

**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 REPLY IN SUPPORT OF REASSERTION OF
OBJECTIONS TO GOVERNMENT'S ASSERTIONS OF PRIVILEGES**

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as “the victims”), by and through undersigned counsel, to file this reply in support of their Reassertion of Objections to Government’s Assertions of Privilege (DE 265), in light of the Government’s response (DE 277). The Government’s response fails to provide any sound reason for rejecting the victims’ arguments against the Government’s privilege claims.

I. THE GOVERNMENT’S PRIVILEGE LOG IS GROSSLY INADEQUATE.

In their opening pleading, the victims explained that the Government has substantially violated the Court’s order to provide an appropriately detailed privilege log for the disputed documents. DE 265 at 1-2. The Government’s response only reinforces the victims’ arguments. The Government does not deny that this Court has already ordered it to provide a privilege log that “clearly identif[ies] each document[] by author(s), addressee(s), recipient(s), date, and general subject matter” DE 190 at 2. The Government, however, ignores its clear failure to comply with this order and instead takes the remarkable position that the victims should be “presumed to know” (DE 277 at 2) enough information to deduce what is contained in the documents that the Government claims are privileged. Of course, the victims did not know what is contained in the documents the Government has provided to the Court and therefore cannot fairly challenge the Government’s privilege assertions.

A good illustration of the problem is the 89 pages of documents contained in a folder labelled “key information” found at P-012362 through P-012451 (discussed in DE 265 at 2). The victims cannot even begin to raise challenges to this privilege assertion because they do not know what specific documents are at issue, who might have seen them, and what subjects were discussed.

The victims further explained that the Government had failed to prove the factual underpinnings of its claims of attorney-client privilege, investigative privilege, and work product privilege. DE 265 at 2-3; *see also* DE 265-1 at 13-14. The Government simply ignores this point, relying instead on the general proposition that “[t]he United States Government is entitled to assert evidentiary privileges *like any other litigant . . .*” DE 277 at 2 (emphasis added). But any other litigant would have to prove the facts undergirding its privilege assertions. The Government has failed to provide affidavits or other evidence that normally accompanies privilege claims.

Rather than provide any facts, the Government cites caselaw, such as *FDIC v. Fidelity and Deposit Co. of Maryland*, 2013 WL 2421770 (S.D. Ind. 2013) (not reported in F. Supp.). *See* DE 277 at 2. But the decision in that case relied on a well-developed evidentiary record – specifically facts in a detailed affidavit submitted by the Government. *See, e.g., id.* at *6 (citing “Kahn affidavit” for factual support of Government’s position). Moreover, the opinion *rejects* privilege assertions for many documents on grounds that apply equally here. *See, e.g., id.* at *7 (“For the vast bulk of the documents for which attorney client privilege is claimed, the descriptions are not sufficient to establish ‘why’ the documents are privileged. None of the descriptions say, for example, ‘the email contains the opinion of counsel on whether to file the Complaint.’”).

The Government’s failure to more particularly describe its documents also bars the victims from being able to effectively raise waiver arguments. It seems likely that many of the allegedly “privileged” documents have been shared with other person outside the relevant privilege – but there is no way to know for certain, because of the Government’s imprecision. *See* DE 265 at 3-5.

