

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH,	.	
	.	
Plaintiff,	.	
	.	CA No. 15-0224 (TSC)
v.	.	
	.	
CENTRAL INTELLIGENCE AGENCY,	.	Washington, D.C.
	.	Thursday, October 29, 2015
Defendant.	.	11:00 a.m.
	.	
.....	.	

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE TANYA S. CHUTKAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	GRANT F. SMITH, Pro Se 4101 Davis Place, NW No. 2 Washington, D 20007 (202) 342-7325
For the Defendant:	ZACHARY J. COREY, ESQ. U.S. Department of Justice Civil Division, Federal Programs 20 Massachusetts Avenue, NW Washington, DC 20002 (202) 616-0042
Court Reporter:	BRYAN A. WAYNE, RPR, CRR Official Court Reporter U.S. Courthouse, Room 6714 333 Constitution Avenue, NW Washington, DC 20001 (202) 354-3186

Proceedings reported 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: Civil action 15-224, Grant Smith
3 versus the Central Intelligence Agency. Counsel, please step
4 forward and state your appearances.

5 MR. SMITH: Grant F. Smith.

6 THE COURT: Good morning, Mr. Smith.

7 MR. SMITH: Good morning.

8 MR. COREY: Zachary Corey, Department of Justice,
9 Civil Division, Federal Programs Branch. And agency counsel,
10 should he introduce himself?

11 THE COURT: Sure. Let's have everybody on the record.

12 MR. FIEBIG: Jason Fiebig, agency counsel for the
13 Central Intelligence Agency.

14 THE COURT: Thank you all. You can have a seat now.

15 So we're here for a status, and I've been updated on some
16 of the issues. It appears that there's a difference of opinion
17 regarding the CIA's obligation to search its files. And you can
18 correct me if I'm wrong, but I believe that Mr. Smith believes
19 that certain files should have been searched as part of the
20 processing of his request.

21 The government's position is that those files are exempt
22 for various reasons, and any issues regarding whether the files
23 should or shouldn't have been searched are to be resolved at
24 summary judgment. Is that right?

25 Okay. Here's my -- and frankly, I agree with that, but my

1 only problem is that it appears that -- and I don't think we
2 need a briefing schedule to argue that. I think that's what
3 summary judgment is for. But it appears that plaintiff wanted
4 to have a joint call with chambers to hash that out, and the
5 defendant felt it wasn't necessary... because they were right,
6 I guess.

7 I don't know why you all couldn't have done this with a
8 call. We could have dealt with it then. I think that if one
9 side wants to do a joint call, unless there's some belief of
10 impropriety, I think it always helps to move things along.

11 So I would suggest to the government that a brief call or
12 joint e-mail to chambers is rarely considered inappropriate by
13 this court because I think it can head off a lot of problems
14 early. Okay. So it looks like defendant has a proposed
15 briefing schedule.

16 MR. SMITH: Your Honor, can I make a few points?

17 THE COURT: Yes. I was going to ask you if you wanted
18 to be heard on your argument.

19 MR. SMITH: I just wanted to take a couple of minutes
20 to discuss why, if we move to summary judgment, a couple of
21 unique rights under the 1984 CIA Act will be stripped away from
22 us.

23 THE COURT: Okay. I'll hear you.

24 MR. SMITH: Okay. So this is an exceptional FOIA
25 case, because only a handful of cases involve a situation in

1 which the CIA can be compelled by the court to search its
2 operational files because in fact it meets the criteria under
3 the 1984 CIA Act, and this act allows the plaintiff to conduct
4 limited discovery. This act allows the plaintiff extra rights.
5 So if we go to summary judgment --

6 THE COURT: In the FOIA context?

7 MR. SMITH: Yes, absolutely. This law was passed by
8 Congress in 1984 so that when there was a lot of FOIA traffic,
9 the CIA wouldn't have to search things that they obviously
10 couldn't release.

11 But Congress made sure that in cases such as the CIA
12 program MKUltra, which was an LSD and mind-control experiment
13 conducted on Americans, that people could get files on that if
14 there had been an investigation of CIA. The same goes with
15 Operation CHAOS when they conducted operations against Vietnam
16 protesters on American soil.

