IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| ELOUISE PEPION COBELL, et al., | ) | |
| | ) | No. 1:96CV01285 |
| Plaintiffs, | ) | (Judge Robertson) |
| v. | ) | |
| | ) | |
| DIRK KEMPTHORNE, Secretary of the Interior, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF IT SECURITY PERSONNEL DOCUMENTS AND REQUEST FOR SANCTIONS**

## INTRODUCTION

In their Motion to Compel Production of IT Security Personnel Documents and Request for Sanctions ("Plaintiffs' motion"), Plaintiffs seek to revive a moot discovery request from a long-closed evidentiary hearing regarding IT security, the results of which were vacated on appeal. Defendants interpreted this Court's January 16, 2007 Order -- denying Interior Defendants' Motion for an Order (1) Clarifying the Scope of the Court's Order to Produce Personnel Documents and (2) Protecting from Disclosure Material Produced to Plaintiffs (Dkt. No. 3044) (filed ("Defendants' Motion") -- as a denial based on the mootness of the issues therein, rather than allowing additional, broad-ranging discovery on IT security. The evidentiary hearing during which the motion was filed, was completed in July 2005, and the Court of Appeals vacated the resulting injunction in July 2006. Furthermore, even assuming, solely for the sake of argument, that IT security is relevant to the accounting the Secretary of the Interior must perform, this Court is not currently reviewing the accounting. Even if it were, under the Administrative Procedure Act ("APA"), review of agency action normally is a record

review, which does not involve broad discovery proceedings. The APA thus does not contemplate discovery, much less the perpetual, roving and intrusive discovery into the agency's operations that Plaintiffs seek. Defendants respectfully submit this memorandum in opposition to Plaintiffs' motion.

## BACKGROUND

During the summer of 2005, this Court held a 59-day evidentiary hearing ("IT Security Hearing") on Plaintiffs' request for injunctive relief that would have shut down not only the Department of the Interior's connections to the Internet for systems that house or access individual Indian Trust Data ("IITD"), but also internal IT connections for systems that house such data. Just prior to the hearing, on April 25, 2005, the Court issued an Order requiring production of "all relevant reports, risk assessments, memoranda, and other documents . . . related to the security of each and every information technology ('IT') system that houses or accesses individual Indian trust data, including, but not limited to [a list of] materials that the defendants offered to produce on April 20, 2005[.]" Order dated April 25, 2005 ("April 25, 2005 Order") (Dkt. No. 2941). In its Order, the Court ordered the production of seven categories of documents. The list did not specify personnel files of Interior employees, although it was preceded by the expansive language "not limited to."[1] Id. at 2.

In June 2005, more than 30 days after the hearing had begun, Plaintiffs requested personnel files and compensation information pertaining to numerous Interior employees.[2]

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1/ Indeed, the number of potentially responsive documents was so broad that Defendants produced over 4 million pages prior to and during the 59-day hearing. See Defendants' Notice of Filing of Document Production Log (Dkt. No. 3105) (filed July 28, 2005).

2/ Plaintiffs' Motion at Exhibit 2; see also Tr. 115:9-13 (June 21, 2005 p.m.) (This portion of the transcript is attached for the Court's convenience, as Attachment A.)

The Court determined that personnel records should be searched for documents relevant to the hearing and, on June 23, 2005, Plaintiffs e-mailed Defendants' counsel a broad request for personnel files and compensation information. Plaintiffs' Motion, Exhibit 2. Plaintiffs broadly requested "*all documentation* (other than medical and health information) since January 1, 2003 reflecting *informal and formal* performance reviews, evaluations, reports or assessments *of any type or nature* (including, without limitation, (a) *all such documentation from personnel files* and (b) *all compensation information*" related to dozens of past and present Interior employees. Plaintiffs' Motion, Exhibit 2 (emphasis added). They sought these highly confidential records for all 18 witnesses who testified or would testify in the 59-day evidentiary hearing; 16 additional individuals mentioned in a particular court order related to document production (the "Zantaz Order"); 36 other individuals who were designated by the government as possible Federal Rule of Civil Procedure 30(b)(6) witnesses; every Interior SES employee who had IT security listed as part of a performance factor, plan, or review; and all "*past and present CIOs of the DOI, its Bureaus or offices,* and *all those who worked or now work directly or indirectly for any of them.*" Id. (emphasis added).

On the same day Plaintiffs e-mailed their request, Interior Defendants filed their Motion for an Order (1) Clarifying the Scope of the Court's Order to Produce Personnel Documents and (2) Protecting from Disclosure Material Produced to Plaintiffs (Dkt. No. 3044) (filed June 23, 2005) ("Defendants' Motion"). In that motion, Interior Defendants urged that the wholesale discovery of personnel files sought by Plaintiffs should not be authorized because it constituted an unwarranted intrusion into the privacy interests of the many employees listed. Interior Defendants argued that the request for personnel files was "plainly overly broad" and sought "irrelevant, confidential material to the extent it [sought] information

unrelated to the security of IT systems that house or access IITD." Defendants' Motion at 4. Regarding the request for compensation information, Interior Defendants explained that the request was plainly unjustified because this information could not be relied upon to determine, one way or the other, whether systems that house or access IITD were secure. Finally, Interior Defendants requested that, because any personnel materials were confidential, the Court enter a protective order conferring upon such materials the same protections set forth in the Court's April 22, 2005 Protective Order (Dkt. No. 2937).

