

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JASON LEOPOLD

Plaintiff

Civil Action Nos.:
13-1324 and 14-048

v.

CENTRAL INTELLIGENCE AGENCY,
DEPT. OF JUSTICE, et al.,

Defendants

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AMERICAN CIVIL LIBERTIES UNION, et al.,

Plaintiffs,

v.

Civil Action No. 13-1870

CENTRAL INTELLIGENCE AGENCY, et al.,

Defendants

-----X

Washington, D.C.

Tuesday, October 7, 2014
9:35 A.M.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES E. BOASBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff Leopold: Jeffrey Louis Light, Esq.
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1 APPEARANCES: (Cont'd.)

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P R O C E E D I N G S

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2 THE DEPUTY CLERK: Your Honor, calling Civil Action
3 Number 13-1324, Jason Leopold versus the Department of
4 Justice, et al.; Case Number 13-1870, the American Civil
5 Liberties Union, et al., v. The Central Intelligence Agency,
6 et al.; Case Number 14-48, Jason Leopold versus the Central
7 Intelligence Agency; and 14-1056, Jason Leopold, et al. v.
8 the Central Intelligence Agency.

9 Counsel, will you please approach the podium and
10 identify yourselves for the record.

11 MR. LIGHT: Good morning, Your Honor, Jeffrey Light
12 on behalf of the plaintiff, Jason Leopold.

13 THE COURT: Good morning.

14 MS. SHAMSI: Good morning, Your Honor. Hina Shamsi
15 and Arthur Spitzer on behalf of the American Civil Liberties
16 Union.

17 THE COURT: Okay. Good morning to you folks.

18 MS. MEI: Good morning, Your Honor. Vesper Mei and
19 Elizabeth Shapiro from the Department of Justice on behalf of
20 all of the defendants.

21 THE COURT: Okay. Good morning to you ladies.

22 All right. So, I know there's been a motion to
23 extend the time. And, Ms. Mei, why don't you elaborate on
24 that.

25 MS. MEI: Your Honor, as you are aware, we

1 originally requested a one month extension until September
2 29th, which we did move for. The committee then requested an
3 additional extension and didn't provide a date by which we
4 should move until. So, therefore, we did move until October
5 29th to give ourselves an extra month.

6 We can't predict exactly when the discussions of
7 declassification will be completed. Obviously, that's not
8 completely in our control, but we have learned, and we don't
9 anticipate further extensions beyond October 29th. So we are
10 actually at this time prepared to set a briefing schedule,
11 assuming that everything will be released by the 29th.

12 THE COURT: Okay.

13 Ms. Shamsi, your position on that?

14 MS. SHAMSI: Your Honor, we had agreed to a one week
15 extension, and I felt we couldn't agree to more without
16 additional information about the status of negotiations, when
17 processing would be completed, and we weren't able to get
18 that information.

19 We also have a concern, as I had expressed to you
20 during the last status conference, Your Honor, about whether
21 or not the agencies did, in fact, possess the full updated
22 SSCI report which is the subject of one of our FOIA requests
23 and the second amended complaint. And we had asked the
24 Department of Justice to let us know whether, in fact,
25 agencies did possess those reports. We asked in June of this

1 summer and were told that, although it wasn't definitive, it
2 wasn't definitive whether, in fact, the agencies possessed
3 any updated version.

4 We asked again in July, August and then in
5 September. And in July, August and September, were told
6 that, in fact, no agencies possessed a full report and that
7 was based on agency's representations to the Department of
8 Justice. That representation was in addition, Your Honor,
9 made to you on September 4th.

10 We, as I had mentioned to you when we last met, Your
11 Honor, I just didn't think that that was plausible given
12 Senator Feinstein's letter to the executive branch in April,
13 intending the executive branch to -- intending for the
14 dissemination of the full report and for lessons to be
15 learned from that report.

16 We also didn't think it was plausible because the
17 full report is 6,000 pages long, and as a matter of common
18 sense, Your Honor, it just seems that CIA and other agencies
19 who are weighing in on the redaction of the summary would
20 want to have the full report.

21 And we then also came to learn through our
22 Washington legislative office that subsequent to the
23 September 4th hearing before this Court, and the
24 representations that were made, Senate staff directly urged
25 DOJ to, in fact, research two things: Whether the agencies

1 did have the full updated report; and two, what remaining
2 time was needed to complete the negotiations and release the
3 executive summary.

4 Just this morning, Your Honor, I understand from the
5 Department of Justice that the Central Intelligence Agency
6 does have the full report. I'll obviously let them speak for
7 themselves, but there's no explanation about when it received
8 the full report and why over the course of the summer we, and
9 then you, were told that it didn't have it.

