

**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 RESPONSE TO GOVERNMENT'S MOTION FOR
LEAVE TO FILE RELEVANCE OBJECTIONS TO PETITIONER'S FIRST REQUEST
FOR PRODUCTION OF DOCUMENTS**

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to respond to the Government's Relevance Objections to Victims' First Request for Production to the Government (DE 260). The Government's objection is meritless for four reasons.

First, the Government cannot object to discovery on "relevance" grounds, but only on the far narrower ground that the victims' requests that are not reasonably calculated to lead to the discovery of admissible evidence. All of the victims' requests are likely to lead to such evidence. Second, the Government has not identified, on a document-by-document basis, which ones it believes are actually "irrelevant." And the Government has filed an inadequate privilege log, which makes it impossible for the Court (and the victims) to identify which documents the Government thinks should not be released. Third, to the extent that the victims can determine which documents the Government deems "irrelevant," the Government's arguments are meritless. The requested documents go to the central issues in this case, such as whether the

U.S. Attorney's Office misled the FBI – who then misled the victims – about the plea arrangements in this case. Finally, the Government is not objecting to the production of documents – the documents are all currently lodged with the Court. The Government is objecting to the *release* of the documents. But granting a “relevancy” objection would entail a new and second record of litigation about which particular documents are not releasable. And the Government has not claimed that it would suffer any prejudice or harm from release of the documents. Accordingly, the Court should simply deny the motion.

I. THE GOVERNMENT CANNOT RAISE “RELEVANCE” OBJECTIONS TO THE VICTIMS’ DISCOVERY REQUESTS.

The Government's proposed request seeks to interpose “relevance” objections to the victims' request for release of certain documents. But these proceedings are currently in a “discovery” phase. See DE 99 at 11 (allowing victims to undertake “discovery”). In discovery, the issue is not the “relevance” of the materials sought but only whether the materials are “reasonably likely to lead to admissible evidence.” See, e.g., *Tolz v. Geico General Ins. Co.*, 2010 WL 298397 (S.D. Fla. 2010) (Marra, J.) (noting that the normal constraint on discovery is whether a request “is reasonably likely to lead to admissible evidence” (internal quotation omitted)). Of course, “relevance for discovery purposes is viewed more liberally than relevance for evidentiary purposes. See, e.g., *United Oil Co. v. Parts Associates, Inc.*, 227 F.R.D. 404, 409 (D. Md. 2005) (citing *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 193, 198 (N.D.W.Va.2000); *Hofer v. Mack Trucks*, 981 F.2d 377, 380 (8th Cir.1992) (cases cited therein)). The bulk of the Government's pleading makes no effort to show that the victims' requests will not ultimately “lead to admissible evidence.” The Court should accordingly deny

the Government's motion as it is a premature attempt to interpose "relevance" objections during discovery. If the documents are truly irrelevant, there will be time enough for the Government to raise that point later.

II. THE GOVERNMENT CANNOT RAISE GENERIC RELEVANCE OBJECTIONS WITHOUT IDENTIFYING THE DOCUMENTS TO WHICH THESE OBJECTIONS APPLY.

The Government's motion should also be denied because the Government is attempting to interpose generic objections without identifying the documents to which the objections apply. As the Court knows, the Government has now produced more than 10,000 pages of documents to the Court for in camera inspection. Along with that production, the Government provided the Court and the victims with an inadequate privilege log,¹ generally describing many of the documents but not complying with the Court's order that the privilege log must "clearly identify[] each document[] by author(s), addressee(s), recipient(s), date, and general subject matter" See DE 190 at 2. Equally important for purposes of this motion, the Government did not coherently organize its production. The Government's production did not identify which documents were being produced in response to which of the victims' requests. Thus, the Government's relevance objections are raised in the abstract, without attaching to particular documents. As a result, the victims cannot identify which documents would not be released if the Government's motion were to be granted – and thus is impossible for the victims to effectively respond.

¹ Contemporaneously with this filing, the victims are filing their re-assertion of objections to the Government's privilege claims. Attached as an exhibit to that pleading is the victims document-by-document response to the privilege log, which specifically lists which privilege log entries the victims' view as being inadequate.

Two illustrations will serve to demonstrate the problem.

