

1 CAROL C. LAM
United States Attorney
2 SANJAY BHANDARI
VALERIE H. CHU
3 JASON A. FORGE
PHILLIP L. B. HALPERN
4 Assistant U.S. Attorneys
California State Bar No. 189120/241709/181542/133370
5 Federal Office Building
880 Front Street, Room 6293
6 San Diego, California 92101-8893
Telephone: (619) 557-7042/7837/7463/5165
7
8 Attorneys for Plaintiff
United States of America
9
10
11
12
13
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,) Case No. 07CR0329-LAB
16)
17 Plaintiff,) DECLARATION OF ASSISTANT U.S.
18 v.) ATTORNEY PHILLIP L.B. HALPERN
19 KYLE DUSTIN FOGGO (1),)
aka "Dusty" Foggo, and)
20 BRENT ROGER WILKES (2),)
21 _____)

22 I, Phillip L.B. Halpern, hereby declare as follows:

- 23 1. I am one of the Assistant U.S. Attorneys assigned to an investigation involving Brent Wilkes
24 and Kyle Dustin "Dusty" Foggo that is being conducted by the United States Attorney's Office for the
25 Southern District of California .
- 26 2. As counsel for the CIA is not part of the Court's Electronic Filing System, I am filing on their
27 behalf the CIA's Response to Defendant Foggo's Objection to CIA's Decision Denying in part
28 Defendant's Touhy Requests.

1 3. This document is being filed publicly as it contains no information that would warrant it being
2 placed under seal. The Government has provided the Court under separate cover a sealed Statement of
3 Facts.

4 Date: August 14, 2007.

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/s/ Phillip L.B. Halpern
PHILLIP L.B. HALPERN
Assistant U.S. Attorney

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3
4 UNITED STATES OF AMERICA,)
5)
6 Plaintiff,) CERTIFICATE OF SERVICE
7 v.)
8)
9 KYLE DUSTIN FOGGO (1),)
10 aka "Dusty" Foggo, and)
11 BRENT ROGER WILKES (2),)
12)
13 Defendants.)
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IT IS HEREBY CERTIFIED THAT:

I, Phillip L.B. Halpern, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the **DECLARATION OF ASSISTANT U.S. ATTORNEY PHILLIP L.B. HALPERN** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Mark Geragos (Counsel for Defendant Wilkes)
Geragos & Geragos, PLC
350 S. Grand Avenue, 39th Floor
Los Angeles, CA 90071-3480
2. Mark J. MacDougall (Counsel for Defendant Foggo)
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036-1564

I hereby certify that I shall cause to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

NONE

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

Executed on August 14, 2007.

/s/ Phillip L.B. Halpern
PHILLIP L.B.

JOHN A. RIZZO
Acting General Counsel
JOHN L. McPHERSON
Associate General Counsel
CHRISTIAN O. RICCIARDIELLO
Assistant General Counsel

Office of General Counsel
Central Intelligence Agency
Washington, DC 20505
Telephone: (703) 874-3118

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. 07CR-0329-LAB
)	
Plaintiff,)	CIA'S RESPONSE TO DEFENDANT
)	FOGGO'S OBJECTION TO CIA'S
v.)	DECISION DENYING IN PART
)	DEFENDANT'S <i>TOUHY</i> REQUESTS
KYLE DUSTIN FOGGO (1),)	
aka "Dusty" Foggo,)	STATEMENT OF FACTS FILED UNDER
BRENT ROGER WILKES (2),)	SEAL PURSUANT TO PROTECTIVE
)	ORDER
Defendant.)	
_____)	

I.

INTRODUCTION

The Central Intelligence Agency (CIA), by its Acting General Counsel John A. Rizzo, hereby responds to Defendant Foggo's objection to the CIA's final decision regarding Defendant's *Touhy* Requests. In connection with defense counsel's voluntary pre-trial interviews of current and former CIA employees regarding matters relating to their official duties, Defendant Foggo has requested, in accordance with the CIA's *Touhy* regulation, 32 C.F.R. Part 1905, that the CIA authorize certain employees to discuss TOP SECRET//Sensitive Compartmented Information (TS//SCI) information. On August 1, 2007, the CIA notified

defense counsel of its final decision granting in part and denying in part Defendant Foggo's *Touhy* requests. See 1 August 2007 Letter from John McPherson to Mark MacDougall, attached to the Statement of Facts as Exhibit A. Defendant Foggo asserts that the TS//SCI information he seeks is necessary to prepare his defense. Appearing by telephone at the August 8, 2007, status conference, Defendant Foggo objected to the CIA's final decision.¹ The Court should dismiss Defendant Foggo's objection.

