

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FEB - 4 2004
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IN RE: IN CAMERA OFFICE OF
INSPECTOR GENERAL REPORT)
)
)

Civil Action No. 03-MC-62-A

JESSELYN RADACK)
petitioner)
)

UNITED STATES OF AMERICA)
interested party)

ORDER

The matter is before the Court on petitioner Jesselyn Radack's "Motion to Inspect and Copy Office of Inspector General Report and Appoint Private Counsel to Investigate Contempt of Court." Oral argument is dispensed with because the facts and legal contentions are adequately set forth in the existing record and oral argument would not aid the decisional process.

In this miscellaneous civil action,¹ Radack seeks relief in connection with a criminal case to which she is not a party, namely *United States v. John Phillip Walker Lindh*, Criminal No. 02-37-A (E.D. Va. 2002). Specifically, Radack requests permission to inspect and copy a document filed by the government *ex parte* and under seal in the *Lindh* case at docket number 308, which document she claims is a copy of a report written by the Department of Justice's Office of the Inspector

¹ Radack, by counsel, initiated this action not by the filing of a formal complaint or petition in accordance with the Federal Rules of Civil Procedure, but rather, by filing the instant motion, listing no person or entity as a respondent or defendant. Moreover, although it appears from the record that Radack mailed a copy of the motion to Attorney General Ashcroft, it does not appear that she served counsel for defendant or the government in the *Lindh* case in accordance with Rule 4, Fed. R. Civ. P.

General (OIG) pertaining to her alleged improper disclosure to the press of certain under seal documents in the *Lindh* case.

A brief summary of the procedural history in the *Lindh* case related to the motion at bar is as follows: On March 1, 2002, the government filed an *ex parte* and under seal motion for a protective order in *Lindh*, pursuant to Rule 16(d)(1), Fed. R. Crim. P., requesting authorization not to disclose to the defense certain documents submitted to the Court for an *in camera* review, arguing that such documents were (i) protected by the attorney-client, work-product and deliberative-process privileges and (ii) not subject to disclosure under either Rule 16, Fed. R. Crim. P. or *Brady v. Maryland*, 373 U.S. 83 (1963). *Lindh*, by counsel, later moved to compel production of these *in camera* documents, pursuant to Rules 16(a)(1)(A) and 16(a)(1)(C), Fed. R. Crim. P., and *Brady*.

On April 1, 2002, following supplemental briefing and oral argument by the parties, *Lindh's* motion to compel was denied and the government's motion for a protective order was granted. See *United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. Apr. 1, 2002) (Order). Because the government's motion focused solely on its request for authorization not to disclose the subject documents to the defense, and because there was no allegation that the documents contained any classified information or sensitive information vital to national security, no separate protective order was issued expressly prohibiting disclosure of the documents to the public by any present or former government employees. Rather, it was the Court's assumption, and surely the government's as well, that the government would maintain the confidentiality of these documents within its own organization. In retrospect, this was an inaccurate assumption, as it appears from an extensive investigation conducted by the OIG that a former government employee — allegedly Radack — disclosed, without government authorization, the contents of some of the protected documents to

members of the press. Thus, on June 15, 2002, following such unauthorized disclosure, the on-line edition of Newsweek magazine published an article that quoted substantial portions of the under seal documents subject to the April 1, 2002 Order. While this unauthorized disclosure may have violated some applicable statute or regulation, including a Department of Justice regulation, such disclosure did not technically constitute a violation of any Order of this Court, including the April 1, 2002 Order granting the government's motion for a protective order with respect to these documents. Indeed, the fact that no specific court orders were violated in this instance was recognized in an Order filed *ex parte* and under seal in the *Lindh* case on November 6, 2002.²

With respect to the instant motion, it is doubtful whether Radack, as a non-party private citizen, has standing to intervene in the *Lindh* case. See, e.g., *In re Globe Newspaper Co.*, 920 F.2d 88, 90 (1st Cir. 1990) (recognizing that the right of a non-party to intervene in a criminal case is doubtful, but still considering a newspaper's motion to unseal portions of the case). But even assuming she could intervene, docket number 308 is not a copy of the OIG's actual investigative report, as Radack contends; rather, it is merely a summary of the findings contained in that report, filed by the government pursuant to a Court order issued in the *Lindh* case.³ And, significantly, the

² See *United States v. Lindh*, Criminal No. 02-37-A (E.D. Va. Nov. 6, 2002) (Order) (advising parties that an Order had issued *ex parte* and under seal on November 6, 2002, pertaining to the unauthorized disclosure of certain documents filed in the *Lindh* case by persons other than the defendant or members of the defense team).

³ In this regard, on June 19, 2002, the government was directed to file a pleading by July 9, 2002 "addressing whether any documents ordered protected by the Court were disclosed by any person bound by an Order of this Court." Thereafter, on July 9, 2002, the government filed a pleading advising the Court that OIG had been assigned to conduct a thorough and comprehensive investigation of this matter and that the investigation would proceed as expeditiously as possible. Then, on October 11, 2002, the government filed docket number 308 — an *ex parte* and under seal pleading advising the Court that OIG's investigation had been complete and had resulted in the conclusion that a former government employee had, without government authorization, disclosed

government does not object to removing the seal from docket number 308,⁴ thus allowing Radack to examine the document in the public record.⁵

Radack also requests that the Court consider appointing private counsel or a special prosecutor to investigate the possible contempt of this Court's discovery orders by the Department of Justice. Again, Radack has absolutely no standing to make this impertinent request, as it is solely the province of the Court to guard the integrity of its own orders. In this regard, if further developments indicate that some person or persons violated an order of this Court, the Court may, in its discretion, take further action at that time.

Accordingly, for the foregoing reasons,

It is hereby **ORDERED** that Radack's "Motion to Inspect and Copy Office of Inspector General Report" is **GRANTED** insofar as the seal will be removed from docket number 308 in the *Lindh* case, allowing Radack to review that document in the public record. The motion is **DENIED** in all other respects.

It is further **ORDERED** that Radack's motion to "Appoint Private Counsel to Investigate Contempt of Court" is **DENIED**.

the contents of some of the subject documents to the press.

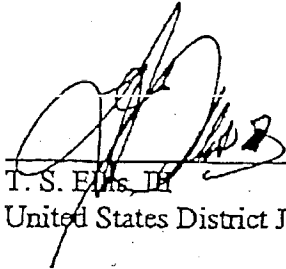
⁴ By Order dated December 9, 2003, the parties in the *Lindh* case were directed to confer to determine whether an agreement can be reached on whether the seal can be removed from all or portions of the record that are currently sealed in that matter. The parties were thus directed to file a pleading by December 19, 2003, either jointly or individually, setting forth the portions of the record that may be unsealed. This filing date was later extended to January 20, 2004 by Order dated December 18, 2003, and then again to February 16, 2004 by Order dated January 15, 2004.

⁵ There is no legal basis or sound reason to direct the OIG to disclose its actual, written, investigative findings to Radack. Indeed, this Court's interest in this matter focuses solely on the integrity of its issued orders. And, in this respect, it appears from the record that no court orders were technically violated in this instance. *See supra*.

The Clerk is directed to place this matter among the ended causes and to remove the matter from the February 6, 2004 Friday docket.

The Clerk is further directed to send a copy of this Order to all counsel of record in this case and in the *Lindh* case.

Alexandria, VA
February 4, 2004



T. S. Ems, Jr.
United States District Judge