

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV01285
)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior,)	
<u>et al.</u> ,)	
)	
Defendants.)	
_____)	

**DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR CONFIRMATION OF REAL-TIME
CAPTURE AND ARCHIVE OF E-MAIL IN THE BUREAU
OF INDIAN AFFAIRS AND BUREAU OF LAND MANAGEMENT**

In filing their Opposition to Defendants' Motion for Confirmation of Real-Time Capture and Archive of E-Mail in the Bureau of Indian Affairs and Bureau of Land Management ("Opposition"), Plaintiffs' counsel inexplicably turn a previously uncontested issue into a contentious one. As noted in Defendants' Motion for Confirmation of Real-Time Capture and Archive of E-Mail in the Bureau of Indian Affairs and Bureau of Land Management ("Motion"), Plaintiffs' counsel filed objections neither to the Court's adoption of the Special Master's 2002 ZANTAZ Opinion and Order,¹ nor to either 2003 Interior submission² seeking similar confirmation for five other bureaus. Despite their reversal of course, Plaintiffs' counsel are

¹ Special Master's September 25, 2002 Opinion ("SM Sept. 25, 2002 Opinion") (Exhibit 1) and accompanying Order ("SM Sept. 25, 2002 Order") (Exhibit 2), as adopted without objection by the Court on February 7, 2003 (Dkt. No. 1793) ("Feb. 7, 2003 Order") (Exhibit 3).

² Letter from Siemietkowski to Balaran of 8/15/03 (Exhibit 4, without attachments; Letter from Siemietkowski to Balaran of 12/10/03 (Exhibit 5, without attachments).

unable to overcome the straightforward and incontrovertible facts that support confirmation of real-time capture and archive of e-mail at the Bureau of Indian Affairs ("BIA") and the Bureau of Land Management ("BLM"). Choosing to ignore the substance contained in fifty-five pages of attachments to Defendants' Motion, Plaintiffs' counsel instead litter their Opposition with unsupported arguments, false statements, and accusations lacking evidentiary support.

I. The Facts Support Confirmation of Real-Time Capture and Archive of E-Mail at BIA and BLM.

As chronicled in Defendants' Motion,³ the facts surrounding the implementation of the ZANTAZ program are not difficult to understand. On August 8, 2002, the Special Master held an on-the-record meeting with counsel for Plaintiffs, counsel for Defendants, Interior, and Interior's e-mail project contractor (ZANTAZ).⁴ On August 14, 2002, Interior filed its motion with the Special Master seeking approval to implement its ZANTAZ proposal.⁵ Plaintiffs filed their opposition brief with the Special Master on August 28, 2002,⁶ and Interior filed its reply on

³ Motion at 2-4.

⁴ See Tr., Briefing on Proposed Department of the Interior EMail Backup and Recovery Program, Aug. 8, 2002.

⁵ Interior Defendants' Motion and Memorandum Regarding Proposal to (1) Restore and Search Retained Backup Tapes Containing E-Mail; (2) Implement Real-Time Capture of E-Mail Traffic and Incorporation of E-Mail into a Searchable Archive; and (3) Replace Indefinite Retention of Backup Tapes Containing E-Mail with Backup of Searchable E-Mail Archive ("Defendants' E-Mail Motion") (Dkt. No. 1421, filed with the Special Master on August 14, 2002), approved by SM Sept. 25, 2002 Order, granted by Feb. 7, 2003 Order.

⁶ Plaintiffs' Opposition to Interior Defendants' Motion and Memorandum Regarding Proposal to (1) Restore and Search Retained Backup Tapes Containing E-Mail; (2) Implement Real-Time Capture of E-Mail Traffic and (3) Replace Indefinite Retention of Backup Tapes Containing E-Mail with Backup of Searchable E-Mail Archive ("Plaintiffs' Opposition to Defendants' E-Mail Motion") (Dkt. No. 1441, filed with the Special Master on August 28, 2002).

September 9, 2002.⁷ On September 25, 2002, the Special Master "ORDERED that the E-Mail Proposal is APPROVED for implementation by the Department of the Interior and ZANTAZ" SM Sept. 25, 2002 Order at 1. On February 7, 2003, the Court adopted the Special Master's September 25, 2002 Opinion and accompanying Order without objection, thus granting Defendants' motion "in accordance with the terms set forth in the Order of the Special Master" Feb. 7, 2003 Order at 1.

In accordance with Defendants' E-Mail Motion, as approved by the Special Master and the Court, Interior notified the Special Master, copying Plaintiffs' counsel, on August 15, 2003 that Interior and ZANTAZ had certified the successful implementation of real-time capture and archive of e-mail in the Office of the Special Trustee (OST), the National Business Center (NBC) and the Solicitor's Office (SOL). Letter from Siemietkowski to Balaran of 8/15/03, at 1. Similarly, on December 10, 2003, Interior notified the Special Master, copying Plaintiffs' counsel, that Interior and ZANTAZ had certified the successful implementation of real-time capture and archive of e-mail in the Office of Hearings and Appeals (OHA) and the Minerals Management Service (MMS). Letter from Siemietkowski to Balaran of 12/10/03, at 1. On both

⁷ Interior Defendants' Reply in Further Support of Motion and Memorandum Regarding Proposal to (1) Restore and Search Retained Backup Tapes Containing E-Mail; (2) Implement Real-Time Capture of E-Mail Traffic and Incorporation of E-Mail into a Searchable Archive; and (3) Replace Indefinite Retention of Backup Tapes Containing E-Mail with Backup of Searchable E-Mail Archive (Dkt. No. 1467, filed with the Special Master on September 9, 2002).

occasions,⁸ and in accordance with the approved E-Mail Motion,⁹ Interior notified the Special Master that it would assume his confirmation of real-time capture and archive of e-mail at these five designated offices if it did not receive a response from him within the approved two-week review period. No objection was made by either the Special Master or Plaintiffs' counsel.

