

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GAWKER MEDIA, LLD, et	:	
al.,	:	
	:	
Plaintiff,	:	
	:	CIVIL 8:15-cv-1202-T-
vs.	:	NO.: 24EAJ
	:	
	:	DATE: July 2, 2015
	:	
FBI, et al.,	:	TIME: 9:00 a.m.
	:	
Defendant.	:	PAGES: 1 - 94
-----	:	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE SUSAN C. BUCKLEW
UNITED STATES DISTRICT JUDGE

Court Reporter: Lynann Nicely, RPR, RMR, CRR
Official Court Reporter
801 N. Florida Avenue
Suite 13B
Tampa, Florida 33602

Proceedings recorded and transcribed by computer-aided
stenography.

A P P E A R A N C E S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

For the Plaintiff:

SETH D. BERLIN, ESQ.
Levine, Sullivan, Koch & Schultz, LLP
1800 L. Street NW
Washington, D.C. 20036

RACHEL E. FUGATE, ESQ.
Thomas & LoCicero, PL
601 South Boulevard
Tampa, Florida 33606

For the Defendant:

ERIK KENNETH STEGEBY, ESQ.
U.S. Attorney's Office
Suite 3200
400 N. Tampa Street
Tampa, Florida 33602

For the Intervenor:

CHARLES J. HARDER, ESQ.
Harder Mirell & Abrams
1925 Century Park East
Suite 800
Los Angeles, California 90067

CHRISTINA K. RAMIREZ, ESQ.
Bajo Cuva Cohen Turkel, PA
Suite 1900
100 N. Tampa Street
Tampa, Florida 33602

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE COURT: Good morning. The matter that is set this morning is Gawker and Gregg Thomas versus the Federal Bureau of Investigation and the Executive Office of the United States Attorney. If I can ask counsel to state their appearances starting with counsel for the plaintiffs.

MR. BERLIN: Good morning, Your Honor, I'm Seth Berlin with the law firm of Levine, Sullivan, Koch & Schultz in Washington, I represent the plaintiffs. Seated with me at counsel table are Heather Dietrick, the president and general counsel of plaintiff Gawker Media LLC, and to her left Rachel Fugate of the Thomas and LoCicero firm.

MR. STEGEBY: Good morning, Your Honor, Kenneth Stegeby from the U.S. Attorney's Office. I represent the FBI and the EOUSA. Right next to me is my paralegal, senior paralegal, Karen Pipas.

THE COURT: Good morning. And probably -- well, you know the relationship, Ms. Ramirez knows the relationship, but in all honesty I probably should have said before that at one point in history a long time ago she used to work with me. So in an effort to disclose. All right. And who is seated at counsel table behind the government?

1 MR. HARDER: Good morning, Your Honor, Charles
2 Harder from the law firm of Harder, Mirell & Abrams
3 in Los Angeles. We represent the intervenor, Terry
4 Gene Bollea, professionally known as Hulk Hogan.

5 MS. RAMIREZ: Good morning, Your Honor,
6 Christina Ramirez of Bajo Cuva Cohen Turkel, local
7 counsel for Terry Bollea.

8 THE COURT: Okay. In an effort of full
9 disclosure again, Ms. Ramirez used to be my law
10 clerk at a point in history.

11 Okay. Here's how I would see this hearing
12 going again. And Mr. Stegeby, unfortunately you're
13 probably the person on the hot seat to start with.
14 I have a number of questions and I would like to ask
15 my questions. After I finished asking my questions,
16 I will give everybody an opportunity to speak if
17 they wish to do so.

18 It is my hope after concluding this hearing
19 that this will be the last hearing regarding FOIA
20 that we have to have in this case, at least prior to
21 the beginning of your trial on July 6th. I'm
22 assuming, Mr. Berlin, your trial is still beginning
23 on July 6th.

24 MR. BERLIN: At this time yes, Your Honor.

25 THE COURT: Obviously you don't have time to

1 be attending hearings on this, so it's my hope this
2 will be the last hearing and I can enter some type
3 of order this afternoon. That's my hope.

4 I would like to begin by just reiterating what
5 has happened since the last hearing the last time
6 that we were here. And I'm sure everybody here
7 probably is well aware, but it's helpful for me and
8 it's probably -- it may be helpful for everyone as
9 well.

10 At the time that we adjourned our last
11 hearing, which was June 24, 2015, I entered an order
12 which set certain deadlines for the production of
13 certain things. Subsequent to my entering that
14 order, the office of -- the Executive Office of the
15 United States Attorneys and the FBI, I'm going to
16 refer you to as the Government, filed an emergency
17 motion for reconsideration and request for extension
18 of time to file certain things.

19 I entered a subsequent order which adjusted
20 the dates and gave slightly different dates for some
21 of the production of some of the documents.

22 In addition to that, there was filed at some
23 point, which was specifically July 1, 2015, a
24 plaintiff's statement regarding defendant agency's
25 implication of newly claimed exemptions and attached

1 to that was also a declaration of Alia L. Smith.

2 In addition to that, there was filed by an
3 intervenor, Terry Bollea, a motion to intervene as
4 well as a motion for Protective Order that was filed
5 on June 30th and I did enter an order on July 1st
6 regarding that. I know you know what it says, but
7 I'm just going to summarize. Essentially I granted
8 the motion to intervene so that I could consider the
9 motion for a Protective Order. And in summary my
10 order was this is an issue for the state court judge
11 to protect her own Protective Order and that I'm not
12 going to order the parties to abide by the state
13 court's Protective Order, that's her job. So I'm
14 summarizing, but that in essence is the you bottom
15 line of what I ordered.

16 I also ordered that a Vaughn index be filed
17 and declarations be filed and those were filed both
18 by the FBI on June 30, 2015 and by the Executive
19 Office of the United States Attorney on July 30,
20 2015.

21 I have read everything that has been filed.
22 Doesn't mean that I still don't have a number of
23 questions, but I certainly have read everything that
24 has been filed.

25 So I would like to begin, if you don't mind,

1 Mr. Stegeby, by asking you to stand at the podium
2 and I'm going to ask if you could answer some of the
3 questions that I still have as a result. If you
4 have the Vaughn indexes, would you bring those up
5 there with you. I'm in a different courtroom, so
6 I'm having to move everything around here. I wanted
7 to make sure I have the Vaughn indexes. I've made
8 myself a little cheat sheet here, but I don't know
9 that it's entirely correct. So let me just ask you,
10 I wrote out here that at issue were 1168 pages of
11 responsive documents, three videos and two audio
12 CDs. Is that approximately correct?

13 MR. STEGEBY: Yes, Your Honor.

14 THE COURT: All right. Also initially all of
15 the 1168 documents and videos were withheld under a
16 law enforcement exemption. You have now stated that
17 you are withdrawing the law enforcement exemption
18 7(a), right?

19 MR. STEGEBY: That's correct, Your Honor.

20 THE COURT: I realize you've asserted new
21 exemptions. As of June 24th when we were here last,
22 you had withheld 88 documents based on FOIA
23 exemptions, and I'm talking about the FBI, 88
24 documents based on FOIA exemptions, 285 documents s
25 being duplications, and you have now produced,

1 according to this, and I want you to correct me if
2 I'm wrong, I'm just trying to help you by saying
3 what I found -- produced 795 documents.

4 Now, this number seemed to include some
5 duplications because I couldn't come out to how that
6 was arrived at.

7 You've produced three videos in which you have
8 redacted a third party voice and image, and you
9 produced two audio recordings by way of redacted
10 transcripts. Again I'm just talking about the FBI.
11 What's right or wrong with what I just said?

12 MR. STEGEBY: I believe that is correct, Your
13 Honor. With respect to the number of pages that we
14 may have produced and redacted form, I'm not quite
15 certain that 795 is the exact number, but it's about
16 right.

17 THE COURT: Pretty close.

18 MR. STEGEBY: It is close, yes, Your Honor.
19 And we have produced the three DVDs and we also
20 produced audio recordings two CDs with the audio
21 recordings in addition to the transcripts.

22 THE COURT: When did you do that?

23 MR. STEGEBY: Yesterday, Your Honor.

24 THE COURT: All right. With respect to the
25 Executive Office of the United States Attorney, what

1 I saw last time were three heavily redacted emails
2 and a copy of some sort of internet news story blog,
3 and that there were 59 documents that were withheld
4 and at that time there were privacy exemptions
5 asserted by the Executive Office of the United
6 States Attorney as well as policy internal documents
7 and that kind of thing.

8 So I have a note here that on June 26th the
9 Executive Office of the United States Attorney
10 released 10 pages in full and 12 pages were released
11 in part or redacted.

12 MR. STEGEBY: That's correct, Your Honor.

13 THE COURT: Okay. And as of June 30th, I've
14 got this categorical index, you have stated that
15 there are 38 pages that you're withholding in full,
16 and I'm going to talk about that in a minute, and 12
17 pages that have been released in part as redacted.
18 I really don't know how many pages have ultimately
19 been produced by the Executive Office of the United
20 States Attorney.

21 MR. STEGEBY: I believe that is correct, Your
22 Honor. And I think initially we withheld 59
23 documents in full and we produced the three emails
24 that were redacted that Your Honor referenced, and
25 then I believe we've released one document in full.

1 So at this time the EOUSA was working on the
2 redacted emails as well as the documents that were
3 withheld in full.

4 THE COURT: Say that again.

5 MR. STEGEBY: So what the EOUSA was working on
6 over -- up until today's hearing was they were
7 reviewing the documents that were withheld in full,
8 the 59 documents, including the -- and as well as
9 the three emails that were redacted.

10 THE COURT: Are you suggesting now they have
11 made any different determinations?

12 MR. STEGEBY: No, Your Honor. I'm just
13 summarizing. When you were asking me about the
14 documents that hadn't been produced after the last
15 hearing, that is what they were focused on.

16 THE COURT: All right. In the declaration
17 that I think I referred to earlier that the
18 plaintiffs filed of Alia L. Smith, attached to that
19 declaration are some exhibits and I just want to
20 talk about two of them right now, Exhibit C and
21 Exhibit D, I believe.

22 Mr. Berlin sent a letter to you, dated
23 June 25th, which in essence he asked you to bring
24 copies of the documents that were being withheld,
25 copies of the documents not produced in full, the

1 unredacted DVDs, and then he wrote you an email and
2 that was June 26th and he says, and I'm just going
3 to read that pertinent part, "Yesterday I wrote to
4 you to request that you bring two complete sets of
5 documents to court on July 2nd so Judge Bucklew can
6 review them and order produced --" whatever I guess
7 I determined should be produced -- "and also that
8 you bring the DVDs. I have not yet been advised
9 that the government planned to produced DVDs other
10 than in full and it remains our view that all
11 documents and full DVDs need to be produced."

12 So here's my question. Did you bring any of
13 such documents to court today?

14 MR. STEGEBY: Your Honor, I have brought
15 unredacted versions of the documents both from the
16 EOUSA as well as the FBI. I have been unable to get
17 the unredacted versions of the DVD and the audio
18 recordings, but I'm sure we could get that pretty
19 quickly to Your Honor.

20 THE COURT: Okay. When you say you've been
21 unable to get them, does that -- what does that
22 mean? Does that mean they're with the FBI some
23 place out of this area or in this area or what?

24 MR. STEGEBY: No, it's up in West Virginia,
25 but we have means by which we can transfer it. We

1 just didn't have enough time to get those DVDs and
2 audio recordings in unredacted form.

3 THE COURT: Okay. So you've got the documents
4 but you don't have the DVDs.

5 MR. STEGEBY: That's correct, Your Honor.

6 THE COURT: All right. Could I talk with you
7 just a moment about the Vaughn indexes that were
8 filed?

9 MR. STEGEBY: Certainly.

10 THE COURT: Just to make an overall comment,
11 and I'm going to talk about both of them, the index
12 that was filed by the Executive Office of the United
13 States Attorney was a whole lot better than the
14 index that was filed by the FBI. I can pretty much
15 look at the index filed by the Executive Office of
16 the United States Attorney and tell what the
17 documents are and make at least some type of fairly
18 intelligent decision regarding exemption; not so
19 with the Vaughn index produced by the FBI. So at
20 any rate, let me just talk about them if you don't
21 mind.

