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Mark Langer, Clerk
U.S. Court of Appeals for the D.C. Circuit
333 Constitution Avenue, N.W.
Washington, D.C. 20001

March 22, 2013

Re: *In re Sealed Case*, No. 12-5147

Dear Mr. Langer:

We are writing at the request of journalists who regularly cover the Court to inquire about *In re: Sealed Case*, No. 12-5147. The Reporters Committee and news organizations are concerned that an entire appellate docket has been sealed – briefs, rulings, and other documents – with virtually no information available to the public and no indication from the Court whether a process has been put in place to provide disclosure as soon as possible.

The basic facts of this matter are known to the public. The Washington Post, The National Law Journal, and other news organizations have reported that it involves Jeffrey Thompson, a District resident whom authorities are investigating for alleged financing of an illegal shadow campaign in support of D.C. Mayor Vincent Gray when he was a candidate for office. *See, e.g.*, Ann E. Marimow and Mike DeBonis, “Probe can see records seized from Thompson,” The Washington Post, March 5, 2013, at B1; Mike Scarcella, “Gray contributor fights DOJ over records,” The National Law Journal, June 4, 2012. Copies of these articles are enclosed.

It appears from the redacted order issued by the District Court that this appeal concerned a dispute between Mr. Thompson and prosecutors over documents seized by federal investigators. On May 3, 2012, Chief Judge Royce Lamberth issued a Memorandum and Order under seal and gave the parties 20 days to suggest redactions to it. *See In re: Sealed Case*, No. 12-196 (D.D.C., Memorandum and Order of May 3, 2012, available at <http://www.dcd.uscourts.gov/dcd/sites/dcd/files/12-196memorandum.pdf>). At that time, the public did not know that a sealed decision had been issued or that a process was underway to partially unseal it.

On May 25, 2012, Chief Judge Lamberth issued a redacted Memorandum and Order and a second Order explaining the redaction process the District Court had undertaken with the cooperation of the parties. Once it became public, it was evident that the May 3, 2012 Memorandum and Order had contained a provision ordering the parties to provide proposed redactions within 20 days.

Mr. Thompson appealed, and this Court issued a sealed decision on March 5, 2013. In addition to the sealed order dismissing the appeal and an

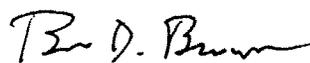
accompanying opinion, the online docket lists entries that say simply “CLERK’S ORDER filed [1423555] parties notify the court” and “CLERK’S ORDER filed [1423557] withholding issuance of the mandate.” The briefs in the appeal are all sealed and the oral argument was closed to the public. It is possible that this Court is soliciting proposed redactions from the parties for an eventual partial unsealing, akin to what the District Court did, but the public cannot know for certain because the Court’s instructions are sealed as well.

We therefore respectfully ask, on behalf of the journalists and news organizations covering this Court, that in matters requiring sealing the Court issue orders on sealing and redaction separately from orders on the merits. By segregating the subjects of sealing and redaction, the Court will put the public in a much more informed spot. In this case, for example, the public would have known at the outset that a redacted opinion is likely to be forthcoming rather than waiting in the dark for weeks or longer until some other official action follows. Such a policy of real-time public notice would faithfully uphold this Court’s express commitment to “the critical importance of *contemporaneous* access” as part of “the public’s role as overseer of the criminal justice process.” *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991).

If there is no redaction process underway in this matter, and the Court intends to keep all materials filed in this process under seal in their entirety, we request entry of a publicly available order justifying that measure. *See United States v. Hubbard*, 650 F.2d 293, 317-322 (D.C. Cir. 1980). In the absence of such an order, the public has no meaningful ability to evaluate the adequacy of the reasons for secrecy and (if appropriate) challenge it through a motion to intervene.

While this case is still in the criminal investigatory phase, the need for complete secrecy abates significantly at the appellate level when there has been both a lengthy public opinion from the District Court and a fair amount of public exposure. Even though there is only a limited right of public access to information ancillary to a proceeding still in the investigatory phase, this Court has held – in the grand jury context – that “secrecy is not unyielding where there is no secrecy left to protect.” *In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154 (D.C. Cir. 2007); *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006).

