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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Fred J. Schoeffler,
Plaintiff,

No. CV-17-00055-PHX-GMS

v.

United States Department of Agriculture
Defendant.

HEARING TRANSCRIPT

February 7, 2020

JUDGE HURWITZ: Mr. Schwartz, whenever you're ready.

MR. SCHWARTZ: Thank you very much, Your Honor.

The Freedom of Information Act was enacted by Congress, from my view, for two basic reasons. They wanted the public to be able to see the actual records, and later with the electronic amendments, electronic information. They wanted secondly for it to be done promptly. This case involves whether or not the USDA is knowingly hiding records related to the Hotshot deaths of the Yarnell Hill fire.

The lower court erred because it believed--because the USDA has told the lower court--it has told this Court that all of the original records--they don't have anything anymore. They were all turned over to the state. It's not true and there's evidence in the record it isn't true. The reason we know that is if you look at

1 EOR 208, it is a series of emails talking about when the USDA turned over the
2 records to the state. That happened on July 5th or 6th of 2013.

3 JUDGE HURWITZ: Did you raise this point in the district court?

4 MR. SCHWARTZ: Yes.

5 JUDGE HURWITZ: What was the district court's response--or, how did it
6 address that point?

7 MR. SCHWARTZ: The judge's order--because there was no oral argument.
8 The judge's order bought the argument presented by the USDA that everything had
9 been turned over--

10 JUDGE HURWITZ: Well, it wasn't just--

11 MR. SCHWARTZ: They didn't have anything.

12 JUDGE HURWITZ: --to be fair, it wasn't just an argument. They submitted
13 affidavits from people who said they had conducted a search and done the research
14 required under FOIA and this is what they came up with.

15 MR. SCHWARTZ: Sure.

16 JUDGE HURWITZ: So, what was the evidence to the contrary?

17 MR. SCHWARTZ: Let's start with what's the evidence to start with. That
18 was from a declaration of Fuller Bennett found at EOR 88 and 89, paragraphs 4 and
19 9, where he said all the original records had been turned over. But if you look at
20 paragraph 9 of that same declaration, it actually quotes what San Dimas had told
21 the FOIA people when they were investigating. It doesn't say the original records
22 were turned over, it just says all of the information was turned over.

23 JUDGE HURWITZ: Doesn't that encompass all the records?

24 MR. SCHWARTZ: Well, it kind of does. But, the reason I mentioned EOR
25 208 giving us in July of 2013, they turned it over. The record also contains and is
26 indisputed (sic) that in August, USDA FOIA was telling news organizations, "We
27 have the recordings." In August, a month later. "We have the recordings." Then,
28 we've asked to supplement the records for a new email chain we discovered after the

1 trial which includes, again, in August of 2013, George Vargas--

2 JUDGE HURWITZ: I don't know how we can supplement the record with
3 evidence discovered after the trial.

4 MR. SCHWARTZ: You have inherent authority--

5 JUDGE HURWITZ: You've to go back to the trial court desk.

6 MR. SCHWARTZ: Even if you don't worry about that. January 2014, EOR
7 210 to 213, is the San Dimas, part of the US Forest Service, sends out the
8 recordings to be evaluated by a private lab. If they told us in 2013 they haven't had
9 the records and in January 2014 they have that recording, and they send it to a
10 private lab, and we have the report from the private lab which includes a partial
11 transcript of what we were asking about, air-to-ground transmissions related to this
12 fire--

13 JUDGE HURWITZ: Are those different than the recordings that you
14 received through the state?

15 MR. SCHWARTZ: Well, they may be the same.

16 JUDGE HURWITZ: Well, that's what I'm asking.

17 MR. SCHWARTZ: Okay.

18 JUDGE HURWITZ: Because their position is the state had all the
19 recordings. The state produced them for--you know, you got them from the state.
20 So, I'm trying to figure out why that part of the record demonstrates anything more
21 than they had those recordings tested.