22 I guess I'll start with the FBI one first.
23 No, it's easier to do the Executive Office first, so
24 let me do the easiest one first. You have
25 withheld -- well, and let me just say that I

1 understand that the burden is on you as far as the
2 exemption is concerned. It's slightly different
3 with respect to what type of exemption it is,
4 whether it's a statutory exemption, I guess the
5 grand jury would be such an exemption, or whether
6 it's a privacy exemption and then in that interest I
7 think there is a need to weigh the public interest
8 in disclosing.

9 There is also, with respect to product, work
10 product memos and that sort of thing -- well, maybe
11 with respect to almost everything, there is also the
12 issue of have these documents been previously
13 disclosed, are they already a matter of public
14 record, and what does that mean essentially, "public
15 record." But all of those issues I think are the
16 burden then shifts over to the plaintiffs to say
17 okay, this is a document that's been previously
18 disclosed -- some of which they did in their
19 declaration that was filed by Ms. Smith. And if
20 there is another -- if it has been previously
21 disclosed some place somehow that's a public record,
22 they've got to tell me that, point it out where and
23 when. So that's my understanding of the burden and
24 the burden shifts.

25 So with that understanding, I would like to

1 talk about the Executive Office Vaughn index. I
2 went back and looked and I think Mr. Berlin or
3 whoever filed it, perhaps it was Mr. Thomas, gave me
4 a pretty good definition of what a Vaughn index
5 should contain. I called it a categorical index
6 which I thought it was a little looser, but you all
7 called it a Vaughn index, so I'm going to assume
8 it's a Vaughn index. It's a detailed roster of
9 withheld records with particularized explanation for
10 the asserted exemption as to how it applies to that
11 record or category or record.

12 So as I said earlier, I can pretty much tell
13 that by way of what I have from the Executive Office
14 of the United States Attorney, but not from the FBI.
15 So let's just briefly look at this for just a minute
16 and I think I can go through this fairly quickly.

17 The first exemption has to do with 16 pages
18 and it's been described as an external memo created
19 by the Assistant U.S. Attorney, dated February 28,
20 2013, contains the factual background and analysis
21 of the legal issues presented by information
22 gathered during the grand jury investigation
23 involving the matter reported to Mr. Thomas's FOIA
24 request. And you've stated both of these exemptions
25 are -- well, one is a privacy exemption and one is

1 am attorney work product exemption.

2 It seems to me that this is probably fairly
3 asserted -- and I'll obviously give Mr. Berlin a
4 chance to weigh in -- unless this has been
5 previously turned over, some of this has been
6 previously turned over either through the
7 correspondence with the lawyers for Gawker, for
8 example, or in some other manner has been made
9 public.

10 The email chain between the Assistant United
11 States Attorney and the FBI dated March 2nd and
12 March 4th in which the agent is seeking the AUSA's
13 guidance regarding how to respond to an inquiry
14 regarding the investigation, and it contains
15 handwritten notes by the AUSA regarding steps the
16 AUSA has taken to resolve the issue, you know, I
17 have interpreted that as an Assistant United States
18 Attorney writing on the email chain, notes on the
19 email chain. Is that correctly interpreted?

20 MR. STEGEBY: That's correct, Your Honor.

21 THE COURT: Okay. Again, it seems to me that
22 that is probably properly withheld under B(7) unless
23 it's been previously disclosed.

24 Then under a single page of handwritten notes
25 dated May 13, 2014 which contains notes regarding

1 the grand jury investigation, contains the grand
2 jury AUSA's thoughts on information that could not
3 be disclosed during the investigation, again even
4 though as Mr. Berlin points out everybody knows who
5 the grand jury AUSA is, any thoughts or any plans or
6 any notes regarding the investigation it would seem
7 to me that it would be covered under B(7) unless
8 it's been previously disclosed.

9 Now, the note also contains the name and
10 telephone number of an individual. I'm assuming
11 that's an individual who hasn't signed a waiver and
12 some sort of third party and so unless there is some
13 reason that shouldn't remain private, probably the
14 privacy exemption applies.

15 I'm just going through and telling you what my
16 notes are after having read this. So you may
17 disagree and Mr. Berlin may disagree.

18 The next one is a single page of handwritten
19 notes dated August 21, 2013 regarding the grand jury
20 investigation and the content of the note is the
21 result of a phone call between the AUSA and someone
22 in connection with the investigation. Again, even
23 though we all know who the AUSA is, the content,
24 unless it's been previously disclosed, is probably a
25 B(5) exemption.

1 The next one is an email between the AUSA and
2 the supervisory AUSAN -- again, we know who both of
3 those people are -- dated March 8th, 2013 in which
4 the AUSA is seeking advise from the supervisory AUSA
5 on an issue regarding the investigation. The
6 information contained in the document contains
7 references to witnesses to the investigation. The
8 email chain includes an email from an outside source
9 to the assigned AUSA which identifies a witness in
10 the investigation by name and discusses the
11 potential cooperation of the witness with the
12 government. Again, that seems to fall squarely
13 under B(7) unless it's been previously disclosed.

14 The next is five pages of handwritten notes
15 concerning the grand jury investigation. These
16 notes are dated December 17, December 20, March 22,
17 and April 5, 2013 -- the December dates are 2012 --
18 notes containing facts that were obtained and
19 developed during the grand jury investigation and
20 the AUSA's impressions. Again, we know who the AUSA
21 is, but as far as notes seem to fall into the B(7)
22 exemption unless they have been previously
23 disclosed.

24 The next is a draft of an internal memo
25 created by the grand jury AUSA to the U.S. Attorney

1 Chief of the Criminal Division and others, and again
2 contains references to third parties, agree that
3 it's probably a B(7) exemption unless it's been
4 previously disclosed.

5 A single page email from an attorney to the
6 grand jury AUSA and a member of the law enforcement,
7 dated March 8, 2013. That's a little questionable.
8 I'm assuming, but maybe that's incorrect, I'm
9 assuming that this is an email from an attorney for
10 a witness?

11 MR. STEGEBY: Your Honor, I would actually
12 have to refer to the document itself to -- I do not
13 remember that. I'm sorry.

14 THE COURT: Okay. That's one that I just -- I
15 probably am just -- I put question marks on that.

16 The author of the email discusses some factual
17 details relating to the grand jury investigation
18 that was taking place at the time and provides the
19 names of several third parties as well as
20 information about them. I just put a question mark
21 on that and perhaps that's one I need to look at.

22 The next is a two-page letter to an attorney
23 for a witness in the case that was prepared by the
24 grand jury AUSA, dated November 8, 2013. The letter
25 contains the name and contact information of third

1 parties and it contains items of interest that were
2 evaluated during the grand jury investigation. Even
3 though you I think said a B(7)(c) exemption, it may
4 be a work product exemption as well. So that
5 probably -- unless someone can tell me that there is
6 a public interest that outweighs that or has been
7 previously disclosed, it's probably a fair
8 exemption.

9 The next one is a two-page letter that was
10 prepared by the grand jury AUSA on August 8th, 2013
11 to an attorney who represented a witness in the
12 grand jury investigation. The letter contains the
13 name and/or contact information for third parties,
14 it discusses evidence that was evaluated. Even
15 though you're just asserting a B(7)(c), it may also
16 be an additional exemption, although it's up to you
17 to assert a B(7) exemption. But that's probably a
18 fair exemption unless there is some public interest
19 that outweighs it or it's been previously disclosed.

20 On page 7 of the Vaughn index is a two-page
21 email chain between the grand jury AUSA and the
22 attorney for Gawker Media as of November 3, 2013
23 where they discuss the attorney for Gawker's
24 understanding of the FOIA request. The first page
25 of the document contains the grand jury AUSA's

1 identity and notes on the discussions with members
2 of law enforcement about the FOIA request. And
3 you've said B(7), and I'm assuming that pertains to
4 the notes on the discussion with members of law
5 enforcement. And then you've said a B(7)(c), I'm
6 not sure why there is -- I don't know. If this is
7 another situation where the AUSA printed out an
8 email and wrote on it, I don't know why those notes
9 can't be redacted. And if it's between Gawker, it's
10 been disclosed. So I'm kind of up in the air about
11 that. So I guess I would just need to look at it.

12 MR. STEGEBY: Yes, Your Honor.

13 THE COURT: All right. Two-page letter from
14 David Houston to the grand jury AUSA, dated
15 September 3, 2013. The letter contains the identity
16 of the grand jury AUSA and third parties. You
17 produced that in part. I'm assuming that means you
18 redacted the names of the third parties.

19 MR. STEGEBY: That would be correct, Your
20 Honor.

21 THE COURT: Okay. Well, obviously Houston has
22 signed the release. So it would seem that unless
23 the third parties have already been produced or it's
24 already been made known or is a matter of public
25 record or there is a public interest that outweighs,

1 that would seem probably fair.

2 A single email from the grand jury AUSA to
3 attorney David Houston, dated September 3, 2013,
4 contains the grand jury AUSA's identity and contact
5 information and the identity of a third party. And
6 you've released it in part. I'm assuming you will
7 redact out the identity of the grand jury AUSA,
8 which seems sort of senseless at this point. But at
9 any rate and the identity of the third party? Or do
10 you know?

11 MR. STEGEBY: I'm sorry, I was looking at it.
12 I do not know if it contains a third party as well.

13 THE COURT: Maybe I need to look at that as
14 well.

15 The next is a released in part two-page letter
16 from the grand jury AUSA to attorney David Houston.
17 Letter contains grand jury AUSA's name, contact
18 information, and the name of a third party. And you
19 have again got a privacy exemption and I'm assuming
20 it's for the third party.

21 The next is a single page letter from grand
22 jury AUSA to an attorney for Gawker Media, dated
23 March 18th, 2014, in which the AUSA informs the
24 attorney of Gawker Media's status in relation to the
25 grand jury investigation. Seems to me that that's

1 probably already in the possession of Gawker and
2 frankly that may be one of the documents that I have
3 but I don't know.

4 But I'm not quite sure why that's not already
5 a matter that's been turned over and a matter of
6 public record and why that's been released in part.
7 I'm assuming to -- I'm not sure.

8 MR. STEGEBY: Your Honor, I would be happy to
9 talk about 7(c) once we're --

10 THE COURT: All right, let me just finish,
11 I've got two of more. A two-page letter from grand
12 jury AUSA to attorney David Houston, dated
13 November 8, 2013, and attachment letter contains the
14 grand jury AUSA's identity and the identity of other
15 third parties. The attachment contains the identity
16 of a third party and information relating to a bank
17 account.

18 First I can understand how information
19 relating to a bank account and third parties might
20 be a privacy issue even though David Houston signed
21 a waiver. Unless there is some sort of public
22 interest that requires disclosure, they have been
23 otherwise made a matter of public record.

24 A two-page email chain that contains
25 communications between grand jury AUSA and a

1 representative of attorney David Houston's office,
2 contains the identity of the grand jury AUSA, the
3 identity of a third party who relayed Mr. Houston's
4 message to the grand jury AUSA and the identity of a
5 member of law enforcement. Again, this seems to me
6 that this might be something Gawker has, that was
7 my -- I wrote that note there for some reason. But
8 you've claimed a privacy exemption.

9 So in summary, some of these appeared -- this
10 is a much better index than the FBI. Some of these
11 appear to be warranted and perhaps at this point
12 without Mr. Berlin on behalf of Gawker weighing in
13 either on public interest or previously disclosed or
14 something of that sort, some of them -- a couple of
15 them I can't really tell and probably need to take a
16 look at the documents.

17 All right. Your turn.

18 MR. STEGEBY: Yes, Your Honor. It seems like
19 one of the concerns that the court has is whether a
20 document has been produced or a name been made
21 public and that that might defeat the privacy
22 interests of that person. But there is case law out
23 there that states that even if a document is shown
24 publicly with the names of certain people or they
25 have been published in any other way, that doesn't

1 necessarily waive their right to privacy.

2 THE COURT: There is case law to the contrary,
3 too.

4 MR. STEGEBY: Oh, certainly, certainly. But
5 it would be our position that the AUSAs and the
6 third parties involved in this case, even though
7 some people might think they know who they are, some
8 people might know who they are, that doesn't
9 necessarily mean that they have a reduced or
10 nonexistent privacy interest in being identified in
11 this particular case and in these documents that we
12 have withheld.

