

FINDINGS OF FACT

The Court, having considered the documents, photographs, videotape and other items received into evidence and further having heard and determined the credibility of the witnesses, hereby enters its Findings of Fact pursuant to Federal Rule of Civil Procedure 52. To the extent that any of these Findings may also be a Conclusion of Law, it is the Court's intent that they be so considered.

A. Jurisdiction and Venue:

1. This Court's jurisdiction is invoked under 5 U.S.C. §552(a)(4)(B); 5 U.S.C. §§ 701 *et seq.*; and 28 U.S.C. § 1331.

2. Venue lies within this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 125 and 1391(e).

B. Procedural History:

1. Plaintiff submitted a FOIA Request to the FBI dated October 12, 2008, seeking copies of (a) "all surveillance videos taken from the area surrounding the Alfred P. Murrah Building on April 19, 1995," the date of the Oklahoma City bombing; (b) "all videotapes collected by the FBI and/or others in Oklahoma from April 15, 1995 through April 19, 1995"; (c) "the videotape taken from Oklahoma Highway Patrol Officer Charlie Hanger's patrol car, which

recorded the arrest of Timothy McVeigh on April 19, 1995”; and (d) any reports describing or referencing the FBI taking possession of those videotapes.¹

2. In that request, the Plaintiff made clear that he also wanted the “[s]ecurity videotapes from the area [that] show the [Ryder] truck detonation 3 minutes and 6 seconds after the suspects exited the truck,’ which is referenced in the Secret Services’ Log of Agents’ Activities.” In that Request, the Plaintiff likewise made the FBI aware of the fact that these same videotapes and records had been the subject of any earlier FOIA request by David Hoffman.² Thereafter, Plaintiff even provided the FBI with a copy of those portions of the Secret Service Log or time-line referenced in his FOIA request.³

3. In January 2009, the FBI released a videotape to Plaintiff labeled “OHP Vehicle Search – McVeigh.”⁴ In that letter, the FBI specifically represented to Plaintiff that “The DVD is being furnished to you in its entirety.”⁵ But as would

¹ Trial Exhibit 200.

² *Id.*

³ Trial Exhibit 10, R.

⁴ Trial Exhibits 201.

⁵ *Id.*

subsequently be shown at trial, the FBI had no way of knowing whether or not Plaintiff had been given a complete and unedited copy of that videotape.

4. By letter dated March 24, 2009, the FBI notified Plaintiff that there were approximately 244 videos and 200 pages of material that appeared to be responsive to his request, and that the estimated search and duplication fees to produce that material were \$6835.⁶

5. By letter dated April 8, 2009, Plaintiff reduced the scope of his request for videotapes to “copies of all of those taken on April 19, 1995, by cameras at the following locations,” which consisted of the Murrah Federal Building, Journal Record Building, Regency Tower Apartment Building, U.S. Post Office, Water Resource Building, South West Bell Building, YMCA Building, US Federal Courthouse, Old US Federal Courthouse, Former Oklahoma City Main Library building, and Parking Lot at the northwest corner of 6th St. and Hudson, NW, along with any “security videotape” showing “the Ryder truck pulling up to the Federal Building and then pausing (7-10 seconds) before resuming into a slot

⁶ Trial Exhibit 202

in the front of the building” and “the truck detonation 3 minutes and 6 seconds after the suspects exited the truck.”⁷

6. Plaintiff, however, again made clear that regardless of the source, he wanted any “tapes showing McVeigh and another person . . . delivering the bomb to the Murrah Building on the morning of April 19, 1995, and the detonation of the bomb immediately outside of the daycare center,” and that he wanted “these videotapes even if they are not among those videotapes I have asked for in paragraphs 1 through 11 above.” Plaintiff also indicated that he wanted all 200 pages of the documents that the FBI had located.⁸

7. The FBI released the 200 pages to Plaintiff as follows: It released 164 pages of documents to Plaintiff in May 2009. Pursuant to a referral from the FBI, FEMA released 35 pages of documents to Plaintiff in August 2009. Following a referral to the General Services Administration, the FBI released an additional page to Plaintiff in April 2010.⁹

⁷ Trial Exhibit 203.

⁸ *Id.*

⁹ Trial Exhibits 205, 206, 207, 208 and 209; *Transcript*, pp. 30-31, 34-35 and 97.

8. The FBI released two DVDs from the Journal Record Building, one DVD from the Oklahoma City Public Library, two DVDs from the U.S. Post Office, and eighteen DVDs from Southwestern Bell to Plaintiff in June 2009.¹⁰ In July 2009, the FBI released to Plaintiff another six DVDs from the Regency Tower.¹¹

9. Plaintiff received no video tapes from the Murrah Building or the YMCA Building,¹² or documents concerning the existence of videotapes obtained from surveillance cameras mounted on those buildings.¹³ Plaintiff also received no videotape of the bomb's detonation.¹⁴

10. On May 5, 2011, the Court entered an *Order* requiring the FBI to conduct additional searches for the videotapes and related records.¹⁵ If the FBI did not conduct those searches, the Bureau was to explain to the Court why such searches would not be reasonably calculated to locate the videotapes and

¹⁰ Trial Exhibit 206.

¹¹ Trial Exhibit 207.

¹² See Trial Exhibits 206 and 207; *Transcript*, pp. 187-188.

¹³ See Trial Exhibit 34.

¹⁴ *Transcript*, p. 188.

¹⁵ Trial Exhibit 9.

documents requested by Plaintiff. The FBI did not conduct the additional searches.¹⁶ Neither, as discussed herein below, did the FBI submit a credible explanation to the Court for not having undertaken those Court-ordered searches.

11. In proceedings before this Court, the FBI moved for summary judgment, attaching descriptions of its records systems and the searches that it conducted, as explained by its declarant, David Hardy, the Section Chief of the FBI's Record/Information Dissemination Section, Records Management Division.¹⁷ Plaintiff subsequently filed a memorandum in opposition to the FBI's motion for summary judgment,¹⁸ a motion pursuant to *Federal Rule of Civil Procedure* 56(d),¹⁹ and a motion to strike portions of Mr. Hardy's declaration.²⁰

12. In its *Order* of September 9, 2013, this Court granted Plaintiff's motion to strike, denied the FBI's motion for summary judgment, and terminated plaintiff's 56(d) motion. In lieu of further summary judgment proceedings, the

¹⁶ *Transcript*, pp. 137, 144 and 154.

¹⁷ Doc. 60.

¹⁸ Doc. 63.

¹⁹ Doc. 88

²⁰ Doc. 109.

Court ordered that the issue of the adequacy of the FBI's search proceed to trial.²¹

13. The FBI has the burden of proof. It is also fitting that the burden of proof is borne by the FBI since in these proceedings Plaintiff has had no opportunity to conduct formal discovery to test the truthfulness of the Bureau's claims, and that, either as present or former employees, the crucial witnesses are not only aligned with the FBI but reside beyond the Court's subpoena power.

14. With respect to its burden of proof, the FBI has the burden to prove that it has not improperly withheld records responsive to Plaintiff's FOIA request.²² When, as in the instant case, the adequacy of the FBI's search is an issue, the Bureau must also prove that it conducted a search that was reasonably calculated to locate records responsive to Plaintiff's request.²³

15. The FBI must, in other words, prove that its search was "reasonably calculated to uncover all relevant documents."²⁴ In other words, the FBI must

²¹ Doc. 125.

²² 5 U.S.C. §552(a)(4)(B); *The Committee On Masonic Homes Of The R. W. Grand Lodge, F. & A.M. Of Pennsylvania v. N.L.R.B.*, 556 F.2d 214, 218 (3rd Cir. 1977).

²³ *Trentadue v. FBI*, 572 F.3d 794, 76-797 (10th Cir. 2009).

²⁴ *Weisberg v. United States, Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983); *The Nation Magazine*, 71 F.3d at 890.

prove that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested,” which means that the FBI cannot limit its search to only one record system if there are others that are likely to turn up the information requested.²⁵ se.

16. It is well established that FOIA is broadly conceived, and that its basic policy is in favor of disclosure.²⁶ Accordingly, FOIA requests are to be liberally construed.²⁷

17. Similarly, the FBI was required by law to release to Plaintiff all records that fell within the scope of his request. Furthermore, given the policy of disclosure embodied in FOIA, the FBI was required to liberally construe what materials fell within the scope of Plaintiff’s request so as to err on the side of inclusion and disclosure rather than exclusion and non-disclosure.²⁸

18. But no such liberal interpretation of Plaintiff’s FOIA request and the records deemed to be responsive to that request occurred in the instant case. In

²⁵ *Id.*

²⁶ *NLRB v. Robbins Tire & Rubber, Co.*, 437 U.S. 214 , 221(1978).

²⁷ *The Nation Magazine v. United States Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995); *Medoff v. United States Central Intelligence Agency*, 464 F. Supp. 158 (D. N.J. 1978).

²⁸ *See Dunaway v. Webster*, 519 F. Supp. 1059, 1083 (N. D. Cal. 1981).

the instant case, the FBI narrowly construed Plaintiff's request as only including videotapes that the FBI had actually logged or placed in to evidence, and to documents showing that the videotapes requested by Plaintiff had been logged or placed into evidence. In the instant case, the FBI construed responsive videotapes as those from third-party sources and not tapes involved in the federal government's surveillance activities.

19. The FBI did not meet its burden of proof. The FBI has withheld, and is continuing to withhold, at least one videotape and an unknown number of records that clearly fall within the scope of Plaintiff's FOIA request. The FBI is doing so without any assertion or claim of an exemption to the release of these materials under FOIA.

20. The FBI also failed to conduct a good faith search that was reasonably calculated to locate records responsive to Plaintiff's request. The FBI did not search databases and/or sources that were reasonably likely to contain responsive records. In fact, the FBI confined its search to unofficial sources and deliberately chose not to search its official records.

21. The FBI likewise knowingly assigned Linda Vernon, an untrained and unqualified person to conduct that search, and then provided her with no

guidance about how to interpret the scope of Plaintiff's request or whether materials located by her search fell within the scope of Plaintiff's FOIA request. Consequently, Ms. Vernon located at least one videotape and numerous documents that were clearly within in the scope of Plaintiff's FOIA request, but these were deliberately withheld because Ms. Vernon did not understand her duties under FOIA.

22. Neither did the FBI followup on obvious leads to other potential locations where responsive records could be found, and search those sources. The FBI also refused to conduct the searches of locations likely to contain records responsive to Plaintiff's FOIA request that the Court had ordered to be undertaken prior to trial and, at trial, the Bureau gave no credible explanation as to why those searches were not done or could not have been done.

23. In the instant case, the FBI's actions with respect to the processing of and responding to Plaintiff's FOIA request went far beyond the absence of good faith. The FBI not only acted in bad faith by designing and implementing a search that was not likely to find all of the videotapes and related records that Plaintiff had requested, but the FBI consistently acted with a conscious disregard of the duties and obligations imposed upon the Bureau by FOIA.

C. RIDS:

1. The FBI's Records Information Dissemination Section or "RIDS," is responsible for responding to FOIA requests received by the Bureau.²⁹ David M. Hardy is an attorney.³⁰

2. He is also the Chief of RIDS,³¹ which is part of the Bureau's Records Management Division.³² The position of Chief of RIDS is considered to be an "attorney supervisor" position within the Bureau that is not associated with the FBI's General Counsel's Office.³³

3. The RIDS staff undergoes extensive training with respect to processing FOIA requests. They are trained and personally supervised until they are certified as qualified to respond to FOIA request, which takes between three and a half to four years of training.³⁴

4. As part of the certification process, RIDS personnel must also take and

²⁹ *Transcript*, p. 11.

³⁰ *Id.* at p. 423.

³¹ *Id.* at p. 422.

³² *Id.*

³³ *Id.* at p. 428.

³⁴ *Id.* at pp. 534-535 and 550-551.

pass several examinations demonstrating their proficiency.³⁵ Mr. Hardy testified that such training is required to insure that the FBI fulfills its “FOIA obligations to citizens,” including Plaintiff.³⁶

5. But RIDS did not conduct the search for records responsive to Plaintiff’s FOIA request. The search was assigned to the FBI’s Oklahoma City Field Office.