Just as they did not challenge any assertions in Interior's August 15 and December 10, 2003 submissions to the Special Master, Plaintiffs' counsel likewise offer no protest to any of the substance contained in the fifty-five pages of attachments to Defendants' current Motion. In essence, Plaintiffs' counsel concede the substance of those attachments, choosing instead to trot out¹⁰ their hackneyed "purple prose."¹¹ In reversing their prior position, however, Plaintiffs'

⁸ See Letter from Siemietkowski to Balaran of 8/15/03 (Exhibit 4), at 2:

Per your September 25 Order, please confirm for us the "implementation of the real-time capture and archive of e-mail traffic" by August 29. If we do not receive a response from you by August 29, Interior will assume your confirmation of this "implementation of the real-time capture and archive of e-mail traffic."

See Letter from Siemietkowski to Balaran of 12/10/03 (Exhibit 5), at 2:

Per your September 25 Order, please confirm for us the "implementation of the real-time capture and archive of e-mail traffic" by December 24. If we do not receive a response from you by December 24, Interior will assume your confirmation of this "implementation of the real-time capture and archive of e-mail traffic."

⁹ See Interior Defendants' E-Mail Motion at 18 (Exhibit 6).

¹⁰ Continuing their recidivist use of intemperate language, Plaintiffs' counsel litter their Opposition with several baseless and base accusations. See, e.g., Opposition at 1 ("text book example of a Rule 11 violation;" "long on deception and intellectual dishonesty;" "the unprincipled trustee-delegate and her unethical counsel"). Those are quotes from just the first two sentences of Plaintiffs' counsel's Opposition. The invective continues throughout their brief. Such schoolyard name-calling in a legal pleading should not be tolerated. Plaintiffs' counsel used similar intemperate language in their Opposition to Interior Defendants' E-Mail Motion, filed with the Special Master on August 28, 2002. See, e.g., Plaintiffs' Opposition to Defendants' E-Mail Motion at 6 n.7 ("trust-
(continued...)

counsel do not, and cannot, explain why they object to confirmation of real-time capture and archiving at the Bureau of Indian Affairs ("BIA") and the Bureau of Land Management ("BLM") when they did not object to similar confirmation packages filed on behalf of OST, NBC, SOL, OHA and MMS. Established facts simply do not support the claims they advance.

II. Plaintiffs' Claims Are Not Supported by Established Facts.

Struggling to justify their first opposition to an Interior submission under the ZANTAZ program, Plaintiffs' counsel accuse "the unprincipled trustee-delegate and her unethical counsel" of "retroactively seek[ing] to recast the Special Master's September 25, 2002 Opinion as something that it is not" Opposition at 1. However, these claims fall short when measured against fact:

<u>CLAIM</u>	<u>FACT</u>
Defendants' Motion is "short on substance." Opposition at 1.	A fifty-five page attachment accompanies Defendants' Motion. Plaintiffs' counsel do not reference any claims in the attachment, much less attack those claims.
"[E]-mail backup tapes - trust records and data . . . are . . . the property of individual Indian trust beneficiaries." <u>Id.</u> at 1-2.	Plaintiffs cite no authority for the astonishing proposition that the beneficiaries own the actual backup tapes or the data on them.

¹⁰(...continued)

delegates who routinely lie about everything material in this litigation;" "contemnors who are inclined to commit fraud and evade accountability;" "there is no reason to believe that contemnors will not do anything to continue to conceal their frauds"). Just as such vituperation did not sway the Special Master in 2002, neither should it persuade the Court today.

¹¹ Order, Apr. 8, 2003 (Dkt. No. 1961), at 2 n.1.

<p>The Special Master's "findings speak only to the capability of ZANTAZ, not . . . Norton's implementation of ZANTAZ's proposal" <u>Id.</u> at 2-3 (original emphasis).</p>	<p>Both block quotes in Plaintiffs' Opposition from the Special Master's Opinion and Order reference <u>implementation</u> of the e-mail proposal. The Special Master made no distinction between ZANTAZ and Interior in terms of implementation of the e-mail proposal. Moreover, the Special Master ordered that "the [Interior Defendants'] E-Mail Proposal is APPROVED for implementation by the Department of the Interior and ZANTAZ" SM Sept. 25, 2002 Order, at 1 (emphasis added).</p>
<p>Interior has not submitted certifications in accordance with federal and local jurat requirements. <u>Id.</u> at 3 n.4, 4 n.6.</p>	<p>Interior's attachments are memoranda within Interior and between Interior and ZANTAZ. Neither Interior nor ZANTAZ require any type of "jurat" when communicating internally or between each other. Moreover, when Interior submitted similar certifications to the Special Master and Plaintiffs' counsel on behalf of OST/NBC/SOL and OHA/MMS, neither the Special Master nor Plaintiffs' counsel raised any objections to any of the attachments, much less to their form. Plaintiffs already had raised similar jurat objections prior to Interior's submissions on behalf of OST/NBC/SOL and OHA/MMS, <u>see</u> Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Order to Show Cause Why Defendants and Their Employees and Counsel Should Not Be Held in Contempt (Feb. 14, 2001) (Dkt. No. 660), at 12, 13; Tr., Bench Trial, at 3167:6-14 (Jan. 31, 2002), yet did not raise such objections later in the context of implementing the ZANTAZ project.</p>
<p>The Special Master granted Interior Defendants' E-Mail Motion in accordance with his attached order, and the attached order "makes no mention - none- of a ticking clock provision" <u>Id.</u> at 5 (original emphasis).</p>	<p>Interior's E-Mail Motion contained the two-week provision. <u>See</u> Defendants' E-Mail Motion at 18, Exhibit 6. The Special Master's Order approved Interior's E-Mail Proposal in the first "ORDERED" paragraph. SM Sept. 25, 2002 Order at 1, Exhibit 2. The Special Master did not in any way excise or modify this two-week provision in his Order. Moreover, Plaintiffs never opposed this two-week provision in their Opposition to Defendants' E-Mail Motion, filed August 28, 2002.</p>