10 We think this is fairly serious, Your Honor, because
11 in order for FOIA to function, the litigants and the courts
12 have to have faith that everyone is acting in good faith.

13 So therefore, Your Honor, I would ask for a couple
14 of things. One, renew my request for a declaration from the
15 agencies, including the CIA, about when they received the
16 full updated report. And when representations were made to
17 the Department of Justice to us and to the Court about
18 agencies not having it and why those representations were
19 made.

20 We think that's important because, Your Honor,
21 depending on the timing, obviously there's an issue of the
22 representations that were made, but also we could have been
23 moving forward in this case. A matter that is of tremendous
24 public significance about a Congressional investigation of
25 historic importance.

1 And then, Your Honor, at a minimum, we would ask you
2 to exercise your discretion and ensure that regardless of
3 when the agency received the full report, we are not required
4 to file an additional FOIA request, an additional amended
5 complaint so that we can proceed expeditiously on the actual
6 substantive issues that should be before the Court.

7 THE COURT: Okay. Thank you.

8 Ms. Mei, do you want to respond?

9 MS. MEI: Your Honor, I just want to correct one
10 thing, which is that none of the other defendant agencies
11 have yet received the full updated report. The CIA has. And
12 after the last status conference, we asked that CIA check for
13 the full report again, and they discovered that they did have
14 it. And there was a miscommunication apparently within the
15 agency as to what they were looking for. In fact, we have
16 learned that the report was conveyed on disk, which may
17 explain some of how 6,000 pages may have -- they didn't
18 realize that they had it.

19 With respect to the declaration from the agencies,
20 we don't think it's necessary. There was a miscommunication,
21 and for the merits of the case and for the agency record
22 issue, it doesn't matter when the report was found.

23 THE COURT: All right. And how about the second
24 issue about filing an additional amended complaint or an
25 additional FOIA request?

1 MS. MEI: I think we're prepared to move forward on
2 a briefing schedule and on the agency record issue without
3 requiring them to file a new FOIA request.

4 THE COURT: Okay. All right. So, what do you --
5 all right. So, Mr. Light, do you want to be heard on any of
6 these issues?

7 MR. LIGHT: Yes, Your Honor. I would echo the
8 ACLU's request as far as asking for a status update as to
9 where the negotiations are. And the most recent request for
10 extension of time, unlike the previous one, the Government
11 did not attach the letter from Senator Feinstein, which may
12 perhaps shed a little bit more detail on where we are.

13 FOIA doesn't include a provision that the Court
14 needs to wait on Senator Feinstein in order to be ready for
15 us to proceed forward. So we'd ask for a briefing schedule
16 to be set right away. And that any further request for
17 extension of time be looked upon with disfavor.

18 THE COURT: Okay. Well, what I'm going to do, I'm
19 not going to require a declaration. I think that, Ms.
20 Shamsi, that the representations you've now heard on the
21 record as opposed to just in private conversations with you
22 are sufficient to give the Government's account. And given
23 that I will also hold them to their agreement that you do not
24 need to file an additional amended complaint or an additional
25 FOIA request.

1 So let's set -- let's set briefing schedules then
2 based off of the October 29th date. So, Ms. Mei, do you have
3 a proposed schedule?

4 MS. MEI: We do, Your Honor. We could file a
5 motion -- or opening briefs on summary judgment by December
6 12th.

7 THE COURT: Okay. And -- all right. Then
8 Ms. Shamsi? I'm sorry, one second. So are you anticipating
9 filing separate ones in the three cases or one brief in the
10 consolidated? And again, they're different, somewhat
11 different requests.

12 MS. MEI: I think we will file separate briefs in
13 the three cases.

14 THE COURT: Okay. All right.

15 So, Ms. Shamsi.

16 MS. SHAMSI: Your Honor, if I may, just on the
17 question about the declaration if you -- just a couple of
18 points very briefly, which is that, DOJ was providing
19 representations from the agency. We don't know whether
20 those -- whether that was a miscommunication or a
21 misrepresentation. And, Your Honor, I don't think you have,
22 frankly, the record from the agency. And I'm not saying
23 anything with respect to DOJ. I am expressing concerns about
24 representations made to us and to the Court by the agencies
25 through the DOJ and whether there was a miscommunication or

1 not. And that is solely the issue when we're talking about a
2 6,000 page report, whether on CD or not, that has gripped the
3 nation's newspapers and public debate. I do think it is very
4 serious, Your Honor, and I would very much ask you to
5 reconsider your decision not to require a declaration, so
6 that the record is clear so that we know whether it was a
7 miscommunication or something else so that we may respond to
8 that, and you may decide whether any further action needs to
9 be taken, Your Honor.

