[redacted]
Appellant

United States of America
Merit Systems Protection Board

[redacted] Regional Office

[redacted] Appellant, v. United States Department of Justice, Respondent.	Case No. [redacted] APPELLANT'S MOTION TO COMPEL DISCOVERY Judge: Hon. [redacted] Appeal Filed: 9/25/2009

INTRODUCTION

This motion to compel concerns discovery served by appellant on Agency.

PROBLEM

Agency did not respond to appellant's written discovery. Agency declined to even discuss a deposition schedule for Agency personnel. Agency did not respond to appellant's attempts to meet and confer. Appellant seeks his Honor's order compelling production of the requested materials, setting depositions, and sanctioning Agency appropriately for its violation of his orders.

FACTS

The following table shows appellant's written discovery to Agency:

Title	Date Served	Date Due	Status
Appellant's Written Interrogatories, Set One	10/5/2009	10/26/2009	No response.
Appellant's Inspection Demand, Set One	10/5/2009	10/26/2009	No response.
Appellant's Inspection Demand, Set Two	10/8/2009	10/28/2009	No response.
Appellant's Inspection Demand, Set Three	10/10/2009	10/30/2009	No response.

Agency waived its objections to the requests by not responding. By appellant's calculation, the first motion to compel is due 11/4/2009.

Appellant attempted to meet and confer on 10/14/2009 by sending a letter reminding Agency that the responses were due 10/26/2009 and that his Honor denied Agency's motion for a discovery stay. Agency representative acknowledged receipt as described in appellant's Motion for Default. Agency did not respond to the contents at any time.

Agency did not respond to appellant's proposed deposition schedule except to imply in its filing of 10/26/2009 that it was somehow improper for appellant to seek to take depositions of Agency personnel. Serving a deposition notice would be futile. The law does not require futile acts, especially when the person who would have had to act could not afford the cost of an appearance-only deposition transcript on multiple occasions.

Appellant wrote Agency on 11/3/2009 by sending a detailed letter discussing each request and its purpose, as well as inviting discussion about any issues. Although appellant was not re-

quired to do so, appellant disclosed with reasonable particularity the anticipated use of the information on the merits. Please see Separate Statement of Disputed Requests below for additional discussion of each response, all of which is in appellant's letter.

While waiting for a response to the request to meet and confer, appellant was at the same time developing other information in the matter and communicated about a number of other subjects in email messages to Agency regarding the possible implications of recent discoveries by appellant in Agency records. Appellant anticipates this will be characterized as a "barrage" of "somewhat unusual" messages by Agency in its opposition, but notes as of this filing no responses to multiple communications sent by appellant, nor an indication that Agency did not want for its own use or benefit the information that appellant was developing without assistance about the propriety of conduct by Agency employees. Appellant represents that he has consulted another rejected attorney and two additional rejected applicants about the facts that could reasonably be inferred from the partial information available to appellant, and appellant represents that he has not been advised in any fashion that his contentions are unreasonable. Rather, appellant has been reassured that his view of the facts is not only possible, but disturbing, and appellant immediately communicated his concerns to Agency out of concern to Agency and its attorneys--without regard to the anticipated negative impact of appellant's beliefs on the likelihood of his eventual internal appeal being granted if this appeal is dismissed. Although appellant sent what might be described in the opposition as "abrasive" or "aggressive" correspondence, appellant notes that much of this correspondence was only tangentially related to this motion, and had more to do with implications that derive from internal issues that appellant believes may have been especially unfortunate contributions to the action that was taken.

Without further information or comment from Agency, appellant regrets but nevertheless contends that at least one Agency employee decided that appellant was not worthy of continued processing for the office for which appellant had been selected, and the employee then concealed important information from the FBI even when appellant advised the employee that the information was important to the specific issues that caused appellant's disqualification. The implications

for the rights of criminal suspects who could have been affected and other security clearances required appellant to communicate his concerns to Agency because appellant simply cares about other people who have been victimized, independent of any duty he might have.

