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March 2, 1998

**CONFIDENTIAL**

The Honorable Janet Reno  
Attorney General of the United States  
United States Department of Justice  
10th Street & Constitution Ave., N.W.  
Washington, D.C. 20530

Re: Prosecutorial Misconduct by the Office of  
Independent Counsel in United States of America v.  
Deborah Gore Dean, Crim. No. 92-181-TFH (D.D.C.)

Dear Attorney General Reno:

By letter dated January 14, 1998, I provided you a copy of a letter to Department of Justice Inspector General Michael R. Bromwich dated January 23, 1997, in which I had requested an expedited investigation into the Department of Justice's handling of allegations of prosecutorial misconduct by attorneys of Office of Independent Counsel Arlin M. Adams in the prosecution of United States of America v. Deborah Gore Dean, Crim. No. 92-181-TFH (D.D.C.). I had made the allegations in materials provided to the Department of Justice and White House Counsel Abner J. Mikva between December 1994 and March 1996 in connection with requests for an investigation of the Office of Independent Counsel and for the removal of Assistant Attorney General Jo Ann Harris and other former Independent Counsel attorneys from positions in the Department of Justice.

In the letter to Mr. Bromwich, I contended that Department of Justice officials had failed to investigate the allegations of prosecutorial misconduct in good faith out of concern that an investigation would reveal that certain Independent Counsel attorneys who went on to hold high positions in the Department of Justice, including Assistant Attorney General for the Criminal Division, violated federal laws through their actions as Independent Counsel attorneys in the Dean case. In my letter to you, I requested that you again consider whether there exist grounds for the removal of Independent Counsel Larry D. Thompson (who succeeded Arlin M. Adams as Independent Counsel in July 1995) both because the Department of Justice did not previously consider the matter in good faith and because developments

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subsequent to the Department's last communication to me on the matter provide independent justification for reconsideration of the earlier determination. Though I requested that you commence an investigation immediately, I indicated that I would be submitting within the next six weeks a detailed account of developments subsequent to the Department's last communication to me.

I will be submitting that account in the time frame indicated in my earlier letter. This letter, however, is intended to bring to your attention certain recent developments pertinent to issues raised in my letter to you as well as in the letter to Mr. Bromwich.

Section A addresses the Independent Counsel's action with regard to my Freedom of Information Act (FOIA) request pending with the Office of Independent Counsel since August 29, 1997, that by its term encompassed material containing allegations of prosecutorial abuse that Counsel for the Office of Professional Responsibility Michael E. Shaheen, Jr. provided Independent Counsel Larry D. Thompson by letter dated February 25, 1997. As discussed in my letter to Mr. Bromwich (at 9-10, 62-67), by letter dated November 15, 1996, a former employee of the Office of Independent Counsel wrote to Mr. Shaheen alleging that Independent Counsel attorneys had engaged in various acts of prosecutorial misconduct. The most notable of these allegations were that Independent Counsel Arlin M. Adams and Deputy Independent Counsel destroyed interview reports not helpful to the Independent Counsel's case and edited interview reports for content and that Deputy Independent Counsel Swartz had suppressed evidence and violated discovery rules. After failing to do anything with the complaint for more than three months, Mr. Shaheen finally forwarded it to Independent Counsel Larry D. Thompson. I explained in the letter to Mr. Bromwich that in Mr. Shaheen's description of the underlying allegations in his transmittal letter to Mr. Thompson (the only part of the material that the Department of Justice would make available under FOIA), Mr. Shaheen had made the complaint appear less serious by eliminating the reference to the allegation that Independent Counsel Adams and Deputy Independent Counsel Swartz destroyed interview reports and by presenting the allegation concerning the editing of interview reports in a manner to diminish the suggestion the reports were edited for content. I also explained that, though in forwarding the complaint Mr. Shaheen stated that he expected Mr. Thompson to inform the affected courts of any instances where criminal convictions were tainted by prosecutorial misconduct, in fact Mr. Shaheen had ample reason to

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know that Mr. Thompson would do nothing to inform the affected courts of such instances.

