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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH, :
 :
 Plaintiff, :CA No. 14-1611
 :
 v. :
 :
 DEPARTMENT OF DEFENSE :
 :
 Defendants. :

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE
Friday, November 21, 2014

APPEARANCES:

For the Plaintiff: GRANT F. SMITH
IRmep
P.O. Box 32041
Washington, D.C. 20007

For the Defendant: U.S. DEPARTMENT OF DEFENSE
BY: LAURA E. JENNINGS, ESQ.
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Proceedings reported by machine shorthand, transcript
produced by computer-aided transcription.

P R O C E E D I N G S

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THE COURT: Good morning.

MR. SMITH: Good morning.

DEPUTY CLERK: Your Honor, this is Civil Action 14-1611, Grant F. Smith v. Department of Defense. We have Mr. Smith, who is representing himself pro se. We have from the Department of Defense Laura Jennings, Mark Herrington, Jane Lyons.

THE COURT: Good morning. Thank you all for agreeing to come in on such short notice. And I would not normally do that except that I have some concerns about the pace at which this case is proceeding. I know that court cases occupy a substantial amount of time and resources for the government, and I know that all documents requested have reviewed, but I'm very concerned about a couple things.

One is that the government filed for an extension of time previously, and that motion was granted, and I gave the government time to file an answer. There is a procedure for these matters. There is a complaint, then there is an answer, then there's scheduling and motions, you know, dispositive motions.

An answer has not been filed in this case, and I reviewed the government's second motion for an enlargement of time. The answer was due yesterday, I believe, two

1 days ago. And the government on the very last day files a
2 motion for an enlargement of time and asks for time to
3 conduct a line-by-line review of the document to make a
4 final determination and then asks for an additional 30
5 days to allow a reasonable time to review the release, for
6 the plaintiff to review the release and determine whether
7 he's satisfied, at which point the Department of Defense
8 will move for summary judgment. That is putting the cart
9 ahead of the horse. There has not been an answer filed in
10 this case.

11 This is a 386-page document that has been
12 requested for some time, has been located, and I don't
13 understand why an answer hasn't been filed in this case.
14 An answer in this case should be a relatively simple
15 matter. And I am not inclined to give the government its
16 requested time to do what is a very simple task, which is
17 to file an answer.

18 So can the government please explain to me why
19 an answer hasn't been filed and why in its current motion
20 for an enlargement of time it is requesting time to do
21 things well in advance of the normal procedure in this
22 case, which is to file an answer.

23 MS. JENNINGS: Your Honor, this is Laura
24 Jennings. I represent the Department of Defense and a
25 Special Assistant U.S. attorney, and it certainly wasn't

1 our intention to circumvent the procedures in this case.
2 Our thought was that it would, in fact, expedite the
3 process. Instead of filing an answer and going through
4 briefing schedule to review -- we had thought that the
5 document, there was a possibility that we would be able to
6 at least, if not release the document in its entirety, in
7 part. And it was determined on the day that the answer,
8 our response was due that that was not the case, and we
9 thought that by being more transparent and coming forward
10 and presenting that -- we've located the document. We've
11 also become aware of these nondisclosure agreements that
12 apply. We'll need to now do a line-by-line review of the
13 document -- we'll do that within 30 days -- release
14 portions that we can to the plaintiff, have him review it
15 and then determine from there whether we'd like to go
16 forward. But with that said, we are happy to file an
17 answer in this case.

18 THE COURT: Well, I mean, that is a procedure.
19 You have filed a complaint, and I still haven't heard why
20 the government didn't file an answer in the time that I
21 gave it the last time an enlargement of time was requested
22 in which to file an answer. And I'd like to know what is
23 taking so long for a 386-page document. The document was
24 located some time ago.

25 I also have questions about this affidavit from

1 Mr. Mark Herrington. Can you tell me why -- and I'm
2 referring to his declaration, paragraph 2, what is the
3 relevance of the *Oleskey v. The Department of Defense* case
4 to this case. It's unclear to me.

5 MS. JENNINGS: Can I talk to him just a moment?

6 (Discussion held off the record.)