On June 27, 2005, the Court heard oral argument on Interior Defendants' Motion and took the matter under submission.[3] Although the Court did not rule on the motion during the remainder of the hearing, Interior Defendants did produce personnel documents concerning several relevant Interior employees through the remainder of the hearing.[4] During the time those documents were being produced, the Court suggested that the responsive portion of

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[3] Tr., at 11:8 - 20:12 (June 27, 2005 a.m.) (This portion of the transcript is attached for the Court's convenience, as Attachment B).

[4] June 22, 2005, 11:44 AM production of disc labeled BLM_IT004, Bates Nos. BLM_IT7000277 - 7000311 (containing 35 pages of documents regarding a management dispute involving Ronnie Levine ); June 26, 2005, 2:17 PM production of disc labeled BLM_IT005, Bates Nos. BLM_IT7004259 - 7004284 (containing 26 pages of documents regarding the Ronnie Levine performance review dispute; June 27, 2005 11:15 PM production of disc labeled SUPP04, Bates Nos. SUPP04_0000001 - 0000071 (containing 71 pages of personnel documents responsive to the DoI-SOL Data Call of June 22, 2005 on Personnel Issues involving job actions regarding: various Interior employees); June 29, 2005, 9:59 AM production of disc labeled BLM_IT006, Bates Nos. BLM_IT7004285 - 7004318, (containing 34 pages of documents regarding a dispute involving Ronnie Levine rescinding of C&A packages); July 10, 2005, 8:10 PM production of disc labeled SUPP08 Bates Nos., SUPP08_7000001 - 7001038 (containing 1,038 pages of documents responsive to the alleged Ronnie Levine retaliation issue); July 10, 2005, 8:10 PM production of disc labeled SUPP09, Bates Nos. SUPP09_7000001 - 7000028 (containing 28 pages of documents regarding the Ronnie Levine performance review dispute); July 12, 2005, 8:54 PM production of disc labeled SOL_IT002, Bates Nos. SOL_IT5001451 - 5001468 (containing 18 pages of personnel documents responsive to the DoI-SOL Data Call of June 22, 2005 on Personnel Issues).

personnel records would be "that part of personnel performance that shows how SESes who had that as a critical element in their performance evaluation were rated."[5] The Court never ruled on Interior Defendants' Motion and the hearing ended on July 29, 2005.

Following the hearing, the Court granted, in part, Plaintiffs' request for injunctive relief. Cobell v. Norton, 394 F. Supp. 2d 164 (D.D.C. 2005). However, on July 11, 2006, the Court of Appeals vacated the Court's injunction. Cobell v. Kempthorne, 455 F.3d 301 (D.C. Cir. 2006). In doing so, the appellate court stated: "If the district court conducts any further proceedings directed at providing equitable relief in the area of Interior's IT security, it must keep in mind the balance between administrative and trust law [that the appellate court had explained earlier in its opinion]." Id. at 317.

On January 16, 2007, this Court denied Interior Defendants' Motion for Clarification and a Protective Order. See Order (Dkt. No. 3283) ("January 16, 2007 Order"). The Court denied the motion without explanation, listing it among a number of pending motions that were being denied by the January 16, 2007 Order. Most notably, the Court did not address the need for any protective order that would keep the personnel records confidential should they be produced to Plaintiffs.

On February 15, 2007, Plaintiffs' counsel inquired by telephone as to whether, in light of the Court's January 16, 2007 Order, Defendants were going to produce the expansive list of personnel documents contained in their June 23, 2005 e-mail request. On that same day, Defendants' counsel informed Plaintiffs' counsel by letter that Defendants would not be producing additional personnel documents. Plaintiffs' Motion, Exhibit 3. The letter explained

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[5] Tr. at 17:20-23 (June 27, 2005 a.m.) (Attachment B).

that because the evidentiary record in the 2005 hearing was closed and because the hearing had already been the subject of a Court of Appeals opinion, Defendants interpreted the Court's denial of their motion as based on the mootness of the issues therein. Id.

## ARGUMENT

### I. The Discovery Plaintiffs Seek is Plainly Moot

Defendants' interpretation of the Court's January 16, 2007 Order – that Defendants' motion was denied because it was moot – is entirely reasonable under the circumstances. Defendants had already produced relevant portions of the requested discovery; the evidentiary portion of the IT Security Hearing closed in 2005; the Court issued its injunction in October 2005; and the Court of Appeals vacated that injunction in July 2006. Although the case is before this Court, the Court has not taken up the matter of IT security, and no proceeding is pending in which personnel records would be relevant. Several of the motions that the Court denied in the same order were also associated with the long-completed and vacated IT security matter. Id. (Dkt. Nos. 3097, 3168, 3186-3188, 3192, 3197, and 3200). Under these circumstances, the reasonable interpretation of the Court's Order is that it denied Defendants' Motion as moot because the IT security hearing was completed and its resulting judgement was vacated on appeal.

It is also unlikely that, even if the Court had intended to grant Plaintiffs some additional discovery of personnel files, it would grant Plaintiffs access to confidential personnel information without first addressing any limitations in scope or any protection from disclosure to third parties. See 5 U.S.C. § 552(b)(6) (the highly confidential nature of personnel files is expressly recognized in the Freedom of Information Act, which exempts from mandatory public disclosure "personnel and medical files and similar files the disclosure of which would

constitute a clearly unwarranted invasion of personal privacy"); Laxalt v. C.K. McClatchy, 809 F.2d 885, 889 (D.C. Cir. 1987) ("[W]hen the District Court considers a request for a Privacy Act order in the discovery context it must consider the use of protective orders and the possibility of in camera inspection."); Waters v. United States Capitol Police Board, 216 F.R.D. 153, 164 (D.D.C. 2003) (rejecting a broad document request for personnel files and limiting disclosure to "information that bears on the witness' honesty or credibility or which disclose a discriminatory or retaliatory intent"). Given the large number of personnel records that Plaintiffs sought and the fact that the confidential nature of personnel records is well established, the Court's silence regarding any protections for the personnel records is reasonably interpreted as demonstrating that the Court did not intend for them to be produced. Moreover, it would be anomalous for the Court to order the disclosure of personnel files of witnesses designated pursuant to Rule 30(b)(6) by the government for the IT Security Hearing but whom Plaintiffs, for the most part, never even called to testify.[6]