As discussed in Section A, responding to my FOIA request, the Office of Independent Counsel repeatedly represented that it did not possess any documents matching the description of the complaint enclosed with Mr. Shaheen's letter dated February 25, 1997. After I provided the Independent Counsel a copy of Mr. Shaheen's transmittal letter (which I did not secure until December 1997), Deputy Independent Counsel Dianne J. Smith represented that she had previously been unaware of the letter from Mr. Shaheen to Mr. Thompson because it was maintained in a file where such material ordinarily would not be kept. For a number of reasons, including the fact that the underlying complaint alleged that Ms. Smith had herself improperly used government resources to attempt to distribute an imported yogurt product, there is reason to believe that Ms. Smith's representations concerning the lack of knowledge of the referenced complaint are false.

If we assume, however, that Ms. Smith's statements were true, the fact that the complaint transmitted by Mr. Shaheen was treated in a way that the Deputy Independent Counsel did not even know of its existence confirms the understanding that regardless of the nature of allegations of misconduct by Independent Counsel attorneys, Independent Counsel Larry D. Thompson will not investigate such allegations.

Section B addresses the Independent Counsel's actions with regard to my Freedom of Information Act request pending since August 29, 1997, concerning a document that there is reason to believe was altered as a part of the effort by Deputy Independent Counsel Bruce C. Swartz (now Counsel to Acting Assistant Attorney General John C. Keeney) and Associate Independent Counsel Jo Ann Harris (who had assumed the position of Assistant Attorney General for the Criminal Division at the time I first filed my complaints with the Department of Justice) to deceive the court concerning certain exhibits the Independent Counsel introduced into evidence to support a false entry in the Superseding Indictment in the Dean case. As discussed in my letter to Mr. Bromwich (at 71), there is reason to believe that in order to facilitate the Independent Counsel's false use of Government Exhibits 20 and 25, Independent Counsel attorneys excluded certain information from the report of an interview of Aristides Martinez conducted on May 15, 1992. I have also been led to understand that agents of the Office of Independent Counsel falsified the transcription dates on interview reports that were

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provided to the defense. Thus, pursuant to FOIA, I requested a copy of the Martinez interview report showing the date typed on it as the date it was prepared.

In responding to my request, the Independent Counsel repeatedly denied that it possessed a copy of such a document. Deputy Independent Counsel Dianne J. Smith then represented that the Independent Counsel had misunderstood the request and that such a document did exist, but that the Independent Counsel would not provide it until a fee dispute was resolved. Now that the fee dispute has been resolved, the Independent Counsel refuses to provide the document, for the first time claiming that the information is exempt from disclosure pursuant to FOIA exemptions 6 and 7. Those exemptions do not provide a plausible basis for refusing to disclose the information.

A. The Independent Counsel's Actions Regarding The Complaint Of Prosecutorial Misconduct Transmitted To Independent Counsel Larry D. Thompson By Letter From Counsel For The Office Of Professional Responsibility Michael E. Shaheen, Jr. Dated February 25, 1997

As discussed in my December 23, 1997 letter to Department of Justice Inspector General Michael R. Bromwich (at 9-10, 62-67), by letter dated November 15, 1996, to Counsel for the Office of Professional Responsibility Michael E. Shaheen, Jr., a former employee of the Office of Independent Counsel alleged that Independent Counsel attorneys had abused their positions in a number of ways. The most significant of the allegations were that Independent Counsel Arlin M. Adams and Deputy Independent Counsel Bruce C. Swartz had destroyed interview reports that did not further the Independent Counsel's case and had edited interview reports for content and that Deputy Independent Counsel Swartz had suppressed evidence and violated discovery rules. Among other allegations were that Associate Independent Counsel Jo Ann Harris had steered a lucrative contract to a friend and that a prosecutor named Dianne J. Smith used government time and resources to set up a distributorship for an imported yogurt product. Dianne J. Smith assumed the position of Deputy Independent Counsel when Deputy Independent Counsel Swartz left the Office of Independent Counsel to assume a position as a Special Assistant to Assistant Attorney General for the Criminal Division Jo Ann Harris.

As discussed in my letter to Mr. Bromwich, the allegations in this letter not only supported claims I had previously made to the Department of Justice, but themselves warranted

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investigation, particularly when considered in light of the detailed allegations I had previously made to the Department. Moreover, at the time Mr. Shaheen received this complaint he had ample reason to know that Independent Counsel Larry D. Thompson would do nothing to address the allegations of this complainant regardless of the merit of the allegations, among other reasons, because Mr. Shaheen knew that Mr. Thompson, though fully informed of the matter previously brought to the attention of the Department of Justice, had done nothing to address the Independent Counsel's prior misconduct. Nevertheless, Mr. Shaheen, after doing nothing with the complaint for more than three months, merely transmitted the complaint to Independent Counsel Larry D. Thompson by letter dated February 25, 1997. In the transmittal letter, which described the underlying complaint in ways that would diminish the impression of prosecutorial abuse (see Letter to Inspector General Bromwich at 65-66), Mr. Shaheen stated: "Of course, if your investigation should determine that any criminal prosecutions were tainted by misconduct, we expect that you will take appropriate steps to inform the affected courts."

