

**From:** "Ben-David, Neeli (USAGAN)" <Neeli.Ben-David@usdoj.gov>  
**Subject:** RE: Case No. 10-cv-03280-TCB  
**Date:** October 24, 2011 11:35:12 AM CDT  
**To:** "Bernhoft Robert G." <rgbernhof@bernhoflaw.com>, "Alice\_Snedeker@gand.uscourts.gov" <Alice\_Snedeker@gand.uscourts.gov>, Julee Smilley <Julee\_Smilley@gand.uscourts.gov>  
**Cc:** bctollefson <bctollefson@bernhoflaw.com>, "Jim Wimberly W." <jww@wimlaw.com>

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Dear Julee:

With regard to the additional documents, this would not affect the sole remaining issue in this FOIA action, namely, whether the agency conducted a reasonably adequate search for documents responsive to the FOIA request. This is true for a number of reasons:

(1) any documents pertaining to the cases that were the subject of the FOIA request were forwarded to the Memphis field office (even if the Atlanta office may have kept copies); as discussed in the original summary judgment motion, the agency already conducted an actual physical search of the Memphis office for responsive documents:

(2) any documents regarding the Marchellettas also should have been pulled up during the agency's search of the nationwide TECS database and

(3) the additional documents are in the possession of the National Archives and Records Administration, as separate entity from the Department of Homeland Security. See Vest v. Department of Air Force, --- F.Supp.2d ---, 2011 WL 2469593, n. 9 (D.D.C. June 22, 2011) (holding that the Court has no authority to compel the Air Force to produce documents that have been sent to National Archives and Records Administration because they are no longer in the Air Force's possession).

Accordingly, they should not affect the Court's disposition of the summary judgment motion.

The reason I asked the agency to request the additional documents from archives was because of the upcoming criminal trial. I am told that it can take up to 2 months to receive the documents from the National Archives and Records Administration; therefore, the sooner they are requested, the better.

Although I asked the agency to review the documents when they receive them to see if they contain any additional documents that may be responsive to FOIA request, the government respectfully submits that, as a legal matter, the agency already has satisfied its obligations under FOIA.

Thank you.

Neeli

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**From:** Bernhoft Robert G. [mailto:rgbernhof@bernhoflaw.com]  
**Sent:** Monday, October 24, 2011 11:16 AM  
**To:** Alice\_Snedeker@gand.uscourts.gov; Julee Smilley  
**Cc:** bctollefson; Jim Wimberly W.; Ben-David, Neeli (USAGAN)  
**Subject:** Re: Case No. 10-cv-03280-TCB

Dear Julee:

Thank you for your patience this morning.

In addition to the plaintiffs' requested surreply, there is one other issue. In its reply to the plaintiffs' opposition to summary judgment, the agency defendants indicated that additional potentially responsive documents have been located. The agency further indicated that these additional documents are being pulled from archives by the SAC Atlanta, at which point the agency will make disclosure/redaction/withholding decisions regarding these new documents.

I'm suggesting that the court allow the agency a specified amount of time to review the documents and make disclosure/redaction/withholding decisions, at which time the parties would meet and confer to attempt resolution of any issues relating to the agencies' decisions in this regard. If the issues are resolved by the parties, the briefing would be complete; if not, the parties would notify the court of the need for additional briefing, and a briefing schedule could be set.

I'm available at the court's convenience any time today through the close of business; tomorrow (Tuesday) afternoon between 3:00

p.m. and 5:00 p.m. EDT; and Wednesday any time.

Thank you, and

Best regards,

Robert G. Bernhoft, Esquire  
Attorney & Counselor at Law  
The Bernhoft Law Firm, S.C.  
207 E. Buffalo Street, Suite 600  
Milwaukee, Wisconsin 53202

1901 Avenue of the Stars  
2nd Floor  
Los Angeles, California 90067

(414) 276-3333 telephone  
(414) 276-2822 facsimile  
[rgbernhoft@bernhoftlaw.com](mailto:rgbernhoft@bernhoftlaw.com)  
[www.bernhoftlaw.com](http://www.bernhoftlaw.com)

On Oct 24, 2011, at 8:24 AM, Ben-David, Neeli (USAGAN) wrote:

Julee,

I believe that Mr. Bernhoft has requested the conference call because he wishes to file a surreply in opposition to the government's summary judgment motion. I told him that we would not object to such a surreply if he could identify that requisite extraordinary circumstances that would warrant it. He has argued that the government raised "new material facts" in its reply brief when it discussed Special Agent Kim Sellers employment history and involvement in the Marchelletta case. I pointed out that Mr. Bernhoft was the one who introduced these new facts in his response brief and that the government simply relied on the trial transcript that he had attached to his response brief. He has not provided any other reasons that he contends would warrant the filing of a surreply.

I have a meeting this afternoon with opposing counsel in one of my cases. I'm not sure how long it's going to last b/c they are going to be making a powerpoint presentation. I am available all day tomorrow and Wednesday morning.

-----Original Message-----

From: [Julee\\_Smilley@gand.uscourts.gov](mailto:Julee_Smilley@gand.uscourts.gov) [mailto:[Julee\\_Smilley@gand.uscourts.gov](mailto:Julee_Smilley@gand.uscourts.gov)]

Sent: Monday, October 24, 2011 8:50 AM

To: bctollefson

Cc: [jww@wimlaw.com](mailto:jww@wimlaw.com); Ben-David, Neeli (USAGAN); [rgbernhoft@bernhoftlaw.com](mailto:rgbernhoft@bernhoftlaw.com); [Alice\\_Snedeker@gand.uscourts.gov](mailto:Alice_Snedeker@gand.uscourts.gov)

Subject: Re: Case No. 10-cv-03280-TCB

Folks,

Judge Batten would either like a brief joint outline of the issue or your respective positions regarding the issue before he schedules a telephone conference. After I receive it/them, we can schedule a telephone conference.

Is there a good time this afternoon for everyone?

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