At this stage in the proceedings, Defendant has two options for obtaining access to such information. He can: 1) submit a *Touhy* request to the CIA; or 2) submit a discovery request to the Government. These two options are not mutually exclusive, and Defendant Foggo can pursue both options simultaneously. The option(s) that he elects, however, determines the legal regime under which judicial review is available.

If Defendant Foggo submits a *Touhy* request to the CIA and seeks to judicially challenge the CIA's denial of his *Touhy* request, he must file a civil action in an appropriate court under the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706. In the alternative, if he submits a discovery request to the Government and seeks to judicially challenge the Government's denial of his discovery request, he must file a motion to compel in this Court under the Federal Rules of Criminal Procedure.

What Defendant Foggo cannot do is the hybrid of the two options by submitting a *Touhy* request to the CIA and then asking this Court to review the CIA's denial of his request under the

¹ Prior to the August 8, 2007, Status Conference, Defendant apparently objected to the CIA's final decision in response to his *Touhy* requests by filing an *ex parte* letter with the Court. At the August 8, 2007, status conference, the Court indicated that while properly withheld from the U.S. Attorney's Office, such filings should be provided to the CIA. In accordance with the Court's comments, the CIA requested a copy of Defendant's *ex parte* letter by letter dated August 9, 2007. See 9 August 2007 Letter from John McPherson to Mark MacDougall, attached to the Statement of Facts as Exhibit B. However, defense counsel failed to respond to the CIA's request. Therefore, unable to respond to defendant's *ex parte* letter, the CIA files this in response to Defendant's oral objection.

criminal discovery rules in an *ex parte* proceeding in which the Government does not participate. First, a district court lacks jurisdiction to review an agency's *Touhy* decision unless and until a plaintiff files a civil action in an appropriate court under the APA. Second, an agency's denial of a *Touhy* request is reviewed under the APA standard for arbitrary and capricious agency action, and not under the standards that apply to criminal discovery. Third, a district court cannot make a discovery ruling under the federal rules if a criminal defendant has not first submitted a discovery request to the Government and if the Government has not had an opportunity to be heard on the matter by the court. Only the Government, with its intimate knowledge of the charges, the evidence, its theory of the case, and the available defenses, is in a position to satisfy the Court whether the Government has fulfilled its criminal discovery obligations.

At the August 8, 2007, status conference, counsel for Defendant Foggo stated that counsel anticipated submitting multiple discovery requests to the Government and filing multiple notices under Section 5 of the Classified Information Procedures Act (CIPA), 18 U.S.C. app. III. Despite the CIA's invitation to counsel for Defendant Foggo to resolve his request for access to classified information by bringing the matter to the attention of the Government and, if necessary, the Court, by filing an appropriate discovery request sooner rather than later, Defendant Foggo has elected to submit a *Touhy* request to the CIA and has elected to forgo, at least for the present, submitting a discovery request to the Government. Whether Defendant Foggo's choice to delay his discovery requests and Section 5 notices is for tactical or other reasons is of no moment, except that Defendant Foggo cannot thereby subvert the APA and invoke the Court's authority to resolve discovery or CIPA disputes without first serving the Government with the appropriate discovery request or CIPA notice.

This Court lacks jurisdiction to review whether the CIA has complied with the law in granting in part and denying in part Defendant Foggo's *Touhy* requests to receive compartmented information from current and former CIA employees in voluntary pre-trial interviews.

II.

STATEMENT OF FACTS

[FILED UNDER SEAL PURSUANT TO THE COURT'S MAY 25, 2007,
PROTECTIVE ORDER AND INCORPORATED BY REFERENCE]

III.