On August 29, 1997, I submitted a Freedom of Information Act request to the Independent Counsel requesting the following records:

8. All documents not filed in court in which the Office of Independent Counsel or Independent Counsel attorneys have been accused of prosecutorial misconduct or of attempting to mislead the court.

By letter dated September 5, 1997, I stated that the Independent Counsel should not include in its response to Item No. 8 of the August 29, 1997 request documents literally falling under the request that I had personally submitted to the Office of Independent Counsel.

After I had agreed to pay up to \$250.00 in search and reproduction fees by letter dated September 15, 1997, I received materials provided with a letter from Administrative Officer Theresa W. Duggan dated September 26, 1997, which stated with regard to the documents the Independent Counsel had produced:

Enclosed please find the documents responsive to your FOIA request of August 29, 1997. Where appropriate, certain personal privacy information has been withheld from disclosure pursuant to exemption 6 of the FOIA.

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Enclosed were approximately 1,064 pages of material, including some materials evidently responsive to Item No. 4 of that request, from which some personal information had indeed been redacted. The only material enclosed that appeared responsive to Item No. 8 was a May 6, 1997 letter to Independent Counsel Larry D. Thompson from Acting Assistant Attorney General John C. Keeney, enclosing some materials that had been forwarded to the Department of Justice by Senator Wendell Ford.

By letter dated October 24, 1997, I informed Deputy Independent Counsel Dianne J. Smith that the materials enclosed with Mr. Keeney's May 6, 1997 letter were the only documents apparently responsive to Item No. 8 of my request of August 29, 1997. I also explained that I did not believe that these materials were the only documents not filed in court (other than the materials submitted by me) in which the Office of Independent Counsel or Independent Counsel attorneys have been accused of prosecutorial misconduct or of attempting to mislead the court. I then stated:

I would therefore appreciate your conferring with Independent Counsel Larry D. Thompson to verify that the Office of Independent Counsel represents that the letter from Mr. Keeney just described is the only document responsive to Item No. 8.

And I noted:

As with other matters I have brought to the attention of the Office of Independent Counsel, be mindful that any false representation to me concerning this matter would violate 18 U.S.C. § 1001.

By letter dated November 24, 1997, responding to my appeal and request for clarification, Deputy Independent Counsel Smith stated in evident response to my request that the Independent Counsel clarify whether the materials provided by Mr. Keeney were the only materials responsive to Item No. 8 (emphasis added):

In addition, be advised that this office and its employees are fully aware of their obligations under federal law, including the FOIA, and will continue to act in accordance therewith. The OIC has provided you with all **unexempted** documents responsive to your requests. Your suggestion that any "false representation" to you would violate 18 U.S.C. § 1001 is both legally incorrect and offensive.

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In an appeal letter dated November 29, 1997, I explained that this response left me still not knowing whether the Office of Independent Counsel represented that the materials supplied by Mr. Keeney were the only materials in court falling under Item No. 8. I noted that I did not interpret Ms. Duggan's letter of September 26, 1997, to mean that there might be responsive materials other than those provided to the Independent Counsel by Mr. Keeney, but that such materials had been withheld pursuant to the privacy exemption referenced in Ms. Duggan's letter. I also pointed out, however, that the quoted language from Ms. Smith's letter suggested the possibility that, as I stated I believed was in fact the case, there did exist additional material containing accusations of prosecutorial misconduct by the Office of Independent Counsel.

Thus, I again requested that the Office of Independent Counsel state whether the materials provided by Mr. Keeney were the only materials responsive to Item No. 8 of my August 29, 1997 Freedom of Information Act request. I also requested that if the Independent Counsel was taking the position that, based on some Freedom of Information Act exemption, the Independent Counsel does not have to disclose whether such materials exist, it would so state.