Appellant has since learned that the employee appellant believes is primarily responsible graduated the FBI Academy in approximately early May 2009, which fortunately mitigates the number of criminal convictions or security clearances that might be implicated by *Brady-Giglio* issues, but still presents concerns appellant believes are important enough that the number of communications sent to Agency and their contents were not unreasonable. Of particular note, appellant stated that he hoped very much that he was wrong, and invited Agency on each occasion to contact him to discuss the matter and/or confirm the plausibility of appellant's account through its own components in a manner appellant could describe for Agency. There was no response.

Appellant contends that the discovery in this matter has attained additional importance as a result of Agency's prior suppression of evidence that would have apprised appellant of this believed misconduct earlier and prevented additional damage to Agency and others.

KEY LAW

The Acknowledgment Order requires the parties to comply with the Board's regulations on discovery.

The Board's regulations on discovery require discovery responses to be served promptly but not later than 20 days after the requests. 5 CFR § 1201.73(f)(2).

The moving party is required to meet and confer by telephone or in person with the responding party. 5 CFR § 1201.73(e).

ARGUMENT

The information is within the scope of discovery because it is reasonably likely to lead to the discovery of admissible evidence. The admissible evidence is the information and public records in the possession, custody, or control of Agency that has previously been withheld from appellant. In addition, deposition testimony may be essential to this case due to the "pass the buck" practices this appellant has observed, in which each person is only incrementally responsi-

ble, but the decisions together have devastating effects.

On at least one occasion, Agency suppressed such evidence by withholding materials under FOIPA under unmeritorious exemptions. Clearly, the suitability determination and supporting FD-302--the key aspects of Agency's decision to adjudicate appellant unsuitable--are so obviously not selection testing materials, records that if produced would impede an active law enforcement investigation, or materials "solely" related to the internal personnel rules of an agency, that their deletion was unmeritorious. Appellant notes no *Vaughn* index in Agency's production of materials in its MSPB filing. Without judging why the materials were withheld, had this MSPB action not been filed and had his Honor not ordered production, for which the appellant is grateful beyond words, the materials would likely have required a FOIPA lawsuit to obtain. By that time, if appellant is believed in his contentions, the SACU Special Agent could easily have participated in a criminal conviction without having his behavior addressed in some fashion.

If it might be contended in the opposition that appellant is somehow causing offense, appellant notes that he correctly assessed the effect of the negative suitability determination on appellant's future employment prospects with the Federal government and this action is therefore about more than the FBI application.

After all, who could argue with non-selecting an applicant to the CIA whom FBI attorneys had assessed (from partial and wrong information provided by SACU) and judged as committing misconduct, violating his attorney's oath and ethical duties, being a party to a drug deal within the previous year and a half, and having no redeeming ethical value? The person or personnel whom appellant contends caused this disaster apparently lacked the very standard of integrity to which they sought to hold appellant; this despite appellant actually possessing the required integrity, and the redeeming information about more serious ethical dilemmas and appellant's appropriate choices being contained in information not only available to SACU, but *reviewed* by SACU or potentially reviewed by SACU. Which does not appear to have been provided to the attorneys who recommended the discontinuation of appellant, else the single paragraph redacted from the suitability determination due to the attorney-client privilege would have been somewhat longer

in length. Appellant is wondering whether there is some claim that might be asserted before the Board especially in light of the Analyst's statement in an email message to the General Counsel's Office, "This applicant is a lawyer so I want to make sure that we could potentially discontinue him for this and not have him come back to appeal it."

Appellant contends that if applicants who are attorneys are targeted for especially negative treatment, despite the FBI manual prescribing that there is no more important aspect of FBI operations than "properly" investigating applicants, it might reasonably be concluded that an internal appeal by this appellant would be hopeless due to the sensitivity of the matters stated therein and the futility of being believed in questioning a Special Agent's credibility.

REQUESTED RELIEF

Appellant requests:

1. That Agency shall produce all information and records called for by appellant's written discovery requests within 10 days, at a time, place, and manner of appellant's choosing, without objection or redaction, at no cost to appellant.

