



MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
KENT COUNTY
102 WEST WATER STREET
DOVER, DELAWARE 19904

CIVIL DIVISION (302) 739-7641
FAX (302) 739-7652
CRIMINAL DIVISION (302) 739-4211
FAX (302) 739-6727

October 31, 2016

Hon. Richard R. Cooch, Resident Judge
New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, DE 19801

**Re: *Rudenberg v. Delaware Department of Justice, et al.*,
C.A. No. N16A-02-006 RRC**

Dear Judge Cooch:

Your Honor, by letter dated September 30, 2016, has asked the parties in the above-captioned docket to address the following: 1) whether the Court can and should consider new facts raised in the declaration of Russell D. Hanson attached to the United States' Statement of Interest; 2) whether the Appellant may take discovery, including the deposition of the declarant, in this FOIA appeal; and 3) whether the matter ought to be remanded for further consideration by the Chief Deputy Attorney General ("CDAG"). Please accept this letter as the response of the Appellee Delaware Department of Justice.

1) The Court may and should consider the Statement of Interest of the United States, including any facts raised in the declaration of Russell D. Hansen.

The United States has filed a Statement of Interest in this appeal, pursuant to 28 U.S.C. § 517, which permits that "any officer of the Department of Justice, may

be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.” The United States routinely files and courts accept—without controversy—such Statements of Interest in various types of litigation. *See, e.g., Alvey v. Gualtieri*, 2016 WL 6071746 (M.D. Fla. Oct. 17, 2016) (accepting Statement of Interest filed by the United States pursuant to 28 U.S.C. § 517 and denying defendant’s motion to strike); *Gross v. German Found. Indust. Initiative*, 456 F.3d 363, 384-85 (3d Cir. 2006) (holding the United States has statutory right to file a statement of interest in any case in which it is interested).

Appellant does not dispute in his October 12, 2016 letter that the United States has a statutory right to file and did properly file its Statement of Interest before this Court. Further, Appellant does not dispute that this Court may consider the Statement of Interest. Thus, it is uncontested by the parties that this Court may and should consider the issues and arguments raised by the United States in its Statement of Interest to the extent that any facts at issue in the declaration of Russell D. Hanson (the “Declaration”) are not implicated.

This Court may and should consider the Declaration as well as any facts included in the Declaration. Statements of Interests filed by the United States are often accompanied by sworn declarations or other documents that provide additional information to the court. For instance, the United States filed Statements of Interest with supporting declarations and documents in the following dockets:

- *Ungaro-Benages v. Dresdner Bank A.G.*, Case No. 01-2547-Civ (S.D. Fla.) (Statement of Interest of the United States accompanied by Declaration of Stuart E. Eizenstat and multiple supporting documents) (filed Jan. 22, 2002)
- *Hunter v. District of Columbia*, Case No. 1:12-cv-01960-GK (D. D.C.) (Statement of Interest accompanied by supporting document, Settlement

Agreement between the United States of America and the District of Columbia under the Americans with Disabilities Act) (filed July 26, 2013)

- *Sokolow v. Palestine Liberation Army*, Case No. 1:04-cv-00397-GBD-RLE (D. S.N.Y.) (Statement of Interest accompanied by Declaration of Antony J. Blinken) (filed Aug. 10, 2015)
- *Faith Action for Community Equity v. Hawaii Dep't of Transportation*, Case No. 1:13-cv-00450-SOM-RLP (D. Haw.) (Statement of Interest accompanied by Declaration of Bernadette Brennan and supporting document, Appendix A to Part 1200 – Certification and Assurances for Highway Safety Grants for Hawaii) (filed Mar. 28, 2014).