In my letter of November 29, 1997 (at 5-6), I also stated that I was recently led to believe that near the end of February 1997, Counsel for the Office of Professional Responsibility Michael E. Shaheen, Jr. had represented that he was forwarding certain materials to Mr. Thompson containing allegations of prosecutorial abuse by Independent Counsel attorneys. I noted that I had been led to understand that among those allegations were claims that Independent Counsel attorneys had modified or destroyed interview reports. And I noted that these materials would have been transmitted to Mr. Thompson at approximately the same time that I first brought to the attention of Ms. Smith and Mr. Thompson, by my letter to Mr. Thompson dated February 26, 1997 (at 5), my reasons for believing that Independent Counsel attorneys had excluded certain information from the report of the May 15, 1992 interview of Aristides Martinez that would have interfered with the Independent Counsel's intended false use of the Arama consultant agreement in Government Exhibits 20 and 25.<sup>1</sup>

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<sup>1</sup> See my letter to Mr. Thompson dated February 26, 1997, at 5. See also my letters to Mr. Thompson dated March 26, 1997 (at 5), May 14, 1997 (at 5-6), June 9, 1997 (at 2), and July 3, 1997 (at 2), and July 28, 1997 (at 2).

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I pointed out that this was an important issue with regard to the matter that had been the subject of my extensive correspondence with Mr. Thompson since February 26, 1997, including my repeated efforts to cause Mr. Thompson to disclose whether the document he represented to be a true copy of Government Exhibit 25 in his letter to me dated March 25, 1997 (but from which the part most relevant to the Independent Counsel's false use of the exhibit was missing), was in fact a true copy of that exhibit. Thus, I pointed out that any attempt to deceive me in responding to my Freedom of Information Act request concerning this matter would violate 18 U.S.C. § 1001 and probably other federal laws as well.

Finally, I noted that whether in fact Mr. Shaheen had forwarded the materials referenced above was the subject of a Freedom of Information Act request pending with the Department of Justice.

By letter to me dated December 19, 1997, Ms. Smith stated with regard to the request for clarification concerning Item No. 8 of my Freedom of Information Act request dated August 29, 1997, and certain other requests for clarification in my letter dated November 29, 1997:

As regards the remaining clarifications sought, the OIC has fully complied with its FOIA obligations in its previous responses to those issues. The OIC therefore denies your appeal as to those clarifications.

Between the time of my letter dated November 29, 1997, and Ms. Smith's response dated December 19, 1997, I had secured a copy of the letter by which Mr. Shaheen transmitted the above-referenced complaint of prosecutorial abuse to Independent Counsel Larry D. Thompson. By letter dated January 5, 1998 (Attachment 1), I transmitted a copy of that letter to Ms. Smith.

In the transmittal letter to Ms. Smith, after recounting the history of my efforts to cause the Independent Counsel to state whether the Independent Counsel had received any complaints of prosecutorial misconduct not filed in court other than those submitted by me and the material provided by Mr. Keeney to Mr. Thompson, I again requested that the Independent Counsel clarify whether, contrary to the representation effected by the Independent Counsel's Freedom of Information Act response dated September 26, 1997, the Independent Counsel did possess at least a copy of the February 25, 1997 letter from Counsel for the Office of Professional Responsibility Michael E. Shaheen, Jr. and its enclosure. I then stated:



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If the Independent Counsel does possess the letter from Mr. Shaheen and its enclosure, pursuant to the Freedom of Information Act, may I have copies? If the Independent Counsel refuses to provide copies, on what Freedom of Information Act exemption does the Independent Counsel base that refusal? Does the Independent Counsel possess other records reflecting complaints of prosecutorial abuse by Independent Counsel attorneys other than those made by me and other than those in the materials provided with Mr. Shaheen's letter dated February 25, 1997?

By letter dated February 2, 1998 (Attachment 2), Ms. Smith provided me a copy of the letter from Mr. Shaheen to Mr. Thompson, stating:

Finally, upon receipt of your letter requesting the February 25, 1997 letter from Counsel for the Office of Professional Responsibility Michael Shaheen, the OIC conducted another review of its files to determine if it had a copy of this letter. The OIC found a copy of the letter in a location not ordinarily containing correspondence of the nature you requested.

