

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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| SOUTHAM NEWS,                           | ) |                              |
|   | ) |                              |
| Plaintiff,                              | ) |                              |
|   | ) |                              |
| v.                                      | ) | Civil Action No. 85-2721 HHG |
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|   | ) |                              |
| UNITED STATES IMMIGRATION &             | ) |                              |
| NATURALIZATION SERVICE, <u>et al.</u> , | ) |                              |
|   | ) |                              |
| Defendants.                             | ) |                              |
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DECLARATION

I, ROBERT E.L. EATON, JR., am an Assistant United States Attorney and have been in this position since March, 1970. Since January, 1978, I have been assigned to the Civil Division of the United States Attorney's Office. I make the following representations based on personal knowledge or my best recollection of facts pertinent to this proceeding.

1. I have been, since the inception of this litigation, counsel of record on behalf of the several agencies named as defendants in this FOIA action.

2. On September 29, 1987, the Court issued a lengthy Memorandum and Order which ruled on the multiple issues raised by defendants' motion for summary judgment and plaintiff's motion for partial summary judgment.

3. Among the matters addressed in that decision, was the necessity for several of the defendants, including the FBI, State Department, the Justice Department and the INS, to conduct additional searches for records responsive to plaintiff's FOIA

request. In addition, the FBI was given twenty (20) days to decide whether or not to grant plaintiff's request for a waiver of search and processing fees, on which, following an earlier preliminary denial, no final decision had been made 1/ In addition in view of a change in the fee waiver provisions of FOIA, and revised agency generated criteria, since that preliminary decision, I felt that early attention to this matter by the FBI was mandatory. Finally, of pertinence here, this Court granted in part and denied in part of the FBI's motion for summary judgment on its claim of FOIA Exemption (b) (7) (C). Specifically, while the Court found it applicable to the identities of Special Agents it was inapplicable to information that would serve to identify clerical employees. No order for the release of this material was provided in the September Memorandum, in contrast with the Court's later Order of January 26, 1988.

4. Following receipt of that Memorandum and Order, my initial task as counsel was to assure that all defendant agencies were provided with copies so that each agency representative would be aware of the rulings that affected his or her agency. This was accomplished in the normal manner by having my secretary make the appropriate number of copies and mail them to each of those representatives. Shortly thereafter, telephonic contact

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1/ In particular, the FBI was given 20 days within which to show cause why the plaintiff's fee waiver request should not be granted.

was made by me to particular counsel at those agencies faced with immediate or specific obligations imposed by the Court's September, 1987 Order. Among these contacts was that made with FBI counsel with respect to the determination of plaintiff's fee waiver request, which was thereafter submitted in a timely fashion, as well as those counsel at agencies where additional searches for records would be taking place. Even though no such schedule was set forth in that Order, I advised each such agency representative that at some point each would be called upon to describe those additional searches and set forth the justification for any withholding of material retrieved as a result.

5. It was the considered belief of counsel, including those with whom I later consulted within my office, such as Assistant United States Attorney R. Craig Lawrence, the Civil Division's Appellate Counsel, that the September, 1987 decision was interlocutory in nature in view of the numerous issues and claims which remained outstanding with its issuance. More specifically, I and FBI counsel believed that reconsideration of the (b) (7) (C) issue could be deferred to a later time, in view of the clear applicability of Rule 54 to that decision. In view of the number of claims left unresolved, we felt that that Rule allowed for "revision", which might be sought by either the plaintiff or the defendants, prior to the entry of a final judgment adjudicating all the claims and rights and liabilities of the parties. In the Memorandum I drafted and filed on May 12, 1988, relevant authority was cited for the applicability of Rule 54 to the

Court's September decision. E.g., Rudd Construction Equipment Co. v. Home Insurance Co., 711 F.2d 54 (6th Cir. 1983); Kane Gas Light and Heating Co. v. Pennzoil Co., 587 F.2d 910, 911 (W.D. Pa. 1984). My notes reveal a discussion with Mr. Lawrence regarding the additional citation to Tolson v. United States, 732 F.2d 998 (D.C. Cir. 1984), although it was not included in the final draft of the Memorandum.

6. Such consultations again took place after the Court issued, on November 9, 1987, an Order finding that the FBI had not adequately justified its decision to deny plaintiff a request for waiver of fees. Specifically, a determination had to be made, within the time allowed, as to whether or not to appeal the November 9 Order. While a Notice of Appeal was eventually filed, we moved to dismiss that appeal on January 19, 1988. However, at no time did our view as to the interlocutory nature of the September, 1987 Order change.

