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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

* * * * *	)	
JASON LEOPOLD, et al.,	)	Civil Action
	)	No. 19-957
Plaintiffs,	)	
	)	
vs.	)	
	)	
U.S. DEPARTMENT OF JUSTICE,	)	
et al.,	)	Washington, DC
	)	April 16, 2019
Defendants.	)	2:04 p.m.
	)	
* * * * *	)	

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE REGGIE B. WALTON,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	MATTHEW TOPIC, ESQ. LOEVY & LOEVY 311 North Aberdeen Street Third Floor Chicago Illinois 60607
FOR THE DEFENDANT:	COURTNEY ENLOW, ESQ. U.S. DEPARTMENT OF JUSTICE CIVIL DIVISION, FEDERAL PROGRAMS BRANCH 1100 L Street, Northwest Washington, DC 20005
REPORTED BY:	LISA EDWARDS, RDR, CRR Official Court Reporter United States District Court for the District of Columbia 333 Constitution Avenue, NW Room 6706 Washington, DC 20001 (202) 354-3269

1 THE COURTROOM DEPUTY: This is Civil Action  
2 19-957, Jason Leopold versus the U.S. Department of Justice,  
3 et al.

4 Counsel, please step forward to the podium and  
5 state your appearances for the record.

6 MR. TOPIC: Good afternoon, your Honor. Matt  
7 Topic. I represent the Plaintiffs, BuzzFeed and Jason  
8 Leopold.

9 THE COURT: Good afternoon.

10 MS. ENLOW: Good afternoon, your Honor. Courtney  
11 Enlow on behalf of the Department of Justice.

12 THE COURT: Good afternoon.

13 Counsel for the Plaintiff, you're seeking  
14 injunctive relief. I had a similar case last week or the  
15 week before last where similar relief was being requested.  
16 I concluded there that there had been no showing of  
17 irreparable harm.

18 And I don't know, obviously, what the Attorney  
19 General's going to release on Thursday. But it seems to me  
20 it's somewhat premature for me to conclude at this point  
21 that what is being produced is not going to be consistent  
22 with what production should be under FOIA.

23 But I'll hear from counsel as to why emergency  
24 relief should be granted in this case in light of the fact  
25 that something will come from the Department of Justice, as

1 I understand, Thursday morning.

2 MR. TOPIC: Should I step up?

3 THE COURT: Yes.

4 MR. TOPIC: Thank you.

5 Your Honor, I'll focus then on the irreparable  
6 harm point.

7 THE COURT: Yes.

8 MR. TOPIC: Under our view of the statute -- and I  
9 don't think we've really seen anything to the contrary from  
10 the Government -- April 18th would be the deadline under  
11 FOIA to produce the report. The question is whether it's  
12 practicable to do so.

13 And the Government has not put forth any  
14 explanation why it could not release the report under FOIA.  
15 It's substantially the same time that the Attorney General  
16 releases the report.

17 They've said that they're expecting it to be the  
18 same, but there won't be any real difference between what  
19 the Attorney General releases and what would be released  
20 under FOIA.

21 The reason it matters is that if we have a delay  
22 to getting the FOIA response, it potentially delays  
23 ultimately adjudicating the redactions that the Attorney  
24 General has already identified.

25 We intend to challenge those. We don't think the

1 Government will be able to prove that all the redactions are  
2 proper. We don't know yet, you know, what that response is  
3 going to be; and obviously, we will have to look at it.

4 But the longer we wait to get the FOIA response,  
5 the longer potentially we have to wait to move the substance  
6 of the case forward. And especially this report, this  
7 historical context, the fact that every day there's more and  
8 more things said by the President and members of Congress  
9 and the President's attorney about this report and what it  
10 shows and its origins and whether it was improper.

11 Any delay, we think, would be irreparable harm.

12 At the very least, your Honor, what we would ask  
13 is that you order them to produce whatever they're going to  
14 produce under FOIA by the ten-day extended deadline, which  
15 would be essentially May 2nd. That would be right around  
16 the time their answer would be due. And as a result, we  
17 would not have any delay in moving the litigation forward.

