

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' UNOPPOSED MOTION TO LIFT
SPECIAL MASTER'S MAY 9, 2002 PROTECTIVE ORDER
AND TO UNSEAL DEPOSITION TRANSCRIPTS TAKEN BY SPECIAL MASTER

Pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and Local Civil Rule 7, Defendants respectfully move this Court for an Order lifting the Protective Order entered by the Special Master on May 9, 2002, with respect to his "interviews" of the Trust Management Improvement Program Steering Committee (the "Protective Order") and to unseal the transcripts of depositions conducted by the Special Master in accordance with the terms of the Protective Order. Pursuant to Local Civil Rule 7.1(m), the undersigned counsel for the Defendants conferred with Plaintiffs' counsel, Mr. Dennis Gingold, on March 31, 2004, regarding this motion, and Mr. Gingold stated that this motion would not be opposed by Plaintiffs.¹

During the period of May 10, 2002, through July 23, 2002, inclusive, the Special Master

¹ In confirming that Plaintiffs would not oppose this motion, Mr. Gingold asked whether Defendants' counsel would agree to undertake a mutual review of the exhibits utilized by the Special Master during the depositions to determine the extent to which those documents needed to remain protected from public disclosure. The undersigned Defendants' counsel advised Mr. Gingold that Defendants' counsel were willing to pursue such an undertaking with Plaintiffs' counsel.

conducted depositions of numerous individuals with regard to the security of the Interior Department's Information Technology ("IT") systems. Prior to commencement of these depositions, the Special Master entered the Protective Order, a copy of which is attached as Attachment A. Protective Order (May 9, 2002) (Balaran, S.M.).

Although the Protective Order stated in its opening paragraph that it was issued in connection with the Special Master's plan to "interview members of the Trust Management Improvement Program Steering Committee," the Special Master utilized it in connection with the previously referenced depositions – not interviews – conducted during the period of May 10, 2002, through July 23, 2002. Moreover, the depositions conducted by the Special Master included numerous deponents who were not members of the Trust Management Improvement Program Steering Committee.

Prior to the commencement of the depositions, the Special Master advised the undersigned Defendants' counsel that the principal purpose of the Protective Order was to ensure that future deponents would not have access to transcripts of previously taken depositions and to restrict counsels' ability to discuss the substance or content of depositions with future deponents. As a result, the Protective Order restricted dissemination of transcripts to a limited group of individuals. Protective Order ¶ 1. In addition, the Protective Order prohibited the disclosure of the content of the depositions, "in form or in substance," to any person not included within the limited group of authorized distributees. Protective Order ¶ 4.

As the Special Master's Report to the Court for August 2002 confirmed, by late summer, the Special Master had concluded taking the depositions covered by the Protective Order and had begun drafting a report setting forth his findings. August 2002 Report of Special Master, at 2

(Aug. 30, 2002) (Dkt. No. 1470) (“As detailed in my invoice, attached hereto, I expended the vast majority of my time during the month investigating Interior’s Information Technology systems and drafting a report reflecting my findings.”). Consequently, by a letter dated August 23, 2002, Defendants’ counsel requested that the Special Master “vacate the protective order that precludes public access to the deposition transcripts.” Attachment B (Letter from S. Spooner to Special Master (Aug. 23, 2002)). Six days later, Defendants’ counsel repeated this request, noting that Defendants’ counsel “[had] reviewed the transcripts of the TMIP Steering Committee depositions taken by [the Special Master] from May 10, 2002, through July 23, 2002, inclusive, and [had] concluded that nothing in the transcripts requires protection from public disclosure.” Attachment C (Letter from J. Warshawsky to Special Master (Aug. 29, 2002)).

In spite of the fact that the Special Master’s depositions were concluded well over a year ago, to date, the Special Master has declined to lift his Protective Order or to unseal the transcripts of the depositions that he took during the period of May 10, 2002, through July 23, 2002. Indeed, despite requests from Defendants’ counsel, the Special Master has never issued his report based upon those depositions. See Attachment D (Letter from J. Warshawsky to Special Master (Jan. 2, 2003)); Attachment E (Letter from S. Spooner to Special Master (Feb. 23, 2003)). This is in spite of the fact that the Special Master stated in his October 2002 Report to the Court:

I concluded my investigation into the IT security practices of the Department of the Interior with the deposition of former Assistant Secretary for Indian Affairs Kevin Gover. My final report on this topic will soon issue.

October 2002 Report of Special Master, at 2 (Nov. 1, 2002) (Dkt. No. 1590) (emphasis added).

Insofar as the Special Master's depositions have been completed for approximately one-and-a-half years, now, the Special Master has no arguable interest in continuing to preserve the confidentiality of what he has asked deponents. Moreover, as Defendants' counsel have confirmed based upon their review of the transcripts, Defendants are not aware of any material in the transcripts requiring protection from public disclosure. Finally, the unnecessarily protected nature of the transcripts apparently has caused plaintiffs to file a brief in the U.S. Court of Appeals for the District of Columbia under seal because the brief references some of the testimony taken by the Special Master. Combined Opposition to Appellants' Emergency Motion for Stay Pending Appeal and Plaintiffs-Appellees' Motion to Vacate This Court's Administrative Stay, No. 04-5984 (Mar. 29, 2004) (filed under seal). Under these circumstances, there is no justifiable ground either for continuing in place the Special Master's May 9, 2002 Protective Order or for barring public disclosure of the Special Master's deposition transcripts.