<p>The January 27, 2003 Special Master Report and the July 27, 2001 Special Master Opinion and Recommendation cited by Plaintiffs' counsel provide background support for their current claim that Interior, through the ZANTAZ program, is destroying trust documents in willful violation of court orders. <u>Id.</u> at 6 n.9, 7.</p>	<p>These quotes from the Special Master's writings indicate that the Special Master was not reticent about criticizing Interior's e-mail practice; yet the Special Master not only approved Interior Defendants' E-Mail Motion, but also uttered not one word of disapproval when Interior filed the two confirmation packages in 2003 on behalf of OST/NBC/SOL and OHA/MMS.</p>
<p>If Interior was so confident of the "ticking clock" provision, there was no need to ask the court for express confirmation for BIA and BLM. <u>Id.</u> at 7.</p>	<p>The Special Master's September 25, 2002 Opinion and Order, as approved by the Court, allowed Interior to presume confirmation by the Special Master after not hearing an objection from him in fourteen days. Interior does not presume such confirmation from the Court because the Special Master's September 25, 2002 Opinion and Order did not provide for confirmation from the Court, much less a presumption of confirmation from the Court after a two-week review period.</p>

III. Plaintiffs Are Inconsistent in Arguing that Interior Has Violated Court Orders and Destroyed Trust Records in Implementing the ZANTAZ Proposal Because Plaintiffs, Having Knowledge of the ZANTAZ Proposal and Its Corresponding Implementation at Five Other Bureaus, Were Fully Aware of Interior's Actions and Acquiesced in Them.

Plaintiffs, through their counsel, claim that Interior has "been in gross violation of Court orders . . . law and federal rules" because it has, in accordance with the Special Master's September 25, 2002 Opinion and Order, presumed confirmation of real-time capture and archive at OST, NBC, SOL, OHA and MMS. Opposition at 5. Their counsel's own actions, however, belie this claim. Interior copied Plaintiffs' counsel on both the August 15 and December 10, 2003 letters to the Special Master regarding confirmation of real-time capture and archiving at

OST/NBC/SOL and OHA/MMS, respectively. Both letters clearly notified the Special Master and Plaintiffs' counsel of the results of confirmation for these bureaus:

After ZANTAZ has completed its restoration and archiving of the backup tapes, it will return those tapes to Interior for recycling as part of the normal backup procedures.

In that regard, Interior Defendants also notify you, in accordance with your September 25 Order, of their intent to return to normal e-mail system backup and tape retention procedures for all e-mail tapes generated for SOL, OST, and NBC on August 29, 2003. Thus, the ZANTAZ archive will replace the indefinite retention of backup tapes, as provided in your September 25 Order.

Letter from Siemietkowski to Balaran of 8/15/03 (Exhibit 4), at 2 (footnotes omitted);

After ZANTAZ has completed its restoration and archiving of the backup tapes, it will return those tapes to Interior for recycling as part of the normal backup procedures.

In that regard, Interior Defendants also notify you, in accordance with your September 25 Order, of their intent to return to normal e-mail system backup and tape retention procedures for all e-mail tapes generated for OHA and MMS after their respective live capture implementation dates. Interior will return to its normal backup and retention procedures for OHA and MMS on December 24, 2003. Thus, the ZANTAZ archive will replace the indefinite retention of backup tapes, as provided in your September 25 Order.

Letter from Siemietkowski to Balaran of 12/10/03 (Exhibit 5), at 2 (footnotes omitted).

Upon receipt of these letters, Plaintiffs' counsel did nothing. Even if they somehow believed, however wrongly, that Interior did not have the Special Master's permission to implement the ZANTAZ project,¹² Plaintiffs' counsel nonetheless knew that "[a]fter ZANTAZ has completed its restoration and archiving of the backup tapes, it will return those tapes to Interior for recycling as part of the normal backup procedures." Letter from Siemietkowski to

¹² Opposition at 3-4.

Balaran of 8/15/03 (Exhibit 4), at 2 (footnotes omitted). Even if they somehow believed, however wrongly, that Interior's submissions to the Special Master did not constitute "certifications,"¹³ Plaintiffs' counsel nonetheless knew of Interior's "intent to return to normal e-mail system backup and tape retention procedures for all e-mail tapes generated for [OST/NBC/SOL and OHA/MMS] after their respective live capture implementation dates." Id.; Letter from Siemietkowski to Balaran of 12/10/03 (Exhibit 5), at 2 (footnotes omitted). Despite their current protests, they did nothing at the time despite having full knowledge of Interior's intentions. Had Plaintiffs seen problems with Interior's actions, their counsel surely would have raised them at that time.

IV. Plaintiffs' Opposition Contains Numerous False Statements.

In their effort to justify their first opposition to an Interior submission under the ZANTAZ program, Plaintiffs make several false statements to the Court:

<u>FALSE STATEMENT</u>	<u>TRUTH</u>
Defendants' Motion refers "generally" to the Special Master's September 25, 2002 Opinion and Order, but does "so without reference to any page or specific citation." Opposition at 2.	Page 2 of Defendants' Motion specifically cites page 1 of the SM Sept. 25, 2002 Order. This citation references the Special Master's approval of Interior's ZANTAZ proposal.

¹³ Id.

<p>"<u>In their entirety</u>, the Master's findings are as follows:" (followed by one paragraph from the SM Sept. 25, 2002 Opinion.) <u>Id.</u> (emphasis added).</p>	<p>Not only did the Master not deem that section of his Opinion "Findings," but also Plaintiffs' counsel omit two sentences that immediately precede, in the same paragraph, their quoted language. Those sentences read: "The Special Master credits the representations of the Associate Deputy Secretary and finds Interior's proposal to be sound. Interior is prepared to spend millions of dollars and retain a firm with considerable credentials to assist with implementation of a proposal that responds directly to concerns raised by the Special Master." SM Sept. 25, 2002 Opinion at 6 (footnotes omitted).</p>
<p>"[T]he Master in his order did not approve implementation of the ZANTAZ proposal" <u>Id.</u> at 3 (original emphasis).</p>	<p>The Order reads, "ORDERED that the E-Mail Proposal is APPROVED for <u>implementation</u> by the Department of the Interior and ZANTAZ" SM Sept. 25, 2002 Order at 1 (emphasis added).</p>
<p>Interior never moved the Master for permission to "discontinue the practice of creating and preserving e-mail backup tapes." <u>Id.</u> at 4.</p>	<p>Interior moved for such relief in its original motion to the Special Master. <u>See</u> Defendants' E-Mail Motion at 18, Exhibit 6. Additionally, Interior sought such relief from the Special Master on August 15, 2003, on behalf of OST, NBC, and SOL. Interior sought the same relief from the Master on December 10, 2003, on behalf of OHA and MMS. Both letters to the Special Master expressly notified him and Plaintiffs' counsel that the respective bureaus would recycle the backup tapes and that the ZANTAZ archive would replace the indefinite retention of backup tapes. <u>See</u> Letter from Siemietkowski to Balaran of 8/15/03 (Exhibit 4), at 2; Letter from Siemietkowski to Balaran of 12/10/03 (Exhibit 5), at 2.</p>

