

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 08-80736-Civ-Marra/Johnson

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES
_____ /

**JANE DOE #1 AND JANE DOE #2'S MOTION FOR ORDINARY BRIEFING
SCHEDULE AND ORDINARY PAGE LIMITS TO RESPOND
TO GOVERNMENT PRIVILEGE ASSERTIONS**

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to move this Court for an ordinary briefing schedule and ordinary page limits on the Government's privilege assertions. Rather than a seven-page pleading from the victims followed by a seven-page pleading from the Government (without any opportunity for a reply), the victims request that the Court simply allow them to file a motion to compel that is (at least) 20 pages long, followed by a 20-page response from the Government, followed by a reply from the victims. An ordinary briefing schedule is justified due to the Government's assertion of multiple (and novel) privileges involving thousands of pages of documents as well as the fact that the Government has not yet provided any description of the factual or legal basis for many of its assertions of privilege.

BACKGROUND

As the Court is aware, on June 18, 2013, it granted the victims' motion to compel discovery from Government, directing the Government to produce documents in response to

outstanding requests for production. DE 190. With regard to these documents, the Court required the Government either to produce the requested documents to the victims or to file a privilege log and produce the documents to the Court. DE 190 at 2. The Court required that the privilege log must “clearly identify[] each document[] by author(s), addressee(s), recipient(s), date, and general subject matter” DE 190 at 2. The Court also ordered that the victims could contest any asserted privileges within 30 days, with the brief limited to seven pages in length. The Court allowed the Government 14 days to respond, with its response limited to seven pages in length. The Court indicated that “[n]o further submissions on asserted privilege claims shall be entertained without the express invitation of the court.” DE 190 at 3.

On July 19 and July 26, 2013, the Government produced to the Court in camera more than 13,000 pages of documents to which it asserted privilege. The Government asserted six different privileges, specifically: (1) attorney-client privilege; (2) deliberative process privilege; (3) investigative privilege; (4) work product doctrine; (5) Rule 6(e) of the Federal Rules of Criminal Procedure; and (6) privacy rights of other victims. Rather than follow the Court’s order that it “clearly identify” such things as author, recipient, and date of the documents, for many of the documents the Government simply lumped them together (in groups of as many as 500 pages) and provided a generic description.

DISCUSSION

The victims require more than seven pages to address the numerous problems with the privileges that the Government has asserted. The victims also require a reply brief because much of the Government’s position has yet to be revealed. Accordingly, the Court should simply

allow the privilege issue to be litigated in the conventional way – with a standard length motion to compel from the victims, followed by the normal response and a reply.

I. THE VICTIMS REQUIRE MORE THAN SEVEN PAGES TO ADDRESS THE SIX DIFFERENT PRIVILEGES ASSERTED BY THE GOVERNMENT.

The Government's privilege assertions are invalid for numerous reasons, which the victims need to present to the Court. While the victims are continuing to research the privilege assertions, they have already identified the following problems with the assertions:

Attorney-Client Privilege.

- A general attorney-client privilege does not exist for ordinary governmental communications. *See Note, In re Grand Jury Subpoena Duces Tecum I: Destruction of the Attorney-Client Privilege in the Governmental Realm?*, 1998 UTAH L. REV. 421.
- Any attorney-client privilege would be limited to communications made for purposes of facilitating the rendition of legal services to the Government client. *See, e.g., Diamond v. City of Mobile*, 86 F.R.D. 324 (D. Ala. 1978) (attorney-client privilege did not bar disclosure of statements made to the city attorney while conducting an internal investigation where the purpose of the investigation was not to provide legal advice to the police officers but rather to provide the city with information relating to alleged indiscretion within the department).
- Any attorney-client privilege is subject to a crime-fraud-misconduct exception. *See In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985). The victims intend to argue that the crime-fraud-misconduct exception applies on the facts of this case.¹
- Any attorney-client privilege has not been properly invoked because the Government has not provided factual material identifying who is the attorney, who is the client, and how the communications were confidential. *See Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (noting privilege holders not

¹ As the Court is aware, the victims have alleged that U.S. Attorney's Office concealed from the victims (and their legal counsel) the existence of the non-prosecution agreement and that many of the communications within the Government were in furtherance of this concealment. *See, e.g.,* DE 48 at 39, 40. The victims have further alleged that they detrimentally relied on false representations from the Government. DE 48 at 34. These well-supported allegations are an example of how the fraud exception applies

“excused from meeting their burden of proving the communication confidential and within the attorney-client privilege”).

- The Government cannot invoke an attorney-client privilege in the context of a Crime Victims’ Rights Act (CVRA) petition because it owes a fiduciary duty to the crime victims to use its “best efforts,” 18 U.S.C. § 3771(c)(1), to protect their rights. *See Solis v. Food Employers Labor Relations Ass’n*, 644 F.3d 221, 226-27 (4th Cir. 2011) (noting that the attorney-client privilege does not apply “in the context of fiduciary relationships” and that “[t]his principle has been applied to fiduciary relationships beyond the traditional trust context”).