II. THE GOVERNMENT’S ATTORNEY-CLIENT PRIVILEGE CLAIM FAILS.

The victims also lodged several arguments against the Government’s attorney-client privilege claim, including the fact that no attorney-client relationship had been proven, any privilege had been waived, only communications facilitating the rendition of legal services are covered, and a crime-fraud-misconduct exception applies. DE 265 at 3-9. The Government responds by arguing that it had some kind of attorney-client relationship with the FBI agents investigating the case. DE 277 at 4. But the two cases it cites do not support the broad proposition that law enforcement agents are covered by the privilege. *See, e.g., United States v. Zingsheim*, 384 F.3d 867, 871-72 (7th Cir. 2004) (noting that attorney-client privilege applies to communications to “client agencies within the Government,” as distinguished from the work-product privilege which applies to “discussions between prosecutors and investigating agents”); *A.N.S.W.E.R. Coalition v. Jewell*, 292 F.R.D. 44 (D.D.C. 2013) (in lawsuit challenging Secret Service rules regulating protestors at presidential parades, extending attorney client privilege to communication between in-house legal counsel to the Secret Service and an AUSA discussing how to tailor various undertakings “to the requirements of the law”). Rather, the prevailing caselaw holds that “when government employees (like investigators) speak with the prosecutor, . . . the communications are not protected by the attorney-client privilege.” *See* DE 265 at 5-6 (citing Paul R. Rice, *Attorney-Client Privilege in the United States* § 4.28 at pp. 396-98 (2012) (citing *Sampson v. Schenck*, 2009 WL 484224, at *8 (D. Neb. 2009) (the prosecutor’s office “does not render legal services to the investigators in the context of pursuing criminal charges against a third-party”))). Indeed, the Government appears to concede this fact when it admits that “the FBI is not part of any confidential relationship.” DE 277 at 5. Nor has the Government contested (in earlier briefing) that some of the documents show that it affirmatively misled the

FBI about what was happening in the case. *See* DE 266 at 9-10. Obviously such deceptive documents cannot legitimately be viewed as helping to provide legal advice to the FBI. And the Government does not contest the victims' argument that many of the documents in questions involve merely factual materials (DE 265 at 7-8) or ordinary governmental communications (DE 265 at 8), to which attorney-client privilege does not extend.

More broadly, it remains the Government's burden to demonstrate who is the client and who is the attorney providing advice for each such communication. Many of the communications did not involve the FBI, meaning the Government must be claiming that there was another "client" of some sort involved. *See* DE 265 at 5. Until the Government at least identifies that client, it has not made a valid privilege claim.

The Government also only briefly replies to the victims' point that a crime-fraud-*misconduct* exception applies to the attorney-client privilege. DE 265 at 5-6 (collecting authorities). The Government contends that violating the CVRA is not the type of misconduct that falls within that exception. DE 277 at 7. But the CVRA is a congressional command that extends to all federal prosecutors and investigating agencies. 18 U.S.C. § 3771(c)(1). And the victims have clearly established prima facie case of misconduct. *See* DE 265-1 at 16-18. The Government offers no principled basis for explaining why prosecutorial misconduct regarding violating the CVRA is not properly included within the exception.

III. THE GOVERNMENT'S DELIBERATIVE PROCESS CLAIM FAILS.

In response to the victims' objections to the Government's deliberative process privilege assertion (DE 265 at 9-11), the Government begins by agreeing that final decisions resulting from deliberations are not covered. DE 277 at 7. But then the Government hurries along to other arguments, never stopping to explain where the documents reflecting the final decisions at

issue can be found. At least those documents must be produced to the victims, although (given the inadequacies of the Government's privilege log) is impossible to tell which documents these are.

The Government then reviews the facts in *Moye, O'Brien, O'Rourke, Hogan & Picket v. National Railroad Passenger Corp.*, 376 F.3d 1270 (11th Cir. 2004), without noting the most salient fact: The Government in that case provided a "detailed declaration" from a senior government official specifically explaining the way the documents revealed "the mental impressions, advice, opinions, and recommendations" of the government officials at issue. *Id.* at 1280. Indeed, in that case, a bench trial was held to determine the extent of the deliberations. *Id.* Here, in stark contrast, the Government's two, conclusory declarations (which have yet to face cross-examination) simply assert that certain documents involve deliberations.