<p>"Norton and her counsel argue disingenuously that plaintiffs had never objected to the e-mail proposal [footnote 7]: Norton and her counsel seem to be suffering from selective amnesia; plaintiffs filed a vigorous opposition to the relief sought in Defendants' Motion to Restore and Capture E-mail." <u>Id.</u></p>	<p>Not only do Defendants never make this claim in their Motion, but also Defendants specifically cite the portion of the SM Sept. 25, 2002 Order that precisely notes the Special Master's consideration of Plaintiffs' Opposition to Defendants' E-Mail Motion. Motion at 2. The only lack of opposition Defendants note is Plaintiffs' counsel's lack of written objections to the Court's adoption of the SM Sept. 25, 2002 Opinion and SM Sept. 25, 2002 Order, and their lack of written objections to Defendants' specific confirmation notices to the Special Master for OST/NBC/SOL and OHA/MMS. Motion at 3; 4 nn.4, 5.</p>
<p>"[T]here is no record of any certification ever being provided to the Master, this Court, or plaintiffs." <u>Id.</u></p>	<p>Interior filed real-time capture and archive certifications from Interior and ZANTAZ with the Special Master and Plaintiffs' counsel on August 15, 2003, for OST/NBC/SOL, and on December 10, 2003, for OHA/MMS. Both filings contain the following language in the first paragraph: "Interior Defendants provide the attached certifications from Interior and ZANTAZ" <u>See</u> Letter from Siemietkowski to Balaran of 8/15/03 (Exhibit 4), at 1; Letter from Siemietkowski to Balaran of 12/10/03 (Exhibit 5), at 1.</p>
<p>"[T]he trustee-delegates never moved the Special Master or the Court to implement their ZANTAZ proposal." "Indeed, the instant motion is the first motion filed by defendants to implement the ZANTAZ proposal." <u>Id.</u>; <u>id.</u> n.8 (original emphasis).</p>	<p>The very title of Defendants' E-Mail Motion, filed with the Special Master on August 14, 2002, reads in pertinent part: "Interior Defendants' Motion and Memorandum Regarding Proposal to . . . (2) <u>Implement</u> Real-Time Capture of E-Mail Traffic and Incorporation of E-Mail into a Searchable Archive" Defendant's E-Mail Motion at 1 (emphasis added).</p>

<p>To the extent it has overwritten e-mail backup tapes, Interior has done so in "secret" and "surreptitiously." <u>Id.</u> at 6, 8.</p>	<p>Interior sought such relief from the Special Master on August 15, 2003, on behalf of OST, NBC, and SOL. Interior sought such relief from the Special Master on December 10, 2003, on behalf of OHA and MMS. Both letters to the Special Master expressly notified him and Plaintiffs' counsel that the respective bureaus would recycle the backup tapes and that the ZANTAZ archive would replace the indefinite retention of backup tapes. <u>See</u> Letter from Siemietkowski to Balaran of 8/15/03 (Exhibit 4), at 2; Letter from Siemietkowski to Balaran of 12/10/03 (Exhibit 5), at 2.</p>
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CONCLUSION

The facts support confirmation of real-time capture and archive of e-mail at BIA and BLM. Plaintiffs' counsel cannot explain why they now oppose Court confirmation for BIA and BLM when they did not oppose Special Master confirmation for five other bureaus on two previous occasions. For these reasons, for all the other reasons stated above, and for the reasons stated in Defendants' Motion, the Court should expressly confirm the real-time capture and archive of e-mail at BIA and BLM.¹⁴

Dated: November 22, 2004

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General

¹⁴ Though Defendants have no objection to the Court deciding Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel, [sic] Should Not Be Held in Contempt for Destroying E-Mail, Dkt No. 1203 (Mar. 20, 2002), referenced by Plaintiffs, Opposition at 8, Defendants do not believe it necessary for the Court to decide that motion in conjunction with this motion.

J. CHRISTOPHER KOHN
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CERTIFICATE OF SERVICE

I hereby certify that, on November 22, 2004 the foregoing *Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Confirmation of Real-Time Capture and Archive of E-Mail in the Bureau of Indian Affairs and Bureau of Land Management* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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/s/ Kevin P. Kingston
Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 1:96CV01285 (RCL)
)	
GALE NORTON, Secretary of the)	
Interior, et al.)	
)	
Defendants.)	
_____)

OPINION

This matter comes before the Special Master on Interior Defendants' Motion and Memorandum Regarding Proposal to (1) Restore and Search Retained Backup Tapes Containing E-mail; (2) Implement Real-time Capture of E-mail Traffic and Incorporation of E-mail into a Searchable Archive; and (3) Replace Indefinite Retention of Backup Tapes Containing E-mail with Backup of Searchable E-mail Archive, ("Motion to Restore and Capture E-mails"), Plaintiffs' opposition and Defendants' reply thereto. For the reasons stated below, Interior's Motion to Restore and Capture E-mails is GRANTED.

BACKGROUND

On June 11, 1998, plaintiffs requested "all documents prepared or signed by past or present attorneys in the Solicitor's Office and relating to the administration of the ILM Trust which express legal advice, conclusions, opinions, assessments, instructions or directions. . . ." Third Request for Production of Documents ("Third Request") at ¶¶ 2, 3, and 5. Defendants responded on July 2, 1998 by filing a Motion for Protective Order in which they argued that the requested documents should be shielded from disclosure pursuant to the attorney-client and

deliberative process privileges as well as the work product doctrine. See Motion for Protective Order at 1-2. On November 9, 1998 the Court denied defendants' Motion without opinion.

On November 20, 1998, Interior filed its Motion for Reconsideration asking the Special Master to revisit that portion of the Court's order implicating the production of e-mail messages retrieved from backup tapes. Citing the unduly burdensome nature of searching the backup tapes for electronic mail messages, Interior maintained that production of paper printouts of the electronic messages rendered "unreasonable and duplicative" the need to search the backup tapes. Motion for Reconsideration at 4.

