

U.S. DISTRICT COURT
DISTRICT OF MINNESOTA (DMN)

Leonard Peltier,

COPY

Plaintiff,

vs.

Court File No. 02-CV-04328

Federal Bureau of Investigation,

Defendant.

SUMMARY JUDGMENT MOTION before Magistrate

Judge Susan R. Nelson, at the U.S. Courthouse, 300 South
Fourth Street, Minneapolis, Minnesota, on September 8,
2006, commencing at approximately 9:30 a.m., before Mara
Yackel, a Notary Public in and for the State of
Minnesota.

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1 (Whereupon the following proceedings were duly
2 had and entered of record to-wit:)

3 THE COURT: We're here today in the matter of
4 Peltier versus the FBI. This is civil file number
5 02-4328. Let's begin with appearances, please.

6 MS. NORONHA: Preeya Noronha, United States
7 Department of Justice on behalf of the Defendant in this
8 case, the Federal Bureau of Investigation. Good morning,
9 Your Honor.

10 THE COURT: Good morning.

11 MR. BACHRACH: Good morning, Your Honor.
12 Barry Bachrach on behalf of Leonard Peltier.

13 MR. KUZMA: Good morning. Michael Kuzma,
14 K-u-z-m-a, on behalf of Leonard Peltier.

15 THE COURT: Good morning. We are here for
16 Defendant's motion for Summary Judgment. Counsel.

17 MS. NORONHA: Thank you, Your Honor. This
18 action is a case brought pursuant to the Freedom of
19 Information Act by the Plaintiff, Leonard Peltier. Mr.
20 Peltier's attorneys filed FOIA requests to the FBI's
21 Chicago and Minneapolis field offices requesting all
22 documents pertaining to him, Mr. Peltier.

23 THE COURT: To be honest with you, I have
24 reviewed this entire file. So if you could focus on
25 the -- particularly Mr. Peltier's counsels' responses to

1 the exemptions if you would.

2 MS. NORONHA: Absolutely, Your Honor.

3 If I may take certain exemptions one by one and start
4 with Exemption B1, the classified information.

5 THE COURT: That would be great.

6 MS. NORONHA: Your Honor, Exemption 1
7 protects records that are authorized under Criteria
8 established by Executive Order 12958, in the interest of
9 national defense or foreign policy that are required to
10 be kept secret, and are in fact properly classified
11 pursuant to this Executive Order. The substantial weight
12 is according to an agency's determination that potential
13 harm merits the classification of particular information.
14 In this case, we submitted detailed declarations that
15 exemplify why the information that is withheld pursuant
16 to the Exemption B1 is properly withheld. There are
17 various substantive and procedural requirements under
18 the Executive Order that need to be satisfied. In this
19 case each document that is held pursuant to B1 has been
20 re-reviewed, it has been determined that the
21 substantive and procedural requirements under the
22 Executive Order have been satisfied and, in fact, all of
23 these documents are properly classified and, therefore,
24 must be withheld pursuant to Exemption B1.

25 There are essentially two categories of

1 information. The first is foreign government
2 information, which is intelligence information exchanged
3 between the United States and foreign countries with the
4 expectation that such information will be withheld in
5 confidence. And as our declarations have shown, the
6 unauthorized disclosure of this information could
7 reasonably be expected to strain relations between the
8 United States and these foreign countries. Have a
9 chilling effect on the free flow of vital information to
10 United States intelligence law enforcement agencies and,
11 therefore, could cause damage, or serious damage to
12 national security on the war on transnational terrorism.
13 Under the Executive Order, Section 1.1C states that the
14 unauthorized disclosure of foreign government information
15 is presumed to cause damage to the national security. So
16 here we have foreign government information, it's
17 presumed that such disclosure could cause harm to the
18 national security and our declaration should be given due
19 deference in this regard.

20 The second type of information is basically
21 intelligence methods. It contains information about the
22 FBI's method for gathering, storing and disseminating
23 intelligence. And our declarations have shown that the
24 release of this information could cause serious damage to
25 the national security in the war on translational

1 terrorism.

2 In response to Plaintiff's allegations
3 regarding our withholding, pursuant to Exemption B1, the
4 Plaintiff challenges the classified information based on
5 pure speculation that in fact the classification
6 determinations were made simply to cover up some sort of
7 misconduct. There's absolutely no evidence in the record
8 to substantiate any of these claims. It's pure
9 speculation and our agency's affidavits are entitled to
10 substantial weight in the national security context.

11 I will note for, Your Honor, that there was a
12 similar case brought in the Western District of New York
13 before Judge Skretny in that court. And the documents
14 there concerned documents out of the Buffalo field office
15 of the FBI. They were very similar to the documents that
16 were produced in this case out of the Chicago and
17 Minneapolis field offices. In that case Judge Skretny
18 issued a very well-reasoned decision in which he upheld
19 various exemptions, including Exemption 1. Judge Skretny
20 considered the allegations made by Plaintiff's attorneys
21 in this case and he made a distinction, a specific
22 distinction between any government conduct during the
23 investigation of the murders and the prosecution of
24 Plaintiff versus the separate and subsequent processing
25 of Plaintiff's FOIA request in this case. And he stated

1 that even assuming there was any misconduct in the
2 earlier stages, it does not follow for sure that the
3 Government continues to act in bad faith 25 years later.
4 So, Your Honor, the issue here is simply whether or not
5 the information that was withheld pursuant to B1 is
6 properly classified and our declarations show that the
7 information is properly classified because all of the
8 substantive and procedural requirements have been
9 satisfied here.

10 THE COURT: Now, it's my understanding that
11 that opinion out of the Western District of New York is
12 on appeal now; is that correct?

13 MS. HORONHA: That's correct, Your Honor,
14 it's on appeal to the Second Circuit. Briefing has been
15 concluded. I don't believe an argument date has been
16 set.

17 THE COURT: Thank you.

18 MS. NORONHA: Your Honor, I will note in that
19 case Judge Skretny initially did deny Summary Judgment on
20 the B1 claim and granted it in the subsequent opinion
21 after we submitted an in-camera ex parte classified
22 declaration and submitted the classified documents
23 in-camera. At this point we said all we can say on the
24 public record. If we reveal anymore detail it would
25 essentially be harming our ultimate purpose here, which

1 is to keep the information classified. If Your Honor
2 wishes to see the documents in-camera we could arrange
3 for an in-camera viewing. Because the documents are
4 classified there would be other security considerations
5 that we would need to take into account, including proper
6 security clearances and proper transport and handling of
7 the documents.

8 THE COURT: What volume of documents was
9 reviewed by the judge in-camera in New York?

10 MS. NORONHA: In that case it was only about
11 eight pages. As Your Honor is well aware there are many,
12 many more pages at issue. If Your Honor has no more
13 questions on Exemption B1, I'll move to Exemption B2.

