UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ABDULRAHMAN CHERRI, *et al.*, Plaintiffs, v. ROBERT S. MUELLER, III, Director, Federal Bureau of Investigation, *et al.*, Defendants.	Case No. 2:12-cv-11656 Hon. Avern Cohn Magistrate: Laurie J. Michelson

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO MOTION TO COMPEL DISCOVERY

AND

PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS MOTION FOR A PROTECTIVE ORDER

Plaintiffs, ABDULRAHMAN CHERRI, WISSAM CHARAFEDDINE, ALI SULEIMAN ALI, and KHEIREDDINE BOUZID, by and through their undersigned counsel, in their combined Reply to Defendants' Response to Plaintiffs' Motion to Compel Discovery and Response to Defendants' Cross Motion for a Protective Order, incorporate specific facts detailed in the statement of facts from the original Motion [Dkt. 86], and further state as follows:

INTRODUCTION

While the attorneys representing the Defendants characterize the protracted nature of discovery in this case as the burdensome imposition of Plaintiffs, the reality is much different. Discovery has proceeded slowly because of Defendants failure to respond to discovery in a timely manner. And the fact of the matter is that the current counsel representing the defendants are the fifth and sixth attorneys that the Department of Justice has assigned to this case.

Before Ms. Ullman and Mr. Folio, Plaintiffs dealt with Mr. Cooper. Before Mr. Cooper, there was Mr. Patrick Nemeroff. And before all of them, Brant Levin and Judson Littleton led the case.

The point is not to impugn the professionalism or character of all of these attorneys—who have been exemplary and cordial—but to point out that Defendants' counsel does not have an accurate picture of just how frustrating discovery has been for Plaintiffs. Indeed, Defendants' current counsel has only been involved in only a fraction of it.

Time and time again, Plaintiffs received new information only at the final hour and had to fight to follow up on critical information that Defendants could have provided earlier but did not. And now, after Plaintiffs have received what is perhaps the clearest evidence of Plaintiffs' discrimination—a questionnaire that Defendants concede they utilize in border interrogations that contains the exact religious questions that form the basis of Plaintiffs' claims—Defendants want to deny Plaintiffs the ability to conduct the 30(b)(6) depositions that would allow them to determine how this policy is implemented.

The factual basis of Plaintiffs claims is unprecedented government wrongdoing, and Plaintiffs are entitled to collect through discovery the facts they need to sustain their claim. This Court should not allow Defendants to deny Plaintiffs that right.

APPLICABLE FACTS AND PROCEDURAL HISTORY

On April 13, 2012, Plaintiffs Abdulrahman Cherri, Wissam Charafeddine, Ali Suleiman Ali, and Kheireddine Bouzid, filed a Complaint against Defendants Robert S. Mueller, III, David V. Aguilar, and Janet Napolitano, in their official capacities. [Dkt. 1]. On January 18, 2013, the government filed a Motion to Dismiss the Complaint. [Dkt. 32]. On June 11, 2013, this Honorable Court issued its Order allowing Plaintiffs to proceed on their Fifth Amendment claim of equal protection. [Dkt. 44].

On September 16, 2013, a Discovery Plan was entered setting the deadline for written discovery for February 14, 2014 and the completion of fact discovery for April 25, 2014. [Dkt. 57]. On October 3, 2013, Plaintiffs issued their First Request for Production of Documents to Defendant D. Aguilar; and on November 8, 2013, Plaintiffs issued their Second Requests for Production of Documents to Official-Capacity Defendants ("Plaintiffs' requests"). Defendants produced documents responsive to Plaintiffs' requests, in batches at a time. However, the deadline for written discovery passed, and the government did not complete production of the documents responsive to Plaintiffs' requests. Accordingly, an Amended Discovery Plan was entered on February 18, 2014, resetting the deadline for completion of fact discovery for July 7, 2014. Dkt. 61.

Additionally, based upon Initial Disclosures filed by the government on November 5, 2013 and pursuant to a meet and confer whereby Defendants advised Plaintiffs regarding the witnesses that have discoverable information, Plaintiffs took the depositions of Customs

and Border Protection ("CBP") Officers that the government disclosed were involved in the religious questioning of Plaintiffs, Ms. Ann Marie Dentzer, Office of Civil Rights and Civil Liberties, who led the Department of Homeland Security investigation into Plaintiffs' complaints filed with the department, and Mr. Christopher Perry, Director of Field Operations for the ports of entry in Michigan. Notably, the government maintained throughout the course of discovery that the Federal Bureau of Investigation ("FBI") was not involved in the religious questioning of Plaintiffs. Accordingly, Plaintiffs did not seek the depositions of an FBI policy witness.