In addition, the Government appears to concede that the deliberative process privilege is not absolute, but merely qualified, and can be overridden by a litigant's need for the documents. *See* DE 277 at 9-10 (discussing DE 265 at 9-10). But the Government simply asserts that the victims have "not explain[ed] why they need deliberative materials generated by . . . OPR." DE 277 at 10. This is untrue, as the victims submitted a detailed affidavit from undersigned counsel explaining in detail exactly why the victims need the materials. *See* Edwards Aff., DE 225-1 at 20-21. The Government pretends to be confused as to why the victims are seeking materials that OPR gathered in May 2011 "more than two years after this lawsuit was filed." DE 277 at 10. But, of course, the materials OPR collected go to the very heart of this lawsuit: the materials all concerned the Government's CVRA violations. Nor does the Government dispute that this case is essentially one-of-a-kind, because it is "not standard practice for the U.S. Attorney's Office to negotiate with defense counsel" about crime victim notifications. DE 265 at 10-11. Because

there will be no similar case in the future in which some sort of chilling effect might occur, any balancing of interests tips decisively in the victims' favor.

IV. THE GOVERNMENT'S WORK PRODUCT DOCTRINE CLAIMS FAIL.

The victims first objected to the Government's work product claims because such claims are not permitted when the issue is whether public officials have properly discharged their statutory duties, such as their duties under the CVRA. DE 265 at 13-14. The victims relied on *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 919-21 (8th Cir. 1997) ("the general duty of public service calls upon government employees and agencies to favor disclosure"), and *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (refusing to extend work product privilege to accountants in light of their "public responsibility transcending any employment relationship with the client"), for the legal principle that the work product doctrine does not apply where larger public goals are at stake. The Government's response (DE 277 at 11-13) never comes to grips with this broad principle that these cases recognize. Instead, the Government quibbles about factual difference between those cases and the current situation. Those quibbles do not defeat the larger point. Moreover, the Government does not respond to recent caselaw cited by the victims demonstrating that only documents prepared in anticipation of CVRA litigation would be protected. DE 265 at 7.

Moreover, work product doctrine is not an absolute privilege, but rather as a court-created tool designed to serve other values. As a result, the doctrine clearly does not shield from scrutiny the government documents in this case, which will help demonstrate the Government's violations of its statutory duties to the victims. Indeed, to underscore this conclusion, the CVRA itself commands that prosecutors must make their "best efforts," 18 U.S.C. § 3771(c)(1), to

protect victims' rights. The Government fails to advance any real argument that applying work product doctrine here would be consistent with this statute. See DE 277 at 15.

The victims also argued that the work product doctrine is not properly applied here because attorney conduct is at issue, and work product doctrine disappears in such circumstances. DE 265 at 15. The victims cited four cases for this proposition. DE 265 at 15 (citing *Charlotte Motor Speedway, Inc. v. International Ins. Co.*, 125 F.R.D. 127, 130 (M.D.N.C. 1989); *SEC v. Nat'l Student Mktg. Corp.*, 18 Fed. R. Serv. 2d 1302 at * 3 (D.D.C. 1974); *Brown v. Superior Court in and for Maricopa County*, 670 P.2d 725, 734 (Ariz. 1983); *In re John Doe*, 662 F.2d 1073, 1080 (4th Cir. 1981)). The Government attempts to distinguish only the last case on grounds that it was a criminal case concerning a grand jury subpoena. DE 277 at 14-15. Of course, as the case captions above reveal, the other three cases were all civil cases. And once again, the Government misses the broader legal principle that these cases collectively establish: the work product doctrine is inapplicable when litigation revolves around the propriety of conduct by an attorney conduct. Attorney conduct stands at the very center of this case, and the Government is not entitled to simply block its conduct by rote invocation of the work product doctrine.

Moreover, even if the work product doctrine applies here, it is doctrine extending only qualified protection to documents, which can be overridden by the victims' superior need for those documents. The victims specifically advanced this argument in their opening pleading, DE 265 at 14-15, backed by a detailed affidavit containing the supporting facts, DE 265-1 at 23, ¶ 117-20. The Government, however, failed to contest this argument in any way. See DE 277 at 10-15 (advancing arguments that the doctrine applies, but responding to victims' argument that they have a superior need for the documents). For this reason alone, the Court should overrule all of the Government's work product claims.