18 They certainly haven't shown exceptional  
19 circumstances or any reason why it wouldn't be practicable  
20 to produce the report at least by that time.

21 THE COURT: Now, are you seeking anything other  
22 than the report?

23 MR. TOPIC: This case is limited only to the  
24 Mueller report.

25 THE COURT: Only to the -- not associated

1 documents or anything of that nature?

2 MR. TOPIC: Correct.

3 THE COURT: Just the report itself?

4 MR. TOPIC: Correct.

5 I think that's an important difference between  
6 this case and the *Epic* case, is we're not dealing here with  
7 a lot of other records that might take more time to process.  
8 We're only talking about the report. And all indications  
9 from the Government are that whatever is produced under FOIA  
10 is going to be the same as what's coming out this Thursday.

11 It's a question, then, of whether it's practicable  
12 to release it Thursday, you know, Friday. Even if it's a  
13 little bit longer than that, it's fine. Our main concern is  
14 we don't want the ultimate cross-motions for summary  
15 judgment that are likely to be filed to be delayed while  
16 we're waiting.

17 And as it stands right now, the Government claims  
18 it can take an open-ended extension with no specific  
19 deadline in mind as to when it has to produce the report,  
20 which again they've said is likely to be exactly the same  
21 version as is being released.

22 So that's the irreparable harm that we're hoping  
23 to avoid, is to not slow down the case while we're waiting  
24 unreasonably for the report to be released under FOIA.

25 THE COURT: Government?

1 MS. ENLOW: Your Honor, we're here on a  
2 preliminary injunction. That's an extraordinary remedy to  
3 be sparingly exercised.

4 And there's a high burden on the Plaintiffs to  
5 show they're entitled to preliminary injunction, especially  
6 for an injunction of this sort, where the order -- there  
7 would be an order of mandatory relief to order the  
8 Department of Justice to do something.

9 They simply cannot meet that high burden for the  
10 exact same reason that *Epic* couldn't meet that high burden.

11 Plaintiffs simply do not identify or even get  
12 close to establishing irreparable harm here. This is  
13 particularly true in light of the Department's anticipated  
14 release of the redacted report on Thursday morning.

15 THE COURT: Do you have any idea whether the  
16 Department's going to take the position that what is  
17 released on Thursday is consistent with what would be  
18 released pursuant to a FOIA request?

19 MS. ENLOW: I do not, your Honor.

20 And for that reason, exactly as the Court ordered  
21 in *Epic*, the report should come out. The parties can  
22 evaluate where they are. And then if this case is  
23 consolidated with the *Epic* case, the parties can come to the  
24 Court on May 2nd and we can give the Court a better sense of  
25 the timing of this.

1           Simply waiting, as Plaintiffs' counsel stated,  
2           that is certainly not the basis for irreparable harm. It is  
3           a very high bar. They simply have not met it. They cannot  
4           possibly be harmed, let alone irreparably, from waiting a  
5           little bit longer to have the FOIA exemptions rather than  
6           the explanations the Attorney General has stated are going  
7           to be on the report.

8           Simply waiting for those exemption numbers is  
9           certainly not irreparably harming Plaintiffs.

10           In addition, I can address the so-called statutory  
11           violation, if the Court would like.

12           So that, first of all, is not a basis for  
13           irreparable harm. That would go to the likelihood of  
14           success on the merits. And the Plaintiffs can't establish  
15           that either.

16           The FOIA statute says that the Agency has 20 days  
17           to make a determination, not process and release the  
18           documents, but just a determination, on the FOIA request.

19           And the *Crew* case from the DC Circuit stated that  
20           a determination is different from processing and releasing  
21           documents. The determination is simply a response to the  
22           Plaintiffs, saying the scope of the responsive documents and  
23           the exemptions that might be taken.