2. Agency shall produce its employees for depositions in the months of November and December 2009 upon 10 days' notice (including document production) at any dates, times, and places named by appellant that are within the Board's jurisdiction, at Agency's sole expense.

3. Agency shall pay or otherwise suffer an appropriate sanction in appellant's favor at his Honor's discretion, for willfully not complying with his Honor's orders and suppressing evidence on prior occasions in a matter that potentially involves national security and/or the constitutional rights of criminal defendants if appellant is believed.

Appellant represents that he would have prepared a proposed order and placed the text of the requests in this brief along with his reasoning, but appellant ran out of time while analyzing issues involved in the case and writing numerous messages to Representative about Agency personnel that appellant believed were important enough to risk not completing this filing.

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DECLARATION

1. [redacted]

[redacted]

Discovery and Disclosures

2. On 10/5/2009 and in the following days, I served written discovery that is attached.
3. On 10/7/2009 and 10/12/2009, I wrote Agency proposing a deposition schedule, and seeking their discussion regarding possibly fee shifting for me to make things more convenient for Agency by having me travel to Washington, D.C. where the key personnel in this matter appear to be located. I asked to discuss fee shifting because I had to leave a contract attorney arrangement in September 2009 because I witnessed unethical conduct occurring and had an ethical duty to withdraw, and because I was laid off by my previous employer for disclosing my FBI application due to my ethical duty to protect clients (see SF-86).
4. Agency did not respond at all to either request, aside from Representative contacting me on 10/14/2009 and asking me not to contact Agency employees about depositions.
5. I had sent a letter to the SACU Special Agent on 10/12/2009 about the schedule/depo with deniable sarcasm, which in my opinion was not out of proportion to his gratuitously cruel email message to me of 7/7/2009 wherein the false but believable impression is given that I might ever be able to reapply to the FBI, among other issues.
6. Being asked not to talk with Agency employees is the extent of Agency's communication with me about discovery that I recall. I wrote the attached 11/3/2009 letter as well.
7. I wrote numerous email messages on 11/3/2009 and 11/4/2009 to representative inviting contact in response of any kind regarding important issues, but have heard nothing despite the potentially explosive contents of my messages under *Brady-Giglio* and other sensitive areas of Federal law. I have provided verifiers who may correct the FD-302 at any time.
8. I am unemployed but actively seeking employment. I cannot afford to spend any money on appearance-only deposition transcripts, which I estimate would cost around $1,000 for the dates I originally proposed to Agency.

9. I was aware of the effect on my financial outlook and other consequences when, in complying with ethical duties as described above, in April 2009 and September 2009 I essentially chose to forego approximately $45,000 in income that would have resulted from continued employment at my prior firm had I not disclosed my FBI application, which also would have prevented me from having to work at the new firm at all.

10. I owed significant but not excessive credit card debt (despite this and being unemployed, I have a credit score of ~780 now due to timely meeting all financial obligations through careful planning) to write the SACU Special Agent specifically about this subject. I wrote and advised him that because "I really want this job," the FBI was free to name a figure of credit card debt it would be comfortable with if it was any issue at all, so that I could obtain an appropriate interest free loan from a family member who was willing to lending me at least 60% of the balance, with the remaining 40% anticipated to be wiped out during training when I had no housing or transportation expenses. I now see that my credit report has been run and my background investigation therefore formally commenced. However, this email and its contents do not appear to be reflected in the FBI file or the agent's FD-302.

I declare under penalty of perjury [redacted] that the foregoing is true and correct.

Date: 11/4/09 By: /S/ [redacted]

Appellant's Written Interrogatories, Set One

Interrogatories 1-6 establish the appellant's tested ability to serve, and therefore his merit and value to the American people, as described at section 67-17.2.4 of the Manual of Investigative Operations and Guidelines. Appellant will contend that the higher his selection test scores were, the more likely he is to be able to make a contribution to national service in the FBI. Based on this information, appellant will contend using interrogatories 5-6 that other similarly situated applicants—attorneys who passed the polygraph examination in the month of June 2009—were possibly preferred over appellant despite differences in scores and competitive rank as against this appellant. This could help appellant explain why he was so aggressively pursued for any possible basis to disqualify him—because there would be no reason to so aggressively pursue a highly ranked applicant for disqualification unless the applicant's rank would be high enough to exceed that of other applicants who appeared more desirable.

