

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
AHCENE ZEMIRI,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 04-2046 (CKK)
)	
BARACK OBAMA,)	
President of the United States, <i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**RESPONDENTS' SUPPLEMENTAL STATUS REPORT IN RESPONSE
TO ORDER DATED FEBRUARY 9, 2009**

Pursuant to the Court's Order dated February 9, 2009 ("Order"), Respondents submit this supplemental status report. Petitioner's counsel objected to the inclusion of the following explanations in the Joint Status Report filed today. Respondents believe, however, that these explanations are necessary to allow the Court to understand why Respondents anticipate being able to ascertain the existence of, collect, and disclose the items identified in the Order on the dates indicated in the Joint Status Report.

1. All Statements Relating to Statements in the Factual Return

The Court has ordered Respondents to disclose "all statements, in whatever form, whether cumulative or not, that have not been previously disclosed, made by Petitioner, Ahmed Ressam, Mokhtar Haouari, or Abdel Ghani Meskini, relating to statements attributed to them in the factual return, if any." Respondents do not rely on any documents from Abdel Ghani Meskini. Respondents rely only on a letter from Mokhtar Haouari. Respondents are unaware of any statements in their possession that relate to this letter.

Respondents understand the Order to require Respondents to produce only primary sources, *i.e.*, statements based on direct observation such as other reports written by contemporaneous observers, raw notes, audiotapes, or videotapes. Respondents also understand the Order to require them to search only the electronic databases maintained by the Joint Intelligence Group of the Department of Defense (“DoD”). Respondents believe that these databases constitute reasonably available sources for such statements. If the searches are confined to these databases, Respondents conclude that they can identify any responsive documents within a shorter period of time. A broader search would require significant time and could require the production of thousands of documents, many containing highly sensitive information and many with little or no relevance to the allegations against Petitioner.

Any documents potentially subject to production in this litigation must be “cleared” for use in the litigation, that is, reviewed to determine whether information can be disclosed in the litigation consistent with national security and law enforcement needs and interests.¹ Thus, if Respondents identify documents that need to be cleared by the DoD, FBI, or other agencies, they will require an additional period of time to produce them. Counsel for Respondents has been informed that, given the extraordinary burdens placed on DoD clearance personnel by the simultaneous discovery ongoing in the Guantanamo Bay habeas litigation, the DoD expects to take at least 30 days to clear documents.

Counsel for Respondents have also considered the demands of an expansive search for documents in locations suggested by information that came to Respondents’ counsel’s attention

¹ Petitioner’s counsel’s offer in the Joint Status Report to assist with the process of reviewing documents is unacceptable because documents must be cleared before Petitioner’s counsel can view them.

during this *habeas* litigation. Respondents have endeavored to assess the burden of a such broader search, beyond the reasonably accessible databases previously described. To do so, Respondent's counsel personally contacted the United States Attorney's Office for the Western District of Washington ("USA-W. Wash."), the Seattle Field Office of the Federal Bureau of Investigation ("FBI-Seattle"), the United States Attorney's Office for the Southern District of New York ("USA-SDNY") and other agencies and individuals involved in interrogations of Petitioner and Ahmed Ressam.

A significant difficulty encountered during this search has been the absence of the individuals originally involved in the investigations of Ressam and Petitioner. USA-W. Wash. is a representative example. Of the three attorneys originally involved in the prosecution of Ressam, one is deceased and two are no longer employed by the federal government. USA-W. Wash. still has records related to Ressam and Petitioner, but Respondents could not ascertain if any potentially responsive documents exist in these records. USA-W. Wash. does not possess electronic records of these interrogations, only hard copies. Thus, to ascertain whether any responsive documents exist, voluminous files would have to be searched by hand. USA-W. Wash. has informed counsel for Respondents that it does, however, have a readily accessible transcript of a statement by Ressam that Respondents expect to produce by February 25, 2009.

FBI-Seattle does maintain electronic files related to Ressam and Petitioner. A search of these files for statements relating to statements relied on in the Factual Return produced no documents. FBI-Seattle personnel noted no record of video or audio recordings associated with these statements. FBI-Seattle also stated that it has files containing notes related to

interrogations. Those files, however, would have to be searched by hand, a time-intensive process.

USA-SDNY also has files relating to Ressam. Like USA-Seattle, the attorneys originally assigned to the Ressam matter are no longer with the office, complicating the search. A search of all reasonably accessible files by a USA-SDNY attorney has not uncovered any documents relevant to the Order. USA-SDNY has additional files related to Ressam's case, but they are stored off-site and thus would require a good deal of time to search.