Request for Production of Documents Regarding Misleading the FBI

The victims have filed a request for production of documents that would show that the U.S. Attorney's Office misled the FBI about the status of the case. The victims believe that if the FBI was misled about the status of the case, then that would obviously explain why they were in turn misled when talking to FBI agents. Accordingly, the Victims' Request for Production #10 asked for documents regarding the FBI being misled.

The Government now interposes a relevance objection to producing these documents about how it misled the FBI, contending that "[t]his has no relevance to whether a violation of the CVRA occurred" Gov't Proposed Relevance Objection at 2. The Government, however, never explains which particular documents it wants the Court to withhold from the victims based on this relevance objection.

Given the current – inadequate – privilege log that the Government has filed, it is impossible for the victims to reasonably determine which documents the Government wishes to withhold from them based on this relevance objection. Consider, for example, this general entry in the Government's privilege log (DE 212-1 at 20) covering 90 pages of documents (Bates P-012362 through P-012451). The only description the victims have is: "File folder entitled 'Key Documents' containing correspondence between AUSA and case agent regarding indictment prep questions, victim identification information, correction to draft indictment, indictment preparation timeline, key grand jury material." The Court will notice that there are no dates, addressees, or recipients listed with regard to these materials. Are these the documents the Government is intending to withhold? There is simply no way to tell.

Documents Showing an Improper Relationship Between Epstein and Prosecutors

Another illustration of how the victims are harmed by the Government's failure to identify which documents it is objecting to producing comes from the victims' request for documents showing improper relationships between Epstein and prosecutors in the U.S. Attorney's Office. Again, the Government does not deny that it possesses such information – information that may involve Bruce Reinhart or another prosecutor, Matthew Menchel.² Instead, the Government remarkably takes the position that documents showing improper relationships between the prosecution team and the defendant it was prosecuting are irrelevant to the victims' claim.

In the next section below, the victims respond to the Government's remarkable contention that improper relationships between Epstein and the prosecutors have nothing to do with why the prosecutors yielded to Epstein's pleadings to deny the victims their congressional-mandated rights. But the important point for present purposes is that the Government has made it impossible to determine which information shows these improper relationships. The

² Confirming that the Government possesses information suggesting improper relationships between its prosecutors and Epstein are the Government's answers to the victims' Requests for Admission. The Government admits, for example, that while working in the U.S. Attorney's Office, one of its prosecutors – Bruce E. Reinhart – learned confidential, non-public information about the Epstein case and discussed the Epstein case with other prosecutors. Gov't Answers to RFA's ¶ 15(a) & (b). Moreover, the Government admits that it possesses information reflecting contacts between Bruce Reinhart and persons/entities affiliated with Jeffrey Epstein before Reinhart left his job at the U.S. Attorney's Office. *Id.* ¶ 16. Reinhart left the U.S. Attorney's Office to start a private firm that was located in the same building (and even on the same floor) as Epstein-related entities. Reinhart quickly began representing Epstein-related clients in matters, including civil suits brought by Jane Doe No. 1 and Jane Doe No. 2. In addition, the Government admits that it has information about a personal or business relationship between Jeffrey Epstein and another prosecutor involved in the Epstein case, Matthew Menchel. *Id.* at ¶ 20.

Government's privilege log, for example, does not contain the words "Bruce Reinhart" anywhere in it. Similarly, while a few of the items in the Government's privilege log mention that e-mails went to Matthew Menchel, none of those documents appear to involve a business or other relationship with Epstein. Again, the Government's failure to specify which documents are at issue makes it impossible for the victims to effectively respond. The Court should deny the Government's imprecise motion for this reason as well.

III. THE VICTIMS ARE SEEKING HIGHLY RELEVANT EVIDENCE.

The victims need factual materials to prove their claims. Indeed, the Court has previously concluded that the victims' proof of their claims is, at this point in the case, inadequate. Instead, the Court has ruled: "Whether the evidentiary proofs will entitle [the victims] to that relief [of setting aside the non-prosecution agreement] is a question properly reserved for determination upon a fully developed evidentiary record." DE 189 at 11-12.

