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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AL-HARAMAIN ISLAMIC FOUNDATION,)
INC., an Oregon nonprofit)
corporation, et al.,)

Plaintiffs,) No. CV-06-274-KI

v) November 1, 2006

GEORGE W. BUSH, President of the) Portland, Oregon
United States, et al.,)

Defendants,)

_____)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE GARR M. KING,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

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P R O C E E D I N G S

(In chambers, telephone conference.)

THE CLERK: Good afternoon counsel.

Mr. Goldberg, can you hear me?

MR. GOLDBERG: I can.

THE CLERK: Mr. Eisenberg.

MR. EISENBERG: Yes.

THE CLERK: Ms. Albies.

MS. ALBIES: Yes.

THE CLERK: Ms. Hassan.

MS. HASSAN: Yes.

THE CLERK: Ms. Jaskol.

MS. JASKOL: Yes.

THE CLERK: Mr. Tannenbaum.

MR. TANNENBAUM: Yes.

THE CLERK: Mr. Coppolino.

MR. COPPOLINO: Yes.

THE CLERK: Ms. Gacki.

MS. GACKI: Yes.

THE CLERK: Mr. Sutherland.

MR. SUTHERLAND: Yes.

THE CLERK: Your Honor, this is the time set for a telephone conference in civil case 06-274-KI, Al-Haramain Islamic Foundation, Inc. et al vs. Bush, et al.

1 Counsel, there's a court reporter
2 present, so please be sure to state your name before you
3 speak, and here is Judge King.

4 THE COURT: Good afternoon, counsel. I've set
5 up this telephone conference to address the issues that
6 were raised -- I don't know.

7 MR. GOLDBERG: Judge, you are cutting out.

8 THE CLERK: If you are on a speaker phone,
9 that's going to be a problem. It is not coming from
10 ours. It is coming from your speaker phone.

11 THE COURT: Okay. Well, as I've indicated, I
12 set up this conference to discuss the issues raised in
13 your -- Mr. Coppolino's letter of October 31. We're only
14 going to deal with this issue of handling the sealed
15 documents. There's no other issue before the court at
16 this point, and I just want to talk about that.

17 Frankly, I want to have this conference
18 because I'd like to make certain that we don't go beyond
19 what we should do as far as concerns, objections and
20 discussions and statements about these filings.

21 I received from the plaintiff, in
22 addition to their motion and their filings that they have
23 made in connection with the motion, an envelope that is
24 sealed. My understanding is that they contacted my
25 in-court deputy and were advised to deliver that directly

1 to her, and she delivered it directly to me. And that's
2 what happened in this case.

3 In looking at my opinion and order in
4 this case, as the plaintiffs point out, I did indicate
5 that plaintiffs would probably have to proceed based upon
6 what is publicly disclosed and what they are able to
7 argue in camera that the sealed document discloses.

8 And I think everybody anticipated that
9 the plaintiffs would be at some point here asserting any
10 arguments in support of their standing or any other
11 arguments they deemed appropriate from their recollection
12 of the sealed document. And I believe that the defendant
13 in this case agreed that that was potentially what would
14 have to happen. That's set forth at page 21 of my
15 opinion and order.

16 So I don't attribute any improper
17 conduct or bad faith to the plaintiff in sending this
18 sealed document the way they did. Frankly, I was
19 surprised to get the motion for partial summary judgment.

20 My contemplation, although, not
21 specifically laid out, and there were no restrictions on
22 filing motions, was that the next step in the process,
23 assuming this court still retains this case after
24 November 30th, would be to have the discovery process
25 that I set forth in my opinion as the process that I

1 thought would be possibly necessary and appropriate.

2 So there's a lot of statements made by
3 the government in their letter about what the plaintiffs
4 are required to do by law. The plaintiff says no, that's
5 not the case. I'm not ruling on that at this point in
6 time. If this has to be ruled on, I will want briefing
7 on it, and I'll make a decision.

8 I would have -- well, I don't know.
9 This was not a motion, so there's no requirement to
10 confer, but I think, Mr. Goldberg, to prevent any issues
11 of this type in the future, it would be well to confer
12 with the government's attorneys. If you don't agree with
13 their position or what they suggest, then we can have a
14 conference as to how anything that is even remotely close
15 to the sealed document or contains information from the
16 sealed document is handled.

17 So to get down to business at this
18 point, I have this envelope that has been delivered to me
19 by the plaintiff, and I think they have not violated any
20 rule, order or law that I'm aware of in doing so. And I
21 would like to now figure out just how we'll handle it so
22 that the government feels comfortable.