14 THE COURT: Okay.

15 MS. NORONHA: There were two types of
16 information withheld pursuant to Exemption B2. One type
17 of information that was not challenged by the police was
18 the polygraph information. The second was the dollar
19 amount of funds paid to an informant for undercover
20 operational expenses. The FBI withheld this information
21 because it could provide insight into funding matters,
22 would reveal inner workings of informant practices.
23 Exemption B2 exempts from disclosure any information
24 related to the internal personnel rules and practices of
25 an agency. And in internal practices that may have some

1 public interest, but actually may risk circumvention of
2 the law if released are protected from disclosure
3 pursuant to Exemption B2. And here the FBI determined
4 that releasing the dollar amount of funds could in fact
5 hamper future law enforcement techniques because
6 informants could essentially leverage the amount of
7 funding that they request in the future for their
8 services and therefore interfere with the FBI's law
9 enforcement techniques.

10 The Plaintiff cited one case out of the
11 District of Massachusetts Globe Newspaper, it's not
12 binding on this Court. In that case the decision was
13 also limited to where the identity of the informant had
14 been publicly acknowledged. In that case the informant's
15 name was well known, the Court determined that just
16 knowing the amount of money he was paid would not be
17 particularly harmful, but here all the informants have
18 been withheld, their names and identities have been
19 withheld and we believe that indicating the amount of
20 money that they may have been paid would also harm the
21 FBI's investigative techniques.

22 Moving onto Exemption B3, Exemption B3
23 incorporates nondisclosure provisions contained in other
24 Federal Statutes. And the Federal Statute at issue here
25 is Criminal Rule 6E, which pertains to Grand Jury

1 materials. This rule gives broad protection to Grand
2 Jury materials because disclosure of this information
3 could reveal matters that occurred before the Grand Jury,
4 expose inner workings of the Grand Jury and such
5 information should be kept secret.

6 In this case the FBI has withheld identifying
7 information of individuals called to testify before the
8 Grand Jury, information that identifies specific records
9 subpoenaed by the Grand Jury and dates of Grand Jury
10 meetings. Judge Skretny considered this sort of
11 information in the Buffalo case and determined that the
12 Exemption B3 was properly asserted over such information.
13 Plaintiff's challenge our assertion in this case simply
14 based on their allegation that we did not show that the
15 declaration had personal knowledge of the information
16 here. They cite a case called Canning v. DOJ. In that
17 case, Your Honor, however, the Court sent the case back
18 for additional Vaughn indices and in that case the FBI
19 submitted an additional declaration which stated that a
20 special agent was actually authorized to review the Grand
21 Jury materials in that case for the purpose of
22 determining whether proper access should be granted under
23 the FOIA.

24 In this case we did submit declarations by
25 Mr. Hardy, particularly the fourth Hardy Declaration

1 states that he personally reviewed the Grand Jury
2 materials. He was aware of the information contained
3 within those documents and was specifically authorized in
4 his capacity as head of the FOIA unit of the FBI to
5 review the Grand Jury materials for the purpose of
6 determining whether access to the FOIA should be granted.
7 And we've satisfied our burden here, we believe that
8 Exemption B3 is properly asserted and we should be
9 granted Summary Judgment on that ground.

10 Moving to Exemption B7(A), Your Honor. B7(A)
11 authorizes the withholding of law enforcement records and
12 law enforcement information to the extent that production
13 of such records or information could reasonably be
14 expected to interfere with law enforcement proceedings.
15 And this Exemption requires the Government to show that
16 there's a law enforcement proceeding that's pending or
17 contemplated and that the release of such information
18 could reasonably be expected to cause some articulable
19 harm to the enforcement proceeding. And here, Your
20 Honor, the documents as Your Honor is well aware pertain,
21 pertain to two very violent crimes that occurred. One
22 occurred 30 years ago, the 1975 execution style shooting,
23 the murder of two FBI agents for which Mr. Leonard
24 Peltier was convicted. The other crime, the other
25 violent crime refers to the 1976 murder of one of Mr.

1 Peltier's associates, Anna Mae Aquash. That
2 investigation has been ongoing for many, many years. No
3 leads really occurred until 1994 when new information and
4 new witnesses came to light. As a result of that
5 information two individuals were indicted, Mr. Arlo
6 Looking Cloud and Mr. John Graham.

7 In Mr. 2004 Mr. Looking Cloud was sentenced
8 to life for the First Degree Murder of Miss Aquash after
9 a trial in the District of South Dakota. His appeal was
10 recently denied. Mr. Graham is currently in Canada and
11 extradition proceedings are ongoing for him. So, Your
12 Honor, the investigation into the murder of Anna Mae
13 Aquash is ongoing. The extradition proceedings
14 pertaining to Mr. Graham are ongoing. And the potential
15 exists for others to be charged as the investigation
16 continues. We believe we have described the situation in
17 our declaration and Mr. Hardy and the special agent who's
18 assigned to the case Mark Vukovich has also submitted a
19 declaration in this case which explains the proceedings,
20 the ongoing investigation and the harm that would occur
21 if these documents were released.

22 THE COURT: It's my understanding though,
23 they have been previously released.

24 MS. NORONHA: Your Honor, that's not exactly
25 correct. There is another set of documents pertaining to

1 Ms. Aquash that are in other field offices. A separate
2 requester, Mr. Hendricks, who also submitted a
3 declaration in this case, made a request to these other
4 field offices, Seattle, Portland and the Milwaukee field
5 offices. He has also made a request in the Minneapolis
6 field office for the Aquash file at issue here.

7 The FBI did not release the Minneapolis field
8 office Aquash documents to Mr. Hendricks. In fact, the
9 entirety of the Exemption 7A, the withholding that was
10 asserted pursuant to Mr. Hendricks' FOIA request, which
11 is the same as asserted here, is the currently at issue
12 in a law suit that Mr. Hendricks has filed that is
13 pending in the District of Montana. I believe that case
14 is fully briefed and oral argument has not been set there
15 in the District Court.

16 When Plaintiff filed their opposition brief
17 we became aware that certain of the Aquash investigation
18 file contained in the other field offices had been
19 released to Mr. Hendricks in redacted form. So the FBI
20 went back to the look at the documents that were released
21 and based on their review of these documents contained in
22 the other field offices, it was determined that some of
23 these documents actually did reference the Minneapolis
24 field office. For example, there were memos that were
25 sent from Minneapolis to the other field offices. Based

1 on that the FBI believes that it may be likely there are
2 duplicates of these documents that exist in both field
3 offices. As a result of that, the FBI determined that
4 they would make the same release that they made to Mr.
5 Hendricks to Mr. Peltier in this case to take care of any
6 potential discrepancies that would occur. And so our
7 claim of Exemption 7(A) in this case we waive as to only
8 those documents that were released to Mr. Hendricks in
9 the context of his FOIA request and subsequently also
10 released to Mr. Peltier in this case. If Your Honor has
11 no other questions on Exemption 7(A) I will proceed to
12 Exemption 7(C).