22 MR. SCHWARTZ: Well, I think what it--

23 JUDGE HURWITZ: Does it suggest there's any different recordings?

24 MR. SCHWARTZ: Well, what I think it demonstrates is the USDA, after it
25 said it turned over the recordings, still had them. That's important, but I think
26 your question is from my perspective more a practical one. Well, just--they had
27 them. They turned it over to the state and the state put them in a Dropbox, made
28 them available to the public.

1 There is no FOIA exemption that says, "Oh, we gave it to somebody
2 else and they made it publicly available, we don't have to produce what we have."
3 That doesn't exist. It's only the lower court and USDA who has tried to create such
4 exemption. Congress didn't do so. So, that is one aspect.

5 The other aspect is every time you make a copy of something, you tend
6 to degrade it in terms of recordings. We all have seen this. It may not be the same.
7 Although, depending on the qualities when you Xerox something--not that we Xerox
8 anything anymore; I'm showing my age there--but when you do that, it tends to
9 degrade things. So, we are entitled to go to the horse's mouth and get what they
10 have directly from them. That's all we're wanting.

11 We're not saying--for all we know, it won't be any better or any worse
12 than what the state has posted. We don't know that, but we want the opportunity.
13 The one thing that's really starkly different about the recordings themselves, there
14 is no declaration saying the USDA today doesn't have the recordings. The best and
15 most--

16 JUDGE HURWITZ: Because that's not what FOIA requires though. FOIA--
17 there are lots of FOIA cases where somebody comes in and says, "Gee, I have this
18 document and you didn't turn it over to me," and the courts say, "FOIA requires a
19 reasonably adequate search." It doesn't--the fact that you have discovered a
20 document that wasn't produced in the search isn't evidence that they didn't conduct
21 a reasonably adequate one.

22 MR. SCHWARTZ: I would agree with that. That is, in fact, the case law, but
23 here's the thing. What happened is the FOIA investigators went to San Dimas;
24 that's the right place to go. They were told way back in 2016, "Hey, whatever we
25 had, we turned over to the state." But they never said, "We don't have a copy of the
26 recording today." That's not been--been reported. Not even Mr. Fuller Bennett's
27 declaration ever says, "We searched in the right place."

28 We're not saying they searched in the wrong place eventually. They

1 eventually got to the right place and went to San Dimas because that's where the
2 AFU study was. But what we were saying is--

3 JUDGE MILLER: Counsel, Counsel, I'm not sure you've answered Judge
4 Hurwitz's question. Because, the question is not: Might there be some of the
5 records out there that weren't turned over. The question is: Did the agency conduct
6 a reasonably adequate search?

7 So, what did you present to the district court to rebut the declarations
8 that on their face would seem to establish that the agency conducted an adequate
9 search?

10 MR. SCHWARTZ: What I would say to that, Your Honor, is it's not that the
11 search--that they went to the wrong place or they didn't ask the right things. But,
12 they didn't get the response in the sense that San Dimas never said, "We don't have
13 them." If they had said that, I would agree with you. This case would be over.

14 But we believe the evidence demonstrates that, in fact, they did have
15 it. And until somebody tells us they don't have it--the recording in San Dimas or
16 the FOIA office itself, you can't grant summary judgment. That--this is not
17 necessarily a definitive ruling, this is there was a question of fact.

18 JUDGE HURWITZ: Okay. See, that--I'm going to go back to Judge Miller's
19 question.

20 MR. SCHWARTZ: Sure.

21 JUDGE HURWITZ: I may be taking slight liberties with the declaration.
22 But, the declaration does seem to say, "We went to San Dimas and asked."

23 MR. SCHWARTZ: Yes.

24 JUDGE HURWITZ: "We went to the FOIA office and asked."

25 MR. SCHWARTZ: Well--

26 JUDGE HURWITZ: "We are now producing the results of those inquiries."

27 So, that seems to me like a reasonably adequate inquiry. They may
28 have not gotten good information or everything that somebody gave to them, but

1 how does that make their inquiry inadequate?

2 MR. SCHWARTZ: I think there would be something very wrong with FOIA
3 law if you look in the right place, you asked the right question, and you just decide
4 that you're not going to answer the FOIA inquiry. In essence, to say, "Hey, we don't
5 have to answer it directly as to whether or not we have the record." Because that is
6 what the FOIA inquiry is. Is it ever going to be a reasonable search, when in
7 essence, the response is nonresponsive? I think the answer to that is: no.