6. Doris Reed works in the Oklahoma City Field Office. Her duties include responding to FOIA requests involving OKBOMB records.³⁷ Ms. Reed, however, played no role in responding to Plaintiff’s FOIA request.³⁸

7. Instead of assigning the responsibility for the record search and review to a trained and experienced person such as Ms. Reed, RIDS selected Linda Vernon to conduct the search for responsive videotapes and records.

8. Ms. Vernon was a “forensic accountant” in the Oklahoma City Field

³⁵ *Id.*

³⁶ *Id.* at pp. 549-550.

³⁷ *Id.* at p. 355.

³⁸ *Id.* at pp. 358-359.

Office.³⁹ She had no FOIA training. Neither was she FOIA certified.⁴⁰

9. Ms. Vernon testified that doing FOIA searches was not within her job category.⁴¹ She was specifically asked whether “searches of OKBOMB records for FOIA [were] a regular part of [her] job responsibilities?” To which Ms Vernon responded “No.”⁴²

10. As a forensic accountant, Ms. Vernon was clearly not qualified to conduct an unsupervised search for the videotapes and records requested by Plaintiff, but her experience as a forensic accountant is noteworthy for another reason. Ms. Vernon had been assigned to the “discovery team” involved in “OKBOMB.”

11. OKBOMB was the name the FBI gave to the Oklahoma City Bombing investigation, which also included the prosecutions of Timothy McVeigh and Terry Nichols. Ms. Vernon was the FBI’s “discovery coordinator” for those

³⁹ *Id.* at p.148.

⁴⁰ *Id.* at p. 550.

⁴¹ *Id.* at p. 167

⁴² *Id.* at p. 151.

prosecutions.⁴³

12. As such, her job responsibilities included assembling the prosecution’s “evidence” and providing it to defense counsel.⁴⁴ It was reasonable to expect, therefore, that in conducting a search for records responsive to Plaintiff’s FOIA request Ms. Vernon would confine her search to the material that had been provided to the McVeigh and Nichols defense counsel, and not look beyond that very narrow universe of FBI records, which is exactly how Ms. Vernon conducted her search.

13. RIDS’ selection of Ms. Vernon to conduct the FOIA search is significant because when RIDS receives a FOIA request it is triaged for sensitive cases or potentially problematic cases, cases that “have a high likelihood of going to litigation.”⁴⁵ These kinds of requests are “flag[ged],”⁴⁶ and brought to Mr. Hardy’s attention.⁴⁷

⁴³ *Id.* at pp. 149-150

⁴⁴ *Id.* at pp. 156-157.

⁴⁵ *Id.* at pp. 435-436.

⁴⁶ *Id.* at p. 437.

⁴⁷ *Id.* at p. 459.

14. As a result of this triage process, Plaintiff's FOIA request was one of those flagged as a potential problem and immediately brought to Mr. Hardy's attention.⁴⁸ Consequently, tasking Ms. Vernon with responding to Plaintiff's FOIA request, which had been immediately identified as a sensitive or potentially problematic request, appears to have been an attempt by the FBI to create a situation of "willful ignorance" with respect to the foreseeable results of Ms. Vernon's search for the videotapes and records that had been requested by Plaintiff.

15. The FBI had, in other words, created a situation of tactical ignorance whereby Ms. Vernon could reasonably be expected to fail in terms of locating and/or producing videotapes and documents responsive to Plaintiff's FOIA request. On the other hand, under this manufactured cloud of ignorance, the FBI could represent to the Court that a proper search had been conducted and that all responsive materials located as a result of that search had been produced.

16. Ms. Vernon did locate documents responsive to Plaintiff's FOIA request, and at least one videotape of the bomb being driven to the Murrah Building, which were withheld by her from the material that she forwarded to

⁴⁸ *Id.* at p. 459.

RIDS for its review and eventual production to Plaintiff. Whereas, the FBI repeatedly represented to the Court that all responsive videotapes and documents had been produced to Plaintiff, that was not true.

17. Similarly, the FBI represented to the Court that it had conducted a search of all locations or sources of records likely to contain the videotapes and documents requested by Plaintiff, which was not true. Ms. Vernon had essentially confined her search to her “personal database” of the materials that had been given to defense counsel during the OKBOMB prosecutions, and conducted no search of official FBI record databases likely to contain responsive materials.

D. RIDS’ One Limited Search:

1. The FBI’s Central Records System or “CRS” contains the universe of records that the Bureau has acquired over the course of its day-to-day law enforcement responsibilities.⁴⁹ It is the FBI’s “primary records” system.⁵⁰

2. The FBI’s Automated Case Support system or “ACS” contains various tools for doing electronic searches for records contained in the Central

⁴⁹ *Id.* at p. 13.

⁵⁰ *Id.* at p. 13.

Record System.⁵¹ It is specifically designed and maintained to identify and locate FBI records.⁵² The ACS consists of three components: the Investigative Case Management system, the Electronic Case File, and the Universal Index.⁵³

3. The Investigative Case Management system or “ICM” is used to open and close cases.⁵⁴ It is a case management tool for the agents and personnel working on an investigation.⁵⁵ It also contains information on the items logged in as evidence.⁵⁶

4. The Electronic Case File or “ECF” contains uploaded versions of the documents contained in the Central Record System.⁵⁷ The ECF contains all FBI generated documents except for “restricted documents” which, for various and

⁵¹ *Id.* at pp. 13-14.

⁵² *Id.* at pp. 434-435.

⁵³ *Id.* at p. 14.

⁵⁴ *Id.* at p. 58.

⁵⁵ *Id.* at p. 58.

⁵⁶ *See* Trial Exhibit 248.

⁵⁷ *Transcript*, pp. 59-61.

unknown reasons, are not uploaded into the ECF.⁵⁸

5. The ECF is not limited or otherwise confined to one case, such as OKBOMB, it contains all of the FBI's non-restricted investigative records.⁵⁹ With respect to the documents or records that have been uploaded into that database, the ECF is a text searchable database.⁶⁰ With respect to restricted documents or records not uploaded into the ECF database, these are apparently identified on an index and are located and retrieved by a manual search of that index.⁶¹

6. Mr. Hardy, in an apparent attempt to justify RIDS' failure to locate and produce videotapes and other records in response to Plaintiff's FOIA request, stated under oath that:

While it is always a possibility that responsive documents might have been misfiled and thus could be located somewhere 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 any such documents (if they exist) because they would not

⁵⁸ *Id.* at pp. 59-60.

⁵⁹ *Id.* at pp. 59-60,62-63, 92-94 and 138-139.

⁶⁰ *Id.*

⁶¹ *Id.* at pp. 60-61.

be in **a location likely to contain** responsive documents.⁶²

But that is obviously not true. Because the FBI documents and records contained in ECF are text searchable, it is even possible to search for and locate misplaced or misfiled records.⁶³

7. RIDS did no text-based search of the ECF database for documents responsive to Plaintiff's FOIA request.⁶⁴ As noted, documents not uploaded into the ECF can be retrieved by a manual search of the ECF indices.⁶⁵ But RIDS did no manual search of the ECF indices for records responsive to Plaintiff's FOIA request.⁶⁶

8. The FBI states that RIDS did no search of the ECF database because the Oklahoma City Bombing occurred in April of 1995; whereas the ACS system did not come on-line until October of 1995. Hence, all investigative records

⁶² *Id.* at p. 479.

⁶³ *Id.* at pp. 62-63, 92-94 and 138-139.

⁶⁴ *Id.* at pp. 62-63.

⁶⁵ *Id.* at pp. 59-60.

⁶⁶ *See id.* at pp. 62-63.

related to the OKBOMB investigation would not have been uploaded into the ECF system.⁶⁷

9. Stated otherwise, RIDS did no search of the ECF database for records responsive to Plaintiff's FOIA request because it is possible that such a search would find nothing. The Court finds the Bureau's explanation not credible.

10. It is not credible because Ms. Monica Mitchell, who was Ms. Vernon's contact person within RIDS, testified that FBI records after 1978 are now in the ACS.⁶⁸ It is likewise not credible because from the records that the FBI produced in this case it is clear that the OKBOMB investigation was not opened and closed in April of 1995.

11. That investigation extended over many years during which time frame countless investigative documents were obtained or prepared. Given that the FBI likewise claims the investigative record in the OKBOMB case fills an entire warehouse, and thus is too vast to conduct any manual search for the records requested by Plaintiff, it is simply nonsensical to think that these documents would

⁶⁷ *Id.* at pp. 127-128.

⁶⁸ *Id.* at p. 61.

not have been uploaded into the ECF system so as to be easily found and retrieved by electronic text-based searches.

12. The suggestion that no search was done of the ECF database because it was not created until approximately 6 months after the bombing and, therefore, might not contain records responsive to Plaintiff's FOIA request is also not credible because Mr. Hardy testified that all of the OKBOMB records have been "uploaded into ACS";⁶⁹ because the one search actually conducted by RIDS involved use of the Universal Index or "UNI"⁷⁰ which, like the ECF database, was part of the same ACS search system that came on-line in October of 1995; and because one of the records found by Ms. Vernon, but not turned over to Plaintiff, involved the FBI having taken possession of a videotape from a surveillance camera at the Regency Tower Apartments on October 26, 1995,⁷¹ which would have been after the ECF came on-line.

⁶⁹ *Id.* at p.531.

⁷⁰ *Id.* at p. 14.

⁷¹ *Id.* at pp. 200-201; and 681-683. The FBI having taken possession of the videotape in October was confirmed by Ms. Coverdale, a resident of the Regency Tower Apartments. *See id.* pp. 491-492.

13. Moreover, it is noteworthy that it is RIDS' policy to use the Universal Index or UNI for all of its FOIA searches rather than the ECF.⁷² The UNI, however, is obviously a less accurate search tool than the ECF for locating and retrieving records because unlike the ECF database, records or documents are not up loaded into the UNI so that text-based searches can be conducted.

14. Instead, the UNI is searched by entering the key terms such as a subject's name, event or organization, etc.⁷³ However, the FBI agent who prepares a report or investigative document is the one who enters the information into the ECF database, and he or she has the discretionary authority as to how that document is described in the UNI for future search and retrieval.⁷⁴

15. That is, the agent selects the terms used to describe the document and its contents for purposes of retrieving the information by way of a subsequent electronic search of the UNI.⁷⁵ Thus, if the appropriate terms are not entered by

⁷² *Id.* at p. 15.

⁷³ *Id.*

⁷⁴ *Id.* at p. 82.

⁷⁵ *Id.* at p. 82.

the agent such as “Murrah Federal Building,” “Regency Tower Apartment Building,” “Southwest Bell Building,” “YMCA Building,” “Ryder Truck,” “Hanger,” “surveillance” “video,” “tape,” “videotape” or “camera” then the document or record cannot be retrieved by use of the UNI.

16. In the instant case, no one knows how effective a search of the UNI would have been using the aforementioned terms because the one search conducted by RIDS personnel of the UNI was done using the generic term “OKBOMB.”⁷⁶ It is not surprising, therefore, that this one search of the UNI database identified Oklahoma City as the location of records.

17. What is surprising, however, is that Ms. Vernon was assigned to conduct the search for records responsive to Plaintiff’s FOIA request. It is also surprising that the search for records responsive to Plaintiff’s FOIA request was going to be confined to the OKBOMB records maintained in Oklahoma City even though the FBI admitted that it had no way of knowing whether all of the OKBOMB records were maintained at that location.⁷⁷

⁷⁶ *Id.* at pp. 19, 83 and 442.

⁷⁷ *Id.* at pp. 72-74.

E. Ms. Vernon's Crucial Role:

1. According to Mr. Hardy, Ms. Vernon was assigned to do the search on Plaintiff's FOIA request because of the institutional knowledge she had acquired from her involvement with discovery in the OKBOMB case, because she was highly skilled and because of the work she had done on other FOIA requests.⁷⁸ There is, however, no evidence that Ms. Vernon had been involved in other FOIA searches.

2. Nor would one expect her to have been assigned to conduct the search on this request, which had already been identified by the experts within the FBI as problematic, since she had no FOIA training, FOIA certification and even testified that conducting FOIA searches was not within her job category.⁷⁹ Besides, Ms. Reed and not Ms. Vernon was the FOIA person assigned to the Oklahoma City Field Office.