Respondents have also been informed that the New York Field Office of the FBI has extensive files associated with Ressam, including files previously in the possession of FBI-Seattle. Respondents, however, have yet to ascertain the nature of those files and the difficulties associated with searching them.

Given the various difficulties entailed in obtaining documents from any of these offices, including the necessity of hand-searches, Respondents estimate compliance would take at least two months, placing it on April 15, 2009. Respondents submit that such a lengthy, time-consuming search conflicts with the requirement of section I.E.2(4) of the Case Management Order that additional discovery should only be ordered if the discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government – especially given that such a search is likely to uncover little, if any, relevant evidence. Such a discovery requirement cannot be fairly described as “prudent and incremental” as mandated by *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality).

2. List of Recordings Made By Joint Task Force Guantanamo

The Court ordered Respondents to disclose to Petitioner whether Petitioner's name appears on a list of Guantanamo detainees whose interrogations were either videotaped or audiotaped by Joint Task Force Guantanamo ("JTF-GTMO"). Petitioner's name does not appear on this list.

3. Original, Untranslated Letters from Petitioner to His Wife

The Court ordered Respondents to disclose to Petitioner's counsel copies of two original, untranslated letters from Petitioner to his wife once Petitioner's counsel had identified those letters with specificity to Respondents. Petitioner's counsel identified those letters to Respondent on February 10, 2009. Respondents located copies of the two original, untranslated letters on February 11, 2009. Given the extraordinary burdens placed on clearance personnel, however, Respondents have yet to obtain the clearance necessary to disclose these letters to Petitioner. DoD personnel state that clearance of these documents may be obtained within 30 days.

4. Exculpatory Information Obtained Through the Canadian Government

The Court ordered Respondents to disclose all documents containing exculpatory information concerning Petitioner or Ahmed Ressam that the Canadian Government has previously provided to the United States Government.

Respondents understand this order to require them to search only the electronic databases maintained by the Joint Intelligence Group of the DoD. Respondents believe that these databases constitute the only reasonably available source for such statements. If searches are confined to these databases, Respondents estimate, based on information provided by the relevant agencies,

that they can identify any responsive documents relatively quickly. As described above, however, the clearance process may then take a month, placing production on March 25, 2009.

Respondents have also endeavored to assess the burden of a broader search, beyond the reasonably accessible databases. USA-W. Wash. stated that some documents from Canadian sources may be in their files. Searching for exculpatory information in these files, however, would require a time-consuming hand search. FBI-Seattle did not uncover any exculpatory information on their search of their electronic database. USA-SDNY likewise was unable to identify any such information in their reasonably accessible files. Time-intensive hand searches would be required to uncover any other evidence that may exist in their possession. Based on conversations with these offices, counsel for Respondents estimates compliance would take at least two months, placing production on April 15, 2009. More time may be necessary given the difficulties associated with clearing documents from foreign governments and the likely necessity of obtaining Canadian permission to disclose any documents found.

Respondents again submit that such a lengthy, time-consuming search conflicts with CMO § 1.E.2(4).

5. Cooperation Agreement and Related Correspondence

The Court ordered Respondents to disclose to Petitioner's counsel any cooperation agreements entered into between Ahmed Ressam and the United States Government relating to Ahmed Ressam's criminal prosecution or sentencing, and any correspondence between Ahmed Ressam or his counsel and the United States Government relating to the same. Respondents have located these documents in the possession of USA-W. Wash. Counsel for Respondents have been informed that disputes arose concerning that nature of the cooperation agreement and the extent

of Ressam's cooperation, producing a significant quantity of correspondence associated with the cooperation agreement. Respondents have also been informed that some of this material may be under seal. Based on these conversations with USA-W. Wash., Respondents estimate it will take until March 25, 2009, to search, clear, and produce this material.

6. Exculpatory Information Provided by the United States to Mokhtar Haouari's Defense Counsel

The Court ordered Respondents to disclose to Petitioner's counsel any exculpatory information provided by the United States to Mokhtar Haouari's defense counsel in connect with the criminal prosecution and sentencing of Mokhtar Haouari. Respondents have contacted USA-SDNY in an effort to find this information. USA-SDNY has not been able to locate any such documents in reasonably accessible files. Any further searches would require hand searches of off-site records, which Respondents submit would be unduly burdensome. Based on conversations with USA-SDNY, Respondents estimate that the search, clearance, and production of these materials could be completed by April 15, 2009.

Dated: February 13, 2009

Respectfully submitted,

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