13 THE COURT: Okay. Do you agree that -- you
14 assert the exemption and if it's been previously --
15 if there is a -- let me say this differently. For
16 example, with the privacy exemption, then the burden
17 shifts over -- the burden is on you to establish the
18 exemption, but then the burden shifts over to the
19 plaintiff to say okay, public interest outweighs
20 that.

21 MR. STEGEBY: That certainly would be the
22 case, yes, Your Honor.

23 THE COURT: All right. And as far as previous
24 disclosure, matter of public record, that's also up
25 to the plaintiffs to say no, no, this has been

1 disclosed.

2 MR. STEGEBY: That is correct, Your Honor, and
3 then it certainly is up to the Court to decide which
4 way to go.

5 THE COURT: Okay. Let's talk about the FBI
6 index for just a minute, which is much more
7 troubling. The FBI index, which they -- you didn't
8 do this, right, the FBI did this.

9 MR. STEGEBY: That's correct, Your Honor.

10 THE COURT: Which the FBI states is a
11 categorical Vaughn index. I am assuming that this
12 is an index of all of those documents that were
13 withheld in full.

14 MR. STEGEBY: Yes, Your Honor, I believe that
15 is true.

16 THE COURT: This index contains a description
17 of records categorically denied to the plaintiff.
18 So we don't have any released in part business here;
19 they're all withheld in full.

20 MR. STEGEBY: Yes, Your Honor, that's my
21 understanding.

22 THE COURT: Okay. All right. Then if you
23 don't mind just take a look at this with me for just
24 a minute. The first document category, Category 1,
25 is electronic communications, non-internal, non-FBI.

1 And it's a private -- there are three private
2 Twitter account screenshots. Frankly I didn't even
3 know there was such a thing as a private Twitter
4 account, but I've been informed there is such a
5 thing. So I'm assuming this is just a screenshot
6 somebody has gotten off of a phone or something like
7 that.

8 MR. STEGEBY: Your Honor, if I may explain
9 sort of the process we've been through over the past
10 week. I have received all of these documents from
11 the FBI. I received them approximately 7 o'clock
12 last night.

13 THE COURT: Okay, you haven't seen them.

14 MR. STEGEBY: I have not had a chance to go
15 through the 1200 documents.

16 THE COURT: All right. Then let me tell you
17 my thoughts. All right. First of all, I don't know
18 why the date is redacted. You don't say -- the FBI
19 doesn't tell us what the dates of those are; they
20 have just simply said that they're private Twitter
21 account screenshots, they have given us a Bates
22 stamp number, and they have asserted an exemption.
23 These are privacy exemptions. I don't have enough
24 information to decide what that is or anything about
25 that. So there is no way I can rule on that without

1 looking at it.

2 MR. STEGEBY: And Your Honor, I believe the
3 Bates pages listed here are the ones referenced in
4 the documents that were produced to the court via
5 email.

6 THE COURT: Ah.

7 MR. STEGEBY: So we certainly could take a
8 look at that.

9 THE COURT: I didn't think -- see, I
10 misunderstood. I thought what you filed with the
11 court were those documents turned over to the
12 plaintiffs.

13 MR. STEGEBY: I believe that is correct, Your
14 Honor. And we believe that based on the Court's
15 order, we were ordered to submit to the court the
16 same documents that we produced to the plaintiffs to
17 the court.

18 THE COURT: Because this hasn't been produced.

19 MR. STEGEBY: I'm sorry?

20 THE COURT: This hasn't been produced.

21 MR. STEGEBY: I'm sorry, I misunderstood Your
22 Honor. I do have the unredacted versions, so this
23 document should be in there. There may be some
24 issues with respect to corresponding the Bates
25 stamps that are placed here with the Bates stamps I

1 put on the documents last night. But the documents
2 appear to be in order, so documents that have been
3 withheld are in the unredacted version. So it
4 should not be too difficult for me to figure out
5 which you document they refer to.

6 THE COURT: Okay. So just so we're clear,
7 what you gave me on my chambers email address was
8 what you produced to the plaintiffs.

9 MR. STEGEBY: Yes, Your Honor.

10 THE COURT: And the reason I wanted that was I
11 wanted to get some sort of feel for how much
12 redaction there was. And I mean I sort of scanned
13 through them, but obviously I didn't spend a whole
14 lot of time looking at each one and all that kind of
15 thing. But my purpose was just to see how much
16 redaction was. But these documents you didn't file
17 in the chambers email.

18 MR. STEGEBY: That's correct, Your Honor.

19 THE COURT: All right. Okay. Well, suffice
20 it to say I don't have enough information to make
21 any kind of determination on that.

22 The next is legal memorandum, investigation of
23 review and legal analysis. I don't know -- I do
24 have a date, 2/28/2013, so I'm assuming this has to
25 do with the grand jury investigation, but I don't

1 know who -- what -- who is doing the investigating,
2 I don't know whether -- who is doing the legal
3 analysis, I don't know if that's something that the
4 United States Attorney's Office was doing, I don't
5 know if it's something the FBI was doing.

6 You said there is an interagency and a privacy
7 exemption. I don't know why there is a privacy
8 exemption, maybe there is somebody's name in there,
9 but just suffice it to say I don't have enough
10 information.

11 The next one is photographs and images, and
12 here we have two undated, one dated 11/1/12, and it
13 says "photographic image." I don't know if it's of
14 a witness, I don't know if -- I mean, I just don't
15 have enough description. I don't know if it's a --
16 what? Image of a person? I'm assuming, but I don't
17 know. You've claimed privacy exemptions. Is this
18 somebody that hasn't signed a waiver?

19 And then the image of CD containing the
20 apology. I think somehow my law clerk happened to
21 know what this was, so I think I know what this is,
22 maybe because it's referenced at Gawker 562, but
23 really it's not properly described either.

24 The next one is document category IV, which is
25 correspondence, but I don't know, is this an email

1 correspondence, is this a letter correspondence, I
2 don't know who it's between, I don't know enough to
3 make any kind of intelligent decision regarding any
4 kind of privacy exemption on this.

5 The next one is -- it says database report
6 results print-out. E agent report. Law enforcement
7 database results. What's an E agent report?

8 MR. STEGEBY: I honestly don't know, Your
9 Honor.

10 THE COURT: Well, I don't know either. And
11 the next one is "Received Property Documents." And
12 it says "check related information." Again, I have
13 no idea what we're talking about.

14 The next one is "forms regarding consensual
15 monitoring." It says "FD 759, approval for
16 electronic monitoring not requiring a court order."
17 The date has been redacted, so I don't know what
18 dates these are. I'm assuming it has something to
19 do with the grand jury, but I don't know that. I
20 don't know what FD 759 is. What's that?

21 MR. STEGEBY: I have not seen it, Your Honor.

22 THE COURT: Well, this sounds like this may be
23 something that is exempt, but I don't know, I can't
24 tell. And there are a bunch of those.

25 Then let's go on down to document Category 8,

1 federal grand jury information. The first one --
2 the dates are all redacted for some reason, I'm not
3 sure why that's the case, but they are. And then
4 they are described as follows. First of all there
5 is a cover letter in response to federal grand jury
6 subpoena. I don't know if it's a cover letter from
7 an attorney, I don't know if it's a cover letter
8 from a witness, I don't know if it's a cover letter
9 that an AUSA wrote. I don't know.

10 So it's true that there is a statutory
11 exemption for the grand jury, but I'm not sure this
12 falls into that without more information. And in
13 essence, Mr. Stegeby, my comments are going to be
14 slightly different, but the same with all.

15 The next one is a response to federal grand
16 jury subpoena. And I don't know from who, is that a
17 witness, I don't know if it's documents, I don't
18 know if it's some sort of letter, is it from an
19 attorney. And I'm just going to say the same thing
20 over again and again. The dates are all redacted.

21 So if you'll move over to page 4, it says
22 Sealed Court Records, Redacted. The date is
23 redacted and it says "sealed court record." I don't
24 know, are we talking about here in federal court,
25 are we talking about in state court, are we talking

1 about something was filed pursuant to the grand jury
2 investigation and was filed with the overseeing
3 grand jury judge? I don't know. I don't know. So
4 I don't have enough information.

5 The rest are similar thoughts. There are 285
6 duplicate pages and they have listed those duplicate
7 pages. I'm assuming that this means -- but you need
8 to correct me -- that the originals were turned
9 over?

10 MR. STEGEBY: I believe that is the case, Your
11 Honor. I have not been able to verify that with the
12 FBI. They sent us a letter yesterday talking about
13 the various documents that they had produced and how
14 many documents and which ones were not produced and
15 so forth.

16 So when they have told us that they had a
17 bunch of duplicate documents, that is what I believe
18 they did.

19 THE COURT: I understand the duplicates, but
20 then they list them. So I guess I'm assuming -- but
21 that's my question. Does that mean they're
22 duplicate documents of documents that have been
23 turned over?

24 MR. STEGEBY: That would be my belief at
25 least, Your Honor. But like I said, I have not been

1 able to verify that with the FBI.

2 THE COURT: All right. Unfortunately for me
3 this probably means that with respect to most of
4 these documents I'm going to have to take a look at
5 the documents.

6 MR. STEGEBY: Yes, Your Honor. And if I may
7 explain the difference between the FBI declaration
8 or index and the EOUSA index. Typically what
9 happens when we get a FOIA request in, they go
10 through, they do the search, they find the
11 responsive documents, they tell the person, the
12 requester, how much it's going to be and do you
13 accept the charges. And once they do, they process
14 the various documents. They assert certain
15 exemptions if applicable. And in most of the FOIA
16 cases that I have been involved with, they create a
17 Vaughn index which is a page by page, line by line,
18 like the EOUSA did. The number of documents they
19 had were obviously a lot smaller than for the FBI.

20 The FBI, when they assert a 7(a) exemption, it
21 is sufficient with a categorical declaration, which
22 takes a lot less time than -- because it's document
23 by document as opposed to page by page.

24 Normally when an agency goes through documents
25 to redact them, they do that first and then they

1 create an index after and a declaration afterwards.
2 In this case the FBI simply didn't have time enough
3 to go through page by page and then create an index.
4 So what they -- it appears to me, I have not
5 verified this either with them. It appears to me
6 that they went through, they focused first and
7 foremost on the documents themselves to go through
8 and redact them and they were going to go back and
9 do an index if so ordered to create a more detailed
10 Vaughn index as opposed to a categorical one.

11 So that's why we received a categorical index
12 from them as well as a declaration that was a little
13 bit more detailed than prior declarations from
14 Mr. Hardy. So that is why there is not more
15 information in this categorical index.

16 THE COURT: Let me ask you another question.
17 In the declaration of Alia Smith that was filed,
18 they have given us in Exhibit B some examples and
19 one such example is an email string, one involving
20 Jason Sheem and David Houston. Another is a letter
21 written to Mr. Houston by Sara Sweeney. Another
22 is -- well, those are the two documents they have
23 shown. These are documents that they have. These
24 are documents -- in fact, the letter from Assistant
25 United States Attorney Sara Sweeney to Mr. Houston

1 is attached in full. Yet when it was turned over,
2 we have Sara Sweeney's name blanked out; we have the
3 type of investigation blanked out even though it
4 says the Davidson investigation on the one that's
5 already been disclosed; we have the content or the
6 name of Sara Sweeney blanked out, and it just --
7 this just seems sort of senseless.

8 MR. STEGEBY: Yes, Your Honor. Again, like I
9 mentioned before, just because your name has been
10 disclosed before doesn't mean that you lose the
11 right to assert that privacy right in future FOIA
12 litigation or FOIA administrative proceedings.

13 Second of all, I believe that the documents
14 that Your Honor is referring to were part of the
15 exhibit that we submitted --

16 THE COURT: They were in the declaration.

17 MR. STEGEBY: Yes, Your Honor. And when I
18 looked at those documents, I believe that those
19 documents are part of an exhibit or a part of a
20 declaration by Mr. Berlin in state court in support
21 of their fifth motion to compel Mr. Hogan or
22 Mr. Bollea to release the information that he
23 wanted.