Ms. Smith's letter, however, made no reference to the enclosure to the letter from Mr. Shaheen to Mr. Thompson and did not respond to the other question posed in my letter. Thus, by letter dated February 9, 1998 (Attachment 3), I again requested that the Independent Counsel provide me a copy of the enclosure to the letter to Mr. Shaheen. In addition, in light of Ms. Smith's acknowledgment that, contrary to earlier representations by the Office of Independent Counsel, the Office of Independent Counsel did possess at least one complaint of prosecutorial misconduct not filed in court other than in materials submitted by me and other than in the materials provided in the May 6, 1997 letter from Mr. Keeney, I again requested an assurance that the Independent Counsel possesses no other complaints of prosecutorial misconduct not filed in court other than those just described and other than the materials provided in the February 25, 1997 letter from Mr. Shaheen.

As discussed in the introductory section, for a variety of reasons, including the fact that the letter enclosed with the February 25, 1997 letter from Mr. Shaheen to Mr. Thompson specifically alleged that Ms. Smith had herself misused government resources in order to conduct a business for profit

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while employed by the Office of Independent Counsel, there is reason to believe that Ms. Smith was fully aware of the materials provided in the February 25, 1997 letter from Mr. Shaheen when she repeatedly represented to me that she was aware of no such materials. On the other hand, however, assuming that Ms. Smith's representations regarding her knowledge of the letter from Mr. Shaheen and the complaint it enclosed were true, the facts that the complaint transmitted by Mr. Shaheen was treated in a manner that the Deputy Independent Counsel was unaware of its existence and that good faith efforts to locate any such document failed to do so confirms that, regardless of the nature of allegations of Independent Counsel misconduct, they will not be investigated or addressed by the current Independent Counsel. Thus, whether or not Ms. Smith's representations to me concerning her unawareness of the complaint transmitted to Mr. Thompson by Mr. Shaheen were true or false, these events provide additional reason why the Department of Justice cannot rely on the Office of Independent Counsel to call to the courts' attention instances where convictions were tainted by prosecutorial abuses.

In addressing this matter with you, however, I do not mean to suggest that it adds materially to things you already know about Independent Counsel Larry D. Thompson's refusal to alert the court concerning Independent Counsel misconduct, even when that misconduct violates federal law. The letter to Mr. Bromwich and the materials provided with it, including the December 9, 1997 letter to Mr. Thompson, make clear that Mr. Thompson is fully aware that Independent Counsel Arlin M. Adams, Deputy Independent Counsel Bruce C. Swartz, Associate Independent Counsel Claudia J. Flynn (until recently Chief of Staff for the Criminal Division), and Associate Independent Counsel Robert J. Meyer (attorney in the Criminal Division) were involved in a conspiracy to obstruct justice by deceiving the court in resisting discovery into whether Supervisory Special Agent Alvin R. Cain, Jr. committed perjury. You should also be well aware that Mr. Thompson, who presumably is himself now a party to that conspiracy, will do nothing to address it. Nevertheless, I believe it appropriate that you be informed of the representations the Independent Counsel has made concerning a matter in which the Department of Justice has ostensibly presented itself as believing that Independent Counsel would address instances where convictions were tainted by prosecutorial abuses.

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B. The Independent Counsel's Refusal To Provide A Dated Copy Of The May 15, 1992 Interview Report Of Aristides Martinez

As discussed in my letter to Mr. Bromwich (at 71), and as mentioned above, there is reason to believe that in order to facilitate the false use of Government Exhibits 20 and 25, Independent Counsel attorneys excluded certain information from the report of an interview of Aristides Martinez conducted on May 15, 1992. I explained the reasoning for this view in various letters to Mr. Thompson seeking an opportunity to review the originals of those and certain other exhibits and requesting that Mr. Thompson explain why the part of Government Exhibit 25 most significant in the Independent Counsel's false use of that exhibit was missing from the copy of Government Exhibit 25 Mr. Thompson provided to me by letter dated March 25, 1997. This concerns a matter in which Associate Independent Counsel Jo Ann Harris and Deputy Independent Counsel Bruce C. Swartz would both have been involved. And unless the Department of Justice takes the position that it is not a violation of federal law for federal prosecutors to make false entries in an indictment and introduce false documents into evidence to support those entries, Department of Justice officials have had reason to know for more than three years that Ms. Harris and Mr. Swartz engaged in criminal conduct regarding this matter.

