

**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 TO COMPEL PRODUCTION OF
DOCUMENTS THAT ARE NOT PRIVILEGED**

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as “the victims”), by and through undersigned counsel, to move this Court to turn over to them numerous documents that to which the Government has asserted various privileges. All of the Government’s assertions of privilege are not well founded, for the reasons described in this pleading, and the Court should provide all of the documents to the victims.¹ The factual support for the arguments found in this memorandum is contained, inter alia, in the attached affidavit of Bradley J. Edwards, Esq. The victims have also concurrently filed itemized objections to the Government’s privilege log.

I. General Responses to All Assertions of Privilege.

Inadequate Privilege Log – The great bulk of the Government’s privilege assertions do not comply with the Court’s requirement 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. As a result of the Government’s failures, it is impossible to even begin to determine which of the Government’s assertions of privilege are valid.

Failure to Prove Factual Underpinnings of Privilege Claim – Most of the Government’s privilege assertions rest on factual underpinnings (e.g., an attorney-client relationship is at issue, a deliberative process is at issue) that have not been proven by any materials in the record. Accordingly, these assertions of privilege are inadequate. *See Bogle v. McClure*, 332 F.3d 347, 1358 (11th Cir. 2003); *Brown v. City of Margate*, 842 F.Supp. 515, 520

¹ Should the Court allow the Government to assert privilege with regard to any of the materials, the victims would then be free to argue that, 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. *See, e.g., Attorney General of the U.S. v. Irish People, Inc.*, 684 F.2d 928, 951 (D.C. Cir. 1982).

(S.D. Fla. 1993) (government failed to prove attorney-client relationship), *aff'd*, 56 F.3d 1390 (11th Cir. 1995).

Waiver of Confidentiality – Some of the Government’s assertions of privilege fail because it is clear that any confidentiality was waived by the presence of persons outside the confidential relationship. For example, some of the assertions of attorney-client privilege involve documents and correspondence sent to person outside of any attorney-client relationship.

Government’s Fiduciary Duty to Crime Victims Bars Privilege - The Government cannot invoke privilege in the context of a Crime Victims’ Rights Act petition because it owes a fiduciary duty to the crime victims to use “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”); *see also In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 919-21 (8th Cir. 1997) (government attorneys have duty to report wrongdoing).

Communications Facilitating Crime-Fraud-Misconduct Not Covered – Any privilege would be subject to a crime-fraud-misconduct exception. *See In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985) (applying exception to attorney-client privilege); *Cox v. Administrator U.S. Steel & Carnie*, 17 F.3d 1386, 1422 (11th Cir. 1994) (applying exception to work product claim). Such an exception applies to the facts of this case.

Factual Materials Not Covered – Any privilege would only cover materials reflecting the confidential relationship, not factual materials. *See, e.g., EPA v. Mink*, 410 U.S. 73, 87-88 (1973) (“memoranda consisting only of compiled factual material . . . 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 factual materials.

Documents Not Prepared in Anticipation of CVRA Litigation – The work product doctrine (as well as the investigative privilege) 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, and certainly not litigation about the Crime Victims’ Rights Act. *See, e.g., Southern Union Co. v. Southwest Gas Corp.*, 205 F.R.D. 542, 549 (D. Ariz. 2002) (documents not protected by work product because not prepared in connection with case at hand).

II. Specific Responses to Specific Assertions of Privilege.

A. Attorney-Client Privilege.

Ordinary Governmental Communications Not Covered – A general attorney-client privilege does not exist for ordinary governmental communications. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 916-21 (8th Cir. 1997).

Only communications concerning legal services covered – 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 the internal investigation where the purpose of the investigation was

not to provide legal advice or assistance to the police officers but rather to provide the city with information relating to alleged indiscretion within the department).

Attorney-Client Relationship Not Established. 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).

B. Deliberative Process Privilege

Privilege Not Properly Invoked – 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 why revealing the information would compromise deliberative processes. *See Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).

Final Decision Exempted from Privilege – Any deliberative process privilege would only 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).

Qualified Privilege Overridden By the Victims' Need for the Documents – 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 Board of Supervisors with violating Federal Fair Housing Act, the interest in free expression by policy makers during the deliberative process leading up to those actions was outweighed by the litigant's interest in obtaining information concerning those deliberations).

C. Investigative Privilege

Privilege Not Properly Invoked – 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 why revealing the information would compromise deliberative processes. *See Landry v. F.D.I.C.*, 204 F.3d 1125, 1135 (D.C. Cir. 2000).

Qualified Privilege Overridden By the Victims’ Need for the Documents – 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). Those ten factors decisively tip in favor of the victims receiving access to the information.

D. Work Product Doctrine.

No Work Product Doctrine in the Context of a Claim Against Public Prosecutors – 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’); *In re Grand Jury Subpoena*, 112 F.3d at 919-21 (“the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials.”).

Qualified Privilege Overridden By the Victims' Need for the Documents – 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 it seeks. *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 185-86 (2d Cir. 2007). The victims here can make this showing.

Work Production Privilege Does Not Apply When the Attorney's Conduct is at Issue – If the attorney's conduct is a central issue in the case, the work-production protection does not apply. *See, e.g., In re John Doe*, 662 F.2d 1073, 1080 (4th Cir. 1981); *Charlotte Motor Speedway, Inc. v. International Ins. Co.*, 125 F.R.D. 127, 130 (M.D.N.C. 1989).

E. Rule 6(e) – Grand Jury Secrecy

Court-Authorized Disclosure Not Covered Under Rule 6(e)(3)(E) – 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 to Release Grand Jury Materials – The Court has “inherent power beyond the literal wording of Rule 6(e)(3) to disclose grand jury material” and has properly exercised that power here. *United States v. Aisenberg*, 358 F.3d 1327, 1347 (11th Cir. 2004).

Victims Have Properly Petitioned for the Release of Grand Jury Materials – 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. They have also concurrently-filed such a petition.

The CVRA Gives the Court Authority to Release Grand Jury Materials – The Court is obligated to enforce crime victims’ rights. 18 U.S.C. § 3771(b)(1) (the court “shall ensure” that crime victims receive their rights). This obligation carries with it authority to release necessary materials to protect victims’ rights, including grand jury materials.

Grand Jury Materials Can Be Severed from Other Materials – The Government can redact grand jury information from the requested materials, and produce the remaining materials. *See, e.g., In re Grand Jury Investigation*, 445 F.3d 266, 280 (3rd Cir. 2006).

F. The Privacy Rights of Other Victims

Government Redaction Can Resolve Privacy Concerns. The Government cannot withhold materials in this case because of the privacy rights of other victims when it has the simple option of simply redacting the names and identifying information of these other victims before producing the materials. The Government has already followed this procedure elsewhere and should do so here. *See, e.g., Bates 000966-67* (materials about victim “B.B.”).

No Assertion of Privacy Rights by Other Victims. Several of the victims cited by the Government are represented by undersigned counsel and do not wish to interpose privacy rights here. Nor has the Government established that they can assert the privacy rights of other victims.

G. The Privacy Act

The Privacy Act Does Not Apply in the Context of Court-Compelled Disclosures for Discovery. *See* 5 U.S.C. § 552a(b)(11).

CONCLUSION

Because the Government’s assertions of privilege are not well-founded, the Court should provide all of the documents the Government submitted for in camera inspection to the victims.

DATED: August 16, 2013

Respectfully Submitted,

/s/ Bradley J. Edwards

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CERTIFICATE OF SERVICE

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