8 We think it's--was their burden to prove that they don't have it. They
9 did that, for example, in the personnel records aspect. They went to the
10 Southwestern region, which was the wrong place to begin with, and they got back,
11 "We have no responsive records." That is not what San Dimas said.

12 The context should not be lost. This is the USDA and the Forest
13 Service who have retaliated against Mr. Schoeffler for raising issues and problems
14 regarding the Yarnell Hill fire and the deaths of the Hotshots. They stopped using
15 him. They misrouted--they intentionally misrouted his initial request to the
16 Southwest Region Office when he sent it to Washington, because he knew that was
17 the right place, and we are supposed to give deference to the USDA for their
18 technical expertise. Mr. Schoeffler knew more about who would have the right
19 records than the USDA themselves did.

20 JUDGE HURWITZ: Can I ask you to shift--

21 MR. SCHWARTZ: Sure.

22 JUDGE HURWITZ: --shift gears for a moment.

23 As to request, I'm just going to use the number, 5736F. There was a
24 response by the USDA, but it was outside the 20-day period.

25 MR. SCHWARTZ: Yes.

26 JUDGE HURWITZ: And your contention is you can go directly to court and
27 sue because the statute says you have constructively exhausted?

28 MR. SCHWARTZ: That is correct. Also, alternatively--

1 JUDGE HURWITZ: You could have--

2 MR. SCHWARTZ: --but it's not jurisdictional.

3 JUDGE HURWITZ: Right. You could have--could you have chosen to go
4 exhaust the administrative process as to those documents?

5 MR. SCHWARTZ: Theoretically, yes. There is nothing that would have
6 prevented us from doing so.

7 JUDGE HURWITZ: Prevented you from doing so.

8 As to those documents, or the information I guess is the way FOIA
9 refers to it, is your argument about the insufficiency of the response the same
10 argument you're making with respect to the other documents?

11 MR. SCHWARTZ: Essentially, yes. I mean, I think--what I understand you
12 to ask is: Are we asking for something so significantly different in that one--

13 JUDGE HURWITZ: No, I mean--yeah, I'm asking--

14 MR. SCHWARTZ: --that was covered than the other ones.

15 JUDGE HURWITZ: I'm asking about your analysis of their response. In
16 other words, if their response on this one was, "We went through the same process
17 we already described to you in our declarations and affidavits." Your attack on that
18 would be precisely the same attack you're making today?

19 MR. SCHWARTZ: Yes.

20 JUDGE HURWITZ: There is no sort of separate argument that, "Oh, no, as
21 to those documents, we all know they were in some other place and you didn't look
22 there"?

23 MR. SCHWARTZ: No. I a hundred percent agree, and that was going to be
24 kind of my point related in our supplemental citation of authorities, the *Ajman vs*
25 *Pompeo* cases. This is not jurisdictional. Exhaustion of remedies--

26 JUDGE HURWITZ: No, let's--

27 MR. SCHWARTZ: --it's non-jurisdictional--

28 JUDGE HURWITZ: I'm assuming for a second that we agree with you. I'm

1 just trying to figure out whether on the merits you have any different FOIA
2 argument with respect to those documents than the FOIA arguments you're now
3 addressing as to--

4 MR. SCHWARTZ: No.

5 JUDGE HURWITZ: --the other two requests.

6 MR. SCHWARTZ: I apologize. I thought I had answered it directly.

7 JUDGE HURWITZ: You have.

8 MR. SCHWARTZ: There is no difference. I was merely trying to point out
9 that's another reason why it would have been an abusive discretion and even the
10 USDA considered it altogether. They sent one letter on October 11th for all of them.
11 So, I agree a hundred percent with you.

12 JUDGE MILLER: But, Counsel, I'm a little puzzled by that. I thought the
13 district court, with respect to the 5736F, the ones where there's the exhaustion
14 issue. I thought the district court had not made a finding that the department's
15 response was adequate. It relied only on exhaustion.