A review of each of the above dockets indicates that the courts accepted and considered the Statements of Interest, including supporting declarations and documents. Particularly, in *Ungaro-Benages v. Dresdner Bank*, the court expressly rejected the plaintiff's motion to strike the Statement of Interest of the United States, which included a lengthy Declaration and multiple supporting documents. *See Ungaro-Benages v. Dresdner Bank A.G.*, 2003 WL 25729923, at *3-4 (S.D. Fla. 2003) (holding a Statement of Interest is “an appropriate means of communication from the executive branch to the judicial branch” and “all of the grounds or arguments advanced by the Plaintiff in moving to strike the Statement of Interest of the United States are insufficient and unpersuasive, and the motion will be denied.”) (internal citations omitted). Moreover, in *Hunter v. District of Columbia*, despite extensive argument and briefing in opposition to the court's consideration of the Statement of Interest, the court expressly considered the Statement of Interest and accompanying supporting document in its Order deciding a motion to dismiss. *See Order* (filed Aug. 18, 2014), *Hunter v. District of Columbia*, Case No. 1:12-cv-01960-GK (D. D.C.) (“Upon consideration of the Motions, Oppositions, Replies, the United States of America's Statement of Interest, the Responses to the United States of America's Statement of Interest, the entire record herein, and for the reasons

stated in the accompanying Memorandum Opinion, it is hereby ORDERED....) (internal citations omitted). The outcome should be no different here and the United States' Statement of Interest and the accompanying Declaration should be considered by the Court.

2) The Court's consideration of the Statement of Interest does not permit the Appellant to conduct additional discovery.

Courts routinely consider Statements of Interest accompanied by declarations and other supporting documents without permitting additional discovery. A review of the aforementioned dockets—*Ungaro-Benages*, *Hunter*, *Sokolow*, and *Faith Action*—indicates that none of the courts permitted additional discovery to be taken regarding the Statements of Interests or accompanying declarations and supporting documents.

The United States files Statements of Interest for a variety of reasons, but often specifically to “correct the record” of a case in which it is not a party. *See U.S. ex rel. Budike v. PECO Energy*, 897 F.Supp.2d 300, 313 (E.D. Pa. 2012) (“In its Statement of Interest, the [United States] Government seeks to correct the record with respect to its conversation with Relator’s counsel.”). A mere “correction of the record” does not amount to, nor does it justify, full discovery benefits, including depositions. In the instant case, Appellant has introduced significant and erroneous “new facts” into the record by citing to a law review article in the Opening Brief that includes facts not otherwise in the record.¹ The United States, by filing its Statement of Interest and supporting Declaration, has merely sought to provide this Court with additional information to correct Appellant’s erroneous assertions. Just as the Appellant’s citation to information in the *HARVARD JOURNAL OF LAW & TECHNOLOGY* does not create a discovery right, the Statement of Interest and

¹ *See* Appellant’s Opening Brief at 3 n.2 and n.3 (citing to article in *Harvard Journal of Law & Technology*).

Declaration filed by the United States to “correct the record” does not require or permit additional discovery.²

Furthermore, Appellant has not specifically identified what discovery would be sought, as Your Honor directed. In Appellant’s October 12, 2016 letter, Appellant describes the “specific discovery” sought as “the opportunity to depose Special Agent Hansen” to learn “the factual basis for [his] declarations” regarding whether the “mere disclosure of model names” or “some other information” “leads to the harms he envisions.” It appears that the Appellant seeks to use discovery to conduct a fishing expedition to obtain the very information that Appellee has asserted its right to protect.

In Freedom of Information Act (“FOIA”)³ request disputes, “[d]iscovery aimed at obtaining information as to the content of the requested documents that are being withheld is not ordinarily permitted.” *Tamayo v. U.S. Dep’t of Justice*, 544 F.Supp.2d 1341, 1345 (S.D. Fla. 2008). This is precisely what Appellant is attempting with his insistence upon discovery if the Court considers the Declaration. Because the Appellant is rightly prohibited from obtaining *via* a FOIA request information regarding the models and specifications, Appellant may not attempt to obtain this information during a deposition of Special Agent Hanson. The Court should not allow this, as it would essentially moot the determination of the CDAG at issue in this appeal as well as the confidentiality concerns of the United States and Delaware governments.

² Following the Appellant’s argument regarding the need to depose Special Agent Hanson to its absurd but logical conclusion, Appellee should also be afforded the opportunity to depose any sources cited by the HARVARD JOURNAL OF LAW & TECHNOLOGY article, which contains new facts interjected into the record at this stage by the Appellant.

³ Delaware’s Freedom of Information Act (“FOIA”) is Chapter 100 of Title 29 of the Delaware Code.