MEMORANDUM OF LAW

A. This Court Lacks Jurisdiction to Review CIA's Final Decision in Response to Defendant's *Touhy* Requests.

Pursuant to 5 U.S.C. § 301, the federal "housekeeping" statute, an agency may create procedures for responding to subpoenas or other requests for official agency information. Specifically, the statute authorizes the head of an agency to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. 5 U.S.C. § 301. It is therefore valid for an agency to promulgate regulations, known as *Touhy* regulations, limiting the authority of employees to provide testimony or produce records. See U.S. ex rel. Touhy v. Ragen, 340 U.S. 462, 467 (1951). The CIA's *Touhy* regulations set forth the policy that current or former employees shall not "produce any materials or information in response to a demand without prior authorization. . . ." 32 C.F.R. § 1905.3. Defendant's complaint arises from the CIA's final decision granting in part and denying in part his requests, under the CIA's

Touhy regulations, to receive TS//SCI information during voluntary pre-trial interviews with employees.²

During the Court's August 8, 2007, status conference, defense counsel for Mr. Foggo stated that he "fundamentally disagreed" with the premise that the CIA's August 1, 2007, response to Defendant's *Touhy* requests constituted final agency action challengeable by filing a civil action in the appropriate court under the APA. Contrary to Defendant's position, it is a well settled matter of law in the Ninth Circuit and elsewhere that an APA action is the only proper means to challenge an agency's denial of a request for access to information under the agency's *Touhy* regulations. In re Elko County Grand Jury v. Siminoe, 109 F.3d 554, 557 n.1 (9th Cir. 1997) ("The appropriate means for challenging the Department of Agriculture's decision under *Touhy* is an action under the Administrative Procedures Act in federal court."); In re Boeh, 25 F.3d 761, 764 n.3 (9th Cir. 1986) ("Plaintiffs could have brought a separate action to challenge the Department's decision under the Administrative Procedures Act, 5 U.S.C. §§ 701-06 ."); Swett v. Schenk, 792 F.2d 1447, 1452 n.2 (9th Cir. 1986) (the proper method for challenging an agency's denial of permission to testify is through a direct APA action); Mak v. FBI, 252 F.3d 1089 (9th Cir. 2001) (considering a criminal defendant's direct APA action challenging the federal government's refusal to disclose official information); Exxon Shipping Co. v. Dep't of Interior, 34 F.3d 774, 780 (9th Cir. 1994) (judicial review under the APA is available to challenge an agency's decision withholding testimony); Smith v. Cromer, 159 F.3d 875, 881 (4th Cir. 1998) (The criminal defendant's "remedy, if any, for the Justice Department's actions in the

² It is well settled that "a defendant's right of access to a witness 'exists co-equally with the witnesses' right to refuse to say anything.'" U.S. v. Black, 767 F.2d 1334, 1338 (9th Cir. 1985) quoting U.S. v. Rice, 550 F.2d 1364, 1374 (5th Cir. 1977), cert. denied, 439 U.S. 935 (1977). In other words, a request of a prospective witness to be interviewed pre-trial is voluntary.

instant case may be found in the Administrative Procedures Act, 5 U.S.C. § 702.”); Houston Bus. J. v. Comptroller of the Currency, 86 F.3d 1208, 1213 (D.C. Cir. 1996) (“When the documents are sought from a federal agency, however, the proper procedure is to make an administrative request, from which review may be had under the APA.”).

Like any other agency, the CIA is an agency in the executive branch of government. When an affected person disagrees with the exercise of an agency’s decision-making functions, he may lodge a challenge by stating a cause of action in the appropriate court pursuant to the judicial review provisions of the APA, 5 U.S.C. §§ 701-706. Despite the conclusory statement that he fundamentally disagrees, Defendant fails to articulate why the doctrine of judicial review of final agency action, among the most basic tenets of administrative law, should apply to every administrative agency except the CIA.

Requiring Defendant to adhere to the judicial review requirements of the APA is not just a technicality. Beyond the obvious fact that without an appropriate action this Court lacks jurisdiction to hear the matter, the Court would also be placed in a judicial no man’s land, asked to resolve a dispute without an applicable standard of review. It is unclear based on Defendant’s objection whether he suggests that the Court simply apply the discovery rules pursuant to its inherent authority over discovery procedures. This would be an oddity at best, if not improper on its face, given that the dispute does not arise from a discovery request. Regardless, the Court need not respond to Defendant’s invitation to proceed in an ad hoc manner according to standards that do not apply, because Congress has prescribed the proper process and standard of review. “The reviewing court shall compel agency action unlawfully withheld or unreasonably delayed; and hold unlawful and set aside agency action, findings, and conclusions found to be