Conclusion

For the foregoing reasons, Defendants respectfully request that this Court grant this unopposed motion and enter an Order lifting the Protective Order entered by the Special Master on May 9, 2002 and unseal for public disclosure the transcripts of depositions conducted by the Special Master in accordance with the terms of the Protective Order.

Respectfully submitted,

ROBERT McCALLUM, JR.
Associate Attorney General

PETER D. KEISLER
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director

/s/ John Warshawsky

SANDRA P. SPOONER
Deputy Director
JOHN WARSHAWSKY (D.C. Bar No. 417170)
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

March 31, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on March 31, 2004 the foregoing *Defendants' Unopposed Motion to Lift Special Master's May 9, 2002 Protective Order and to Unseal Deposition Transcripts Taken by Special Master* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston

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.)	
_____)	

PROTECTIVE ORDER


The Special Master has determined that, as part of his investigation into the security of the Department of the Interior's computer systems housing individual Indian trust data, it will be necessary to interview members of the Trust Management Improvement Program Steering Committee ("TMIPSC"). The Special Master has also determined that information may come to light during these interviews that is sensitive and confidential and should not be publicly disclosed. Accordingly, it is hereby ORDERED that:

1. Transcripts of the TMIPSC interviews shall be distributed, upon written request, only to the deponent, counsel representing the deponent in his or her personal capacity, counsel representing the deponent in his or her official capacity, one official of the Department of the Interior who shall be designated in advance, plaintiffs' counsel and immediate staff and one named plaintiff who shall be designated in advance.

2. All persons designated in Paragraph 1, prior to receiving a copy of a TMIPSC interview transcript, shall sign an acknowledgment that he or she has read and understands this Protective Order and agrees to be bound by its requirements.
3. These transcripts shall not be duplicated without the prior written approval of the Special Master.
4. The content of the TMIPSC interviews, in form or in substance, shall not be discussed with or revealed to any persons or entities not specifically designated in Paragraph 1 of this Order.
5. Purposefully making or causing the unauthorized disclosure of the TMIPSC interview transcripts or information contained therein may subject the person or persons committing the same to punishment for contempt of Court.
6. At the conclusion of this litigation, all TMIPSC transcripts shall be turned over to the Special Master for disposal.

SO ORDERED.

May 9, 2002


ALAN L. BALARAN
Special Master

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ACKNOWLEDGMENT

The undersigned hereby acknowledges that I have reviewed and understand the attached Protective Order and agree to be subject to its requirements.

DATE: _____



United States Department of Justice
Civil Division
Commercial Litigation Branch

Sandra P. Spooner
Deputy Director

P.O. Box 875, Ben Franklin Station Tel: (202) 514-7194
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Email: sandra.spooner@usdoj.gov

August 23, 2002

BY FACSIMILE

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave. NW, 12th Floor
Washington, DC 20006

Re: TMIP Depositions and Report

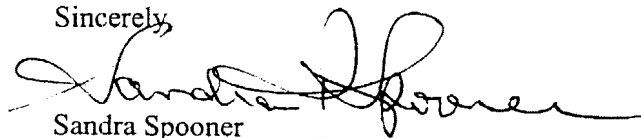
Dear Mr. Balaran:

It is our understanding that your depositions of members of the Trust Management Improvement Project Steering Committee have been completed. If that is the case, we ask that you vacate the protective order that precludes public access to the depositions transcripts. We anticipate that your report on these matters will be issued shortly and wish to consult with government personnel who have not yet had an opportunity to review the proceedings.

As you know, the Department of Interior is actively involved in long term and short term planning to improve the security and integrity of information technology systems that house Indian trust data, with the ultimate goal of achieving A-130 compliance. To the extent the information you have gathered offers additional insight that may help guide Interior's efforts, your timely sharing of this information will be appreciated.

Thank you.

Sincerely,



Sandra Spooner

cc: Dennis M. Gingold
Keith Harper



U.S. Department of Justice
Civil Division, Commercial Branch
1100 L Street, N.W., Room 10030
Washington, D.C. 20005

John Warshawsky

Telephone: (202) 307-0010 Facsimile: (202) 514-9163

August 29, 2002

By Facsimile

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

Re: Cobell v. Norton – TMIP Steering Committee Depositions

Dear Mr. Balaran:

As a follow up to Ms. Spooner's letter to you dated August 23, 2002, this is to advise you that we have reviewed the transcripts of the TMIP Steering Committee depositions taken by you from May 10, 2002, through July 23, 2002, inclusive, and have concluded that nothing in the transcripts requires protection from public disclosure. Accordingly, we request that you vacate the application of your May 9, 2002 Protective Order with regard to those transcripts.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John Warshawsky".