The Special Master disagreed and, on May 11, 1999, ordered defendants to produce those e-mail documents responsive to Plaintiffs' Third Request forthwith. Special Master Opinion and Order at 5 (May 11, 1999).¹ More than one year later, on August 2, 2000, defendants sought "clarification" of the May 11 opinion, questioning: (1) whether the Special Master Order required defendants to search only the cache of 206 backup tapes retained by the agency for use in a separate independent investigation or whether it imposed a broader, ongoing obligation that includes all tapes – even those produced at Department of Interior Regional and Area Offices; (2) whether the Special Master Order should be revisited in light of the Court's December 21, 1999 ruling; and (3) whether the burden of searching backup tapes was unreasonable in light of the procedural posture of the case and in light of defendants' policy of maintaining the identical e-mail information in hard copy. Special Master Opinion at 2 (July 27, 2001). The Special Master,

¹ By separate opinion issued the same date, the Special Master granted plaintiffs' motion to compel production of certain documents after finding that they were not protected by either the attorney-client or deliberative-process privilege. See Cobell v. Babbitt, Opinion and Order at 7-18 (May 11, 1999).

on July 27, 2001, held that defendants were obligated to retain and search all e-mail backup tapes generated by the Office of the Solicitor and that this obligation was neither mitigated by the underlying litigation posture or by Interior's policy of generating paper copies of its electronic transmissions. See generally Special Master Opinion (July 27, 2001).

INTERIOR'S E-MAIL PROPOSAL

In response to the July 27, 2001 Opinion, Interior filed the instant motion in which it proposes: (1) to conduct a physical inventory of backup tapes in the possession of the Office of the Solicitor, Bureau of Indian Affairs, Office of the Special Trustee, Office of the Secretary, Office of Historical Trust Accounting, Office of Policy, Management and Budget, Office of the Assistant Secretary for Indian Affairs, Minerals Management Service, Bureau of Land Management and Office of Hearings and Appeals – collectively referred to as the “Designated Offices” (Motion to Restore and Capture E-mails at 4-5); (2) to restore e-mails from those tapes, reduce multiple occurrences of an identical e-mail to a single unique document (“de-dupe”), upload all unique e-mails to a searchable storage medium and then search those transmissions (Motion to Restore and Capture E-mails at 9); and (3) to capture all e-mail traffic generated and received by the Designated Offices and route those transmissions to an off-site searchable e-mail archive. Motion to Restore and Capture E-mails at 10. (“E-Mail Proposal”).

Phase I of Interior's endeavor has already been completed by Ernst & Young who determined that the Designated Offices housed a total of 7,088 e-mail backup tapes generated between May 1, 1999 and November 30, 2001. To implement the remaining two phases, Interior proposes to retain the services of ZANTAZ Inc. (“ZANTAZ”) – “the largest outsourced service provider that delivers secure storage, archiving and instantaneous retrieval solutions for

electronic messages and all related attachments.” Motion to Restore and Capture E-mails, Ex. 1 (DEF0043318). Given the estimated \$5 million cost of this effort (February 20, 2002 Letter from United States Department of Justice Attorney Peter B. Miller to Special Master Alan L. Balaran and Plaintiffs’ counsel Dennis M. Gingold at 2), Interior, before entering into a final contract with ZANTAZ, seeks advance concurrence from the Special Master that the E-Mail Proposal “addresses the July 2001 Opinion and related orders regarding the search and production of e-mails from retained e-mail backup tapes and from future e-mail traffic” and “relieves the Interior Defendants of the financial and administrative burden of indefinitely generating and retaining e-mail backup tapes as soon as ZANTAZ has implemented its real-time capture of e-mail traffic and its own backup procedures.” Motion to Restore and Capture E-mails at 6.

Plaintiffs oppose Interior’s efforts on the grounds that the E-Mail Proposal constitutes a transparent attempt by Interior to avoid complying with the July 27, 2001 Opinion of the Special Master. Plaintiffs object specifically to the exclusion of certain key offices and bureaus from the list of Designated Offices, to the proposed “periodic” appraisal of the Special Master, to the use of search terms and to the methodology involved in de-duping the responsive e-mails – that they contend will result in “massive spoliation” of key information such as transmission receipt times, modification dates and other “embedded” data.

The Special Master conveyed similar concerns to Interior and requested confirmation: (1) that the National Business Center (“NBC”), the Bureau of Reclamation (“BOR”) and the Office of Surface Mining (“OSM”) would be included in the list of Designated Offices; (2) that e-mail traffic captured from the Designated Offices would contain information residing on the servers of these offices operated by Interior employees as well as third parties and contractors; (3) that there

exist no other collections of e-mails that should be incorporated into the E-Mail Proposal; (4) that e-mails generated by official laptops would be captured and archived for storage and retrieval; (5) that no information contained on Interior's e-mails would be lost or overwritten; (6) that all e-mails on servers would be captured on backup tapes for restoration or captured in real time and housed on ZANTAZ' archival system; and (7) that archived transmissions would be compared to those residing on e-mail servers to verify complete and accurate capture.²

By letter dated September 20, 2002, Interior Associate Deputy Secretary James Cason assured the Special Master: (1) that NBC, BOR and OSM would be included among the Designated Offices (and that the Office of the Chief Information Officer would amend the recent Federal Register notice accordingly); (2) that all Designated Office e-mail servers had been identified and a list of these servers would be provided to the Special Master; (3) that there are no other e-mail collections to be incorporated into the E-Mail Proposal; (4) that e-mails generated or received by official laptops assigned to Designated Offices would be transmitted through a server identified as part of the E-Mail Proposal; (5) that e-mails would be copied to the ZANTAZ digital safe, with originals returned to Interior; (6) that all e-mails traveling on the server would be captured for cataloging and storing; and (7) that restored and captured e-mails would be checked against existing back-up tapes during the startup period when there is an overlap between the two.³

² The Special Master also inquired into the deadlines for obligating funds for the E-Mail Proposal and into the procedures Interior would employ to update the Special Master of its progress.