3. Mr. Hardy testified that if Ms. Vernon had not been involved in conducting this search, he would have "rethought" relying upon the Oklahoma

⁷⁸ *Id.* at p. 443.

⁷⁹ *Id.* at p. 167

City Field Office to do the search,⁸⁰ and that Ms. Vernon was a “primary factor” in having the search delegated to the Oklahoma City Field Office.⁸¹ However, Mr. Hardy had never even spoken with Ms. Vernon.⁸² Ms. Vernon’s contact with RIDS was Monica Mitchell, not Mr. Hardy,⁸³ and Ms. Mitchell is assigned to the litigation support unit,⁸⁴ not the FOIA processing unit with RIDS.

4. Nevertheless, without any apparent basis for doing so Mr. Hardy characterized Ms. Vernon as a “very effective searcher.”⁸⁵ He also testified that the search that was done by Ms. Vernon with respect to Plaintiff’s FOIA request was “highly reliable.”⁸⁶

5. Mr. Hardy said that in terms of the search done by Ms. Vernon, if he

⁸⁰ *Id.* at p. 444.

⁸¹ *Id.* at p. 461.

⁸² *Id.* at p. 461.

⁸³ *Id.* at p. 461.

⁸⁴ *Id.* at p. 11.

⁸⁵ *Id.* at p. 451.

⁸⁶ *Id.* at pp. 452-453.

had it to do over again nothing would have been done differently;⁸⁷ and that Ms. Vernon “did a whiz-bang job.”⁸⁸ But the record does not support Mr. Hardy’s claims. The record in this case shows that the search actually conducted by Ms. Vernon was not reasonably calculated to find the materials requested by Plaintiff, and that responsive documents as well as one videotape were located but deliberately and intentionally withheld from the Plaintiff.

6. Ms. Vernon, for example, repeatedly testified that RIDS had made the final call as to what documents and/or tapes were responsive to Plaintiff’s FOIA request because she was not qualified to make a determination as to whether the records and videotapes that she located during her search should be produced.⁸⁹ Ms. Vernon testified that any videotapes or documents located as a result of her search were sent to RIDS to make the decision as to what should or should not be produced to Plaintiff.⁹⁰ But that was not so.

7. Ms. Vernon acted as a gatekeeper. Ms. Vernon intentionally withheld

⁸⁷ *Id.* at p. 456.

⁸⁸ *Id.* at p. 457.

⁸⁹ *Id.* at pp 167-168.

⁹⁰ *Id.* at pp. 192.

from RIDS and, therefore from Plaintiff, Exhibit 35. Exhibit 35 is an FD 302 reporting that the FBI took possession of a videotape from one of the Regency Tower Apartment Building’s surveillance cameras that had been “blown off the wall” by the explosion and that this tape might contain a “photograph of the persons responsible for the bombing of the Alfred P. Murrah Building.”⁹¹

8. Exhibit 35 fell squarely within the scope of Plaintiff’s request, which asked for “all reports, including 302's that describe and/or reference the FBI taking possession of these videotapes.”⁹² Ms. Vernon found this document, but did not provide it to RIDS for production to Plaintiff,⁹³ which she freely admitted to the Court:

THE COURT: Let me make sure I’m clear on this. Is this a document that you found during your search or not? That is Exhibit, Plaintiff’s Exhibit 35?

THE WITNESS: One second, your Honor. When I did my searches, *yes, I found it. I did not include it.*

THE COURT: Did you – and you didn’t send it to the– Ms. Mitchell?

⁹¹ Trial Exhibit 35.

⁹² Trial Exhibits 200 and 203; Joint Pre-Trial Order, Doc. 137. p. 6, ¶ 1.

⁹³ *Transcript* at pp. 197-199.

THE WITNESS: *No, sir, I did not.*

THE COURT: You made a decision yourself not to forward this document?

THE WITNESS: Because I read his description and he asked for when it was provided to evidence.

THE COURT: A little while ago, you testified that you always erred in the side of including documents if there was any doubt. What was it that led you to believe that this document should not be sent and let someone who understood the Freedom of Information Act make the decision?

THE WITNESS: Just the way it was worded, sir. It showed that it was just mainly Mr. Payne gave it [the videotape] to Mr. Hippard. It doesn't really say that it— I mean in Mr. Legleiter's 302, I'm assuming it had more information that is why I picked it at that point.

THE COURT: But this document seems very much on point as to the request that was made, does it not?

THE WITNESS: And he got the videos for this document, yes, sir.

THE COURT: But you made the decision, on your own, without consulting with anyone else, to exclude this document, is that correct?

THE WITNESS: *Yes, sir, the way I read it in 2008.*⁹⁴

9. If the evidence in this case was limited to just the foregoing testimony

⁹⁴ *Id.* at pp. 198-200(emphasis added).

by Ms. Vernon in response to Exhibit 35, Plaintiff prevails because the FBI did not do a search reasonably calculated to locate all responsive records; because a responsive record was found but deliberately withheld from Plaintiff; and because through a lack of training Ms. Vernon had unlawfully construed the scope of Plaintiff's FOIA request to narrowly cover only those records showing videotapes being logged into evidence. But the evidence of the FBI's failure to fulfill its FOIA obligations to Plaintiff is far greater; it is overwhelming.

10. Ms. Vernon also found during her search Exhibit 37, which was an October 26, 1995 FD 302 reporting that a surveillance tape had been recovered from a security camera on the Regency Tower Apartment Building.⁹⁵ This document fell within the scope of Plaintiff's FOIA request but it, too, was not forwarded by Ms. Vernon to RIDS for production to Plaintiff.⁹⁶

11. Exhibit 62 is a partial list of the results of the FBI's survey of buildings in the vicinity of the Murrah Building that had exterior surveillance cameras. This survey was done very late in the afternoon of April 19, 1995.⁹⁷

⁹⁵ *Id.* at pp.200-01.

⁹⁶ *Id.* at p.201

⁹⁷ *Id.* at p. 204.

This document fell within the scope of Plaintiff's FOIA request but was not forwarded by Ms. Vernon to RIDS for production to Plaintiff.⁹⁸ This exhibit also merits further discussion because of when it was prepared, its significance in terms of Plaintiff's FOIA request, and that it is incomplete.

12. On the morning of April 19, 1995, during the midst of rescue operations, men wearing FBI jackets removed the surveillance cameras from the Murrah Building along with the mounting brackets for those cameras and the exposed wiring.⁹⁹ A witness said that it appeared that these men were removing all evidence that surveillance cameras had ever been on the Murrah Building.¹⁰⁰ The removal of those surveillance cameras, mounting brackets and wiring is even documented and confirmed by before-and-after photographs taken of the Murrah Building that morning.¹⁰¹

13. Thereafter, on the afternoon of April 19, 1995, at about 4:30 PM, two FBI agents began to search for surveillance cameras and recording equipment in

⁹⁸ *Id.* at p. 204.

⁹⁹ *Id.* at p. 507.

¹⁰⁰ *Id.* at p. 507.

¹⁰¹ *Id.* at pp. 506-508; Trial Exhibit 20.

the area of the Murrah Building. Starting at the Murrah Building, they walked around each building looking for “*visible surveillance cameras*,”¹⁰² which means they would have seen no surveillance cameras on the Murrah Building because those cameras had already been removed.

14. Exhibit 62 documents the result of that search for *visible* surveillance cameras,¹⁰³ including identifying not only those buildings on which the agents had seen surveillance cameras, but it also reporting whether the agents took custody or possession of videotapes from any of those cameras. It is an inventory of locations where surveillance cameras were observed and some, but not all, surveillance tapes were obtained.

15. In his FOIA request, Plaintiff asked for any surveillance camera videotape taken on the morning of April 19, 1995 by cameras mounted on the Public Library, as well as documents showing the FBI had possession of these videotapes.¹⁰⁴ Exhibit 62 reports that on the afternoon of April 19, 1995, an FBI agent acquired a surveillance tape from the “Security Officer of the Oklahoma

¹⁰² *Transcript*, pp. 666-668(emphasis added).

¹⁰³ *Id.* at pp. 679-680.

¹⁰⁴ Trial Exhibit 203.

City Public Library.”

16. Plaintiff should have been given this document, but Ms. Vernon “culled” it from those documents that she forwarded to RIDS. Exhibit 62 is also not complete.

17. As part of this same inventory, there were records prepared for other buildings, most notably the Murrah Building and the YMCA Building.¹⁰⁵ Plaintiff asked for, but did not receive, tapes from either of these buildings or any documents referencing videotapes from these two locations, however.

18. Missing from Exhibit 62 are the pages from this inventory that pertain to the Murrah Building, YMCA Building, and other buildings in the vicinity of the Murrah Building. But the FBI obviously has them.

19. More importantly, the FBI presented no evidence that these missing pages from that inventory no longer exist, or that they were not found by Ms. Vernon. Thus, these facts would certainly support the inference that these records were not produced to Plaintiff in order to conceal the fact that the FBI had one or more videotapes that actually show the bomb being driven to the Murrah Building on the morning of April 19, 1995, and/or those who carried out that attack.

¹⁰⁵ *Transcript*, p. 680.

20. Ms. Vernon also found but kept from RIDS Exhibit 69, which reports that the FBI had examined video footage from an ATM machine at the Regency Apartments in which the Ryder Truck driven by Timothy McVeigh could be seen.¹⁰⁶ In addition to videotapes taken from surveillance cameras on specific buildings, Plaintiff's FOIA request asked for "tapes showing McVeigh and another person, delivering the bomb to the Murrah Building on April 19, 1995."¹⁰⁷

21. This ATM tape clearly came within the scope of Plaintiff's FOIA request since it captured the bomb being transported to the Murrah Building. Just as clearly, the FBI is in possession of this videotape, but it was not among those tapes given to Plaintiff.¹⁰⁸

22. Ms. Vernon likewise found during her search Trial Exhibits 36 and 60 that describe tapes from the Journal Record Building and Southwest Bell Building "testing positive" for images or sounds of the explosion or "main subjects" in the bombing investigation;¹⁰⁹ as well as Exhibits 55, 56, 57, 58, 65

¹⁰⁶ *Transcript*, pp. 211-12.

¹⁰⁷ Trial Exhibit 203.

¹⁰⁸ *Transcript*, p. 568.

¹⁰⁹ *Id.* at pp. 204-06.

and 66 that were FBI records reporting upon an alleged attempt by an FBI agent to sell a videotape depicting the delivery of the bomb to the Murrah Building on the morning of April 19, 1995. Ms. Vernon, however, “*culled*” these documents from those sent to RIDS for production to Plaintiff.¹¹⁰

23. Ms. Vernon said that it was her decision not to transmit these records to RIDS so that they could be provided to Plaintiff. Ms. Vernon did not provide these documents to RIDS because she had narrowly interpreted Plaintiff’s FOIA request as only asking for documents related to the subject videotapes being lodged into evidence or placed into evidence,¹¹¹ which is not what the request said.

24. In fact, under cross examination, Ms. Vernon admitted that Plaintiff’s FOIA request had asked for all documents or reports that referenced or described the FBI having taken possession of videotapes.¹¹² More importantly, Ms. Vernon testified that if a document showed that the FBI had one of the subject videotapes but that document did not involve placing or logging that tape into evidence, then it was deliberately withheld from those records that she sent to RIDS so as not to

¹¹⁰ *Id.* at pp. 206-207 and 225.(emphasis added).

¹¹¹ *Id.* at pp. 199 and 214.

¹¹² *Id.* at pp. 202-03, and 225.

be produced to Plaintiff.¹¹³

25. The FBI has asserted no claim of exemption for withholding these records from Plaintiff. Rather, the FBI contends that some of these withheld documents were not responsive to Plaintiff's FOIA request since they do not reference the Bureau taking possession of the videotapes. But that is not how Plaintiff's a FOIA request should have been interpreted.

26. FOIA requests are to be broadly construed by the responding agency in favor of disclosure, which means that Plaintiff's request must be construed as asking for all documents showing that the FBI had possession of the subject videotapes. But rather than giving the request a liberal interpretation, Ms. Vernon construed Plaintiff's FOIA request as only asking for records showing that the subject videotapes had been placed or logged into evidence by the FBI.

27. Without the aid of any formal discovery in this case, Plaintiff was able to locate Exhibits 35, 36, 37, 55, 56, 57, 58, 60, 65, 66, and 69 from sources other than the FBI. But the fact that he does have copies of these documents does not make the FBI's failure to produce them irrelevant.