23 What's your suggestion, Mr. Coppolino?

24 MR. TANNENBAUM: Your Honor, this is
25 Mr. Tannenbaum for the government.

1 THE COURT: Okay. Mr. Tannenbaum.

2 MR. TANNENBAUM: I mean, with respect if we
3 could just set forth our position, which is we
4 certainly -- while the court's opinion certainly
5 contemplated further in camera submissions from the
6 plaintiff, although, I think the court recognized,
7 probably not so quickly, we certainly do not think that
8 it contemplated those submissions without following the
9 appropriate requirements to handle classified
10 information.

11 And those requirements as we've told
12 plaintiffs, and they are aware, they've been made aware
13 repeatedly, apply not just to the filing and the storage
14 of the documents at the end of the day when the
15 plaintiffs handed them to the court but to the
16 preparation and creation of the documents in their
17 storage when they are in draft form.

18 Of course, if the documents have to be
19 stored in a SCIF when they are filed, they have to be
20 stored in a SCIF when they are in the process of being
21 created and be created on proper equipment during that
22 time.

23 So we're actually quite troubled by the
24 way it has been handled. We would -- you know, we would
25 ask -- we're particularly troubled also by the

1 plaintiff's suggestion, their recent letter that none of
2 these requirements apply to them. We think they
3 certainly do apply. They are the requirements that the
4 security professionals in the executive branch have
5 determined necessary to protect this kind of information
6 which the court, of course, has recognized in securing
7 the prior filings, sealed filings in the SCIF as well.

8 So with that as a back-drop, we would
9 request a number of things. First, that the documents
10 that the plaintiffs filed -- that, you know, that they
11 submitted to the court be delivered to either
12 Mr. Sutherland or Mr. Borgen, the court's security
13 officer, so that they can be put in a SCIF, that they can
14 be secured fax to the government's attorneys in the case
15 so that we can determine whether any other security
16 procedures or methods are necessary.

17 In addition, we think that all other
18 drafts of the document that were created, whether they
19 are in paper or electronic form, also need to be put in a
20 SCIF or destroyed.

21 I would just want to alert the court and
22 plaintiffs that we've been advised by the security
23 experts that we can't discuss on this open phone
24 precisely where those other copies might be because that
25 itself would be a security risk, but just say generally

1 that we think all of the other copies or drafts should be
2 accounted for and deposited in a SCIF.

3 We would also ask that the court, and I
4 think this is in line with the court's suggestion that
5 the parties confer before anything further is done, which
6 we think would be very wise.

7 We would also ask that plaintiff not
8 file any further or attempt to create any draft or file
9 any further in camera submissions until, first, until it
10 is clear that this case will proceed. Obviously, there's
11 a stay motion pending and then only after consulting with
12 the government on the security procedures necessary and
13 in compliance with those procedures.

14 If that becomes the case down the road,
15 we can work with them to help them comply with those
16 procedures, but we would just ask, just to make
17 absolutely certain that they don't do anything further in
18 terms of, you know, creating drafts or anything that
19 would pose the same security risks.

20 THE COURT: Well, Mr. Tannenbaum, my problem
21 with your statement is that you assume you are absolutely
22 correct in everything that you are stating, and I'm not
23 sure that you are, I'm not saying you aren't, but I'm not
24 sure that you are. And you are setting the ground rules
25 based upon your interpretation of what is required, and I

1 don't know that the plaintiff has to agree with that. I
2 don't know that I have to agree with it.

3 I will mention in looking at your
4 letter, you make statements like plaintiffs have flouted
5 the very process contemplated by the court. That's not
6 the case. I don't believe that that's the case.

7 You discussed their, quote, mishandling
8 of this document. We wouldn't be where we are today if
9 the government hadn't mishandled this document, and the
10 government did not do it in bad faith. I do not
11 attribute any bad faith to the plaintiff here.

12 So what I'm trying to do is just to work
13 through a process so that we don't have these disputes
14 and threats and recriminations that looks like they are
15 occurring in this case more often than I would like to
16 see.

17 Now, in my view, the plaintiffs followed
18 a process that they thought was appropriate. My
19 suggestion that you talk is just so that you do talk.
20 They don't have to agree with what you've said. If they
21 don't agree, then we'll put the issue before the court,
22 and I'll make a decision as to what has to occur.