24 So it's actually not our office, as far as I
25 could tell based on the sequence of the documents,

1 that produced it; in fact it was Mr. Berlin instead.
2 Maybe he has an explanation for it, maybe I'm
3 incorrect because the affidavit by Mr. Berlin
4 references Exhibit A and B, and A is not attached; B
5 is attached. It looks disjointed. So I don't know
6 if all the documents were included in it.

7 But the bottom line is that it appears that it
8 was not us who actually published that, although we
9 attached it to our response to their summary
10 judgement motion.

11 THE COURT: Okay. All right. Just a couple
12 comments on the July 1st filing by Gawker objecting
13 to the newly claimed exemptions, and I'll talk about
14 that with Mr. Berlin. But it was somewhat
15 disconcerting to me that -- we talked about this at
16 the last hearing because at that time you told us
17 that even though the only exemption that had been
18 asserted was a law enforcement exemption, that that
19 didn't mean that there were not other exemptions
20 that were not going to be asserted, that -- I'm
21 summarizing -- it's just easier if there is a law
22 enforcement exemption to say okay, it's a law
23 enforcement exemption, and then you don't have to
24 worry about going through and asserting the other
25 exemptions.

1 But it is somewhat disconcerting, it seems
2 like we're doing what I said that I didn't want to
3 do, that okay, let's look at this exemption; if that
4 doesn't work, let's go over to this exemption and
5 see if that works. Which although perhaps
6 disconcerting, distressing and something that just
7 seems to me sort of a waste of time, in the long run
8 I'm going to come down and I'm not going to say you
9 can't assert it, so that's just my thought.

10 I also wanted to say that I see my job here as
11 simply trying to address the FOIA requests, the
12 exemptions, and determining what else should be
13 disclosed. And even though in their most recent
14 filing Gawker has said that there may be a public
15 interest short and aside from the fact they need
16 these documents for the litigation beginning
17 July 6th, they need the documents for the
18 litigation. And certainly we have been on some sort
19 of expedited schedule based on that understanding.

20 It would seem to me that I see my job as
21 trying to make that decision as quickly as possible
22 and then we'll deal with the summary judgment and so
23 on later, at least not today.

24 You mentioned -- no, maybe it was in the
25 declaration, Mr. Stegeby, and this is sort of a

1 question I was going to ask at the end, but I might
2 as well ask it now. The declaration indicated that
3 the government -- the FBI was going to file some
4 sort of motion for summary judgment. Plaintiffs had
5 filed a motion for summary judgment, but that the
6 FBI was going to file a motion for summary judgment.
7 But nobody said that in the response; that was just
8 in the declaration.

9 Is that something the FBI intends to do?

10 MR. STEGEBY: Ordinarily we would absolutely
11 file a motion for summary judgment and we have
12 spoken about it in some detail. Based on the very
13 condensed schedule here, we didn't think it was
14 feasible. If we would have filed it yesterday, the
15 plaintiff would not have had a chance to respond and
16 the Court wouldn't have a chance to consider it, so
17 we chose not to. If Your Honor wants us to do it,
18 we can do it in relatively quickly.

19 THE COURT: I was just wondering what you
20 intend to do. Okay. Can I talk to Mr. Berlin for
21 just a moment?

22 MR. STEGEBY: Your Honor, may I address a
23 couple of issues first that you mentioned?

24 THE COURT: Sure.

25 MR. STEGEBY: It seems like Your Honor has

1 some concern about the waiver of underlying
2 exemptions. I just wanted to mention that I read
3 plaintiff's submission with respect to the possible
4 waivers. They cited two different cases that shows
5 that a waiver may occur. Those cases are very
6 different from the current case and in fact there is
7 a case from the Middle District here that
8 distinguishes the first case that they cite, the
9 first one --

10 THE COURT: Are we talking now though -- be a
11 little bit more specific. Are you talking about
12 grand jury or are you talking about public domain,
13 what are you talking about?

14 MR. STEGEBY: Well, Your Honor, one of the
15 cases they relied upon was Ray. That's the first
16 case they cited. And that case dealt with, I
17 believe, exemption B(6). And after they had
18 litigated it for about two years, the court denied
19 the exemption for the government. Then at that
20 point once they got a bad ruling, the government
21 asserted I believe it was 7(c) and it could have
22 been another exemption. And the court denied it
23 based on the untimeliness of the assertion of the
24 underlying case. It was years too late.

25 Then the other case I think is called Mydok or

1 Mydak. That case involved an assertion of
2 additional exemptions on appeal after they had
3 litigated in district court. So the untimeliness
4 that plaintiff is attempting to rely upon with
5 respect to a potential waiver of our now current
6 exemptions simply doesn't apply.

7 We informed the court, we informed plaintiffs
8 that there were possible underlying exemptions. We
9 had discussions about bifurcating --

10 THE COURT: Well, at the last hearing you did.

11 MR. STEGEBY: Yes, and I had been in touch
12 with plaintiffs before about that when we were
13 looking to -- seeking an extension of time to
14 respond to them. Obviously we realize and are
15 mindful of plaintiff's situation with respect to the
16 trial that's coming up.

17 So in the end it didn't turn out that we filed
18 a motion for bifurcation, it was part of the
19 declaration that we attached to one of our filings.

20 But nevertheless, we have not raised the
21 underlying exemptions in an untimely manner. We
22 have done that as quickly as we could.

23 THE COURT: Okay. I think I said that's --
24 things are all in the eyes of the beholder, but I
25 understand your argument.

1 MR. STEGEBY: Thank you, Your Honor.

2 THE COURT: Thank you.

3 Mr. Berlin, I asked Mr. Stegeby to tell me
4 what had been turned over and when. I went through
5 my list that I had put together, compiled, and let
6 me just ask -- I don't want to go through each thing
7 with you again, but let me just ask you what you
8 received and when you received it.

9 MR. BERLIN: Very well, Your Honor, thank you.
10 First we received -- well, first on Monday there
11 were some DVDs sent of the videos sent to Judge
12 Campbell that originally supposed to go -- Judge
13 Case is away in Montana, so they went to Judge
14 Campbell. I'll come back to this in a minute.

15 Judge Campbell called in counsel for the
16 parties yesterday -- sorry, Tuesday, and had us
17 review those materials, which I want to come back
18 to.

19 Then we received, when you received them on
20 the court docket, we received the indexes and the
21 affidavits. And then lastly we received yesterday
22 afternoon, probably about 2 or 3 o'clock in the
23 afternoon, an electronic file of the documents.
24 Apparently they were Fed Exed from somewhere in
25 Virginia or West Virginia where the FBI's document

1 folks are, to us. The Fed Ex didn't arrive or was
2 sent for afternoon delivery so it missed the noon
3 deadline, and to his credit Mr. Stegeby got them to
4 electronically transmit a copy and made them
5 available on disk. And we also got two audio -- two
6 disks of audio files --

7 THE COURT: And transcripts.

8 MR. BERLIN: And transcripts. Those were
9 among the documents. Just as a housekeeping matter,
10 I don't know that it matters hugely, you did ask
11 whether or not we were provided with the duplicates.
12 Curiously, because it probably takes more time than
13 just copying them, we didn't get the duplicates and
14 each time a duplicate was in the stack, there is a
15 form that the government fills out that says this is
16 a duplicate of earlier pages, which may explain
17 things like that I was always wondering about how it
18 would take 66 hours a week and some additional
19 weekday shifts to go through 1100 pages, but I've
20 learned a lot.

21 So that's what we got. And I think that's
22 should be it. We did get -- that's the FBI.

23 From the EOUSA we got the 24 pages, I think it
24 was, on Friday, plus the ones that had been produced
25 previously, the three mostly redacted emails and the

1 one news article that we had gotten previously. We
2 got no more documents from the EOUSA, just the
3 Vaughn index log that Your Honor saw. We got an
4 explanation of why we hadn't gotten more, but we got
5 no more pages.

6 THE COURT: Okay. Let me -- an overall
7 question that's occurred to me the whole time I've
8 been looking at this. A lot of these documents you
9 have. A lot of these redacted names you know. It
10 seems almost an exercise that we're all spending a
11 great deal of time, effort, in attempt to get this
12 done before the trial starts on July 6th, when a lot
13 of it you already have, a lot of it you already
14 know, a lot of the redactions you're fully aware of
15 who it is.

16 MR. BERLIN: Well, Your Honor, let me try and
17 answer that. We have a much, much smaller set of
18 documents. So in the state court litigation, after
19 some motions practice that went on for a while, the
20 plaintiff there, Mr. Bollea, was ordered to give us
21 his communications with the government. That's a
22 portion of what we have. And we've been able to
23 pick from that as examples, hey, here's a document
24 we already have, here's a document we gave to you,
25 here's a document that you attached to Mr. Hardy's

1 declaration and filed in open court; why is this a
2 secret? We're giving you those as examples.

3 But I will say and it's fair to say, Your
4 Honor, that I will say that having gotten the
5 documents, I was in court all day yesterday in state
6 court in pretrial proceedings for this trial that's
7 starting Monday and when I got back to my hotel late
8 last night, had a chance to go through some but not
9 all of these documents, and there is a lot of
10 information in there that was new to us. And the
11 redactions -- in many instances you can sort of
12 guess who it is, but the document is a lot less
13 useful in that context if it's got a big white box
14 there. The documents --

15 THE COURT: Why? If you can guess who it is.
16 You know, I don't know what you intend to do with
17 these documents. I don't know if this is just
18 simply for your educational purposes for trial, if
19 you intend to introduce these documents, and
20 obviously it would seem to me that may be a problem
21 in light of the state court judge's discovery
22 deadline. But why is that problematic if you aren't
23 going to actually introduce those documents in
24 court?

25 MR. BERLIN: Well, we would very much like to

1 introduce those documents in court and ask witnesses
2 about them and we're not -- it's very difficult to
3 ask a witness about a document, tell me about what
4 -- this document seems to say blank did
5 such-and-such on blank date -- it's just -- it's
6 very difficult to ask the witness questions like
7 that. And in this instance, so, for example, we
8 have documents, this is a -- none of this is a
9 secret, we put this in our papers, this is a
10 situation where Mr. Bollea had sexual encounters
11 with Mrs. Clem with Mr. Clem's blessing.

12 Mr. Clem has talked about this on the radio,
13 there's been news reports. The third page, it's
14 Gawker number 5, is a newspaper article that says
15 that, that the FBI had in its file and yet the FBI
16 says well, you know, he has a privacy interest to
17 assert and it's just -- it reminds me, there was
18 that old film with Robin Williams, *Good Morning,*
19 *Vietnam*, Adrian Cronauer, and there were these two
20 guys who sat outside where the news came in and they
21 blacked out everything and everybody around knew
22 that it was true but it was just this fiction. And
23 that's what we're dealing with.

24 THE COURT: I see your point, but I also
25 think, why do you care? You know who it is.

1 MR. BERLIN: Because -- this is in all
2 seriousness, Your Honor. Let me try and answer this
3 question. The same thing is true with the names of
4 the agents, which is interesting and I want to come
5 back to the names of the agents because there is an
6 issue with this production that's more serious than
7 some of the things that we've talked about so far.

8 We also know, because the government has
9 disclosed it, that the person that they were looking
10 at in this investigation is this person Keith
11 Davidson. That's also in -- now in the public court
12 file and was the subject of news reporting. This is
13 not private in any reasonable -- you know,
14 Mr. Stegeby's argument is that things get disclosed
15 and they're still private. I mean, that's like
16 *Through the Looking Glass*.

17 Why do I want to know? Let me tell you about
18 this, Your Honor. I have to pause for a minute
19 because I'm under, as Your Honor knows, I'm under an
20 order in the state court and the state court order
21 says that these documents are to be treated as
22 confidential and given to Mr. Bollea for 30 days.
23 So I'm limited in what I can say in open court, so
24 I'm going to try and proceed judiciously.

