

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

JESSE CARL TRENTADUE,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION

Defendants.

Civ. Action No. 3:04-CV-00772 DAK

FIFTH DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD"), at Federal Bureau of Investigation Headquarters ("FBIHQ") in Washington, D.C. I have held this position since August 1, 2002. Prior to my joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act ("FOIA") policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my current capacity as Section Chief, I supervise the Freedom of Information/Privacy Acts ("FOIPA") Litigation Support Unit ("LSU"). The statements contained

in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the treatment afforded the two FOIA requests of Jesse Trentadue ("plaintiff"), which seek (a) a particular "memorandum" dated January 4, 1996; (b) investigative records concerning Morris Dees's and/or the Southern Poverty Law Center's ("SPLC"), involvement with, and/or connection to, Elohim City, OKBOMB, BOMBROB, Timothy McVeigh, Richard Guthrie, Terry Nichols, Dennis Mahon, Robert Millar, Michael Brescia, Peter Langan, and/or Andreas Strassmeier; and (c) a copy of an FD-302, which, according to plaintiff, documents a meeting between plaintiff and two United States Department of Justice ("DOJ") attorneys and an FBI Special Agent ("SA").

(4) The purpose of this declaration is to provide detail regarding the documents released on July 21, 2005, as a matter of discretion, by the FBI to plaintiff. It also provides, in accordance with Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), an explanation of the bases for the redactions made in those documents pursuant to FOIA Exemptions 2, 6, 7(C), and 7(D).

PROCEDURAL HISTORY OF PLAINTIFF'S REQUEST

(5) The administrative correspondence related to this matter is summarized in my December 9, 2004 declaration, which was filed in support of the FBI's motion for summary judgment. See Declaration of David M. Hardy ("Hardy Decl.") ¶¶ 5-9.

(6) On May 5, 2005, this Court issued an Order granting Plaintiff's Motion for Partial Summary Judgment and denying Defendant's Motion for Summary Judgment. In the Order, the Court directed the FBI, *inter alia*, to conduct an additional search for documents responsive to plaintiff's FOIA request.

(7) As I have explained previously, the FBI conducted an additional, extraordinary search in response to the Court's May 5 Order. See Third Declaration of David M. Hardy ("3d Hardy Decl.") ¶¶ 9-10; Fourth Declaration of David M. Hardy ("4th Hardy Decl.") ¶¶ 13-16.¹ In my May 19, 2005 declaration, I stated that this additional search had identified approximately 340 potentially responsive documents, which still required review. See 3d Hardy Decl. ¶ 10.

(8) On June 6, 2005, before the results of the FBI's additional search had been completely processed and reviewed, the Court issued an Order staying its May 5 Order. In the Order, the Court only required the FBI to release, as they become available, documents "the Defendants have discovered . . . that are responsive to Plaintiff's FOIA requests (as interpreted by [the FBI]) and to which [the FBI] do[es] not assert any FOIA exemption." See Order of May 5,

¹ Although the FBI continues to contend that its original search was adequate, it performed, in response to the Court's May 5 Order, an additional, extraordinary search consisting of a hand search of four investigative files (totaling approximately 7500 pages) and a ZyIndex text search of the OKBOMB investigative file (approximately 1.2 million pages). See 3d Hardy Decl. ¶ 9 & n.8.

2005, at 2.

(9) The FBI's additional search resulted in seventeen documents that are responsive to plaintiff's FOIA requests (as interpreted by the FBI). After processing and review, the FBI determined that it would assert FOIA exemptions over information in all seventeen documents. Accordingly, the documents were not produced to plaintiff pursuant to the Court's June 6 Order.

(10) The FBI determined, however, that the seventeen documents would be released in redacted form, as a matter of discretion. On July 21, 2005, the FBI released the documents to plaintiff. As stated in ¶ 4, above, these documents are the subject of this declaration.

**ADDITIONAL DETAIL REGARDING
THE DOCUMENTS RELEASED ON JULY 21**

(11) As stated in ¶ 9, above, the seventeen documents released on July 21 are all the documents resulting from the FBI's additional, extraordinary search that are responsive to plaintiff's FOIA requests (as interpreted by the FBI). No responsive documents resulting from the search were withheld in their entirety.