Interrogatory 7 establishes that Agency suppressed evidence that proved a correctable mistake in the investigation, which snowballed into a potentially disqualifying admission, depending on what the redaction in the suitability determination contains.

Interrogatory 8 establishes that Agency suppressed evidence in order to prevent appellant from learning the basis for Agency's decision to reject him, which affects both timeliness and intent.

Interrogatory 9 establishes the information that would have been provided to appellant and the Merit Systems Protection Board in a Vaughn index.

Interrogatory 10 establishes whether appellant was intentionally targeted for disqualification by effectively diverting him to final adjudication prior to the full background investigation being conducted, even though appellant's conduct had previously been reviewed multiple times and was not disqualifying.

Interrogatory 11 establishes whether a legitimate error for which the Personnel Security Interviewer was ultimately not responsible due to her training agent missing the same issue occurred, or whether appellant was intentionally not advised of the scope of the applicant back-

ground investigation.

Interrogatory 12 establishes which documents in the FBI file were actually relied upon by Acting Unit Chief Montchell Brice and others when appellant was discontinued. For example, if Acting Unit Chief Brice relied on only the suitability determination and the FD-302, appellant could prove that Acting Unit Chief Brice was led to believe differently than the facts by materials that omitted statements necessary to make the statements made not misleading.

Interrogatories 13-15 establish in part whether Special Agent Grahm Coder is a "closer" whose job is to aggressively pursue certain applicants for disqualification, or whether this is just how SACU Special Agents act.

Interrogatory 16 establishes part of the chain of command in the decisions that were made as well as which personnel could be responsible for the misconduct that appellant contends occurred.

Interrogatory 17 establishes which personnel identified in interrogatory 16 could have misled the supervisors who approved the negative suitability determination and whether the supervisors could be liable for any wrongdoing, assuming they were not aware of what occurred.

Interrogatories 18-20 establish the actual basis for the negative suitability determination as opposed to the pretext, and will assist appellant in correcting erroneous information.

Interrogatory 21 establishes who is responsible for the PSI error in which appellant was not advised of the scope of the applicant background investigation. It appears to appellant that the interviewer was less responsible than the training agent, because the training agent impliedly directed her to obtain information outside the scope of investigation by noting "H.S. was not listed," although this would not explain why the Advise Interviewee section was not read.

Interrogatories 22-25 seek the same information as 18-20 just in case 18-20 does not result in appropriate responses.

Appellant's Inspection Demand, Set One

Request 1 seeks Time Utilization and Record Keeping information ("TURK"), which will assist appellant in establishing numerous facts at issue. This is key information in support of

appellant's case. First, assuming Special Agent Coder wanted to be paid his Law Enforcement Availability Pay, a 25% increase over his base pay, SA Coder would have had to enter his time from 6/25/2009 to 6/30/2009. If there are any entries, or adjustments to entries after the fact that modify or delete portions of the information, appellant's proof that the FD-302 was backdated could be enhanced. A number of other facts would be supported, such as those pertaining to the appellant's chronology and who was being apprised of the negative information that was coming in a piece at a time as appellant's investigation was conducted. Depending on its specificity, the information might also establish how many times SA Coder revised his FD-302 and whether he and the Analyst or other personnel exchanged any drafts. The information might also establish any meetings in which decisions concerning appellant could have been made, and who was present.

Request 2 will assist appellant in understanding the materials produced in response to request 1.

Request 3 seeks the materials withheld from appellant under unmeritorious FOIPA exemptions.