Plaintiffs' interpretation -- that the Court intended to re-open discovery into IT security issues that were the subject of a hearing completed in 2005 -- is simply unreasonable. Beneath Plaintiffs' unnecessarily harsh rhetoric lies a baseless argument that the requested discovery is still relevant. They argue that the personnel files they request are "a window into the credibility of government witnesses," and whether such witnesses have been intimidated by Interior Defendants and their senior managers. Plaintiffs' Motion at 9. Thus, they argue, "such information is fundamental to the integrity of this proceeding," id., without identifying the "proceeding" to which they refer. At this point in time, there is no "proceeding." No

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[6] See Interior Defendants' Notice of Filing of List of Designated Witnesses (Dkt. No. 2949) (filed May 2, 2005).

government witnesses are scheduled to testify about IT security. Indeed, although the case is still before this Court, the evidentiary portion of the IT Security Hearing closed in the summer of 2005, the Court issued its injunction in 2005, and that injunction was vacated in July 2006. Moreover, a principal reason the Court of Appeals gave for vacating the Court's 2005 IT Security Injunction was that it was "unconvinced the class members demonstrated that they would necessarily suffer harm without th[e] injunction." Cobell, 455 F.3d at 315. Given that finding, Plaintiffs' assertion that the integrity of IT systems is "central to the issues in this litigation," Plaintiffs' Motion at 1, is misguided.

To bolster their relevance argument, Plaintiffs attempt to establish the inevitability of further proceedings on IT Security by claiming that the "Court of Appeals plainly contemplated proceedings concerning the adequacy of IT security." Plaintiffs' Motion at 8-9. They further state that the Court of Appeals "envisions 'further proceedings directed at providing equitable relief in the area of Interior's IT security.'" Plaintiffs' Motion at 11 (citing Cobell, 455 F.3d at 317). What the Court of Appeals actually stated was, "*If the district court conducts any* further proceedings directed at providing equitable relief in the area of Interior's IT security, it must keep in mind the balance between administrative law and trust law that we explained in part II [of the opinion]." Cobell, 455 F.3d at 317 (emphasis added). The omitted language is significant because it flatly rebuts Plaintiffs' assertion that the Court of Appeals viewed further proceedings concerning IT security to be a foregone conclusion. In fact, the Court of Appeals' language implies the opposite. Therefore, Plaintiffs' argument that the personnel files of IT security personnel are perpetually relevant and discoverable fails.

Plaintiffs' argument advocates that the January 16, 2007 Order should be interpreted completely out of context, without consideration of intervening appellate decisions, the current

posture of the case, or common sense. Defendants' interpretation -- that the Court considered the motion moot because the IT Security hearing and appellate review of the matter are long over -- makes much more sense under the circumstances.

## II. The Discovery Plaintiffs Seek To Compel is Improper Under the APA

The APA also forecloses Plaintiffs from obtaining the roving discovery they seek. In their Motion, Plaintiffs rely on the Court's September 17, 2002 and February 8, 2005 opinions to argue that they may engage in perpetual discovery.[7] Although this Court has previously permitted Plaintiffs discovery on certain topics notwithstanding this case's jurisdictional footing in the APA, the Court of Appeals has since reiterated and clarified the limits of the Court's jurisdiction under the APA in this case vis-a-vis the common law governing trusts. Cobell, 455 F.3d at 303-07. Therefore, future proceedings, including discovery, must be viewed in the context of the recent Court of Appeals' decisions and the well-established constraints of the APA.

In its July 11, 2006 decision, the Court of Appeals reconciled the fact that this is an APA case with the fact that Interior is acting as a fiduciary to whom common trust law would apply. In vacating the preliminary injunction entered following the IT Security hearing, the Court of Appeals explained:

> Because "an on-going program or policy is not, in itself, a 'final agency action' under the APA," our jurisdiction does not extend to reviewing generalized complaints about agency behavior. Consequently, each case only presents the court with a narrow question to resolve, it can have no occasion to order wholesale reform of an agency program. Still, "because the underlying

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[7] Plaintiffs' Motion at 6-7 (citing Cobell v. Norton, 226, F.Supp.2d 1, 159) (D.D.C. 2002), rev'd on other grounds, 334 F.3d 1128 (2003); Cobell v. Norton, 226 F.R.D. 67, 72 (D.D.C. 2005)).

> lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties," the court "retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy." These equitable powers, limited at one end of the spectrum by the court's inability to order broad, programmatic reforms, are also limited in the opposite direction by an inability to require the agency to follow a detailed plan of action. The court generally may not prescribe specific tasks for Interior to complete; it must allow Interior to exercise its discretion and utilize its expertise in complying with broad statutory mandates. These restraints are put in place by both administrative law and trust law. The ability of the agency itself to exercise its discretion is somewhat constrained, however. Rather than its normal freedom to choose 'any reasonable option,' the agency's actions must satisfy fiduciary standards.

Id. at 307 (internal citations omitted).

