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1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 Alexandria Division

4 MICHAEL DRIGGS, et al., : Civil Case
5 : No. 1:23-cv-01124-DJN-JFA
6 Plaintiffs :
7 v. :
8 CENTRAL INTELLIGENCE : March 13, 2024
9 AGENCY, : 10:30 a.m.
10 Defendant :
11 :

12 TRANSCRIPT OF TELEPHONE CONFERENCE
13 BEFORE THE HONORABLE DAVID J. NOVAK
14 UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

16 FOR THE PLAINTIFFS: JOHN CLARKE
17 LAW OFFICE OF JOHN H. CLARKE
18 1629 K Street, NW
19 Suite 300
20 Wasington, DC 20006
21 202-344-0776

22 FOR THE DEFENDANT: DENNIS CARL BARGHAAN, JR.
23 MATTHEW J. MEZGER
24 UNITED STATES ATTORNEY'S OFFICE
25 2100 Jamieson Avenue
Alexandria, VA 22314
703-299-3700

OFFICIAL COURT REPORTER: REBECCA STONESTREET, RPR, CRR
U.S. District Court, 9th Floor
401 Courthouse Square
Alexandria, Virginia 22314
(240) 426-7767

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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P R O C E E D I N G S

THE COURT: Okay. We're on the record. This is Driggs, et al. vs. Central Intelligence Agency, 23-CV-1124.

Who do I have for the plaintiff?

MR. CLARKE: Good morning, Your Honor. John Clarke on behalf of the plaintiffs.

THE COURT: Okay. And who do I have for the defense?

MR. BAARGHAN: Good morning, Your Honor. Assistant U.S. Attorneys Dennis Baarghan and Matthew Mezger on behalf of the CIA.

THE COURT: Again, a reminder that before you speak, identify yourselves so the court reporter can know who's speaking.

Before we get started, I want to ask this. Maybe, Mr. Clarke, I should direct this to you. How much of a case -- how much of an overlap is this case with the one in D.C. that Judge Lamberth was dealing with? Is this the same case?

MR. CLARKE: No, not entirely. It's largely overlapping, yes.

THE COURT: Okay. Well, I'm not doing another case when you've already got rulings on it. Why would I do that? That doesn't make any sense to me.

MR. CLARKE: Well, Your Honor, on the 22nd I will submit our position on that. But I don't believe that collateral estoppel is applicable here; moreover, we dismissed

1 that case so there was not a final ruling on those issues.

2 THE COURT: Well, according to the government, he gave
3 you a ruling.

4 I'm going to tell you, you're not doing double-dipping
5 with me. I'll look at what you have to say, but you can forget
6 about it. So to the extent that there's an overlap, that's off
7 the table. Okay?

8 Now, Mr. Baarghan, have you had a meet and confer yet
9 with plaintiff's counsel?

10 MR. BAARGHAN: We have with respect to the issues that
11 we feel are able to be addressed at this time. As Your Honor
12 saw in our clarification paper, the production of all the
13 documents, and thus other issues that may arise during that
14 production, we're obviously not able to deal with yet. But
15 those issues that we can deal with, we have met and conferred on
16 them with Mr. Clarke.

17 THE COURT: Okay. So you've heard what I just said to
18 Mr. Clarke. Like, this running through a different district to
19 get a different answer is not going to work.

20 So excluding everything that was covered in the other
21 case -- because that's what's going to happen here. All right?
22 You'll file motions, you'll do whatever we have to do, but we're
23 going to knock out all that stuff because we're not relitigating
24 something that's already been done. How much stuff is left, and
25 can you get that done in a couple of months?

1 MR. BAARGHAN: So the answer to that is no, and let me
2 try to explain why.

3 The case in D.C. was about a former FOIA request that
4 looked a lot like this one but is not identical. There is, as
5 Mr. Clarke said, a great deal of overlap. But once that FOIA
6 request was completed and that civil action dismissed and these
7 plaintiffs submitted a new FOIA request to the CIA, the CIA had
8 to start all over again in producing records. That is,
9 unfortunately, the way FOIA works.

10 And so it needs to do the exact same process again in
11 order to fulfill its FOIA obligation. And so as a result, there
12 are issues that were not litigated in D.C., but could have been
13 but for plaintiff's choice to voluntarily dismiss that
14 litigation, that the plaintiffs now want to litigate in this
15 court, for whatever reason.

