

**In the United States Court of Federal Claims**

No. 08-700C

(Filed: August 7, 2015)

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JAY ANTHONY DOBYNS,		)
		)
Plaintiff,		)
		)
v.		)
		)
THE UNITED STATES,		)
		)
Defendant.		)
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OPINION AND ORDER

The special master, having completed his responsibilities, ordered the parties to state their positions as to whether all docket entries since his appointment, to include what he issued and what the parties filed, should now be unsealed. See Orders, ECF Nos. 431 & 432. The special master asked the parties to meet and confer to see if they could agree on what should be unsealed. They cannot agree. See ECF No. 433.

**Documents Produced in Discovery**

Before I resolve their differences, it must be recalled that in addition to the court filings by the parties, the government produced many documents in discovery, waiving privileges it could have otherwise claimed. Additionally, I overruled the privileges the government did claim, except as to a small handful of documents. See Opinion & Order, June 19, 2015, ECF No. 406. Thus, there has been a nearly complete disclosure of the documents plaintiff sought.

As to such documents, the Supreme Court’s opinion in Seattle Times Co.v. Rhinehart, 467 U.S. 20 (1984) is dispositive: discovery is not a public process and the information produced therein is not subject to any legitimate claim of public access premised on the First Amendment. Thus, these documents will remain subject to the

earlier order forbidding their dissemination, albeit a new order will issue in light of this Opinion and Order.

This protection pertains to all documents that were produced whether produced by the government advertently or inadvertently; the latter occurred on one occasion. That an inadvertent production of documents may have assertedly waived a privilege has nothing to do with whether that document should be made available to the public. The claim that it does confuses two unrelated issues: (1) whether the privilege was waived by the inadvertent production; and (2) whether a document given in discovery (whether purposefully or mistakenly) is to be made public and as accessible as, for example, the opinions and orders of the special master. Obviously, resolution of the first question has nothing to do with resolution of the second. Thus, my order barring dissemination of all documents exchanged in discovery pertains to all documents exchanged in discovery whether produced advertently or inadvertently.

### **Redactions**

There are instances where the documents produced in discovery are cited in the parties' filings with the court. Plaintiff insists that such filings be disclosed in their entirety. See Joint Notice of Compliance with Special Master's Orders Dated July 27, 2015 and July 30, 2015 (Joint Notice), ECF No. 433.

For its part, the government seeks redaction of a few references to portions of "documents prepared for submission to, or generated by, the Department of Justice, Office of Professional Responsibility (OPR)." Id. at 3.

The redactions sought amount in total to about one or two pages of text if counted collectively. The government argues that release of these portions of these documents would compromise the still ongoing OPR investigation and be unfair to the attorneys cooperating with the inquiry.

These portions of documents requested to be redacted are as follows:

1. Characterizations by plaintiff pertaining to whether a document shows that one government lawyer misled the court as to the lawyer's knowledge of another person's alleged attempted obstruction of justice. ECF No. 399, page 3, lines 16–20.
2. An assertion by plaintiff that one document (DOJ-Civil 0000298–299) is "filled with false statements to OPR." ECF No. 399, page 3, lines 21–22.
3. Another assertion by plaintiff that another document (DOJ-Civil 00000300) attacked a witness's professionalism, ethics, and character. ECF No. 399, page 3, lines 22–23.

4. Quotations from statements made by one of the Department of Justice lawyers to OPR and plaintiff's allegations that this lawyer thereby obstructed justice, ECF No. 399, page 5, lines 2–22; and quotations of statements made by that lawyer to OPR characterized as false, ECF No. 399-1, page 6 of 16; ECF No. 420-1 ¶ 96; ECF No. 420-1, ¶ 99; ECF No. 420-1, ¶ 104–105.
5. Statements by plaintiff in his declaration that (1) summarize what he claims the Office of Investigation (of ATF) did and characterize its alleged failings, ECF No. 420-1, ¶ 89; and (2) quote a memorandum by OPR counsel Robin Ashton, ECF No. 420-1, ¶ 90, that in turn quote what a witness said during the OIG investigation.
6. A reference in a government filing to a statement an ATF lawyer made to the OPR about whether that same lawyer participated in a particular phone call. ECF No. 424, page 20, first paragraph.

In seeking redactions, the government argues that there should be redaction of these references because, if there is not, “it could prove disruptive to OPR’s work and unfair to the attorneys cooperating with the inquiry.” Joint Notice, at 3. The government has the burden of establishing that specific prejudice or harm will result if the redaction it seeks is not permitted. See In re Violation of Rule 28(D), 635 F.3d 1352, 1357–58 (Fed. Cir. 2011).