13 Exemption 7(C) protects information that
14 could reasonably be expected to constitute an unwarranted
15 invasion of privacy and this Exemption requires
16 essentially a balancing test. If there are privacy
17 interests at issue in certain information in that case,
18 then that privacy interest must then be balanced with any
19 potential public interest in releasing the information.
20 It is well established that parties in law enforcement
21 materials have presumptive privacy information in having
22 their information kept private. There is a distinct
23 stigma of being associated with a criminal investigation,
24 having your name appear in an FBI filed. And in this
25 case the privacy interest is very strong. As I've

1 stated, there is great interest in this case. The
2 investigation of the murder of one of Mr. Peltier's
3 associates is ongoing. There is intense stigma in
4 releasing personal information in the context of this
5 case. In every instance in which information was
6 withheld pursuant to Exemption 7(C), and essentially,
7 Your Honor, the information that was withheld concerned
8 identifying information of the third parties, identifying
9 information of sources who were given express or implied
10 assurances of confidentiality and identifying information
11 about state and local law enforcement employees. In
12 every instance the FBI conducted a balancing test, looked
13 at the very strong privacy interests of these individuals
14 and determined whether there was any public interest that
15 outweighed the very strong private interest. In this
16 case there's no public interest that was essentially
17 articulated by Plaintiff.

18 Plaintiff's brief is full of allegations
19 concerning the alleged misconduct occurring in his trial
20 30 years ago with regard to his due process rights being
21 violated, infiltration of his defense by informants of
22 the FBI. All of those sorts of allegations are
23 particular to Mr. Peltier. In fact, the FOIA request in
24 this case asks specifically for information pertaining to
25 Mr. Peltier, it was a very similar FOIA request submitted

1 in the Buffalo case, Judge Skretny there looked at public
2 interest and determined there was none. Mr. Peltier was
3 simply looking for some sort of information to try and
4 prosecute a collateral challenge to his criminal
5 conviction. Therefore, the privacy interest is so strong
6 here, there really is no public interest, valid public
7 interest recognized by case law articulated by Plaintiff
8 and the FBI's withholding of Exemption B7(C) information
9 is proper here. I will note that Plaintiffs have
10 repeatedly stated that the names of FBI employees were
11 withheld, and that's simply not the case. The only
12 information was withheld was third-party information,
13 source information and local state and law enforcement
14 agency names.

15 Plaintiffs raised an allegation that the FBI
16 did not take reasonable measures to determine whether
17 individuals are currently living or deceased. In fact,
18 that's incorrect as we have stated in the fourth Hardy
19 Declaration, we did use reasonable measures to look at
20 each person's name to consider whether their death would
21 extinguish their privacy interest, which is the position
22 of the FBI. The FBI is aware if someone had deceased
23 they would have released that individual's name and that
24 has occurred in some instances in documents issued here.

25 In essence the FBI followed the 100 Year

1 Rule, if a person's birth date is on the documents and
2 they're over a hundred years, the FBI assumes they have
3 died. Institutional knowledge, which is the knowledge of
4 the FBI based on prior FOIA requests that they have
5 reviewed and various knowledge of the special agents, et
6 cetera, about individuals involved in the case. And
7 finally consulting the who's who, which would indicate
8 prominent individuals have been deceased.

9 The Schrecker case in the District of
10 Columbia has upheld these sorts of reasonable measures in
11 the context of a very voluminous document review. And we
12 believe they were reasonable in this case as well.

13 Next, Your Honor, Exemption 7(D). Exemption
14 7(D) states that informants are entitled to protection
15 from disclosure. If at the time they gave the
16 information to the FBI, or to law enforcement, they were
17 either given an express assurance of confidentiality or
18 provided the information in circumstances in which an
19 assurance could be implied. This Exemption is designed
20 to protect these individuals from retaliation and
21 encourage cooperation with law enforcement authorities in
22 the future. There's no balancing required under this
23 Exemption. All that needs to be looked at is whether the
24 informants were given this type of assurance of
25 confidentiality at the time they provided the

1 information.

2 In this case, we divided the information in
3 to several categories. First is information provided by
4 informants with an express assurance of confidentiality.
5 And in those circumstances the documents themselves
6 reveal that these informants were provided express
7 assurance of confidentiality by the words the protect,
8 protect identity. Those sorts of terms are actually
9 present in the documents themselves and indicate that an
10 express assurance of confidentiality was made.

11 The other type of withholding is identifying
12 information provided by informants with an implied
13 assurance of confidentiality. An implied confidentiality
14 can be inferred from the nature of the crime that was
15 investigated, and the sources in relation to it. In this
16 case we're talking about two very violent crimes. The
17 murder of two FBI agents by Mr. Peltier and the murder of
18 one of Mr. Peltier's associates. The informants here
19 were close to the circumstances. They were familiar with
20 the activities of Plaintiff. They were mostly Native
21 Americans who provided information and confidential
22 interviews. And based on these circumstances this
23 Exemption was properly asserted and should be withheld.

24 The third type of information is identifying
25 data information provided by foreign law enforcement

1 agencies under an express agreement with the FBI which
2 expressly forbids dissemination of the information. Our
3 declarations have shown that these foreign law
4 enforcement agencies were given express assurances of
5 confidentiality and disclosure of these identities would
6 have a chilling effect on the FBI's relationship with
7 these agencies and potentially hamper other similar
8 future agreements with these agencies.

9 I will note again, that Judge Skretny
10 considered this issue in the Buffalo case, determined
11 that Exemption 7(D) was properly claimed and asserted
12 over the informant information in that case, which is
13 very similar to the informant information withheld in
14 this case.

15 Your Honor, I also note that the informant's
16 names and identities that are withheld pursuant to
17 Exemption 7(D) are also withheld pursuant to both
18 Exemption 7(C) and Exemption 6, which is another privacy
19 Exemption which I'll get to in a second. There are
20 multiple exemptions asserted on lot of this information.
21 And if Your Honor determines that one Exemption is
22 proper, then the inquiry could really end there.

23 Moving on to Exemption 7(F). I will note,
24 Your Honor, 7(E) was not challenged by Plaintiff. So
25 Exemption 7(F) protects information where release of the

1 information could reasonably be expected to endanger the
2 life or physical safety of an individual. And here
3 certain identifying information pertaining to
4 confidential sources involved in both Mr. Peltier's
5 investigation and prosecution as well as the
6 investigation of the murder of Anna Mae Aquash were
7 withheld. And as the third and fourth Hardy Declarations
8 show, these individuals specifically requested to the FBI
9 agent that their identities not be revealed because they
10 expressed specific concerns for their personal safety
11 should their identities be made known. Therefore, the
12 FBI has asserted Exemption B7(F) for these individuals.

13 And, finally, Exemption B6. Exemption B6 is
14 asserted in conjunction with Exemption 7(C). Exemption
15 7(C) is particular to law enforcement material and
16 Exemption B6 is applicable to other types of information.
17 Exemption 7(C) is actually a broader privacy protection.
18 And so we believe that Exemption 7(C) is properly
19 asserted here, Your Honor, believes that Exemption 7(C)
20 is properly asserted therefore Exemption 7 -- I'm sorry,
21 Exemption 6 should apply as well.