28. The fact that the FBI located but failed to produce these responsive

¹¹³ *Id.* at p. 225.

documents is evidence that the Bureau's search was not reasonably calculated to locate the videotapes and records at issue.¹¹⁴ Neither can it be said that these were all of the responsive documents that Ms. Vernon culled from those she sent to RIDS.

29. Furthermore, Exhibits 62 and 69 are clearly relevant because they are crucial records showing the locations from which the FBI obtained surveillance camera footage of the bombing of the Murrah Building, and that at least one videotape actually in the possession of the FBI was not produced to Plaintiff.

30. Admittedly, Ms. Vernon received no supervision or direction from RIDS with respect to interpreting the scope of Plaintiff's FOIA request. She had received no training on the requirements of FOIA and most certainly did not have the requisite certification to perform this search. But those matters aside, it was still the FBI's responsibility to see that all searches, including the one done by Ms. Vernon, met the standards of FOIA,¹¹⁵ and the FBI failed to do this with respect to the search for videotapes and records responsive to Plaintiff's FOIA request.

¹¹⁴ See *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999).

¹¹⁵ *Transcript*, p. 448.

31. The foregoing problems, however, were not the only deficiencies in Ms. Vernon's search. An even bigger problem perhaps concerns where and what she searched for videotapes and responsive records.

32. Ms. Vernon conducted her search using the following terms: "Murrah Federal Building," "Regency Tower Apartment Building," "Southwest Bell Building," "YMCA Building," "Ryder Truck," "Hanger," "surveillance" "video," "tape," "videotape" or "camera."¹¹⁶ She could have done a search of the ECF using these terms, but did not. Ms. Vernon also could have searched the UNI using these same terms, but she did not.

33. Instead, Ms. Vernon primarily searched her personal data base that had been compiled to deal with discovery in the OKBOMB case, and it was not an official FBI database for Bureau records.¹¹⁷ This database was only on her computer.¹¹⁸ It was her "tool" having been removed from all other computers in the Oklahoma City Field Office.¹¹⁹

¹¹⁶ *Id.* at pp. 158-159 and 191.

¹¹⁷ *Id.* at pp.158-59 and 191.

¹¹⁸ *Id.* at p. 158.

¹¹⁹ *Id.* at p. `59.

34. Ms. Vernon said that she used her personal database because: “*I’m lazy and it was the easier one for me to use.*”¹²⁰ She said, too, that this database was not part of the official FBI record system.¹²¹

35. Ms. Vernon tried to confirm the results of the search of her personal database with another search of the ZyIndex, which was a system set up specifically for the OKBOMB investigation.¹²² The ZyIndex contains a very limited universe of documents, however. It has FBI teletypes, EC’s, 302s, inserts and lab reports produced during the OKBOMB investigation.¹²³ The ZyIndex is also not an official FBI record system.¹²⁴

36. Admittedly, Ms. Vernon searched the Investigative Case Management system or ICM, which is an official source of FBI records. But, she only did this search to confirm that no additional videotapes had been logged in as evidence in the OKBOMB prosecutions.¹²⁵ Other than this one limited search of the ICM,

¹²⁰ *Id.* at p. 158.(emphasis added).

¹²¹ *Id.* at p. 161.

¹²² *Id.* at p. 171.

¹²³ *Id.* at p. 172.

¹²⁴ *Id.* at p. 161.

¹²⁵ *Id.* at p.

Ms. Vernon did not search a single official source of FBI records.

37. The Court is mindful, too, that as the discovery coordinator for the OKBOMB prosecutions, Ms. Vernon would have been well versed in what evidence had been turned over to the defense teams and what evidence was not turned over to the defense. It is not surprising, therefore, that the videotapes and documents produced to Plaintiff were in the already produced to defense counsel category, while those not produced to Plaintiff appear to have been among those not given to the defense in the OKBOMB prosecutions, such as Exhibits 68 and 69.¹²⁶

F. Court-Ordered Searches That Were Not Done:

1. At one time, the OKBOMB file was a “restricted file.”¹²⁷ “Restricted” means that someone within the Bureau’s chain of command would have to review a report or other investigative documents before it could be placed into the official case file.¹²⁸

2. Once a document is approved, it is uploaded in to the official case file

¹²⁶ *Id.* at pp. 566-569.

¹²⁷ Trial Exhibit 44; *Transcript* pp. 373-375.

¹²⁸ Trial Exhibit 44; *Transcript*, p.375.

where it would be turned over to defense counsel in a criminal case, and subject to production in response to a FOIA request.¹²⁹ Conversely, if a document is not approved for uploading into the official file, then it will not be produced in response to a FOIA request.¹³⁰

3. While a document is under review for uploading into the official case file, it remains in the I-Drive, and during the OKBOMB investigation, there was an I-Drive in the Oklahoma City FBI Field Office.¹³¹ That I-Drive, which has since been replaced, was a “shared drive,” meaning that a supervisor could access and review an agent’s work, including making changes or modifications to a document before it was uploaded into the official file.¹³² Documents not approved for uploading into the official case file remained in the I-Drive.¹³³

4. The Oklahoma City Field Office’s I-Drive was replaced by the S-

¹²⁹ *Transcript.* p. 376.

¹³⁰ *Id.* at p. 376.

¹³¹ *Id.* at pp. 378, and 403-404.

¹³² *Id.* at pp. 414-415.

¹³³ *Id.* at .p. 378-379.

Drive,¹³⁴ which is currently in use at that location.¹³⁵ The S-Drive serves the same purpose as the I-Drive,¹³⁶ and functions exactly like the I-Drive.¹³⁷ More importantly, as part of the replacement process, documents not placed into the official case file and remaining on the I-Drive in the Oklahoma City Field Office were moved to the S-Drive.¹³⁸

5. The FBI was ordered by the Court to conduct a search of both the I-Drive and S-Drive located in its Oklahoma City Field Office. If no such search was done, then the FBI was to explain to the Court why such a search would not be reasonably calculated to locate the requested videotapes and other materials.¹³⁹

6. The FBI conducted no search of the I-Drive or S-Drive in the Oklahoma City Field Office for documents or records responsive to Plaintiff's request.¹⁴⁰ In an attempt to explain why no such search was conducted, Mr. Hardy

¹³⁴ *Id.* at .p. 404.

¹³⁵ *Id.* at p. 407.

¹³⁶ *Id.* at pp. 380 and 404.

¹³⁷ *Id.* at p. 416.

¹³⁸ *Id.* at p. 405.

¹³⁹ Trial Exhibit 9, ¶ 2.

¹⁴⁰ *Transcript*, p. 530.

said that RIDS had never done an I-Drive search.¹⁴¹

7. Mr. Hardy also stated that to conduct such searches would be so burdensome that he could not even provide the Court with a “*reasonable estimate of the time necessary*” to do such a search.¹⁴² Both statements, however, were not true.

8. In order to respond to other FOIA requests, RIDS had searched both the I-Drive and S-Drive in the FBI’s Oklahoma City Field Office for responsive records,¹⁴³ which shows that such searches can be done and have been done. Furthermore, under cross examination, Mr. Hardy admitted that in another FOIA matter he had signed a sworn declaration stating that “[A] search of the I and S Drives at the Oklahoma City Field Office” had produced no responsive records.¹⁴⁴

9. Mr. Hardy also stated under oath that a search of the S-Drive at the Oklahoma City Field Office would be “fruitless” because the S-Drive did not exist at the time of the OKBOMB investigation. The Court also finds that statement to

¹⁴¹ *Id.* at pp. 478-479.

¹⁴² *Id.* at pp. 529-530.(emphasis added).

¹⁴³ *Id.* at pp. 412-414.

¹⁴⁴ *Id.* at pp. 523-524.(emphasis added).

be incorrect. It is undisputed that when the I-Drive system at the Oklahoma City Field Office was replaced by the S-Drive system, all documents or records remaining on the I-Drive were moved to the S-Drive.¹⁴⁵

10. The Court further finds that the FBI has offered no credible evidence as to why it did not search, and has not searched, the I-Drive and S-Drive at the Oklahoma City Field Office for records requested by Plaintiff; that the I-Drive and S-Drive should be searched as a location that was reasonably likely to contain records related to the subject tapes; and that by not having searched the I-Drive or S-Drive the FBI did not undertake a good faith search for the records requested by Plaintiff.

11. The FBI was ordered to advise the Court whether the Evidence Control Center of “ECC” at the Oklahoma City Field Office had been manually searched for responsive records. If no manual search had been done, then the FBI was to explain to the Court why there was no reasonable likelihood that any materials requested by Plaintiff would be found by such a search.¹⁴⁶

12. The FBI conducted no search of the ECC at the Oklahoma City Field

¹⁴⁵ *Id.* at p. 405.

¹⁴⁶ Trial Exhibit 9, ¶ 3.

Office.¹⁴⁷ No search was conducted of that ECC even though FBI records reflect that on October 15, 1997 some evidence related to the OKBOMB case was removed from the “valuable evidence vault” in the ECC and copied;¹⁴⁸ and that in the days immediately following the bombing, the videotapes from “surveillance cameras” were being “turned over to the custody of the ECC.”¹⁴⁹

13. The FBI produced “evidence technician” Diane Lang to explain to the Court why a very simple and easily done search of the Field Office’s ECC had not been done. Ms Lang testified that OKBOMB evidence has never been housed in the ECC,¹⁵⁰ which the FBI’s own records show is not true.¹⁵¹

14. Ms. Lang testified that there are annual inventories done of the evidence contained in the ECC;¹⁵² that she had reviewed those inventories;¹⁵³ and

¹⁴⁷ *Transcript*, p. 475.

¹⁴⁸ Trial Exhibit 41.

¹⁴⁹ Trial Exhibit 34, pp. 40, 45, 54, and 64.

¹⁵⁰ *Transcript*, p. 292.

¹⁵¹ Trial Exhibit 34, pp. 40, 45, 54, and 64.

¹⁵² *Transcript*, pp. 299-300.

¹⁵³ *Id.* at p. 303.

that no videotapes were on those inventory lists.¹⁵⁴ Those annual inventories of the contents of the Oklahoma City Field Office's ECC would be the best evidence of whether any of the videotapes that Plaintiff is seeking have ever been in, or are in the ECC, but the FBI did not produce those inventories at trial.

15. The Court does not find credible Ms. Lang's testimony that OKBOMB evidence has never been housed in the Field Office's ECC. To the contrary, the Court finds that during the weeks following the bombing, surveillance tapes that the FBI obtained as potential evidence were being stored in that ECC.

16. The Court also finds that the FBI could have produced, and should have produced, the annual inventories done of the contents of the ECC as proof of there being no need to search the ECC. The FBI controlled this evidence, which was not available to Plaintiff. Under these circumstances, the FBI's failure to produce these inventories gives rise to an inference that had these records been produced they would have very likely shown that the videotapes sought had at one time been in the ECC or perhaps are there even now.

17. The Court finds, too, that the FBI has offered no credible evidence as

¹⁵⁴ *Id.* at p. 303.

to why it did not search, and has not searched, the ECC for the videotapes requested by Plaintiff or for evidence as to the existence and/or location of those videotapes; that the ECC should have been searched as a location that was reasonably likely to contain either the videotapes or records related to those tapes; and that by not having searched the ECC, the FBI did not undertake a good faith search for the records requested by Plaintiff.

18. Prior to trial, the Court also ordered the FBI to either manually search the OKBOMB physical files in Oklahoma City for the requested videos and other materials that were collected during the first 14 days following the bombing on April 19, 1995, or provide evidence as to why such a search would be too burdensome to undertake.¹⁵⁵ The FBI did not conduct that search.¹⁵⁶ Mr. Hardy testified that such a manual search was not done because it would be “*extremely time-consuming*”¹⁵⁷ but, as the evidence shows, that is not so.

19. Ms. Reed is the person in the FBI’s Oklahoma City Field Office who handles FOIA requests involving OKBOMB materials. It is her job to “pull the

¹⁵⁵ Trial Exhibit 9, ¶ 4.

¹⁵⁶ *Transcript*, pp. 81 and 530-531.