7. It was in this mid-Winter time frame, inclusive of the holiday season, that I was in frequent communication with respective agency counsel regarding the progress of the additional searches called for by the September Order. And, as I had expected, a motion was filed by plaintiff calling for a schedule for submission of Vaughn affidavits reflective of the results of those searches as well as the release of materials on which the Court had granted the plaintiff partial summary judgment in its September Order. I did not oppose this motion for I shared the view that such a schedule should be set so that the litigation would move forward with the eventual resolution of

FOIA Exemption claims taken on material found as a result of these additional searches.

8. The Court issued such an Order on January 26, 1988. Following its receipt, I followed the same procedure as earlier described, in order that all affected agencies were advised of the schedule set by the Court. At some point after copies of this Order were sent to these agencies, my copy of the Order was either misfiled or lost. Thus while the record reflects that I continued to be aware of and focus on the schedule for the submission of Vaughn affidavits, initially reflective of the searches that had taken place, and ultimately of the additional withholding of materials so discovered, I inadvertently lost track of that aspect of the Order calling for release of the FBI material for which the Court had granted partial summary judgment in September, 1987. In addition, although I had some conversations with plaintiff's counsel in this time frame relative to the submission of these affidavits, I do not recall any mention being made by plaintiff's counsel of the need to release the FBI material at issue.

9. With the several Vaughn affidavits completed and filed by the beginning of March, I, in conjunction with FBI counsel, set about the task of drafting a motion for reconsideration of that portion of the Court's September, 1987 decision relating to its Exemption (b)(7)(C) claim for the identities of clerical employees. That motion, filed on April 14, 1988, was based on what in our view was established case law finding the Exemption applicable to such employees, as well as the recent amendments to

Exemption 7, which had taken place since the filing of our motion for summary judgment.

10. At a status call the following day, the Court, inter alia, questioned the basis for our motion, which plaintiff's counsel had not yet received, indicating a belief that the basis for the motion to reconsider was solely the FOIA amendments. The remainder of the hearing focused on continuing obligations of INS. Following an opposition to our motion by plaintiff, we submitted a reply thereto, emphasising the broad-based support for seeking reconsideration of the Court's ruling that Exemption (7) (C) was not applicable to the FBI's clerical employees. I note that not only had I lost track of the January 26 Order, but plaintiff in its opposition to our motion to reconsider failed to mention that Order, arguing only that our motion for reconsideration should have been filed within ten days of the issuance of the September decision and that the FOIA amendments did not support reconsideration of that decision.

11. At a status call on May 9, 1988, set to determine INS compliance with certain matters, the Court questioned the basis for the FBI's noncompliance with the Court's decision granting the plaintiff partial summary judgment. I responded to the Court's inquiry by stating the position, continuously held with respect to the Court's September, 1987 decision, that it was interlocutory and as such was subject to revision by the Court pursuant to Rule 54(b) of the Rules of Civil Procedure. In response to a demand of the Court, I then drafted a Memorandum, filed some three days later, in which we explained that the

amenability of the September decision to Rule 54(b) reconsideration was a general consensus of counsel and those FBI officials involved in the litigation. I stated in that Memorandum that no one individual was at any time responsible for a decision "not to comply" with the Court's September, 1987 decision.


12. During the preparation and final reviews of that Memorandum, however, a question was raised by John D. Bates, Chief of Civil Division of the U.S. Attorney's Office, whether there had ever been a subsequent Order entered which imposed a specific obligation on the part of the FBI to release materials which were the subject of the September decision. Finding no such order in my file, I called agency counsel to whom it would have been sent and learned from FBI counsel that, indeed, such an Order issued on January 26, 1988. When I learned telephonically the contents of that release provision, I immediately informed my superiors in the Civil Division. Promptly thereafter, it was determined that we likely had been in error and as a result I drafted and filed a Supplemental Memorandum withdrawing the papers reflective of our Rule 54(b) motion to reconsider and the initial Memorandum to the Court. In this Supplemental Memorandum, I correctly described the error as inadvertent neglect of counsel. Quite simply, had I recalled and been aware of the release provisions of the January 26 Order, and its implications for finality and appealability, the motion for reconsideration would not have been filed. I regret this oversight, not only because it contributed to the nonrelease of

material ordered released in late January, but also because it dealt with an issue about which the FBI and its employees feel strongly.

13. In conclusion, I was not party to, nor am I aware of, any conscious decision to avoid compliance with the Court's January 26, 1988 Order and I have been assured that all materials required to be released therein have now been released to the plaintiff.

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

June 2, 1988  
DATE

  
ROBERT E.L. EATON, JR.  
Assistant United States Attorney