On June 25, 2014, just prior to the close of fact discovery, it was discovered during the deposition of CBP Officer Janos, who questioned Plaintiff Cherri, that he was a member of a joint taskforce, which the FBI is a member, and the existence of which Plaintiffs at no time prior to this deposition were made aware. Plaintiffs immediately issued a notice of deposition of an FBI policy witness, on July 3, 2014. However, Defendants refused to produce a policy witness at the deposition. Moreover, at the time of the close of fact discovery, the government still did not complete production of the documents responsive to Plaintiffs' requests.

Plaintiffs brought the outstanding discovery issues to the attention of the Court. A status conference was held on August 7, 2014 whereby the Court ordered the discovery deadline be extended to December 1, 2014. *See* Minute Order (Aug. 7, 2014). Moreover, the Court ordered the Plaintiffs to issue additional discovery requests and 30(b)(6) deposition notices to the FBI and CBP, in order to allow Plaintiffs to discover information related to religious questioning by the FBI and the joint taskforce, of which CBP Officer Janos is a member. Pursuant to the Court's order, Plaintiffs issued requests for production of

documents and interrogatories, and notices for 30(b)(6) depositions of CBP on August 17, 2014. Dkt. 78, 79 and 80. The Court deferred ruling on the 30(b)(6) depositions until after the close of fact discovery on December 1, 2014.

On the last day of fact discovery, December 1, 2014, Defendants produced a heavily redacted Sample Questionnaire of religious questions used by an Immigration and Customs Enforcement ("ICE"). In response to an inquiry regarding the document, on December 9, 2014, Defendants for the first time disclosed that an ICE Agent, Matthew Sabo, used the Sample Questionnaire to conduct religious questioning of Plaintiff Wissam Charafeddine at the borders. **Exhibit A - Email Exchange Regarding ICE Sample Questionnaire and ICE Depositions.** Up until this point, Defendants made no mention of ICE's involvement whatsoever in the religious questioning of Plaintiffs. Accordingly, Plaintiffs were not provided an opportunity to seek a 30(b)(6) deposition of ICE, the deposition of ICE Agent Sabo, or other discovery regarding ICE's involvement in religious questioning. Moreover, on December 23, 2014, more than three weeks after the close of fact discovery, Defendants produced the first responsive documents to Plaintiffs' requests by the FBI.

Once again, Plaintiffs brought the above outstanding discovery issues to the attention of the Court. On February 20, 2015, another Status Conference was held with the Court. At that time, the Court ordered Plaintiffs to file a Motion to Compel any outstanding discovery.

Pursuant to the Court's order, Plaintiffs filed a Motion to Compel Discovery on March 16, 2015. [Dkt. 86]. Defendants filed a Response and Cross-Motion for Protective Order on April 28, 2015. [Dkt. 89, 90]. Defendants have also continued to produce documents responsive to Plaintiffs' requests, as recently as April 28, 2015.

ARGUMENT

I. Plaintiffs are entitled to the relief requested in their motion to compel as the information requested is not protected by Law Enforcement Privilege.

Generally, "[t]he government invokes a 'law enforcement investigatory privilege.'" *United States v. Four Hundred Sixty Three Thousand Four Hundred Ninety Seven Dollars & Seventy Two Cents ($463,497.72) in U.S. Currency From Best Bank Account*, 779 F. Supp. 2d 696, 713 (E.D. Mich. 2011). "A limitation on the applicability of the privilege arises from the fundamental requirements of fairness." *United States v. Bryant*, 951 F.2d 350 (6th Cir. 1991). Moreover, "[t]he burden of establishing the existence of the privilege rests with the person asserting it." *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 450 (6th Cir. 1983).

"Exemption 5 [of FOIA] embodies privileges against discovery such as attorney-client and work-product privileges." *White v. I.R.S.*, 707 F.2d 897, 902 (6th Cir. 1983) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). "[T]he privileges which Congress intended to protect by Exemption 5 were the government's 'executive privilege' and the 'attorney work product privilege.'" *SELIGMAN & ASSOCS. v. NLRB*, 735 F.2d 1365 (6th Cir. 1984). Additionally, "'purely factual or investigatory reports' are not protected in Exemption 5 from disclosure." *Id*. (quoting *NLRB*, 421 U.S. at 150).

"In assessing the government interest in secrecy, the district court should remember that the requested files are of completed investigations. Often courts have recognized that there is less government interest in secrecy in completed, than in ongoing, investigations." *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 659 (6th Cir. 1976) (internal citation omitted).

Therefore, the law enforcement privilege can be applied only so long as the limitation is fair. The burden of proof with respect to the privilege claimed is upon the party claiming

the privilege. The privilege protected includes the executive privilege and attorney work product privilege. Factual or investigatory reports are not protected from disclosure.

In the present case, the documents withheld by Defendants are not privileged documents. These documents are subject to disclosure on the basis of public interest.