22 As far as the segregability question is
23 concerned we stated in our declaration the FBI has
24 released all reasonably segregable information in the
25 records. It provided as much nonexempt information as

1 possible without compromising the interest and
2 nondisclosure protected by FOIA. It's a very narrow set
3 of information that was withheld here, Your Honor, in a
4 very voluminous amount of documents. We're talking
5 about approximately 70,000 pages of documents released to
6 Plaintiff, and 14 or 15 bankers boxes worth. So it was a
7 lot of information. As Your Honor is well aware we
8 provided a representative sample of documents pursuant to
9 the Plaintiff's indications to what they would like in
10 the sample. And we believe that our declarations that
11 we've submitted in conjunction with this case have been
12 detailed, submitted in good faith, reasonably describe
13 the withholding that we've taken. Plaintiff has
14 presented no evidence to the contrary that anything was
15 done in bad faith and that any of the information should
16 be released. And based on this the FBI is entitled to
17 Summary Judgment in this case. If Your Honor has any
18 questions?

19 THE COURT: I don't, thank you very much.

20 MR. BACHRACH: Good morning, Your Honor. My
21 name is Barry Bachrach and I represent Leonard Peltier.
22 I'm going to split the argument with Mr. Kuzma if that's
23 okay with Your Honor.

24 THE COURT: That's acceptable.

25 MR. BACHRACH: At issue here, I view it as a

1 little narrower than the FBI. We're really talking about
2 two significant files. One is known as the sub file N,
3 the informant files, and the second is the Anna Mae
4 Aquash file. With respect to the sub file N, the
5 informant files, it's our contention that Mr. Peltier is
6 entitled to these documents to determine whether his due
7 process rights were violated by FBI informants gaining
8 access to his legal defense. And, Your Honor, let me
9 start off with through FOIA after Mr. Peltier's trial it
10 has been discovered that Mr. Peltier's case is a case
11 fraught with injustice. In fact, after several months
12 after we were before you I think in early 2003, the
13 United States Court of Appeals for the Tenth Circuit
14 stated quote, "Much of the Government behavior at Pine
15 Ridge Reservation and in it's prosecution of Mr. Peltier
16 is to be condemned. The Government withheld evidence,
17 intimidated witnesses. These facts are undisputed." And
18 I'm not going to at this point, we put in our briefs the
19 litany of injustice that Mr. Peltier has suffered. But
20 that has to be kept in the background as we set forth the
21 reasons why Mr. Peltier is entitled to these documents as
22 a -- for a fair trial in balancing the interests of
23 privacy. And the other issue is that the FBI, no
24 governmental agency, can keep documents protected to
25 shield misconduct. Now, the time period we're talking

1 about '75 through '77, the United States Court of Appeals
2 for the Eighth Circuit has well documented and there is
3 much literature that the FBI engaged in covert action
4 programs directed against domestic groups with the intent
5 to disrupt and neutralize groups and individuals. One of
6 the main targets of the Federal Bureau of Investigation
7 and what was called COINTELPRO was the American Indian
8 Movement. The Eighth Circuit has recognized in the cases
9 that we've cited United States v. Cooper; United States
10 v. Dodge, that one of the tactics utilized in particular
11 against the American Indian Movement was the infiltration
12 of legal defense camps and hence the attorney-client
13 privilege by paid informants. There is a history of the
14 FBI intentionally infiltrating the attorney-client
15 privilege in relationship in connection with the trial of
16 the American Indian Movement members. In fact, in the
17 case of the United States v. Crow Dog, the Eighth Circuit
18 recognized in connection with this issue that courts must
19 guard against the abuse of judicial process. Supervision
20 of the administration of criminal justice in the Federal
21 courts implies the duties of establishing and maintaining
22 civilized standards of procedure and evidence.

23 What we're talking about here, Your Honor, is
24 that we believe that Mr. Peltier's due process rights,
25 and particularly as I'll go through the prima facie

1 showing that there's evidence that his -- the sources may
2 very well have compromised his defense, that we've on the
3 balance, there should be no balance in this country
4 versus privacy rights and the deprivation of someone's
5 due process rights. And the public interest in upholding
6 justice in this country requires that the FBI provide,
7 particularly 30 years after the fact, the names of
8 informants so that we can determine whether or not Mr.
9 Peltier's defense was infiltrated. We recently provided
10 this Court with a document showing that the FBI in
11 connection with Mr. Peltier's extradition that Douglas
12 Durham, a well-known paid informant by the FBI was
13 actually in contact with Mr. Halprin, the Canadian
14 prosecutor in connection with the extradition of Mr.
15 Peltier. And I quote from the case of United States v.
16 Leonard Crow Dog about Douglas Durham a known informant.
17 "The informant, Douglas Durham, had worked in various
18 undercover capacities prior to the Wounded Knee incident.
19 His relationship with the FBI began in March of 1973 when
20 he supplied the FBI office in Des Moines, Iowa with
21 copies of photographs he had taken in a one-day visit to
22 Wounded Knee. He later served in various leadership
23 positions within AIM. Including National Security
24 Director and National Administrator. He became a close
25 companion of AIM leader Dennis Banks during the period,

1 including the Banks-Means trial in St. Paul. Throughout
2 this period of intimate affiliation with AIM and its
3 leaders he was supplying information to the FBI."

4 In the case of United States United States v.
5 Dodge, another Eighth Circuit case. The Eighth Circuit
6 said, "Were we concerned on this appeal with the question
7 of whether the conviction of Dennis Banks or Russell
8 Means tried in St. Paul could be upheld, we would have
9 another case. There's evidence in the record and in the
10 FBI files to indicate that Durham was privy to numerous
11 conversation between Banks and his lawyers; that he was
12 present in St. Paul during the course of the trial; and
13 that he was in constant communication not only with Banks
14 and the other defendants during the trial, but with the
15 FBI." Your Honor, we have, as the Government indicated,
16 had recently been given many boxes that were withheld for
17 30 years. And we just within the past few weeks found
18 evidence that the FBI actually had Mr. Durham in contact
19 with the Canadian prosecutor to provide him with
20 information. We also provided Your Honor with the
21 document that indicated, it's dated June 5th, 1976, where
22 the FBI sent to its field offices that authority was not
23 being granted at that time to authorize travel of AIM
24 sources to Cedar Rapids, which was the first trial of Mr.
25 Robideau and Mr. Butler, but then goes on to talk that

1 that sources could go with specific authorization, but
2 were warned don't partake in any communications. If
3 you're there and you're involved in a communication with
4 an attorney and the Defendant, try to remove yourself.
5 But as Douglas Durham testified before Congress with
6 respect to that, he had been given the same type of
7 advice. And what did Mr. Durham say when he testified
8 before Congress. He said, "If Dennis and I were sitting
9 in a room and an attorney would walk in and start
10 talking, I couldn't jump up and say I can't be here, the
11 FBI won't allow it." The point is, Your Honor, that
12 there were clearly sources, paid informant sources in the
13 American Indian Movement. The FBI highly infiltrated the
14 American Indian Movement. We provided documents which
15 indicate that at least as a prima facie case that should
16 be investigated whether these sources were in contact
17 with counsel and the defendant. Without the names of
18 these sources we cannot determine that. If given the
19 names of the sources we can then determine who was in
20 contact and sitting privy in the discussions with counsel
21 and Mr. Peltier and determine whether or not his due
22 process rights were violated.