16 THE COURT: That's over. Anything that Judge Lamberth
17 ruled on that was at issue in that case is gone. They forfeited
18 it. They should have litigated it in front of Judge Lamberth.
19 You don't get two bites. It's gone. I want to make that
20 abundantly clear.

21 So here's what I need you to do. Okay? Now knowing
22 that the overlap information is off the table, okay, I want you
23 to sit down with Mr. Clarke and work out a rolling production
24 such that you get it done by Thanksgiving. That seems to me to
25 be reasonable, particularly because, under Mr. Clarke's own

1 description here, there's a substantial overlap. Not the same,
2 substantial overlap.

3 Any stuff that was overlapped is off the table. That's
4 gone. It's forfeited. It's now about what is left that was not
5 subject to overlap. But you need to agree to what that universe
6 is first, and then come up with a schedule for a rolling
7 production.

8 I never envisioned you having everything done by March.
9 What I wanted you to do is to have this meeting and figure out
10 what's in dispute and what's not in dispute in terms of the
11 production. Then you can assert whatever privileges you need
12 down the road.

13 But it seems to me we just whittled this down by
14 three-quarters, probably. Am I wrong about that, Mr. Baarghan?

15 MR. BAARGHAN: I would like to believe that you are
16 correct, Your Honor. The problem, I think, is that because of
17 the way FOIA works and the fact that the CIA has to now respond
18 to these new FOIA requests that are about the same information
19 but aren't exactly the same, I think it would be difficult to
20 separate what has already been produced and what hasn't been
21 produced into separate columns.

22 And I know that's very difficult to articulate, and so
23 I apologize for what must be a very frustrating answer. But I
24 don't know whether it is as simplistic as saying, we've already
25 produced Documents A through Z; now we need to produce

1 Documents 1 through 10. I'm having trouble believing that
2 that's possible.

3 I can certainly talk to my client and see whether that
4 is possible, with the understanding that you want this completed
5 by Thanksgiving.

6 THE COURT: Yes. But I'm also saying, it seems to me
7 that there are categories now of information that are no longer
8 at issue, that were -- anything that was -- any information that
9 was sought in the D.C. case that Judge Lamberth addressed is
10 gone. So that seems to me to be a large swath of information
11 that is no longer going to be party to this litigation. If they
12 want to relitigate it, they can go back to Judge Lamberth.

13 But it seems to me that you can sit down with
14 Mr. Clarke and work out what was covered, what was involved in
15 that one and what was not, and the stuff that was involved in
16 the D.C. case, if he wants to have further litigation about
17 that, he can go back to Judge Lamberth and let him deal with
18 this.

19 That seems to me to narrow the field here
20 substantially.

21 MR. BAARGHAN: We can certainly work with that, and
22 work with Mr. Clarke towards that goal.

23 THE COURT: Let's do this. I want you to have another
24 meet and confer within 30 days. Within 60 days I want you to
25 put together a joint proposal of what's left outside of the D.C.

1 case that is subject to litigation, and then I want you to
2 propose a schedule of rolling production that gets this done by
3 Thanksgiving.

4 You got that?

5 MR. BAARGHAN: Understood. Understood, Your Honor.

6 THE COURT: All right. Mr. Clarke, have you got
7 anything else you want to say?

8 MR. CLARKE: Yes, Your Honor. The previous order that
9 the Court issued said that we were to submit a joint statement
10 of what issues -- not necessarily what records, but what issues
11 are still on the table. And I would like to go ahead and submit
12 that on the 22nd.

13 THE COURT: You can do that, but I want to tell you
14 right now, anything that was involved in the Judge Lamberth
15 case, you go back to him. You don't get two bites at the apple.
16 You should have litigated it the whole way. I'm just going to
17 tell you that right now, so don't waste my time.

18 What I want you to do is meet and confer to see what
19 documents you're going to be fighting over, and then have the
20 government -- I want you to get the information you're entitled
21 to and I want them to come up with a schedule to produce it.
22 But what I'm not going to do is give you a second bite at the
23 apple.

24 You want to go back to Judge Lamberth, you go ahead and
25 do that. That's fine. That's not the way litigation works.

1 Okay? All right. Anything else?

2 MR. BAARGHAN: Yes. Your Honor, my understanding of
3 what the Court just articulated is that this meet and confer in
4 30 days, 60 days submit a paper that provides a proposal of
5 rolling productions and what is left, that supersedes your
6 previous order of by March 22nd having a joint substantive
7 filing of what remains to be decided. Am I correct on that?