Request 4 seeks materials that appellant may use to correlate TURK with his chronology to establish what each person who contributed to the FBI file knew and when. For example, how much time was spent by the Office of General Counsel and which personnel participated in responding to a recently produced inquiry from the Analyst concerning the May 2008 incident.

Request 5 would assist appellant in capturing "discontinuation codes" as those are described in the case of Jones v. Mukasey, D.C. Cir. no. 04-941, because the stated code in the BPMS screens partially produced in the 10/26/2009 filing of Agency is "other," which doesn't mean anything in particular to appellant.

Request 6 seeks additional suitability-related information to the extent not produced in response to previous requests.

Request 7 seeks materials beyond the FD-302, produced in order to assist in determining what information formed the basis for the contents of the FD-302.

Request 8 would assist in determining the scope of the leads given by the Analyst to the Special Agent and therefore the authorized scope of the Special Agent's communications with appellant. In addition, the request would help establish how many drafts of the FD-302 there were and who may have contributed.

Request 9 would establish whether Special Agent [redacted] was ever asked to confirm whether she had advised appellant of the scope of investigation, and therefore whether SACU could have been aware of the error before appellant was asked questions by SACU Special Agent Grahm Coder on 6/30/2009 that implicated the scope of investigation. If SACU communicated with Special Agent [redacted] about an error, surely SACU could have communicated with the polygraph examiner and other personnel about their contributions to the investigation.

Request 10 would establish the precise questions asked on each occasion appellant was contacted by SACU, to the extent prepared by the analyst and not the Special Agent, and therefore the scope of the answers given.

Request 11 would assist appellant in establishing how many drafts of the FD-302 there might have been and who might have contributed.

Request 12 would assist appellant in establishing the same information as request 11 but as to the Analyst instead of the Special Agent.

Request 13 would assist appellant in establishing whether the actions of the Analyst and Special Agent were within acceptable parameters of an applicant investigation.

Requests 14-17 seek production of key documents identified in interrogatories.

Request 18 establishes what information the Acting Unit Chief was provided in support of the suitability determination, whether contained in the FD-302 or other sources, and therefore what could have been considered.

Request 19 establishes what might have occurred at internal meetings.

Request 20 establishes the nature and extent of Special Agent Coder's assignment to applicant, and whether it is the same as was represented to applicant during communications with Special Agent Coder.

Request 21 establishes who approved applicant for continuation and why, after appellant reported negative information in and subsequent to his written application, as against the same conduct reported in the suitability determination.

Request 22 establishes whether SACU personnel verified any issues occurring in appellant's investigation prior to contacting appellant on 6/25/2009 and 6/30/2009.

Request 23 seeks to determine whether section 67-17.3.2(3) of the manual is deprecated or current.

Request 24 establishes the permissible scope of appellant's disclosure outside this appeal of proprietary information from the Phase I and Phase II portions of selection.

Request 25 establishes whether any information beyond the Analyst's 6/30/2009 determination contributed to appellant's discontinuation.

Request 26 establishes what standards there might be for review or comparison of appellant with other applicants, as suggested by the Acting Unit Chief's letter wherein several references appear regarding the competitiveness of the applicant pool.

Appellant's Inspection Demand, Set Two

Request 27 establishes which specific personnel might have apprised SACU of information prior to appellant's file being assigned to SACU.

Request 28 helps support appellant's credibility in the event it is attacked, by demonstrating his sincerity in answering Phase II questions and excitedly and sincerely describing why he wishes to join the FBI.

Request 29 helps support appellant's credibility in the event it is attacked by impeaching the challenger with officially sanctioned assessments of appellant's credibility by other FBI personnel.

Request 30 is of the same purpose as Request 29.

Request 31 is needed to impeach the SACU Special Agent in the event he challenges appellant's recollection.

Request 32 is needed to show a pattern or practice of conduct by the SACU Special Agent.