23 Now, all I have at this point is a
24 letter. All I have is a sealed document. I'm going to
25 deliver this sealed document to Mr. Sutherland to put in

1 the SCIF. Now, anything else that you are asking for,
2 i.e., that their draft goes into the SCIF, anything of
3 that nature, you are going to have to file a motion so
4 that I can look at this and I'll let the plaintiffs
5 respond.

6 In the meantime, the plaintiffs are not
7 to distribute or deliver or do anything with their drafts
8 or their copies that they have in their possession. I
9 want counsel for the plaintiffs to retain all of these
10 drafts and copies of the documents at this point.

11 Don't send anything to the plaintiffs at
12 this point in time and as to the named plaintiffs Ghafoor
13 and Belew and as to your -- the entity Al-Haramain. If
14 you sent them copies of these declarations, have them
15 return those copies to you, Mr. Goldberg, seal them and
16 hold them for further order of the court.

17 MR. GOLDBERG: Your Honor, this is Goldberg.
18 I can represent to the court that Belew and Ghafoor do
19 not have -- have not retained copies of the documents.

20 THE COURT: Okay. Well, in any event, as I
21 say, I'm not going to do these things by letter because I
22 think I need to have positions of both of the parties,
23 the plaintiff and the defendant, on the specific request
24 of the government. If you don't agree, then you are
25 going to have to brief it for me so I can make a

1 decision.

2 Okay. Mr. Tannenbaum, any comments on
3 that?

4 MR. TANNENBAUM: Your Honor, I think we made
5 our position clear. We understand your views. We're
6 certainly willing to file a motion if it is necessary.

7 THE COURT: Okay.

8 MR. TANNENBAUM: I guess we would ask if the
9 plaintiffs are willing voluntarily to turn over any or
10 destroy any drafts or other electronic versions.

11 THE COURT: Why don't you talk to them, talk
12 to each other, see what you can work out. My impression
13 is that Mr. Goldberg has been reasonable in his approach
14 on these things as far as what needs to go into the SCIF,
15 but it is, frankly, I see the representations you are
16 making in the letter as to what the law calls for, but I
17 don't know if that's the law or just the practice within
18 any particular agency that you have quoted.

19 Their practice does not necessarily mean
20 that it is the law, so I need to know a little more about
21 this before I can make a decision if you can't agree. So
22 talk to each other when we hang up today, get in touch
23 with each other and see where we go.

24 Mr. Sutherland, do you want to come up
25 and get this material?

1 MR. SUTHERLAND: I'll come up with Mr. Borgen.
2 If I might add one other thing. To the extent that
3 there's some concern about communication and the security
4 of the line, our office has a secured phone line. We can
5 make that available to Mr. Goldberg. I wouldn't be in
6 the room, obviously, unless you wanted me to, but those
7 types of conversations, if necessary, over a secured
8 line, he can use our facilities.

9 THE COURT: Okay.

10 MR. GOLDBERG: Your Honor, can I clarify two
11 points? This is Goldberg. Number one, I'm assuming when
12 you are ordering that the documents be delivered to the
13 SCIF, that we're talking about the same procedures with
14 it being kept in the locked bag.

15 THE COURT: Yes.

16 MR. GOLDBERG: And the second question is
17 regarding the documents being sent to the government
18 attorney, we've never been -- I've not provided any
19 copies to the government attorneys up to now. We still
20 don't know whether or not the government's attorneys have
21 security clearances to look at these documents. Can we
22 clarify that issue once and for all?

23 THE COURT: Mr. Tannenbaum.

24 MR. TANNENBAUM: Your Honor, I would have to
25 check with the appropriate security officials to see

1 whether that information can be disclosed. I think the
2 last time, in the last two times --

3 THE COURT: Now, wait a minute. You're saying
4 you can't disclose whether you have security clearance.

5 MR. TANNENBAUM: I'm saying I don't know
6 whether I can or not. There are -- I do know in some
7 instances, it is classified as to whether certain people
8 contain certain security clearances.

9 THE COURT: I'll tell you, Mr. Tannenbaum, my
10 eyebrows go up when I hear that kind of a statement.

11 MR. TANNENBAUM: I've relayed what is told to
12 me, your Honor. That decision is made by people with
13 original classifying authority who made the
14 determinations. I have no control over them. I
15 certainly don't want to violate them.

16 THE COURT: Okay.

17 MR. TANNENBAUM: I guess we'll have to get
18 back to you on that question.

19 THE COURT: All right. Well, the plaintiff
20 has no obligation to serve you with copies of these until
21 you have told the plaintiff that someone has security
22 clearance and they are authorized to send copies to them.