17 So Congress specifically said that if the plaintiff can
18 show that there's been an investigation of wrongdoing of the CIA
19 that the plaintiff has the right to obtain a search of
20 operational files.

21 Now, in this case we've made two exhibits which the
22 defendant has ignored. One of them was an exhibit from the
23 Attorney General's Office in which his special assistants talked
24 about their review of thousands of CIA documents. Why were they
25 reviewing CIA documents? Because there was an investigation of

1 cover-ups of any government organization that knew about a
2 violation of the Atomic Energy Act and didn't do anything about
3 it.

4 Exhibit 11 was a 1978 General Accounting Office
5 investigative report made on behalf of Congress in which they
6 were charged specifically to see if weapons-grade nuclear
7 material "was diverted to Israel by NUMEC's management with the
8 assistance of the CIA." They were investigating that. Congress
9 was investigated by GAO because of that suspicion.

10 And when we last entered this courtroom, we had just
11 received more documents in which they made it clear that they
12 had not at all considered the CIA Act of 1984. Exhibit 7 is the
13 original response. No mention of the CIA Act of 1984. There's
14 a litigation record in which the CIA has routinely tried to
15 fight this.

16 So it's our assertion that although they've given us this
17 limited hangout -- and I can explain that in CIA terminology if
18 you wish -- of some files, if we assume at minimum, if the
19 Justice Department looked at thousands of documents, if they
20 were two pages each, there were 2,000 documents, we've received
21 3 percent of what the CIA had in 1979.

22 So we attempted to raise this issue with the defendant.
23 We attempted to schedule a call with your chambers, but the
24 defendant wanted to talk about the bark on the logs they gave
25 us; we wanted to talk about the forest. They still refused to

1 let us engage in this discussion by rushing for the exits to
2 summary judgment.

3 THE COURT: But what's going to be lost? In other
4 words, I understand your point, and you may have one. But can
5 that issue not be litigated in summary judgment briefing? In
6 other words, is there something that's going to be destroyed or
7 lost or extinguished --

8 MR. SMITH: Yes.

9 THE COURT: Okay. That's what I --

10 MR. SMITH: So here's the point. Summary judgment --
11 I mean, I'm not a lawyer, but --

12 THE COURT: You're doing pretty well for one who is
13 not, in front of me anyway.

14 MR. SMITH: Thank you. But it's normally when there
15 are no major disputes over the facts of the case.

16 THE COURT: Except at the FOIA stage, in FOIA cases
17 it's a little different. In summary judgment, normally in a
18 civil case, all the evidence has been adduced, all the
19 depositions have been taken, all the documents have been
20 reviewed, and one or both sides will say, there's nothing to go
21 to the jury; there's no disputed material fact from which a jury
22 could find what the plaintiff is asking for.

23 Summary judgment in a FOIA case is a little different
24 because, really, the whole question for the court is the
25 adequacy of the search. I have ruled several times in FOIA

1 cases that -- I've partially granted summary judgment; I've
2 denied summary judgment; I've entirely granted summary judgment.

3 But very often I have ruled that the government may be
4 entitled to summary judgment as to certain requests but not as
5 to others, because the search may not have been adequate because
6 they haven't given reasons; they haven't met their burden
7 showing that their search was adequate.

8 So I guess what I'm saying to you is, if at summary
9 judgment the government says, as one would expect, we've
10 searched all the files to which we're legally obligated to
11 search; and you say, no, you haven't because you haven't
12 searched these files that you're supposed to search under the
13 1984 CIA Act which are supposed to be searched in FOIA requests,
14 and you make your argument, the same argument you're making to
15 me with the exhibits and everything, I have several options
16 before me.

17 I can say, no, I agree with the government. They didn't
18 have to search those files, the search was adequate, end of
19 story. Or, I can say, you're right, they have done a partially
20 adequate search, but they haven't sufficiently explained to me,
21 based on plaintiff's arguments, why they haven't searched these
22 others; I'm ordering them to go back.

23 That's what happens. It's not over. It then goes to the
24 next round where I say, go back, conduct a search, or explain to
25 me or provide more information by way of affidavit or otherwise

1 why plaintiff isn't right. Either say you've searched them and
2 there's nothing, or tell me why, under the law, you're not
3 obligated to search them.