Each of the victims' requests seeks specific evidence that is highly relevant to the case to "fully develop" the evidentiary record. Concurrently with the filing of this memorandum, the victims are re-filing an affidavit from their counsel, which provides an item-by-item justification for needing the information requested in each request for production. Rather than repeat those arguments here, the victims would simply direct the Court's attention to that affidavit.³

Of course, the Court must assess the Government's relevance objection against the backdrop of evidence that exists in a case. In this section, the victims first provide the Court with a point-by-point response to the Government's relevance objections. Then the victims

³ The Bradley J. Edwards, Esq. affidavit is Exhibit 1 to the Jane Doe #1 and Jane Doe #2's Re-assertion of Objections to Government's Assertions of Privileges.

provide the Court with the backdrop of how the victims' case is developing in light of recent correspondence received by the victims. That backdrop shows emerging evidence of a conspiracy between the Government and defense counsel to deliberately conceal vital information from the victims about the plea negotiations in this case.

A. Each of the Items that the Victims Are Requesting Is Directly Relevant to this Case.

Turning now to the relevance of the specific items requested by the victims, the Government's objection never considers the fact that the Court has stated that it will be considering an "estoppel" argument raised by the Government as a defense in this case. DE 189 at 12 n.6. The Court has noted that this argument "implicates a fact-sensitive equitable defense which must be considered in the *historical factual context of the entire interface between Epstein, the relevant prosecutorial authorities and the federal offense victims* – including an assessment of the allegation of a deliberate conspiracy between Epstein and federal prosecutors to keep the victims in the dark on the pendency of negotiations between Epstein and federal authorities until well after the fact and presentation of the non-prosecution agreement to them as *a fait accompli*." DE 189 at 12 n.6 (emphasis added).

Against that backdrop alone, the victims have a compelling need for information about all the Government's actions to show the "historical factual context of the entire interface" between the Government and the victims. The Government also appears to preparing to raise many other defenses, to which the victims will need to respond. *See, e.g.*, DE 62 (52-page response from the Government to the victims' earlier summary judgment motion, raising numerous factually-based and other arguments against the victims' position). For example, Request for Production No. 1 is

a vital part of developing the record, as it goes directly to what the Government knew at the time that it was failing to communicate with the victims. The request seeks materials going to the strength of the Government's case against Epstein. Those materials would directly demonstrate that the Government had an extremely strong case against Epstein, giving the Government a motive for needing to keep the victims in the dark about the plea deal. With such a strong case, the Government would not have been able to answer the simplest of questions from the victims about why they were dropping all federal charges against Epstein. Nor would the Government have been able to explain to the victims why it was not pursuing additional investigative leads against Epstein. Proof that the Government had a strong case against Epstein is a critical starting point for the victims' case.

The victims' need for information is also demonstrating by the Government's refusal to admit basic facts surrounding the strength of its case. The victims' first request for admission to the Government asked it to admit that the U.S. Attorney's Office and the FBI's "investigation into Jeffrey Epstein developed a case for a federal prosecution against Epstein for many federal sex offenses." Victims' Req. for Admission #1. Rather than simply admit this point, the Government responded cagily: "The government admits that the FBI and the U.S. Attorney's Office . . . conducted an investigation in Jeffrey Epstein and developed evidence and information in contemplation of a potential federal prosecution against Epstein for many federal sex offenses. *Except as otherwise admitted above, the government denies Request No. 1.*" Gov't Resp. to Pet.'s First Request for Admissions, #1 (emphasis added). The Court will also recall that it directed the Government to work with the victims to reach stipulations about basic facts in this case; the Government, however, while initially agreeing to do so, later backed out of even the

most basic stipulations. See Edwards Aff. at ¶¶ 3-25 (recounting extensive efforts by the Government to block efforts to reach a stipulated set of facts). Against that backdrop of Government obstructionism, the victims are plainly entitled to have the Court produce documents concerning the investigation.

Request for production No. 10 seeks documents tending to show that the FBI was misled by U.S. Attorney's Office. As discussed above, the Government's failure to itemize what it is producing creates considerable confusion. In its relevance objection, the Government states that it "disputes that the FBI was misled in any way by the U.S. Attorney's Office, but that issue is irrelevant to this case." Gov't Relevance Obj. at 3. The victims are left to wonder: Has the Government produced documents tending to show that the FBI was misled about the status of the case? If there are no such documents, then the Government should simply state that fact, and the request for production becomes moot. But it appears that the Government has, in fact, already produced such documents to the Court, in camera and is now trying to interpose a "relevance" objection to their release to the victims.