V. THE GOVERNMENT’S LAW ENFORCEMENT INVESTIGATIVE PRIVILEGE CLAIMS FAIL.

Any investigative privilege extends protection only to information “pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources, information that would endanger witness and law enforcement personnel [or] the privacy of individuals involved in an investigation, and information that would “otherwise ... interfere[] with an investigation.” *In re the City of New York*, 607 F.3d 923, 944 (2d Cir. 2010). See DE 265 at 12. The Government has failed to even attempt to show that the vast bulk of the materials for which it is asserting this privilege fall within these categories. Instead, in its response, the Government refers to a brief affidavit by FBI Agent Kuyrkendall. DE 277 at 16 (citing DE 229-1). But the Kuyrkendall affidavit fails to identify particular documents by Bates number or any other fashion. It is, therefore, impossible for the victims (or the Court) to determine which documents might be covered by the arguments advanced in the affidavit.¹ More important, the affidavit focuses on the fact that the sexual abuse suffered by other victims in this case revealed “highly personal and intimate details” about how Epstein sexually abused them. DE 229-1 at 1. But any such privacy concerns can be easily resolved through redacting the names and any other identifying information in the documents. DE 265-1 at 24, ¶125. The Government itself has already followed this approach for other documents. See, e.g., Bates 000966-67 (materials about victim “B.B.”). There is no reason way the same approach cannot be followed here.

¹ For example, the affidavit claims that certain documents pertaining to Operation Leap Year pertain to “sensitive investigative and operational methods.” DE 229-1 at 2. But it makes no effort to show which particular documents disclose such methods. Nor does it explain why the few such documents that might reveal methods could not simply be provided to victims’ counsel under a protective order.

Even if an investigative privilege has been properly invoked, the privilege is a qualified one that can be overcome by showing of sufficient need for the documents. The victims made a detailed argument about how they have overcome the privilege, with a substantial supporting affidavit. DE 265 at 12-13 (citing DE 265-1 at ¶¶ 106-16). Here again, the Government makes no real effort to even respond to this argument, much less provide the supporting affidavits or other evidence that would be necessary to prevail in such a factual dispute.

VI. THE GOVERNMENT HAS FAILED TO DEFEND ITS ASSERTION OF GRAND JURY SECRECY.

To defeat the Government's assertion of "grand jury secrecy" as a basis for blocking the release of documents, the victims advanced five specific objections: (1) that court-ordered disclosure (such as that made by DE 190) is not covered by Rule 6(e)(3)(E); (2) that the court has inherent power to release these materials; (3) the victims have properly petitioned for, and been granted release of the materials, under DE 257; (4) the CVRA gives the court authority to release grand jury materials; and (5) grand jury materials can be severed from other materials. DE 265 at 16-17; *see also* DE 265-1 at 23-24 (affidavit regarding invalidity of Government's assertions). The Government apparently concedes these points, as it has not responded to *any* of the victims' arguments and thus has not attempted to defend its invocation of grand jury secrecy.

VII. THE GOVERNMENT HAS FAILED TO SHOW THAT THE PRIVACY ACT BARS RELEASE OF ANY DOCUMENTS.

The victims challenged the Government's assertion of a Privacy Act argument by noting that the Court has already ordered disclosure of the documents, DE 265 at 18, only allowing the Government to assert specific claims of privilege. *See* DE 190. In response, the Government said that it would "confer with petitioners' counsel to determine which Order they are relying upon." DE 277 at 17 n.2 As of today's filing – ten days later – the Government has not even

bothered to contact defense counsel to discuss this order, much less file any sort of leave to brief this issue. This argument, too, must now be rejected because of the Government's failure to even defend its position.

In any event, assuming that privacy concerns are in play, redaction of sensitive information (or providing the information to victims' counsel under a protective order) can easily resolve the issue. DE 265 at 17-18; *see also* DE 265-1 at 24, ¶ 125.

CONCLUSION

The Court should reject all of the Government's assertions of privilege and provide all of the documents the Government has submitted for in camera inspection to the victims.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

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using the Court's CM/ECF system:

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