

SOMETIMES NOTES GET DESTROYED, SOMETIMES THEY DON'T

One more point about the case of Mohamed Mohamud, the accused bomber from Oregon. A government filing submitted last month addresses the defense's requests for notes regarding various interactions Mohamud had with the FBI. It describes two sets of hand-written notes from a FBI agent(s). The first are the notes an FBI agent took after Mohamud got stopped at the airport last year.

The government has notes of its interview with defendant on June 14, 2010. Those notes are accurately summarized in the report of that interview that has been provided to defendant. The government has compared the agent's handwritten notes to the final, written report, and there are no variances or discrepancies. The only information that appears in the notes, but not in the report, is a statement made by defendant or one of his parents that he was born in Mogadishu, and the date defendant said he planned to return from Alaska. Thus, the notes should not be produced. The government does not have notes from its second, and only other, interview with defendant that occurred on November 26, 2011.

Those handwritten notes were preserved.

But there was another set of handwritten notes—those documenting the July 30 meet at which a recording device failed. Those notes were not preserved.

Defendant has also asked for notes “purporting to relate to the July 30th meeting.” The contents of the July meeting were summarized by an FBI agent

in a typewritten report that was provided to defendant on December 10, 2010. Consistent with his practice in all cases where witness statements were not taken, the agent memorialized his notes in their entirety in typewritten reports for all the meetings between UCEs and defendant and, after doing so, he destroyed his handwritten notes. All of the reports written based on those notes have been provided to the defense. [my emphasis]

Now, it's not clear that the agent in question is the same (that is, it's not clear that the same agent chose to destroy just some of his notes); the complaint uses "I" a lot, but does not use "we" in its discussion of the follow-up to the airport stop, and the agent who destroyed his notes is not stationed in Portland. The government explanation—that one interview included a witness statement while the other did not—sort of offers an explanation if the same agent took both sets of notes, though not a logical one. After all, if something happens with the recording in the most important meeting in a case, wouldn't it make sense for an agent to make an exception to his normal procedure, and keep his notes?

The government admits as much when it talks about making sure remaining records of the meeting are preserved.

Even before the filing of defendant's motion, the government had taken steps to ensure that any remaining notes or other documentation of the July 30, 2010 meeting were preserved and that the events surrounding the meeting were documented.

If keeping remaining records after a failed recording makes sense after indictment, doesn't it make sense before indictment, too?

Yet one of the reasons the government objects to an order the defense has proposed limiting FBI agents' ability to discuss the meeting is that if they're prohibited from doing that, they won't be able to provide further reports from the meeting to the defense.

Additionally, the proposed order is problematic because it would prohibit agents from discussing any issue related to the August 3 report, which includes not only details of the meeting but other details of defendant's initial contact with the agent. The order would also limit the government's ability to comply with its discovery obligations. For example, the agents who are processing the discovery would be unable to finish any reports related to the July 30 meeting and would be unable to complete the ongoing process of providing defendant with additional discovery related to that meeting.

In other words, the government seems to be saying that the court should not order its employees not to talk about the meeting, because doing so would prevent another person who heard the meeting to complete a report, almost a year after the fact, about the meeting, because she has to talk to others to complete such a report.