³ In response to the Special Master's inquiry regarding deadlines for obligating funds and the method by which Interior would report to the Special Master, Interior stated that Special Master concurrence with the E-Mail Proposal must be received by 5:00 p.m. on September 25,

DISCUSSION

The Special Master credits the representations of the Associate Deputy Secretary and finds Interior's proposal to be sound.⁴ Interior is prepared to spend millions of dollars and retain a firm with considerable credentials to assist with implementation of a proposal that responds directly to concerns raised by the Special Master.⁵ After reviewing ZANTAZ' Statement of Work and other relevant documentation and attending the August 8, 2002 presentation, the Special Master finds that ZANTAZ possesses the technology and skill necessary to capture, archive and search Interior's e-mail transmissions. ZANTAZ' ability to initiate multiple search variations, accommodate additional bureaus and offices,⁶ capture all sender and recipient information, and archive all information in a secure environment render it an appropriate candidate for implementing the E-Mail Proposal.⁷

2002 in order to "reasonably ensure [Interior's] ability to obligate funds" from the Fiscal Year 2002 budget and that Interior would provide ZANTAZ' monthly reports in the biweekly status reports already prepared for the Special Master.

⁴ The Special Master's endorsement of Interior's plan should not be construed as one that relieves the agency of its obligations to produce to plaintiffs, once and for all, all responsive information contained on these backup tapes (as well as all relevant information captured and searched in the future). Plaintiffs have been seeking access to this information since June 11, 1998. Nor does this opinion have any impact on whatever consequences may flow from Interior's past failure to do so.

⁵ ZANTAZ' credentials and proposed methodology are set out in Interior's Motion to Restore and Capture E-mails at Exhibit 1 B (DEF0043338); Exhibit 2, pp. 7 and 13; and Exhibit 3, pp. 1-2 and will not be repeated here.

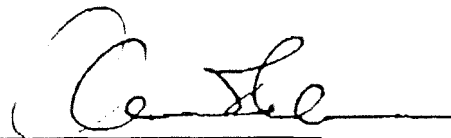
⁶ See ZANTAZ Statement of Work ("The Contractor shall implement Live E-Mail Capture for additional DOI bureaus not included in the original scope of this contract.") Statement of Work at 10, § 6.4 Option 3.

⁷ USinternetworking ("USi"), at the direction of the Special Master, conducted a battery of tests to assess ZANTAZ' security controls. In a report to the Special Master dated September

For these reasons, Interior's Motion to Restore and Capture E-mails is GRANTED in accordance with the terms of the attached Order.

Respectfully submitted,

DATE: 9/25/02



Alan Balaran
SPECIAL MASTER

17, 2002, USi confirmed ZANTAZ' ability to securely archive Interior's e-mail transmissions. See also Motion to Restore and Capture E-mails at Exhibit 1 Attachment B (DEF0043341 - DEF0043343) and Exhibit 1 Attachment C (DEF0043344 - DEF0043399).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, <u>et al.</u> ,)
)
Plaintiffs,)
)
v.)
)
GALE A. NORTON, Secretary of the Interior, <u>et al.</u> ,)
)
Defendants.)

Case No. 1:96CV01285 RCL
(Special Master Alan Balaran)

ORDER REGARDING INTERIOR DEFENDANTS' E-MAIL PROPOSAL

Upon consideration of the Interior Defendants' Motion and Memorandum Regarding Proposal to (1) Restore and Search Retained Backup Tapes Containing E-Mail; (2) Implement Real-Time Capture of E-Mail Traffic and Incorporation of E-Mail into a Searchable Archive; and (3) Replace Indefinite Retention of Backup Tapes Containing E-Mail with Back-Up of Searchable E-Mail Archive and attachments thereto (collectively, "E-Mail Proposal"), the Plaintiffs' response, the August 8 presentation by the Interior Defendants and ZANTAZ to the Special Master and to counsel for the Plaintiffs, and the entire record herein, it is hereby

ORDERED that the E-Mail Proposal is APPROVED for implementation by the Department of the Interior and ZANTAZ, and it is further

ORDERED that the following offices and bureaus within the Department of the Interior shall be "Designated Offices" for purposes of implementing the E-Mail Proposal: Office of the Solicitor; Bureau of Indian Affairs; Office of the Special Trustee; Office of Historical Trust Accounting; Minerals Management Service, Bureau of Land Management, Office of the Secretary; Office of the Assistant Secretary for Indian Affairs; Office of Hearings and Appeals;

and Office of the Assistant Secretary for Policy, Management and Budget, Bureau of Reclamation, National Business Center, Office of Surface Mining and any other office or bureau determined by the Special Master to warrant inclusion in the list of Designated Offices; it is further

ORDERED that the Interior Defendants shall notify the Special Master immediately of any delay or circumstance that adversely affects implementation of the E-Mail Proposal; shall notify the Special Master immediately when the Department of the Interior enters into a final contract with ZANTAZ for services related to the E-Mail Proposal; shall keep the Special Master informed on a monthly basis, via a written report, of the status of the restoration, archive, and search of retained backup tapes for the Designated Offices, of the status of implementation of real-time capture of e-mail traffic within the Designated Offices and of the incorporation of that e-mail traffic into the searchable e-mail archive backed up, maintained, and administered by ZANTAZ; and shall forward to the Special Master a copy of all progress reports generated by ZANTAZ; and it is further

ORDERED that implementation of the real-time capture and archive of e-mail traffic, when certified by the Department of the Interior and ZANTAZ and confirmed by the Special Master, will relieve the Department of the Interior of any obligation to indefinitely retain backup tapes containing e-mail traffic and will allow the Department of the Interior to follow its normal system backup and tape retention procedures as long as the real-time capture and archive of e-mail traffic remains in effect.

DATE: 9/25/02


Alan L. Balaran
SPECIAL MASTER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 GALE NORTON, Secretary of the)
 Interior, et al.,)
)
 Defendants.)
 _____)

Civil Action Number 96-1285 (RCL)

FILED

FEB - 7 2003

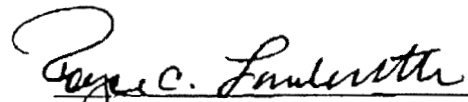
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

For the reasons stated in the opinion of the Special Master on defendants' motion to restore and capture e-mails [1421-1], which opinion was filed on January 17, 2003, it is hereby ORDERED that defendants' motion be, and hereby is, GRANTED in accordance with the terms set forth in the Order of the Special Master [1734].