4 So I guess what I'm asking you is, is there some exigency?
5 Is there some concern that you have that, say, documents are
6 about to be destroyed or files are about to be destroyed?
7 Because that's the kind of thing that I would say, okay, well,
8 maybe we can't wait for summary judgment briefing because, if
9 files are going to be destroyed or documents are going to be
10 destroyed in the interim, then we --

11 MR. SMITH: Sure.

12 THE COURT: -- gotta do something in place.

13 MR. SMITH: Your Honor, I stand corrected, then, on
14 the issue of the appropriateness of summary judgment with
15 respect to disputes like this.

16 The other issue, I guess -- and I don't have any means of
17 knowing whether under scheduled document destruction guidelines
18 that they could in fact --

19 THE COURT: I'm going to inquire.

20 MR. SMITH: Wonderful. I guess the only other issue
21 that I would raise, though, is that before summary judgment,
22 according to what I've seen -- and this is unique in this
23 case -- if in fact the 1984 CIA Act does apply, we are permitted
24 limited discovery to ascertain certain facts that they'll have
25 to admit or not, and there are some questions as to whether,

1 under the 1984 CIA Act, they have conducted appropriate
2 decennial reviews for release in the public interest of this
3 volume of material which we think still exists.

4 And so, I would like to have that out, and if we are
5 allowed this very limited form of discovery, asking them can you
6 verify that you conducted, given the age of this, two decennial
7 reviews of this material for public release since the 1984 CIA
8 Act applies, that would be discovery before summary judgment.

9 THE COURT: Although it's not really discovery.
10 I guess it goes to what the government addresses in their
11 declarations, because normally when the government moves for
12 summary judgment they attach declarations, usually affidavits,
13 of agency officials saying, here's what we did; here are the
14 steps we took to comply with the act.

15 We can proceed in a couple ways here. I'm going to inquire
16 of the government as to whether there's any danger that documents
17 or files would be lost, but you can file something with me as
18 part of the briefing schedule saying what you just told me if
19 it's not already in your pleadings, which I think it may be.

20 MR. SMITH: No.

21 THE COURT: It's not. Okay. You've stated in open
22 court. If the government wants to address that in their
23 briefing schedule, in their opening brief on summary judgment,
24 they can do that, too, if they feel that they are clear enough
25 on what it is you're asking. So maybe I should turn to the

1 government now and inquire of them a couple of things.

2 MR. SMITH: Thank you.

3 THE COURT: Thank you, Mr. Smith.

4 MR. SMITH: Thank you.

5 THE COURT: So, my first question would be, having
6 heard Mr. Smith, is there any possibility -- and I'm saying
7 possibility, not danger -- of any possibility that any of the
8 files to which Mr. Smith refers -- because we're talking about
9 fairly old records, right, Mr. Smith?

10 MR. SMITH: Correct.

11 THE COURT: Is there any possibility that in the
12 period between now and final briefing that any of those files or
13 documents are going to be destroyed or otherwise unavailable
14 should I later rule that they need to be searched?

15 MR. COREY: I just briefly conferred with agency
16 counsel, and we have no reason to believe that there would be --

17 THE COURT: Okay. Given that it's the CIA, I believe
18 that. I just don't think too many old files go to getting
19 destroyed. Okay. Having heard Mr. Smith's argument, are you
20 prepared to address that issue in your summary judgment
21 briefing, or do you want to do interim briefing on that?

22 MR. COREY: I'm not sure what issue you're referring to.

23 THE COURT: Okay. Come on up, Mr. Smith.

24 Mr. Smith asserts that he's entitled to some limited
25 discovery, or at least -- I'm not sure if "discovery" is the

1 right word because it's not really a look at files. It's some
2 assertions from the government or some -- that he's entitled to
3 know whether the government searched certain files.

4 Is that right?

5 MR. SMITH: Right. And in fact, I sent him an
6 authoritative article by Hannah Bergman about this very rare
7 situation in which the CIA has to search operational files
8 because of the conditions of --

9 THE COURT: Okay. I tell you what. Mr. Smith, why
10 don't you submit something -- I'm going to enter a briefing
11 schedule, but in the interim, I'd like you to submit what you're
12 asking for in writing and then have the government respond. I
13 think that would be a better way to proceed.