Request 33:

B. Appellant withdraws his request as to Special Agent

First, the admission of all Requests for Admission pertaining to the PSI, Criminal Copyright Infringement, and scope of investigation moot the request. Second, appellant has since considered SA 's possible testimony and has concluded there is no need to advance a prejudicial fact, pursuant to requiring attorneys not to advance prejudicial facts as to the honor or reputation of a witness unless the justice of the cause requires it. Although appellant is not obligated to follow this section in an action in which he represents himself, appellant generally makes no distinction between causes in which he represents himself and those in which he represents others, as to his duties as an attorney. Appellant regrets having to even include SA in this section, and represents that he very much did not wish to include SA in this section due to the apparent inadvertence of the issue with the PSI, but appellant believed he had to do so in the event his memory of the PSI were challenged.

C. Appellant withdraws his request as to SA 's training agent for the same reasons as SA

The remainder of the request is needed to impeach the SACU Special Agent and Analyst when the FD-302 and suitability determination are challenged.

Appellant's Inspection Demand, Set Three

Request 34 appears to be completed but appellant requires an appropriate response containing Agency's certification that its filing of 10/26/2009 contains its complete production in response to the request.

Request 35 is needed to show what SACU was aware of and when.

And of course, as to all of the above requests, appellant requests certificated responses in addition to actual production of the information. /S/ 11/4/2009

[redacted]

November 3, 2009

By Email/U.S. Mail
Federal Bureau of Investigation
Office of General Counsel
Employment Law Unit
Attn: Patricia A. Miller
935 Pennsylvania Avenue, NW, Room PA-400
Washington, DC 20535
Patricia.Miller@ic.fbi.gov

Re: MSPB Appeal [redacted] v. Dept. of Justice
Applicant File #67B-HQ-[redacted]

Subject: Discovery

Dear Ms. Miller,

This letter concerns a number of discovery requests that I served, for which I have not been provided responses. The purpose of this letter is to meet and confer regarding the discovery requests, which are important to this matter and its timely resolution. I hope we can discuss so that a motion to compel is not needed.

Under Merit Systems Protection Board discovery regulations, the 10-day deadline for the initial set of requests that were due 10/26/2009 is Wednesday 11/4/2009. It appears that our prompt attention is needed in discussing these matters, and I apologize for not writing sooner, but I was occupied with filing my Motion for Default as well as reviewing your 10/26/2009 filing.

I have included all of the pending requests here even though not all of the motions would be needed on 11/4/2009, because the deadlines are fairly close together and I felt it appropriate to file one motion with all of the requests included. Please let me know if you have any preferences in that regard.

The following provides a summary of the requests I have served, and I will explain the relevance of the information below:
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My pleading number	Title	Date Served	Date Due	Status
4.	Appellant's Written Interrogatories, Set One	10/5/2009	10/26/2009	No response.
5.	Appellant's Inspection Demand, Set One	10/5/2009	10/26/2009	No response.
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12.	Appellant's Inspection Demand, Set Three	10/10/2009	10/30/2009	No response.

As noted in my recent Motion for Default, the Requests for Admission served 10/5/2009 and 10/7/2009 were admitted and therefore do not require a motion. I also served errata promptly after serving the pertinent requests to correct a few issues with spelling and definitions, and as I did not hear any objection about those, the corrected requests to the Requests for Admission and the above requests are the final versions.

This will confirm that, due to the absence of any response, all objections have been waived to each of the above requests. Therefore, I understand there are no grounds to oppose the motion. Despite this, although not required to do so, I provide the following comments on each of my requests in order to assist you in evaluating the merits of any opposition you might be considering filing.

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Interrogatories 1-6 establish the appellant's tested ability to serve, and therefore his merit and value to the American people, as described at section 67-17.2.4 of the Manual of Investigative Operations and Guidelines. Appellant will contend that the higher his selection test scores were, the more likely he is to be able to make a contribution to national service in the FBI. Based on this information, appellant will contend using interrogatories 5-6 that other similarly situated applicants—attorneys who passed the polygraph examination in the month of June 2009—were preferred over appellant despite attaining potentially lower scores and a lower competitive rank than appellant. This could help appellant explain why he was so aggressively pursued for any possible basis to disqualify him—because there would be no reason to so aggressively pursue a highly ranked applicant for disqualification unless the applicant's rank would be high enough to exceed that of other applicants who appeared more desirable. 