23 MR. TANNENBAUM: Well, I would just note that
24 the last two times this has happened, those documents
25 have been secured faxed to the appropriate people in the

1 government. So we would request that the same thing
2 happen here. We don't see that it really matters with
3 whether plaintiffs know at this point who precisely is
4 looking at them as long as the government is looking at
5 them.

6 MR. GOLDBERG: This is Goldberg. My response
7 to that is we've not been subject to this kind of attack
8 as set forth in the four-page letter we got yesterday.
9 We're going to be extremely careful as we've been about
10 who is getting this document or what we're doing with it.
11 So it seems to me it is not unreasonable for us to ask
12 that question.

13 THE COURT: Well, I agree with Mr. Goldberg.
14 Frankly, your response, Mr. Tannenbaum, is kind of an
15 Alice in Wonderland response. I think you need to
16 determine at this point and advise Mr. Goldberg as to who
17 and how they should send copies of these documents, and
18 represent to him that these people are authorized, and
19 that he's not violating any regulations, rules or laws by
20 sending those documents to them, so talk about that on
21 the telephone.

22 MR. TANNENBAUM: Sure. We'll do that, your
23 Honor.

24 THE COURT: Okay. Thank you.

25 MR. TANNENBAUM: Your Honor, can I just raise

1 two other quick matters?

2 THE COURT: Yes. Sure.

3 MR. TANNENBAUM: As we set forth in our
4 letter, we're still concerned about whether plaintiffs
5 have complied with the court's order to return all copies
6 of the classified document as you indicated.

7 We disagree with their analysis that the
8 Officer Soliman Al-Buthi is not subject to the order.
9 Regardless of that, we think that the plaintiffs should
10 not be the ones in the position of deciding who is and
11 who is not subject to the order and how they will or will
12 not comply. If they do so much --

13 THE COURT: You are going to have to go back.
14 We lost you with the static and the court reporter --
15 what you just said.

16 MR. TANNENBAUM: I was just saying we would
17 ask that if the plaintiffs think that a particular person
18 is exempt from the court's order, because I see they are
19 very clearly suggesting that the Officer Soliman Al-Buthi
20 who is featured very prominently in their allegation,
21 that he's not complying with the court's order, we would
22 ask that they seek clarification from the court or relief
23 from the court's order so that that issue can be briefed
24 rather than just allow plaintiffs to decide in the first
25 instance.

1 THE COURT: All right. I want you to discuss
2 that. If you cannot arrive at an agreement and file a
3 motion, I want another motion at this point with
4 specifics as to what you believe that the plaintiff
5 should be doing with regard to any copies of the sealed
6 documents. Okay?

7 MR. TANNENBAUM: Finally, just one last point
8 on the motion for summary judgment. Technically, our
9 response would be due --

10 THE COURT: Right. I'm going to defer your --
11 I'm going to order that you may defer filing the response
12 until further order of the court. I want to see where
13 you are on all of this.

14 Frankly, Mr. Goldberg, I will say to you
15 that I do not intend to proceed with briefing and
16 decision on your summary judgment motion until the
17 decision is made as to whether this case is transferred
18 to the Northern District of California.

19 I understand that the Multidistrict
20 Litigation Panel will be considering this on
21 November 30th. And I just do not feel it is appropriate
22 for this court to jump in and make this kind of decision
23 or even proceed with the briefing until I find out
24 whether I'm going to continue handling this case at this
25 juncture of the case.

1 MR. GOLDBERG: This is Goldberg, your Honor.
2 Does that apply also to the discovery conference? We had
3 previously, I think conferred as you directed in the
4 September 7th opinion and order with the government
5 regarding dates for discovery conference. I think we
6 provided those to the court. We haven't heard anything
7 more.

8 THE COURT: Right. I am going to wait until
9 after November 30th until that decision is made to hold a
10 discovery conference. If this is transferred to
11 California, I don't believe it is appropriate for this
12 court to be doing that at this time. I think Judge
13 Walker has other cases down there where he may be looking
14 at these issues.

15 So at this point, I am not going to hold
16 the discovery conference prior to the decision of the
17 Multidistrict Litigation Panel. Okay?

18 MR. GOLDBERG: Okay.

19 MR. TANNENBAUM: Okay.

20 THE COURT: All right. Thank you.

21 (Proceedings concluded.)
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Certificate

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter. A transcript without an original signature is not certified.

This the 2nd day of November, 2006.


KAREN M. EICHHORN, CSR, CM,

Karen M. Eichhorn, CSR, CM