14 MR. SMITH: Before summary judgment, Your Honor?

15 THE COURT: Before summary judgment. I'm going to set
16 a summary judgment schedule, and then I'm going to set a shorter
17 schedule for this. I don't want to have to come back here --
18 wait, I see agency counsel. Come on up.

19 MR. FIEBIG: My only concern is that I know that Zach
20 is going to be leaving his current position in the near term,
21 and so having to respond when we both are of the opinion that
22 summary judgment briefing is the appropriate way to go here --

23 THE COURT: Well, it may be. It's going to be. In
24 every FOIA case, at some point there's going to be a summary
25 judgment briefing.

1 MR. FIEBIG: My only concern is that we would have to
2 get a new attorney up to speed --

3 THE COURT: Oh.

4 MR. FIEBIG: -- a case that's been going on for a long
5 time to respond to his request, which I think has some validity,
6 but we just believe that --

7 THE COURT: Well, suppose I do this. Suppose I set a
8 shorter deadline for -- and I'm not talking about a long brief.
9 I assume Mr. Smith's can be limited. You're point is going to
10 be, what, five pages?

11 MR. SMITH: Our point is going to be a couple of
12 Justice Department memos, okay? It's going to be reference to
13 the exhibits which show that there was an investigation that
14 meets all the criteria of the 1984 act, and we can do that in a
15 week.

16 THE COURT: Okay. Mr. --

17 MR. COREY: That's an issue about adequacy of the
18 search. That's a summary judgment issue. There's just no need
19 to have any interim briefing. He wants to know whether certain
20 parts of the CIA have been searched in agency files, but that's
21 what our initial search declaration does, as you've said. It'll
22 tell him every --

23 THE COURT: Well, okay. Hold on a second. But what
24 about Mr. Smith's assertion that the government hasn't addressed
25 the memos that he attached as exhibits to his complaint?

1 MR. COREY: So he keeps on saying that this is an
2 exceptional case. This is not an exceptional case. Every FOIA
3 case, the plaintiff wants the CIA to search operational files.
4 It's exceptional and extremely rare if the CIA is ever ordered
5 to search operational files because of the statutory exemption
6 that has three narrow exceptions.

7 And he keeps insisting that that is met when attaching, for
8 example, an exhibit of a GAO investigation when that's not even
9 one of the entities listed in the statute. So I don't know how
10 many times we'll have to respond to that, but that can all be
11 covered in summary judgment briefing.

12 THE COURT: Okay. Mr. Smith?

13 MR. SMITH: Yeah, I totally disagree with that
14 characterization. Notice he avoided the Justice Department
15 investigation aspect. GAO investigates on behalf of Congress
16 all the committees, including the intelligence committees, the
17 oversight committees. So he's wrong on that point.

18 The other point I'd mention is the strongest and most
19 relevant piece here is the Justice Department memo saying, we
20 are investigating to see if agencies have covered up a diversion
21 of nuclear material. And in this case, what they released --
22 and I'd like to include that as an exhibit -- shows that they
23 were engaged in a cover-up.

24 THE COURT: Mr. Smith, I guess what I want to know is
25 why can't they do that in their -- in other words, I think I

1 know what you're asking for, and I think they know what you're
2 asking for, and they're prepared to address it in their summary
3 judgment brief. And if I think that this is that rare case
4 where --

5 MR. SMITH: It is.

6 THE COURT: All right. I like your confidence.
7 I like your confidence.

8 MR. SMITH: Thank you.

9 THE COURT: But let's say that it is. Then the time
10 to address that is after I've read the briefing and if I decide,
11 well, the government hasn't shown me enough reason why they
12 haven't searched their operational files. It sounds to me like
13 we don't need to do this in a piecemeal fashion because the
14 government's going to cover all of that in their summary
15 judgment motion, and if they don't, it's at their peril.

16 MR. SMITH: Your Honor, will I lose the opportunity to
17 engage in discovery of decennial reviews if we've passed into
18 summary judgment mode?

19 THE COURT: You have talked about an opportunity to
20 engage in discovery. Discovery, as we use it in the civil
21 context -- and in the criminal context, for that matter -- is
22 usually looking at the evidence. When you say you want
23 discovery, I take that to mean you want to look at the actual
24 documents themselves. That's not what you're asking for.