25 I don't know if Your Honor had a chance to

1 look at the documents or the substance --

2 THE COURT: No. You're talking about the ones
3 that were turned over?

4 MR. BERLIN: Yes. Not that you should, I just
5 -- but --

6 THE COURT: No, I didn't.

7 MR. BERLIN: But what these documents show,
8 and then I'll come back and I can talk a little bit
9 about the exemptions and the indexes, but let me
10 tell you what our concern is, Your Honor. So in
11 this investigation what we know is that
12 Mr. Bollea -- this is not -- I'm not treading on
13 secret ground here. What we know is that Mr. Bollea
14 came with his lawyer, Mr. Houston, to the FBI and
15 asked for an investigation, which they conducted.
16 And what we know from Mr. Hardy's last declaration
17 is that part of this investigation yielded three
18 DVDs that have encounters involving the three key
19 participants in this -- Mrs. Clem, Mr. Bollea, and
20 for portions of it Mr. Clem.

21 Each of those people has testified
22 differently, they have all said different things
23 about what actually happened, when it happened, how
24 often it happened, whether -- what was known.

25 And so one of the reasons why we said we would

1 like to get -- we started by just saying look, we
2 thought we would find, which we eventually got in
3 yesterday's stack, statements by Mr. Bollea and his
4 lawyer, and to see whether what he was saying to the
5 FBI matched what he is saying in our lawsuit.

6 Turns out, without getting into the specifics,
7 they don't, that we have essentially under oath
8 testimony to the FBI and we have under oath
9 testimony in our case directly at odds with one
10 another. So we have a situation -- and it's very
11 unfortunate that this is two days or one business
12 day before we're supposed to start a trial on this
13 matter, but we have a situation where the key
14 participant, the plaintiff, is telling us one thing
15 under oath and telling the FBI something else.

16 So this is why we're asking -- and you can't
17 use that document to impeach a person if there is a
18 bunch of blanks in it that somebody is saying well,
19 that's private even though it's already public.

20 So that's the documents. But then we have the
21 DVDs. So we went and in this instance one of the
22 documents that Mr. Bollea produced to us was a
23 document in which Mr. Davidson had prepared a
24 summary transcript of what was on these DVDs. And
25 we've been looking at it and we've been saying look,

1 this would appear to be reliable because
2 Mr. Davidson did this presumably in his own
3 interests, there was another witness who produced a
4 different summary transcript that had different
5 things where the two matched. So we looked at the
6 transcript and said geez, we'd really like to be
7 able to authenticate this because it has some very
8 interesting things that are useful to our case and
9 to understand why Mr. Bollea was bringing the case
10 and whether his claims that he was damaged by what
11 Gawker did, which was publishing a minute and
12 41 seconds of a video, in fact caused the damage
13 that he was claiming in the case.

14 So we said let's try and add that to the FOIA
15 request. So we had both of these things, we wanted
16 his statements, the documents, and we wanted these,
17 if they had them, these videos.

18 So then as Your Honor knows, and I just said,
19 we went to the court on Tuesday to look at the
20 videos and --

21 THE COURT: The state court.

22 MR. BERLIN: The state court, yes, thank you
23 for clarifying. We went to the state court to look
24 at the videos. And I went with a couple of lawyers
25 from my team, Mr. Harder was there with Mr. Houston

1 and Mr. Turkel.

2 THE COURT: Who are the lawyers for Terry
3 Bollea?

4 MR. BERLIN: Yes, who are the lawyers for
5 Mr. Bollea. Sorry. So we were escorted with the
6 disks into a room and so the first disk -- I want to
7 take these out of order if I could.

8 One of the disks we looked at and the FBI, as
9 you may recall, Mr. Hardy had an affidavit in which
10 he described three disks with three -- on each disk
11 there was a sexual encounter. So one disk had a
12 minute and 14 seconds of footage showing -- and I
13 don't think I'm violating any confidences by saying
14 it had no people in it, right, it was just a shot of
15 a room, bedroom with a bed, and it was a minute and
16 14 seconds.

17 So when we came back I contacted Mr. Stegeby
18 -- who has been trying, as I think is obvious, he's
19 not the person who is with the documents, he's been
20 trying to get the information -- to say look, this
21 does not match what this affidavit says.

22 Now, I asked Mr. Stegeby about it this
23 morning; he said that he was able to get some
24 clarification and that may have been some redaction
25 issues. He actually had to talk to Judge Campbell

1 to get confirmation that it was okay to release the
2 disks in the manner that was agreed upon, which I
3 think he was trying to be careful, and he
4 represented there was a problem with one of the
5 disks. So there appears to be a problem.

6 For purposes of our case and whether this
7 production s complete -- which is really what I'm
8 trying to tell you the background, but as you said
9 your role in this process is to figure out whether
10 this production was properly made or not. Key
11 documentary evidence appears to be missing. And
12 that's was interesting, but not the most interesting
13 part.

14 Then we watched another disk, it's about
15 45 minutes, and we take out this transcript -- I
16 take out this transcript that's been prepared by
17 Mr. Davidson and I'm reading along and I'm watching
18 what's going on in the tape and there is a
19 description. Sometimes it's description of things
20 that are happening, sometimes it's description of
21 conversation.

22 THE COURT: I'm not following you. And
23 perhaps I just don't know enough about it. Are we
24 talking -- it was my -- are we talking about the CDs
25 or are we talking about the DVDs?

1 MR. BERLIN: DVDs. So this is video footage.
2 There are three DVDs. I've already talked about one
3 which I think is complete. So we watched the second
4 one and I'm watching it with Mr. Davidson's
5 transcript which describes in some instances
6 activities and in some instances conversation, and
7 it's got time codes periodically, and we're going
8 along, and I'm saying okay, check, check, and it
9 matches, everything that I'm seeing matches what's
10 on the transcript.

11 Then I watch the last of the disks which we
12 watched. The last of the disks, the first 15
13 minutes matches the transcript of Mr. Davidson
14 exactly. Then at approximately 15 minutes through
15 the transcript, the audio shifts. The video
16 continues to match. So I watch the rest and what's
17 described as happening matches perfectly, but the
18 audio is the audio that is from a portion of the
19 prior disk.

20 So there has been a situation where we have
21 audio that's been put on the disk and it appears to
22 be incomplete. And Mr. Harder and Mr. Turkel,
23 Mr. Houston, who as you can see in the documents was
24 -- we talked about this earlier, was involved in the
25 contact with the FBI, sort of shrugged and said

1 well, that's interesting. And it turns out that
2 there is some -- that on the transcript, right, for
3 the portion, there is something that is particularly
4 of sensitive and of interest to us in the case and
5 that is the portion that has been overdubbed, if you
6 will, with the audio from the earlier CDs. So we
7 have two CDs with two different video and for a
8 portion of it the audio is the same. So we were
9 left --

10 THE COURT: Why is that their problem, if they
11 have turned over to you what they have?

12 MR. BERLIN: Well, maybe it is what they have
13 and maybe it isn't what they have. So if I can
14 finish my tail and I'm sorry to -- if you'll indulge
15 me, I will try and tie this up.

16 THE COURT: Go ahead.

17 MR. BERLIN: So this is perplexing to us
18 because we believed, until we watched them, that
19 these DVDs were going to match these transcripts.
20 And the third one, which we're missing, appeared to
21 be -- although we can't tell because we didn't get
22 it, the third one with the minute and 14 seconds,
23 the one that was missing appears to be, based on the
24 transcript, matches a version of what Gawker got.
25 Gawker got one DVD from which it made this minute

1 and 41 seconds of excerpts, and that one matched.
2 So we've now seen at some point two and a half DVDs
3 that match this transcript. So we're sort of saying
4 well, this is interesting.

5 So then we go back to our -- I go back to my
6 hotel and there is these audio tapes. And one of
7 the audio tapes is of a session in which -- I'm only
8 going to talk about the part that is relevant to the
9 production here because I don't want to violate the
10 state court order in any way. One of them is an
11 audio tape of a meeting in which Mr. Davidson is
12 present and Mr. Bollea is present and Mr. Houston is
13 present, about these DVDs.

14 THE COURT: I think that was something that
15 was turned over and something I glanced through, so.

16 MR. BERLIN: So in this meeting --

17 THE COURT: Of course I didn't read it for any
18 content and I don't have any idea about what value
19 it has.

20 MR. BERLIN: It is our understanding that at
21 the end of this meeting the government took
22 possession of the three DVDs that we're talking
23 about. And in this meeting where you can hear the
24 audio, you can hear the audio of Mr. Bollea and
25 Mr. Houston and Mr. Davidson watching these DVDs

1 including the audio that is matching the transcript
2 but doesn't match the audio that we heard yesterday.

3 So when you say to me what does it matter if
4 they gave you what they had, I want to understand
5 how it is that between that moment when the FBI took
6 possession of those DVDs and when I saw those tapes
7 in Judge Campbell's anteroom on Tuesday, that audio
8 got changed.

9 When you ask me -- I know you're going to ask
10 me at some point in this argument, "What is the
11 public interest beyond your litigation?" Your
12 Honor, this thing is -- it smells like bad fish.
13 Right. And I've got a situation where I have been
14 trying for 18 months to get documents, not only to
15 defend my client and also to understand what
16 happened. And now I have a situation where when I
17 finally get them, I'm missing one, I've got a second
18 one where the audio doesn't match, and the audio
19 doesn't match at a key moment. And then I have the
20 audio -- I have a video where the audio doesn't
21 match at a key moment, and then I have an audio for
22 the last minute that anybody besides the government
23 had these where there is different audio that you
24 can hear on the tape. Right?

25 THE COURT: Well, I'm not sure what you're

1 suggesting. Are you suggesting the government
2 altered the tapes or deleted --

3 MR. BERLIN: I don't know, Your Honor, but let
4 me tell you this. When the government comes and
5 says I don't want to tell you who any of the agents
6 are and I don't want to tell you anything about this
7 and I want to white out everything, right, there is
8 a problem here.

9 What I'm going to ask you for, just so we're
10 clear about this, is that the audio -- we have a
11 problem. We have documents where the integrity of
12 the document is now called into question. And your
13 job, right, as you articulate it -- I don't want to
14 tell you your job; you tell me your job. But as you
15 articulate it, Your Honor, is to make sure that we
16 get a proper production from the government of what
17 we're entitled to and we don't get what we're not
18 entitled to. That's the -- you're the one that
19 adjudicates that.

20 What I am trying to say in this proceeding --
21 and I want to come back, this is -- there are issues
22 with exemptions and some of those specific documents
23 that you addressed. But my biggest concern now is
24 that I have a situation where there is a document
25 that has been produced to me that is representing

1 this is the video, and there is a different document
2 that has been produced to me this is the audio of us
3 listening to the video, that are different.

4 And I'm not suggesting -- look, I don't want
5 to impugn anybody at the FBI or in the U.S.
6 Attorney's Office or in Winchester, Virginia where
7 they review them, or anywhere else, right --

8 THE COURT: You are.

9 MR. BERLIN: Well, I'm not trying to do that
10 deliberately, I'm just trying to say that at the end
11 of the day we were not getting -- there's a question
12 about the integrity of the documents that we got.
13 And it is over a key portion of audio footage that
14 if you were to review the documents that were
15 provided to you in your chambers, you would see is
16 something that in my judgment Mr. Bollea has used
17 the arms of the federal grand jury to try and
18 suppress, and that I didn't know -- I didn't know
19 that the FBI was in the business of doing that.

20 THE COURT: Of doing what?

21 MR. BERLIN: Of trying to -- of essentially
22 trying to use arms of the federal government to help
23 people -- you know, we've all done or said things
24 that we wished we hadn't. But I didn't know you
25 could down to your local FBI office and say hey, can

1 you prosecute this or investigate this to try and
2 keep that from coming out. And that is what I think
3 is going on here and that is wrong.

4 THE COURT: Well, I would be very surprised if
5 that's what's going on here. I realize why it's in
6 your best interests to say something like that, but
7 I would be very surprised to say that's going on.

8 MR. BERLIN: Look, all I know, right, and some
9 of this requires some review of the records to be
10 able to say more than I can say in court because the
11 substance of this is I've got my hands tied so I'm
12 dancing a little bit here.

13 But the bottom line is it was very concerning
14 to me and to Gawker to get a DVD -- to get three
15 DVDs produced where one was supposed to have an
16 encounter on it and only had a minute and 14 seconds
17 of empty bed, and one had an audio track that was
18 duplicated from another video at a key moment, and
19 then third to get an audio CD where you can hear
20 that same DVD with a different audio and they're
21 listening to it. Coupled with, right, testimony in
22 our state court case where both Mr. Bollea and
23 Mr. Houston denied ever having looked at those
24 videos.