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706; Bobreski v. EPA, 284 F. Supp 2d 67, 73-74 (D.C. Cir. 2003) (“A party challenging an agency’s *Touhy*-based denial of a subpoena or request for testimony ‘must proceed under the APA, and the federal court will review the agency’s decision . . . under an arbitrary and capricious standard.’” quoting Hous. Bus. J., 86 F.3d at 1212, n. 4. The applicable standard is clear, but before a court may apply it, Defendant must file a cause of action in an appropriate court and cite a specific grant of subject matter jurisdiction. Unless and until that occurs, this Court or any court lacks jurisdiction to decide the issue. In re: Elko County Grand Jury, 109 F.3d at 556, citing Swett, 792 F.2d at 1452.

B. In the Alternative, the Defendant May Bring the Issue before the Court by Propounding a Discovery Request upon the Government.

Through his initial *Touhy* requests, supplemented by the July 16, 2007 and July 18, 2007 proffers, Defendant chose to seek access to classified information through an administrative request to the CIA directly (emphasis added). At the time of the requests, the well-established case law in the Ninth Circuit and elsewhere holding that a final agency decision denying a *Touhy* request must proceed under the APA was readily available to defense counsel. Thus, defense counsel knew or should have known then that proceeding administratively would lead to this point in the event of an administrative denial. However, if the Defendant is unhappy with the procedures and standards required under the APA, he could have then, and he still can now, seek the information by propounding discovery on the Government directly. If Defendant’s discovery request leads to a dispute between the parties, the dispute could be resolved by simply applying the Federal Rules of Criminal Procedure, CIPA, and applicable case law.

In fact, the Ninth Circuit has articulated a preference for resolving such disputes using the civil discovery rules. In Exxon Shipping Co., the Court resolved a *Touhy* dispute using the discovery rules, noting that while review under the APA is appropriate, “collateral APA proceedings can be costly, time-consuming, inconvenient to litigants, and may effectively eviscerate any right to the requested testimony.” 34 F.3d at 780 n.1. However, significantly, in that case a civil discovery request for the information had already been made, so the Court did not face the bizarre prospect of applying the discovery rules without the government being a party to the proceedings. Id. at 776 (emphasis added).

In addition to avoiding costly, time-consuming collateral proceedings, resolving the dispute through discovery should be the preferred method because that is where Congress envisioned, through CIPA, that pre-trial disputes over defense access to classified information would be resolved. See United States v. Klimavicius-Viloria, 144 F.3d 1249, 1261 (9th Cir. 1998) citing United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988) and United States v. Pringle, 751 F.2d 419, 427 (1st Cir. 1984) (“CIPA creates a pretrial procedure for ruling upon the admissibility of classified information. When the government seeks to protect classified information, *sections 3 and 4* of CIPA are relevant.”) Whether access to the information is acquired through a voluntary pre-trial interview or through discovery, Defendant’s request, at its essence, is a request for access to highly classified information. Thus, rather than proceeding in an ad hoc manner, if the Defendant were to seek the information in discovery and the Government refused to comply with the request, the Defendant’s motion to compel, and the Government’s response would all be properly before the Court, and would aid the Court in resolving the dispute.

Finally, the Defendant complains that he should not have to seek the information in discovery because voluntary pre-trial interviews are a preliminary matter that would aid the defense in crafting eventual discovery requests. While perhaps not consistent with Defendant's preference, the complaint is certainly not dispositive. Discovery is a process by which the issues are clarified and narrowed. Shepard's Discovery Proceedings in Federal Court Vol. 1 at 4-5 (3d ed. 1995). Defendant, himself, has acknowledged that the case will require multiple discovery requests and notices of his intent to use classified information pursuant to CIPA section 5. It only makes sense that without the benefit of voluntary pre-trial interviews, Defendant's discovery requests might be broader at first, and later narrowed when informed by whatever information he may receive. In any event, the decision is the Defendant's. Should he choose to forgo pursuing the information in discovery, an action under the APA is available.

C. Even if the Court did have Jurisdiction in this Case to Decide a Challenge to the CIA's *Touhy* Response, Much of the Dispute would be Moot.