7 THE COURT: Do you mean -- you're also if you
8 want to approach. Just state your name for the record.

9 MR. HERRINGTON: Good morning, Your Honor. I am
10 Mark Herrington with the Department of Defense.

11 THE COURT: You're Mr. Herrington?

12 MR. HERRINGTON: I am.

13 THE COURT: Great.

14 MR. HERRINGTON: It's a classic problem of
15 trying to write a declaration quickly using an old one
16 from the *Oleskey* trial and not changing the jurat. I
17 apologize to the Court for that.

18 THE COURT: All right. I just was wondering if
19 there was something I missed in the complaint.

20 MR. HERRINGTON: No.

21 THE COURT: So it's an error in creating a
22 document.

23 MR. HERRINGTON: Right.

24 THE COURT: All right. So are you the ODC
25 counsel assigned to this case?

1 MR. HERRINGTON: To this case, yes, Your Honor.

2 THE COURT: All right. Can you tell me how
3 long -- how long has -- how long ago was this document
4 located?

5 MR. HERRINGTON: The document was located quite
6 a while ago. As far as my involvement in the case would
7 have been shortly after the complaint was filed.

8 THE COURT: Why hasn't it been reviewed?

9 MR. HERRINGTON: So the document was reviewed
10 and withheld in full under both the initial FOIA request
11 and then the appeal. Once it went into litigation is when
12 my office becomes involved. And I am not as convinced
13 that it has to be withheld in full, so trying to figure
14 out, understanding the plaintiff's complaints, that it is
15 a 386-page document that's over 25 years old and
16 unclassified, the idea that it has to be withheld in full,
17 I understand his complaint, so it is my job to convince
18 them not of statutes apply but what is truly defensible in
19 court, and so I am in that process now of reviewing the
20 document myself.

21 THE COURT: But Mr. Herrington, this case was
22 filed on September 23. We are talking about one document
23 that's 386 pages long. I've reviewed my share of
24 documents in my career. It should not take that long to
25 review that document and decide what needs to be redacted,

1 whether it needs to be withheld. But even before that,
2 that's -- again, that's jumping ahead of ourselves. An
3 answer -- and maybe that's where I need to speak to your
4 cocounsel here -- I understand maybe the government
5 thought it was somehow expediting matters by, you know,
6 proposing this, but the fact is the Court gave the
7 government time to file an answer. And we're not talking
8 about a long answer. We're not talking about a
9 complicated answer. We're talking about an answer that
10 the plaintiff, Mr. Smith, could then proceed and this case
11 could proceed in logical fashion. We find ourselves back
12 in court two days after the answer is due debating whether
13 to give an enlargement of time and talking about reviewing
14 a document and an answer still hasn't been filed.

15 So I guess my question is what's taking so long
16 in terms of reviewing this document and determining what
17 your decision is going to be about its disclosure.

18 MR. HERRINGTON: The Department of Defense, as
19 you know, Your Honor, is a gigantic bureaucratic machine,
20 and giving the decision-maker and identifying who it is
21 that can decide whether or not to release part or all of
22 the document took me quite a while. I believe I've
23 identified that person and now it is a matter of
24 describing to them the process of if you want to deny a
25 document this is what is going to be required in order for

1 the Court to agree with our decision and explaining the
2 legal basis and these different things.

3 So I do not have release authority. All I can
4 do is persuade the decision-maker. I have finally
5 identified the decision-maker. I'm also taking it into my
6 own hands to review the document to decide, one: Whether
7 or not these nondisclosure agreements apply, and if they
8 do, to make sure that absolutely as much of the document
9 that can be released is rather than just saying there's no
10 segregable part of it in the 386-page document but to say
11 there certainly is something out of that document that can
12 be released.

13 So it's a matter of being able to provide
14 counsel to the decision-maker and deciding exactly how
15 much, if not all, of the document can be released. But we
16 have not reached that.

17 And then the 30 days is just because of my past
18 experience with FOIA case after FOIA case and the amount
19 of people that have to be briefed and discussed and the
20 back and forth. I hope to do it faster than that, but
21 that allowed enough time to make sure that I would not be
22 asking the Court to give us more time yet again. The only
23 reason we didn't file the answer, as you said, the answer
24 is not complicated, we can do that, but that puts it in
25 the regular process and takes time. We were hoping to

1 have had a decision two days ago. Came close, didn't
2 quite get there. So rather than --

3 THE COURT: If you were hoping to have a
4 decision two days ago and came close and didn't get there,
5 why are you asking for what is in essence 60 more days?