25 MR. SMITH: No, Your Honor. In this case -- and I

1 apologize for not mentioning the exact type of discovery that is
2 specifically allowed in this type of case, but the 1984 act
3 cases that have been tried -- and they are, as defense says,
4 relatively few -- it does specifically allow for engaging in
5 discovery which is, in this case -- it's got a name; it's not
6 coming to mind, but it's not widespread. It's not looking at
7 all of the other issues. It's simply confirmations, yes-or-no
8 answers to specific requests.

9 THE COURT: Like interrogatories, you mean?

10 MR. SMITH: If that's a yes-or-no answer, yes.

11 THE COURT: What's your response?

12 MR. COREY: I have read that section at least of the
13 CIA Act. I have not seen anything that suggests discovery.

14 THE COURT: I don't think it's discovery in that he
15 wants to look at the documents themselves.

16 MR. COREY: And as you know, I'm sure, discovery is
17 highly disfavored in the FOIA context. There's a million
18 citations for that case.

19 THE COURT: It is.

20 MR. COREY: He's never brought that up in a brief
21 before. He has never -- I mean, this is --

22 THE COURT: I think we're talking past each other.
23 I don't think what Mr. Smith is referring to is discovery as we
24 traditionally refer to it. And I don't have the act in front of
25 me; I feel like I'm operating in the dark. Just a second.

1 (Pause.)

2 All right. I do have this. You're right. If it's the
3 operational files exemption that we're all talking about, which
4 is 40 U.S.C. § 3141, the director of the CIA, with the
5 coordination of the director of National Intelligence, may
6 exempt operational files of the CIA from the provisions of § 552
7 of Title 5, which is the Freedom of Information Act, which
8 require publication or disclosure or search or review in
9 connection therewith.

10 Operational files are defined as three categories of files
11 under § 3141(b), and the government is correct that none of the
12 three statutory exemptions under 3141(c) seem applicable in this
13 case. But it does appear that plaintiff is correct that under
14 subsection (d), 3141(d), files that contain nonexempted
15 information and are derived from operational files may be
16 subject to review.

17 Is that what you're talking about, Mr. Smith?

18 MR. SMITH: Yes. And, Your Honor, there are cases
19 where files have been transferred to investigatory entities like
20 the Justice Department, and that in itself made them searchable.
21 They were considered operational before, still kind of had that
22 status, but they were then, because of the investigation,
23 releasable.

24 And I apologize, and I don't mean to disagree, but the
25 discovery issue is key, and it is allowed. It is allowed under

1 this 1984 act for the plaintiff to ask these questions,
2 yes-or-no questions: Did you do this? Did you do that? And
3 it's rare, I admit. Discovery is disfavored in FOIA. I was
4 surprised. But it is in fact --

5 THE COURT: Why couldn't that be dealt with at summary
6 judgment? In other words, if the government is aware of -- and
7 it appears that the government is aware of its obligations and
8 the case law and the statutes to which we're all discussing
9 here.

10 The government, it's their burden to address all those
11 requirements at summary judgment, and certainly if you find --
12 because you respond, right? -- that they haven't met that burden
13 and they haven't answered those questions in their pleadings and
14 affidavits, then you're entitled to make that argument in your
15 response. Then I'll decide if they've met their burden, and if
16 they haven't, they gotta go back and meet it.

17 So I guess I'm not seeing how -- why we need anything --
18 I'm persuaded by the government that we don't need to have any
19 interim briefing, that we can go to summary judgment, and they
20 know that if they don't answer the questions that have to be
21 answered, if they haven't shown that they have searched to make
22 sure that the files don't contain any nonexempt information
23 which was derived from operational files, then they're going to
24 have to go back and do that.

25 I don't see you losing anything if we go directly to

1 summary judgment. There's no rights you have that are going to
2 be extinguished. There's no review that I won't have that I
3 won't have at summary judgment.

4 So the only thing final at summary judgment is if I decide,
5 based on the government's affidavits and declarations, that they
6 have done an adequate search. And I'll only decide that if
7 you've had a chance to see what they've done and review what
8 they've done and I've decided that your argument has no merit.
9 But there's no right you have that I can see that's going to be
10 extinguished or lost between now and summary judgment.