A. ICE Sample Questionnaire

Defendants concede that "ICE created the Sample Questionnaire to provide their special agents a guide for conducting certain types of investigative interviews." [Dkt. 89, 90 at 14]. Moreover, Defendants concede that the ICE Sample Questionnaire was used by Special Agent Matthew Sabo in conducting the religious questioning of Plaintiff Wissam Charafeddine at the border. *See* **Ex. A**. Nonetheless, Defendants have improperly redacted the ICE Sample Questionnaire provided to Plaintiffs. Plaintiffs request this document in its complete undredacted form as it is critical to Plaintiffs' equal protection claims.

Defendants argue that the redacted portions of the Sample Questionnaire are protected by the law enforcement privilege, and further claim that the information redacted "did not involve religious questions and its disclosure risks undermining an investigative technique currently used by ICE…" [Dkt. 89, 90 at 13]. However, a cursory review of the redacted document suggests otherwise.

Contrary to Defendants' assertion that "Defendants have not redacted the portion of the questionnaire that is labeled "**Religious Beliefs and Associates**" [ICE000001], it is evident from the redacted version of the Sample Questionnaire that beneath the heading "**Religious Beliefs and Associates**" are a series of eighteen religious questions located throughout the document and separated by heavily redacted portions of the document in between. The questions include "What is your priest/minister/imam/rabbi's name?"

[ICE000002]; "Have you attended any religious schools?" [ICE000002]; "Do you have any relatives or friends who have been martyred fighting in the defense of your beliefs?" [ICE000002]; and "Do you plan to visit any church, mosque, temple, conference, or event while in the United States?" [ICE000004]. *See also* Dkt. 89, 90 at 15-16. Regardless of whether or not the information in between includes "questions not about religion" as the Defendants assert, the information redacted is clearly relevant to contextualizing the document and discovering information related to the apparent ICE policy of conducting religious questioning of Plaintiff Charafeddine and other Muslim travelers as the information is located in between a series of religious questions to be used by ICE special agents and beneath the larger heading "**Religious Beliefs and Associates**." [*See* Dkt. 89, 90 at 16].

B. FBI #2 and #4

Defendants have failed to provide Entries Nos. 2, 4, and 6 of Defendants' privilege log. Defendants claim that Entry 2 and 4 are training documents.

According to Defendants, Entry 2 is an FBI operational training providing guidance on certain categories of investigation, and Entry 4 is a training attended by a CBP officer. Defendants are attempting to utilize the law enforcement privilege to shield information that they neither created nor own. Defendants have failed to prove that the training documents that they withheld are privileged documents. Defendants' statement that the document contains law enforcement-sensitive information is not acceptable. Factual or investigatory reports are not protected by the privilege, as discussed *supra*.

II. Defendants are not entitled to a Protective Order as the Plaintiffs are entitled to conduct additional discovery based on newly discovered, relevant evidence.

"Protective orders more often deal with such amorphous concerns as embarrassment [or] oppression, or broader considerations of public policy . . . ." *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1099 (6th Cir. 1994) (internal quotation and citation omitted). Further, "[t]he district court's decisions to award sanctions and issue a protective order are within the broad discretion of the district court in managing the case." *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989).

Additionally, "[t]he extent that a party may go in seeking discovery is subject to protective orders that the judge may make under Rule 30(b) or (d). Under the rules, the extent of discovery and the use of protective orders is clearly within the discretion of the trial judge." *Chem. & Indus. Corp. v. Druffel*, 301 F.2d 126, 129 (6th Cir. 1962). "A grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." *United States v. Chary*, 173 F.3d 856 (6th Cir. 1999). Moreover, "[n]ecessity [of deposition] is determined as of the time of taking, ..." *Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989). Therefore, courts consider public policy before granting a protective order. The district courts have broad discretionary power in issuing protective orders. A party claiming unreasonableness bears the burden of proving the same. Further, necessity of a deposition is determined on the basis of the time of taking the deposition.

In the present case, Plaintiffs' deposition notices are closely related to Plaintiffs' core allegations. Plaintiffs have sought to question the agencies, through their representatives, about a memorandum that likely authorized the religious questioning of Plaintiffs. Plaintiffs have obtained critical evidence regarding religious questions imposed by Defendants of

Plaintiffs and other Muslim travelers only after the close of fact discovery. The questions imposed by Defendants strongly support the Plaintiffs' claims, and Plaintiffs should be permitted to conduct further discovery and depositions as argued in their initial motion to compel.

CONCLUSION

WHEREFORE, for the above-mentioned reasons, Plaintiffs respectfully request this Honorable Court GRANT their Motion to Compel Discovery and DENY Defendants' Cross Motion for a Protective Order.

Respectfully submitted,

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Dated: May 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2015, I electronically filed the foregoing document with the Clerk of the Court for the Eastern District of Michigan using the ECF System which will send notification to the registered participants of the ECF System as listed on the Court's Notice of Electronic Filing.

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