

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,)
)
v.) Criminal No. 08-231(EGS)
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)
THEODORE F. STEVENS,)
)
Defendant.)
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ORDER

On the afternoon of December 11, 2008, the government filed a "Sealed Memorandum" accompanied by a motion to seal and for a protective order. The government's pleading notified the Court that the government's attorneys in this case had received a copy of a "self-styled whistleblower complaint" on December 2, 2008. The complaint, authored by a Special Agent with the Federal Bureau of Investigation ("FBI") with extensive knowledge of the investigation and trial in this case, raised allegations of misconduct by certain government employees involved with the investigation and prosecution of the defendant.

In its motion to file *ex parte* and its motion to seal, the government represented to this Court that it had received the complaint on December 2, 2008 and over the course of the following days "received additional information, guidance and advice *to satisfy itself that any possible statutory and regulatory confidentiality concerns surrounding a request for*

whistleblower protection had been fully [sic] explored and addressed, and would not prohibit a disclosure to the Court at a minimum." (emphasis added). Neither the complaint nor the substance of the complaint was filed or revealed to the Court until nine days after its receipt by attorneys in the Office of Public Integrity.

The defendant objected to any sealing of the complaint. In addition to First and Sixth Amendment arguments, the defense argued that any redactions would make it more difficult for the defendant to adequately address and argue the allegations made in the complaint. The government and counsel for the complainant strenuously argued that the complaint should not be made public based on whistleblower and privacy concerns. The government also maintained that publication of the complaint would interfere with an ongoing investigation into the allegations being conducted by the Department of Justice's Office of Professional Responsibility ("OPR"). The Court ordered briefing on the government's motions to file *ex parte* and to file under seal and, following a hearing on December 19, 2008, the Court issued a 29-page Opinion and Order later that day, ordering that the complaint be filed on the public docket, with identifying information about the complainant's and the individuals named in the complaint redacted. Pursuant to that Opinion and Order, the redacted complaint was made public on December 22, 2008. Also on December

22, 2008, the defendant filed a Motion to Dismiss the Indictment, or, in the Alternative, Motion for a New Trial, Discovery, and an Evidentiary Hearing, based on the allegations made in the complaint.

On January 14, 2009, the government initiated a call to chambers, with defense counsel on the line, to request that it be permitted to file on the public docket a version of the complaint with fewer redactions. The Court scheduled a hearing for 2:00 p.m. on January 14, 2009 to hear arguments related to that request. At the hearing, held in open court, the government explained that it had found it difficult to respond to the defendant's Motion to Dismiss the Indictment, or, in the Alternative, Motion for a New Trial, Discovery, and an Evidentiary Hearing, without revealing the government employees' identities. Moreover, the government explained, it had contacted the government employees and they did not object to having their identities revealed. Finally, in response to a question from the Court, the government acknowledged that the author of the complaint, Agent Chad Joy, had not been granted whistleblower protection by the Office of Inspector General ("OIG").¹ In response to a follow-up question by the Court, the government then revealed to the Court - *for the first time* - that Agent Joy

¹ Neither government counsel nor the complainant's attorney had strenuous objections to revealing his identity in view of the denial of whistleblower protection.

had been notified as early as December 4, 2008 that he had not been afforded whistleblower protection. That notification came at least seven days before the government filed its motions to file *ex parte* and to seal the complaint - seven days when, according to the prosecution, it was receiving "additional information, guidance and advice to satisfy itself that any possible statutory and regulatory confidentiality concerns surrounding a request for whistleblower protection had been fully explored and addressed" - and fifteen days before the hearing and the Court's Opinion and Order.

Based on the government's repeated representations, this Court and the defendant proceeded on the understanding that Agent Joy had whistleblower protection or that his status as a whistleblower was as yet undecided due to the ongoing investigation by OIG and/or OPR. Had the Court known that the government had already legally determined that Agent Joy was not entitled to whistleblower protection *by the time it first filed the complaint under seal*, the Court would have proceeded differently.

Therefore, it is hereby

ORDERED that Attorney General Michael B. Mukasey personally sign a declaration under oath to be filed by no later than 12:00 p.m. on Friday, January 16, 2009, and provide copies of all relevant correspondence, detailing precisely (1) who within every

office of the Department of Justice knew about the complaint filed by Agent Joy, (2) what those individuals and offices knew, and (3) when those individuals and offices received the relevant information. That declaration must also address all decisions, correspondence, and communications within the Department of Justice related to Agent Joy's status as a whistleblower and the determination that he was not entitled to whistleblower protection. It is further

ORDERED that the government's request to file on the public docket a version of the Joy complaint with fewer redactions is **GRANTED** and the government shall file that complaint on the public docket by no later than 6:00 p.m. on January 14, 2009. It is further

ORDERED that in view of the information in the complaint that will now be made public, the defendant may file a revised Motion to Dismiss the Indictment, or, in the Alternative, Motion for a New Trial, Discovery, and an Evidentiary Hearing by no later than January 26, 2009. It is further

ORDERED that a status hearing is set for January 29, 2009 at 9:30 a.m. in Courtroom 24A.

SO ORDERED.

Signed: **Emmet G. Sullivan**
United States District Judge
January 14, 2009