23 In addition to this, Your Honor, also in
24 connection with these trials as we submitted the FBI took
25 a special care to try to keep documents from discovery

1 and we submitted that as Exhibit D to our memorandum.
2 And the FBI issued a document that because of certain
3 discovery in the Wounded Knee trials and in order to
4 avoid discovery, the FBI wrote, "In the anticipation of a
5 similar occurrence of trials involving RESMURS, every
6 effort is being made to keep administrative and informant
7 material and separate sub files in order to keep this
8 material from being available on a general discovery
9 order." So the FBI knowing that in the Wounded Knee
10 trials it was discovered what it did with paid informants
11 and how the paid informants had an impact on those
12 trials. It deliberately engaged in a manner to avoid
13 discovery of this information. And, Your Honor, with
14 respect to protecting investigative techniques, it is
15 fine if we're protecting legal investigative techniques,
16 but when investigative techniques go beyond the line and
17 violate a person's due process rights, then those
18 documents cannot be protected by avoiding discovery, by
19 avoiding FOIA. Those documents have to be produced.
20 And so I'd submit, Your Honor, that with respect to the
21 balancing of Mr. Peltier's rights, particularly after 30
22 years and with the showing that we've made that there's
23 certainly a prima facie reason for us to get the names of
24 the sources so that we can determine whether in fact Mr.
25 Peltier's was defense was infiltrated any greater than

1 the fact that Douglas Durham was involved in the
2 extradition. It's essential for the fairness. This is a
3 man who has suffered injustice at every step of the way.
4 The courts have acknowledged the injustice, we submitted
5 it in a brief. The Government we found through FOIA that
6 ballistics evidence was manufactured, ballistics evidence
7 was withheld. My sister mentioned that this was a
8 violent crime. Yes, it was, but the Government has
9 admitted that it as a result of the evidence that
10 manufactured and coerced from the witnesses is has
11 admitted to the Eighth Circuit on numerous occasions that
12 it does not know who shot the agents. It cannot prove
13 Mr. Peltier shot the agents. And in light of the
14 balancing of these factors, it's important that we find
15 the names of the informants and the sources. And I would
16 submit to, Your Honor, if as a compromise position if the
17 FBI is concerned about names becoming public, one manner
18 of trying to resolve this would be to release the names
19 in confidence to Mr. Peltier's attorneys who can
20 determine from speaking with their client who would also
21 have to be in confidence, who the people were and we can
22 determine whether they were people who in fact
23 infiltrated his defense. So there is a way to balance
24 Mr. Peltier's need to know versus the Government's need
25 for alleged privacy 30 years after the fact. If Your

1 Honor, doesn't have any other questions on this issue
2 I'll leave Mr. Kuzma to address the specific Exemptions.
3 I just want to mention Anna Mae Aquash for a bit. We, in
4 fact -- I just do not understand the FBI's position on
5 that. They either provide the documents or they don't.
6 The fact that some of the field offices are releasing
7 investigative material doesn't -- shouldn't impact the --
8 shouldn't be allowed to be used as well. Some of our
9 offices are releasing it, but we're Minneapolis and we're
10 not going to release it. Either it's investigative
11 material or not. This is a man, Steve Hendricks, who
12 submitted an affidavit, who's now published a book using
13 FBI documents on Anna Mae Aquash. The book is going to
14 be out in print within weeks. And yet they're keeping
15 the documents from Mr. Peltier. And the acknowledged
16 reason that while they asked different field offices than
17 we did, again, Your Honor, I submit either the documents
18 are investigative or not. Once the FBI has released the
19 documents, no matter from what field office, they've
20 completely waived their right to withhold the documents
21 from us. We think that the fact that they're releasing
22 the documents to some people and not to Mr. Peltier's
23 speaks volumes.

24 If you have no questions I'll turn it over to
25 Mr. Kuzma.

1 THE COURT: Thank you, sir. Mr. Kuzma.

2 MR. KUZMA: Good morning. If I may, I'd like
3 to just let the Court know I am the attorney on the
4 appeal of Judge William M. Skretny's decision. A reply
5 brief was filed on August 28th. The Court in its
6 original scheduling order indicated we should be prepared
7 for the oral argument the week of September 25th.

8 However, I did check the Court's calendar prior to
9 leaving Buffalo, it looks based on my past experience
10 that the case will not be argued until November of this
11 year. But given the fact that the decision out of the
12 Western District of New York is on appeal, no weight
13 whatsoever should be given to Judge Skretny's decision.

14 The next thing I'd like to do is address a
15 misstatement made by the Government both today in oral
16 argument as well their moving papers. The Government
17 claims that the names of no FBI employees have been
18 withheld. However, if you look at the exhibits to the
19 Defendant's motion for Summary Judgment, there's a number
20 of pages where clearly the identities of FBI special
21 agents or employees have been excised or redacted. And
22 those pages are for the record, pages 1, page 4, page 17,
23 and it's page 21 and it's either 3 or C, there's a very
24 odd numbering system, page 47 and page 225. So clearly
25 the Government has misstated once again in the Peltier

1 case the facts. I think our memorandum of law covers all
2 the points that we feel are very important to this case.
3 I'm going to just address the highlights.

4 Now, It's our contention that FOIA may be
5 used to remedy or deter Brady violations. At the time
6 Leonard Peltier was tried in 1977, the Government turned
7 over roughly 3,500 pages of material and as the Court is
8 aware as a defense attorney unless you have somebody
9 within the Government saying the prosecution is being
10 less than truthful, you have to take them at their worth.
11 As a result of this case, and the FOIA case that was
12 brought in the Western District of New York, we now learn
13 that the Minneapolis field office alone has 90,000 pages
14 of material that were never turned over to Mr. Peltier's
15 attorneys at the time of the 1977 trial. In fact, for
16 this instant case the Government by it's own admission
17 reviewed 77,149 pages of material, 66,594 pages were
18 released in full or in part. A wapping 10,555 pages
19 remained withheld in Minneapolis alone. And more in
20 incredibly as a result of this instant case, the case in
21 the Western District of the New York, we now know that
22 the FBI has 142,579 pages that have never been turned
23 over to Mr. Peltier or his defense attorneys. And it's
24 our contention that this material should have been turned
25 over in 1977. The case law is clear. We cited the

1 Bright case in our memorandum. I'd like to also draw the
2 Court's attention to the Ferry v. Bell case out of the
3 Third Circuit, that's a 1981 case, and the cite is 645 F
4 .2d 1213 at page 1218 the decision was modified at 671
5 F2d 769 at 1982. The Third Circuit in that case stated,
6 "The public at large has an important stake in insuring
7 that criminal justice is fairly administered to the
8 extent disclosure may remedy and deter Brady violations
9 society stands to gain." So it's our contention that
10 this material should have been provided to Mr. Peltier
11 and his defense attorneys in 1977 and the case law is
12 clear that FOIA may be used to remedy and deter Brady
13 violations.