¹⁵⁷ *Id.* at p. 476.(emphasis added).

documents.”¹⁵⁸ But, as previously noted, she played no role in the FBI responding to Plaintiff’s FOIA request.¹⁵⁹

20. Ms. Reed testified that the warehouse in Oklahoma City, where all of the OKBOMB material is supposedly located, has the physical evidence stored on one side of the warehouse and the paper record on the other side.¹⁶⁰ She also said that the material is organized.¹⁶¹

21. Ms. Reed described the FBI record keeping or cataloging system by reference to a specific 302.¹⁶² This document reported that the FBI took possession of a surveillance tape from a 7-11 Store at 2912 NW 122nd Street, Oklahoma City, Oklahoma that apparently showed a bombing suspect get out of a brown pickup truck and enter the store on April 19, 1995.¹⁶³

22. According to Ms. Reed, the May 3, 1995 date on this document is the date that it was transcribed, which was when it was typed and placed into the

¹⁵⁸ *Id.* at p. 355.

¹⁵⁹ *Id.* at pp. 358-359.

¹⁶⁰ *Id.* at p. 366.

¹⁶¹ *Id.* at pp. 366-367.

¹⁶² Trial Exhibit 34, p. 38.

¹⁶³ *Id.*

official OKBOMB file.¹⁶⁴ The April 29, 1995, date on the document is the date that the FBI agent obtained the information and submitted the tape into evidence. On the bottom of the document, is written the OKBOMB case number “174A-OC-56120” then “Sub-D” and the number “1474.”

23. The Sub-D would indicate that this 302 was placed in Sub-file D of the OKBOMB case file, and the number 1474 was the serial number given the document.¹⁶⁵ Documents in are kept in serial number order, which means that the next document entered in that Sub-file would be serial number 1475.

24. The date of this 302 was May 3, 1995, which was 2-weeks plus one day post-bombing. More importantly, at that time there were only 1474 or less documents in Sub-file D for the FBI to review for the existence of videotapes or records responsive to Plaintiff’s FOIA request.

25. A Sub-file is also dedicated to a specific or discrete subject in an FBI investigation.¹⁶⁶ Exhibit 211 is a list of the videotapes and records that Ms. Vernon forwarded to RIDS for review as being what she had determined were

¹⁶⁴ *Transcript*, 367.

¹⁶⁵ *Id.* at p. 368.

¹⁶⁶ *Id.* at pp. 78-80.

potentially responsive to Plaintiff's FOIA request.¹⁶⁷

26. Of course, this list did not contain all of the records and videotapes that Ms. Vernon had found but determined were not responsive because they did reference placing or logging a videotape into evidence. Nevertheless, the last column on this exhibit references where the records showing the FBI obtaining each particular videotape could be found, and these were all filed in Sub-file D.

27. Sub-file D was certainly a location within the OKBOMB case file where the FBI maintained records related to the Bureau having acquired surveillance videotapes during the course of that investigation. Furthermore, the Court does not see how manually reviewing the first two weeks of entries in Sub-file D as part of the Court-ordered search would have been particularly burdensome. Nor did the FBI present any evidence to why such a manual review would have been burdensome.

28. Ms. Vernon has likewise identified on Exhibit 211, documents being kept in "Sub-file E" of the official OKBOMB case file, which were produced to Plaintiff.¹⁶⁸ An example of a Sub-file E document responsive to Plaintiff's request

¹⁶⁷ *Id.* at pp. 21 and 174.

¹⁶⁸ *See, e.g.*, Trial Exhibits 68, and 34, pp. 44, 45, 56, and 58.

that Ms. Vernon found during her search but did not forward to RIDS is Exhibit 62, which was placed in Sub-file E.¹⁶⁹

29. As previously discussed, Exhibit 62 was the inventory that two FBI agents performed of “*visible surveillance cameras*” on the Murrah Building and surrounding buildings late in the afternoon of April 19, 1995 after the Murrah Building cameras had been removed. One of the agents who conducted that survey said that this document was an “Investigative Insert,”¹⁷⁰ from which one can assume that Sub-file E is dedicated to Investigative Inserts concerning videotapes; whereas Sub-file D is dedicated to FD-302s concerning videotape evidence.

30. Furthermore, it would be an easy matter for the FBI to determine which Sub-files needed to be searched. Although there were 94 Sub-files set up for the OKBOMB investigation,¹⁷¹ the Bureau has an “index” describing and/or identifying the subject matter or contents of each Sub-file,¹⁷² and even without reference to that index it is apparent to the Court that these two Sub-files are

¹⁶⁹ See Trial Exhibit 62.

¹⁷⁰ *Transcript*, pp. 678-679.

¹⁷¹ *Id.* at p. 381.

¹⁷² *Id.* at pp. 381-382.

locations wherein records responsive to Plaintiff's FOIA request are reasonably likely to be found.

31. It is equally apparent, too, that a manual search of the records entered in these two Sub-files during the two weeks following the bombing would not have been a burdensome task because documents are easily retrieved based on the FBI's serial number cataloging system.¹⁷³ Ms. Reed said that if asked, she could pull the first 2500 documents in Sub-file D for someone to review.¹⁷⁴

32. But that no one ever asked Ms. Reed to retrieve the documents filed in either of these Sub-files on or before May 2, 1995.¹⁷⁵ Instead, Mr. Hardy represented to the Court that a manual review of the records compiled during the first 14 days of the bombing investigation would be "*extremely time-consuming*," which is not true.

33. A manual review of the first two weeks of records in the OKBOMB case file would not have been particularly burdensome if the FBI had confined that review to the Sub-files wherein responsive records were likely to have been found

¹⁷³ *Id.* at pp. 369-370.

¹⁷⁴ *Id.* at pp. 370-371.

¹⁷⁵ *Id.* at pp. 370-371.

rather than, as Mr. Hardy would have the Court believe, a manual review of all of the records placed in the OKBOMB file from April 19, 1995 until May 2, 1995, which perhaps would have been too burdensome.

34. The Court finds that the FBI has offered no credible evidence as to why it did not manually search the OKBOMB physical files in Oklahoma City for the requested videos and other materials that were collected during the first 14 days following the bombing on April 19, 1995; that such a manual search should have been done of Sub-files D and E because they were reasonably likely to contain responsive records; and that by not having undertaken this manual search, the FBI did not conduct a good faith search for the records requested by Plaintiff.

G. Additional Searches That RIDS Should Have Conducted:

1. Mr. Hardy testified that if RIDS discovers or is furnished with information suggesting that there is another location where there is a reasonable likelihood of responsive records being found, that these additional potential sources of records should be searched as well.¹⁷⁶ In fact, Mr. Hardy acknowledged that it was RIDS' duty to do that search.¹⁷⁷

¹⁷⁶ *Id.* at p. 471.

¹⁷⁷ *Id.* at p. 551.

2. The law developed under FOIA required RIDS to make more than a perfunctory search for the requested videotapes and records, it also had to follow-up on obvious leads to the possible location of these materials.¹⁷⁸ There were numerous locations where responsive records and/or the subject videotapes were likely to be found, and RIDS was aware of these locations or potential sources of records, but RIDS did not followup and pursue them as was its duty under FOIA.

3. The FBI, for example, has an Electronic Surveillance database or “ELSUR.”¹⁷⁹ However, ELSUR was not among the databases that RIDS searched in response to Plaintiff’s FOIA request.¹⁸⁰

4. ELSUR was brought to light as a result of the cross examination of Ms. Mitchell.¹⁸¹ ELSUR contains records on the FBI’s surveillance activities, including video surveillance.¹⁸² RIDS produced to Plaintiff a record showing that it had taken possession of surveillance camera videotapes, and that this evidence

¹⁷⁸ *Valencia-Lucena* , 180 F.3d at 325.

¹⁷⁹ *Id.* at p. 66.

¹⁸⁰ See Trial Exhibit 248; *Transcript*, pp. 14-17.

¹⁸¹ *Id.* at p. 66.

¹⁸² *Id.* at p. 227.

had been placed in the “ELSUR ROOM.”¹⁸³

5. In the record before the Court, is an FBI 302 indicating that the Bureau of Alcohol, Tobacco and Firearms and the FBI had “prior knowledge of the bomb which destroyed the Alford [sic] P. Murrah Federal Building in Oklahoma City on April 19, 1995”, as the apparent result of a “sting operation,” but “did not take the bomb threat seriously.”¹⁸⁴ Regardless of the truth of the matters stated in this document, it is reasonable to conclude that the FBI might very well have surveilled those involved in the bombing, including filming their activities.

6. If the FBI had such video surveillance tape, it would have been stored in the ELSUR system.¹⁸⁵ This fact, and the fact that other OKBOMB surveillance tapes had found their way into the ELSUR system, should have put the FBI on notice of this potential source of records responsive to Plaintiff’s FOIA request.

7. ELSUR records are kept in a separate Sub-file of the OKBOMB case

¹⁸³ Trial Exhibit 34, p. 87 (emphasis in original); *Transcript*, p. 395.

¹⁸⁴ Trial Exhibit 45.

¹⁸⁵ *Transcript*, p. 227.

file.¹⁸⁶ Thus, it appears that a search of the ELSUR system for records responsive to Plaintiff's FOIA request could have easily been done. But there was no search of the ELSUR Room or ELSUR records by the FBI for videotapes and/or documents responsive to Plaintiff's FOIA request.¹⁸⁷

8. The FBI attempted to justify its failure to search ELSUR because Plaintiff had not specifically requested that this database be searched.¹⁸⁸ But that is not a defense. The FBI had a duty to search all files, databases, etc. that were reasonably likely to contain records requested by Plaintiff, and ELSUR was most certainly one such place.

9. Besides, if the Bureau can limit its searches to those locations identified by the person submitting a FOIA request, the FBI can easily circumvent its responsibility under FOIA, which is to make a good faith effort to conduct a search for the requested records using methods which could be reasonably

¹⁸⁶ *Id.* at p. 381.

¹⁸⁷ *Id.* at pp. 66-67 and 227.

¹⁸⁸ *Id.* at p. 128.

expected to produce the information requested.¹⁸⁹ Furthermore, there is no way for Plaintiff, or anyone else submitting a FOIA request, to know where those records might exist within the FBI's vast and highly complex record keeping system.

10. The FBI also attempted to defend its failure to do a search of ELSUR by claiming that Plaintiff's FOIA request only sought videotapes from cameras belonging to a third-party or business, and not from the government.¹⁹⁰ But that is not so.

11. In addition to videotape from cameras on specific buildings, Plaintiff specifically asked for all videotapes taken of the Murrah Building on the morning of April 19, 1995 "even if they are not among those videotapes I have asked for in paragraphs 1 through 11 above."¹⁹¹ That language would include videotapes taken by the FBI on the morning of April 19, 1995 as part of any surveillance operation.

¹⁸⁹ See *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

¹⁹⁰ *Transcript*, p. 128.

¹⁹¹ Trial Exhibit 203.

12. Ms. Mitchell, who is assigned to RIDS litigation support unit,¹⁹² and served as RIDS' liaison with Ms. Vernon,¹⁹³ conceded on cross examination that if the FBI had prior knowledge of a plan to blow up the Murrah Building as the result of a failed sting-operation, that would certainly have been motive for the Bureau not to find the surveillance tapes requested by Plaintiff.¹⁹⁴ And except for the possible motive admitted by Ms. Mitchell, the FBI offered no credible evidence as to why it did not search ELSUR for records requested by Plaintiff.

13. The Court finds that the ELSUR system, which does not even appear on the list of potentially searchable databases that the FBI presented to the Court,¹⁹⁵ should have been searched as a location that was reasonably likely to contain records related to the subject tapes; and that by not having searched ELSUR the FBI did not undertake a good faith search for the videotapes and records requested by Plaintiff.

14. During her search, Ms. Vernon found Exhibits 55, 56, 57, 58, 65 and

¹⁹² *Transcript*, p. 11.

¹⁹³ *Id.* at p. 461.

¹⁹⁴ *Id.* at pp. 142-144.

¹⁹⁵ *See* Trial Exhibit 248.