Documents proving that federal prosecutors misled the FBI about the plea arrangement would plainly be relevant to this case. To the extent that Jane Doe #1 and Jane Doe #2 received any information about what was happening in the case, it came from the FBI. If the FBI was misled about the plea negotiations, then presumably the FBI (inadvertently) passed along misleading information to the victims. Certainly, the FBI could not have provided accurate information if it was misled. Given that communications progressed from (1) the U.S. Attorney's Office to (2) the FBI to (3) the victims, exactly what the FBI was told is crucial to this case. These are not merely internal, intra-governmental communications, but communications

from one government agency to another that were, in turn, disseminated externally to the victims. The victims are entitled to broad discovery regarding these communications, which lie at the heart of this case.

Moreover, if sophisticated FBI agents were misled by the U.S. Attorney's Office, it would be reasonable to infer that young, sexual assault victims might have been misled as well. Such evidence would show a "common plan and motive," *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010) – if the plea deal was so bad that the prosecutors did not want to reveal it to FBI agents, presumably they had the same plan and motive when dealing with crime victims. Such evidence is clearly admissible under Fed. R. Evid. 404(b).

Underscoring the victims' need for this information is the Government's obstructionism on issues relating to motive. The victims sent a request for admission to the Government, asking it to admit that "[d]uring its negotiations with Jeffrey Epstein's defense attorneys, the U.S. Attorney's Office was aware that publicly disclosing the agreement would likely have led to public criticism of the agreement." Victims' Req. for Admission #4. Rather than admit this point, the Government flatly denied it. Gov't Resp. to Pet.'s First Request for Admissions, #4. Motive is clearly in dispute in this case, and the victims are entitled to discovery of documents about it.

In Request for Production No. 16, the victims sought evidence of an improper relationship between a former prosecutor in the U.S. Attorney's Office and Epstein. Here again, in its current pleading, the Government does not deny that such documents exist – i.e., does not deny that it possesses documents showing that a prosecutor working inside the U.S. Attorney's Office when the deal was being arranged left the office shortly thereafter and began representing

persons close to Epstein (such as his pilots). Of course, once again, if such documents do not exist, then the Government should not be wasting the Court's (and victims' counsels') time in interposing an irrelevant relevance objection. But the Government has seemingly taken conflicting positions on this issue. While its current position is that the documents should not be disclosed, in a pleading filed a year ago the Government appeared to suggest that no such documents exist. See DE 230 at 3-4 (accusing the victims of making "fallacious assumptions" in asserting that the Government is withholding documents showing improper relationships). Which is it? Are there such documents or not? Here again, the Government's privilege log is so inadequate, there is no way to tell.

Such documents would be highly relevant to the victims' claim. The Government has already admitted that AUSA Bruce Reinhart discussed the Epstein case with a prosecutor working on the case and that he learned confidential, non-public information about the case. Gov't Resp. to Pet.'s First Request for Admissions, #15(a) and #15(b). Clearly the Government's motivations in failing to properly notify and confer with the victims lies at the heart of this case. Not to put too fine a point on it, but if one of the prosecutors in the Office was not working for the best interests of the United States, but rather for those of Epstein, that would be clear evidence of motive to intentionally keep the victims in the dark. The victims are plainly entitled to full discovery on such a pivotal issue..

Request for Production No. 18 asks for information about why the U.S. Attorney's Office for the Southern District of Florida was "conflicted out" of handling various issues related to the Epstein case. This information is needed to show why the victims did not receive proper notifications about the non-prosecution agreement that the Office negotiated with Epstein. It

appears that the conflict of interest that has been recognized may have to do with the Office's treatment of the victims. Moreover, in its production of documents and in follow-up correspondence, the U.S. Attorney's Office for the Southern District of Florida has indicated that there are no responsive documents being held by the U.S. Attorney's Office in the other district that is handling conflict matters. (It appears that this other office is the Middle District of Florida.) This seems improbable, because resolving the conflict would presumably have generated at least some documents covered by the victims' discovery requests, including (for example) the OPR investigative file. Accordingly, the conflict matter is highly relevant to determining whether the U.S. Attorney's Office has provided complete production to the victims. A conflict of interest would also be highly relevant to the motivations of the Government attorneys throughout the handling of the Epstein case.

