FBI. The evidence that Plaintiff seeks regarding the scope and duration of the FBI's *Sensitive Informant Program* is both relevant and material to that

determination. Moreover, without having the FBI's answers to these eleven *Interrogatories*, Plaintiff will be denied *due process* and those persons with standing to challenge the FBI's unconstitutional *Sensitive Informant Program* may never learn of its existence.

Another reason that the FBI's futility argument is flawed is the case law submitted by the Bureau in support of its contention that *FOIA* exemptions shield from public disclosure its unconstitutional conduct. This case law only addresses exemptions (b)(1) and (b)(3), otherwise known as the super exemptions because they relate to matters of national security or intelligence gathering and have a separate statutory basis for their existence other than FOIA in that they are allowed either pursuant to an *Executive Order* or a specific act of Congress. In the present case, however, the decisional law cited by the FBI largely relates to exemption (b)(3), which only exempts an agency's intelligence sources and methods otherwise protected by either the *National Security Act of 1947* [20] or the *Central* Intelligence Act of 1949.[21] Insofar as these cases address (b)(3), they are irrelevant since (b)(3) was not proffered by the FBI as justification for withholding any portion of the *Manual*.

Admittedly, the FBI has asserted the national security exemption contained in

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[20] 50 U.S.C. §403(d)(3) (1976).

[21] 50 U.S.C. §403g (1976).

(b)(1) as a reason not to produce portions of the *Manual*, but the FBI's use of that exemption has been very limited.[22] No (b)(1) exemption, for example, was claimed by the FBI with respect to the *Domestic Investigations and Operations Guide*, [23] which appears to be at the heart of its *Sensitive Informant Program*, or the *Corporate Policy Directive* on the use of confidential human sources. [24] With respect to the *Confidential Human Source Policy Manual*,[25] and the *Confidential Human Source Validation Standards Manual*[26] the FBI only raised the national security (b)(1) exemption to portions of 38 pages of these documents.

Thus, out of the 205 pages of the *Manual* produced to Plaintiff, the FBI only

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[22] The most common exemption asserted by the FBI is § (b)(7)(E), which exempts from disclosure under *FOIA* material that would reveal techniques and procedures used for law enforcement **but only** if that disclosure could reasonably be expected to risk circumvention of the law. This exemption should not 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 unconstitutional act of spying.

[23] Doc. 14-10.

[24] Doc. 14-7.

[25] Doc. 14-9. For the Court's convenience, Plaintiff has attached as Exhibit 1 those pages from the *Confidential Human Source Policy Manual* to which a (b)(1) exemption was claimed by the FBI.

[26] Doc. 14-8.For the Court's convenience, Plaintiff has also attached as Exhibit 2 those pages from the *Confidential Human Source Validation Standards Manual* to which a (b)(1) exemption was claimed by the FBI.

claimed national security or the (b)(1) exemption to portions of 38 pages. Therefore, even if the FBI's limited assertion of the national security (b)(1) exemption is valid with respect to its unconstitutional nationwide domestic spying activities, the same would not necessarily be true for the other lesser *FOIA* exemptions behind which the FBI is attempting to hide in order not to produce significant portions of the *Manual*. Furthermore, none of the cases relied upon by the FBI involves a program deliberately designed to subvert and undermine the *Constitution*, which Plaintiff submits is a significant distinction. These cases are likewise clearly distinguishable from the facts of the instant case and, more importantly, do **NOT** support the FBI's argument that the discovery sought by Plaintiff is either irrelevant or unnecessary.

In *ACLU v. Dep't of Defense,*[27] for example, the plaintiff was suing the Department of Defense and the CIA under *FOIA* to obtain documents related to the CIA's interrogation by water boarding of "high value" detainees at the U.S. Naval Base in Guantanamo Bay, Cuba. The government claimed that these records were exempt under §§ (b)(1) of *FOIA,* which exempts documents that have been classified pursuant to a specific *Executive Order* as needing to be kept secret in the interest of national security. In that case, the plaintiff argued that since water boarding had been prohibited by the President, exemption (b)(1) was essentially invalid in that the CIA could not classify

[27] 628 F.3d 612 (2nd Cir. 2012).

information obtained by the government as a result of the torture of these high value detainees as needing to be kept secret. The District of Columbia Court of Appeals disagreed holding that "there is no legal support for the conclusion that illegal activities cannot produce classified documents."[28]

In *ACLU v. Dep't of Justice,*[29] the plaintiff made another attempt to obtain documents related to "enhanced interrogation" techniques being used against high value detainees. In this case, however, the plaintiff sued the Department of Justice and the CIA under *FOIA* to obtain documents related to the torture of one high-value detainee, Abu Zubaydah. The plaintiff likewise made essentially the same argument as in the *ACLU v. Dep't of Defense* case: use of water boarding in particular instances do not relate to an "intelligence method" because the President has declared that practice illegal.[30]

Relying in part upon the holding in *ACLU v. Dep't of Defense,* the Second Circuit Court of Appeals upheld the (b)(3) exemption.[31] In doing so, the Second Circuit stated that "a judicial determination of the legality of water boarding is beyond the scope of this

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[28] 628 F.3d at 620.