Yours very truly,



Bruce D. Brown

Enclosures

cc: Chief Judge Merrick Garland, U.S. Court of Appeals for the D.C. Circuit
Circuit Judge Thomas Griffith, U.S. Court of Appeals for the D.C. Circuit
Circuit Judge Brett Kavanaugh, U.S. Court of Appeals for the D.C. Circuit
Chief Judge Royce Lamberth, U.S. District Court for the District of Columbia

The Washington Post

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Probe can see records seized from Thompson

By [Ann E. Marimow](#) and [Mike DeBonis](#),
Published: March 5

A D.C. businessman at the center of a [far-reaching corruption probe](#) into Mayor Vincent C. Gray's 2010 campaign must let prosecutors pore through millions of pages of personal and business records, a federal appeals court ruled Tuesday.

[Jeffrey E. Thompson](#), who is alleged to have financed a "[shadow campaign](#)" for [Gray \(D\)](#) that was not disclosed as required by election laws, had fought to keep federal investigators from seeing some of the documents. It is unclear what the documents contain, but prosecutors have fought eagerly to get them to help with their investigation.

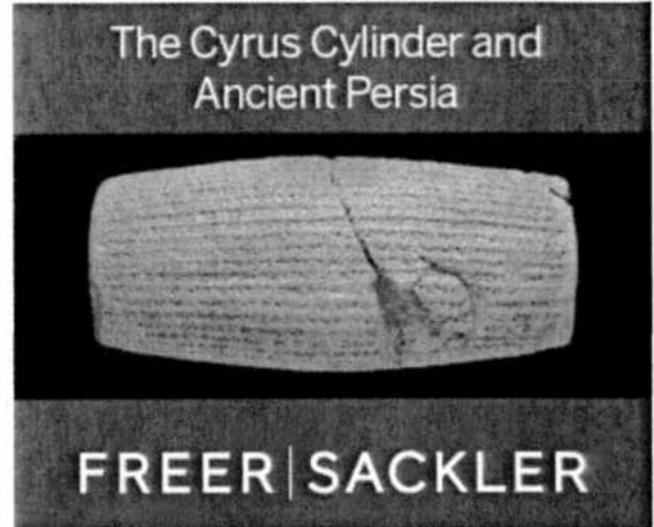
The ruling, by the U.S. Court of Appeals for the District of Columbia Circuit, was kept under seal Tuesday, but it was confirmed by two people familiar with its content. In addition, the court's online docket showed Tuesday that Thompson's appeal had been dismissed. A lower court ruling last May first disclosed the haul of more than 60 boxes of records and the request by Thompson's attorney to narrow the review of the documents.

The records under dispute were seized, at least in part, during federal raids at Thompson's home and offices last March, and a large chunk of them have been in legal limbo ever since.

Federal officials at the time said the raids were part of an investigation into city corruption, and one of Thompson's accounting partners told city officials that the search pertained to Thompson's campaign-finance activities. The raid prompted close media scrutiny of Thompson's campaign donations in the District and elsewhere.

But the scope of his potential involvement in corrupt activities was not revealed until July, when a former associate, [Jeanne Clarke Harris](#), pleaded guilty in federal court to helping orchestrate the shadow campaign in support of Gray during the 2010 mayoral election. Several people familiar with the investigation said that Thompson was the "co-conspirator" named in court filings who funded the secret, \$653,000 effort.

U.S. Attorney Ronald C. Machen said at the time that the mayoral race was "compromised by backroom deals, secret payments and a flood of unreported cash."



Under city campaign finance laws, all contributions and expenditures made on behalf of a candidate must be publicly reported. But as part of the Harris case, prosecutors alleged that Thompson wanted to keep his doings secret in order to protect his business interests with the city government if Gray were to lose.