66, which were FBI records reporting an alleged attempt by an FBI agent to sell a videotape depicting the delivery of the bomb to the Murrah Building on the morning of April 19, 1995. According to FBI records, his tape “allegedly shows the Ryder truck parking in front of the Murray Federal Building [sic], TIMOTHY McVEIGH getting out and the bomb exploding.”¹⁹⁶

15. As part of a good faith search for the videotapes requested by Plaintiff, the FBI should have followed up on this alleged attempt to sell a tape of the bomb being delivered to the Murrah Building, but it did not followup. Instead the FBI produced retired agent Stephen Brannan in an apparent attempt to show that the Bureau had followed up on this possible source of information about the tapes requested by Plaintiff.

16. Prior to his retirement, Mr. Brannan had been assigned to the FBI’s Birmingham Field Office.¹⁹⁷ And it was actually one of Mr. Brannan’s confidential sources who reported the plot by one or two agents to sell a copy of the videotape.¹⁹⁸ It was also Mr. Brannan who prepared Exhibits 55, 56, 57, 58, 65

¹⁹⁶ Trial Exhibit 251.(emphasis in original).

¹⁹⁷ *Transcript*, pp. 630-631.

¹⁹⁸ *Id.* at p. 631.

and 66.¹⁹⁹

17. Mr. Brannan testified that the plot to sell a videotape of the bombing was a “hoax.”²⁰⁰ But upon cross examination, Mr. Brannan’s testimony was seriously undermined.

18. On cross examination, Mr. Brannan testified that there were actually two investigations commenced into this matter: one investigation by the FBI’s Los Angeles Field Office where the plot to sell the videotape took place, and the other by the FBI’s Office of Professional Responsibility or “OPR.”²⁰¹ But Mr. Brannan had no direct involvement in either investigation.²⁰²

19. Furthermore, the Los Angeles investigation was closed because of the lack of cooperation from Mr. Brannan’s informant. It was not closed because the plot had been thoroughly investigated and found to have been a “hoax” as Mr. Brannan testified.²⁰³

20. The OPR investigation was directed at the conduct of the agents

¹⁹⁹ *Id.* at pp. 632-634.

²⁰⁰ *Id.* at p. 635.

²⁰¹ *Id.* at p. 647.

²⁰² *Id.*

²⁰³ *Id.* at p.649.

allegedly involved in the plot. Mr. Brannan has never seen a copy of the OPR's report of this investigation.²⁰⁴

21. More importantly, Mr. Brannan was not contacted about this matter until approximately two weeks before trial, when the FBI's counsel reached out to him.²⁰⁵ That contact had nothing to do with following up on the information contained in Exhibits 55, 56, 57, 58, 65 and 66 as part of the FBI's duty to expand its initial search to include obvious leads to the possible locations of these materials that come up as a result of the initial search results.

22. The Court finds that rather than produce Mr. Brannan to testify that this alleged attempt by one or more agents in the Los Angeles Field Office was a hoax, the FBI should have produced, and could have produced, the report of the OPR's investigation into that matter; and that the FBI's failure to do so gives rise to an inference that had these records been produced they would have very likely shown that there was indeed a plot to sell a videotape of the bombing being delivered to the Murrah Building as well as the possible location of that tape.

23. The Court further finds that the FBI has offered no credible evidence

²⁰⁴ *Id.* at pp. 653-654.

²⁰⁵ *Id.* at pp. 651-652.

as to why it did not, as part of a follow-up search, contact OPR for records requested by Plaintiff; that the OPR should have been contacted as a location that was reasonably likely to contain records related to the subject tapes; and that by not contacting OPR the FBI did not undertake a good faith search for the videotapes and records requested by Plaintiff.

24. RIDS was likewise aware that an identical FOIA request had been previously submitted by a man named David Hoffman,²⁰⁶ and that as a result of that request the FBI had identified as responsive records but not given to Mr. Hoffman 300 documents and one videotape, that were being kept at FBI Headquarters and not with the other OKBOMB evidence in Oklahoma City.²⁰⁷

25. Ms. Mitchell testified that she personally reviewed the Hoffman file for records responsive to Plaintiff's FOIA request because "that is part of my job to make sure that we adequately responded to the FOIA request."²⁰⁸ But she did nothing to followup on the materials which, at one time, were being kept at the

²⁰⁶ Trial Exhibit 200, p. 4; *Transcript*, pp. 67-69.

²⁰⁷ Trial exhibit 200, p. 12; *Transcript*, pp. 70-71.

²⁰⁸ *Transcript*, p. 42.

FBI's Headquarters in Washington, D.C.²⁰⁹

26. Ms. Mitchell's review of the Hoffman file also did not occur until several months before trial.²¹⁰ Moreover, the materials that Ms. Mitchell allegedly located as a result of her review of the Hoffman file were not provided to Plaintiff as a response to his FOIA request. Instead, they were introduced at trial by the FBI as Exhibits 243, 244, 245 and 246.²¹¹

27. Ms. Mitchell testified that these four Exhibits essentially reflected what documents and videotapes the FBI had found to be responsive to Mr. Hoffman's FOIA request, which may or may not be true. What is true, however, is that in the Hoffman matter the FBI had submitted an Affidavit or Declaration apparently describing with specificity the videotape and records,²¹² but Ms. Mitchell did not review that Affidavit or Declaration. Nor was it produced.

28. The Court finds that the FBI has offered no credible evidence as to why it did not, as part of a follow-up search, review the Hoffman file, including

²⁰⁹ *Id.* at p. 71.

²¹⁰ *Id.* at pp. 40 and 42.

²¹¹ *Id.* at pp 50-51.

²¹² Trial exhibit 200, p. 12; *Transcript*, pp. 70-71.

following up with FBI Headquarters about the documents and videotape that had been housed at that location; that the Hoffman file should have been one of the first sources searched by RIDS upon receipt of Plaintiff's FOIA request as a location that was reasonably likely to contain records related to the subject tapes since Plaintiff's request mirrored Mr. Hoffman's and he had so informed the FBI; that MS. Mitchell should have reviewed the Affidavit or Declaration which the FBI submitted in the Hoffman matter to describe the results of the Bureau's FOIA search in that case; and that by not reviewing the Hoffman file as part of the initial search RIDS not only violated its own procedures but it also did not undertake a good faith search for the videotapes and records requested by Plaintiff.

29. The Court further finds that RIDS' search of the Hoffman file was not done in an effort to respond to Plaintiff's FOIA request. Instead, that alleged search was undertaken as part of the FBI's defense in this case and that, as described by Ms. Mitchell, the search actually done of the Hoffman file was inadequate.

30. RIDS knew, too, that the Secret Service had compiled a time-line of events leading up to the bombing. Plaintiff even refers to that time-line in his FOIA request and directs the FBI's attention to the following language from that

time-line: “security videotapes” showing “the [Ryder] truck pulling up to the Federal Building and then pausing (7-10 seconds) before resuming into a slot in the front of the building,” and “the truck detonation 3 minutes and 6 seconds after the suspects exited the truck.”²¹³

31. Under cross examination, Ms. Mitchell said that she had seen the time-line.²¹⁴ She conceded, too, that the description of the videotape or tapes contained in the time-line were “pretty specific.”²¹⁵

32. But she never inquired of anyone at FBI Headquarters whether the information contained in that time-line was accurate, or where evidence related to the possible existence of that tape might exist.²¹⁶ The only thing that Ms. Mitchell did by way of followup was to convey the information to the “field,”²¹⁷ which turned out to be Ms. Vernon.²¹⁸

33. The Court finds that the detail with which the videotapes are

²¹³ Trial Exhibit 203; *Transcript*, pp. 75-76.

²¹⁴ *Transcript*, p. 76.

²¹⁵ *Id. at* p. 76.

²¹⁶ *Id. at* pp. 77- 78.

²¹⁷ *Id. at* pp. 77, 95 and 103.

²¹⁸ *Id. at* pp. 131-132.

described in the Secret Service time-line certainly suggests that these tapes may exist and, if so, then FBI Headquarters would be a location reasonably likely to contain information about them. The Court further finds that RIDS should have made some inquiry to FBI Headquarters with respect to the time-line information but did not; and that RIDS' failure to do so is yet another example of the FBI's failure to conduct a good faith search for records responsive to Plaintiff's FOIA request.

34. Plaintiff's FOIA request also included a request for a copy of the videotape taken by the dashboard camera on Oklahoma Highway Patrolman Charles Hanger's vehicle showing the arrest of Timothy McVeigh on the morning of April 19, 1995.²¹⁹ The FBI sent Plaintiff a copy of the Hanger dashcam tape of McVeigh's arrest.²²⁰ That videotape was sent to Plaintiff along with a letter from Mr. Hardy stating that "The enclosed DVD is being furnished to you in its entirety."²²¹

35. This was the first videotape that Plaintiff received from the FBI in

²¹⁹ Trial Exhibit 200.

²²⁰ Trial Exhibit 200.

²²¹ Trial Exhibit 201.

response to his FOIA request.²²² Upon receipt, Plaintiff immediately wrote back to the FBI's counsel advising them that the tape of McVeigh's arrest appeared to have been edited, since it showed only the search of McVeigh's vehicle but not his arrest. More importantly, it did not show a brown pick-up truck that had been reported in a May 2, 1995 story by the *Houston Chronicle* as being captured by that dashcam.

36. Plaintiff even sent the FBI's counsel a copy of the *Houston Chronicle* story,²²³ which reported that the Hanger tape showed that a brown pick up truck belonging to a known McVeigh associate, Steven Colburn, had been traveling with him at the time of the arrest. The FBI responded by informing Plaintiff that he had received "a complete and unedited copy of the videotape," and refusing Plaintiff's request to see the original videotape.²²⁴

37. Ms. Mitchell was aware of the *Houston Chronicle* story and Plaintiff's concern that he had not been given a complete copy of the Hanger

²²² *Transcript*, p. 22.

²²³ Trial Exhibit 10, H.

²²⁴ Trial Exhibit 10, L.

dashcam tape.²²⁵ Ms. Mitchell said that neither she nor anyone else at RIDS did any followup to determine whether Plaintiff had been given the compete tape.²²⁶ In fact, until it was played in Court while Ms. Mitchell was testifying, she had never even seen the tape.²²⁷

38. For almost six years, Plaintiff has been asking to see the original Hanger tape. But at no time during this almost six-year interval did the Bureau come forward with evidence that it did not have the original tape or even a copy of that tape until Ms. Vernon testified at trial.

39. It was Ms. Vernon who discovered upon receipt of Plaintiff's FOIA request, that the FBI no longer had the original Hanger videotape or even a copy of that videotape.²²⁸ Ms. Vernon testified that the original tape had been given to the Oklahoma Highway Patrol.

40. Ms. Vernon testified that thereafter John Mabry, a person no longer associated with the FBI, obtained a copy of the Hanger videotape from the

²²⁵ *Transcript*, pp. 133-134.

²²⁶ *Id.* at pp. 134-135.

²²⁷ *Id.* at p. 133.

²²⁸ *Id.* at pp. 178 and 193-194.

Oklahoma Highway Patrol, which she then sent to Ms. Mitchell at RIDS.²²⁹ Ms. Vernon has no idea how Mabry obtained a copy of that tape.²³⁰ Neither is there any evidence that Mabry or anyone else compared that copy with the original to see that it was a complete and exact copy of the original dashcam tape.

41. The FBI tried to downplay the significance of having provided Plaintiff a copy of the Hanger tape and having assured both him and the Court that it was an exact, unedited copy of the original without having any basis to make such claims. The FBI did so through the testimony of from Mr. Hanger, who had been contacted by the FBI's counsel about two weeks prior to trial.²³¹

42. Mr. Hanger testified that he had not started the video camera until after he had arrested McVeigh and had only done so by mistake. Mr. Hanger testified that he had intended to push the button that would have allowed him to record his conversations with McVeigh, but had instead pushed the video camera button by mistake.²³² And there the matter may have ended except for Exhibit 68.

²²⁹ *Id.* at pp, 179-180 and 186.

²³⁰ *Id.* at p. 194.

²³¹ *Id.* at p. 603.

²³² *Id.* at p. 597.

43. Mr. Hanger said that he had turned that videotape over to the FBI “just days after the bombing.”²³³ Exhibit 68 is the record of an April 21, 1995 FBI interview of Mr. Hanger conducted by Agent Witt.