11 Like I said, there are no files that are going to be -- we
12 may have a disagreement, Mr. Smith, ultimately, as to what the
13 CIA was supposed to search. I don't know. I'm not there yet.
14 I haven't read any pleadings; I haven't done my research. But
15 that will be my decision, and it will be my decision based on
16 all the arguments you bring to me about the adequacy of their
17 search.

18 And like I said, if for some reason I agree with you and
19 decide the search isn't adequate because they haven't shown me
20 that they've met the points you've brought up, then I'll send
21 them back.

22 MR. SMITH: Your Honor, the specific type -- just to
23 backtrack, the specific type of discovery that I am worried
24 about not having if we move to summary judgment was a request
25 for admission. That's the type.

1 THE COURT: A request for admission is like an
2 interrogatory. In other words, you ask them: Did you do that?
3 Did you do this? And the information contained in those sorts
4 of admissions are of the type that are contained in the
5 declarations.

6 MR. SMITH: Okay. Your Honor, if it's the Court's
7 view that we are not admitting any agreement at all on the basis
8 for moving to summary judgment, if the plaintiff is not --

9 THE COURT: You're not going to be missing anything.

10 MR. SMITH: Yeah, conceding any of that. If the
11 plaintiff is not conceding any right to discovery should the
12 1984 act be found to be applicable, if the plaintiff is not
13 conceding that the CIA or the defendant in this case has even
14 begun to conduct anything like an adequate search, which is our
15 position, then I guess we are overreacting to the idea that
16 summary judgment is upon us and we have not even scratched the
17 surface.

18 THE COURT: Has the government completed all its
19 searches and production?

20 MR. COREY: Yes.

21 THE COURT: Okay.

22 MR. COREY: And obviously, we completely disagree with
23 everything --

24 THE COURT: Right. Okay, well, I mean, that's the --

25 MR. COREY: -- he just said.

1 THE COURT: -- government's --

2 MR. COREY: It was an adequate search. It's our
3 burden.

4 THE COURT: It's their burden. They're going to have
5 to bear the risk. In other words, what happens now is that the
6 government says, we're done, we've searched everything we're
7 required to search, we've produced everything we're required to
8 produce, and here's why. They'll give me declarations of
9 various officials who will discuss in detail the searches that
10 were conducted and why they don't believe any further searches
11 are necessary or that their searches were legally adequate.

12 At that point, Mr. Smith, you could say, well, no, they
13 haven't done this search, or they didn't look at these files, or
14 they didn't answer all these questions. Then government can
15 respond, and then I'll decide whether if in fact the search was
16 adequate. And if you believe that the declarations don't give
17 you the answers to what you call your request for admission, I
18 have remedies. I can ask them to answer those questions in my
19 ruling.

20 So I don't think you're -- like I said, I don't think the
21 fact that you're going to summary judgment means that you're,
22 you know -- they're not going to search anymore. In other
23 words, if this is a card game, they have laid their hand down on
24 the table.

25 MR. SMITH: May I approach?

1 THE COURT: Yes.

2 MR. SMITH: Your Honor, I guess -- I see this, and
3 thank you. But I see this as a rush for the exits. We've spent
4 five years. We've given every opportunity to make a *bona fide*
5 search. We've now supplied 137 pages of information which I
6 think makes it self-evident -- apparently, it's not self-evident
7 -- but self-evident that in this unique case, this is not about
8 the CIA funding the Contras. This is about -- well, it is kind
9 of like that.

10 THE COURT: We're really going back in time.

11 MR. SMITH: This goes back further. It's about
12 illegal activity inside the CIA that was investigated by an
13 outside party. Most FOIA requests to the CIA don't have any
14 aspect like that. This is truly unique.

15 And my concern is we're jumping into this final mode where
16 supposedly -- and again, maybe this doesn't apply to FOIA cases;
17 I don't know -- where we're jumping into this final mode where
18 it's normally assumed that now everything that needed to be
19 hashed out is now resolved and it's ready for this final judgment,
20 and I just don't see that we're even close after five years.

