UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION AND SUPPORTING MEMORANDUM TO STRIKE PLAINTIFFS' "NOTICE OF SUPPLEMENTAL INFORMATION IN SUPPORT OF PLAINTIFFS' RENEWED REQUEST FOR EMERGENCY STATUS CONFERENCE REGARDING THE SECURITY OF ELECTRONIC TRUST RECORDS (FILED JANUARY 4, 2005) AND CONTINUING VIOLATION OF DECEMBER 17, 2001 CONSENT ORDER" AND TO REQUIRE RETURN OF PRIVILEGED DOCUMENT

In opposing Defendants' motion to strike Plaintiffs' filing of a privileged document, Plaintiffs make a series of false assertions about the circumstances surrounding the memorandum and its meaning, incorrectly construe the Court's rulings on attorney-client privilege, and – by their silence – admit that they received the memorandum from an unauthorized source. As a result, the Court should strike the filing and order Plaintiffs to return the privileged memorandum to Defendants.

DISCUSSION

First, Plaintiffs repeat their false claim, originally made in their Notice, that the memorandum shows that Interior reconnected BIA systems to the Internet. Plaintiffs' Opposition at 2-5 (Feb. 18, 2005). Plaintiffs state that Defendants "do not even purport to contest this fact in their Motion to Strike." Opposition at 2. Yet, as Defendants pointed out in the Motion, the memorandum establishes

on its face that the "remote dial-up" does not involve Internet connectivity. Motion at 2-3.

Moreover, despite Plaintiffs' claim that "there is not a shred of evidence that Plaintiffs' Notice constitutes 'false representations,'" Opposition at 3, the memorandum is unrebutted in concluding that the dial-up to Lotus Notes does not violate the Court's orders barring reconnection of BIA systems to the Internet. Plaintiffs' Notice and Opposition are evidence of nothing but Plaintiffs' uninformed pronouncements about Internet connectivity. Thus, Defendants have no reason to offer or cite to evidence other than the memorandum.

Second, Plaintiffs misconstrue the Court's opinions concerning attorney-client privilege and the fiduciary exception to the privilege. See Opposition at 4-5. Plaintiffs argue that Interior sought advice related to trust administration and therefore to fiduciary matters. Opposition at 4. To the contrary, as the memorandum unequivocally reveals, Interior sought advice solely concerning whether the dial-up connection would expose Interior to civil or criminal liability resulting from a potential violation of the Court's orders. Such communications concern "non-fiduciary" matters and are therefore not subject to the fiduciary exception as defined by this Court. Cobell v. Norton, 212 F.R.D. 24, 31 (D.D.C. 2002).[1]

Also contrary to Plaintiffs' contention, Defendants have met their "burden of demonstrating that the document[] at issue solely concern[s] nonfiduciary matters." Cobell v. Norton, 212 F.R.D. 24, 30, quoted in Opposition at 5. The memorandum identifies who was involved in seeking and providing the advice, the subject matter of the advice, and the legal issue examined. This information fulfills the

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[1] While Interior Defendants respectfully disagree with the Court's formulation of the fiduciary exception as first set forth in Cobell v. Norton, 212 F.R.D. at 26-32, even under that formulation, the memorandum is privileged.

elements of attorney-client privilege, as recently restated by this Court. Memorandum Opinion at 36-37 (Feb. 8, 2005). Specifically, the memorandum, together with the Motion and Defendants' January 14, 2005, letter to Plaintiffs' counsel (Motion Exhibit 2) establish that Defendants have met their burden: (1) that the Department of the Interior is the holder of the privilege and a client of the Department of Justice; (2) the communication was made (a) to a Justice Department attorney who is a member of the bar of this Court and (b) was acting as a lawyer in connection with this communication; (3) the communication relates to facts related to the attorney (a) by her client, (b) without the knowledge of individuals outside of Interior or the Justice Department, (c) to secure primarily an opinion of law and/or assistance in a legal proceeding, (d) and not for the purpose of committing a crime or tort; and (4) Defendants have (a) claimed the privilege and (b) not waived the privilege. See Memorandum Opinion at 37 (quoting Alexander v. FBI, 193 F.R.D. 1, 4 (D.D.C. 2000)). Thus, the memorandum provides the evidence to support Defendants' claim of privilege.[2]

Finally, by their continued silence, Plaintiffs implicitly admit that they received the memorandum from an unauthorized source. See Motion at 2 & n.2. Their improper acquisition and unjustified publication of this privileged document requires that it be returned to Defendants and removed from Plaintiffs' website.

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[2] Plaintiffs also attempt to reserve an argument by stating they possess "evidence that may implicate the crime-fraud exception" to the attorney-client privilege. Opposition at 5 n.8. However, Plaintiffs have already waived the right to make such an argument because they failed to seek *in camera* review of the document before disclosing it. See United States v. Zolin, 491 U.S. 554, 572 (1989); United States v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996). Moreover, Plaintiffs would first have been required to submit evidence – other than the memorandum itself – of crime or fraud before the Court could agree to review the memorandum *in camera*. Zolin, 491 U.S. at 574-75.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court issue an Order striking Plaintiffs' Notice, directing Plaintiffs to remove all copies of the Notice from the Internet and any other public media in which it may have been disclosed, and directing Plaintiffs to return the subject memorandum and all copies thereof to Defendants.

Dated: March 3, 2005

Respectfully submitted,
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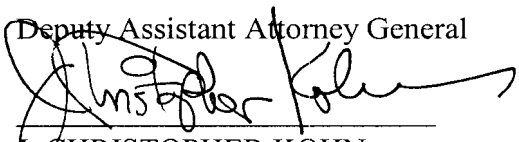

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CERTIFICATE OF SERVICE

I hereby certify that, on March 3, 2005 the foregoing *Defendants' Reply in Further Support of Motion and Supporting Memorandum To Strike Plaintiffs' "Notice of Supplemental Information in Support of Plaintiffs' Renewed Request For Emergency Status Conference Regarding the Security of Electronic Trust Records (Filed January 4, 2005) and Continuing Violation of December 17, 2001 Consent Order" and to Require Return of Privileged Document* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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Oppositions and Replies

1:96-cv-01285-RCL COBELL, et al v. NORTON, et al

U.S. District Court

District of Columbia

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