First, while the OPR investigation has not been concluded, the documents clearly establish that the Department of Justice attorneys cooperated with the OPR investigation and gave their statements and accompanying documents to the OPR. Indeed, what they did in the weekend before agent Trainor resumed his testimony is set out in meticulous detail in the special master’s opinion, e-mail by e-mail. Earlier opinions discussed other allegations against the Department of Justice in detail and found them insufficient as a matter of law. It is hard to imagine what more could possibly be known about the allegations of the lawyer’s improper behavior that is not already known. It is difficult therefore to understand how disclosure of what the lawyers said to OPR about what are well known facts, discussed in opinions and filings that will soon be made public, will obstruct whatever investigation remains for OPR to finish. If the government is suggesting that in the future Department of Justice lawyers will not cooperate with OPR investigations if there is premature publication of the work of OPR, I have already pointed out why I consider such a concern fanciful in light of the powerful motive those lawyers have to cooperate with OPR investigations. Opinion and Order of June 19, 2015, ECF No. 406, at 11–12.

Second, the concern about the lawyers’ reputations is a legitimate one. But learning that they cooperated with an OPR investigation hardly harms their reputations. As to plaintiff’s characterizations of the lawyer’s behavior, they are just that—

characterizations. Right thinking people will see them for what they are—characterizations, no more or less than “the slings and arrows,” albeit not “of outrageous fortune.”<sup>1</sup> Legal filings are full of characterizations of the behavior of others, whether parties or counsel. If protections of reputation were grounds for redaction, there would be precious few filings that would not be bowdlerized, defeating the public interest in knowing what occurs in courts.

Finally, in its submission, the government protests that certain documents it produced inadvertently should not be disclosed and, as indicated above, I accept that argument. Nevertheless, in its submission, the government states that: “This exception applies to portions of only three documents: Dkt. 399, 399-1, and 420-1.” Joint Notice, at 4. The government’s statement is unclear. First, one has to assume that “[t]his exception” means the exception (whatever it may be) for inadvertently produced documents, but there is no explanation of what “this exception” requires. Second, the reference is to the same documents (ECF Nos. 399, 399-1 and 420-1) as to which the government seeks minor redactions on the basis of their connection to the OPR inquiry as explained above. Thus, it is unclear what the government wishes. If this is a request for additional redactions in those documents, it is denied for lack of specificity.

### **Orders Issued by Other Judges**

Two other issues arise because of the Orders of other judges, Judge Allegra and the Chief Judge who is now presiding over this matter.

First, the government indicates that on February 7, 2011, Judge Allegra issued an Amended Protective Order that protected against the disclosure of matters potentially subject to the Privacy Act, including information “related to ongoing or closed personnel matters involving employees or former employees of ATF.” Joint Notice, at 4 (quoting Amended Protective Order, ECF No. 62). In accordance with that Order, the government seeks redaction of references in one of its own filings, ECF No. 342, pages 41 and 42, to a settlement agreement resolving a personnel matter between the ATF and one of its employees and to documents pertaining to that agreement, ECF No. 342-1, App. 38–45 and App. 48–49. Joint Notice, at 4.

The special master lacks authority to revoke an order by the court, and because it appears that the matters to which the government refers fall clearly within the Protective Order, the redaction sought is granted.

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<sup>1</sup> William Shakespeare, *Hamlet* Act III, Sc. 1.

Additionally, the parties agree that references to an Order issued by Judge Allegra barring certain Department of Justice attorneys from filing materials in this case (ECF No. 298) and other references to the identity of those lawyers should remain sealed. Pursuant to that agreement, the government's request to redact the following is granted: ECF No. 337, page 2, lines 11–12; ECF No. 350, page 8, line 23 and page 9, lines 20–21; and the sentence in ECF No. 401, page 2.

During the course of my service, plaintiff sought relief from a certain order by the assigned judge, and that application engendered filings that are under seal. Whether the resulting docket entries should or should not be sealed is within the assigned judge's jurisdiction and any application to unseal them must be made to her. See ECF Nos. 409, 410, 425, and 428.

An Order specifying the exact redactions being permitted for use by the Clerk will be issued forthwith. I am imposing upon government counsel the obligation to make the necessary filing that the Clerk will require to comply with my order.

IT IS SO ORDERED.

s/John M. Facciola  
JOHN M. FACCIOLA  
Special Master