John Warshawsky
Trial Attorney
Commercial Litigation Branch
Civil Division

cc: Mr. Dennis Gingold (by facsimile)
Mr. Keith Harper (by facsimile)



U.S. Department of Justice
Civil Division, Commercial Branch
1100 L Street, N.W., Room 10030
Washington, D.C. 20005

John Warshawsky

Telephone: (202) 307-0010 Facsimile: (202) 514-9163

January 2, 2003

By Facsimile

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

Re: Cobell v. Norton – TMIP Steering Committee Investigation

Dear Mr. Balaran:

We understand that you have completed your investigation of the TMIP Steering Committee and that you have completed your report setting forth your findings and conclusions resulting from this investigation. Therefore, we request that you issue your report and that you provide us with a copy.

Thank you for your consideration of this request.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John Warshawsky".

John Warshawsky
Trial Attorney
Commercial Litigation Branch
Civil Division

cc: Mr. Dennis Gingold (by facsimile)
Mr. Keith Harper (by facsimile)



United States Department of Justice
Civil Division
Commercial Litigation Branch

Sandra P. Spooner
Deputy Director

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February 27, 2003

BY FACSIMILE

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., N.W.
Twelfth Floor
Washington, DC 20006

Re: Cobell v. Norton - TMIP Steering Committee Investigation

Dear Mr. Balaran:

On September 3, 2002, we filed a motion seeking release of your report regarding the IT security practices of the Department of the Interior and any information (including any interim report or draft) you provided to the Court regarding your investigation or report. On September 17, 2002, the Court denied our motion on the ground that your report should not be submitted because "it was directed largely at difficulties within OST, and did not address BIA, CIO, and Secretarial difficulties." Order, Sept. 17, 2002, at 1. The Court stated that "[i]n the Court's view, a report addressing the Department's failure to fix IT security is the appropriate way to proceed." Id. The Court further stated that "[t]he Special Master readily agrees, and he has no interim or other report to submit, nor will he have a report until he has conducted and completed all of the necessary fact-gathering." Id. at 1-2.

In accordance with the February 24, 1999 Order appointing you, which requires that "[a]ny information reported to the [C]ourt by the [S]pecial [M]aster shall also be reported to counsel for the parties," Order, Feb. 24, 1999, at 3, we also sought any information you reported to the Court regarding your IT investigation or report in our September 3 motion. The Court did not address this request in its September 17, 2002 Order.

Your October 2002 Report stated that you "concluded your investigation into the IT security practices of the Department of the Interior with the deposition of former Assistant

Secretary for Indian Affairs Kevin Gover,” and that your “final report on this topic will soon issue.” October 2002 Report of Special Master at 2 (Nov. 1, 2002). Your November 2002 Report stated:

As reported in my October 2002 monthly report, I concluded the depositions related to my investigation into the IT security practices of the Department of the Interior. On November 22, 2002, Interior produced the final documents responsive to my various requests related to this investigation. Following review of those documents, I will issue my final report.

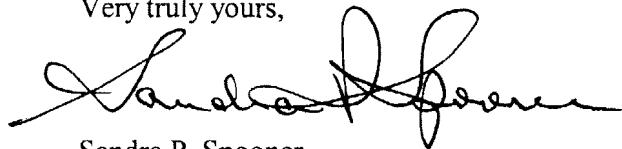
November 2002 Report of Special Master (Dec. 2, 2002).

In a January 2, 2003, letter to you from John Warshawsky, we noted our understanding that you had completed your report on Interior’s IT security, and requested that you issue your report and provide us with a copy. We received no response.

As we have explained, Interior is actively involved in long term and short term planning to improve the security and integrity of information technology systems that house Indian trust data, with the ultimate goal of achieving A-130 compliance. See Letter from Sandra P. Spooner to Alan L. Balaran (Aug. 23, 2002). We again request that you issue your report so Interior may utilize any information you have gathered that may help guide its efforts. In addition, as you may be aware, the Special Master-Monitor is seeking to depose former Special Trustee Thomas Slonaker during the week of March 24, 2003, and the report may contain information that will be relevant to that deposition.

We ask that you advise us as to the approximate date on which you intend to release your IT security report no later than next Tuesday, March 4, 2003. Thank you for your prompt consideration of this request.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sandra P. Spooner", written in a cursive style.

Sandra P. Spooner

cc: Dennis Gingold, Esq.
Keith Harper, Esq.

IN THE UNITED STATES DISTRICT COURT
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ELOUISE PEPION COBELL, <u>et al.</u> ,)	
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Plaintiffs,)	
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)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

ORDER

This matter comes before the Court on the *Defendants' Unopposed Motion to Lift Special Master's May 9, 2002 Protective Order and to Unseal Deposition Transcripts Taken by Special Master*, Dkt No. _____. Upon consideration of the Unopposed Motion, any Response thereto, the applicable law and the entire record of this case, the Court finds the Defendants' Unopposed Motion to Lift Special Master's May 9, 2002 Protective Order and to Unseal Deposition Transcripts Taken by Special Master should be and is hereby GRANTED.

SO ORDERED

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date: _____

cc:

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