

**FILED**

**DEC 22 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

In re: GRAND JURY INVESTIGATION.

No. 06-17218

NADIA WINSTEAD,

D.C. No. CR-05-90293-SI  
Northern District of California,  
San Francisco

Witness - Appellant,

v.

ORDER

UNITED STATES OF AMERICA,

UNDER SEAL

Appellee.

Before: GOODWIN, McKEOWN and FISHER, Circuit Judges.

Nadia Winstead appeals the district court's order holding her in civil contempt pursuant to 28 U.S.C. § 1826. Having reviewed the briefs and considered the arguments raised in this matter, we vacate the district court's contempt order and remand the case for further proceedings on appellant's motion for disclosure of electronic surveillance.

On October 3, 2006, the district court denied appellant's motion for disclosure of electronic surveillance. We agree with the district court's finding that appellant had made a sufficient showing under 18 U.S.C. § 3504 that she was the subject of unlawful electronic surveillance. We also agree with the district court's finding that the government did not make an adequate showing that

appellant was not subject to such surveillance. However, we disagree with the district court's conclusion that the adequacy of the government's denial is irrelevant.

“If the witness makes a preliminary showing that he was a victim of illegal electronic surveillance, the government must unequivocally affirm or deny the use of such surveillance.” *In re Grand Jury Proceedings (Garrett)*, 773 F.2d 1071, 1072 (9th Cir. 1985) (per curiam). In this case, the government failed to meet its burden of unequivocally denying the use of electronic surveillance. The declarations submitted by the government do not unequivocally deny the existence of electronic surveillance; rather, they indicate that the declarants are unaware of any surveillance. Nor do the declarations sufficiently address whether the government relied on electronic surveillance used by law enforcement agencies other than the FBI. And, the government's search of the ELSUR Records System appears to have been overly restrictive both with regard to the databases searched and the search term used. On remand, the government should reasonably address these gaps in order to unequivocally deny the use of unlawful electronic surveillance, as is required.

In denying appellant's motion to compel, the district court found that although appellant had made a preliminary showing she was subject to electronic

06-17218

surveillance and the government had failed to unequivocally deny that she was subject to such surveillance, it did not matter because appellant failed to demonstrate that an arguable causal connection existed between the questions she was asked and the alleged surveillance. We disagree.

In *In re Grand Jury Investigation (Doe)*, 437 F.3d 855, 858 (9th Cir. 2006), which dealt with a contempt order of another witness in this investigation, we held that Doe could not establish a causal connection because the “government already had a legitimate independent basis to consider Doe a person of interest in the investigation...” In this case, in contrast to the situation in *Doe*, the government failed to establish that it had any independent basis for identifying appellant as a person of interest in this case. We will not consider the supplemental declaration of Elise Becker submitted with the government’s request for an order to show cause below and submitted to this court as Exhibit B to appellee’s opposition to appellant’s motion for bail pending appeal. At the time the district court ruled on appellant’s motion for disclosure, this declaration was not before the court and the government had failed to offer any explanation as to how appellant became a person of interest in the investigation. In the absence of such information, and in light of the government’s failure to unequivocally deny the use of unlawful

electronic surveillance, Winstead's suggestion that her identity was discovered through such surveillance is not unfounded.

We also disagree with the district court's conclusion that, as in *Doe*, appellant failed to demonstrate an arguable causal connection because of the generic nature of the questions asked of appellant before the grand jury. In *Doe*, the witness voluntarily agreed to be interviewed by law enforcement prior to his grand jury testimony, thus providing an independent basis of information for the questions before the grand jury. The same was not true here – appellant had not been interviewed by law enforcement prior to her testimony before the grand jury. The generic nature of the questions is not so obvious as in *Doe*; some of the questions are more detailed here. Moreover, unlike *Doe*, there was no independent source of information for the questions asked of appellant. Therefore the government is not excused from its obligation to make an unequivocal denial.

Accordingly, having found that the government failed to meet its burden under 18 U.S.C. § 3504 to unequivocally deny the use of unlawful electronic surveillance, the district court's November 3, 2006 contempt order is vacated and the matter is remanded for further proceedings consistent with this order.

The parties' motions to file their briefs and excerpts of record under seal are granted.

**VACATED and REMANDED.**