16 Am I wrong about that?

17 MR. SCHWARTZ: I think Your Honor is understanding the record correctly.
18 That the district court only relied on and treated it, from our perspective, as if it
19 was jurisdictional.

20 JUDGE HURWITZ: That's why I asked the question because let's assume--

21 MR. SCHWARTZ: Yeah.

22 JUDGE HURWITZ: --let's assume the district court erred and should have
23 addressed it on the merits. What you're saying is your argument as to those
24 documents on the merits is identical to the argument you made as to the other
25 documents.

26 MR. SCHWARTZ: That is correct. I and I would otherwise stand on our brief
27 and reserve the remaining time.

28 JUDGE HURWITZ: Mr. Solomon.

1 MR. SOLOMON: Good morning. May it please the Court. My name is Bill
2 Solomon. I represent the United States Department of Agriculture.

3 Judge Miller hit the nail on the head here. The issue in this case is not
4 whether there might exist some other records possibly responsive to appellant's
5 FOIA requests. The issue is whether the search for those records was adequate.

6 Appellant's arguments regarding the existence of other records is
7 almost identical to the arguments this Court rejected in the cases of *Lar* and
8 *Hamden* that are cited in our brief. In those cases, the appellants also pointed to
9 emails and other records that purportedly show the agencies failed to produce all
10 documents responsive to their requests. What this court and those cases applies
11 with equal force here.

12 The court said that an agency affidavit submitted by an employee
13 supervising a FOIA search is all that is needed to comply with Rule 56c's personal
14 knowledge requirement. It also said that agency declarations submitted to
15 demonstrate the adequacy of a search are presumed to be submitted in good faith.
16 It said, in addition, that the failure to produce or identify a few isolated records,
17 which is what we are arguing about here, cannot, by itself, defeat the adequacy of a
18 search. It then finally said, that the fact that a document once existed doesn't mean
19 it now exists, and the fact that an agency created a document doesn't necessarily
20 imply that the agency has retained the document.

21 JUDGE HURWITZ: I want to ask you to address Mr. Schwartz's argument
22 about the tapes. I understand your response was, the tapes are in the possession of
23 the State of Arizona and they are available on the website electronically. He says
24 there is evidence in the record later on that USDA has the tapes--

25 MR. SOLOMON: Yeah, so--

26 JUDGE HURWITZ: --and that that response must've been incorrect.

27 MR. SOLOMON: And what's wrong with this argument is it doesn't take into
28 account the entire record. He cites the August 1st email from the FOIA

1 representative in Washington DC, Ms. Jones, to an ABC News representative
2 saying that--and that email actually says, if you look at that email, it is excerpt of
3 record 217. It actually--I'm sorry. It's I believe 215, excerpt of record 215. It
4 actually says that the records had been turned over to the state. So it doesn't say
5 that they still have the records. It says the records have been turned over to the
6 state, but then it also informs Mr. Meeks that he would need to submit a FOIA
7 request for those records.

8 Now, what that argument omits is another email from Ms. Jones on--
9 I'm sorry, I believe this is excerpt of record 215. Another email on the same date,
10 August 1st, from Ms. Jones to the State Forestry Division. In that email, she tells
11 the State Forestry Division that our aviation department at the USDA believes that
12 these requests for recordings should go to the state.

13 Then, on August 5th there is another email that the appellant
14 disregards. That is excerpt of record 204 to 206. That is the request that Mr.
15 Meeks actually submits through FOIA requesting these recordings. And a final
16 email that that argument disregards is at EOR 208, that's the email from Ms. Jones
17 to Mr. Meeks responding to his FOIA email and spelling out exactly what had
18 happened with those recordings. She stated that on June 30th, the day of the
19 tragedy.

20 On June 30th, a Forest Service employee who was with the AFU study
21 as they collected data asked the AFU study participants to provide them all of their
22 data. On the following day, July 1st, that Forest Service employee took possession
23 of that data. He also contacted his supervisor, asked the supervisor when the
24 state's accident investigation team would arrive in Phoenix, how he could provide
25 this data to the state investigation team.

