

**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.

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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.

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The above-entitled matter is before the undersigned United States District Judge pursuant to Plaintiff Leonard Peltier's appeal of Magistrate Judge Susan Richard Nelson's Order dated January 11, 2005.

Magistrate Judge Nelson issued an order on August 15, 2003, denying Plaintiff's motion for a *Vaughn* index and granting Defendant's motion for a stay of proceedings. The August 15, 2003, Order also addressed the processing of Plaintiff's FOIA requests. 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, consistent with Defendant's representations to the Court. (*See* August 15, 2003, Order at 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. The background of this matter is set forth in the Magistrate Judge's August 15, 2003, Order and is incorporated herein for purposes of this motion.

Plaintiff now asserts that Defendant has not acted in good faith in producing documents. (*See* Letter of January 6, 2005, from Barry A. Bachrach and Michael Kuzma to Magistrate Judge Nelson.) Magistrate Judge Nelson construed Plaintiff's January 6, 2005, correspondence as a letter requesting a motion to reconsider the August 15, 2003, Order pursuant to L.R. 7.1(g). In an Order dated January 11, 2005, Magistrate Judge Nelson concluded that there were no compelling circumstances as required by L.R. 7.1(g) and, accordingly, denied Plaintiff's request for reconsideration. Plaintiff has appealed from the January 11, 2005, Order. 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. Plaintiff's request for leave to file a motion to reconsider is **DENIED**.
2. Consistent with Magistrate Judge Susan Richard Nelson's Order dated

August 15, 2003, Defendant is hereby ordered to complete the release of all documents requested by Plaintiff from the Minneapolis Field Office by December 1, 2005.

Dated: April 26, 2005

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

**MEMORANDUM**

In an order dated August 15, 2003, Magistrate Judge Nelson ordered that the FBI commence releasing documents from the Minneapolis Field Office in December 2004, and release the documents in 60-day intervals. (*See* August 15, 2003, Order at 15.) The FBI has produced its first round of documents, purportedly in compliance with this order. However, Plaintiff contends that the FBI has not acted in good faith and due diligence in producing such documents. Specifically, Plaintiff challenges the withholding of 144 pages of the first release of public trial transcripts. The FBI asserts that these documents were withheld pursuant to Exemption (b)(5)<sup>1</sup> because they contained conversations outside

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<sup>1</sup> The Court assumes that the FBI is referring to the provisions of 5 U.S.C. § 552(b)(5), which provides that an agency need not make public "inter-agency or intra-agency memorandums or (continued...)"

the hearing of the jury, and “the FBI had no practicable method for determining whether these pages were ever released to the public.” (*See* Defendant’s Response to Appellee’s Brief by Federal Bureau of Investigation at Ex. B.)

Although the FBI may technically be in compliance with the Magistrate Judge’s order, the Court is unsatisfied with the FBI’s explanation for withholding the 144 pages. As noted in this Court’s previous Order, this Court was able to determine in less than one hour of inquiry that the parties had received daily transcripts for every day of the Leonard Peltier trial, and that such transcripts were entirely available to the public and unsealed. (*See* March 21, 2005, Order at 4.) A “practicable method” to determine whether such documents were publicly accessible (also known as due diligence) may have involved a quick phone call to the Clerk’s Office, but clearly this was not done. Whether this sequestration of pages was the result of the FBI’s lack of resources or ineptitude, it is inexcusable and will not be tolerated again by this Court.

The Court also questions Defendant’s contention that Plaintiff has no real method of recourse, because Plaintiff is “already at the front of the line” in the queue. (*See* Defendant’s Response to Appellee’s Brief by Federal Bureau of Investigation at Ex. B.) Defendant has not defined the “front of the line.” It is not clear to the Court whether such status even implies that more than one FBI staff member is “processing” Plaintiff’s request, now that it has reached the front of the FBI’s processing queue. Magistrate Judge Nelson relied on the good faith of the FBI when she ordered the FBI to

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<sup>1</sup>(...continued)

letters which would not be available by law to a party other than an agency in litigation with the agency.”

release documents according to the schedule set forth in her August 15, 2003, Order. The FBI is mistaken if it believes that there is no further relief that the Court can grant to Plaintiff, as the Court is fully prepared to order an expedited release schedule if it is demonstrated, again, that the FBI has not acted in good faith.

Magistrate Judge Nelson's order fully contemplates that the FBI complete the release of all documents from the Minneapolis field office by December 2005, consistent with representations made by Defendant. (*See* August 15, 2003, Order at 15.) It is with this structure in mind that the Court specifies that such releases be completed in full by December 1, 2005.

Finally, Plaintiff asserts that two categories of documents—Subfile N and the Anna Mae Aquash file—are known to be in dispute, and that the FBI is aware that it does not intend to release these documents. At oral argument, counsel for the FBI represented that the FBI has not yet decided whether these documents will be made available. The FBI further implied that it need not release any information as to whether these documents will be released until it has completed its release of documents and, subsequently, its *Vaughn* index. The Court finds that due diligence would require the FBI to notify Plaintiff as soon as a determination is made with regard to whether these allegedly critical documents will be released. As soon as the Court is made aware of the FBI's decision as to these documents, the Court will order a briefing schedule to expedite the matter.

D.W.F.