UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S MOTION FOR RECONSIDERATION AND TO VACATE JANUARY 14, 2009 ORDER DIRECTING THAT THE ATTORNEY GENERAL PERSONALLY SIGN A DECLARATION UNDER OATH

The United States of America, by and through its undersigned attorneys, respectfully asks this Court to vacate its January 14, 2009 order directing that Attorney General Michael B. Mukasey personally sign a declaration under oath 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. As explained below, the Court's order was premised on a misstatement by government counsel at the January 14 hearing to the effect that Agent Joy has been denied whistleblower protection and had been so notified as early as December 4, 2008, by the Office of Professional Responsibility (OPR). Government counsel was mistaken; they had misconstrued a letter sent to Agent Joy by OPR. The Department has never determined that Agent Joy is not entitled to whistleblower protection, and has never so advised him. We apologize for this error. A copy of the OPR letter is attached.

Because the Court's order is premised on a misunderstanding of Agent Joy's status, we respectfully ask the Court to relieve us of the obligation of providing the Court with a complete

list of every Department of Justice employee who has knowledge of the Joy complaint. Even if the Court is not willing to relieve us of the obligation to provide that information, the Court should vacate its order to the extent that it directs the Attorney General to sign a declaration providing facts about which he lacks first-hand knowledge.

1. Sometime in late November or early December 2008, Special Agent Chad Joy submitted an undated complaint containing allegations of misconduct regarding his co-case agent and federal prosecutors in the above case. In the complaint, Agent Joy explicitly requested "any and all whistleblower protections." Complaint at 7. The complaint was referred to the Office of Professional Responsibility (OPR), which advised Agent Joy, on December 4, 2008, that it intended to investigate the matters raised in his letter about his co-case agent and the *Stevens* prosecutors. OPR further advised Agent Joy that because Agent Joy had not alleged any reprisals resulting from his complaint, OPR lacked "jurisdiction to initiate an investigation pursuant to 28 C.F.R. §27.3 into whether you are entitled to relief as an aggrieved whistleblower." Exh. A.

Meanwhile, on December 1, 2008, Criminal Division officials received a copy of the Joy complaint, and, in the following days, attempted to determine whether, in light of the allegations in the complaint, they were free to provide a copy of the complaint to the trial prosecutors, and, thereafter, to the Court or to counsel. The trial team provided the Court with a copy of the complaint under seal on December 11, 2008, and, as the Court has noted, argued thereafter that the complaint should not be made public based on privacy concerns relating not only to Agent Joy but also to co-case agent Kepner who had not yet been apprised of the complaint. The Court released the complaint on December 22, 2008, after redacting information identifying Agents Joy and Kepner, the prosecutors, and others.

On January 14, 2009, the government asked the Court to lift some of the redactions in the complaint, noting that Agent Kepner and the prosecutors named in the complaint did not object to publication of their names. 1/14/2009 Tr. 2-3. The government further noted that unsealing some of the redacted portions of the complaint would facilitate litigation of defendant's misconduct claims. *Id.* at 3. At this point, the Court advised the parties that it was "the Court's inclination to make public the identity of the complainant." *Id.* at 5. As the discussion continued, government counsel advised the court that the complainant (Agent Joy) "does not qualify for whistleblower status." *Id.* at 8. The Court asked the prosecutors when their "office" had learned that Agent Joy "was denied whistleblower protection," (*id.* at 15), and the prosecutors were unable to identify the date, although they believed it was after the December 19 hearing (*id.* at 17): "because after I apprised OPR of what was going on here, that's when I was informed that there was a – that Mr. Joy had been given a letter as early as December 4th telling him he had been denied whistleblower status." The Court then stated: "If your office knew this man had been denied whistleblower status, it had an obligation to tell me before we had that hearing. * * * if you learned about it afterwards, as soon after you learned about it, you had an obligation to let the Court know." *Id.* at 20. The Court then ordered the government to produce a full accounting of "everything that happened with respect to this whistleblower issue" in the form of a declaration from the Attorney General. *Ibid.*; 1/14/2009 Order at 4-5.

The factual premise on which the Court's order is based – that Agent Joy had been denied whistleblower status – is incorrect. The prosecutors had misconstrued the OPR letter, which merely advised Agent Joy that because he had not alleged retaliation, OPR lacked jurisdiction to

initiate an investigation into whether he was entitled to any relief as an aggrieved whistleblower.[1] OPR had not denied Agent Joy whistleblower status.