14 Our second major contention revolves around
15 FOIA exemptions and illegal or unauthorized investigative
16 tactics. And there's a number of cases where the courts
17 have stated that FOIA exemptions cannot be used to shield
18 illegal or unauthorized investigative tactics. For
19 example, in Stern v. FBI, 737 F .2d 84 at page 93 that's
20 out of the District of Columbia 1984. The Court
21 recognized that the public has a strong interest in the
22 area of the FBI's unlawful and improper activities. And
23 as the Court may recall, Carl Stern who was the Plaintiff
24 in that case was an NBC reporter who made a FOIA request
25 regarding COINTELPRO, the FBI's infamous

1 counterintelligence program which was designed to
2 neutralize targeted groups and individuals with a host of
3 dirty tricks. And we have cited in our memorandum of law
4 a number of cases where courts have recognized the
5 illegality and impropriety of the FBI's COINTEL Program.
6 Also I would note in *Kuzma v. Internal Revenue Service*,
7 that's 775 F .2d 66 and page 69, that's out of the Second
8 Circuit, 1985. Unauthorized or illegal investigative
9 tactics may not be shielded from the public by use of
10 FOIA exemptions.

11 So our second main argument is that the
12 exemptions are not applicable. If the Court would find
13 that the Brady argument is without merit, it's our
14 contention given the history of the investigation and
15 prosecution of Leonard Peltier and courts in both the
16 Eighth and Tenth Circuit have recognized all the
17 impropriety and illegality that have occurred in Mr.
18 Peltier's case that the exemptions cannot be invoked and
19 case law is pretty clear on that.

20 Now, with respect to the B1 Exemption, and
21 it's cited in our memorandum of law. The B1 Exemption if
22 you look at Executive Order 12958 Section 1.7(A) and that
23 is in our memorandum of law. It says, "In no case shall
24 information be classified in order to, one, conceal
25 violation of law, inefficiency or administrative error

1 or, two, prevent embarrassment or to a person,
2 organization or agency." And it's our contention with
3 the respect to the B1 Exemption that once again this
4 Exemption is being invoked to prevent the FBI and FBI
5 personnel from being embarrassed and prevent some
6 illegality from being publicly aired. We know what the
7 Government did, it was recognized by the Tenth Circuit.
8 They intimidated witnesses, they withheld evidence and
9 what have you. The one thing that I find most intriguing
10 and curiously the Government didn't address this. When
11 Leonard Peltier was arrested on February 6, 1976, he was
12 in the company of gentleman by the name of Frank Black
13 Horse who's actual name is Frank Leonard DeLuca. Mr.
14 Black Horse was sought in connection of the death of
15 agents Coler and Williams. Also under indictment for
16 wounding special agent Curtis A. Fitzgerald at Wounded
17 Knee and I cited cases in regard to Grand Jury
18 proceedings Des Moines, Iowa, 568 F .2d, page 555, that's
19 the Eighth Circuit 1977. Mr. Black Horse is arrested in
20 Canada, he's sought in connection for the deaths of
21 Agents Kohler and Williams. He's under indictment for
22 wounding Curtis A. Fitzgerald, but yet Mr. Black Horse,
23 a/k/a Mr. DeLuca is never extradited to the United
24 States. In fact, he's a free man in Western Canada. I
25 actually talked to Jamie Graham who's now the chief of

1 police in Vancouver. And at the time in 1976 he was one
2 of the arresting officers with the RCMP and he confirmed
3 for me Mr. Black Horse, a/k/a DeLuca was a free man in
4 western Canada. And it's our contention this B1
5 Exemption along with the other exemptions is -- they're
6 being invoked to hide further impropriety on the part of
7 the FBI. I find it unimaginable that an individual could
8 wound an FBI agent, be sought in the connection of the
9 deaths of two other agents and he's never brought back to
10 the States. I think the evidence is ample. The
11 Government claims it's pure speculation and what have
12 you. The Eighth Circuit, the Tenth Circuits have
13 recognized all the impropriety, the sheer volume of
14 documents that have been withheld, the Black Horse
15 mystery. I think there's ample evidence here for this
16 Court to order the full release of the documents at
17 issue. And I would just close by saying that the Court
18 should never lose sight of the fact that disclosure, not
19 secrecy, is the dominant feature of the Freedom Of
20 Information Act. And I believe that the time has come to
21 tear down the veil of secrecy surrounding the documents
22 relating to Leonard Peltier and RESMURS. Thank you.

23 THE COURT: Thank you. Brief response from
24 the Government.

25 MS. NORONHA: Thank you, Your Honor.

1 THE COURT: Before you begin, counsel made
2 some very good points. One of which is that either the
3 investigative material around the Aquash murder is
4 protected or not. If it's -- if some of it has already
5 been produced, how do you distinguish that material from
6 what's been retained and why would the investigation be
7 protected by retaining that material when a big chunk of
8 it has already been produced?

9 MS. NORONHA: Well, Your Honor, the
10 information that was released again came from three other
11 field offices, the Seattle, Portland and Milwaukee field
12 offices. Those are essentially satellite field offices
13 with regard to the Aquash investigation. And the
14 Minneapolis field office is lead and originating office
15 of the Aquash investigation. That where the bulk of the
16 materials exist. This other FOIA request was processed
17 separately and apart from the FOIA request here. I will
18 note that the entire Minneapolis Aquash file has also
19 been withheld pursuant to 7(A) when Mr. Hendricks
20 requested it as well. So we're acting completely
21 consistently with regard to the Minneapolis file.

22 The documents were looked at individually and
23 it was determined that the documents in those files would
24 not cause harm to the ongoing investigation if they were
25 released. I will note that they were released in

1 redacted form. Here, the documents pertain to the lead
2 office, the bulk of the materials consisting of the
3 Aquash investigation file are in the Minneapolis field
4 office. We believe that there would be a harm to the
5 investigation if these documents were released. A
6 document by document review was conducted of these
7 materials, it was determined that there would be a harm
8 that would exist in they were released. They were put
9 into functional categories pursuant to the case law as we
10 represented in our declaration and based on this our
11 position is that there would be an intense amount of harm
12 to the ongoing investigation and I will note that the
13 documents that we are withholding have been submitted,
14 the representative sample portion of them approximately
15 50 page, have been submitted to Your Honor in unredacted
16 form for your Honor to review.

17 With regard to Plaintiff's argument with
18 regard to the sub N file. Again, Your Honor, this is the
19 informant file. And the central Exemption that is
20 applicable to this file, this sub N file is Exemption
21 7(D). As I've stated in my opening argument there is no
22 balancing test in 7(D). All that the FBI has withheld
23 here are names and identifying information of the
24 informants. If at the time they provided their
25 information they were given either an express or implied

1 assurance of confidentiality, their names should be
2 withheld. That's the legal standard and that's what the
3 FBI has applied here. In addition to the 7(D), which we
4 believe has been appropriately asserted and should be
5 enough to grant Summary Judgment on this information, if
6 you want to look at 7(C), which does have a balancing
7 test in addition to 7(D), Plaintiff's argument is that
8 these informants essentially violated the confidences of
9 the defense, that Mr. Peltier's due process rights were
10 violated, but all the Plaintiffs want here are the name
11 of the informants. And I don't see how the names of the
12 informants will inform any way any of this misconduct
13 occurred. The privacy rights of these informants are
14 paramount. The whole purpose of protecting their
15 information under 7(D) is to prevent them from being
16 retaliated against, to encourage future cooperation for
17 them and other informants.

