

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL SECURITY COUNSELORS, *

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Plaintiff, *

*

v. * Case: 1:11-cv-00443 (BAH)

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CENTRAL INTELLIGENCE AGENCY, *

*

Defendant. *

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**PLAINTIFF’S REPLY IN SUPPORT OF ITS MOTION FOR SUPPLEMENTAL
STATUS CONFERENCE REGARDING COUNT 3 AND ELECTRONIC RECORDS**

Defendant’s Opposition to Plaintiff’s Motion for a Supplemental Status Conference is a carefully crafted and exquisitely worded argument against the need for further investigation into the issues at hand that nonetheless does not actually deny any of Plaintiff’s allegations. As such, it serves as further evidence of the need for a second status conference to ensure that the Court has the *completely accurate* information and does not fall prey to inferences and red herrings.

Defendant’s argument regarding the use of the phrase “systems of records” is a perfect example of this nuanced phraseology. Defendant states, “In her Supplemental Declaration in this case, Ms. Viscuso did not indicate that she intended to limit the term ‘system of records’ to the narrow definition provided in the Privacy Act,” as though that should be the final word on the issue. (Def.’s Opp’n Pl.’s Mot. Supp. Status Conf. at 2 [hereinafter Def.’s Opp’n].) Very noticeably, Defendant does *not* state that Ms. Viscuso *did not limit* the definition of the term; it only states that she did not *say* she limited it in the Supplemental Declaration. Such a clarification would have been the essence of simplicity to make, begging the question of why Defendant refused to make it, choosing instead to quibble over the exact context of the argument

in *James Madison Project v. CIA*, No. 08-1323 (E.D. Va.). This is the type of ambiguity that is properly the subject of status conferences.

Similarly, Defendant argues tautologically that it stores unclassified information on the classified system without addressing the underlying question of *why* it even *has* an unclassified system in the first place if all its records are on the classified system. Defendant seems to have missed the point of Plaintiff's argument, namely, that the *existence* of an unclassified system means that that system has to be *searched* in response to FOIA requests. It is nonsensical to imagine that the CIA possesses an unclassified system but stores no records on it, but Ms. Viscuso clearly stated that the CIA *only searches the classified system* in response to FOIA requests. Defendant similarly glosses over the fact that Plaintiff identified two documents which *were* on an unclassified system (the CIA public website), *not* that *should be* on an unclassified system. This calls Ms. Viscuso's claim that "the CIA does not transfer documents from the unclassified system to the classified system for review and redaction pursuant to a FOIA request" (Viscuso Supp. Decl. ¶ 3) into question, because it means that either: (1) this is an incorrect statement; or (2) the CIA has records on the unclassified system that are readily reproducible in electronic format, but *chooses* to only search the *classified* system for *its* versions of these records, thereby allowing Defendant to argue that the records are not "readily reproducible." As such, this statement is in clear need of clarification before the Court can reach an educated decision regarding the reasonableness of Defendant's policy.

As a side note, this case is distinguishable from *Landmark Legal Found. v. EPA*, 272 F.Supp.2d 59 (D.D.C. 2003), for two clear reasons. First, in that case, the plaintiff was arguing that the agency must reorganize its files to make sure that the records were readily reproducible in electronic format. *Id.* at 63. In this case, Plaintiff is arguing no such thing; it is arguing that

records that *already exist on the unclassified system* should be *searched* on the unclassified system. Defendant will not need to create a new records system or reorganize its files to comply with the law; it will only need to search the place where the files *already are*. Second, in that case the files that the plaintiff wanted in electronic format did not exist in electronic format, whereas in this case the records already do exist in electronic format. However, even if this Court finds that Chief Judge Lamberth did intend for his opinion to be interpreted in the way Defendant proposes, Plaintiff respectfully argues that such an interpretation would be inconsistent with the plain meaning of FOIA and that, since a district court ruling carries no precedential mandate, this Court should not be bound by it.

As a final note, Defendant's argument that no blanket policy exists (Def.'s Opp'n at 3-4) has no merit. Plaintiff is willing to concede that in very few instances where the CIA maintains "some large collections of documents that are frequently requested pursuant to the FOIA" (Viscuso Decl. ¶ 11), Defendant produces electronic records in response to FOIA requests. However, the blanket policy alleged by Plaintiff is not that Defendant *never* provides electronic records; it is that other than those few clearly segregated cases, such as records pertaining to MKULTRA and Nazi war crimes, Defendant never provides electronic records. While it may be technically true that the decision that a record is not readily reproducible is made on a case-by-case basis, if that decision hinges solely on whether or not the record is on a short preapproved list of electronic records, then the "case-by-case" modifier is meaningless.

For the foregoing reasons, the Court should hold a Supplemental Status Conference and require Defendant to clarify the ambiguities in the Viscuso Supplemental Declaration.

Date: January 22, 2012

Respectfully submitted,

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