Thompson's health-care firm, Chartered Health Plan, did \$355 million of business with the city in 2011. His accounting firm, Thompson, Cobb, Bazilio & Associates, did tens of millions more.

Since the raids, Thompson has sold his interest in the accounting firm and has withdrawn from the management of Chartered, which is now under city receivership and on the cusp of liquidation.

Prior to the raids a year ago, Thompson was a prolific fundraiser for candidates both in the city and elsewhere. Prior to his alleged secret support of Gray, he was a close supporter of former mayor Anthony A. Williams (D), and he also gave to Williams's successor, Adrian M. Fenty. Thompson also has raised funds, to various degrees, for a majority of D.C. Council members, Martin O'Malley's successful 2010 Maryland governor campaign and Hillary Rodham Clinton's 2008 presidential run.

In the earlier opinion, U.S. District Judge Royce C. Lamberth wrote that some of the documents were protected by various privileges, such as the attorney-client privilege.

But Lamberth rejected Thompson's argument that his attorneys should be allowed to review the records first. Lamberth said he had confidence in the U.S. attorney's ability to set up an independent filtering team to review records that might contain privileged information.

Thompson's attorney, Brendan Sullivan, said Tuesday, "We do not comment about cases."

A spokesman for the U.S. attorney's office also declined to comment.

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HEADLINE: Gray contributor fights DOJ over documents;
Friend of D.C. mayor challenges government's use of 'taint' team.

BYLINE: Mike Scarcella,mscarcella@alm.com, Special to the national law journal

BODY:

A prominent Washington businessman who is caught up in a campaign finance investigation is fighting to restrict the government's ability to review tens of millions of pages of documents seized from his home and office.

Federal agents in March executed search warrants against Jeffrey Thompson, a longtime accountant and founding member of a professional services firm who is enmeshed in a probe over the 2010 mayoral election of Vincent Gray. Lawyers for Thompson, who has not been charged with a crime, want the U.S. Court of Appeals for the D.C. Circuit to limit the scope of the documents that investigators can review in the high-profile corruption probe.

At issue in the dispute is the use of a government "filter" or "taint" team to inspect 60 boxes of documents and 23 million pages of electronic files. Filter teams serve as an ethical barrier designed to keep privileged information out of the hands of the prosecution team.

Federal judges have long struggled over how much flexibility to give prosecutors to review documents without violating a person's attorney-client privilege. Across the country, there's no clear standard. Some judges have declined to allow

Gray contributor fights DOJ over documents; Friend of D.C. mayor challenges government's use of 'taint' team. The National Law Journal (Online) This article also appears in the following

government filter teams to review information that is potentially privileged.

Thompson's attorneys, including Williams & Connolly partner Brendan Sullivan Jr., contend the proposed filter team is invalid because it is made up of government lawyers. The lawyers want to do their own search for privileged information without help from federal investigators.

Chief Judge Royce Lamberth of U.S. District Court for the District of Columbia last month ruled in favor of the U.S. Attorney's Office for the District of Columbia, saying in an opinion that "the court has no reason to doubt the good faith of the government or its willingness to abide by the procedures it has suggested."

Lamberth unsealed the ruling on May 25. The 14-page redacted opinion doesn't name Thompson, but the Web address for the ruling identifies the document as "Thompson Order." Two people familiar with the Gray campaign finance investigation confirmed that Thompson is fighting the government over the attorney-client privilege in the U.S. district court. Sullivan and a spokesman for the U.S. attorney's office, William Miller, declined to comment.

Thompson's lawyers have asked the appeals court to put the government's document review on hold pending the challenge. Prosecutors on May 30 said they are opposed to a stay.

ONGOING INVESTIGATION

Prosecutors in Washington have not kept secret the ongoing investigation of the Gray mayoral election campaign, a probe that has landed on the front page of The Washington Post. Published reports in recent months characterized Thompson, a founder of Thompson, Cobb, Bazilio & Associates, as one of the city's largest political donors.

Last month, two of Gray's campaign aides, Thomas Gore and Howard Brooks, pleaded guilty to their roles in a scheme to divert funds from Gray's campaign to the campaign of a challenger.