25 So this is really like I don't -- what I'm

1 going to ask you for, I started to say this, what
2 I'm going to ask you for, and I know Your Honor was
3 hoping to end this today, but in FOIA cases, it
4 doesn't usually happen, but in FOIA cases, because
5 usually you can just resolve these things on the
6 exemptions, but where they are fact issues, parties
7 are entitled to discovery and this seems like we've
8 got to do a little discovery to find out what
9 happened to my --

10 THE COURT: All right. We're not going there,
11 we're not doing that. So I'm going to have to take
12 about a 10-minute break because I've got to go
13 cancel my dentist appointment at 11 o'clock, which I
14 have good and bad feelings about it, frankly; I hate
15 going to the dentist.

16 MR. BERLIN: Then you're welcome.

17 THE COURT: So give me about 10 minutes and
18 let's come back and talk about what we're really
19 here for. So we're in recess until 10:30.

20 (Recess was taken from 10:21 until 10:29 a.m.)

21 MR. BERLIN: I tried to let your assistant
22 know. I wasn't sure, given your apparent
23 ambivalence for going to the dentist, whether that
24 would be good news or bad news, but I did want to
25 let you know that the Second District Court of

1 Appeal -- with plenty of notice before Monday's
2 trial, I might add -- has vacated the trial judge's
3 trial order and there will be no trial commencing on
4 Monday. If that helps you get to the dentist, I'm
5 happy to come back at a different time.

6 THE COURT: I already cancelled.

7 MR. BERLIN: I apologize for their and our
8 unfortunate timing.

9 THE COURT: Okay. So there is no trial date.

10 MR. BERLIN: As far as I can tell there is no
11 trial date. And for what it's worth, Your Honor,
12 the opinion is something like 14 pages and I haven't
13 read it, I just read to the bottom, so I don't
14 actually know what the directions are about what to
15 happen next and we'll have to wade through that and
16 sort that out.

17 THE COURT: All right. Let me just go back to
18 Mr. Stegeby for a minute.

19 Mr. Stegeby, have you looked at -- I feel like
20 I can breathe a sigh of relief here as far as
21 timing. Have you looked at the DVDs, have you
22 listened to the CDs and -- have you done any of
23 that?

24 MR. STEGEBY: Your Honor, what I've done is
25 when I received the DVDs, the videos, I opened them

1 to make sure that they were properly openable before
2 we produced them to plaintiffs, and when I opened it
3 I also clicked, fast forward through it, every 10,
4 15 seconds or so. So I haven't watched the entire
5 video is the bottom line, but I understand what the
6 content of it is.

7 THE COURT: Okay. Do you understand what
8 Mr. Berlin is saying with regard to the concerns
9 that he has about either they have been altered or
10 something has happened maybe in the redaction or
11 there is some problem?

12 MR. STEGEBY: Your Honor, my understanding is
13 that the FBI has -- there are two different types of
14 files, video files, different formats. Two of them
15 the software that the FBI had was able to redact
16 whatever needed to be redacted. The third file was
17 of a format that could not be redacted properly in
18 the way that Mr. Berlin had asked me to convey to
19 them that he wanted, which means blurring out the
20 face and minimize the redactions of the audio
21 related to the video. And that was possible with
22 two of them.

23 I didn't listen to the audio, so I don't know
24 how that works, whether they just bleeped it out or
25 cut it out, but they did blur out the face of the

1 third parties.

2 With respect to the last video, their software
3 could not do that. Their only option was to redact
4 both the video and the audio and that is why the FBI
5 left one minute and I believe 14, 15 seconds or so,
6 and it's only of the bed, there are no people there.

7 THE COURT: Okay. So they redacted the entire
8 thing.

9 MR. STEGEBY: Yes, Your Honor, except for the
10 first one minute and 14 seconds or thereabouts. We
11 have inquired of the FBI for more information about
12 it, so we're pushing hard to figure out what's going
13 on with this.

14 THE COURT: Okay. All right. Mr. Berlin,
15 this seems like something we can now, because of the
16 time, we can work out.

17 MR. BERLIN: I would agree, Your Honor. Look,
18 one of the things that I have -- when you have key
19 documentary evidence, right, you have three
20 participants in the underlying events, we're not one
21 of them, and you have key documentary evidence, you
22 want the documentary evidence so you can find out
23 what happened.

24 I will say that my understanding again from
25 the audio of the participants watching this, we have

1 an audio disk of them watching it, there is watching
2 a tape which at the end they say oh, this must be
3 the one that Gawker has. And I will say that if the
4 third tape with the minute and 14 seconds is, as I
5 would suspect, the one that ultimately was provided
6 to Gawker -- not by the government obviously, but
7 was ultimately provided to Gawker -- that one should
8 have been able to have been produced with much more
9 fulsomeness because for the bulk of that recording
10 there are only two people in it and they have both
11 provided waivers. So there is an issue there which
12 is something we could probably sort out.

13 And I will say this, I said this last week
14 when I was before you, Mr. Stegeby in his office,
15 Mr. Flynn, they have been great to deal with, they
16 have been very responsive, it is quite clear to me
17 that they are not the ones in the driver's seat in
18 terms of how this production is being made or making
19 these indexes, and I don't want to in any way -- I
20 want to express my appreciation on my behalf for
21 their efforts. And I believe that now that the time
22 pressure is off, that maybe it makes sense to try
23 and get to the bottom of what -- with their help, of
24 what happened with these two disks that are -- over
25 which there are questions.

1 And I want to be clear, Your Honor, I'm not --
2 and I really mean this. This is suspicious, but I'm
3 not intending to malign anybody. I'm just saying
4 hey, this is suspicious. I hear Mr. Harder laughing
5 behind me. But that's the reality, right, we've got
6 a tape, transcript, an audio; things don't match;
7 you say to yourself these things ought to match, can
8 we try to get to the bottom of that. That's what
9 lawyers do, we try and get to the bottom and get to
10 the truth of things. And that's part of this
11 process.

12 And for your purposes your job I think is just
13 to make sure that we have get the proper production.
14 And if it's not proper, to make sure that that
15 happens, and that's why we've brought this
16 proceeding.

17 THE COURT: I agree. Let me ask you a couple
18 of other questions. And what I think how I'm going
19 to resolve the DVD/CD controversy now that we have
20 more than a day or an afternoon, is to have
21 Mr. Stegeby look at it and see what the problem is
22 and maybe that can be resolved short of court
23 intervention here.

24 MR. STEGEBY: Your Honor, if I may, as I
25 mentioned earlier, I don't believe we have the

1 actual raw DVD yet, but we will get it as quickly as
2 possible and I will review it and work with the FBI
3 to find out what happened.

4 I just wanted to let the court know we have
5 tried to produce information in this case as quickly
6 as possible.

7 THE COURT: I know you have.

8 MR. STEGEBY: And my understanding is that
9 this is simply a technical glitch, we'll get to the
10 bottom of it.

11 THE COURT: Okay. I want to go back,
12 Mr. Berlin, to a couple of things. I think you
13 correctly pointed out in one of your filings as far
14 as the privacy exemptions that the Court has to
15 weigh the public interest in disclosure against the
16 privacy exemption request.

17 But it's up to you to tell me what the
18 privacy -- I mean what the public interest is. And
19 I realize that without the documents, that may be
20 somewhat difficult. But generally what is the
21 public interest in the disclosure of these allegedly
22 privileged because of privacy documents?

23 MR. BERLIN: Well, Your Honor, when you asked
24 Mr. Stegeby this and laid out the test -- and I'll
25 put aside the waiver issue which I'll talk about for

1 a moment in a minute -- the first question before
2 you get to the public interest is is it private,
3 right. So the first thing that we're saying -- and
4 most of what other focus has been in the paper, the
5 papers that we submitted yesterday, and we submitted
6 those prior to having any documents, so it was just
7 to talk in general terms about what the issues are.
8 But there are redactions of people's names who are
9 well known who have talked about this on the radio
10 in the case of Mr. Clem, where there is many, many
11 news reports. There are in the case of Mr. Davidson
12 that's been put in the court record in this case and
13 has been the subject of news reporting.

14 THE COURT: In this case?

15 MR. BERLIN: In this case, yes, Your Honor.
16 Mr. Hardy's first declaration attached a letter
17 which described Mr. Davidson as the target of the
18 investigation, gave the investigation number, and
19 that was one of the examples we gave you.

20 When you asked me essentially why are we
21 bothering you for this if you already have the
22 information. There is a great deal of information
23 we just got. So it was -- it was not stuff that we
24 had in any significant respects. But --

25 THE COURT: Yeah, but see the problem is that

1 I don't know all of that. You know it; I don't know
2 it. So short of us going through each document and
3 you telling me that, I have no idea.

4 MR. BERLIN: Here's the -- you asked about the
5 test, Your Honor. The exemption in the first
6 instance is to be applied by the government and then
7 of course as reviewed de novo by you. Unlike an
8 exemption 3, which is a statutory exemption,
9 something for grand jury materials, which I'll come
10 back to in a moment.

11 The privacy exemption is supposed to be done
12 by the government. What the government has done
13 here is taken the position that is contrary to the
14 statute which is to say any time a person's name
15 appears for any reason in any context -- there is a
16 page on which my name is redacted, Your Honor, okay.

17 THE COURT: Anybody that hasn't signed a
18 waiver.

19 MR. BERLIN: Anybody that hasn't signed a
20 waiver, their name gets redacted. That's basically
21 the approach that the operation in Winchester,
22 Virginia, or West Virginia, wherever they are, has
23 taken.

24 I would respectfully submit that that is not
25 what is contemplated by the statute because there is

1 -- if you have in your own file a news report where
2 Bubba Clem is talking about his involvement in this,
3 you can't just simply say there is a name we don't
4 have a waiver, that's the end of it, right? You
5 have to ask the question, which we would ask you to
6 make now, but they're in the first instance obliged
7 to do this, to say is this private and is there
8 public interest.

9 In every single example, for 1168 pages or
10 whatever the production was, and in every single
11 assertion of this in Mr. Hardy's declaration, the
12 answer has been this is private and this is not
13 public interest. And they have not done any actual
14 balancing. They have basically taken a blanket
15 position that if there is a name and we don't have a
16 waiver, we're cutting that out. I'm saying to
17 you --

18 THE COURT: Is it their job to do the
19 balancing or is it your job to point it out and then
20 my job to do the balancing?

21 MR. BERLIN: In the first instance the statute
22 requires them to do that balancing. At this point
23 they have done it; with apologies for dumping it on
24 your desk, it's now your job.

25 But I want to say to you that the starting

1 point where we were when we got these documents,
2 which is there is a box around every person's name,
3 you know, look, there are people where I say okay,
4 here is a person who didn't sign a waiver, there is
5 sensitive information, it's something that is
6 actually private, right, but that's the deal.

7 Now, let me give you another example. So we
8 talked about Mr. Davidson, we talked about Bubba the
9 Love Sponge Clem. You've got the names of agents,
10 U.S. attorneys, right? The notion that -- I mean
11 this in a respectful way to you as a government
12 official, to Mr. Stegeby, to everybody who is a
13 government official. The performance of a
14 government official's job in their work is generally
15 not something in which they have -- the statute
16 refers to personal privacy, in which they have a
17 personal privacy interest, right? So if you --

18 THE COURT: Not even a law enforcement officer
19 who is doing an investigation?

20 MR. BERLIN: Certainly if you have an
21 undercover agent, you have a clandestine spy. But a
22 routine investigation that's over, right -- and
23 look, if you said to -- it depends on the
24 circumstances, of course. If this were an
25 investigation into a gang that murders law

1 enforcement agents, you could say all right, yeah.
2 But this is an investigation into a sex tape. And
3 the motion that there is a personal privacy interest
4 in protecting that doesn't make any sense to begin
5 with and it particularly doesn't make sense in a
6 context where the names of the people involved have
7 already been disclosed. Mr. Sheerm is in the court
8 record courtesy of Mr. Hardy. Ms. Sweeney is in the
9 court record courtesy --

10 THE COURT: And I agree.

11 MR. BERLIN: In the balancing of this -- and I
12 will say to you, this part I would put off. If my
13 suspicions about these DVDs turn out to be more than
14 a technical problem -- and I have some suspicions
15 but I'll leave it be -- then who is involved has a
16 different issue, but we can reserve on that until we
17 get to the bottom of that. But the primary thing is
18 we have a situation where we have the government
19 saying we're going to do an investigation into
20 Mr. Davidson at the behest of Mr. Bollea, doing that
21 investigation. Apparently we know now there may
22 have been grand jury proceedings, we don't know what
23 they were, but they're asserting grand jury
24 protection, so I'm assuming some proceedings. There
25 are references to subpoenas by the grand jury and so

1 forth, so we've used that process. And then at some
2 point there is no prosecution. At some point we
3 know from last week there is now another
4 investigation by a state agency which last week was
5 grounds for asserting a law enforcement exemption,
6 this week it wasn't.