24           In addition, even if it was the law that the  
25           Government had to process and release the document within 20

1 days, which it's not, OIP has stated it needs the ten extra  
2 days for the -- because this case involves unusual  
3 circumstances. And so that would even push us even beyond  
4 April 18th. It would push us somewhere into May.

5 Again, it is not the law that any kind of  
6 violation of this deadline to give a determination means  
7 that the Agency has to produce the documents under FOIA.

8 THE COURT: So it's a determination of what?

9 MS. ENLOW: It's a determination of a FOIA  
10 request, to determine whether or not there are responsive  
11 documents to it and what exemptions might be taken.

12 The Crew case specifically states that, that it's  
13 different from processing and releasing documents.

14 THE COURT: So on the 2nd of May, you believe  
15 you'll be in a position to articulate whether what has not  
16 been produced is, in fact, protected from production under  
17 one of the exemptions?

18 MS. ENLOW: Your Honor, I can't give you a  
19 timeline -- the Court a timeline on that at the moment.

20 OIP has stated it's not practicable to actually  
21 produce the document within the time the report may be  
22 released to the public.

23 But in any event, even if the Agency doesn't meet  
24 the statutory processing deadline, all it gets the  
25 Plaintiffs is the ability to come into court and then have



1 the Agency not be able to say that their case is barred by  
2 the administrative exhaustion defense.

3 So Plaintiffs cannot establish -- certainly cannot  
4 establish irreparable harm, certainly also cannot establish  
5 likelihood of success on the merits here.

6 And for those reasons, the Court should deny the  
7 Plaintiffs' case, consolidate this -- deny the Plaintiffs'  
8 motion; excuse me -- consolidate this with *Epic* and order  
9 the Plaintiffs to appear at the status hearing on May 2nd,  
10 when we already have the hearing set with *Epic*.

11 THE COURT: Any response to that?

12 I guess one of the concerns I have is, again, I  
13 don't know what the Department is going to release. And  
14 obviously, the Government's going to have to represent  
15 sometime in the near future whether what's been released is  
16 what they believe they would have an obligation to release  
17 under FOIA.

18 And then it seems to me we're at a stage where we  
19 would be in a position to immediately have the Government --  
20 I don't know how long it will take, but it shouldn't take  
21 long -- to indicate exactly under which exemptions to the  
22 statute they believe the withholdings have been  
23 appropriately made.

24 And it seems to me least in reference to -- if  
25 there is consolidation -- and I have issued an order for the

1 parties to respond to whether there should be  
2 consolidation -- and it seems to me at least to the extent  
3 that *Epic* and in this case there's a request for the  
4 production of the report, that at least those issues should  
5 be consolidated as far as the other documents that *Epic*'s  
6 requesting that's not being requested here. That's a  
7 different issue.

8 But it seems to me that we would be able to move  
9 this case along fairly quickly on summary judgment filings  
10 as they relate to the report itself, since I would assume,  
11 at least to a significant degree, if not totally, the  
12 Government will be taking the position that what has been  
13 withheld from what's going to be released on Thursday is  
14 consistent with what would be withheld under FOIA.

15 MR. TOPIC: And according to their brief in this  
16 case, they are highly likely to be the same. There won't be  
17 a difference between what's -- there's not additional stuff  
18 that's likely to be produced under FOIA that the Attorney  
19 General wasn't already going to release.

20 In fact --

21 THE COURT: So I don't mean to cut you off.

22 MR. TOPIC: That's okay.

23 THE COURT: But I think in addition to the issue  
24 of whether you can make a showing of irreparable harm, which  
25 I think it's fairly difficult at this point to do that, I

1 think it's also difficult for me to assess whether there's a  
2 substantial likelihood of success on the merits since we  
3 don't know at this point exactly what is going to be  
4 produced on Thursday.