18 THE COURT: I think, counsel, Mr. Peltier
19 would argue and have argued that the benefit of gaining
20 the names would be to share them with Mr. Peltier and ask
21 whether they participated in attorney-client
22 communications.

23 MS. NORONHA: Your Honor, under the FOIA a
24 release to any FOIA requester is a release to the public.
25 That is the way FOIA is applied to Government agencies.

1 So any release to Plaintiff's counsel under the FOIA
2 would be a release to the public. There is no compromise
3 position that we can take on this issue. And I think
4 that informants would not be happy about their names
5 being released in this fashion in any event.

6 With regard to the various documents that
7 Plaintiff's attorneys have appended to their papers,
8 these arguments were addressed by Judge Skretny. Some of
9 the documents, exact documents came from the Buffalo
10 field office and were presented to him as well. And his
11 conclusion was that the documents equally support the
12 opposite inference that Plaintiff has alleged. There's
13 some indication that the individuals whose identity was
14 redacted was advised not to become involved in developing
15 any information for Defendants. So I believe that the
16 documents that Plaintiffs have presented to the Court
17 actually suggest that the FBI did not want these
18 informants to engage in improper behavior by violating
19 any confidences of defense. And, so, there's really only
20 speculation here as to the possibility of any potential
21 misconduct.

22 With regard to the document regarding proper
23 placement of information in various files, I submit, Your
24 Honor, that's simply a proper record keeping. I think
25 the memo was issued so that the administrative materials

1 and investigative materials, informant materials could be
2 kept in appropriate sub files the way the FBI has been
3 keeping them throughout their investigative processes and
4 in that way it protects investigative techniques, it
5 protects law enforcement privileges. There's no
6 indication that anything improper was done in that
7 regard.

8 With regard to withholding of the names of
9 FBI employees. Again, Your Honor, there is no indication
10 in the record that we have withheld any such names. I
11 haven't had times to look at all the pages that were
12 named by Mr. Kuzma in his presentation, but if Your Honor
13 would look at them, they're all named by categories. And
14 the declaration of Mr. Hardy explains which categories of
15 information are withheld. All the documents are numbered
16 appropriately. For example, I just looked at page 1
17 briefly and it seemed that the information that was
18 withheld there was third-party information and not
19 information of any FBI employees. So there is no
20 withholding of FBI employee information in the record as
21 explained thoroughly in our declarations.

22 With regard to the general allegation of the fact
23 that 90,000 pages were not released at the time of the
24 trial, Your Honor, this has been a long case. At the
25 time of the trial there was information released to

1 Plaintiff's attorneys in the late '70s, he acquired
2 approximately 20,000 pages of documents from FBI
3 headquarters through a FOIA request. The information has
4 accumulated over the years. Simply because there are
5 90,000 pages that the FBI has now, does not mean those
6 90,000 pages also existed at the time of the trial. We
7 acted pursuant to the law in this FOIA request and have
8 released to the Plaintiff all nonexempt information that
9 the FBI has that is responsive is the FOIA request at the
10 time it was made.

11 With regard to Plaintiff's argument that the
12 FOIA cannot be used to shield unauthorized investigative
13 tactics, there's no indication that anything improper was
14 done here. We withheld limited information pursuant to
15 well-recognized FOIA exemptions. There's nothing that
16 Plaintiffs can point to in these documents to suggest
17 that FOIA exemptions, the withholdings that were taken,
18 were done improperly. These documents were processed in
19 good faith pursuant to the FOIA and there's no indication
20 that anything improper was done.

21 And with regard to the Executive Order. We
22 agree with Plaintiff that the Executive Order states that
23 classification cannot occur to cover up any sort of
24 misconduct or embarrassment done by the Government. And
25 that simply is not what happened here. The Hardy

1 Declaration has stated that the Executive Order's
2 requirements were followed and one of these requirements
3 is that classification cannot be used to cover up any
4 misconduct or embarrassment. Plaintiff's have just
5 suggested a lot of speculative activities that may or may
6 not have occurred, but there's no indication that these
7 documents were improperly classified to cover up anything
8 that was untoward.

9 Finally, Your Honor, again, we are talking
10 about a voluminous number of documents. Mr. Peltier is
11 seeking these documents to assist him in any collateral
12 challenges to his conviction. He has been tried and
13 convicted of these murders, his appeal was denied. He
14 has filed several collateral challenges to his conviction
15 already, some of which were based on information that he
16 obtained through the FOIA and information he obtained
17 from FBI headquarters many years ago. All of these
18 collateral challenges have been denied. There has been
19 no indication that any Brady violations have occurred.
20 We believe that the FOIA exemptions are properly asserted
21 here and the FBI should be granted Summary Judgment in
22 this case.

23 THE COURT: Thank you.

24 MS. NORONHA: Thank you.

25 THE COURT: Very brief.

1 MR. BACHRACH: Just short few points.

2 THE COURT: You bet.

3 MR. BACHRACH: Initially with respect to the
4 Anna Mae Aquash documents, I did not provide the Court
5 with any that Mr. Hendricks provided to me because he
6 asked not to until his book is out. But I would submit,
7 Your Honor, as Mr. Hendricks said in his affidavit and I
8 believe I could submit them to the Court now, because his
9 book is coming out within a week, that review of these
10 documents would lead one to the conclusion it's hard to
11 say how the release of the documents would inhibit the
12 investigation. It is clear from those documents that the
13 FBI knew basically virtually by the early '76 the
14 documents are given to us, the FBI knew very much what
15 had happened to Anna Mae Aquash. And knew she was in
16 Denver, knew that she had been taken to Denver, knew
17 where in South Dakota she was taken. And these documents
18 have already been made public as the Government said.
19 Once the FOIA documents are provided, they're public so
20 they're in the public domain. So I don't -- Your Honor,
21 if you would like I can submit these documents to you so
22 you can see for yourself how detailed the investigative
23 material has already been released to the public. And
24 the FBI can't choose we're going to release it to some
25 people and we're not going to release it to others.

1 Where Mr. Peltier's name was smeared in the Arlo Looking
2 Cloud trial and he continues to be smeared wrongfully in
3 connection with the Anna Mae Aquash murder and I reviewed
4 the documents that were made public and there's no
5 involvement by Mr. Peltier. And it's just not correct
6 that they reveal some of the documents, documents as Mr.
7 Hendricks said and you'll see in his book very shortly,
8 detailed what the FBI knew and when and how early they
9 knew it.

10 THE COURT: You may submit that there's about
11 179 pages?

12 MR. BACHRACH: No, those were public at one
13 point and then were taken out of the reading room.
14 There's about 200 documents that are involved in the
15 investigation that Mr. Hendricks provided to me that I
16 could provide to the Court.

