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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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EMPOWER OVERSIGHT           :   Civil Action No.:
WHISTLEBLOWERS & RESEARCH,  :   :
                             :   1:21-cv-1275
                             :   :
                             :   Plaintiff,      :
                             :   :
                             :   versus         :
                             :   :
                             :   Friday, April 8, 2022
                             :   :
NATIONAL INSTITUTES OF     :
HEALTH,                    :
                             :
                             :   Defendant.    :
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The above-entitled motion to vacate scheduling order was heard before the Honorable Leonie M. Brinkema, United States District Judge. This proceeding commenced at 10:01 a.m.

A P P E A R A N C E S:

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FOR THE PLAINTIFF:   MICHAEL SCHRIER, ESQUIRE
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                    (202) 378-2313

FOR THE DEFENDANT:  MEGHAN LOFTUS, ESQUIRE
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                    (703) 299-3700

ALSO PRESENT:      JASON FOSTER

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES



1 of the investigation by the defendant into, you know,  
2 possible sources of responsive information, will be  
3 addressed in the summary judgment papers. If the Court  
4 finds that there's an inadequate record of an appropriate  
5 investigation, we can deny the motion for summary judgment  
6 and then have a more, I think, tailored approach to some  
7 limited discovery.

8           So why don't you tell me why that would not  
9 adequately work.

10           MR. SCHRIER: Thank you, Your Honor.

11           You're absolutely right. In the most typical FOIA  
12 cases, discovery would be after the summary judgment motions  
13 have been filed. But, in this case, you know, we have a  
14 copy of the Government's declaration already, so we already  
15 know what the Government's going to say.

16           THE COURT: But they've represented that that's  
17 not -- that's sort of the tip of the iceberg. My  
18 understanding is that there's more to come, and it would  
19 come in the context of the summary judgment pleadings. And  
20 I think once we've seen them, then you'd have a better sense  
21 of whether, you know, there's enough there.

22           I mean, one of the ways you could oppose the  
23 motion is just saying, you know, the very motion the  
24 Government has filed shows why we need discovery. You may  
25 find that it doesn't. I mean, we just don't know at this

1 point.

2 But, you know, in terms of trying to be efficient  
3 and save everybody a lot of time and expense, the  
4 proposal -- and it doesn't overly delay this case. I mean,  
5 they've given a schedule here that would have this thing  
6 resolved basically by the end of June. So I don't -- and,  
7 by FOIA timing, this is moving pretty quickly.

8 MR. SCHRIER: I would expect nothing else in this  
9 court, Your Honor, yes.

10 THE COURT: All right. So, I mean, is there  
11 anything specific that's really -- that you really think is  
12 deficient and that you honestly believe will not be  
13 corrected in the forthcoming additional information that's  
14 going to be in the motion for summary judgment?

15 MR. SCHRIER: Your Honor, at this point I think  
16 it's simply a question of timing. Do we address the issues  
17 regarding the scope and adequacy of the search and the  
18 indexing now in light of the fact that we have a declaration  
19 now; or do we wait for summary judgment? And, again, just  
20 being -- given that I know what this Court puts a premium on  
21 on moving cases forward quickly, it would just seem -- given  
22 the facts that we have, it would make sense to do that  
23 discovery now.

24 THE COURT: All right. Well, let me hear --  
25 Ms. Loftus, come up to the lectern for a second.

1           I want to make sure that I've read and considered  
2 your position appropriately. But it's my understanding that  
3 you have additional affidavits or additional information  
4 you're planning to provide; is that correct?

5           MS. LOFTUS: Yes, Your Honor. And as we laid out  
6 in our reply brief, my understanding of providing the  
7 declaration early was for the parties to work together --  
8 we've had a great working relationship up to this point, to  
9 work together to narrow either issues for a later briefing  
10 or to potentially resolve the case without future judicial  
11 intervention.

12           So if there are deficiencies, I -- you know,  
13 counsel and I can meet and confer and discuss what  
14 additional items they would like to see in the declaration,  
15 in upcoming declarations that we can provide with summary  
16 judgment, but certainly it was not meant to be -- it was  
17 meant to be a starting point for the parties to continue  
18 negotiation and continuing to see if we can resolve this  
19 case.

20           THE COURT: The one area -- and, again, it may go  
21 into an area that's irrelevant or not appropriate under the  
22 various exemptions that exist under the statute -- that  
23 struck me that might be something you want to look at a bit  
24 more carefully is that my understanding is that almost all  
25 of the responses have come from that one, what I'll call

1 subagency within NIH. But one of the areas that I think the  
2 plaintiff was looking for were communications that might  
3 have occurred with some of the members of Congress.

4 Now, it's been my experience, having worked at  
5 the -- for the executive branch at one point, that when a  
6 request comes in from a U.S. senator, that that often goes  
7 to the highest echelons within the department. And so it  
8 struck me, for example, that scope might have to go beyond  
9 just your -- that subset -- subagency.

10 I don't know, again, what the practice or policy  
11 is at NIH when you get a congressional request. Is there a  
12 central office that handles all communications with members  
13 of Congress that would cover all of the subagencies within  
14 that department? I'm not convinced that the declaration  
15 that you provided actually covered that.

16 And that's the one thing, again, in terms of  
17 apparently the excellent relationship you have with  
18 plaintiff's counsel that you might want to look at that  
19 might resolve that particular issue more expeditiously; all  
20 right?

21 MS. LOFTUS: Yes, Your Honor.

22 THE COURT: But the bottom line is, I am going to  
23 grant your motion.

24 Was the proposed order, Mr. Schrier, acceptable to  
25 you in terms of the timing? Did it give you enough time to

1 respond? So this would have the Government -- the  
2 defense -- I'm sorry. Or, I guess it says opening briefs.  
3 You're anticipating cross motions for summary judgment?

4 MS. LOFTUS: Your Honor, I left open the  
5 possibility that plaintiff would want to file their own  
6 motion. I defer to my colleague as to whether that's the  
7 case.

8 THE COURT: Do you think you would be in that  
9 position at this point, or would you not?

10 MR. SCHRIER: At this point, I don't have any  
11 facts to be able to assess that. It's based limited on the  
12 declaration provided to date. It's a possibility. But if  
13 they are giving me more declarations forthcoming and there  
14 would be a refinement of the declaration, it may change how  
15 we have to respond to this.

16 THE COURT: What we'll do is this: I'm going to  
17 go ahead and grant the motion as it's proposed. If -- after  
18 the plaintiff receives the opening brief from the defense on  
19 May 13, if you've chosen not to file your own motion for  
20 summary judgment, but after you see their motion, rather  
21 than filing an opposition, what you want to file is an  
22 affirmative motion. You can ask for an adjustment of the  
23 scheduling order. All right. It would, I think, require  
24 then some tinkering. But, in this case -- other than that,  
25 I'm going to go ahead and set it.