The APA's limitations articulated in this appellate decision are consistent with the Court of Appeals' decisions in prior APA cases. In all but exceptional situations, judicial review of agency action is confined to the administrative record. See Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C. Cir. 1998) (in most instances, the APA "limits review to the administrative record . . . ." (citations omitted) ); see also Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 65 (D.D.C. 2002), aff'd, 333 F.3d 156 (D.C. Cir. 2003) ("It is well-established that the scope of review under the APA is narrow and must ordinarily be confined to the administrative record." (Citation omitted)). As established thirty years ago in Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam), "the focal point for judicial review [of agency action] should be the administrative record already in existence, not some new record made initially in the reviewing court." Accord Fla. Power & Light v. Lorion, 470 U.S. 729, 743 (1985); see also Common Sense Salmon Recovery v. Evans, 217 F. Supp. 2d 17, 20 (D.D.C. 2002) ("[P]laintiffs fail to recognize the basic rule that

generally discovery is not permitted in Administrative Procedure Act cases because a court's review of an agency's decision is confined to the administrative record." (citations omitted) ); Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("[C]hallengers to agency action are not . . . ordinarily entitled to augment the agency's record with" discovery); Texas Rural Legal Aid, Inc. v. Legal Services Corp., 940 F.2d 685, 698 (D.C. Cir. 1991) ("The general principle that informal agency action must be reviewed on the administrative record predates the APA . . . ." (citations omitted)); National Law Ctr. on Homelessness and Poverty v. Department of Veteran's Affairs, 736 F. Supp. 1148, 1152 (D.D.C. 1990) ("discovery is not [generally] permitted prior to a court's review of the legality of agency action . . . .")

With respect to IT security, in its July 11, 2006 decision, the Court of Appeals noted the statutory scheme established by the Federal Information Security Management Act of 2002 ("FISMA")[8] to manage and provide oversight of IT security risks. Cobell, 455 F.3d at 308-14. The appellate court further observed that "[n]otably absent from FISMA is a role for the judicial branch," id. at 314, and concluded that "[t]his is not a FISMA compliance case, whether or not such an animal exists elsewhere." Id. (dictum). Thus, APA review of final agency action on an accounting does not translate to perpetual discovery and judicial oversight of Interior's programmatic efforts concerning IT security.

In contradiction to this controlling authority, Plaintiffs apparently intend to engage in a roving investigation into IT security, untethered to any proceeding. They claim such discovery is relevant to "reveal actual instances of loss, fraud, or manipulation; competence, skill, and IT

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[8/] See Pub. L. No. 107-347, Title III, §§ 301-305.

security experience; as well as the nature and scope of pressure placed on Interior employees . . . to elicit less than candid testimony, inadequate certifications and accreditations, false reports, and confirmations and concurrences in Interior defendants' misrepresentation of IT security posture." Plaintiffs' Motion at 9. Such a fishing expedition is not merely improper under the APA, it is never appropriate under the federal rules.[9]

Plaintiffs have already been afforded vast discovery into the Interior Department's efforts to secure and protect its IT systems – well beyond that countenanced in any APA case – and nothing warrants further departure from the firm rule that APA cases are decided on the administrative record. In their motion, Plaintiffs argue that IT security is "highly relevant" at this juncture because of Interior's efforts to transmit historical statements of account and its efforts to reconnect disconnected bureaus from the Internet. Plaintiffs' Motion at 9. However, that argument ignores the statutory confines of the APA.[10] Before the Court can ascertain whether additional extra-record discovery is appropriate in this case, Interior must file an administrative record on its accounting. Only at that point will it be appropriate for Plaintiffs to attempt to demonstrate that this is one of the exceptional circumstances in which judicial review of an agency action may consider matters not in the administrative record.[11]

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[9] Even under the usual rules of discovery that would apply in a non-APA case, Plaintiffs would not be entitled to launch such an untethered "fishing expedition" into the personnel files listed in their June 23, 2005 request. Alexander v. F.B.I., 186 F.R.D. 113, 119 (D.D.C. 1998) ("[I]t is one thing for a plaintiff who may have spotted a fish to throw his net in that direction; it is quite another to trawl the entire lake to see if it contains any fish at all.")

[10] It also ignores the Court of Appeals' conclusion that Plaintiffs, despite having been afforded vast discovery, had failed to show that any IT security issue "would substantially harm the class members' ability to receive an accounting." 455 F.3d at 317.

[11] To the extent Plaintiffs have propounded this discovery for the purpose of investigating potential criminal contempt allegations, this Court's decision in Landmark Legal Foundation v. EPA, 272 F. Supp. 2d 70, 76 (D.D.C. 2003), citing Young v. United States ex rel. Vuitton et Fils,

## III. Plaintiffs' Motion Contains Material Omissions and Misstatements of Fact

By omission, Plaintiffs' motion suggests that none of the documents they seek to compel was produced. In fact, Defendants did produce personnel records of several individuals after the Court directed Defendants to search personnel records for relevant documents during the IT Security Hearing, even though the Court had not yet ruled on Interior Defendants' Motion.[12] Plaintiffs also fail to mention that the Court suggested what type of personnel information would be relevant from personnel files, which was far narrower than the scope of Plaintiffs' June 23, 2005 Request.[13]

Plaintiffs wrongly accuse government counsel of obstructing discovery during the IT Security Hearing. They accuse government counsel of "impermissibly" withholding relevant documents. Plaintiffs' Motion at 1-2, n.1. Yet an examination of the April 25, 2005 Order shows that personnel files were not listed and were not otherwise clearly responsive to the order. Government counsel explained Defendants' good faith determination on the record.[14] After the Court informed government counsel of its contrary view, Defendants immediately began producing relevant documents. Similarly, Plaintiffs unjustly accuse government counsel of instructing a witness not to produce documents in order to obstruct discovery. Plaintiffs' Motion at 4. However, they do not mention that the undersigned government counsel

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S.A., 481 U.S. 787, 801, 814 (1987), makes clear that the Plaintiffs cannot assume this role.