10 THE COURT: But how would that affect the merits of
11 the case, since -- well, we've been holding it pending
12 declassification. So, if they had had it or not, if they'd
13 seen it or not seen it, how would that affect the merits?

14 MS. SHAMSI: Well, it would affect the posture and
15 the stance of the case, Your Honor, in this way, which is
16 that we've been seeking these reports since last year, since
17 2013. We've sought to move forward and to obtain
18 representations about the possession of the full report since
19 June of this year. And there is a fundamental importance in
20 FOIA that the public needs to have faith in the agencies
21 fulfilling their statutory obligations and doing so in good
22 faith themselves.

23 It would be important for us and the Court to know
24 whether or not each of the representations made on a monthly
25 basis over the course of the summer, that the full report was

1 not in the possession of the agencies, that meant that we did
2 not move forward on briefing expeditiously the matter of
3 whether this is an agency record or not. And, therefore, the
4 public release of that record, that is significant. It was
5 not just a day, it was multiple months over --

6 THE COURT: Well, but isn't that all -- and I
7 understand your point, but isn't it all mooted by the
8 declassification review?

9 MS. SHAMSI: No, Your Honor. Declassification
10 review are two separate things because under FOIA, there is
11 an independent obligation that this Court has to adjudicate
12 the merits of any basis for withholding, whether that's
13 agency record or exemptions themselves. The fact that we
14 have not been able to brief to you that you have not been
15 able to exercise your independent judgment, which is separate
16 from the declassification issue with respect to the executive
17 summary is, I think, significant.

18 THE COURT: Okay.

19 Ms. Mei, do you want to respond to that?

20 MS. MEI: Your Honor, I would just point out that
21 there is no pending FOIA request for the full updated SSCI
22 report at this time. We filed an answer saying that none of
23 the agencies had received the full updated version, and
24 there was an agreement by counsel that we would do our best
25 to check and see when the agencies received that full report.

1 So, we were doing this not because of some legal
2 obligation. We were doing this because we had agreed
3 informally with counsel to do this. And the agreement was
4 that, you know, I would -- we would check with the agency
5 contacts and they would see what they had. And obviously
6 there was a miscommunication. But again, that doesn't affect
7 the merits of the case.

8 THE COURT: Okay.

9 Ms. Shamsi, do you want to respond?

10 MS. SHAMSI: One final word, Your Honor. And that's
11 exactly the issue here, which is that we had asked for
12 certainty about whether or not that report had been provided
13 to the executive branch. We were told on a monthly basis
14 that it had not been received. And again, this is a case
15 that should not come as any surprise to any of the agencies
16 that we were seeking the full report.

17 We've been seeking the full report since last year.
18 If it turned out that the CIA had that report in July or
19 August or September when representations were made that the
20 CIA didn't have the report, then we do think that that is a
21 significant issue because it relates to the good faith of the
22 agency in compliance with statutory obligations.

23 THE COURT: All right. Just a second.

24 (There was a pause in the proceedings.)

25 THE COURT: Okay. Your request is certainly not an

1 unreasonable one, but I think it's not required in this case
2 given the Government's representations. And so I am going to
3 move forward and set a briefing schedule on the documents as
4 they are. So, they say they want to file December 12th. How
5 long do you need?

6 MS. SHAMSI: We think that they should file in
7 November, Your Honor, because this is a motion, again,
8 there's now been in our view, we don't know how much delay
9 there's been as a result of when the agency received the
10 record or not. This is not an issue that is new to the
11 agency. They've previously briefed the issue of agency
12 record. We don't think --

13 THE COURT: Well, I think that this would be more
14 than that. I mean, Ms. Mei, this is your summary judgment
15 briefing, which will relate to your search and exemptions and
16 everything, I trust. This isn't just a jurisdictional
17 question; right?

18 MS. MEI: Your Honor, for the full SSCI report, I
19 think it would be a jurisdictional question. For the other
20 parts of it, there would be obviously other arguments. But
21 yes, for the exemptions and the withholdings of the other
22 records.

23 MS. SHAMSI: So, Your Honor, we would urge a
24 November date. And as you've correctly pointed out, there is
25 a search issue here. And we might seek to renew the search

1 issue with respect to the CIA as briefing goes forward.

2 THE COURT: All right. I'm going to say December
3 5th. But the problem is if I do 30 days, that's
4 Thanksgiving, and I think that's not terribly appropriate.

5 So, Ms. Shamsi, I'll give you whatever time you
6 want. I know you want to move things along, so if you want
7 your opposition to be more quickly filed, fine. I know we've
8 got the holidays, so whatever you want, I'll accept.