6 MR. HERRINGTON: The 30 days was, again, it
7 takes a while to commence and given the Thanksgiving
8 holidays and people's leave schedules this time of the
9 year, I was trying to build in enough time for that.

10 The 30 days after that was rather than in 30
11 days saying, Plaintiff, here is the document and Court,
12 here is our declaration and a brief and here is why it has
13 to be withheld, give the chance for the document to be
14 released to actually have been sufficient. So the
15 plaintiff can have a week or two to look at the document
16 and have the chance that the plaintiff says, Okay, that's
17 actually fine and thanks for the document. We'll dismiss
18 the case and then move and then file our summary judgment
19 motion in the declarations and everything else.

20 If we can avoid writing the declaration at the
21 same time we're reviewing the document, the document can
22 get out faster.

23 THE COURT: I'm going to stop because I'm a
24 little confused here. When you say you came close two
25 days ago, what did you come close to doing?

1 MR. HERRINGTON: Making a determination to
2 release the document.

3 THE COURT: So why can't you get -- so if you
4 came that close, why can't that be done in a few more
5 days?

6 MR. HERRINGTON: It may very well be able to be.
7 The problem is the few more days is Thanksgiving week.

8 THE COURT: Okay.

9 MR. HERRINGTON: Two weeks I think I can do.

10 THE COURT: The problem I think you're talking
11 about is you sort of decided to try and follow your own
12 internal scheduling system, and there's a process once
13 litigation has been filed in these cases and a procedure.
14 And I understand that it was well-intentioned.

15 MR. HERRINGTON: Yes, Your Honor.

16 THE COURT: But, you know, there's a complaint
17 and then there's an answer, and the filing of an answer
18 does not in any way, as far as I can tell, maybe you can
19 tell me differently, how would the filing of an answer
20 have stopped you from proceeding in the way you have been
21 proceeding?

22 MR. HERRINGTON: It would not, Your Honor. It
23 wouldn't have stopped anything proceeding the way we were
24 proceeding, but we were going under the idea of if we can
25 get the document out prior to the answer and having more

1 court involvement with the scheduling order and everything
2 else, we were trying to save both the Court's time and
3 resources and be able to -- again, you are correct that we
4 could have still been processing at the same time, and
5 just because the scheduling order is not for another month
6 doesn't mean we can't release the document in the interim.
7 That is absolutely true. It is really just a matter of
8 trying to keep the Court from having to review the answer
9 and come up with the scheduling order. It really was not
10 trying --

11 THE COURT: Your answer would not have burdened
12 this Court. And certainly -- you know what, I'm going to
13 hear from Mr. Smith.

14 MR. HERRINGTON: Thank you, Your Honor.

15 MR. SMITH: Thank you Judge.

16 THE COURT: Yes, good morning, Mr. Smith.

17 MR. SMITH: Can I just have a moment to talk
18 about the stakes and all through this?

19 THE COURT: I think I understand them and I know
20 that the talks are beginning and the time -- I understand
21 why you need this information.

22 MR. SMITH: Okay.

23 THE COURT: But certainly if you need a minute
24 or two to just lay the foundation, I'm going to let do you
25 that.

1 MR. SMITH: Sure. After our filing of the FOIA
2 request, the administrative process, the Department of
3 Defense had 20 days to respond to our appeal. Rather than
4 respond within the administrative time limit, they began
5 to string us along with various email communications,
6 which I appreciated and documented in the lawsuit. But
7 continually promise that just over the horizon there would
8 be a bona fide response to our appeal, after a thousand
9 days, well over the time limit, and after they cut off
10 unilaterally communication with us, we filed a lawsuit,
11 again, at our own expense.

12 We believe that we were due a bona fide response
13 on the 19th that if there were new attorneys coming into
14 this case that they comply with Rule 7A of the federal
15 procedure and 83-6. That didn't happen. We had this
16 mysterious exhibit referring to an entirely different
17 case, which is the second example of boilerplate being
18 filed in response to our complaint.

