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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY	.	
INFORMATION CENTER	.	
Plaintiff,	.	
vs.	.	Docket No. CV 19-810-RBW
	.	
UNITED STATES DEPARTMENT	.	Washington, D.C.
OF JUSTICE	.	
	.	Friday, August 9, 2019
Defendant.	.	
.x	2:32 p.m.

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE SENIOR JUDGE REGGIE B. WALTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: John L. Davisson, Esquire
 Marc Rotenberg, Esquire
 ELECTRONIC PRIVACY INFORMATION CENTER
 1718 Connecticut Avenue, NW
 Suite 200
 Washington, DC 20009

For the Defendant: Courtney Danielle Enlow, Trial Attorney
 Elizabeth J. Spariro, Trial Attorney
 U.S. DEPARTMENT OF JUSTICE
 Civil Division, Federal Programs Branch
 1100 L Street, NW
 Washington, DC 20530

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Court Reporter: Cathryn J. Jones, RPR
Official Court Reporter
Room 6521, U.S. District Court
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Proceedings recorded by machine shorthand, transcript
produced by computer-aided transcription.

P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Your Honor, this afternoon this
3 is In re: Electronic Privacy Information Center versus U.S.
4 Department of Justice, Civil Action 19-810.

5 Ask the parties to step forward and identify
6 yourselves for the record, please.

7 MR. DAVISSON: John Davisson for the Electronic
8 Privacy Information Center. With me at counsel table is
9 Mr. Marc Rotenberg.

10 MS. ENLOW: Good afternoon, your Honor, Courtney
11 Enlow for the Department of Justice. With me at counsel
12 table is Elizabeth Shapiro.

13 THE COURT: Good afternoon. Has the government at
14 this point completed its search to determine how many
15 responsive documents there may be?

16 MS. ENLOW: Yes, Your Honor, and according to the
17 Court's order, OIP completed its searches as required and
18 yesterday issued a response letter to the plaintiffs
19 explaining the results of those searches. And for the
20 majority of them there are no responsive records, and for
21 one there is a small discrete set of responsive records. So
22 we conferred with counsel this morning for EPIC to reach a
23 settlement in this matter.

24 Unfortunately, the parties weren't able to come to
25 a complete agreement. The government would propose

1 September 12th as a date to respond to the remaining
2 requests, process, and release the documents with
3 appropriate redactions. And then after that date a week
4 later the parties could file post-joint schedule for
5 proposed further proceedings in this matter.

6 And I would propose September 12th for a few
7 reasons, your Honor. The first is that as I previously
8 notified the Court I'm out of the office the next two weeks.
9 And second, OIP needs some time to do the appropriate
10 consultations with others in the department before we can
11 release the records.

12 THE COURT: What's the plaintiff's position?

13 MR. DAVISSON: Your Honor, with respect to the 17
14 pages we believe three weeks is an appropriate turnaround.
15 This Court ordered the government, the DOJ in particular to
16 produce 750 pages a month in prior expedited FOIA cases.

17 THE COURT: I would tend to agree, but what about
18 the fact she's going to be on vacation for two weeks?

19 MR. DAVISSON: Well that still allows two weeks
20 for the OIP to conduct its review of the 17 pages and an
21 addition week for counsel to be present in the office.

22 THE COURT: Okay. Anything else?

23 MR. DAVISSON: Yes, Your Honor. I want to
24 underscore that EPIC has very serious concerns at the moment
25 about the sufficiency of the agency's search. We, the

1 number of responsive records simply is not commensurate with
2 the scope of EPIC's request, which was quite broad. We
3 covered seven different categories of records. Five of them
4 explicitly contemplated by the Special Counsel's
5 regulations. And given the exceptional urgency of this case
6 and as Your Honor has said the need to expeditiously compel
7 the disclosure of records to the public, we think it would
8 be appropriate for the Court to order the agency to produce
9 an affidavit at the time of production setting forth the
10 methodology of the search that was conducted.

11 The agency again has identified 17 pages allegedly
12 responsive to EPIC's request, and we think that raises real
13 questions about whether the agency has impermissibly
14 narrowed its search and whether the DOJ has adequately
15 inventoried what I call the voluminous records that it
16 received from the Special Counsel.

17 In particular Category 6, Category 6 calls for all
18 reports, recommendations and other compilations of
19 information prepared for the eventual consideration of one
20 or more members of Congress. That describes the Mueller
21 report. And we know for a fact that from the record that
22 Special Counsel Mueller intended the, at a minimal the
23 executive summaries and the introductions to that report to
24 be transmitted to Congress. Yet the agency is saying that
25 Category 6 has no responsive records, so we view this as a

1 canary in the coal mine that suggests that the agency is not
2 actually, properly scoping the searches for responsive
3 records.