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Request 32 is needed to show a pattern or practice of conduct by the SACU Special Agent.

Request 33:

B. Appellant withdraws his request as to Special Agent [redacted] First, the admission of all Requests for Admission pertaining to the PSI, Criminal Copyright Infringement, and scope of investigation moot the request. Second, appellant has since considered SA [redacted] possible testimony and has concluded there is no need to advance a prejudicial fact, pursuant to [redacted] requiring attorneys not to advance prejudicial facts as to the honor or reputation of a witness unless the justice of the cause requires it. Although appellant is not obligated to follow this section in an action in which he represents himself, appellant generally makes no distinction between causes in which he represents himself and those in which he represents others, as to his duties as an attorney. Appellant regrets having to even include SA [redacted] in this section, and represents that he very much did not wish to include SA [redacted] in this section due to the apparent inadvertence of the issue with the PSI, but appellant believed he had to do so in the event his memory of the PSI were challenged.
C. Appellant withdraws his request as to SA [redacted] 's training agent for the same reasons as SA [redacted]

The remainder of the request is needed to impeach the SACU Special Agent and Analyst when the FD-302 and suitability determination are challenged.

Appellant's Inspection Demand, Set Three

Request 34 appears to be completed but appellant requires an appropriate response containing Agency's certification that its filing of 10/26/2009 contains its complete production in response to the request.

Request 35 is needed to show what SACU was aware of and when.

And of course, as to all of the above requests, certificated responses are needed in addition to actual production of the information.

I hope we can discuss any issues you might have with specific requests, given that I am taking what I believe is the unexpected extra step of telling you why I need the information. Please let me know if you have any comments or questions about the above.

Sincerely,

[redacted]

[redacted]

[redacted]

October 12, 2009

By Fax/U.S. Mail
Federal Bureau of Investigation
Office of General Counsel
Employment Law Unit
935 Pennsylvania Avenue, NW, Room PA-400
Washington, DC 20535
f. 202-220-9355

Re: MSPB Appeal [redacted] v. Dept. of Justice
Applicant File #67B-HQ-[redacted]

Subject: Deposition Scheduling

Dear ELU,

This letter supplements my 10/7/09 letter to you regarding a tentative deposition schedule.

Recognizing that depositions of Headquarters employees may have some impact on their work due to travel to [redacted] I have a suggestion for how this impact may be avoided or at least reduced.

In some discovery cases I have read, fee shifting against the government has been permitted. See generally The Rutter Group, *Federal Civil Procedure Before Trial* at 11-29 to 43 and 11-327 to 340 (2009).

As I've previously written you, I cannot afford to travel because I am unemployed (through no fault of my own). If we were able to work out a fee/cost shifting arrangement that would let me travel to Washington, D.C. and take the depositions of FBI Headquarters personnel where they are located, I would be open to that and I invite your suggestions as to how we might accomplish this.

I'm not sure whether one trip or more than one would be needed, as that depends in part on your responses to my Requests for Admission and other discovery. Either way,

the time frame I'm looking at is the second and third week of November for the first round and early December for the second—provided this is well before the close of the record in the Merit Systems Protection Board appeal.

Please let me know your thoughts at your earliest convenience.

Sincerely,

[redacted]

October 12, 2009

By Email/U.S. Mail
Federal Bureau of Investigation
Special Agent Clearance Unit
Attn: Special Agent Grahm Coder
935 Pennsylvania Avenue, NW
Washington, DC 20535
Grahm.Coder@ic.fbi.gov

Re: MSPB Appeal [redacted] v. Dept. of Justice

Subject: Deposition Scheduling

Dear Special Agent Coder,

As you may be aware, I have filed an appeal with the Merit Systems Protection Board of the negative suitability determination apparently made in my case.