5 And while I would hope the Government is as  
6 transparent as it can be, obviously, because a lot of the  
7 proceedings conducted by Mr. Mueller were conducted before  
8 the grand jury, then obviously there are going to be some  
9 6(e) issues; and there may be some other issues because  
10 there are pending cases in other jurisdictions, I guess, and  
11 maybe in this Court also, that it may be appropriate to  
12 withhold information regarding those pending matters.

13 But again, I don't know exactly what the  
14 Government's going to withhold and to what extent they're  
15 going to take the position that what they've withheld as of  
16 Thursday is consistent with what they believe they can  
17 withhold under FOIA.

18 MR. TOPIC: Yes.

19 And, your Honor, we're not arguing at this  
20 juncture that there's a likelihood of success that the  
21 entire report without redactions would be released. We  
22 fully recognize there's going to be a process.

23 Our concern is: Can we get that process moving as  
24 quickly as possible or, more to the point, as the statute  
25 says, as soon as practicable?

1           THE COURT:  And my inclination in that regard --  
2           as I said before, I would hope the Government would be in a  
3           position to at least preliminarily indicate on the 2nd of  
4           May when we come back in *Epic* -- and I'd be bringing this  
5           case back at the same time -- to be able to represent  
6           whether they believe that their withholdings that have  
7           already been made as of Thursday are the same withholdings  
8           that they would assert under FOIA.

9           And then we can proceed with the submission of a  
10          *Vaughn* index, if that's necessary, and the production of  
11          summary judgment motions, at least as it relates to the  
12          report itself, and try and get that done as quickly as  
13          possible.

14          MR. TOPIC:  Yes.

15          Your Honor, if -- even if this wasn't an expedited  
16          processing case, if this was just a regular, non-expedited  
17          case, if they wanted to go beyond the additional ten days  
18          for an extension, then they'd have to show exceptional  
19          circumstances to your Honor anyway.

20          So I think maybe there's different ways we can get  
21          to the same path.  But what we're suggesting is that there  
22          should be a showing if they want to go beyond that date.  
23          Because it's an expedited case, they really should be making  
24          that showing at this point as to why it's not practicable to  
25          do that.

1           And we contend they have not, that they have not  
2           made that showing.

3           As to irreparable harm, I would just point out  
4           that there is a sliding scale still in the Circuit between  
5           the various factors. So even if you were to conclude that  
6           the harm maybe isn't the most significant, though we  
7           obviously think that it is, we think we're really strong on  
8           the likelihood of success and the public interest in  
9           disclosure, especially given that you have government  
10          officials all over the place talking about this report, what  
11          it shows, what it means.

12          The longer we go without actually being in a  
13          position to decide whether the redactions are appropriate,  
14          you know, the less the public can participate in that  
15          discourse.

16          So we certainly think it should move along  
17          quickly.

18          As to consolidation, we will file something by the  
19          deadline and hopefully a little bit sooner than that. You  
20          know, our concern just is that the resolution of the report  
21          not be slowed down --

22          THE COURT: No. I think clearly the report and  
23          the other documents that *Epic* is seeking -- that those two  
24          should be severed. And we'd be dealing separately with the  
25          report, since, as I said, you know, as of Thursday,

1 according to the Attorney General, there's going to be a  
2 release of at least a portion of the report.

3 So it seems to me that it's hard for me to  
4 appreciate why what's being released as of Thursday would  
5 not be basically, if not identical, to what would not be  
6 released pursuant to the Government's position under FOIA.

7 If that's the case -- and I would assume that  
8 would be the case -- then it seems to me we could be on a  
9 fast track to at least address the issue of the report  
10 itself.

11 MR. TOPIC: Very good.

12 And when we do that filing, I'll certainly keep  
13 those thoughts in mind.

14 THE COURT: I don't know. This is something for  
15 the Government to think about, I mean, how I'm going to be  
16 put in the best position to assess whether what the  
17 Government is representing by way of exemptions -- whether  
18 those allegations or representations should be credited.