4 MS. ENLOW: Your Honor, a couple of points. First
5 is that right now is not really the appropriate time to talk
6 about the scope of the agency's search. If EPIC intends to
7 challenge the scope of the search we propose that after OIP
8 processes the 17 pages of records and we release it to EPIC
9 then we come up with a briefing schedule to not do this
10 piecemeal, to just have one motion for summary judgment from
11 the government and EPIC if they choose to cross move,
12 describing the appropriateness of the redactions of those 17
13 pages of documents. If EPIC so chooses to challenge that as
14 well as the adequacy of the search and at that point we
15 would, of course, submit a detailed declaration explaining
16 the search that was done.

17 With regard to this one category of records that
18 counsel mentioned I mean again, I would say this is not the
19 appropriate forum since we haven't briefed the issue at all.
20 But I would note that the request itself cites to a case,
21 and that case specifically talks about Grand Jury reports.
22 And so it's entirely plausible that the scope of the search
23 is adequate given that EPIC self-narrowed its request in
24 such a way. But again, I think the most appropriate forum
25 for this is summary judgment briefing if EPIC does choose to

1 challenge the adequacy of the search.

2 THE COURT: I mean that's normally how we do it.
3 Why would we deviate from that normal process?

4 MR. DAVISSON: Well, Your Honor, this is a unique
5 case, so it is exceptionally urgent that the records
6 requested be made available to the public and to EPIC as
7 Your Honor has acknowledged in previous proceedings in this
8 case.

9 I do want to say that EPIC narrowed the scope of
10 its request at the urging of the DOJ because initially the
11 DOJ had told us that we were unable to -- sorry, the request
12 rather would cover too broad a universe of records
13 essentially all of the records in the Special Counsel's
14 office. And so we worked with the DOJ to attempt to narrow
15 that scope, and now we are told that there are only 17
16 records responsive. This is sort of not the reasonable
17 universe of records that the narrowing of the search that
18 EPIC undertook was meant to encompass.

19 I did want to add that also in this case given the
20 urgency of the case on the current record EPIC would I can
21 say with certainty would move for summary judgment to
22 challenge the adequacy of the agency search. So we either
23 have to conduct, to draft that affidavit now, or we'll have
24 to draft it later at the motion for summary judgment stage,
25 but for drafts and now there's at least a chance that

1 extraneous briefing can be avoided if the agency can
2 demonstrate through that affidavit that in fact it did
3 conduct a reasonable search. Thank you.

4 MS. ENLOW: Just to briefly respond, Your Honor.
5 The affidavit as the Court is aware goes hand-in-hand with
6 the motion for summary judgment. It simply doesn't make
7 sense to have the agency draft it now and give it to them in
8 three weeks time when soon thereafter if EPIC still chooses
9 to challenge the search we could just brief summary judgment
10 and file the affidavit with it.

11 I'd also like to point out that again I'm out of
12 the office for two weeks, and that would only leave the week
13 I get back to somehow coordinate this declaration, which
14 again, I would urge the Court to simply follow the normal
15 course of things and let us file summary judgment motion
16 with the declaration attached. And at that point if EPIC
17 sees a declaration and then says okay, we think the search
18 is adequate they certainly don't have to oppose the
19 government's motion for summary judgment.

20 THE COURT: How many additional cases -- I assume
21 you only work on FOIA cases?

22 MS. ENLOW: No, Your Honor, I don't.

23 THE COURT: How many additional cases do you have
24 that you have to work on that you'll have to deal with when
25 you come back from vacation?

1 MS. ENLOW: So I'm on the transgender military
2 service cases as well, which are extremely busy with
3 discovery and discovery motions this month and quite frankly
4 through the fall. That's my main priority. I have other
5 FOIA cases. I have border patrol cases. It's not a light
6 docket at all I can assure you.

7 THE COURT: Okay. I think the key as to whether I
8 would accede to what's being requested regarding an
9 affidavit regarding the scope of the nature or methodology
10 of this search being provided at the time they would produce
11 the responsive records, or not produce them based upon they
12 believe they're exempt I guess, I do agree it's an important
13 case to try and move along, but on the other hand, I just
14 don't see how the proposal by the plaintiff would in some
15 way expedite that.

16 I'll do the best I can to get it resolved as
17 quickly as possible, but I think probably the most prudent
18 way is to maintain the normal way in which we process these
19 cases, so I won't require that an affidavit be submitted
20 until such time as the government files its motion for
21 summary judgment.

22 MS. ENLOW: Thank you, Your Honor.

23 THE COURT: Okay. So I'll agree with the
24 government. It's unfortunate we have the lapse of time, but
25 vacations are a part of life and I can't considering the

1 other obligations counsel has I think the 12th is a
2 reasonable date for the government to provide responsive
3 documents, or to not do so based upon the fact that they
4 believe they're exempt. And then I'll require the parties
5 to submit a proposed schedule on the 19th of September and
6 then we'll do the best we can to set a schedule so to try
7 and get this resolved on the summary judgment motions as
8 quickly as possible.