Deliberative Process Privilege

- A “deliberative process” privilege does not exist when the victims are proceeding not under the Freedom of Information Act (FOIA) but rather under the CVRA, in view of the overriding statutory obligation of the Government to use its “best efforts” to protect crime victims. 18 U.S.C. § 3771(c)(1).
- Any deliberate process privilege would only cover deliberative materials, not factual materials. *See, e.g., EPA v. Mink*, 410 U.S. 73, 87-88 (1973) (“memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.”). Many of the materials at issue are severable, factual materials.
- Any deliberative process privilege would cover only the processes by which a decision was made, not the final decision itself. *See, e.g., NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151-52 (1975).
- Any deliberative process privilege would be a qualified privilege, which would be overridden by the victims’ compelling need to obtain the materials here. *See, e.g., Newport Pac., Inc. v. County of San Diego*, 200 F.R.D. 628, 638-41 (S.D. Cal. 2001) (in action charging County with violating the Federal Fair Housing Act, the plaintiff’s interest in obtaining information concerning relevant deliberations outweighed the policy makers’ interest in free expression during the deliberative process).
- Any deliberative process privilege has not been properly asserted, because it must be asserted by the head of the department having control over the requested information who must explain in detail why revealing the information would compromise deliberative processes. *See Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).

Investigative Privilege

- Any investigative privilege would be a qualified privilege, in which the public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information. *Tuite v. Henry*, 98 F.3d 1411, 1418 (D.C. Cir. 1996). The balancing is ordinarily made by considering the ten factors identified in *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973). Here those ten factors decisively tip in favor of the victims receiving access to the documents.
- Any investigative privilege has not been properly asserted, because it must be asserted by the head of the department having control over the requested information who must explain in detail why revealing the information would compromise deliberative processes. See *Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).
- As a remedy for the Government's assertion of privilege, the Court should preclude the Government from denying the claims by the victims that would have been supported by the withheld information. *Attorney General of the U.S. v. Irish People, Inc.*, 684 F.2d 928, 951 (D.C. Cir. 1982) (discussing need for the court not to simply enter judgment against the Government for invoking privilege but rather to "fashion a remedy which balance the interests of the parties").

Work Product Doctrine

- The work product doctrine does not apply to claims advanced by crime victims that federal prosecutors have violated their public responsibilities under the Crime Victims' Rights Act. See *U.S. v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (refusing to extend work product privilege to public accountants, because they have "a public responsibility transcending any employment relationship with the client").
- The work product doctrine only applies to documents prepared by an attorney in anticipation of litigation, not to documents prepared in the ordinary course of business, pursuant to regulatory requirement, or for other non-litigation purposes. *Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221, 231 (4th Cir. 2011). Many of the documents at issue here were not prepared in anticipation of litigation about the CVRA.
- The work product doctrine is subject to a crime-fraud exception. See *Cox v. Administrator U.S. Steel & Carnie*, 17 F.3d 1386, 1422 (11th Cir. 1994). Such an exception applies to the facts of this case.

- The work product doctrine is a qualified privilege that can be overcome where a litigant shows it has a substantial need for the materials and that it has exhausted other means of obtaining the relevant information. *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 185-86 (2d Cir. 2007). The victims here have a substantial need for the documents at issue and have exhausted other means to obtain these documents.²

Rule 6(e) – Grand Jury Secrecy

- The Court can authorize disclosure of grand jury materials pursuant to Fed. R. Crim. P. 6(e)(3)(E). It has already authorized disclosure of grand jury materials here, and the Government has no independent “privilege” to interpose against court-ordered disclosure of grand jury materials.
- The Court has “inherent power beyond the literal wording of Rule 6(e)(3) to disclose grand jury material,” *United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004), and has properly exercised that power here.
- A litigant can petition for release of grand jury materials. Fed. R. Crim. P. 6(e)(3)(F). The Court has properly granted the victims petition for release of the materials.³

The Privacy Rights of Other Victims

- The Government cannot withhold materials in this case because of the privacy rights of other victims where it has the simple option of redacting the names and identifying information of these other victims before producing the materials.⁴

The victims cannot properly present to the Court their arguments on all of these complicated issues in just seven pages. Many of the Government’s novel assertions raise issues

² To establish these facts, the victims will be filing a detailed affidavit from their counsel about their need for the materials at issue and exhaustion of other possible sources.

³ To avoid any debate about whether the victims’ pleadings so far in this case constitute a proper “petition” for release of grand jury materials under Rule 6(e)(3)(F), the victims plan on file a short (approximately three pages) protective petition for release of grand jury materials.