Indeed, it would have been inappropriate for OPR – or any component of the Department of Justice – to do so. The Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified in scattered sections of 5 U.S.C.) (WPA) "provides most federal agency employees with protection against agency reprisals for whistleblowing activity, such as disclosing illegal conduct, gross mismanagement, gross wasting of funds, or actions presenting substantial dangers to health and safety. *See* 5 U.S.C. § 2302(b)(8)." *Stella v. Mineta*, 284 F.3d 135, 142 (D.C. Cir. 2002). Because the FBI is not an "agency" within the meaning of the Act, *see* 5 U.S.C. § 2302(a)(2)(C)(ii), the Department of Justice promulgated a series of regulations that provide similar whistleblower protection to FBI employees. *See* 28 C.F.R. § 27.1 *et seq.* Those protections apply where the disclosing employee "reasonably believes" that the information he is providing evidences:

> (1) A violation of any law, rule or regulation; or
>
> (2) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

28 C.F.R. § 27.1(a). If the disclosing employee satisfies this threshold, the FBI whistleblower regulations bar his supervisors from taking any personnel action in "reprisal for a protected disclosure." 28 C.F.R. § 27.2(b).

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[1] As prosecutor Brenda Morris advised the Court on more than one occasion, the prosecutors are not versed in whistleblower law. *See, e.g.*, 1/14/2009 Tr. 24: "And if you recall, Judge, when I initially reached out to the Court, I was very ginger because I'm just not familiar with this aspect of the law and what I could and couldn't say, and that was when I first contacted the Court and with Defense counsel to say, 'This issue has come up. I'm just not familiar with the law with what I can't and can't say.'"

At this time, OPR has not completed its investigation of Agent Joy's allegations. Further, it is not the province of the Public Integrity Section or the Criminal Division to determine whether Agent Joy is entitled to protection under the applicable regulations. Moreover, Agent Joy has not alleged any reprisal, and therefore no Justice Department official has yet determined whether his belief in the accuracy of the allegations in his complaint is "reasonable." In short, there has been no formal determination of Agent Joy's whistleblower status, and he is presently entitled to the same prohibition against retaliation as any FBI employee.

We apologize again for the confusion caused by our misinterpretation of OPR's December 4 letter. Accordingly, the facts are as we represented them in our earlier pleadings and at the December 19, 2008 hearing.

In light of the above, we ask that the Court relieve us of the responsibility of identifying everyone within the Department of Justice who knew about the complaint filed by Agent Joy. Such an inquiry is no longer likely to benefit the Court.

2. Wholly apart from the misunderstanding that led to the Court's January 14 order, the Court should vacate its order directing that the Attorney General personally sign a declaration under oath providing detailed information about which Department of Justice employees have knowledge of Agent Joy's complaint. Under well-established principles, there is a strong presumption against compelling high Executive Branch officials to provide testimony in law enforcement proceedings (or be subjected to interrogatories or depositions) absent exceptional circumstances. *See, e.g.*, *In re United States (Reno and Holder)*, 197 F.3d 310, 314 (8th Cir. 2000) (finding that the Attorney General and the Deputy Attorney General could not be compelled to testify because of the absence of "extraordinary circumstances"); *In re United*

States (Kessler), 985 F.2d 510, 512 (11th Cir. 1993) (per curiam) (defendants were not entitled to subpoena FDA Commissioner because "[t]his case does not present extraordinary circumstances or a special need for the Commissioner's testimony"); *In re Office of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991) (per curiam) (directing district court to "remain mindful of the requirement that exceptional circumstances must exist before the involuntary deposition of high agency officials are permitted"); *Energy Capital Corp. v. United States*, 60 Fed. Cl. 315, 318 (Fed. Cl. 2004) ("[C]urrent high-ranking government officials may only be deposed and otherwise personally involved in a civil suit if 'exceptional circumstances' exist that required their personal testimony."). The D.C. Circuit has previously applied this rule in affirming a district court's refusal to require top Department of Labor officials to testify. *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) ("[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.") (citing *United States v. Morgan*, 313 U.S. 409, 421-22 (1941)). *See also Peoples v. U.S. Dep't of Agri.*, 427 F.2d 561, 567 (D.C. Cir. 1970) ("[S]ubjecting a cabinet officer to oral deposition is not normally countenanced"). More recently, the Fifth Circuit vacated a district court's discovery order that the Attorney General himself provide a signed letter asserting privilege, refusing to discuss at length its reasons for doing so because the "request was obviously inappropriate." *In re United States (Ashcroft)*, 397 F.3d 274, 286 n.16 (5th Cir. 2005).