(12) If a released document referred to or referenced another document, the referred to or referenced document was also released if it, too, was responsive to plaintiff's FOIA requests (as interpreted by the FBI). For example, the teletype consisting of pages Trentadue II-14 to Trentadue II-16² refers to "EC from FBI, Mobile to Oklahoma City CP and Director dated 12/21/95." Because that "EC" was responsive, it was included in the release as pages Trentadue II-71 to Trentadue II-72. Likewise, the teletype consisting of pages Trentadue II-57 to Trentadue

² As explained in ¶ 16, *infra*, the documents released on July 21 have been Bates-stamped, starting at Trentadue II-1 and concluding at Trentadue II-87.

withheld the names and identifying information.

(37) In contrast, the identities of FBI personnel who are members of the Senior Executive Service (SES) would add to the public's understanding of the activities and operations of the FBI. The public would directly benefit from knowing the identities of high-level employees of the federal government, who have significant oversight and decisionmaking responsibility. Accordingly, the public interest outweighed the privacy interest with respect to Inspector in Charge Danny Defenbaugh, whose name and/or identifying information was not withheld on page Trentadue II-29 and elsewhere.

(38) Exemption (b)(6)-1 has been asserted in conjunction with Exemption (b)(7)(C)-1.

(b)(6)-2 Names and/or Identifying Information of Third Parties Who Provided Information Under an Implied Assurance of Confidentiality

(39) On pages Trentadue II-1, -3, -6 through -9, -11, -12, -15, -30 through -32, -34, -35, -38, -40, -42, -44 through -46, -49, -51, -52, -58, -59, -71 through -74, -82, -85, and -87, the names and identifying information of third parties who provided information to the FBI under an implied assurance of confidentiality have been redacted and withheld from release. The notation "(b)(6)-2" in the margins of these pages indicates where the names or other information that could reasonably lead to identification have been redacted. Information provided by these third parties has not been withheld unless that information could reasonably be expected to disclose the identity of the third party. In some circumstances, information that is singular—that is, known to a limited or unique group of individuals—has been withheld as information that could reasonably be expected to disclose the identity of the source.

(40) As explained in ¶ 87, below, three third parties provided information to the FBI that concerns organizations and individuals known or suspected to be violent and possibly engaged in domestic terrorism. In particular, the information in question here was related and relevant to the FBI's investigation of the bombing of the Murrah Federal Building in Oklahoma City. One of the third parties acquired some of the information by interacting directly, undercover, with the above-described organizations and individuals. All three third parties provided information that they had acquired from confidential sources within these organizations to which they had expressly promised confidentiality. For these reasons, these third parties have provided information at the high risk of harassment, retaliation, reprisal, or other significant harm. Accordingly, it can reasonably be inferred that these third parties provided the information with an expectation of confidentiality. It can also be reasonably inferred from these circumstances that the confidential sources of these third parties also would expect confidentiality from the FBI.

(41) In certain circumstances, the names and identifying information of these third parties, and the identifying information of their confidential sources, could add to the public's understanding of the activities and operations of the FBI or the government generally. The light that information would shed is marginal, however, given the information that already has been released in these documents. Even without learning an informant's specific identity, the public has learned from these documents the fact that an informant existed, the general and often specific circumstances in which the informant operated, and nearly all of the information the informant has provided to the FBI. Knowledge of the identities of these third parties would primarily allow the public, and the violent organizations and individuals described above, to contact, harass, and harm

information was not withheld on page Trentadue II-6 and elsewhere.

(48) Exemption (b)(6)-3 has been asserted in conjunction with Exemptions (b)(7)(C)-3.

(b)(6)-4 Name and/or Identifying Information of a Third Party Who Provided Information Under an Express Assurance of Confidentiality

(49) On pages Trentadue II-75 through -77, the name and identifying information of a third party who provided information under an express assurance of confidentiality has been redacted and withheld from release. The notation "(b)(6)-4" in the margins of these pages indicates where the name or other information that could reasonably lead to identification has been redacted. Information provided by this third party has not been withheld unless that information could reasonably be expected to disclose the identity of the third party.

(50) A third party provided information to the FBI under an express assurance of confidentiality. As is apparent from the pages in question, the third party provided information concerning organizations and individuals known or suspected to be violent, which was acquired by interacting directly with those organizations and individuals. Because of the risk of harassment or retaliation, the third party received an express assurance of confidentiality. For the same reasons, this third party has a significant privacy interest in the nondisclosure of his or her name and other information that would lead to identification.

