

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY L. VIOLA,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF INVESTIGATION; U.S. DEPART-
MENT OF JUSTICE, EXECUTIVE OFFICE FOR
U.S. ATTORNEYS; CUYAHOGA COUNTY
MORTGAGE FRAUD TASK FORCE; and
KATHRYN CLOVER,

Defendants-Appellees.

No. 18-2573

**FEDERAL DEFENDANTS' MOTION TO EXPAND THE SCOPE OF
THE PARTIAL REMAND**

In this Freedom of Information Act (FOIA) action, plaintiff Anthony L. Viola seeks records from the Federal Bureau of Investigation (FBI), the Executive Office for U.S. Attorneys (EOUSA), and the Cuyahoga County Mortgage Fraud Task Force. In October 2019, counsel for the federal defendants discovered that the *Vaughn* index submitted to the district court in support of EOUSA's withholdings contained inaccuracies. The federal defendants therefore requested a partial remand to allow EOUSA to reprocess responsive records and submit a new *Vaughn* index and declaration to the district court. The other parties to this appeal did not oppose the motion, and this Court granted it on October 31, 2019.

When EOUSA reprocessed the responsive records on remand from this Court, it referred to the FBI a number of records for which the FBI was the custodian. When the FBI received those records, it discovered that they had not been processed during the initial phase of district court litigation. The FBI investigated why the records were not initially processed and found that, when it had initially searched for and gathered records, it had inadvertently failed to obtain all portions of the responsive records. The FBI thus determined that, in addition to the records referred from EOUSA, it must now process the previously unprocessed responsive records within its own investigative files. The FBI intends to process the additional records expeditiously and then to provide the district court with a supplemental declaration and *Vaughn* index.

Because the federal defendants' motion for a partial remand asked for a remand only as to EOUSA, not the FBI—and because this Court granted the motion without saying anything further about the scope of the remand—it appears that the district court may currently lack jurisdiction to consider a supplemental declaration and *Vaughn* index, and adjudicate any resulting disputes, as to the FBI. The federal defendants accordingly request that the partial remand be expanded to include the FBI.

The Cuyahoga County Mortgage Fraud Task Force does not oppose this request. Viola intends to file a response.

CONCLUSION

The Court should vacate the district court's judgment with respect to the FBI and remand with instructions that the FBI be permitted to produce a supplemental

declaration and *Vaughn* index after it processes additional records. This appeal should continue to be held in abeyance until the district court has completed proceedings on remand as to the FBI and EOUSA.

Respectfully submitted,

SHARON SWINGLE

/s/ Daniel Winik

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June 29, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 398 words, according to the count of Microsoft Word.

/s/ Daniel Winik

Daniel Winik

CERTIFICATE OF SERVICE

I certify that I electronically filed this motion with the U.S. Court of Appeals for the Third Circuit using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, except that the following individual will be served by first-class mail:

Kathryn Clover
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/s/ Daniel Winik

Daniel Winik