SO ORDERED.

Date: 2-6-03


 Royce C. Lamberth
 United States District Judge

1793



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Civil Division

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Trial Attorney

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Facsimile: (202) 514-9163
E-mail: John.Siemietkowski@usdoj.gov

August 15, 2003

By Hand Delivery

Mr. Alan Balaran
Special Master
1717 Pennsylvania Avenue, N.W.
Thirteenth Floor
Washington, D.C. 20006

Re: Notification and Certifications from Interior and ZANTAZ that Real-Time Capture and Archive of E-Mail Has Been Successfully Implemented in SOL, OST, and NBC

Dear Mr. Balaran:

In accordance with your September 25, 2002 Opinion and Order,¹ filed by the Court on January 17, 2003,² Interior Defendants provide the attached certifications from Interior and ZANTAZ regarding the successful implementation of real-time capture and archive of e-mail in SOL, OST, and NBC. In addition, Interior Defendants also provide the attached presentation package describing ZANTAZ's process for verifying the real-time capture and archive of e-mail. Interior seeks your confirmation that SOL, OST, and NBC need no longer indefinitely retain backup tapes of these captured and archived e-mails.

You will note that each section of the certification package (SOL, OST, NBC) contains ZANTAZ's certification, a two-page overview of the certification process provided by ZANTAZ (identical for each of the three bureaus), and a short print-out or spread sheet from Interior identifying which code word each bureau randomly chose to use in its test message to ZANTAZ (i.e., "Aardvark"). Please note that ZANTAZ has marked its presentation slides as "Confidential

¹ This Opinion and Order approved Interior Defendants' Motion and Memorandum regarding their proposal to (1) restore and search retained backup tapes containing e-mail; (2) implement real-time capture of e-mail traffic and incorporate e-mail into a searchable archive; and (3) replace indefinite retention of backup tapes containing e-mail with backup of a searchable e-mail archive.

² Neither party filed objections to your September 25 Opinion and Order.

and Propriety Information." Interior asks that you treat the presentation slides as confidential and therefore not for release to the public, either by you or by plaintiffs. Please note too that Interior has redacted the IP addresses identified by each bureau's OCIO.

The process of restoring and archiving e-mail from backup tapes into the ZANTAZ archive is continuing for e-mail backup tapes generated for the designated offices, including SOL, OST, and NBC, for which confirmation is now sought. This restoration and archiving will continue for backup tapes generated before live capture was implemented on February 22 (OST), May 22 (SOL), and June 27 (NBC). Interior Defendants have reported, and will continue to report, the status of the restoration and archiving through the status reports attached to Interior's portion of the biweekly report. After ZANTAZ has completed its restoration and archiving of the backup tapes, it will return those tapes to Interior for recycling as part of the normal backup procedures.

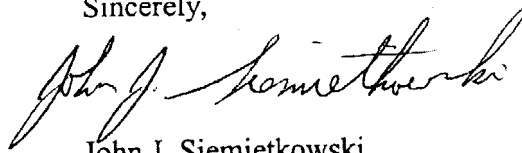
In that regard, Interior Defendants also notify you, in accordance with your September 25 Order, of their intent to return to normal e-mail system backup and tape retention procedures for all e-mail tapes generated for SOL, OST, and NBC after their respective live capture implementation dates. Interior will return to its normal backup and retention procedures for SOL, OST, and NBC on August 29, 2003.³ Thus, the ZANTAZ archive will replace the indefinite retention of backup tapes, as provided in your September 25 Order.⁴ Per your September 25 Order, please confirm for us the "implementation of the real-time capture and archive of e-mail traffic" by August 29. If we do not receive a response from you by August 29, Interior will assume your confirmation of this "implementation of the real-time capture and archive of e-mail traffic."

Thank you for your assistance in this matter.

³ See Interior Defendants' Motion and Memorandum regarding the ZANTAZ proposal, filed February 14, 2002, at 18 (specifying two-week review period for Special Master).

⁴ [I]mplementation of the real-time capture and archive of e-mail traffic, when certified by the Department of the Interior and ZANTAZ and confirmed by the Special Master, will relieve the Department of the Interior of any obligation to indefinitely retain backup tapes containing e-mail traffic and will allow the Department of the Interior to follow its normal system backup and tape retention procedures as long as the real-time capture and archive of e-mail traffic remains in effect.

Sincerely,

A handwritten signature in black ink, appearing to read "John J. Siemietkowski". The signature is fluid and cursive, with the first name "John" being particularly prominent.

John J. Siemietkowski
Trial Attorney
Commercial Litigation Branch
Civil Division

Enclosures

cc: Dennis M. Gingold, Esquire (by hand delivery, with enclosures)
Brenda Riel, Esquire (by hand delivery, with enclosures)



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Civil Division

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E-mail: John.Siemietkowski@usdoj.gov

December 10, 2003

By Hand Delivery

Mr. Alan Balaran
Special Master
1717 Pennsylvania Avenue, N.W.
Thirteenth Floor
Washington, D.C. 20006

Re: Notification and Certifications from Interior and ZANTAZ that Real-Time Capture and Archive of E-Mail Has Been Successfully Implemented in OHA and MMS

Dear Mr. Balaran:

In accordance with your September 25, 2002 Opinion and Order,¹ filed by the Court on January 17, 2003,² Interior Defendants provide the attached certifications from Interior and ZANTAZ regarding the successful implementation of real-time capture and archive of e-mail in OHA and MMS. In addition, Interior Defendants also provide the attached presentation package describing ZANTAZ's process for verifying the real-time capture and archive of e-mail. Interior seeks your confirmation that OHA and MMS need no longer indefinitely retain backup tapes of these captured and archived e-mails.

You will note that Tabs 5 and 7 contain ZANTAZ's certification, a two-page overview of the certification process provided by ZANTAZ (identical for each of the two bureaus), and a short print-out or spread sheet from Interior identifying which code word each bureau randomly chose to use in its test message to ZANTAZ (i.e., "outterbanks"). Please note that ZANTAZ has marked its presentation slides as "Confidential and Proprietary Information." Interior asks that you

¹ This Opinion and Order approved Interior Defendants' Motion and Memorandum regarding their proposal to (1) restore and search retained backup tapes containing e-mail; (2) implement real-time capture of e-mail traffic and incorporate e-mail into a searchable archive; and (3) replace indefinite retention of backup tapes containing e-mail with backup of a searchable e-mail archive.