19 So we're upset with that. Don't think it was
20 actually a response, as you've alluded to. It was just
21 another delaying tactic. The stakes couldn't be higher
22 for us. It's our basic position that in 1987 the
23 Department of Defense discovered that Israel had a nuclear
24 weapons program, detailed it and then has covered it up
25 for 25 years in violation of the Symington and Glenn

1 amendments, costing taxpayers \$86 billion. That's our
2 perspective.

3 It's our view that this should be discussed
4 within the contention of increased attention on the whole
5 issue of nuclear weapons in the Middle East. That's what
6 I do as a public interest researcher. That's what I write
7 about.

8 So what we've seen most recently is that the
9 government is now coming up with novel ways to try and
10 delay this by talking about mandatory disclosure reviews.
11 We don't think it's meaningful that their captive think
12 tank may have signed NDAs. Perhaps they even have a sock
13 puppet within the Pentagon that signs NDAs on their
14 behalf. It would be the same from our perspective.

15 So what we'd like the Court to do is to realize
16 that the Department of Defense has failed to respond. If
17 it's necessary that we file an additional motion
18 requesting your personal in-camera review of the document
19 in question and allowing DOD to submit these NDAs if they
20 really think they are that important, that's what we'd
21 like to do. We'd like to file that motion, proceed so
22 that at least there's an outside chance that we can review
23 this very important study by November 24. I know that
24 seems unrealistic in the bigger framework, but these
25 issues are too important to just allow this sort of

1 spurious, you know, utter refusal to engage in court
2 that's been demonstrated by DOD.

3 THE COURT: That you, Mr. Smith. I'm not
4 willing to characterize the government responses as
5 necessarily trying to be evasive or deceptive on the
6 Court.

7 As to the Rule 7 and Local Rule 83 issue, I do
8 find that Ms. Jennings, entering an appearance, you know,
9 she entered her appearance, the government has filed
10 pleadings in this case. I don't think that's an issue.

11 But I do think that this matter is dragging
12 along. It is, like I said, this is a document that was
13 created in 1987. It is one document. I have a lot of
14 FOIA cases that may have been involved thousands and
15 thousands and thousands of documents. This is not that
16 kind of case. I've reviewed the attached emails to the
17 complaint. It appears Mr. Smith has diligently and with
18 some forbearance tried to obtain this document through the
19 proper channels and brought this case after those attempts
20 proved fruitless, and I gave them one previous
21 continuance. And I would note that the first request
22 asked for a lot more time than I gave.

23 But Mr. Smith, I don't think you're going to get
24 the document produced by the 24th of November. I think
25 even had the government filed an answer within the time it

1 was given by this Court, the document would not have been
2 produced. So I understand the urgency, the timing, but I
3 don't think that's going to happen. But what I will --
4 I'm going to caution the government, this case has to
5 proceed along more expeditiously than it has, far more
6 expeditiously than it has.

7 I am ordering the government to file an answer
8 by Wednesday. I know it's Thanksgiving. I also know with
9 an answer how long it would take to prepare it. It
10 probably would takes an afternoon in this case, and I
11 don't think that's unreasonable, that's an unreasonable
12 request given how much time has passed.

13 Mr. Smith, you're free to file any motion you
14 wish after that point, although the Court's normal
15 scheduling procedures will begin immediately. And I want
16 to caution the government that I'm going to be looking
17 with disfavor on further motions for extensions of time.
18 And given that -- given Mr. Herrington's representations
19 to me as to what has already taken place, I'm expecting
20 that notwithstanding the holiday schedule that all efforts
21 are going to be made to review and internally decide how
22 much of this document is going to be disclosed very, very
23 quickly. This is, as I said, a document that was made in
24 1987 that is 386 pages long. It should not take very
25 long. You've located the parties who have the sign-off

1 authority. I would like you to convey to them the Court's
2 desire to have this reviewed quickly. That's the order
3 from the Court. Is there anything else?

4 MS. JENNINGS: No.

5 MR. SMITH: Thank you.

6 THE COURT: You're welcome. Have a good
7 weekend.

8 (Proceedings adjourned at 11:28 a.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Barbara DeVico, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



Handwritten signature of Barbara DeVico in cursive script.

11-24-14

SIGNATURE OF COURT REPORTER

DATE