The reasons for such a rule are clear. Agency heads are charged with sweeping statutory responsibilities in furtherance of the public interest. At the same time, their agencies are generally involved in litigation in courts across the nation. If agency heads could routinely be

ordered to provide sworn testimony in civil and criminal proceedings, their ability to execute the duties of their offices and thus serve the public interest would be severely impaired. As the Supreme Court explained in *United States v. Morgan*, 313 U.S. 409, 422 (1941), subjecting high officials to regular scrutiny concerning the reasons for their official actions would compromise the "integrity of the administrative process." Such testimony should thus be required only if absolutely necessary, such as when the information sought is not available from any other source or witness. *See Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) ("[W]ithout appropriate limitations, [high ranking government] officials will spend an inordinate amount of time tending to pending litigation."); *In re United States (Reno)*, 197 F.3d at 314 (exceptional circumstances could not be demonstrated absent showing that discovery sought from Attorney General and Deputy Attorney General "cannot otherwise be obtained"); *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995) (holding that district court erred by failing to quash deposition subpoenas issued to the Acting Chairman of the FDIC, the Comptroller of the Currency, and the Acting Director of the Office of Thrift Supervision) ("We think it will be the rarest of cases * * * in which exceptional circumstances can be shown where the testimony is available from an alternate witness."); *In re United States (Kessler)*, 985 F.2d at 513 ("Because of the time constraints and multiple responsibilities of high officials, courts discourage parties from calling them as witnesses and require exigent circumstances to justify a request for their testimony."); *id.* at 512 ("The reason for requiring exigency before allowing the testimony of high officials is obvious. High ranking government officials have greater duties and time constraints than other witnesses."); *United States v. Winner*, 641 F.2d 825, 834 (10th Cir. 1981) (finding that the

Assistant Attorney General could not be compelled to testify until it was established that other witnesses could not provide the necessary information).

Finally, the presumption against requiring high-level Executive Branch officials personally to provide information in civil or criminal legal proceedings is even stronger where, as here, the official lacks personal or first-hand knowledge of the detailed information sought. *Bogan*, 489 F.3d at 423 (permitting access to high government officials through the discovery process requires, at a minimum, "first-hand knowledge related to the claim being litigated"); *Simplex Time Recorder Co.*, 766 F.2d at 586 (upholding ALJ's decision to strike top Department of Labor officials from plaintiff's witness list because "any testimony which these officials might provide would be irrelevant since they had no first-hand knowledge of the case"). A requirement that the official have personal knowledge of the information sought complements the principle that high officials should not be forced to testify or submit to discovery if an alternate witness could provide the information requested. *See Buono v. City of Newark*, 249 F.R.D. 469, 470 (D.N.J. 2008) (describing requirement that "the official has first-hand information that could not be reasonably obtained from other sources"). *Accord United States v. Koubriti*, 305 F. Supp. 2d 723, 754 (E.D. Mich. 2003) (finding "no compelling need" for the Attorney General's in-court testimony even though "[t]he conduct at issue here unquestionably is that of the Attorney General himself and his direct staff, as opposed to a more general matter of departmental policy or agency decisionmaking"); *Energy Capital Corp.*, 60 Fed. Cl. At 318 (noting that high-ranking government officials may be subject to depositions "if the party has personal knowledge of the facts in issue"). Here, the court's order compelling an affidavit from the Attorney General would require the Attorney General to issue a sworn statement setting forth detailed facts about which

he lacks personal, first-hand knowledge. *See, e.g.*, Fed. R. Civ. P. 56(e)(1) ("A supporting or opposing affidavit must be made on *personal knowledge* * * *.") (emphasis added); *Wicker v. Oregon ex rel. Bureau of Labor*, 543 F.3d 1168, 1178 (9th Cir. 2008) ("[A]ffiants' assertions about a meeting which they apparently did not attend and about which they had no personal knowledge are not the proper subject of an affidavit.").

We thus respectfully submit that this court's order directed to the Attorney General, who lacks first-hand knowledge of the detailed information sought by the Court, does not present one of the rare situations in which the personal testimony, in the form of a sworn declaration, of a high-level Executive Branch official is necessary or appropriate.

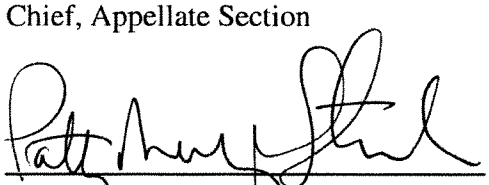
* * *

CONCLUSION

For the foregoing reasons, the Court should vacate its January 14, 2009, order.

Respectfully submitted,

PATTY MERKAMP STEMLER
Chief, Appellate Section



Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Tel: 202-514-2611
Fax: 202-305-2121

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2009, I caused a copy of the foregoing "GOVERNMENT'S MOTION FOR RECONSIDERATION AND TO VACATE JANUARY 14, 2009 ORDER DIRECTING THAT THE ATTORNEY GENERAL PERSONALLY SIGN A DECLARATION UNDER OATH" to be delivered electronically to the following:

Brendan V. Sullivan, Jr., Esq.
Robert M. Cary, Esq.
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005

Patty Merkamp Stemler