21 THE COURT: Well, that's where summary judgment in
22 a normal civil case differs from summary judgment in a FOIA
23 case, because in a civil case at a summary judgment, there is no
24 more discovery to be had. It's all out there. All the
25 witnesses have been questioned. Both sides agree discovery's

1 over.

2 In a FOIA case, routinely the Court will say, you haven't
3 searched enough; you need to go back and either do these
4 searches or explain why they shouldn't be done. That's routine.
5 That's common in FOIA cases. So it's not the final phase as it
6 is in a normal civil case.

7 MR. SMITH: I see.

8 THE COURT: So like I said, the government bears the
9 burden. The government is going to have to justify to me why
10 the search is adequate and reasonable and why the files that
11 you're saying should have been searched weren't or were, and if
12 you raise questions that they haven't answered, I can ask them
13 to answer them.

14 In other words, if after summary judgment briefing is over
15 I decide that the government needs to do additional searches
16 based on the fact that I don't think it was adequate, there may
17 be more documents produced. Or they may come back and say, we
18 don't have to because of these other reasons, and I may say,
19 okay, you're right. But it's not the end as it is in a civil
20 case.

21 MR. SMITH: Your Honor, the vibe I'm getting is that
22 you're going to have to make a ruling on the 1984 CIA Act at
23 some point, and --

24 THE COURT: Whoa, whoa, whoa. The only ruling I'm
25 going to make is whether the government's search was adequate;

1 and obviously, if there's an act that bears on whether certain
2 documents are searchable or produceable under FOIA and that is
3 in the CIA Act, then I'm going to consider that, and my decision
4 will certainly consider everything that I have to legally
5 consider.

6 But I'm not -- you know, this is a Freedom of Information
7 Act. I'm not going to start interpreting other acts except as
8 they pertain to the Freedom of Information Act.

9 MR. SMITH: Your Honor, in predecessor cases, the
10 judge, with the CIA, has had the say --

11 THE COURT: All right. I'll look at it, Mr. Smith.

12 MR. SMITH: And just one more thing. So, again, just
13 to recap, I assume that if we are forced to go into summary
14 judgment mode, that if you do make that decision, at that time
15 we can do discovery, at that time we can ask for a *Vaughn* index
16 if they come up with some more files and --

17 THE COURT: All those things are going to be -- well,
18 you keep saying "discovery," and I keep seeing the government
19 blanch, and I know why. It's not really discovery. They have
20 to produce declarations and affidavits. They have to produce a
21 *Vaughn* index that lists the documents. They have to produce a
22 privilege log, if they haven't already. All of that is part of
23 the summary judgment briefing.

24 So when you say, "if we have to go to that," that's where
25 we are. That's how these cases are. Once the government says,

1 we're done producing documents, or we have processed the
2 request, we are finished, it goes to summary judgment.

3 And then the plaintiff has the chance to say, no, you're
4 not. You're not finished. You haven't complied with this law
5 and this statute and you haven't searched these documents, and
6 if they haven't, they're going to have to explain why.

7 So it's not the end of the case unless they've done their
8 job according to the law. And I haven't had a chance to
9 obviously review everything they're going to give me, so I don't
10 know.

11 MR. SMITH: Your Honor, thank you very much.

12 THE COURT: You're very welcome.

13 MR. COREY: Your Honor?

14 THE COURT: Yes.

15 MR. COREY: We would like at least 45 days to prepare
16 our motion for summary judgment.

17 THE COURT: Absolutely, absolutely.

18 MR. COREY: And then typical is 30 days to oppose,
19 but if Mr. Smith wants more time because of the holidays, which
20 that'll come through Christmas...

21 THE COURT: Okay. So that will be -- you all can have
22 a seat. The defendant's proposed briefing schedule -- and
23 Mr. Smith, tell me if you need more time, because government
24 counsel is right, and I appreciate their pointing that out.

25 So, the government, is November 19 enough time?

1 MR. COREY: We would like 45 days from today.

2 THE COURT: Oh, that's right. Okay. So that would
3 take us to...

4 THE DEPUTY CLERK: December 14.

5 THE COURT: So government's motion is due December 14,
6 and response would be due -- how much time would you need from
7 then, Mr. Smith?