[12] See n.4, supra, detailing the personnel records produced during the IT Security Hearing.

[13] Compare Tr. at 17:20-23 (June 27, 2005 a.m.) (Attachment B), with Plaintiffs' June 23, 2005 Request (Plaintiffs' Motion at Exhibit 2).

[14] Tr. at 115: 20-23 (June 21, 2005 p.m.) ("Well, with all due respect, Your Honor, until yesterday, I don't believe it had occurred to any of us that a personnel file would be responsive to this order.") (Attachment A) .

subsequently explained to the Court on the record during the hearing that he had in fact not instructed any witness to withhold such documents and that those documents were ultimately produced.[15]

For their assertion that "Interior defendants use personnel practices to punish or reward employees," Plaintiffs' Motion at 3, Plaintiffs rely on their own contempt motion involving allegations of retaliation against Ronnie Levine to accuse Interior of misconduct, id. at 3, n.6 & n.7, but they fail to acknowledge that their motion was denied by the Court's January 16, 2007 Order. The Inspector General's Report that Plaintiffs cite did have negative findings regarding disciplinary processes at Interior, but its focus was not on IT security. Plaintiffs' Motion at 3-4. Thus, these old allegations do not justify the discovery plaintiffs now seek.

## IV. Defendants' Interpretation of The Court's January 16, 2007 Order Is Substantially Justified

Even if the Court determines that Plaintiffs are entitled to some or all of the requested discovery,[16] Defendants' interpretation of the Court's January 16, 2007 Order is substantially justified and, therefore, sanctions are not appropriate. In adjudicating discovery disputes, sanctions are not appropriate if, as in this instance, a party was "substantially justified" in advancing its position. FED. R. CIV. P. 37(a)(4)(A). "If there is an absence of controlling authority, and the issue presented is one not free from doubt and could engender a responsible difference of opinion among conscientious, diligent but reasonable advocates, then the

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15/ Compare Plaintiffs' Motion at 4 with Tr. at 15:19-21 (June 27, 2005 a.m.) (government counsel explaining to the Court, "I did not instruct him not to produce documents . . . So there was from me - and from no one else, as far as I know – no instruction not to produce these documents.") (Attachment B).

16/ Defendants already produced a portion of the requested discovery as part of the IT Security Hearing. See n.4, supra.

opposing positions taken by them are substantially justified." Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 200, 205 (D.D.C. 1998) (citations omitted).

For all the reasons previously articulated in this Opposition, Defendants' interpretation of the Court's January 16, 2007 Order – that the Court denied Defendants' Motion as moot -- is reasonable. The context in which Defendants' Motion was denied (one and a half years after the hearing, the appellate reversal, and the lack of any current evidentiary proceedings in which such discovery is relevant) would lead a reasonable litigant to understand that the Court denied Defendants' Motion because the issue was moot. Under these circumstances, an adverse ruling by the Court should not warrant sanctions.

## CONCLUSION

For these reasons, Defendants request that the Court deny Plaintiffs' Motion To Compel IT Security Personnel Documents and For Sanctions.

Dated: March 19, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 19, 2007 the foregoing *Defendants' Opposition to Plaintiffs' Motion to Compel Production of IT Security Personnel Documents and Request for Sanctions* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., : Civil Action 96-1285
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Plaintiffs :
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v. : Washington, D.C.
: Tuesday, June 21, 2005
DEPARTMENT OF THE INTERIOR, :
: 2:00 p.m.
et al., :
:
Defendants : AFTERNOON SESSION
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DAY 35
EVIDENTIARY HEARING
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UNITED STATES DISTRICT JUDGE
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ATTACHMENT A
Defendants' Opposition to
Plaintiffs' Motion to Compel
Production of I-T Security Personnel
Documents and Request for Sanctions

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how we need to figure out to get a handle on that. But I don't see any colorable argument, even, that these weren't responsive to my order.

So what's your suggestion about how to proceed with that, my not having that information?

MR. QUINN: I became aware of this last evening, Your Honor, after the subject had come up in Court --

THE COURT: I mean, it's certainly inconsistent with the approach you told me you were taking about what was responsive.

MR. QUINN: Yeah, I'm sorry, Your Honor, I don't know what the actual exchange was yesterday, and I haven't had a chance to actually confer with Mr. Kirschman about the particulars of his conference with Mr. Burns. But I would say that if Your Honor would indulge me, I would go back to our team. I'm not aware of anyone within the DOJ trial team that has been giving out any kind of general advice about responsiveness to individuals trying to determine -- outside of the general guidance that we've been giving to people as far as trying to determine whether something is IT security related or not.

THE COURT: Right.

MR. QUINN: I didn't have an opportunity -- I wasn't consulted on that, and I don't even know necessarily whether that's exactly how that occurred.

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THE COURT: Right. Right.

MR. QUINN: But I would be happy to go back and consult with the trial team and ask them whether there's been any other incidents of that nature so we can address them in due course.

THE COURT: I would appreciate that. And you can report back to me next week.

MR. QUINN: I will do that, Your Honor.

THE COURT: Thanks, Mr. Quinn.

