

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Leonard Peltier,

Civil No. 02-4328 (DWF/SRN)

Plaintiff,

v.

ORDER AND MEMORANDUM

Federal Bureau of Investigation,

Defendant.

Barry A. Bachrach, Esq., Bowditch & Dewey; and Michael Kuzma, Esq., Michael Kuzma, Esq.,
counsel for Plaintiff.

Elizabeth J. Shapiro, Esq., and Preeya M. Noronha, Esq., U.S. Department of Justice, counsel for
Defendant.

This matter is before the Court upon Plaintiff's appeal of Magistrate Judge Susan Richard Nelson's Order dated January 11, 2005. Magistrate Judge Nelson issued an order on August 15, 2003, concerning Plaintiff's motion for a *Vaughn* index and Defendant's motion for a stay of proceedings. The August 15, 2003, Order addressed the processing of Plaintiff's FOIA requests. In that Order, Magistrate Judge Nelson directed that the processing of documents requested from the Minneapolis FBI Field Office would begin not later than December 2004 and would be completed by December 2005, as Defendant has represented to the Court. (*See* Magistrate Judge Nelson's Order of August 15, 2003, at page 15.) Finally, Magistrate Judge Nelson ordered the Defendant to submit progress reports to the Court every four months from the date of the Order until the completion of its processing of Plaintiff's documents. Plaintiff now asserts that the Defendant has not acted in good faith

in producing documents. (Letter of January 6, 2005, from Barry A. Bachrach and Michael Kuzman to Magistrate Judge Nelson.)

Magistrate Judge Nelson construed Plaintiff's January 6, 2005, correspondence as a letter requesting a motion to reconsider her prior Order of August 15, 2003, pursuant to L.R. 7.1(g). Magistrate Judge Nelson filed an Order on January 11, 2005, concluding that there were no compelling circumstances as required by L.R. 7.1(g) and, accordingly, denied Plaintiff's motion for reconsideration. The Defendant opposes Plaintiff's appeal.

The Court must modify or set aside any portion of the Magistrate Judge's order found to be clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); Local Rule 72.1(b)(2). This is an "extremely deferential standard." *Reko v. Creative Promotions, Inc.*, 70 F. Supp. 2d 1005, 1007 (D. Minn. 1999). "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Chakales v. Comm'r of Internal Revenue*, 79 F.3d 726, 728 (8th Cir. 1996) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Based upon the presentations of the parties, including the parties' written submissions; the Court having reviewed the contents of the procedural history and the Court's file in this matter; the Court being otherwise duly advised in the premises; and for the reasons stated in the Memorandum below, the Court hereby enters the following:

ORDER

1. The Court hereby sets this matter for oral argument to address the following issues:

a. The procedural status of the case and the current schedule for release of documents from the Minneapolis Field Office between the date of this Order and December 2005;

b. The lack of communication between Plaintiff's and Defendant's counsel regarding what documents are already in Plaintiff's possession. For example, a review of the criminal docket for *United States v. Leonard Peltier*, No. C77-3003 (D. N.D.), will reveal that both parties were getting daily copies of the trial transcript back in 1977 during the 27-day trial. Moreover, that same review of the criminal docket reveals that on June 13, 1977, the court reporter filed all 24 volumes for the 27-day trial, not one page of which was sealed.

The parties shall contact Lowell Lindquist (651-848-1296), Calendar Clerk for the undersigned, to set a hearing date. The Court contemplates no more than a 15-minute argument by each party, which will be preceded by an in-chambers conference with counsel to discuss all issues with respect to resolving all FOIA issues related to the documents at the Minneapolis Field Office of the FBI. No additional briefing should be necessary.

Dated: March 21, 2005

s/Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court

MEMORANDUM

The Court is curious to learn why it took more than a day or two to process trial transcripts that, to this day, are available to any member of the public. In less than one hour of inquiry, the Court determined that the parties had received daily transcripts for every day of the Leonard Peltier trial. In addition to the daily transcript, the entire transcript was filed in June 1977 and remains available to this day. A review of the docket by this Court shows that no part of the trial proceedings was sealed. The Court is at a loss to understand the legal basis for the FBI's decision to sequester 144 pages from a public trial transcript.¹ On the date of the hearing, the Court will inquire of counsel as to what level of communication, both oral and written, there has been between the parties with respect to the necessity of releasing documents that everyone is already in possession of.

This case has had a procedural life of its own for nearly 30 years. Hopefully, the conduct of the lawyers has not exacerbated that controversial procedural history. The Court assumes that there is an explanation for the conflict at issue here. Whatever that explanation may be, the Court will await any argument and explanation from counsel and then attempt to resolve all issues with respect to the remaining documents.

D.W.F.

¹ The record before the Court is unclear as to whether the trial transcripts from *United States v. Butler* and *United States v. Robideau* (also public trial transcripts) are included within the "over 5,000 pages of court transcripts."