Finally, if the Court finds that it will only consider the Declaration if Appellant is allowed the opportunity to depose Special Agent Hanson, then the Court should only consider the Statement of Interest to the extent that any facts at issue in the Declaration are not implicated and disregard the Declaration. The Appellant may attempt to obtain the information he seeks regarding whether “there is some other . . . combination of . . . information with model names, that leads to harm” by pursuing his request directly with the United States. *See McGeehan v. McGeehan*, 2016 WL 6299681 (Md. Ct. Spec. App. Oct. 26, 2016) (holding that wife was not entitled to additional discovery into matters addressed in the United States’ Statement of Interest filed in her divorce proceedings without the permission of the United States government, and that wife may request additional information about husband’s employment directly from the United States government through established regulatory procedures). If the Court has additional questions of Special Agent Hanson, or seeks to further explore the information provided in the Declaration, the Declaration indicates the Special Agent is available for an *ex parte in camera* communication.

3) The Court should not remand this matter to the Chief Deputy Attorney General.

26 *Del. C.* § 10005(e), the statutory provision enabling this appeal does not require nor contemplate remand to the CDAG.⁴ Although development of the record

⁴ 26 *Del. C.* § 10005(e), in relevant part, only requires “Every petition against an administrative office or officer, agency, department, board, commission or instrumentality of state government which the Attorney General is obliged to represent pursuant to § 2504 of this title shall be referred to the Chief Deputy Attorney General who shall, within 20 days of receiving the petition, render a written determination to the petitioner and the public body involved declaring whether a violation has occurred or is about to occur. If the Chief Deputy finds that a violation of this chapter has occurred or is about to occur, the Attorney General shall not represent the public body in any appeal filed pursuant to this chapter for such violation if the public body the Attorney General is otherwise obligated to represent fails to comply with the Chief Deputy's determination. Regardless

is not required or warranted, as explained above, Appellee does not dispute that in the interest of a “just, speedy and inexpensive determination”⁵ of this matter, remand to the CDAG is unnecessary and inappropriate. This Court is more than capable of considering the issues, including those raised in the properly-filed Statement of Interest.

Establishing the precedent of remand in a FOIA appeal will also not effectuate the swift administration of these types of appeals going forward. Here, the first and only opportunity of the United States to provide its Statement of Interest was in the appeal before this Court. Thus, it is inappropriate and unnecessary to remand to the CDAG for consideration of the Statement of Interest, as the Statement of Interest would never have been presented to the CDAG in the first instance. It is also unlikely that the additional insight provided by the Statement of Interest would alter the decision of the CDAG, who already granted in part and denied in part the Appellant’s FOIA request based on the information available to her at that time. The Statement of Interest would likely serve only to reinforce the CDAG’s previous determination. Thus, it is likely that remand to the CDAG for consideration of the Statement of Interest would only result in further appeals by the Appellant to this Court and additional delay of the final resolution of this matter.

Conclusion

For all of the aforementioned reasons, it is respectfully submitted that the United States’ Statement of Interest, including its appurtenant Declaration of Special Agent Hansen should be considered in its entirety. The Appellant should not be permitted to conduct “discovery” into the United States’ position, nor should Special Agent Hansen be subject to a deposition in this FOIA appeal. Should the Court

of the finding of the Chief Deputy, the petitioner or the public body may appeal the matter on the record to Superior Court.”

⁵ Super. Ct. Civ. R. 1.

disagree and believe discovery is appropriate, it is respectfully submitted that the Statement of Interest should be considered without the facts attested to in the Declaration. Regardless of the finding, the parties agree that remand to the CDAG is not appropriate.

Respectfully submitted,

/s/ Patricia A. Davis

Patricia A. Davis (Del. Bar No. 3857)
Deputy Attorney General
Delaware Department of Justice
102 W. Water Street, 3rd Floor
Dover, DE 19904
(302) 257-3233
PatriciaA.Davis@state.de.us

*Attorney for Appellee,
Delaware State Police*

cc: Richard H. Morse, Esq.
Ryan Tack-Hooper, Esq.
Joseph Handlon, DAG