

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUTHAM NEWS,

Plaintiff,

v.

U. S. IMMIGRATION AND NATURALIZATION
SERVICE, ET AL.,

Defendants.

CIVIL ACTION NUMBER
85-2721

DECLARATION OF JOHN M. OSCADAL

I, John M. Oscadal, hereby declare as follows:

(1) I am a Special Agent (SA) of the Federal Bureau of Investigation (FBI), and am currently assigned as a SA-Attorney to the FBI's Legal Counsel Division (LCD), specifically, the Information and Privacy Acts Litigation Unit (IPALU).

(2) IPALU is the operational unit within LCD responsible for Freedom of Information and Privacy Acts (FOIPA) litigation in which the FBI is a party. SA-Attorneys assigned to handle FOIPA litigation are responsible for the preparation of litigation and status reports, the monitoring of the litigation until such time as the litigation is entirely resolved or the FBI ceases to be a litigant, coordination with assigned Department of Justice (DOJ) attorneys to full representation of FBI interests, and coordination with other FBI personnel assigned to the operational Divisions (i.e., Records Management (RMD) and Identification Divisions) to insure compliance with DOJ requests/instructions and Court Orders. Additionally, the SA-Attorneys assigned to IPALU are responsible for representing the FBI before the Merit Systems Protection Board

and formal hearings conducted by Equal Employment Opportunity (EEO) Administrative Judges during the intra-agency adjudication process of administrative EEO complaints.

(3) I have been assigned to IPALU, LCD since August, 1985 and in the normal course of my duties I was assigned to handle the captioned Freedom of Information Act (FOIA) litigation on August 30, 1985. As part of my responsibilities and duties in this particular litigation I prepared a litigation report for use by the assigned Assistant United States Attorney (AUSA), Robert Eaton. The FBI's litigation report dated September 23, 1985 described and explained the factual and legal background of the lawsuit and suggested appropriate legal defenses to be undertaken. My duties and responsibilities further entailed conveying AUSA Eaton's requests/instructions as well as the Court's Orders to appropriate personnel in the FBI's RMD responsible for the release of responsive agency records or the submission of responsive declarations to the Court. At all times relevant to the proceedings in the instant case, the FBI responded in a timely fashion to the requests/instructions of AUSA Eaton and the Court's Orders^{1/} except for the matter of a partial release of information which was the subject of the Court's September 29, 1987 Memorandum and January 26, 1988 Order. The information from Agency

1. During the course of the captioned litigation spanning approximately three years both the plaintiff and the defendants have requested, both individually and jointly, extensions of time in which to comply and/or respond to the Court's Orders. As to each of those instances the defendants noticed the Court of the need for further time in order to respond to the Court's Order, an extension of time was granted by the Court and defendants thereafter timely responded or complied with the Court's Order.

records ordered released by the Court's January 26, 1988 Order consisting of the identities or identifying information about FBI clerical personnel was released to plaintiff on May 31, 1988. See, Attachment A, FBI letter to plaintiff dated May 31, 1988. This release complies with the Court's January 26, 1988 Order and the representation made to the Court in defendants' Supplemental Memorandum to the Court on May 16, 1988. A factual description of the actions taken by the FBI as well as the reasons and legal bases for such actions follow in compliance with the Court's Order to show cause issued on May 20, 1988.

(4) On September 29, 1987, the Court granted in part and denied in part the defendants' motion for summary judgment. As regards FBI records, the Court denied the FBI's withholding of information pertaining to the "identities of clerical personnel or other federal government employees who handled administrative tasks related to official investigations" pursuant to FOIA Exemption (b)(7)(C). A copy of the Court's Order was forwarded by AUSA Eaton to me, and I in turn notified Supervisory Special Agent (SSA) John L. Mencer of the FBI's RMD, and provided him with a copy of the Court's decision. SSA Mencer is the RMD case agent assigned to the captioned litigation. At the time of our initial discussion of the Court's September 29, 1987 Order, SSA Mencer advised me that the FBI would take the appropriate action in response to the Court's Order pertaining to the plaintiff's request for a fee waiver within the mandated twenty day period. However, as regards the partial denial of defendants' motion for summary judgment (i.e., Exemption (b)(7)(C) and the withholding of identifying information pertaining to non-agent

personnel), SSA Mencer advised that the FBI should seek reconsideration from the Court. In formulating the FBI's response to the plaintiff's fee waiver request in compliance with the Court's Order of September 29, 1987, AUSA Eaton was advised by me, and I believe SSA Mencer, that it was the FBI's intention to seek reconsideration of the Exemption (b) (7) (C) ruling of the Court's Order. During my discussions with both SSA Mencer and AUSA Eaton, the filing and content of pleadings regarding a petition for reconsideration were not specifically discussed.

(5) Subsequent to the FBI's response to plaintiff's fee waiver request and the Court's rejection of the FBI's position as set forth in the Court's November 9, 1987 Order, there was consideration of an appeal. However, after comments were received from the FBI's LCD and RMD, the U.S. Attorney's Office for the District of Columbia, the Office of Information and Privacy, Office of Legal Policy, DOJ and the Federal Programs Branch, Civil Division, DOJ, the Appellate Staff, Civil Division, DOJ determined that no appeal should be taken. A motion to dismiss the appeal of the Court's November 9, 1987 ruling relative to the FBI's fee waiver decision was filed with the Court on or about January 19, 1988. The Court granted defendants' motion to dismiss their appeal on January 21, 1988.