44. Mr. Witt asks Mr. Hanger whether he recalls a “pickup truck traveling in tandem with the MCVEIGH vehicle”?²³⁴ Mr. Hanger is reported to have said that he had no recollection of that vehicle.²³⁵

45. However, the next question asked of Mr. Hanger by Agent Witt is highly significant and so, too, is Patrolman Hanger’s answer. Agent Witt asks about “an object on the ground near the stopped MCVEIGH automobile,” and the response was “HANGER was confident this was the gun he had recovered from the MCVEIGH vehicle.”²³⁶ At trial, Mr. Hanger confirmed that this interview had taken place, and that he had temporary placed McVeigh’s gun on the ground during the arrest.²³⁷

46. The Court has viewed the Hanger dashcam tape provided by the FBI

²³³ *Id.* at p. 601.

²³⁴ Trial Exhibit 68.

²³⁵ *Id.*

²³⁶ *Id.* (emphasis in original).

²³⁷ *Transcript*, pp. 598-599.

to Plaintiff,²³⁸ and there is no object resembling a gun on the ground near that vehicle. Neither does that tape show McVeigh's arrest in the immediate aftermath of the bombing. What it shows instead, is the apparent conclusion of an inventory search of the McVeigh vehicle by Patrolman Hanger and then Patrolman Hanger driving off to presumably transport McVeigh to jail.²³⁹

47. What image of what object on the ground, then, were Agent Witt and Mr. Hanger referencing in their discussion? It is obvious to the Court that there must be an image of the gun lying on the ground near McVeigh's vehicle, and the likely source of that image is the dashcam tape of McVeigh's arrest as reported by the *Houston Chronicle*.

48. But that cannot now be known with certainty because the FBI gave the original Hanger videotape to the Oklahoma Highway Patrol; because the FBI never made and retained a copy of the original Hanger tape before giving the original to the Highway Patrol; and because no one compared the copy obtained by Mr. Mabry that was given to Plaintiff to see if, in fact, the copy was an exact duplicate of the original. This is yet another example of the FBI's failure to

²³⁸ Trial Exhibit 1.

²³⁹ *Id.*

followup and do an adequate search for the videotapes and records requested by Plaintiff.

H. Missing Surveillance Tapes:

1. The videotapes produced by the FBI to Plaintiff did not contain any footage from the cameras that had been on the Murrah Building. Neither did these tapes contain footage of the bomb's detonation.²⁴⁰

2. Throughout the history of this case, the FBI has taken the position that the only relevant inquiry is the search that it performed and not whether the videotapes exist. And the Court has accepted that position.²⁴¹

3. But the FBI's position changed at trial when, as part of its rebuttal case and over Plaintiff's objections, the Bureau directed the focus of its evidence towards an attempt to convince the Court that there are no videotapes depicting the attack upon the Murrah Building which is supposedly why, according to the Bureau, its search failed to locate any such videotapes or related records.

4. The FBI never raised the alleged non-existence of records as a

²⁴⁰ *Transcript*, pp. 187-188.

²⁴¹ *Id.* at p. 266.

defense.²⁴² In the Joint Pretrial Order, the FBI did not make the alleged non-existence of these videotapes an issue for trial.²⁴³

5. As the sole issue to be determined at trial, the Pretrial Order identified: “Whether the FBI conducted a search reasonably calculated to locate all records in the FBI’s possession responsive to Plaintiff’s FOIA request.²⁴⁴ But if the existence or non-existence of the videotapes and related records requested by Plaintiff is relevant, then it is one upon which the FBI has the burden of proof,²⁴⁵ and the Bureau has not met that burden.

6. The FBI, for example, called Richard Williams in an effort to show that there were no videotapes from Murrah Building cameras. Mr. Williams worked for the General Services Administration.

7. Mr. Williams is now retired. But prior to his retirement, he was assistant building manager for the Murrah Building, and his duties included contracting with third parties for the repair, maintenance and upkeep of the

²⁴² See Doc. 19.

²⁴³ See Doc. 183.

²⁴⁴ Doc. 183, p.8.

²⁴⁵ *Goldgar v. Office of Admin. Executive Office of President*, 26 F.3d 32, 34 (5th Cir. 1994)(“It is the agency’s burden to prove the non-existence of the records sought. . .”).

Building. He functioned more or less like a “landlord.”²⁴⁶

8. Mr. Williams said that Federal Protective Services was responsible for security at the Murrah Building;²⁴⁷ that Mr. Tom Hunt was the head of Protective Services in Oklahoma City;²⁴⁸ and that Mr. Hunt would have better knowledge than him about the security system in place at the Murrah Building on April 19, 1995, including the camera system.²⁴⁹

9. Mr. Hunt still lives in Oklahoma City.²⁵⁰ But he was not called as a witness by the FBI.²⁵¹ Neither did the FBI offer any evidence as to why Mr. Hunt could not have come from Oklahoma City to Salt Lake City testify or testify from Oklahoma City via video conference as did other FBI witnesses.

9. Mr. Hunt resides beyond the Court’s subpoena power and was thus unavailable to Plaintiff. This fact, as well as the fact that the FBI could have produced this witness but did not, supports an inference that the FBI did not call

²⁴⁶ *Transcript*, p. 613.

²⁴⁷ *Id.* at p. 614

²⁴⁸ *Id.* at p. 625.

²⁴⁹ *Id.* at p. 627.

²⁵⁰ *Id.* at p. 517.

²⁵¹ *Id.* at p. 627.

Mr. Hunt because he would have testified that Murrah Building surveillance cameras were functioning on April 19, 1995 and, therefore, may have captured images of the perpetrators.

10. Similarly, the FBI did a survey of the buildings that had surveillance cameras and videotapes taken by those cameras on the morning of the bombing.²⁵² The Murrah Building was one of the locations surveyed for surveillance tapes.²⁵³

11. The FBI prepared an inventory of the buildings that had cameras and videotapes.²⁵⁴ But the FBI did not produce this inventory, which supports the inference that the FBI did not produce this evidence because it would have shown that Murrah Building had surveillance cameras, and these cameras were operational, including recording, at the time of the bombing. Furthermore, the testimony given by Mr. Williams does not undermine this inference.

12. The FBI contacted Mr. Williams two weeks prior to the trial and asked him to testify.²⁵⁵ Mr. Williams said that as part of budgetary constraints, the

²⁵² *Id.* at pp. 666-668.

²⁵³ *Id.* at pp. 679-680.

²⁵⁴ Trial Exhibit 62.

²⁵⁵ *Transcript*, p. 624.

Murrah Building and Post Office Building surveillance cameras were shut down about four years prior to the bombing.²⁵⁶

13. He also testified that not only were the Murrah Building and Post Office cameras not in operation on the day of the bombing, but that those cameras had never been set up to be recorded.²⁵⁷ The Court finds this testimony by Mr. Williams to be not credible for several reasons.

14. Although Mr. Williams testified that the cameras on location at the Murrah Building and Post Office Building were not in operation and did not record, even when they were operational, in response to Plaintiff's FOIA request the FBI actually produced "2 DVD's" from the "*U.S. Post Office.*"²⁵⁸ Mr. Williams' testimony about the Murrah Building cameras having been take out of operation four years prior to the bombing and never having been set up to record is also directly contradicted by the testimony of two witnesses who had more recent knowledge about the Murrah Building's security system.

15. The first witness was Joe Cooley. Mr. Cooley was employed by

²⁵⁶ *Id.* at pp. 625-626.

²⁵⁷ *Id.* at p. 671,

²⁵⁸ Trial Exhibit.(emphasis added).

Profile International Security Services in the Spring of 1995. Profile International Security Services was bidding on a contract to provide security services to the Murrah Building and Mr. Cooley, who was helping to prepare that bid, toured the Murrah Building to look at the security system.²⁵⁹ He personally saw the monitors in operation, and this was a mere three or four months before the bombing.²⁶⁰

16. The second witness is Donald Browning, a retired Oklahoma City Police Officer. Mr. Browning's duties as an Oklahoma City Police Officer included assisting the Secret Service in providing security for visiting federal officials. The Secret Service's Office was likewise located in the Murrah Building.²⁶¹

17. Mr. Browning was familiar with the external security or surveillance cameras on the Murrah Building. The last time he toured the Murrah Building the cameras were operating, the images from those cameras were being recorded on videotape and those videotapes were being stored. Mr. Browning's tour of the

²⁵⁹ *Transcript*, p. 516.

²⁶⁰ *Id.* at p. 517.

²⁶¹ *Id.* at p. 501.

Murrah Building security system was in 1991 or 1992.²⁶²

18. But perhaps the most compelling testimony given by Mr. Browning involved removal of the surveillance cameras. According to Mr. Browning:

A. We were told by a female, a white Caucasian female, wearing an FBI rain jacket, . . . that there were files so critical to the government that there would be no recovery effort. We were told to stand our ground on the courtyard of the Murrah Building . . . and they would let us know when we would be allowed back into the building.²⁶³

* * *

Q. So you testified that a female in an FBI jacket came into the area and stopped, prevented you, made you leave the area, preventing you from rescuing others so that in your words critical files could be recovered. Is that – is that correct?

A. Yes, sir. That is exactly what she told us.

* * *

Q. If I was prevented from rescuing people who were potentially in harms way I would be pretty upset about that. Were you?

A. Yes, sir, extremely upset.²⁶⁴

²⁶² *Id.* at pp. 5110512.

²⁶³ *Id.* at p. 505.

²⁶⁴ *Id.* at p. 509

19. While standing outside waiting to be allowed to re-enter the Murrah Building and continue in his efforts, Mr. Browning saw several men wearing FBI rain jackets remove surveillance cameras from the building:

Q. And explain to the court what you saw in terms of being removed. Who removed them?

A. There was three or four men wearing FBI rain jackets using that extension ladder and they were removing not only the camera but the bracketing and a good distance of the wiring.

Q. Fair to say that they were removing all evidence of the camera having been there?

A. Yes, sir.²⁶⁵

16. Mr. Browning's testimony about the surveillance cameras being removed that morning is confirmed by Trial Exhibit 20, which contains photographs taken immediately after the bombing. This Exhibit shows the ladder described by Browning that was used by men wearing FBI jackets to remove the surveillance cameras, the surveillance cameras in place and the same location after the cameras had been removed, just as Browning had testified.

20. It is also noteworthy that the FBI had known of the substance of the

²⁶⁵ *Id.* at p. 507.

testimony that Mr. Browning was going to give at trial since March of 2010, when his *Declaration* was filed in this case.²⁶⁶ Yet, the Bureau had no evidence to counter Mr. Browning's testimony. Nor could the FBI do so given Exhibit 20, which conclusively corroborates Mr. Browning's testimony..

21. The Court finds that this evidence supports an inference that these cameras were removed from the Murrah Building that morning to conceal the fact that there was a security system in place that may have recorded the perpetrators. The Court further finds that the FBI has failed to prove that the non-existence of a videotape taken by Murrah Building cameras on the morning of April 19, 1995.

22. In similar fashion to Mr. Williams, the FBI brought Jon Hersley from Denver, Colorado to testify in an attempt to convince the Court that there was not videotape showing the bomb being delivered to the Murrah Building. The Court, however, remains unconvinced by Mr. Hersley's testimony.

23. Mr. Hersley is a retired FBI agent.²⁶⁷ Prior to his retirement, Mr. Hersley had been one of the primary investigative case agents on the OKBOMB

²⁶⁶ Doc. 49-4; Trial Exhibit 48.

²⁶⁷ *Transcript*, p. 694.

case, which meant that he had overall responsibility for that case in general.²⁶⁸

24. On April 27, 1995, Mr. Hersley testified at the *Preliminary Hearing* for Timothy McVeigh's criminal prosecution. During that proceeding, Mr. Hersley described in detail photographs that had been prepared from a videotape taken at approximately 9:00 AM on the morning of April 19, 1995 from one of the Regency Tower exterior surveillance cameras.

25. Mr. Hersley testified that this camera had captured the Ryder Truck proceeding towards the Murrah Building, as well as what may have been McVeigh's get-a-way car, a "yellow Mercury" speeding away.²⁶⁹ According to Mr. Hersley's testimony from almost 20 years ago, this camera scanned the entire area in front of the Regency Towers, including a parking lot across the street from the Murrah Building.²⁷⁰ For some unexplained reason, Mr. Hersley had not watched the entire tape but was shown instead still photographs produced from the tape, which he testified showed the Ryder Truck moving in an "easterly direction" on Fifth Street towards the Murrah Building at approximately 9:00 AM on April

²⁶⁸ *Id.* at p. 697.