In addition to believing that Independent Counsel attorneys had excluded information from the Martinez interview report that would have precluded the Independent Counsel's false use of Government Exhibits 20 and 25, I had reason to believe that the dates typed on interview reports as the dates on which the reports were transcribed were not the true dates on which the reports were transcribed. My basis for this belief was knowledge that the same former Independent Counsel employee who wrote the November 15, 1996 letter to Mr. Shaheen had elsewhere alleged that agents of the Office of Independent Counsel had falsified the dates on the interview reports. The Independent Counsel had redacted the dates from all interview reports provided to the defense in the Dean case. While having no strong reason to believe that the date typed on the Martinez interview report would be revealing of whether information had been excluded from the report, I nevertheless had an interest in learning what date was typed on the report for such bearing as it might have on that issue and for such bearing as it might have on the separate issue of the falsification of the dates on which the interview reports were transcribed, which I assume would be a violation of 18 U.S.C. § 1001.

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Thus, in a FOIA request dated September 15, 1997, I sought the following records (emphasis added):

6. All versions in any medium of the report of the interview of Aristides Martinez conducted on May 15, 1992, other than the one found as Exhibit 1 to the Memorandum in Support of Defendant Deborah Gore Dean's Motion for Dismissal of the Superseding Indictment or, in the Alternative, for a New Trial on All Counts (Feb. 4, 1997) in United States of America v. Deborah Gore Dean, Crim. No. 92-181-TFH (D.D.C.).
7. **A copy of the interview of Aristides Martinez conducted on May 15, 1992, found as Exhibit 1 to Memorandum in Support of Defendant Deborah Gore Dean's Motion for Dismissal of the Superseding Indictment or, in the Alternative, for a New Trial on All Counts (Feb. 4, 1997) in United States of America v. Deborah Gore Dean, Crim. No. 92-181-TFH (D.D.C.), showing the date typed on the report as the date on which the report was prepared.**
8. Any documents indicating that the date typed on the report of the interview of Aristides Martinez conducted on May 15, 1992, found as Exhibit 1 to the Memorandum in Support of Defendant Deborah Gore Dean's Motion for Dismissal of the Superseding Indictment or, in the Alternative, for a New Trial on All Counts (Feb. 4, 1997) in United States of America v. Deborah Gore Dean, Crim. No. 92-181-TFH (D.D.C.), as the date on which the report was prepared is not the true date on which the report was prepared.

In a letter from Independent Counsel Administrative Officer Theresa W. Duggan dated September 29, 1997, the Independent Counsel stated that any records responsive to Item No. 6 would be exempt from disclosure pursuant to FOIA exemptions 3, 7(A) and/or 7(C), and that there were no records responsive to Nos. 7 and 8.

In my appeal letter to Deputy Independent Counsel Dianne J.

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Smith dated October 25, 1997, noting that it was difficult to believe that there could be no document responsive to Item No. 7, I asked Ms. Smith to state whether I was mistaken that the redacted material at the beginning of the first page and the end of the last page of the Martinez interview report included a date on which the report was supposed to have been prepared. I also asked Ms. Smith to state whether there existed any copy of the document in the Independent Counsel's files with the date showing, including any document maintained in electronic form.

Rather than answer these quite simple questions, by letter dated November 24, 1997, Ms. Smith responded to my appeal by stating: "The OIC reiterates that there are no documents responsive to requests Nos. 7-10 and 12 (of your FOIA request dated September 15, 1997)."

I appealed this matter once more by letter dated November 29, 1997, pointing out that I had in several places stated reasons to believe that Independent Counsel attorneys excluded material from the Martinez interview report that would have shown that the Independent Counsel's intended use of Government Exhibits 20 and 25 was false. I also noted that I believed that agents of the Office of Independent Counsel may have typed dates on interview reports as the dates on which the reports were prepared that were not the true dates on which the reports were prepared.

I then stated:

What I perceive as your refusal to give a straightforward answer to some very simple questions provides additional support for that belief. In any case, I believe the literal construction of your statement is that in fact there exists no document whatever reflecting the date that had been typed on the interview as the date on which it was prepared. If that is not the true intention of your statement, please so advise me.