7 You know, there are a number of things here
8 where -- and even apart from Gawker's interest as a
9 litigant, Gawker's interest as a news organization,
10 having spent a lot of money to get to this point,
11 has an interest in understanding, okay, how is the
12 government operating. And that's what the point of
13 the public interest part of this --

14 THE COURT: Say that again. Because I was
15 going to ask you to please tell me what the public
16 interest is again. What do you -- what are you
17 saying is the public interest?

18 MR. BERLIN: The public interest -- in general
19 in the cases when you get to this point, putting
20 aside -- I'm making you the first point that a lot
21 of this is not private, right, so there is a privacy
22 balance against that.

23 But when we get to the public interest prong,
24 right, the main point of FOIA is to allow the public
25 to understand how the government is operating.

1 THE COURT: I agree with that. But that's not
2 your reason for doing it.

3 MR. BERLIN: There is a difference between why
4 we originally came here and what we're ultimately
5 trying to find out. When I came here 18 months ago
6 when I filed FOIA request or had Mr. Thomas file a
7 FOIA request, it was to get statements by Mr. Bollea
8 and if there was any documentary evidence to get
9 that. Right. This is basic discovery for a
10 lawsuit.

11 We now have a situation where over the course
12 of that time we now have a situation where we know a
13 lot about it and we -- at least Gawker as a news
14 organization is left scratching its head saying how
15 is this that the government is operating. And maybe
16 there is good and valid reasons, but the whole point
17 of this statute is to be able to scrutinize those
18 reasons.

19 THE COURT: I realize that and I realize what
20 FOIA is and I realize the purpose of the statute and
21 I think I said when we were here last, that's really
22 not your purpose and I'm not sure that it's my job
23 at this point to evaluate why you make a FOIA
24 request. So I really -- the government raised the
25 fact you're doing it for litigation purposes, but

1 I'm not considering that.

2 Let me ask -- I want to change subjects a
3 minute. I want to leave the privacy and the public
4 interest behind for just a moment. When we get to
5 the cases that the information is already in the
6 public domain, I think that your understanding and
7 my understanding perhaps may be different as far as
8 what that means being already in the public domain.
9 Because if something has been in a news report, I'm
10 not sure -- or something has been blogged about or
11 tweeted about or something, I don't know that I
12 would consider that under what I've looked at as far
13 as the case law is concerned as being in the public
14 domain.

15 So I would like to hear what your thoughts are
16 regarding public domain. And let me just -- I made
17 some notes, so let me just go back and be a little
18 more specific.

19 I pulled this from one of the cases. Publicly
20 disclosed information that has been specifically
21 officially acknowledged, made public through an
22 official document disclosure or something like that.
23 It's not something that somebody may have --
24 somebody may have written about in a newspaper story
25 somewhere. Anyway, I don't even know how the

1 government would know something like that.

2 It has to be -- maybe something filed in
3 court. Maybe the information filed with the
4 declaration, for example. But I would like to hear
5 what your understanding is of public domain, the
6 public domain doctrine.

7 MR. BERLIN: Sure. I think it's -- in many
8 respects the public domain -- the name of the
9 doctrine is a bit of a misnomer because you have to
10 go back to the statute. The statute is saying we
11 protect interests and personal privacy. They have
12 asserted exemption 6 as a catch-all, but that's
13 basically on the language for medical records and
14 other similar records and I don't think we have
15 anything in this case that is exemption 6 unless
16 you're going to take the position that that applies
17 to everything that names a person, which I think is
18 an overreach based on the language of the statute.
19 You don't have to go any further than that.

20 But if we talk about exemption 7(c), the
21 question is does a person have a personal privacy
22 interest in this information, right. And maybe the
23 government says okay, prophylactically we'll take
24 the position that any time a person's name is
25 mentioned. But when it gets to the point of

1 litigation and it's in front of a judge, obviously
2 there is a greater level of sensitivity that you can
3 bring to that question than perhaps somebody in the
4 records division at the FBI. And the question is
5 does the person have a personal privacy interest in
6 this information.

7 And I would say to you two things: One is
8 that the personal privacy interest that a person has
9 of saying, you know -- let's use Bubba Clem, for
10 example. Having a personal privacy interest in
11 saying I was somehow connected to this thing with my
12 now ex-wife and Mr. Bollea. If you're on the radio
13 talking about that day after day after day, and the
14 government has in its records reports that tell you
15 that, it is hard to say that that person has a
16 personal privacy interest in being linked to those
17 events, right.

18 I mean, you think about this -- you know, we
19 just prosecuted the Boston Marathon bomber, right.
20 I mean, that's a much greater example. But the
21 people involved in that, there were some people who
22 were prosecuted and you may remember there was
23 another student who was somehow connected that they
24 went to Rhode Island to fetch. Sort of a bit
25 player, right? At some point you lose your personal

1 privacy interest in this even if it turned out that
2 you got the wrong person or whatever, right? So
3 that's the first piece of this, which is if it's
4 known widely, it's not -- there is no longer a
5 personal privacy interest. And then the
6 government's motion of well, even if it's widely
7 known, somehow we can put that back in the bottle
8 and we still don't have to disclose it -- it's
9 counterintuitive, doesn't make any sense.

10 The second is a more narrow subset of that,
11 which is has the government disclosed this. And in
12 this instance we have disclosures by the government
13 with respect to Mr. Davidson, with respect to
14 Ms. Sweeney --

15 THE COURT: I agree with that --

16 MR. BERLIN: So that's the narrower version,
17 but the larger version is if it's not private, you
18 can't --

19 THE COURT: My concern that I struggle with --
20 and I don't disagree with if it's been with filing
21 or it's a part of the court record or something of
22 that sort.

23 My concern is your analogy to Mr. Clem talking
24 about it on his radio show. I don't know that. Or
25 the fact that somebody -- it may have been in some

1 newspaper story somewhere someplace or some, you
2 know, on the internet sometimes someplace.

3 MR. BERLIN: Let me make a suggestion, Your
4 Honor, because we're now operating in a different
5 posture than we were when we walked in this morning,
6 which is, you know, we got these documents at
7 3 o'clock yesterday and we had to come in and say --
8 and make some showings, right. And in our statement
9 yesterday we were literally giving examples without
10 even knowing what there was, but just having seen a
11 few redacted documents from the EOUSA.

12 What I would propose -- and you're right,
13 you're not -- you're not necessarily supposed to
14 know. Your clerks may know about a certain thing,
15 you had mentioned the apology, right, that's another
16 example of being on the air talking about this. But
17 you're not supposed to know necessarily. And now
18 that we have a bit more time, for the ones that are
19 not released by the government directly, we should
20 be -- we're happy to come in and make a showing and
21 give you that information so that you can make a
22 proper decision without having to take my word for
23 it that Bubba Clem is a radio DJ who has talked
24 about this a lot. You know, I can bring you
25 transcripts and audio and you can make a

1 determination about whether or not that's truly
2 private or not.

3 THE COURT: Okay. Let's do this, let's talk
4 about where we go from here now. And you're right
5 -- and I'm going to ask you, Mr. Stegeby, the same
6 thing. Things have changed because I already had
7 dates and a timeframe worked out about how we were
8 going to -- how I was going to deal with in this
9 light of the trial starting on July 6th. But now
10 it's not starting on July 6th.

11 So what would you propose? He has copies of
12 the documents. They're clearly -- I think I need to
13 look at those documents and I'm hoping he'll give me
14 those documents to look at this morning. And
15 Mr. Stegeby has indicated he's going to go back and
16 look at the DVDs and the CDs and the transcripts and
17 see if he can figure out why it doesn't match and if
18 it's something that they can resolve. So it would
19 appear to me that those two things can definitely
20 occur.

21 You also have now the luxury, Mr. Berlin, of
22 looking at whatever has been disclosed and
23 determining whether there is any concern regarding
24 the redactions, which you haven't had before. So
25 how would you suggest we proceed?

1 MR. BERLIN: Well, at some point, as Your
2 Honor knows, Mr. Stegeby called before filing his
3 motion for reconsideration and for an extension and
4 asked me for an extension, and I said, which I will
5 reveal in this court, that I'm almost the kind of a
6 lawyer that would work out a reasonable schedule
7 except that I have no choice here because I have a
8 trial in a week.

9 So I'm happy to work out a reasonable schedule
10 with Mr. Stegeby for having him get the DVDs and
11 look at them, get you the documents if there is
12 documents you're going to look at, to be able to
13 look at them, and let's look at the redactions, have
14 us make a showing if there are things where our
15 position is these things are not private not because
16 they have been released in a court record, which you
17 would have, but for other reasons which you might
18 not have before you so we can make that showing.
19 And to get all that done and to come up with a
20 reasonable schedule for doing that.

21 The only footnote about this is that my
22 understanding -- and again, I haven't read the full
23 14-page order -- is that the Second District Court
24 of Appeals order directing the rescinding of the
25 trial order does not specify when -- at least the

1 part I read didn't catch my eye about when it needed
2 to be reset. And if it gets reset -- if it gets
3 reset 30 days from now, that's going to affect the
4 schedule. If it gets reset for several months from
5 now, that's going to be a different timetable and
6 that will I think get sorted out reasonably soon.

7 So the only thing I would say is I would like
8 to give Mr. Stegeby and the court a reasonable time
9 so nobody is working at breakneck speed, but I would
10 like not to have it extend so far so that if it
11 turns out that the trial is set soon, we're not in
12 this situation again at the eleventh hour because
13 that seems like a problem.

14 THE COURT: Mr. Stegeby?

15 MR. STEGEBY: Your Honor, it sounds reasonable
16 what he says. My goal in working with him on a
17 schedule would be to ensure that we follow normal
18 FOIA procedures and this --

19 THE COURT: Has not been normal.

20 MR. STEGEBY: Yeah. Normally we have a little
21 bit more time than this. But I understand his
22 concerns about the trial being rescheduled within a
23 relatively short period of time. So we'll work --

24 THE COURT: If I were the judge, I would want
25 to reschedule it in a short period of time. But.

1 MR. BERLIN: And that may happen. So, you
2 know, I would ask -- for example, if Mr. Stegeby,
3 he's got to look at these three DVDs, assuming he
4 could get them early next week and look at them at
5 some point next week, that would seem -- over the
6 course of the week, it would seem like by the end of
7 next week we ought to be able to do that.

8 And I think for my purposes by the end of next
9 week we ought to be able to look at the documents we
10 have and get you something. If he wanted to go into
11 the following week, we would certainly have no
12 objection to that. But that seems like -- and you
13 already have -- he needs to just get you the
14 redacted documents, is that what you're asking the
15 third thing was?

16 THE COURT: No, I'm asking him to give me --
17 both, withheld and redacted. I wanted the ones that
18 are in the Vaughn index that weren't turned over
19 that he said he brought today. And if he brought
20 them, might as well just give them to me and I can
21 go ahead and look at them.

22 MR. STEGEBY: On that point, Your Honor, I
23 just want to say in open court that we will provide
24 the documents to you for in camera review and we
25 would object to any production directly to --

1 THE COURT: Well, it was my understanding you
2 would give them to me.

3 MR. STEGEBY: Yes.

4 THE COURT: Okay. Mr. Stegeby, estimate for
5 me how long you think it's going to take you to get
6 with the FBI, look at the tapes, figure out if there
7 is a problem or that's the way it was intended or --
8 give me a timeframe.