MR. WARSHAWSKY: Your Honor, if I may, I know Mr. Quinn will report back. I must advise the Court during one of our breaks, I had a discussion with Mr. Dorris regarding whether personnel matters -- personnel files were responsive to the April 25th production order. It's our view, certainly it's not a document related to the security of a system that houses or accesses Individual Indian Trust data. We have, of course, very serious concerns about the privacy issues involved --

THE COURT: Well, you claim privilege or you make a Privacy Act argument for that. You don't not identify it and say it's not responsive. It's clearly responsive to my order.

MR. WARSHAWSKY: Well, with all due respect, Your Honor, until yesterday, I don't believe it had occurred to any of us that a personnel file would be responsive to this order.

THE COURT: Well, it better occur to you now, because it is.

MR. WARSHAWSKY: We understand that now, Your Honor.

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And Mr. Dorris has indicated an interest in seeing other personnel files. I am hopeful that we can have a continuing discussion with the plaintiffs' counsel to see if we can narrow the scope to what they want produced, because we certainly don't believe every personnel file should be produced.

THE COURT: I understand that. But when you're disciplining somebody for not doing his job on IT security, I don't know how you could think that's not responsive to the Court's ordering you to produce documents about IT security.

MR. WARSHAWSKY: Well, I understand the Court's position --

THE COURT: It's a preposterous determination of the Department of Justice, with all due respect.

MR. WARSHAWSKY: And I understand where the Court is --

THE COURT: There's not much due for that determination, I'll tell you.

MR. WARSHAWSKY: Thank you, Your Honor.

THE COURT: All right.

Mr. Dorris?

MR. DORRIS: Your Honor, I know others are waiting, so I'll try to be brief. I want to just quickly update you.

Number one, and make sure the government hears it this time and it's clear, of the disks that are outstanding, almost half of them are MMS. And as you'll recall, we were telling them we wanted those moved up to the top of the line. Mr. Brown

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is going to be back with us, hopefully starting next Tuesday. It sounds like that there are almost 70 more disks to be produced there. So we need those expedited as quickly as possible.

There are a few items we would like to mention to you that we would like to take up on Monday, and they include the following: First of all, KPMG, there is an issue that is coming up regarding their 2005 workpapers. We would like to provide notice to KPMG that if they want their counsel to address that, we would like to take it up with you on Monday morning, and we will provide notice to them to be here if that's acceptable to the Court.

THE COURT: That's fine.

MR. DORRIS: We also have an issue that we would ask the government have Mr. Siemetkowski here on Monday. He is continuing to look into the ZANTAZ issue with respect to Mr. Cason's e-mails that first arose where we have hard copies of a number of e-mails from Mr. Cason, that weren't produced in ZANTAZ and we don't know why. We understand he's still exploring to look at that. I think it may be a responsiveness issue, at least he alluded to that, and we would ask that be brought to head on Monday with a report from him.

THE COURT: Okay.

MR. DORRIS: We will also report back to you where we stand on the personnel files then.

ATTACHMENT A
Defendants' Opposition to
Plaintiffs' Motion to Compel
Production of I-T Security Personnel
Documents and Request for Sanctions

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| ELOUISE PEPION COBELL, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>SECRETARY, DEPARTMENT OF THE INTERIOR, et al,.<br><br>Defendants. | : | Civil Action No. 96-1285<br><br>Washington, D.C.<br>Monday, June 27, 2005<br>10:13 a.m. |

DAY 36 - AM SESSION
TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Pages 1 through 87

ATTACHMENT B
Defendants' Opposition to
Plaintiffs' Motion to Compel
Production of I-T Security Personnel
Documents and Request for Sanctions

THERESA M. SORENSEN,
OFFICIAL COURT REPORTER

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to that.
THE COURT: All right.
MR. HARPER: That's fine, Your Honor. We are in agreement with that.
THE COURT: Okay. Then 366 will be received, but only the first page of the exhibit. The remaining pages will be returned to the plaintiff.
(Whereupon, Plaintiffs' Exhibit Number 366, having been previously marked for identification, was received in evidence.)
THE COURT: Any others?
MR. WARSHAWSKY: That's it, Your Honor.
THE COURT: All right.
MR. HARPER: Your Honor, with respect to Plaintiff's Exhibit 346, this document, among other things, states that ownership information is considered mission critical, and I think it's important because it demonstrates that the government, the Department of Interior, has, since at least 1997, described such information as mission critical, and now they have reduced it to a moderate as opposed to a high level of criticality. So -- at least for the LRIS system -- so we think it's probative on that question, among others.
THE COURT: All right. The objection to 346 is overruled. The objection to 382 and 378, which is only on

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relevance grounds, is overruled as well, although in both instances I have the final versions. For 382, it's 382-A; and for 378, it's 384. Whatever relevance the earlier may have remains to be determined after reviewing the testimony, but since that's what the witnesses had when they testified, I will go ahead and receive them for what they are worth.
All right. What other issues do we have?
MR. HARPER: Your Honor, last week, the government filed a motion for clarification with respect to the production of personnel files, and we would like to just have that heard at this point.
THE COURT: All right.
MR. HARPER: These files are clearly highly probative, as we saw in the case of Mr. Foster where his -- where there was material in his file that went directly to his conduct in the certification and accreditation process.
THE COURT: Well, they are probative where they show some deficiency in performance. Why would they be otherwise probative?
MR. HARPER: I think they are also probative, for example, if they are congratulated for having certified a system that ought not have been certified.
THE COURT: Okay. But that would only be that part of a personnel rating that showed the rating on that critical element. It wouldn't be their overall -- it