⁴ To avoid any confusion on this point, the victims recently sent notice to the Government that they were not asking for any identifying information on any of the other victims in this case.

of first impression in the Eleventh Circuit and require extensive briefing. Accordingly, the victims request (at least) the standard twenty pages to present their motion to compel.⁵

The victims also wish to advise the Court that they will be filing one other substantive pleading simultaneously along with their motion to compel. That pleading will be a motion asking the Court to rule on their still-pending motion for an order directing the U.S. Attorney's Office not to suppress material evidence relevant to this case. DE 50. As the Court will recall, the victims filed that motion in March 2011, contending that the Government was required not to resist the victims' efforts to enforce their rights, but rather to use "best efforts" to enforce them. The victims further contended that, just as the Government has *Brady* obligations to produce helpful evidence to a criminal defendant, it likewise has similar obligations in this case to produce evidence helpful to the victims. In its ruling on September 26, 2011, the Court indicated that it would "reserve" ruling on this motion pending the outcome of further discovery efforts. DE 99 at 11. The victims intend to argue that, in view of the Government's failure to produce meaningful discovery, the Court should now take up and grant this motion, ordering the Government not to suppress material evidence. Such a ruling would obviate the need for an extensive in camera review of more than 13,000 pages of documents that the Government envisions. While this pleading will obviously provide the victims an opportunity to present an additional argument to the Court, it will not provide an opportunity to directly address the merits

⁵ To be candid, the victims believe that in view of the Government's across-the-board assertions of numerous privileges, a 25-page limit is more appropriate. The victims respectfully ask the Court to consider whether, given the sweeping way the privilege issue has unfolded as to thousands of pages of documents, it would be willing to allow more than the standard 20 page brief for issues of this magnitude and complexity.

of the Government's privilege assertions. Therefore, the Court should give the victims (at least) a standard sized brief on privilege assertions.

II. THE COURT SHOULD ALLOW THE VICTIMS A REPLY BRIEF BECAUSE THE GOVERNMENT HAS YET TO REVEAL THE FACTUAL OR LEGAL BASES FOR MANY OF ITS PRIVILEGE ASSERTIONS.

In light of the Government's expansive assertions of privilege, the Court should also modify its briefing schedule to give the victims a reply brief. It is now apparent that the Government has not spelled out for the victims (or the Court) the factual or legal bases for many of its privilege assertions. To take the attorney-client privilege as one example, the Government has not provided factual information about who is the client involved and how the communications at issue facilitated the rendition of legal services. Without such basic facts, the victims will be essentially shooting in the dark when they file their motion to compel.

As another example, the Government has not explained what kind of deliberative process privilege exists. Is this privilege an absolute one that would justify the Government in not producing any information subject to the privilege? Or is it a qualified one that, in this particular case, should be interpreted as involving Government interests superior to those the victims? Until the Government files its response brief, these basic points (and many others) will not be clear. Accordingly, the victims should be allowed to file a reply brief in this case. Otherwise, their fundamental right to respond to claims made by the Government will be compromised.

Finally, the victims would note that it is difficult (and in some cases, impossible) for them to brief the privilege issues on the current state of the record. The Government has unilaterally decided not follow the Court's order and provide a privilege log "clearly identifying each document[] by author(s), addressee(s), recipient(s), date, and general subject matter"

DE 190 at 2. As a result of the Government's "lump and dump" approach, the victims must frequently guess as to what sorts of documents the Government is withholding. In light of this fact as well, the Court should allow the victims a reply brief.

To avoid any delay in the proceedings, the victims propose that they file their motion to compel on August 16; the Government would then have 14 days to respond (the same time frame as contemplated in the current order, DE 90); the victims would then have 10 days to reply. Because the proposed August 16 date is earlier than the current schedule contemplates,⁶ this proposed schedule would not delay the case by extending the time in which the Court would have full briefing on the issue.

POSITION OF THE GOVERNMENT

Before filing this motion, the victims contacted the Government and explained the difficulties that they would have to responding to the privilege assertions in only seven pages as well as the difficulty they would have without a reply brief to respond to the Government explanations of its privilege claims. The victims asked to work with the Government to come up with a stipulated proposal to the Court to accommodate their concerns. The Government responded that it would oppose any "motion to alter the current procedures outlined by the Court in DE 190."

CONCLUSION

The Court should allow the victims to file a 20-page motion responding to the Government's claims of privilege. That motion should be due on August 16, 2013. The

⁶ The Government obtained an extension and filed its last privilege log on July 26, so under the current order the victims would have 30 days from that date to file their motion to compel.

Government should then have 14 days to file a brief of the same length responding. The victims should then have 10 days to file a reply. A proposed order to that effect is attached to this pleading.

DATED: August 1, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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