26 JUDGE HURWITZ: When you say "data," what do you mean?

27 MR. SOLOMON: I mean--and I will get to--that's actually further described
28 later in the email. He stated actually that he actually took the hard drive--and it's

1 in the email at EOR 208--he actually took the hard drive from the AFU study that
2 had all of the data. And in the FOIA response in the declaration, it says that it was
3 all photo, video, and other evidence that the AFU team had collected. It wasn't
4 copies of it. It wasn't discs containing the information. It was the hard drive from
5 the AFU study team that he turned over then on July 5th or July 6th to the State of
6 Arizona accident investigation team.

7 So, it's not a matter of whether there were other copies available or
8 other discs that may have had this. It was the raw data that was turned over on
9 the hard drive that the AFU study collected the data. So, that's the evidence here.

10 Sure, the--the FOIA response or the initial response to ABC News was,
11 "We'll submit a FOIA request for it." "We've turned it over to the state, submit a
12 FOIA request," but the rest of the story is that she particularly described to that
13 same individual on August 7th the process by which that raw data on a hard drive
14 was given to the state for the accident investigation.

15 JUDGE HURWITZ: Can I ask you to address the 5736F--

16 MR. SOLOMON: Certainly.

17 JUDGE HURWITZ: --production. And, let me lay out for you what my
18 problem or my question. That was produced more than 20 days; it was produced
19 untimely.

20 MR. SOLOMON: It was.

21 JUDGE HURWITZ: The statute says, in what seemed to be pretty clear
22 terms, if stuff is produced untimely, the requester has exhausted his administrative
23 remedies.

24 MR. SOLOMON: It does say that.

25 JUDGE HURWITZ: The district judge said, "No, you failed to exhaust your
26 administrative remedies." Now, I understand that the other--five other circuit
27 courts have read into that statute a cure provision, if you will. But it's not there in
28 the text. Why shouldn't we just follow the text of the statute?

1 MR. SOLOMON: Well, this is why. I agree, it isn't on the text, Your Honor.
2 The text does not have this saving provision.

3 JUDGE HURWITZ: There is a safety valve in the text for, if you don't
4 produce at all, you can go to the district judge and say, "I'm sorry, we've been
5 diligently searching." And the judge can say, "Fine, I'll give you more time to
6 produce."

7 MR. SOLOMON: Correct.

8 JUDGE HURWITZ: My concern, now that you have talked--I wanted to lay
9 this all out for you. When you look at that safety valve provision, it doesn't seem to
10 require exhaustion thereafter, it just seems to require that the agency produced the
11 materials. And then, I think the judge goes on to adjudicate the FOIA request.

12 So, why shouldn't the same thing be true if you produced them late?

13 MR. SOLOMON: Well, and the reasoning is set forth in the *Oglesbee* case.
14 Specifically, in footnote 8 of the *Oglesbee* case, the district circuit of--the DC Circuit
15 Court explains its reasoning. Explains that the overarching intent of FOIA, as
16 opposing counsel stated, is for prompt and full disclosure of records by agencies to
17 individuals who request information.

18 But, it also looked at the context and at the overarching statutory
19 scheme that Congress created. Yes, Congress--and it actually says that Congress
20 created the 20-day requirement and the exhaustion provision--the constructive
21 exhaustion provision as a spur to the agencies, to spur them to provide the
22 information promptly. But, it also looked at the remainder of the statute and found
23 that if Congress provided an administrative appeal process and a very timely
24 administrative appeal process also only 20 days to respond to administrative
25 appeal, that Congress couldn't possibly have intended for that administrative
26 appeal process to be superseded by judicial intervention simply because the agency
27 failed to respond promptly.

28 JUDGE HURWITZ: So, what if--

1 JUDGE MILLER: But, counsel, I mean--

2 JUDGE HURWITZ: Judge Miller.

3 JUDGE MILLER: Thank you.

4 That's a sensible policy argument, but the Supreme Court has told us
5 repeatedly, and in FOIA cases in particular, and in cases where it's reversed the DC
6 Circuit in particular, that when the text clearly answers the question, we are not
7 supposed to rely on broader understandings of what we think Congress might have
8 intended based on the statute as a whole. So I'm not sure how footnote 8 really
9 addresses the question of what the particular provision at issue here actually says.