As explained fully in the Statement of Facts, a portion of the Defendant's *Touhy* requests that was denied in full by the CIA was related specifically to requests to interview CIA employees who have declined to be interviewed.³ Therefore, all but a narrow portion of the CIA's denial relates to requests to discuss information in voluntary interviews that will not occur in any event, because the employees have refused to be interviewed. As such, even if this Court had jurisdiction to resolve the dispute on the merits, much of the dispute is moot.

³ In accordance with the Court's May 25, 2007, Protective Order Regarding *Touhy* Disclosures, the CIA has filed the Statement of Facts and Exhibits to this brief under seal. Therefore, rather than recount the facts surrounding any employee's decision to decline a request for a voluntary interview, those facts are incorporated by reference here.

D. Defendant's Complaint that the CIA has Caused Any Delay is Wholly Without Merit.

Any complaint that the CIA has caused undue delay in issuing its response to Defendant's *Touhy* requests is a mischaracterization of the record and should be summarily dismissed. The CIA issued its final response to Defendant's request on August 1, 2007, exactly two weeks after defense counsel conducted the last proffer in support of the requests. Moreover, the fact that one must file a collateral civil action under the APA to challenge such a decision is well-established Ninth Circuit law. Defendant certainly knew or should have known that a challenge under the APA would be his remedy in the event of administrative denial of a *Touhy* request. Defendant chose to go the administrative route anyway, and received a response in two weeks. In any event, if defendant believed that the administrative response was "unreasonably delayed," then the mechanism for judicial review was also through the APA. 5 U.S.C. § 706(1). Therefore, even if Defendant's complaint that the CIA has caused delay had any merit whatever, this Court is without jurisdiction to hear it.

III.

CONCLUSION

For the foregoing reasons, the CIA respectfully requests that this Court refuse to consider Defendant's challenge to the CIA's administrative decision regarding his *Touhy* requests because the Court lacks jurisdiction over the matter.

Respectfully submitted this 14th day of August, 2007.

JOHN A. RIZZO
Acting General Counsel

_____/s/_____
JOHN L. McPHERSON
Associate General Counsel

_____/s/_____
CHRISTIAN O. RICCIARDIELLO
Assistant General Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. 07CR 0329-LAB
)	
Plaintiff,)	CERTIFICATE OF SERVICE
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v.)	
)	
KYLE DUSTIN FOGGO (1),)	
aka "Dusty" Foggo,)	
BRENT ROGER WILKES (2),)	
)	
Defendant.)	
_____)	

IT IS HERBY CERTIFIED THAT:

I, John L. McPherson, am a citizen of the United States and am at least eighteen years of age. My business address is Office of General Counsel, Central Intelligence Agency, Washington, DC 20505. I am not a party to the above-entitled action.

I have caused service of the CIA'S RESPONSE TO DEFENDANT FOGGO'S OBJECTION TO CIA'S DECISION DENYING IN PART DEFENDANT'S *TOUHY* REQUESTS (**with** Statement of Facts) on the following:

Clerk, United States District Court

by delivery of a SEALED package to the United States Attorney's Office for hand delivery to the Clerk of the Court WITHOUT OPENING.

I have caused service of the CIA'S RESPONSE TO DEFENDANT FOGGO'S OBJECTION TO CIA'S DECISION DENYING IN PART DEFENDANT'S *TOUHY* REQUESTS (**with** Statement of Facts) on the following:

Mark J. MacDougall (Counsel for Defendant Foggo)
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036-1564

by the United States Postal Service at the last known address, at which place there is delivery service of mail from the United States Postal Service.

I have caused service of the CIA'S RESPONSE TO DEFENDANT FOGGO'S OBJECTION TO CIA'S DECISION DENYING IN PART DEFENDANT'S *TOUHY* REQUESTS (**without** Statement of Facts) on the following:

1. Phillip L.B. Halpern
United States Attorney's Office for the
Southern District of California
880 Front Street, Room 6239
San Diego, CA 92101-8893

2. Mark Geragos (Counsel for Defendant Wilkes)
Geragos & Geragos, PLC
350 S. Grand Avenue, 39th Floor
Los Angeles, CA 90071-3480

by the United States Postal Service at the last known address, at which place there is delivery service of mail from the United States Postal Service.

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

Executed on August 14, 2007.

_____/s/_____
JOHN L. McPHERSON