19 I mean, obviously, there is a real concern as to  
20 whether there will be full transparency.

21 And I hate to say it, but unfortunately, you know,  
22 the Attorney General has created an environment that I think  
23 is going to cause a significant portion of the American  
24 public to be concerned about whether there is transparency.  
25 And that puts the Court, obviously, in a very difficult

1 situation. But I've dealt with difficult situations before.

2 And, you know, I am of the view that there's going  
3 to have to be some type of probing on my behalf as to  
4 whether or not appropriate redactions have been made. I  
5 don't know the best way to do that.

6 I mean, obviously, in a normal case, it's done by  
7 way of a *Vaughn* index and affidavits. And there have been  
8 several occasions where the Courts have had to do an  
9 in-camera inspection of the withheld documents to make an  
10 assessment as to whether or not the withholding of that  
11 information is appropriate under the statute.

12 And that's something we'll have to work through.  
13 But it's something I'll have to think about as to -- if  
14 there's a challenge to the propriety of the withholdings,  
15 you know, how do I best assess whether the Government's  
16 position is correct?

17 MR. TOPIC: Yes, indeed.

18 And I think all those tools that your Honor  
19 mentioned would be appropriate in this case.

20 I think most likely we would have cross-motions  
21 for summary judgment, hopefully on as expedited a schedule  
22 as we all can do. You may find when you look at the  
23 affidavits and especially given the magnitude of this report  
24 that this is a case where an in-camera inspection would be  
25 appropriate.

1 THE COURT: Okay. We're due back on the 2nd.

2 At this point, I'm going to have to conclude that  
3 I don't doubt that there's some harm, but I don't see it as  
4 irreparable harm, especially in light of the fact that  
5 there's going to be a release of something on Thursday.

6 And in addition, not knowing exactly what is going  
7 to be released on Thursday, I think I'm in a difficult  
8 position to assess whether there's substantial likelihood of  
9 success on the merits. I don't know what the Attorney  
10 General is going to submit and to what extent he's going to  
11 be transparent in reference to what he releases and what he  
12 feels he can release, considering all of the other things  
13 that are taking place in reference to the investigation that  
14 was conducted by Mr. Mueller.

15 So I will deny the motion for injunctive relief at  
16 this point and bring this case back at the same time *Epic*  
17 is.

18 I haven't made a decision on consolidation yet.  
19 But my thinking is, as I said before, at least in reference  
20 to the report that there is identical relief being requested  
21 by *Epic* and by the Plaintiff in this case; and therefore,  
22 consolidation -- rather than having cases on a different  
23 track, consolidation of the issues related to the report  
24 should be dealt with collectively.

25 And then obviously, the other documents that *Epic*



1 is dealing with, we would have to deal with on a separate  
2 track.

3 MR. TOPIC: Very good.

4 THE COURT: So what time are we due back on the  
5 2nd?

6 THE LAW CLERK: 10:00 a.m.

7 THE COURT: I'll see you back at 10:00 a.m. on the  
8 2nd.

9 I would ask Government counsel to do your best to  
10 obtain from the Attorney General's Office whether it is  
11 going to be the Government's position that what is released  
12 on Thursday is what it believes it has an obligation to  
13 release also pursuant to FOIA.

14 And if that can't be definitively indicated on the  
15 2nd, I will be obviously putting the case on a fast track  
16 for the Government to set forth the basis for the  
17 withholdings pursuant to FOIA so that we can proceed to get  
18 summary judgment briefing done and get this issue resolved  
19 as quickly as possible.

20 MR. TOPIC: Okay. Thank you, your Honor.

21 THE COURT: Thank you.

22 (Proceedings concluded.)  
23  
24  
25

**CERTIFICATE**

I, LISA EDWARDS, RDR, CRR, do hereby  
certify that the foregoing constitutes a true and accurate  
transcript of my stenographic notes, and is a full, true,  
and complete transcript of the proceedings produced to the  
best of my ability.

Dated this 16th day of April, 2019.

/s/ Lisa Edwards, RDR, CRR  
Official Court Reporter  
United States District Court for the  
District of Columbia  
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