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wouldn't be the entire rating, I don't think. I think at most, if there is any probative value, it would be how they were rated on what they did about improving security or whatever that critical element was in if it was in their performance rating, right?
MR. HARPER: Yes. Your Honor, if I could speak on that point because I think this is a critical issue. What we have found is that there has been a lot to be desired with respect to the responsiveness review by the government. I just gave you one example, which is the OIG opinion: plainly responsive, highly probative -- not produced. We don't know what else hasn't been produced in that context.
A couple other examples: box 61, the torn document. That was a relevant document, yet not produced, determined to be non-responsive. There have certainly been ZANTAZ e-mails -- I know you don't want to get into that issue right now, but there are still about 50 percent of the ZANTAZ e-mails for Mr. Burns. They were produced in hard copy but not produced in ZANTAZ. Again, we don't have the ability to cross-reference other people. We can cross-reference Mr. Burns because he provided an index. Finally, these personnel files themselves -- in the case of Mr. Foster, I think in the case of the witness today, Ms. Levine, highly probative.
So we are very concerned as to whether or not the

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government can appropriately review these for responsiveness purposes. They seem to leave out all kinds of material that is plainly probative, clearly relevant to the matters at hand. So we would like the opportunity to review those under the -- and we understand that there are Privacy Act concerns, but under Laxall and under the decision of this Court in Lorenz," the fact that there may be Privacy Act concerns does not rise to the level of a privilege. It is a factor in the balancing, and we think, balanced correctly, this material ought to be produced so that we have an opportunity to review it and determine responsiveness, particularly in light of the practice that has been demonstrated time and again with respect to the government's review on these issues.
THE COURT: All right.
MR. KIRSCHMAN: Your Honor, if I may respond, and also, too, Your Honor, I'm also here to clarify what I understand to be outstanding questions you had regarding the incident regarding Mr. Burns and the Al Foster documents.
First, I think it's significant that both the documents related to Mr. Foster and the documents that were made reference here to regarding Request 1 are not under the scope of what we have sought from our witnesses. We provided the data call, and those documents came within our definition of what is relevant and it is consistent with

ATTACHMENT B
Defendants' Opposition to
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Documents and Request for Sanctions

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what, we believe, the Court expressed last Tuesday regarding what should be produced. So we have taken the Court's admonishment to heart, we have a data call, and we have received documents. Ms. Levine's documents are an example, and you will likely hear about those today.

So there is no reason demonstrated why plaintiffs should be allowed to sift through personnel files in such a sweeping scope. These are highly confidential documents. And we understand the Court's concern to be whether there was a corrective action, whether it be a reprimand, whether it be a letter of counseling, and we have addressed that concern and we will throughout.

So to take the plaintiffs' position and to allow all evaluations to be reviewed, all assessments of any type or any nature, formal or informal, or to allow compensation information to be reviewed, is beyond the scope of reasonableness. It's just not called for in this circumstance and, again, it's beyond what the Court had raised just last week. Keeping in mind the Court's strictures, we have acted promptly to comply with this, but anything else would be not likely to lead to relevant information and would be highly intrusive, not to mention onerous on all the parties involved: the individuals, Human Resources, supervisors, what have you.

For that reason, we ask that the Court grant our

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motion adopting the definition we set forth in our motion for clarification.

THE COURT: All right.

MR. KIRSCHMAN: Now, factually, regarding the incident with Mr. Burns, I met with Mr. Burns, and for a time there was DIO counsel there, and subsequently Mr. Gillett joined me. But in the time in question, I was prepping Mr. Burns for his upcoming testimony. We were speaking about his testimony.

At the time, we were not talking about document production, and Mr. Burns expressed to me a concern about what, if anything, he could testify to relating to the ADR, the negotiations that resulted from Mr. Foster's challenge to the reprimand. So in that context, I spoke to Mr. Burns regarding what he could say or how he could handle questions that were posed to him, and I did not instruct him not to produce documents. That was not the issue that was addressed.

So there was from me -- and from no one else, as far as I know -- no instruction not to produce these documents. That wasn't the issue being addressed by Mr. Burns and I that afternoon; it was his testimony and what he should anticipate when he was testifying.

THE COURT: All right.

MR. KIRSCHMAN: Do you have any questions

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regarding that?

THE COURT: No.

MR. KIRSCHMAN: Thank you, Your Honor.

THE COURT: All right.

MR. HARPER: Your Honor, a couple of additional points. On the last matter with respect to Mr. Burns, the individual we are talking about -- Mr. Foster -- was the primary person certifying and accrediting, doing the entire process, for the last year, and during that exact same period, there was material regarding a reprimand and the termination of his employment, and somehow that issue got raised in a conversation and there was no discussion about whether or not the material was responsive to the order? I find that very difficult to believe.

Any material, furthermore, Your Honor, that goes to whether or not people are being rewarded or punished for whatever action they are taking in IT security is relevant to this proceeding because it -- we saw with the change in the SES review that people were getting criticized sometimes for taking positions that are not consistent with the message that the government wants to send out -- meeting the numbers, as Mr. Burns talked about.

So we would ask that we have the ability to determine what of this material is responsive in light of the practice that the government has engaged in --

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withholding plainly relevant material.

THE COURT: All right.

MR. HARPER: Thank you.

THE COURT: I will give you the last word since it's your motion.

MR. KIRSCHMAN: Thank you, Your Honor.

I am new to this case and the Court, and while counsel might find it hard to believe, when I make a representation to the Court, that's a truthful representation. If I had made a mistake, if I had misunderstood the scope of your instruction, I would tell you that. So I don't appreciate this insinuation that I'm not being truthful with the Court. It did not come up, the matter of production of those documents, because we weren't addressing that at the time, and that's the truth of the matter.