I've contacted the Employment Law Unit to propose a tentative deposition schedule, including your deposition, but I thought I would write to give you as much notice as possible if they perhaps haven't had a chance to discuss the details of this action with you yet.

My intention is to conduct your deposition in the second or third week of November. As a courtesy to you, if I hear back from you by Friday 10/16/09 it would be my pleasure to let you pick the date of your own deposition, as long as it is in the week of 11/9/09-11/13/09 or 11/16/09-11/20/09, and the date is confirmed with a Stipulation given to me by the Employment Law Unit no later than 10/21/09, which is suitable for filing as an Order with the MSPB. The place would be a court reporter's office in [redacted].

My suggestion would be a Monday or a Friday in either of those weeks, as that would reduce the impact of your travel on work. In addition, you might have some sightseeing opportunities if one of your travel days is on a weekend. On the other hand, if ELU and I were able to work out some type of arrangement by which your and others'

depositions could be taken at your current duty station (I'm assuming it's still Headquarters), I would be open to that as well.

Please let me know if you have any questions; I look forward to working with you to resolve this challenge.

Sincerely,

cc via fax/mail:
Employment Law Unit
f.

[redacted]

October 12, 2009

By Fax/U.S. Mail
Federal Bureau of Investigation
Office of General Counsel
Employment Law Unit
935 Pennsylvania Avenue, NW, Room PA-400
Washington, DC 20535
f. 202-220-9355

Re: MSPB Appeal [redacted] v. Dept. of Justice
Applicant File #67B-HQ-[redacted]

Subject: Transmittal

Dear ELU,

Enclosed are copies of three recent letters regarding deposition scheduling:

1. Appellant to ELU 10/7/09
2. Appellant to SA Grahm Coder 10/12/09
3. Appellant to ELU 10/12/09

Due to the time frames involved, I have taken the liberty of obtaining your fax number, and I hope this is acceptable to you. If you prefer email for instant communication, could you please favor me with a point of contact who can accept PDF attachments by email?

Sincerely,

[redacted]

[redacted]

[redacted] * [redacted] *
[redacted] *

October 7, 2009

By U.S. Mail
Federal Bureau of Investigation
Office of General Counsel
Employment Law Unit
935 Pennsylvania Avenue, NW, Room PA-400
Washington, DC 20535

Re: MSPB Appeal [redacted]
v. Dept. of Justice
Applicant File #67B-HQ-[redacted]

Subject: Deposition Scheduling

Dear ELU,

Prior to discovery and receiving your initial disclosure, I am aware of at least four FBI employees whose depositions will be necessary:

1. Special Agent [redacted] FBI [redacted]
2. Unnamed preparer of SF-86 notes dated 5/18/09, FBI [redacted]
3. Special Agent Grahm Coder, Special Agent Clearance Unit.
4. Unnamed analyst, SACU.

As the FBI has the burden of proof to support the suitability determination that was made, I intend to take at least these depositions prior to giving my own deposition. Additional depositions may be necessary, but can most likely wait until after these preliminary ones, as long as the timing of (1) your written discovery responses and (2) the close of the MSPB record on any relevant areas are both favorable. The contents of your initial disclosure may also impact my plans.

Because the Headquarters personnel will need to travel to [redacted] I hope we can work out a schedule that provides for reasonable accommodations to you and them, as well as a reasonable time frame for me. My suggestion for the timing and sequence of depositions is as follows:

1. Special Agent [redacted] – week of November 2-6.
2. Unnamed preparer of SF-86 notes – week of November 2-6, same day and immediately following the deposition of SA [redacted]
3. Special Agent Grahm Coder – week of November 9-13.
4. Analyst – week of November 9-13 (separate day from SA Coder).
5. Applicant – week of November 16-20.
6. Remaining FBI personnel—early December.

If you have other suggestions on the timing and sequence of depositions, please let me know and I would be pleased to discuss the matter with you. I think it would be best to handle scheduling by way of a Stipulation and Proposed Order so that subpoenas are not necessary. Please advise if you are of a different view.

Sincerely,

[redacted]

[redacted]