Meanwhile a fee dispute had arisen as a result of the Independent Counsel's seeking a \$443.00 payment for a supplemental response to my FOIA request dated August 29, 1997, for which I had agreed to pay up to \$250.00 for a complete response and for which I had already paid \$233.40. The Independent Counsel assessed the charge without consulting with me as required by Independent Counsel regulations. This led to my November 28, 1997 appeal of the charge, which the Independent

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Counsel denied by letter dated December 19, 1997. In that letter, the Independent Counsel also stated that it would refuse to comply with further FOIA requests unless I paid the contested amount in full or returned the documents for which the disputed charges had been incurred.<sup>2</sup>

In another letter dated December 19, 1997, Ms. Smith replied to my November 29, 1997 request for further clarification concerning a dated copy of the Martinez interview report by representing that the Independent Counsel had not previously understood Item No. 7 of my September 15, 1997 request to encompass "a copy of the Aristides Martinez interview report indicating the date on which the report was transcribed." Ms. Smith also stated that the Independent Counsel did possess such a document, but would not provide it until I paid the disputed charge discussed above.

By letter to Ms. Smith dated January 5, 1998, I complied with Ms. Smith's demand that in lieu of payment of the disputed

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<sup>2</sup> The Independent Counsel's actions concerning this matter are detailed in my letter to Deputy Independent Counsel Smith dated November 28, 1997, and Ms. Smith's representation as to why the Independent Counsel believed it was unnecessary to contact me before incurring an additional expense of \$443.00 is found in one of the letter's from Ms. Smith dated December 19, 1997. Though the Independent Counsel's actions concerning this matter suggest that this and another large search and reproduction charge assessed without compliance with Independent Counsel regulations were intended to give the Independent Counsel a basis for refusing to comply with further FOIA requests, the matter does not warrant detailed treatment in this letter.

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charge for the supplemental response to my FOIA request dated August 29, 1997, I return the documents provided in the supplemental response. In the same letter, I requested that the Independent Counsel provide the Martinez interview report as soon as possible, since the document should have been provided to me in the response of September 29, 1997. I also noted that:

In light of your characterization of the document, I assume I can accept the providing of the document as a representation by you that the date on the report purporting to indicate that date on which the report was transcribed is in fact that [sic] true date on which the report was transcribed.

The Independent Counsel did not respond to this request until February 2, 1998. In the Independent Counsel's letter of that date, Ms. Smith now interposed for the first time that objections that the document was exempt from disclosure pursuant to exemptions 6 and 7 of the Freedom of Information Act.

The initial request for a dated copy of the Martinez interview report in the August 29, 1997 FOIA request was clear enough. There is thus reason to believe that the Independent Counsel's initial claims that no such document existed were delaying tactics. There is also reason to believe that the initial refusal to provide the document because of the disputed charge, after the first acknowledgment of its existence by letter dated December 19, 1997, was a further delaying tactic. And I suggest that there is no merit to the Independent Counsel's belated resort to FOIA exemptions to refuse to provide the document. Thus, there is reason to believe that, whether or not material was excluded from the interview report that would have interfered with the Independent Counsel's false use of Government Exhibits 20 and 25 and whether or not the Independent Counsel believes that the date typed on the report as the date of transcription is relevant to this issue, there is reason to believe that the date is a false date. There is also reason to believe that the Independent Counsel has violated its obligations under FOIA in an effort to conceal this information.

I believe that Bruce C. Swartz, who must give truthful responses to questions you pose in this matter, can explain to you that indeed information was excluded from the interview report because the information would have interfered with the intended false use of Government Exhibits 20 and 25. Mr. Swartz can also explain to you whether agents of the Office of Independent Counsel falsified the preparation dates on interview

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reports and whether there is a false date on the Martinez interview report. I suggest that you cannot fulfil your responsibilities for oversight of the Office of Independent Counsel without making these inquiries.

Be mindful, however, that regardless of the facts concerning the Martinez interview report, the Department of Justice has long had a basis for knowing that Mr. Swartz and Ms. Harris conspired to make a false entry in the Superseding Indictment with the intent of misrepresenting the nature of certain exhibits that would be introduced into evidence to support that false entry. Thus, unless the Department of Justice takes the position that such conduct is not criminal, assuming that Department officials initially discharged their responsibilities in this manner competently and in good faith, the Department has long known that Mr. Swartz and Ms. Harris violated laws through their actions as prosecutors in the Dean case.

Sincerely,

/s/ James P. Scanlan

James P. Scanlan

Attachments

cc: The Honorable Orrin G. Hatch  
Chairman  
Senate Judiciary Committee

The Honorable Henry J. Hyde  
Chairman  
House Judiciary Committee

Michael R. Bromwich, Esq.  
Inspector General