Regarding the motion, again, what plaintiffs are asking for is onerous and not within the confines of relevance here. The information --

THE COURT: What about the more limited suggestion I made about only that part of the personnel performance that shows how SESes who had that as a critical element in their performance plans were rated?

MR. KIRSCHMAN: Well, the issue here, Your Honor, is --

ATTACHMENT B
Defendants' Opposition to
Plaintiffs' Motion to Compel
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Documents and Request for Sanctions

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THE COURT: There can't be that many. I don't know how many SESes there are that had that element, but I wouldn't think that would be nearly as onerous as every employee.
MR. KIRSCHMAN: Well, no, certainly that whittles it down, Your Honor. But the issue here is the security of IT systems, and --
THE COURT: I understand, but if they are being rated on how they are performing on IT matters and that is what is required in that critical element, wouldn't that be probative, that they are getting all these outstanding ratings at the same time that they are sending all these memos saying nothing works?
MR. KIRSCHMAN: Respectfully, Your Honor, I don't think so, and maybe your question establishes the point. If they got outstanding ratings, would that mean that IT security was in outstanding shape. If someone got a poor rating because they failed to report to a supervisor, would that mean IT security was in poor shape? There is no correlation regarding -- necessary correlation between the hypothetical you gave and IT security, and we have to keep some focus on that. And because there is no correlation of that, to go beyond --
THE COURT: Because the element doesn't go to security.

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MR. KIRSCHMAN: I'm sorry?
THE COURT: The element doesn't go to security. What was the element that was added to the performance work plans?
MR. KIRSCHMAN: There is an element regarding -- and I'm going to speak generally because I don't remember the terms. Although I have seen it, I don't recall it. But providing for adequate IT security as part of their mission to ensure --
THE COURT: So the element is IT security.
MR. KIRSCHMAN: There are at least sub-elements, I understand, that address IT security, certainly, Your Honor.
THE COURT: Okay.
MR. KIRSCHMAN: But the question is the relevance to the actual state of IT security today and whether in 2003 -- and by the way, the plaintiffs asked that we go all the way back to 2003. Whether someone received a meets or an outstanding doesn't really go to whether IT security was outstanding in 2003, and it doesn't go to whether it was poor.
Now, the Court has addressed reprimands and letters of counsel that addressed work geared towards IT security. That's an entirely different situation from what plaintiffs are asking for here. So within the confines of what the Court addressed last week, we have already

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endeavored to meet that.
We promptly retrieved documents related to Ms. Levine and made them available to plaintiffs, both in hard copy and CD, as soon as we learned of it and consistent with your instruction. We take your instructions seriously. But there is no reason to balloon the issue from what you addressed Tuesday to what plaintiffs have proposed to us in their e-mails.
THE COURT: Okay.
MR. KIRSCHMAN: Thank you, Your Honor.
THE COURT: I will take that matter under submission and issue a ruling as promptly as I can. I want to hear about the Levine documents today first.
All right. The exhibits admitted were 342 through 384.
(Whereupon, Plaintiffs' Exhibits Number 342 through 384, having been previously marked for identification, were received in evidence.)
THE COURT: All right. You have one other issue?
MR. HARPER: Yes, Your Honor. Thank you.
We wanted to raise the issue -- and I understand Mr. Jones is in the courtroom today -- with respect to the production from KPMG.
There has been some back and forth with respect to 2005 documents. There was an ongoing audit and review of

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the Department of Interior's FISMA compliance. Those issues are plainly relevant. One of the government's principal arguments is that was then, this is now, so this kind of material is critical.
We initially were looking for production from KPMG and received only material through the Fiscal Year 2004 timeframe, workpapers and other such material. At that time, we realized that 2005 material had not been produced. We have had ongoing conversations. We have now clarified that there is, in fact, 2005 material. I would like to hand up, Your Honor, a couple of exhibits that we have found through the Office of Inspector General production. Should I mark these as exhibits? This is KPMG --
THE COURT: Let's not get them mixed in with exhibits that are being admitted into evidence.
MR. HARPER: Okay.
THE COURT: So you can just show them to me.
MR. HARPER: The first item that I have handed you is the proposal to provide task to amend the Fiscal Year 2005 audit dated March 2nd. If you turn, Your Honor, to the last four digits Bates stamped 1856, you can see Task No. 6 listed there is Federal Information Security Management Act. Turn your attention, Your Honor, to Task 6, which begins on page 32, or Bates stamp 1890, and it says, the first sentence, "KPMG understands that the objective of this task

ATTACHMENT B
Defendants' Opposition to Plaintiffs' Motion to Compel Production of IT Security Personnel Documents and Request for Sanctions

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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|---|---|
| ELOUISE PEPION COBELL, et al., | |
| Plaintiffs, | |
| v. | Case No. 1:96cv01285JR |
| DIRK KEMPTHORNE, Secretary of the Interior, et al., | |
| Defendants. | |

**ORDER**

This matter comes before the Court on *Plaintiffs' Motion to Compel Production of I-T Security Personnel Documents and Request for Sanctions and Memorandum in Support Thereof* (Dkt. # 3295). Upon consideration of the Plaintiffs' Motion and Request, Defendants' Opposition, any Reply thereto, and the entire record of this case, it is hereby

ORDERED that the Motion to Compel Production of I-T Security Personnel Document is DENIED and;

It is further ORDERED that the Request for Sanctions is also DENIED.

SO ORDERED.

_____
Hon. James Robertson
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date:_____