(6) In addition to the resolution of the plaintiff's fee waiver request, the FBI also responded to the Court's September 29, 1987 Order as it pertained to an additional search for a specific agency record. The multi-page document was located and released to plaintiff on March 11, 1988 in compliance with the Court's January 26, 1988 Order.

(7) On January 26, 1988, in response to plaintiff's motion for release of agency records and preparation of Vaughn indices, the Court ordered, inter alia, the release of agency records which were the subject of the Court's September 29, 1987 Memorandum, as well as the filing of a Vaughn indices justifying claims of exemptions for records not released^{2/} and declarations describing the searches ordered by the Court on September 29, 1987. On February 23, 1988, SSA Mencer executed a declaration which was later filed with the Court. This declaration described the actions already taken and to be taken by the FBI in compliance with the Court's September 29, 1987, November 9, 1987 and January 26, 1988 Orders.^{3/} In addition to explaining what further actions had to be taken by the FBI as well as the need for an extension of time, SSA Mencer's declaration raised the matter of the FBI's intention to seek the Court's reconsideration of its September 29, 1987 ordered disclosure of the identities of FBI clerical personnel and/or other Federal Government personnel. While clearly not satisfying the requirements of Rule 52(b) and/or 59(e) of the Fed. R. Civ. P. for seeking a motion for reconsideration, or a stay of the Court's Orders, it was the FBI's intent to supplement the pleadings to be filed in response to the Court's January 26, 1988 Order and seek

2. The Vaughn indices were to address withheld Agency records located as a result of new searches ordered by the Court on September 29, 1987 and subject to the fee waiver granted by the Court on November 9, 1987.

3. On March 25, 1988 an additional declaration was executed by SSA Philip W. Thomas, Classification and Appeals and Affidavits Unit, RMD, FBI in response to the Court's January 26, 1988 Order. The declaration was later filed with the Court and responded to the Court's Order for a Vaughn index as regards agency records withheld pursuant to Exemption (b)(1).

reconsideration on this particular issue. By error and oversight the pleadings filed in response to the Court's January 26, 1988 Order failed to seek reconsideration, certification for appeal or a stay of the Court's Order to release the information in issue. Due to these procedural errors and oversight, not the least of which was Agency counsel's failure to discover the delinquency, the error was not corrected and the situation, wherein there was neither compliance with the Court's Order of January 26, 1988 nor relief sought from the Order, was perpetuated.

(8) Inasmuch as the described delinquency was neither noted nor corrected by Agency or assigned counsel, the subsequent declaration executed by SSA Mencer on March 28, 1988 and filed with the Court also was not supported by appropriate pleadings on the matter to seek reconsideration of the Court's Orders. This was so despite arguments on the issue put forth in SSA Mencer's March 28, 1988 declaration. As a result of the defendants' error and neglect to properly focus on the matter, in particular the procedural requirements, the motion to seek reconsideration was not filed until April 14, 1988.

(9) In response to the Court's May 9, 1988 demand for an explanation for defendants' failure to comply with the Court's September 29, 1987 Order requiring release of identifying information as previously described, the defendants by memorandum to the Court dated May 12, 1988 explained that the matter of the Court's ruling regarding Exemption (b)(7)(C) was thoroughly considered, and reconsideration was intended to be timely sought but subject to other priorities. Our memorandum of explanation, of

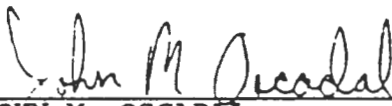
course, was also in error as it overlooked the Court's January 26, 1988 Order which voided the arguments and position put forth in our April 14, 1988 motion for reconsideration. The arguments made to the court by defendants' May 12, 1988 memorandum in defense of the motion for reconsideration, however, were honestly, albeit erroneously, placed. The neglect on the defendants' part, particularly that of assigned and Agency counsel, was the cause of the confusion and error. However, there was never any intention, let alone a decision on the part of defendants, to ignore any of the Court's Orders. To the contrary, timely efforts were made to comply with the Court's Orders, and but for the defendants' failings on this particular aspect of the case, the record evidences due diligence on the part of both the defendants and plaintiff to resolve the issues before the Court.

(10) In direct response to the Court's Order of May 20, 1988, it is admitted that the defendants in this case did commit error, and notwithstanding the fact that such error has delayed the resolution of the case, it must also be stated that it was never the defendants' intention to ignore the Court's Orders or otherwise cause an affront to the Court, or to employ dilatory tactics to avoid the defendants' responsibilities in the matter. The Supplemental Memorandum to the Court filed on May 16, 1988 by AUSA Eaton correctly describes the errors made and the reasons for the actions taken by the defendants. Moreover, it properly places the defendants' intent and failure to correctly focus on the Court's January 26, 1988 Order in proper perspective.

(11) There is by necessity a division of labor between the different personnel assigned to represent the varied interests of the defendant government agencies, and while Agency counsel must defer to the experience, knowledge and function of the assigned counsel, such deferral and deference does not obviate the responsibility of Agency counsel. Accordingly, as Agency counsel, I am also responsible for the errors committed and the inconvenience caused, but emphatically state to the Court that such actions were the result of omission and error and not the result of conduct intended to ignore or offend the Court, or to avoid the defendants' legal obligations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on June 2, 1988.



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