10 MR. SOLOMON: I would concede, Your Honor, that the statutory language
11 is clear. There is a constructive exhaustion.

12 JUDGE HURWITZ: And, there is a hole--there is really a hole in the statute,
13 isn't there? Congress thought about what happens if you produce documents after
14 the--you want to produce documents after the lawsuit begins. If you've produced
15 nothing, you can go to the judge and say, "We have been trying, Judge. I'm sorry.
16 We will get them out quickly."

17 MR. SOLOMON: If you don't produce, yes.

18 JUDGE HURWITZ: Right.

19 MR. SOLOMON: Yes.

20 JUDGE HURWITZ: But, Congress didn't seem to contemplate this
21 circumstance, I mean, at least expressively.

22 MR. SOLOMON: I agree. In the text, it's not there.

23 JUDGE HURWITZ: So, under that scenario, why don't we just take them at
24 their word that there was exhaustion?

25 MR. SOLOMON: Well, I concede that the statute is clear here. But I will say
26 this as well, and it goes to Your Honor's questions regarding the nature of the
27 argument with respect to the response to this 5736. That is, the court may not
28 actually have to go there.

1 JUDGE HURWITZ: Well, that leads me to the question I wanted to ask you.
2 Why don't you just waive exhaustion in this case? He has now told you
3 he's going to make exactly the same arguments that he made with respect to all the
4 other documents. Why don't--as opposed to having this high-flown fight about what
5 the statute means or doesn't mean, can't the agency just waive exhaustion--

6 MR. SOLOMON: Your Honor, I'm sorry to interrupt Your Honor--

7 JUDGE HURWITZ: --it's not jurisdictional.

8 MR. SOLOMON: It's not jurisdictional. A district court did not find that it
9 was jurisdictional.

10 JUDGE HURWITZ: No, so--

11 MR. SOLOMON: The district court granted summary judgment.

12 JUDGE HURWITZ: --so it's an affirmative defense that you have to raise.

13 Why don't you just say, "Gee, in this case we don't raise it."

14 MR. SOLOMON: What we would say is that, that appeal--or case 5736F was
15 addressed simultaneously with the appeal of the initial request. And, they are
16 almost identical requests.

17 JUDGE HURWITZ: So then why are you entitled to dismissal for failure to
18 exhaust? See, the district judge didn't say, "I'll treat all the previous appeals as
19 covering this and I'll reach the merits."

20 MR. SOLOMON: He did not.

21 JUDGE HURWITZ: He didn't. He said, "I can't--I'm not going to adjudicate
22 this request because they haven't exhausted." And that just strikes me wholly
23 apart from statutory interpretation as sort of messy in this case. You have
24 produced the documents you believe for all the reasons you've said in your affidavits
25 that you looked everywhere you should've. Why not somehow get this issue back in
26 front of the district judge, so that he can rule on it?

27 MR. SOLOMON: I'm not sure that it needs to go back to the district judge for
28 that ruling, because like I said, in the agency response to that request it was also

1 responding to the appeal, 272.

2 JUDGE HURWITZ: Okay. But if that's true, then didn't they exhaust?

3 MR. SOLOMON: No, they did not exhaust. Because the agency response--
4 the agency's response was late. It was actually three days late. It responded--it
5 was required to respond within 20 days; it responded 23 days after the request was
6 received.

7 JUDGE HURWITZ: I'm asking the question differently.

8 If they were to go back and exhaust today, let's assume--

9 MR. SOLOMON: Yes.

10 JUDGE HURWITZ: --there was an exhaustion requirement and they could
11 still timely exhaust; wouldn't you just reprint your response to the last one?

12 MR. SOLOMON: Yes, Your Honor. I believe most likely that be the case,
13 because it was--although the agency deemed the appeal to be moot, I believe that
14 the response would be identical to the response. Because the agency gave all of
15 these records to the state. The state posted them on the Dropbox site. So, yes, I
16 believe the response would be identical because that's what happened with the
17 records.