9 I'd ask counsel, I'm in Pittsburgh that week in
10 trial, but I guess we could actually on the 20th, we could
11 probably do a, so that we can move this along, because I may
12 be in Pittsburgh the following week also for at least some
13 portion of that time. So we can set this for September 20th
14 at noon for a hearing in which -- well, we'll set that date
15 the 20th at noon if the parties can't agree to a schedule so
16 the parties can consult and submit a proposed schedule on
17 the 19th. If you all agree with that being an appropriate
18 schedule, fine we won't have to have the hearing on the
19 20th. But I'll have to do it through teleconference because
20 like I say I'll be in Pittsburgh presiding over a criminal
21 case that date. We'll set it for 12 o'clock noon assuming
22 that's necessary.

23 And once we receive that proposed schedule then
24 I'll give a date of when I would try my best to try and get
25 this resolved; although, it's going to be hard because I've

1 got so much on my agenda here and in Pittsburgh, but I'll
2 get it done as quickly as I can. Anything else? Thank you.

3 [Thereupon, the proceedings adjourned at 2:43
4 p.m.]

5 CERTIFICATE

6 I, Cathryn J. Jones, an Official Court Reporter
7 for the United States District Court of the District of
8 Columbia, do hereby certify that I reported, by machine
9 shorthand, the proceedings had and testimony adduced in the
10 above case.

11 I further certify that the foregoing 10 pages
12 constitute the official transcript of said proceedings as
13 transcribed from my machine shorthand notes.

14 In witness whereof, I have hereto subscribed my
15 name, this the 4th day of September, 2019.

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18 /s/_Cathryn J. Jones
19 Cathryn J. Jones, RPR
20 Official Court Reporter
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<p>MR. DAVISSON: [5] 3/6 4/12 4/18 4/22 7/3 MS. ENLOW: [7] 3/9 3/15 6/3 8/3 8/21 8/25 9/21 THE COURT: [9] 3/12 4/11 4/16 4/21 7/1 8/19 8/22 9/6 9/22 THE DEPUTY CLERK: [1] 3/1</p>	<p>adjourned [1] 11/3 affidavit [7] 5/9 7/23 8/2 8/5 8/10 9/9 9/19 after [2] 4/3 6/7 afternoon [3] 3/2 3/10 3/13 again [5] 5/11 6/18 6/24 8/11 8/14 agency [8] 5/8 5/11 5/13 5/24 6/1 7/22 8/1 8/7 agency's [2] 4/25 6/6 agenda [1] 11/1 agree [5] 4/17 9/12 9/23 10/15 10/17 agreement [1] 3/25 aided [1] 2/7 all [5] 5/17 6/19 7/13 9/6 10/17 allegedly [1] 5/11 allows [1] 4/19 along [2] 9/13 10/11 also [3] 7/19 8/11 10/12 although [1] 10/25 Anything [2] 4/22 11/2 APPEARANCES [1] 1/12 appropriate [8] 4/3 4/9 4/14 5/8 6/5 6/19 6/24 10/17 appropriateness [1] 6/12 are [5] 3/20 7/15 7/15 9/2 9/25 as [19] ask [2] 3/5 10/9 assume [1] 8/20 assuming [1] 10/21 assure [1] 9/6 attached [1] 8/16 attempt [1] 7/14 Attorney [2] 1/17 1/17 August [1] 1/6 available [1] 7/6 Avenue [2] 1/14 2/2 avoided [1] 8/1 aware [1] 8/5</p>	<p>cases [8] 4/16 8/20 8/21 8/23 9/2 9/5 9/5 9/19 categories [1] 5/3 category [4] 5/17 5/17 5/25 6/17 Cathryn [4] 2/1 11/6 11/17 11/18 CENTER [4] 1/3 1/14 3/3 3/8 certainly [1] 8/18 certainty [1] 7/21 CERTIFICATE [1] 11/5 certify [2] 11/8 11/11 challenge [5] 6/7 6/13 7/1 7/22 8/9 chance [1] 7/25 choose [2] 6/11 6/25 chooses [2] 6/13 8/8 cites [1] 6/20 Civil [2] 1/18 3/4 coal [1] 6/1 COLUMBIA [2] 1/2 11/8 come [3] 3/24 6/9 8/25 commensurate [1] 5/1 compel [1] 5/6 compilations [1] 5/18 complete [1] 3/25 completed [2] 3/14 3/17 computer [1] 2/7 computer-aided [1] 2/7 concerns [1] 4/24 conduct [3] 4/20 7/23 8/3 conducted [1] 5/10 CONFERENCE [1] 1/9 conferred [1] 3/22 Congress [2] 5/20 5/24 Connecticut [1] 1/14 consideration [1] 5/19 considering [1] 9/25 constitute [1] 11/12 Constitution [1] 2/2 consult [1] 10/16 consultations [1] 4/10 contemplated [1] 5/4 coordinate [1] 8/13 could [4] 4/4 8/9 10/10 10/10 counsel [9] 3/8 3/11 3/22 4/21 5/16 5/22 6/18 10/1 10/9 Counsel's [2] 5/4 7/13 couple [1] 6/4 course [2] 6/15 8/15 COURT [12] Court's [1] 3/17 Courtney [2] 1/17 3/10 cover [1] 7/12 covered [1] 5/3 criminal [1] 10/20 cross [1] 6/11 current [1] 7/20 CV [1] 1/4</p>
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