(51) The names and identifying information of these third parties could, in certain circumstances, add to the public's understanding of the activities and operations of the FBI or the government generally. The light that information would shed is marginal, however, given the information that already has been released in these documents. Even without learning an informant's specific identity, the public has learned from these documents the fact that an

(b)(7)(D)-1 Names and/or Identifying Information of Third Parties Who Provided Information Under an Implied Assurance of Confidentiality

(86) On pages Trentadue II-1, -3, -6 through -9, -11, -12, -15, -30 through -32, -34, -35, -38, -40, -42, -44 through -46, -49, -51, -52, -58, -59, -71 through -74, -82, -85, and -87, the names and identifying information of third parties who provided information under an implied assurance of confidentiality have been redacted and withheld from release. The notation "(b)(7)(D)-1" in the margins of these pages indicates where the names or other information that could reasonably lead to identification have been redacted. As stated in ¶¶ 42 and 68, above, Exemption (b)(7)(D)-1 has been asserted in conjunction with Exemptions (b)(6)-2 and (b)(7)(C)-2.

(87) Three third parties provided information to the FBI that concerns organizations and individuals known or suspected to be violent and possibly engaged in domestic terrorism. In particular, the information in question here was related and relevant to the FBI's investigation of the bombing of the Murrah Federal Building in Oklahoma City. One of the third parties acquired some of the information by interacting directly, undercover, with the above-described organizations and individuals. All three third parties provided information that they had acquired from confidential sources within these organizations to which they had expressly promised confidentiality. For these reasons, these third parties have provided information at the high risk of harassment, retaliation, reprisal, or other significant harm. Accordingly, it can reasonably be inferred that these third parties provided the information with an expectation of confidentiality. It can also be reasonably inferred from these circumstances that the confidential sources of these third parties also would expect confidentiality from the FBI.

release of a symbol number would reveal connections to dates, times, places, events, and names from which the source's identity could reasonably and ultimately be deduced. As stated in ¶ 88, above, other information that could reasonably lead to the identification of these two confidential sources has also been withheld.

(b)(7)(D)-3 Name and/or Identifying Information of a Third Party Who Provided Information Under an Express Assurance of Confidentiality

(91) On pages Trentadue II-75 through -77, the name and identifying information of a third party who provided information under an express assurance of confidentiality has been redacted and withheld from release. The notation "(b)(7)(D)-3" in the margins of these pages indicates where the name or other information that could reasonably lead to identification has been redacted. As stated in ¶¶ 52 and 76, above, Exemption (b)(7)(D)-3 has been invoked in conjunction with Exemptions (b)(6)-4 and (b)(7)(C)-4.

(92) The third party who provided information to the FBI, as documented on pages Trentadue II-75 through -77, received from the FBI an express assurance of confidentiality. As is apparent from the pages in question, the third party provided information concerning organizations and individuals known or suspected to be violent, which was acquired by interacting directly with those organizations and individuals. The third party faced a high risk of harassment, retaliation, or reprisal.

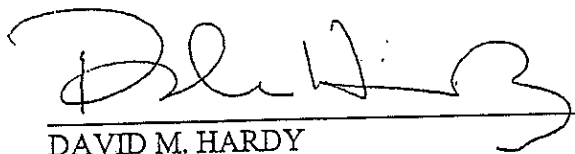
CONCLUSION

(93) The FBI closely examined the records resulting from its additional, extraordinary search, as described in ¶ 7, above. It released seventeen documents (87 pages) with carefully

tailored redactions pursuant to FOIA Exemptions 2, 6, 7(C), and 7(D). As explained above, the FBI only withheld administrative internal agency information; internal agency information that, if released, would circumvent or disrupt agency operations; information that would infringe upon the privacy of certain FBI personnel or third parties; and information that would reveal the identity of confidential sources. As stated in ¶ 15, above, the FBI has processed and released all segregable information from the documents provided to plaintiff on July 21. This information cannot be further segregated without revealing the privileged information itself.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that Exhibit A attached hereto is a true and correct copy.

Executed this 17th day of October, 2005.



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