8 THE COURT: Yeah, that's fine. I agree. Because
9 now -- I didn't realize -- you know, when I get something on
10 initial pretrial conference, I just get the complaint. That's
11 all I have. I didn't know that there had been all this
12 litigation in D.C. on this, and Judge Lamberth had made a
13 decision. That's a big deal for me, because I'm not going to
14 redo what he's already done. That's not the way this works, and
15 I'm not going to put up with that.

16 So I'm going to vacate that order and I want you to,
17 again, meet and confer within 30 days to decide what was covered
18 in the D.C. case and what wasn't. What wasn't is what is going
19 to be left for the production. Okay?

20 Now, you still have -- you can assert privileges and
21 stuff, and I'll deal with that down the road if I have to. But
22 to me, there's now two categories of information, A and B. A is
23 the D.C. stuff, off the table; B is the other stuff that was not
24 requested in D.C. That we'll take a look at.

25 And I want you to come up with a schedule that allows

1 us to get done on a rolling production. I don't want this all
2 to wait until Thanksgiving. I want you to produce it as you can
3 turn it around such that it is fulfilled by Thanksgiving, and
4 then we'll see where we are.

5 We'll set a call for December. Does December 5th work
6 for you-all? And then you can tell me, Mr. Clarke, whether
7 you're satisfied or not with the production that is made by
8 the -- in what I'm calling Category B.

9 So does December 5th work for you?

10 MR. CLARKE: Yes, Your Honor, that works for me. I do
11 have a question, though. I would like to submit a position
12 paper on the 22nd, if that is agreeable to the Court.

13 THE COURT: Well, I mean, look, you can submit it. I'm
14 not going to require it, but -- I already told you how we're
15 going to deal with this now.

16 So I don't want to hear about the D.C. stuff. I'm
17 going to tell you that right now. Do not waste my time on that.
18 If you have something else to tell me, go ahead and tell me.
19 I'll read it. But we're not revisiting this. You go back to
20 Judge Lamberth if you want to deal with the D.C. stuff. Okay?

21 So Mr. Baarghan, are you available December 5th at
22 10 a.m.?

23 MR. BAARGHAN: I am, Your Honor.

24 THE COURT: So we're going to set the status call for
25 December 5th at 10 a.m.

1 But before, Mr. Clarke, you file something, why don't
2 you and Mr. Baarghan sit down and work through this, so before
3 you file stuff needlessly, you see what you're agreeing on and
4 what you're not agreeing on. And don't even talk about the D.C.
5 stuff, because that's gone. Okay?

6 MR. CLARKE: Well, Your Honor, there is the issue of
7 whether or not the defendant needs to search its operational
8 records. So that's particularly what I want to point out to the
9 Court on the 22nd.

10 THE COURT: Yeah. And did you meet and confer about
11 that?

12 MR. CLARKE: We did, and they declined to search their
13 operational records, the CIA did.

14 THE COURT: Okay. You can file something about that
15 and I'll take a look at it.

16 But again, this would go to Box B, not Box A. So if
17 you requested that in front of Judge Lamberth, that's off the
18 table. So you can tell me whether you did it or not. Okay?

19 MR. CLARKE: Yes, Your Honor.

20 THE COURT: All right. Mr. Baarghan, anything else
21 from you? If you want to respond to anything he files, you can
22 do it 14 days later and I'll take a look at it.

23 But let 's have this meet and confer and let's see what
24 we're really disagreeing about and what we're not disagreeing
25 about, noting that I want nothing to do with anything that was

1 already addressed in D.C. If it was sought in D.C., it's off
2 the table. Okay? You've got to go back to D.C. for that. This
3 will be new stuff that wasn't sought in D.C. That's all that's
4 at issue for me, in my view. Okay?

5 MR. CLARKE: Thank you, Your Honor.

6 THE COURT: All right. Have a nice day. See you guys.

7 MR. CLARKE: Thank you, Your Honor.

8 (Off the record at 10:44 a.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

15

16

I, Rebecca Stonestreet, certify that the foregoing is a
17 correct transcript from the record of proceedings in the
18 above-entitled matter.

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DATE

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