²⁶⁹ *Id.* at pp. 717-717 and 720-721.

²⁷⁰ *Id.* at pp. 722-723.

19, 1995.²⁷¹

26. Mr. Hersley's testimony about the Regency Tower exterior camera facing the Murrah Building was corroborated by the eyewitness testimony of Janie Coverdale. At the time of the bombing, Ms. Coverdale lived at the Regency Tower Apartments with her two grandsons, five year old Aaron Coverdale and two year old Elijah Coverdale.²⁷²

27. Every morning before she went to work, Ms. Coverdale walked her grandsons to the daycare center located in the Murrah Building.²⁷³ By referring to Trial Exhibit 32, which was a photograph of the Murrah Building and vicinity taken after the bombing, Ms. Coverdale identified the Regency Apartments where she and her grandsons lived, and the Murrah Building a short distance away.²⁷⁴

28. When Ms. Coverdale and her grandsons walked to the Murrah Building, they walked under that camera described by Mr. Hersley, which was located on the fifth floor of the Apartment Building and facing down Fifth Street

²⁷¹ *Id.* at p

²⁷² *Id.* at p. 487.

²⁷³ *Id.* at p. 487.

²⁷⁴ *Id.* at p. 489.

towards the Murray Building.²⁷⁵ Ms. Coverdale dropped her grandsons off at the daycare on the morning of April 19, 1995, and never saw them again.²⁷⁶

29. During the McVeigh Preliminary, Mr. Hersley had clearly and unequivocally testified about the existence of a videotape taken by an exterior camera located on the Regency Tower Apartment that scanned in an easterly direction down Fifth Street in Oklahoma City towards the Murrah Building and across the nearby parking lot. But when Mr. Hersley testified at the trial of this case on July 31, 2014, almost 20 years after the McVeigh Preliminary Hearing, Mr. Hersley said that he had been mistaken.

30. Mr. Hersley said that the camera he had testified about had really been located in the lobby of the Regency Tower, and not on the outside of the Apartment Building.²⁷⁷ Consequently, Mr. Hersley said that there was no videotape showing the Ryder truck pulling in front of the Murrah Building or the bomb detonating.²⁷⁸

²⁷⁵ *Id.* at p. 489.

²⁷⁶ *Id.* at p. 491-492.

²⁷⁷ *Id.* at p726.

²⁷⁸ *Id.* at pp. 726-727.

31. The testimony about this videotape given by Mr. Hersley 20 years ago just after the bombing conflicts with the testimony that he gave at this trial. The Court, however, finds that the testimony given by Mr. Hersley at the Preliminary Hearing is the more credible. The Court further finds that the FBI has failed to prove that the videotape described by Mr. Hersley during the McVeigh Preliminary Hearing does not exist.

I. Additional Searches;

1. The FBI should have searched the ECF for videotapes and records responsive to Plaintiff's FOIA requests because the ECF was reasonably likely to contain responsive records, but the FBI did not do that search. The FBI will now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff. The FBI shall likewise advise Plaintiff as to the terms the Bureau used to search the ECF.

2. The FBI should have manually searched the ECF indices of restricted documents for videotapes and records responsive to Plaintiff's FOIA requests because the ECF was reasonably likely to contain responsive records, but the FBI did not do that search. The FBI will now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff.

3. The FBI should have searched the UNI for videotapes and records responsive to Plaintiff's FOIA requests because the UNI was reasonably likely to contain responsive records, but the FBI did not do that search. The FBI will now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff. The FBI shall likewise advise Plaintiff as to the terms the Bureau used to search the UNI.

4. The FBI should have searched the ELSUR for videotapes and records responsive to Plaintiff's FOIA requests because the ELSUR was reasonably likely to contain responsive records, but the FBI did not do that search. The FBI will now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff. The FBI shall likewise advise Plaintiff as to the terms the Bureau used to search the ELSUR.

5. The FBI should have searched the ECC at the Oklahoma City Field Office for videotapes and records responsive to Plaintiff's FOIA requests because the ECC was reasonably likely to contain responsive records, but the FBI did not do that search. The FBI will now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff.

6. The FBI should have searched the I-Drives and S-Drives at the

Oklahoma City Field Office for videotapes and records responsive to Plaintiff's FOIA requests because the I-Drive and S-Drive were were reasonably likely to contain responsive records, but the FBI did not do that search. The FBI will now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff.

7. The FBI should have manually searched the OKBOMB Sub-files D and E for videotapes and records responsive to Plaintiff's FOIA requests because these two Sub-files were reasonably likely to contain responsive records, but the FBI did not do that search. Within 30 days, the FBI will search or review the first 2,500 serials entered Sub-file D and Sub-file E, for videotapes and records responsive to Plaintiff's FOIA requests, and provide copies of all responsive videotapes or records found to Plaintiff.

8. Within 30 days, Ms. Vernon will repeat the search that she did on her personal database, using the same search terms that she used in her original search of this database. The FBI will provide copies of all responsive videotapes or records found to Plaintiff. The FBI shall likewise advise Plaintiff as to the terms that Ms. Vernon used to search that database.

9. Within 30 days, Ms. Vernon will repeat the search that she did on

ZyIndex using the same search terms that she used in her original search of this database. The FBI will provide copies of all responsive videotapes or records found to Plaintiff. The FBI shall likewise advise Plaintiff as to the terms that Ms. Vernon used to search that database.

10. Within 30 days, the FBI will follow up with OPR to verify whether there had in fact been a plot by FBI agents to sell a videotape of the bombing of the Murrah Building.

11. Within 30 days, the FBI will follow up with FBI Headquarters to verify whether there had in fact been a plot by FBI agents to sell a videotape of the bombing of the Murrah Building.

12. Within 30 days, the FBI will follow up an review the Affidavit or Declaration submitted to verify whether there had in fact been a plot by FBI agents to sell a videotape of the bombing of the Murrah Building.

13. The results of these searches will also be considered in determining the scope and nature of the discovery that Plaintiff will be able to conduct.

J. Discovery:

1. Prior to trial, the Court also ordered Mr. Hardy to submit a declaration or affidavit stating that he did not know of either the existence or likely locations of

the requested videotapes, and that he was otherwise unaware of anyone else who may know of the existence or likely locations of the videotapes at issue.²⁷⁹

2. In response to that Order, Mr. Hardy stated under oath that: “I can attest that all locations likely to contain the information responsive to the FOIA request have been searched and all information that was located through these searches has been provided to plaintiff.”²⁸⁰ These representations were not true.

3. It is undisputed that unknown numbers of responsive documents located by Ms. Vernon were “culled” and not given to Plaintiff. It is likewise undisputed that at least one videotape, the tape from the ATM machine at the Regency Tower Apartments, was not given to Plaintiff. It is undisputed, too, that neither Ms. Vernon nor anyone at RIDS searched the ECF and the only search conducted using the UNI or Universal Index was done using the most generic term possible: “OKBOMB”

4. Discovery is appropriate in a *FOIA* case when there is reason to believe, as in this case, that the agency is either withholding records or did not conduct an adequate “good faith” search for the materials. The Court finds,

²⁷⁹ Trial Exhibit 9, ¶ 5.

²⁸⁰ *Transcript*, pp. 479-480.

therefore, that Plaintiff should be entitled, and is entitled, to conduct formal discovery.

5. Given the intransigence of the FBI in refusing and/or failing to carry out its duty to conduct a good faith search for the records and videotapes requested by Plaintiff, including carrying out the Court-ordered searches, and the FBI's lack of candor with the Court, the discovery in this case should be overseen by United States Magistrate Judge Dustin B. Pead, who will determine both the scope and nature of that discovery.

6. But Magistrate Pead's determination of the scope and nature of the discovery required by Plaintiff shall not occur until after the FBI completes the searches that it has been ordered to conduct herein, and Plaintiff has been given an opportunity to review the results of those searches.

CONCLUSIONS OF LAW

Based upon its Findings of Fact, the Court hereby enters the following Conclusions of Law pursuant to *Federal rule of Civil Procedure 52*:

1. The FBI deliberately and unlawfully construed Plaintiff's FOIA request so as to avoid having to produce the videotapes and records that he had requested.

2. The FBI found, but unlawfully withheld from Plaintiff, one videotape and other records that were responsive to Plaintiff's FOIA request, and the FBI is doing so without any assertion or claim of an exemption to the release of these materials under FOIA.

3. The FBI did not make a good faith effort to conduct a search for the requested records using methods that could be reasonably expected to produce the videotapes and records requested by Plaintiff.

4. The FBI did not search databases and/or sources that were reasonably likely to contain responsive records. In fact, the FBI confined its search to unofficial sources.

5. The FBI did not followup on obvious leads to other potential locations where responsive records could be found, and search those sources.

6. The FBI refused to conduct the searches of locations likely to contain records responsive to Plaintiff's FOIA that Court had ordered to be undertaken prior to trial and, at trial, the Bureau gave no credible explanation as to why those searches were not done or could not have been done.

7. In the handling of Plaintiff's FOIA request, the FBI exhibited extreme bad faith as well as a deliberate disregard of and indifference to its obligations

under FOIA.

8. The FBI should have searched the ECF for videotapes and records responsive to Plaintiff's FOIA requests, but did not do that search. The FBI shall now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff. The FBI shall likewise advise Plaintiff as to the terms the Bureau used to search the ECF.

9. The FBI should have manually searched the ECF indices of restricted documents for videotapes and records responsive to Plaintiff's FOIA requests, but did not do that search. The FBI shall now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff.

10. The FBI should have searched the UNI for videotapes and records responsive to Plaintiff's FOIA requests, but did not do that search. The FBI shall now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff. The FBI shall likewise advise Plaintiff as to the terms the Bureau used to search the UNI.

11. The FBI should have searched the ELSUR for videotapes and records responsive to Plaintiff's FOIA requests, but did not do that search. The FBI shall now conduct that search within 30 days and provide copies of all responsive

videotapes or records found to Plaintiff. The FBI shall likewise advise Plaintiff as to the terms the Bureau used to search the ELSUR.

12. The FBI should have searched the ECC at the Oklahoma City Field Office for videotapes and records responsive to Plaintiff's FOIA requests, but did not do that search. The FBI shall now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff.

13. The FBI should have searched the I-Drives and S-Drives at the Oklahoma City Field Office for videotapes and records responsive to Plaintiff's FOIA requests, but did not do that search. The FBI shall now conduct that search within 30 days and provide copies of all responsive videotapes or records found to Plaintiff.

14. The FBI should have manually searched the OKBOMB Sub-files D and E for videotapes and records responsive to Plaintiff's FOIA requests, but did not do those searches. Within 30 days, the FBI shall search or review the first 2,500 serials entered Sub-file D and Sub-file E, for videotapes and records responsive to Plaintiff's FOIA requests, and provide copies of all responsive videotapes or records found to Plaintiff.

15. Within 30 days, the FBI shall require Ms. Vernon to repeat the search

that she did on her personal database, using the same search terms that she used in her original search of this database. The FBI shall provide copies of all responsive videotapes or records found to Plaintiff. The FBI shall likewise advise Plaintiff as to the terms that Ms. Vernon used to search that database.

16. Within 30 days, the FBI shall require Ms. Vernon to repeat the search that she did ZyIndex using the same search terms that she used in her original search of this database. The FBI shall provide copies of all responsive videotapes or records found to Plaintiff. The FBI shall likewise advise Plaintiff as to the terms that Ms. Vernon used to search that database.

17. Plaintiff shall be entitled, and is entitled to conduct formal discovery.

18. The discovery in this case shall be overseen by United States Magistrate Judge Dustin B. Pead, who will determine both the scope and nature of that discovery.

19. Magistrate Pead's determination of the scope and nature of the discovery required by Plaintiff, however, shall not occur until after the FBI completes the searches that it has been ordered to conduct herein, and Plaintiff has been given an opportunity to review the results of those searches.

20. The Court will retain jurisdiction over this case until the Court-ordered

searches and discovery have been completed.

Dated this of , 2015.

BY THE COURT

HONORABLE CLARK WADDOUPS
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2015, the foregoing was served by electronic process upon:

KATHRYN L. WYER
ADAM C. SIPLE
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