17 THE COURT: Now, those are the same documents
18 that the Government is willing to disclose?

19 MS. NORONHA: Your Honor, we have already
20 disclosed them to Mr. Peltier, yes.

21 THE COURT: Okay.

22 MR. BACHRACH: No, they haven't. Because we
23 have gone through all the documents that they've
24 disclosed and there are many more documents that I
25 received from Mr. Hendricks than were disclosed to us by

1 the FBI.

2 THE COURT: Well, you'll need to sit down and
3 meet and confer and compare those documents together.

4 MR. BACHRACH: Okay, Your Honor.

5 THE COURT: But in the meantime, yes, you may
6 submit those documents to me with an affidavit swearing
7 that those are the actual documents and I will compare
8 them then to the sample that the Government gave me to
9 see if there's justification for the Government's
10 position that they're going to withhold these documents.

11 MR. BACHRACH: Thank you, Your Honor, I'll be
12 able to get that to you probably within a week and-a-half
13 because I'm going to have to get back to my office and
14 make sure Mr. Hendricks is available to sign an affidavit
15 that this is what he received. Is that --

16 THE COURT: That's acceptable.

17 MR. BACHRACH: Thank you, Your Honor. And
18 then just briefly -- and then just briefly with respect
19 to the informant issue, Your Honor. We submitted in our
20 briefs there's more than speculation. It's well
21 documented by the circuit the conduct the FBI engaged in.
22 We don't expect that you'd find after the fact as the FBI
23 wrote in its document, they're not going to in Mr.
24 Peltier's trial write that this informant told them this
25 or this informant was involved with the legal defense

1 team. That's why it's important that we know the names
2 and the sources because there were many members of the
3 American Indian Movement who were involved and became
4 part of the defense team and would meet with the lawyers
5 and meet with Mr. Peltier in connection with his defense.
6 And had we suspected or known that they were informants,
7 they certainly wouldn't have been invited in. And they
8 certainly wouldn't have been discussed the issues. And
9 as we know, Mr. Durham who was a known informant, we know
10 that he was involved in connection with the extradition.
11 So balancing Mr. Peltier's rights after all these years
12 and balancing the right to a fair trial, which is the
13 cornerstone of this country, to deprive us of the
14 information which could further show injustice in this
15 case, Your Honor, would be just wrong. And so if you
16 have no other questions. Mr. Kuzma would like to make
17 one other point.

18 THE COURT: Fine, thank you. Mr. Kuzma.

19 MR. KUZMA: Your Honor, if I may Judge
20 William M. Skretny did not review the same documents that
21 have been submitted to this Court. In fact, the only
22 document that was at issue in the Western District was a
23 July 7, 1975 teletype, it was from the Buffalo field
24 office and that was directed to the director of the FBI
25 as well Richard G. Held who was the special agent in

1 charge of Pine Ridge Indian Reservation. It was a
2 three-page teletype. I have a copy. Unfortunately I
3 didn't bring that file with me.

4 THE COURT: I think it is attached.

5 MR. KUZMA: Judge Skretny did not order an
6 in-camera inspection of that document. He upheld the
7 Government's claim of Exemption under the various
8 subparts of B7 without conducting the in-camera
9 inspection. I would also note the Government's alleging
10 that many of these documents may have been generated
11 after the time of Mr. Peltier's trial in 1977. However,
12 the overwhelming majority of documents I reviewed were
13 generated shortly before or after the June 26, 1975 fire
14 flight.

15 And one final point that I forgot to raise
16 during my opening argument, Myrtle Poor Bear who was the
17 individual provided the three affidavits that were used
18 to have Mr. Peltier extradited from Canada to the United
19 States passed away last year. It's Myrtle Poor Bear
20 Salas, S-a-l-a-s. And a quick search of Family
21 Search.org or the social security index would prove that
22 Miss Poor Bear is now deceased and I would ask or request
23 that the Court or the Government on its own release any
24 and all documents relating to Myrtle Poor Bear contained
25 in the Leonard Peltier and/or RESMURS files. Thank you.

1 THE COURT: Thank you. Was the Government
2 aware that Miss Poor Bear had passed away?

3 MS. NORONHA: Your Honor, I don't have that
4 information at this time, but I could look it up and get
5 back to you on that.

6 THE COURT: If you would get back to me on
7 that. If she has died, I would like to know whether the
8 Government is willing to release those extradition
9 related orders. A week and-a-half on that, would that
10 work for you?

11 MS. NORONHA: I'm sorry?

12 THE COURT: A week and-a-half?

13 MS. NORONHA: Yes. Thank you.

14 THE COURT: Okay.

15 MR. BACHRACH: I would request that the Court
16 direct the Government not to destroy any files relating
17 to Myrtle Poor Bear. It's been our experience, for
18 example, with the New York City field office we submitted
19 a FOIA request in November of 2002. The Government
20 claimed that the files were missing; that they were
21 somewhere in the building but they couldn't find these
22 files. I was just notified that they've given up on
23 looking for these New York City files.

24 Now, with respect to the Portland, Oregon,
25 the FBI initially told us they had no files relating to

1 Leonard Peltier's or RESMURS. They later said oops, they
2 found them, and later then they said they lost them and I
3 would ask the Court to direct given the FBI's history of
4 shenanigans with respect to the RESMURS files and the
5 Leonard Pelter files, the Court direct the FBI or
6 Government not to destroy any records relating to Myrtle
7 Poor Bear given the Government's history of record loss
8 and destruction in this case.

9 THE COURT: What is the Minneapolis and
10 Chicago field office's document retention policy?

11 MS. NORONHA: Your Honor, I don't have that
12 information at this time. I will say once a FOIA request
13 is filed, the documents are put in a separate area so
14 they're not destroyed. Any question regarding the
15 legality of the retention policies not associated with
16 FOIA. The FOIA is only concerned with the documents that
17 are in the possession of the agency at the time the
18 request is made. Any of Plaintiff's allegations
19 regarding any document destruction are appropriate under
20 the Federal Records Act which is a separate statute.

21 THE COURT: Can I assume if you segregated
22 the FOIA documents they would include the Poor Bear
23 documents and until this litigation is resolved they
24 would not be destroyed?

25 MS. NORONHA: Your Honor, when a initial FOIA

1 request was made, a search was conducted for the words
2 Leonard Peltier as a search term. And any document which
3 came up in the electronic searches which we presented in
4 detail to Your Honor in our declarations, those files
5 would then have been put aside. I am not sure if all the
6 of the Myrtle Poor Bear files would have been responsive
7 to Leonard Peltier FOIA request. If they were then they
8 would be been put aside.

9 THE COURT: In any event, any Poor Bear files
10 that currently exist in the FOIA group will not be
11 destroyed; is that right? In fact, no documents will be
12 destroyed until the litigation is resolved.

13 MS. NORONHA: That is correct, Your Honor.

14 THE COURT: Anything further?

15 MR. BACHRACH: Nothing.

16 THE COURT: This matter will be taken under
17 advisement. Court is adjourned.

18 (Concluded at 11:00 a.m.)

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24 DATED: _____

25 Mara Yackel, Court Reporter