8 MR. SMITH: Thirty days.

9 THE DEPUTY CLERK: January 14.

10 THE COURT: All right. January 14. And any reply?

11 MR. COREY: Two weeks. Is that typical?

12 THE COURT: Yes, that's fine.

13 THE DEPUTY CLERK: January 28.

14 THE COURT: Okay. January 28. Great.

15 All right. So that's our briefing schedule. Government's
16 motion for summary judgment due December 14, plaintiff's
17 response January 14, any government reply January 28.

18 Mr. Corey, I know you've had a chance to -- you've heard
19 Mr. Smith's arguments. You've seen his exhibits that he's
20 attached to his pleadings. So I don't have to tell you that you
21 have to address all those issues.

22 Yes, Mr. Smith.

23 MR. SMITH: How precisely is he going to address the
24 issue of these Justice Department memos and other evidence that
25 we've gathered showing that there was an investigation?

1 THE COURT: We shall see.

2 MR. SMITH: But he doesn't have those, Your Honor.

3 THE COURT: Well, did you file them?

4 MR. SMITH: Not that one. Again, I referenced two
5 exhibits that make it abundantly clear why the CIA Act of --

6 THE COURT: So --

7 MR. SMITH: -- but there are other documents that we
8 need to file if we want to be economical. That's why, Your
9 Honor, we asked for this special treatment given the nature of
10 the case.

11 THE COURT: Okay. Hold on.

12 MR. COREY: He can raise all of this, and then, as you
13 say, we're going to submit a declaration or numerous
14 declarations about the adequacy of the search and the *Vaughn*
15 index for the withholdings.

16 THE COURT: Are you aware of the memoranda that
17 Mr. Smith has --

18 MR. COREY: If he sent it to me, I'm aware of it.

19 THE COURT: Well, he says there are some other things
20 that you haven't met.

21 MR. COREY: He can raise all that in his opposition
22 brief.

23 THE COURT: All right. I --

24 MR. SMITH: Your Honor...

25 THE COURT: Okay, Mr. Smith.

1 MR. SMITH: This is precisely why I mentioned in our
2 joint status report, unfortunately, we can't work on this unless
3 it's under your guidance. I mean, I've tried to raise these
4 issues. I've tried to have a conference call. They wouldn't do
5 it. And now we're rushing into summary judgment, and they don't
6 have any of this.

7 THE COURT: Well, we're not rushing. If there are
8 documents you want them to -- first of all, they have your FOIA
9 request. Okay?

10 MR. SMITH: Correct.

11 THE COURT: They have your complaint which had
12 exhibits attached.

13 MR. SMITH: Correct. But the exhibits, Your Honor,
14 don't include the Justice Department AG memo saying, investigate
15 to see if there's been a cover-up.

16 THE COURT: Here's what I want you to do. I want you
17 to file a notice of supplemental exhibit, with everything you
18 want the government to address, by next Wednesday. Can you do
19 that?

20 MR. SMITH: Done.

21 THE COURT: All right. So you'll have the entirety of
22 whatever it is Mr. Smith wants you to address. All right?

23 MR. COREY: Okay.

24 THE COURT: You don't have to respond.

25 MR. COREY: But Mr. Smith doesn't get to dictate

1 our --

2 THE COURT: No, you --

3 MR. COREY: We'll meet our burden under FOIA --

4 THE COURT: Absolutely.

5 MR. COREY: -- to show that our search was adequate.

6 THE COURT: But just so the record is clear. And you
7 don't have to respond to anything, just so you have them.

8 MR. SMITH: Your Honor, they've shown no inclination
9 to do an adequate search. I just want that on the record.

10 THE COURT: That is to be decided at summary judgment.
11 The adequacy of the search is a whole ball of wax, and then I
12 will decide that.

13 MR. SMITH: I'm talking about the inclination to even
14 work.

15 THE COURT: Well, you know, I have the CIA in front of
16 me in a lot of cases, and I've found them to be very
17 professional. So I don't think we need to go there. Okay?

18 File whatever exhibits you want to file by next Wednesday.
19 The government can consider them, to the extent they think they
20 are relevant, in their summary judgment briefing. All right?

21 MR. COREY: Thank you, Your Honor.

22 THE COURT: Thank you all.

23 (Proceedings adjourned at 11:40 a.m.)

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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Bryan Wayne
BRYAN A. WAYNE