9 MR. STEGEBY: A week.

10 THE COURT: Okay. All right. Then what I'm
11 going to do is I'm going to adjourn the hearing, I'm
12 going to ask you to give me copies of the documents
13 for an in camera review. I'm going to ask you to
14 take a look at the DVDs and the CDs to see if it's
15 something that occurred when the FBI redacted or if
16 that is what it is.

17 And then why don't you all give me just a
18 proposed schedule for anything else that you think
19 as far as asserting any kind of objections to the
20 exemptions.

21 MR. STEGEBY: Certainly. And one more point
22 about the unredacted documents. The FBI informed us
23 that they have withheld the grand jury documents. I
24 just wanted to let the Court know that. What I saw
25 was some inserts where it says "withheld grand jury

1 documents." So there are some records --

2 THE COURT: Okay, well, give me what you have
3 and then I will be able to make sense out of it.

4 MR. STEGEBY: Yes, Your Honor.

5 THE COURT: Okay. Thank you.

6 Mr. Harder?

7 MR. HARDER: Yes, Your Honor, may I be heard?

8 MR. BERLIN: Before we get to that, can I just
9 ask a follow-up question about the scheduling on a
10 housekeeping matter?

11 THE COURT: Yes.

12 MR. BERLIN: Did you want to -- are we going
13 to come back here or will you just set a hearing if
14 you need to hear from us?

15 THE COURT: I'm probably going to have to set
16 a hearing, but I would like to see what I have
17 first. And after I hear from you.

18 MR. BERLIN: Okay, very well.

19 THE COURT: I mean, obviously if your trial
20 schedule changes, that may adjust everything.

21 MR. BERLIN: Right. Before I sit down, Your
22 Honor, if I just may address one last thing about
23 the documents that you went through this morning.
24 We understand that there is grand jury protections
25 and there is protections in legal memoranda written

1 by an Assistant U.S. Attorney, and the only thing
2 that we would really ask for in that is that in some
3 of those instances what we'll really interested in
4 -- I'm not interested in what the Assistant U.S.
5 Attorney is thinking, that's the deliberative
6 process part of this. What I am interested in are
7 facts. And oftentimes a memo may start with the
8 fact section and say here are the facts. Like I'm
9 interested in facts. So if there is factual
10 disclosures that can be made as you're reviewing
11 those documents, if I might plant a seed in your
12 head about that, that would be the kind of thing
13 that we would like.

14 And in some instances -- in a couple of
15 instances Your Honor raised the question of whether
16 certain things were protected as work product but
17 they were correspondence to third parties and
18 there's a question in that regard about whether
19 those things are private at this point or protected
20 work product. If I send somebody a letter, I think
21 I no longer have any work product protection in
22 that, and I just wanted to raise both of those
23 things.

24 So I appreciate that before I sit down and
25 we'll try and get our part and Mr. Stegeby's part

1 done hopefully over the next week or so. And would
2 you like a report or something from us to tell you
3 what happened?

4 THE COURT: Yeah. What I would like, if you
5 do a -- you can call it a notice of filing or
6 whatever you would like, and tell me the agreed to
7 dates, if you have agreed to dates. And if you want
8 to address that issue or if you want me to conduct a
9 hearing, you can address it orally, just let me know
10 what you want to do.

11 MR. BERLIN: Thank you very much, Your Honor.

12 MR. STEGEBY: Just one more thing. I just
13 wanted to let Your Honor know that we plan on filing
14 a motion for summary judgment.

15 MR. BERLIN: There had to be some cost of
16 having an extension of the trial. That's it right
17 there.

18 THE COURT: Thank you. Mr. Harder?

19 MR. HARDER: Thank you, Your Honor. Very
20 briefly, I just wanted to address a few points. The
21 first one is that -- and I wrote the quote
22 Mr. Berlin said: "Mr. Bollea has used the arms of
23 the federal government to suppress."

24 THE COURT: I ignored it.

25 MR. HARDER: I didn't, Your Honor. Nothing

1 could -- I take it personally. My client would take
2 it personally once he hears this --

3 THE COURT: You're sort of grandstanding. We
4 don't need that kind of thing. It doesn't have any
5 effect on me whatsoever.

6 MR. HARDER: I understand, Your Honor, but we
7 also have members of the press in the audience and I
8 can't let this go unaddressed.

9 Nothing could be further from the truth and I
10 think it's shameful for someone to make a statement
11 like that and I've never heard in 18 years of
12 practicing law anyone make such a statement.

13 The second thing, Your Honor, is I just want
14 to address the issue of the DVDs that went to Judge
15 Campbell. Judge Campbell reviewed those DVDs,
16 counsel reviewed the DVDs, we had a motion in limine
17 yesterday and she granted the motion and those DVDs
18 are out of trial. I just wanted to make that clear
19 because this whole lawsuit is about getting
20 discovery for purposes of the trial in the state
21 court. Well, those DVDs are out. The judge found
22 that there is massive problems with the DVDs and
23 they're just not relevant to the case because the
24 case doesn't pertain to the content that's on those.

25 THE COURT: Well, that's certainly her

1 decision.

2 MR. HARDER: Also, Your Honor, Mr. Berlin
3 talked about that he's trying to -- he's doing all
4 this discovery in order to get to the bottom of why
5 Mr. Bollea really brought the lawsuit. Well, we had
6 a motion in limine on that issue, namely what his
7 motives or alleged motives were for bringing a
8 lawsuit. The judge granted that motion in limine as
9 well; that's not allowed to be heard.

10 So the point is from our perspective and we
11 recognize that a lot has been done and a lot is
12 going to be done and we're not standing in the way
13 of that. But from our perspective a lot of this is
14 really is a side show. It's a lot of -- it's much
15 ado about nothing.

16 But when you look at the underlying -- there
17 are two underlying matters. One is that Gawker
18 played a one minute 41 second excerpt of my client
19 naked and having sex. The second is that separately
20 my client was the target of an extortion. And so he
21 had a few options at that point. The option he
22 decided to take was to go to the FBI and seek
23 prosecution of the extortionist.

24 The FBI had Mr. Houston communicate with the
25 extortionist and set up a sting and that's what

1 these audio CDs are and that's where these DVDs come
2 from and that's where these alleged transcripts come
3 from.

4 Mr. Berlin is saying, well, these DVDs aren't
5 reliable and these DVDs have problems with them and
6 the audio is all over, and then he accuses the FBI
7 and my client of having something to do with it,
8 which couldn't be further from the truth.

9 These DVDs came from an extortionist, someone
10 who is trying to get money out of saying these DVDs
11 contains certain content, a content that you're
12 going to want to make go away with a big check.
13 Well, none of that is reliable.

14 So I'm just adding just some context here
15 because I feel like some of it is either not being
16 addressed or is being glossed over.

17 Two other things, Your Honor. One is
18 apparently the government produced a big chunk of
19 materials to the other side at 2 or 3 p.m.
20 yesterday. We haven't gotten any of that.

21 THE COURT: You're not a party to this
22 lawsuit.

23 MR. HARDER: Well, actually, Your Honor, the
24 protocol that is called for under the state court
25 action is --

1 THE COURT: That's fine, you take it up with
2 the state court judge.

3 MR. HARDER: Well, Your Honor, it's that
4 materials that get -- well, I thought Your Honor
5 entered an order that you're going to be following
6 that protocol such that when DVDs get produced --

7 THE COURT: Yeah, I did, we did that. With
8 the DVDs that's -- and actually that was at
9 Mr. Berlin's request or Mr. Thomas's that they be
10 turned over to Jim Case or I guess if he wasn't
11 available, to the judge. And certainly we'll do
12 that, yes.

13 MR. HARDER: Yes. And that also calls for my
14 office and my side getting a copy of whatever gets
15 produced because up until a few minutes ago we were
16 one day away from a trial. Mr. Berlin is receiving
17 700 pages of documents and audio CDs that he says is
18 all relevant to our lawsuit, but we were about to go
19 to trial without having gotten any of that
20 information. And the protocol that was agreed to by
21 the parties and entered by the court was -- and this
22 court as well --

23 THE COURT: No, the state court.

24 MR. HARDER: The state court. Is that we were
25 to get a copy. So I would request if it's not too

1 much trouble, Your Honor, that we are an intervenor,
2 we would like to receive a copy of documents and
3 materials that come from the FBI and go to the
4 Gawker parties.

5 THE COURT: Mr. Stegeby?

6 MR. STEGEBY: Your Honor, I would take the
7 position that Mr. Bollea can use the state court
8 system to get copies of whatever we produced to
9 Gawker rather than Your Honor ordering us to submit
10 materials to a third party.

11 THE COURT: Yeah, that's my thought, too. You
12 take it up with the state court judge. If she
13 orders them to produce it, they have to produce it.
14 That's her problem.

15 MR. HARDER: That's fine, Your Honor. One
16 final thing, Your Honor, is the reason we're
17 intervening is because of the privacy aspects of the
18 content that's at issue. Both the DVDs which have
19 video and audio, as well as the audio CDs which
20 Mr. Berlin was saying -- I haven't heard them
21 myself, but he was saying that there was audio from
22 the secret recordings in a bedroom that were on the
23 audio CDs of the meeting with Mr. Davidson.

24 My point is, Your Honor, this is all highly,
25 highly private information, it was a secret filming,

1 and there has been interest among the members of the
2 press to get access to that information. We would
3 request that the court do whatever means it has
4 available to ensure that information being disclosed
5 from the government to the Gawker parties does not
6 find its way into -- at least with regard to the
7 recordings, does not find its way into the public
8 domain because that would be a disaster from our
9 point of view and it's what our whole state court
10 lawsuit is all about and it would be unfortunate if
11 a party in a state court lawsuit is able to bring a
12 federal court lawsuit and undo that when we are
13 seeking in the state court action which is a
14 permanent injunction from the video and audio and
15 all aspects of the secret recording to ever be shown
16 to the public.

17 THE COURT: Well, I said this in my order, but
18 I suggest you take that up with the state court
19 judge. The items that I am ordering produced or
20 that they have produced were pursuant to a FOIA
21 request and that's what FOIA is, it's something the
22 public "is entitled to."

23 If that violates the state court judge's
24 Protective Order, you need to take that up with the
25 state court and she can certainly -- she has

1 jurisdiction over Gawker and they're a party in her
2 lawsuit and she can certainly tell them what to do
3 or not do.

4 MR. HARDER: I understand, Your Honor. The
5 state court judge doesn't have jurisdiction over the
6 press making inquiries with the federal court,
7 though; that's why I was bringing this up with you.

8 THE COURT: Well, if you're concerned about
9 them making inquiries with me, I'm not going to talk
10 with them about it.

11 MR. HARDER: Well, I mean, with the federal
12 court to try to -- or with the FBI to try to obtain
13 these same materials.

14 THE COURT: That's between the FBI and the
15 press.

16 MR. HARDER: Okay. Thank you, Your Honor.

17 THE COURT: Thank you. Okay. I'll enter a
18 short order after we are adjourned. And
19 Mr. Stegeby, could you give me what you have?
20 Copies?

21 MR. STEGEBY: Yes, Your Honor.

22 THE COURT: And actually you can just give
23 them to my lawsuit, Ms. Kirkwood over here.

24 MR. STEGEBY: Your Honor, they're Bates
25 stamped and there are three binders that is from the

1 FBI. Then I have a small manila folder from the
2 EOUSA.

3 THE COURT: Okay. Thank you very much. All
4 right. We're adjourned.

5 (The proceedings adjourned at 11:10 a.m.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

I, Lynann Nicely, RMR, CRR, Official Court Reporter for the United States District Court, Middle District, Tampa Division,

DO HEREBY CERTIFY, that I was authorized to and did, through use of Computer Aided Transcription, report in machine shorthand the proceedings and evidence in the above-styled cause, as stated in the caption hereto, and that the foregoing pages, numbered 1 through 94, inclusive, constitute a true and correct transcription of my machine shorthand report of said proceedings and evidence.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Tampa, County of Hillsborough, State of Florida, July 2, 2015.

/s/ Lynann Nicely
Lynann Nicely, RMR, CRR,
Official Court Reporter