U.S. Attorney Ronald Machen Jr. said in a statement on May 24 that "underhanded" activity with campaign funds "tainted the integrity" of the mayoral campaign. Machen praised Brooks for owning up to mistakes and telling the truth. "We urge others to do the same as we continue our efforts to get to the bottom of what happened during the 2010 election," he said.

The ongoing dispute over the Thompson documents could delay how swiftly prosecutors wrap up the Gray campaign investigation. Prosecutors told Lamberth that the government has not yet inspected the millions of pages taken from Thompson. The government, Lamberth said, proposed using a filter team to review the documents at the same time that Thompson's team would conduct their assessment of the files. The sides would then submit any privilege disputes to a judge for resolution.

Thompson, however, objected to the procedure, arguing that his team alone can conduct a substantive privilege review without government intrusion. Thompson's legal team pointed to a D.C. Circuit decision in 2007 over the propriety of search warrants concerning then-Rep. William Jefferson (D-La.), the target of a public corruption probe.

At issue in the Jefferson dispute was whether the seizure of documents from a congressional office violated the Constitution's speech or debate clause, which gives some protection to legislative files and testimony. The D.C. Circuit said a judge must first conduct the privilege review and return any protected documents to the congressman.

Gregory Poe, a name partner at Washington's Poe & Burton, said in a friend-of-the-court brief in support of Jefferson that "filter teams are nothing more than blunt objects masquerading as surgical instruments."

The Thompson dispute gave Lamberth the chance to test the boundaries of the Jefferson decision. The judge said he was "loathe to apply" the Jefferson ruling "beyond the exceptional circumstances posed in that case." Under the

Gray contributor fights DOJ over documents; Friend of D.C. mayor challenges government's use of 'taint' team. The National Law Journal (Online) This article also appears in the following

government's proposed review process, Thompson has a chance to assert privilege claims before the investigative team ever sees the information. That wasn't the case in the Jefferson matter, Lamberth said. Lamberth said he is confident the procedures in the Thompson document review will ensure the investigation team does not have access to potentially privileged documents.

"Indeed, the government has every incentive to abide by its procedures, because any leaks between the filter team and the investigation team...may lead to a violation of the petitioners' Sixth Amendment rights and will compromise the prosecution's ability to secure a conviction," the judge wrote.

NO SINGLE STANDARD

The U.S. Justice Department's manual on the search and seizure of computers, last updated in 2009, said the "preferred practices for determining who will comb through the files vary widely among different courts."

Prosecutors prefer to use filter teams over special masters, who "often take several years to complete their review."

No single standard has emerged through court rulings in recent years, according to the manual's authors, including the Justice Department's Nathan Judish, a senior counsel in the computer crimes and intellectual property section.

The Sixth Circuit in 2006, for example, "expressed discomfort" with filter teams in connection with grand jury subpoenas, but not in relation to search warrants.

In 2007, U.S. District Judge Richard Roberts in Washington ordered a special master to review electronic information for any privileged communication. The use of a special master, Roberts said, "will best promote the appearance of fairness."

Lamberth said in the Thompson dispute that he is unaware of any circumstance that would "give rise to any special appearance of impropriety through the use of a filter team." Still, the judge said the use of a filter team viewing privileged documents "will have some chilling effect, if only marginal," on communication between lawyers and clients.

Mayer Brown white-collar defense partner Kelly Kramer, who is not involved in the Thompson dispute, said courts have recognized that taint teams "pose real risks to privilege holders" and that they should only be used when there is no viable alternative.

"What is curious here is that it seems there is a perfectly good alternative: letting the defense conduct the privilege review," said Kramer, who has litigated privilege issues flowing from search warrants. "In fact, the opinion seems to suggest that the defense and the taint team may be reviewing the same documents at the same time. If that is right, it is hard to see what good purpose is served by the taint team."

Mike Scarcella can be contacted at mscarcella@alm.com.

LOAD-DATE: November 1, 2012