[29] 681 F.3d 61 (2nd Cir. 2012).

[30] *Id.* at 73.

[31] *Id.* at 74-75.

FOIA action.[32] For the foregoing reasons, we reject Plaintiff's argument that the Government could not withhold information relating to water boarding on the grounds that water boarding is now 'illegal' and therefore beyond the CIA's mandate."[33] Again, the Second Circuit did not consider the illegality argument with respect to exemption (b)(1) specifically noting that "FOIA exemptions are independent of each other."[34]

Similarly, in *Agee v. Central Intelligence Agency*,[35] the plaintiff was seeking CIA documents related to an investigation of him, which the agency had declared protected under (b)(1) and (b)(3). The plaintiff in that case also argued that these super exemptions should not apply because this material may have been obtained illegally and in violation of his civil rights. The United States District Court for the District of Columbia upheld the exemptions, but in doing so noted that:

> There is no indication that the documents were classified [as involving national security] for the purpose of concealing illegal conduct. Thus, the

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[32] The same thing, needing to determine the constitutionality or legality of the *Sensitive Informant Program*, would not be true with respect to the present case. What the FBI is doing, for example placing informants on defense teams in criminal prosecutions, is clearly unconstitutional. Neither would it be necessary for the Court to make such a determination. The only "legality" determination that the Court would have to make would be whether the *Executive Order* under which the FBI eventually identifies as governing its use of exemption (b)(1) does or could include the *Manual* do to its unconstitutional purpose and use?

[33] *Id*. at 75.

[34] Id. at 73, fn. 11.

[35] 524 F. Supp. 1290 (D. D.C. 1981).

> CIA papers at issue are properly protected under (b)(1). Indeed, they are doubly protected because of the CIA's special statutory exemption for documents relating to sources and methods by (b)(3).[36]

These cases relied upon by the FBI in support of its discovery is not needed argument all involve issues of national security and an exemption from disclosure claimed on the basis of under 5 *U.S.C.* § (b)(1) because the material had been classified pursuant to an *Executive Order* as needing to remain secret. Yet even under exemption (b)(1), in each of these cases the District Court was still charged with determining whether that exemption came with the scope of an *Executive Order* allowing the documents to be classified as "secret," **AND** whether that "secret" classification had been given by the agency in bad faith for the purpose of concealing unconstitutional activity? Furthermore, while the federal government's illegal actions taken against foreign citizens and the federal government's violation of a single citizen's constitutional rights or the rights of a few citizens may not have been sufficient to override §§ (b)(1) in these three cases, the same would not necessarily be true of the FBI *Sensitive Informant* Program.

In conclusion, it is difficult to see how there could possibly be an *Executive Order* allowing the FBI to classify an unconstitutional domestic nationwide spying program

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[36] *Id*. at 1294. The Court's statement about "illegal conduct" was in reference to *Executive Order* No. 12,065, which provided that classification of documents as needing to be kept secret "may not be used to conceal violations of law . . . ." *Id*. If the *Sensitive Informant Program* is as broad and long running as Plaintiff suspects, that would be powerful evidence that the FBI's assertion of any *FOIA* exemption was done in bad faith.

"secret" or, if there is such an *Executive Order*, how that *Order* could possibly be constitutional?[37] But those points aside, the discovery that Plaintiff seeks will be necessary for the Court to determine whether the FBI's classification of portions of the *Manual* as "secret" pursuant to any such *Executive Order* and thus exempt under *FOIA* on the basis of national security, applies to each of the following categories of *Sensitive Informants*: (1) those on the staffs of members of Congress and perhaps even federal judges, (2) those in the national media, (3) those within other federal agencies, (4) those on defense teams in high profile federal and/or state criminal prosecutions, (5) those inside state and local law enforcement agencies, and (6) those among the clergy of organized religions. The validity/applicability of the FBI's use of exemption (b)(1) will have to be made by the Court for each of these categories of *Sensitive Informants* and Plaintiff's *Interrogatories* are designed to provide the information that will allow the Court to make those determinations.

DATED this 27th day of February, 2013.

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

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[37] If there is in fact an *Executive Order* covering the FBI's use of (b)(1) for the *Manual*, it will be interesting to see which President authored that *Order*.

CERTIFICATE OF SERVICE

I hereby certify that this 27th day of February, 2013, I electronically filed the foregoing **REPLY MEMORANDUM RE: 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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