18 JUDGE HURWITZ: And, these are--these are all recordings that we're
19 dealing with--

20 MR. SOLOMON: These are recording--they requested recordings and
21 transcripts specifically from the AFU study group.

22 JUDGE HURWITZ: By the way, I don't think Mr. Schwartz is arguing to the
23 contrary. He said, "I'm asking for--this is a larger set of recordings that I asked for
24 in another one."

25 But your response to all of them is: The states got them.

26 MR. SOLOMON: It is the same response, yes. It would be an identical
27 response. All those records were taken from the AFU group, they were provided to
28 the State of Arizona, the original records. The State of Arizona posted them on the

1 link to the Dropbox for the public.

2 JUDGE HURWITZ: Okay. So, if--this leads me to my last question in this
3 line. Let's assume we were to treat his claim as exhausted. Shouldn't we also treat
4 it as implicitly rejected by the district court?

5 MR. SOLOMON: I think you could--

6 JUDGE HURWITZ: And then, review it--then determine whether or not the
7 district court was right or wrong?

8 MR. SOLOMON: I think that would be appropriate, yes. Because it would
9 be the exact same response that he got to the request that he did appeal, or the
10 response to the request he did appeal. So, I believe the court would be proper in
11 treating it that way as well.

12 If there are no further questions, I would simply conclude by stating
13 that in this case, as in any FOIA case, the appellant is entitled to a reasonable
14 search, not a perfect one. A reasonable search is what he got. For that reason, the
15 Department of Agriculture respectfully requests that this Court uphold Chief Judge
16 Snow's rulings below.

17 Thank you.

18 JUDGE HURWITZ: Mr. Schwartz, you have a couple of minutes.

19 MR. SCHWARTZ: I'll be brief.

20 JUDGE HURWITZ: Everybody says that.

21 MR. SCHWARTZ: EOR 210 is the email from February and January of 2014.
22 It says, "San Dimas has the recordings. San Dimas checked the recordings. San
23 Dimas sent the recordings out for a preliminary analysis and the report is the next
24 several pages after that." So, there is no question, they have these--maybe a copy.
25 Whatever they have, we want it. No one--USDA's counsel has not--there is no
26 declaration, there is no evidence that they don't have it today. San Dimas
27 responded to the request, "Hey, whatever we had we gave to the state way back
28 when, and they posted it." Not, "We don't have it."

1 So just merely asking a question of the right agency. If they don't ever
2 directly respond and tell you, "This is what we have. This is what we don't have," is
3 no request at all. It's giving no process whatsoever to the FOIA requester. Because
4 all they're saying is, "Hey, once upon a time we gave it to somebody else. That
5 should be sufficient." Not, "This is what we have today." That's what's missing in
6 this case.

7 There is also--we have focused mostly on the recordings. There's also a
8 question of fact about the transcripts. You have Dean Whitney in the reply
9 declaration saying, "Oh, I don't know happened to them. I don't know what
10 happened to these transcripts." You have Mr. Whitney telling Mr. Schoeffler way
11 back when, and it's in his declaration that, in fact, Jack Marvin, his supervisor, had
12 taken the transcripts and the three-ring binder.

13 There's no way there's not a question of fact as to whether or not these
14 records exist and whether they have them and should be produced. We're not
15 talking about buried in a thousand documents or a million documents. We're
16 talking about special recordings which they know about. We're not talking about,
17 hey, a single document wasn't turned over in everything we gave. This is the only
18 document that they were requested to have: The recordings; give it to us if you've
19 got them.

20 With that, we ask that this Court reverse the decision and remand the
21 case back for bench trial.

22 JUDGE HURWITZ: Thank you, Counsel.

23 This case is submitted and I--we thank both counsel for their helpful
24 briefs and arguments.

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CERTIFICATION OF TRANSCRIPT

I, Jennifer L. MacGregor, do hereby certify that the foregoing was transcribed from a digital recording not made by me, but transcribed verbatim by me or under my supervision to the best of my ability.

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