Request for Production No. 19 asks for information supporting allegations made in March 2011 by former U.S. Attorney Alexander Acosta. He sent a three-page letter to the news media in which he claimed that when Government attorneys began investigating Epstein, Epstein retaliated by launching "a yearlong assault on the prosecution and the prosecutors." This information is needed to explain why the U.S. Attorney's Office would have withheld notifications from the victims about the non-prosecution agreement. If the prosecutors were being assaulted, as Acosta has said they were, then they would have reason to disregard their obligations to crime victims. In addition, this would show improper behavior by Epstein, which would be relevant at the remedies stage of this case in determining the scope of any remedy. These allegations would also bear strongly on motive and bias.

Request for Production No. 25 seeks all initial productions that are required under the Rule 26(a)(1) of the Federal Rules of Civil Procedure. The Court recently reiterated that the Federal Rules of Civil Procedure generally cover this action. *See* DE 257 at 3. (“As this Court has previously indicated, *see* DE 190, the Federal Rules of Civil Procedure govern the general course of this proceeding.”). Rule 26(a)(1) requires production of simple, basic information about a case. The victims long ago made such production to the Government. Yet the Government still refuses to reciprocate. Of course, initial productions involve only information that is, by definition, potentially relevant to a case. The Government should be required to provide this information to the victims.

B. The Victims Are Beginning to Receive Evidence Pointing to a Broad Conspiracy Between Government Prosecutors and Epstein to Conceal Evidence from the Victims.

For all the reasons just explained, the victims are certainly seeking “relevant” information through their discovery requests. But the Court should also assess these requests against the backdrop of the (partial) information that the victims have received so far. That information points towards a broad conspiracy between the Government and Epstein’s attorney’s to conceal from the victims basic information about the non-prosecution agreement.

Information demonstrate a conspiracy comes from correspondence that the victims recently obtained. As the Court is aware, following an unsuccessful effort by Epstein to obtain an Eleventh Circuit order blocking production of certain correspondence, the victims received hundreds of pages of correspondence between the prosecutors and defense counsel regarding the negotiations over the non-prosecution agreement. Because this correspondence will be a critical

part of the victims' case, it will be useful for the Court to have a brief overview of this correspondence in assessing the Government's relevance objections.

In brief, the letters and emails that have been provided to the victims so far make clear that the Government was fully aware of more than thirty specific victims at the time it formally concluded the non-prosecution agreement. The Government did not inform all the victims of agreement before concluding it, but did notify three victims about the agreement shortly afterwards. At that point, Epstein objected and the Government withheld making further notifications for months. The Government also withheld other important information from the victims. The Government and defense counsel also discuss ways to mislead the sentencing judge about the nature of the agreement, as well as moving the proceedings to a geographical area far from where the victims lived. Finally, after extensive back-and-forth spanning more than eight months, the Government ultimately provided partial notification to the victims – just two days before Epstein entered his guilty plea to state law crimes.

Filed contemporaneously with this pleading is a separate, sealed submission quoting from just a few of the important e-mails and letters between the Government and defense attorneys. Because this correspondence is under seal, the materials are filed separately under seal.

IV. DENYING THE GOVERNMENT'S RELEVANCY OBJECTIONS WILL REDUCE BURDENS ON THE COURT AND EXPEDITE THIS LITIGATION.

For all the reasons just explained, the Government's relevancy objections lack merit. But one final point is worth underscoring: Typically a litigant raises a relevancy objection to reduce litigation burdens. But in this case, the Government's relevancy objections do exactly the

opposite, creating the need for a potential second-round of litigation over which documents are and are not relevant.

The Government cannot argue that it is burdensome to produce the documents in question. The Court already has all the documents, which were all submitted for *in camera* review. The only issue now is whether the Court will be forced to spend additional time deciding which documents fall within the Government's proposed "irrelevancy" exclusion. Presumably many of the documents may be relevant for one purpose but irrelevant for another. And given that the Government has yet to itemize which documents it is seeking to keep from the victims, it is impossible to determine the scope of litigation that the Government plans to force on the Court.

The Government has not established any good reason for undertaking this second round of litigation. The Government has not argued that it will suffer any harm or prejudice if the purportedly "irrelevant" documents are simply provided to victims' counsel. Given the victims' clear need for all the evidence and lack of any burden on the Government, the Court should deny the relevancy objections.

CONCLUSION

For all these reasons, the Court should deny the Government's "relevance" objections to release of documents already provided to the Court.

DATED: October 20, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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using the Court's CM/ECF system:

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