² Neither party filed objections to your September 25 Opinion and Order.

treat the presentation slides as confidential and therefore not for release to the public, either by you or by plaintiffs. Please note too that Interior has redacted the IP addresses identified by each bureau's OCIO.

The process of restoring and archiving e-mail from backup tapes into the ZANTAZ archive is continuing for e-mail backup tapes generated for the designated offices, including OHA and MMS, for which confirmation is now sought. This restoration and archiving will continue for backup tapes generated before live capture was implemented on June 9, 2003 (OHA) and August 5, 2003 (MMS). Interior Defendants have reported, and will continue to report, the status of the restoration and archiving through the status reports attached to Interior's portion of the biweekly report. After ZANTAZ has completed its restoration and archiving of the backup tapes, it will return those tapes to Interior for recycling as part of the normal backup procedures.

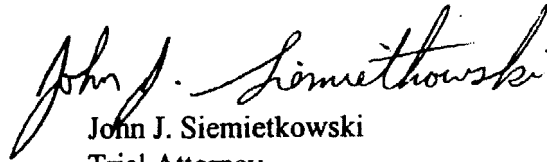
In that regard, Interior Defendants also notify you, in accordance with your September 25 Order, of their intent to return to normal e-mail system backup and tape retention procedures for all e-mail tapes generated for OHA and MMS after their respective live capture implementation dates. Interior will return to its normal backup and retention procedures for OHA and MMS on December 24, 2003.³ Thus, the ZANTAZ archive will replace the indefinite retention of backup tapes, as provided in your September 25 Order.⁴ Per your September 25 Order, please confirm for us the "implementation of the real-time capture and archive of e-mail traffic" by December 24. If we do not receive a response from you by December 24, Interior will assume your confirmation of this "implementation of the real-time capture and archive of e-mail traffic."

Thank you for your assistance in this matter.

³ See Interior Defendants' Motion and Memorandum regarding the ZANTAZ proposal, filed August 14, 2002, at 18 (specifying two-week review period for Special Master).

⁴ [I]mplementation of the real-time capture and archive of e-mail traffic, when certified by the Department of the Interior and ZANTAZ and confirmed by the Special Master, will relieve the Department of the Interior of any obligation to indefinitely retain backup tapes containing e-mail traffic and will allow the Department of the Interior to follow its normal system backup and tape retention procedures as long as the real-time capture and archive of e-mail traffic remains in effect.

Sincerely,

A handwritten signature in cursive script that reads "John J. Siemietkowski".

John J. Siemietkowski
Trial Attorney
Commercial Litigation Branch
Civil Division

Enclosures

cc: Dennis M. Gingold, Esquire (by hand delivery, with enclosures)
Keith Harper, Esquire (by fax, without enclosures)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)
)
Plaintiffs,)
v.)
)
GALE NORTON, SECRETARY OF)
THE INTERIOR)
et al.,)
Defendants.)

No. 1:96CV01285 RCL
(Hon. Alan L. Balaran, Special Master)

**INTERIOR DEFENDANTS' MOTION AND MEMORANDUM
REGARDING PROPOSAL TO
(1) RESTORE AND SEARCH RETAINED BACKUP TAPES CONTAINING E-MAIL;
(2) IMPLEMENT REAL-TIME CAPTURE OF E-MAIL TRAFFIC AND
INCORPORATION OF E-MAIL INTO A SEARCHABLE ARCHIVE; AND
(3) REPLACE INDEFINITE RETENTION OF BACKUP TAPES CONTAINING
E-MAIL WITH BACKUP OF SEARCHABLE E-MAIL ARCHIVE**

The United States, on behalf of the Interior Defendants, respectfully submits to the Special Master this consolidated motion and memorandum, with accompanying proposed order, regarding (1) restoration and search of retained backup tapes containing e-mail, (2) implementation of real-time capture of e-mail traffic and incorporation into a searchable archive; and (3) replacement of the indefinite retention of backup tapes containing e-mail with backup of the searchable e-mail archive (items 1-3 collectively, "E-Mail Proposal").

As described preliminarily in the February 20, 2002 letter to the Special Master and Counsel for the Plaintiffs and accompanying attachments, attached and incorporated by reference ("February 20 Letter"; see Exhibit 1), the Interior Defendants have been working to address discovery-related issues involving the search and potential production of e-mail from system backup tapes containing e-mail ("e-mail backup tapes"), as addressed in the Special Master's July

indefinitely retaining e-mail backup tapes and allowing them to return to standard system backup and tape retention procedures according to the following process:

- (1) The Interior Defendants will provide the Special Master with two documents to confirm that e-mail capture has been implemented:
 - (a) a letter from Interior declaring that it identified to ZANTAZ all mail servers providing e-mail to a particular Designated Office, and
 - (b) a letter from ZANTAZ confirming that the real-time capture and archive of e-mail traffic has been implemented for all identified mail servers providing e-mail to a particular Designated Office and has operated for two weeks in accordance with ZANTAZ's standards for monitoring and documenting e-mail capture;
- (2) The Special Master will have two weeks from receipt of that letter from the Interior Defendants to verify or otherwise follow-up with the Interior Defendants and/or ZANTAZ regarding operation of the real-time capture and archive of e-mail traffic for that particular Designated Office;
- (3) Upon the earlier of the Special Master's approval or passage of the two-week period without any response from the Special Master, unless extended by order of the Special Master for a particular Designated Office, that office will be released from any further obligation to indefinitely retain e-mail backup tapes and may return to its standard system backup and tape retention procedures; and
- (4) Compliance with these procedures will relieve Interior from indefinitely retaining e-mail backup tapes, and Interior will have no further e-mail backup and retention obligations relating to this case – apart from those performed by ZANTAZ – unless and until the contract with ZANTAZ is terminated or ZANTAZ otherwise notifies Interior that it is unable or unwilling to perform e-mail backup and retention on behalf of Interior.