9 Mr. Light, while she's checking her calendar, what's
10 your position for a date?

11 MR. LIGHT: First, Your Honor, you said December 5th
12 for the Government; correct?

13 THE COURT: Right, yes, uh-huh.

14 MR. LIGHT: We would actually ask that they have
15 until December 8. December 5th is a Friday. And our concern
16 is that if their due date is on a Friday, they're going to
17 release it in the evening when the public is not going to be
18 paying attention to it. Let's give them until the 8th. I
19 think they'll be happy to take until that date.

20 THE COURT: For their brief?

21 MR. LIGHT: For their summary judgment brief, I'll
22 give them an extra three days.

23 THE COURT: Okay. The 5th is fine. So what would
24 you like for yours?

25 MR. LIGHT: From the 5th, we could have our

1 opposition ready December 18th.

2 THE COURT: Ms. Shamsi, what -- again, I'll give you
3 what you want, depending on -- meaning your schedule and the
4 holidays, I'm happy to work with.

5 MS. SHAMSI: Yes, Your Honor, and thank you.
6 Because it's not just the holidays, we actually have two
7 other major briefs due during that time. I think we would
8 appreciate getting until January 9th, if the Government files
9 on the 5th, or January 12th, if the Government files on the
10 8th.

11 THE COURT: Okay. January 9th is fine.

12 And, Mr. Light, you can file early if you want, but
13 I'll give you until the same date.

14 And then are you expecting to file an opposition and
15 a cross-motion or just an opposition, Ms. Shamsi, if you
16 know?

17 MS. SHAMSI: Your Honor, I expect to file an
18 opposition and a cross-motion.

19 THE COURT: Okay. All right. So the Government's
20 reply and opposition, so then how is January 30th for your
21 reply and opposition?

22 MS. MEI: That will work.

23 THE COURT: All right. Then is February 14th good
24 for the plaintiffs for their rely, Mr. Light?

25 MR. LIGHT: I think February 14th is a Saturday.

1 THE COURT: I'm sorry, you're right. The 13th is
2 what I meant.

3 MR. LIGHT: That's fine.

4 THE COURT: Is that okay?

5 MR. LIGHT: Yes.

6 THE COURT: Great.

7 Ms. Shamsi, does that work for you?

8 MS. SHAMSI: It does, Your Honor.

9 THE COURT: Okay, good. So I'll memorialize these.
10 And I'll also memorialize the order that the ACLU is not
11 required to file an additional amended complaint or the usual
12 FOIA request.

13 All right. Any other issues then on these three
14 cases, Ms. Shamsi?

15 MS. SHAMSI: No, Your Honor.

16 THE COURT: Mr. Light?

17 MR. LIGHT: I wasn't clear. The dates that we were
18 just talking about, were those for all three cases or just
19 the SSCI report and the Panetta report?

20 THE COURT: I have expected they were for all three
21 cases, is what I understood.

22 MR. LIGHT: Okay.

23 THE COURT: Do you agree with that, Ms. Mei?

24 MS. MEI: Yes, Your Honor.

25 MR. LIGHT: Okay. The third case that relates to

1 the alleged CIA spying on the Senate computers doesn't
2 involve the same kind of factual interconnection --

3 THE COURT: Are you talking about the 1056 case?

4 MR. LIGHT: Right.

5 THE COURT: We will do that afterwards.

6 MR. LIGHT: Oh, okay.

7 THE COURT: Yeah, I'm sorry. The ones I was talking
8 about today, this hearing is just your two 13-24, 1870 and
9 48.

10 MR. LIGHT: Oh, those three. I thought you meant my
11 three.

12 THE COURT: No.

13 MR. LIGHT: All right. I understand that.

14 THE COURT: Okay. Thank you.

15 Ms. Mei, anything else?

16 MS. MEI: No, Your Honor.

17 THE COURT: All right. Thank you, folks. I
18 appreciate your patience and your diligence on this. We'll
19 look for the briefing.

20 Okay. Now let's call the 14-1056 case. So ACLU
21 counsel are excused, thank you.

22 MS. SHAMSI: Thank you.

23 THE COURT: I'll issue an order today memorializing
24 the schedule.

25 MS. SHAMSI: Thank you.

1 (Court adjourned in the above-entitled matter
2 at 10:00 a.m.)

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6 CERTIFICATE OF REPORTER

7 I, Lisa Walker Griffith, certify that the foregoing
8 is a correct transcript from the record of proceedings in the
9 above-entitled matter.
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15 Lisa Walker Griffith, RPR

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