

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: WATTS COORDINATED) No. 19 C 1717
PRETRIAL PROCEEDINGS)
) Judge Valderrama
)
) Magistrate Judge Finnegan

**UNITED STATES' OPPOSITION TO CERTAIN DEFENDANTS'
MOTION TO DEPOSE FBI AGENTS REGARDING ALLEGATIONS OF
AGENT MISCONDUCT PROFFERRED BY PLAINTIFFS' DISCLOSED WITNESSES**

Introduction

Certain defendants have moved to depose Federal Bureau of Investigation special agents “regarding allegations of agent misconduct . . . during the joint investigation conducted by the FBI and Internal Affairs Division of the Chicago Police Department [‘IAD/CPD’]” concerning defendants Ronald Watts and Kallat Mohammed (“Defs.’ Mot.”). The United States opposes this motion. Defendants previously sought disclosure of such testimony from the Department of Justice pursuant to the DOJ *Touhy* regulations. The disclosure was not authorized because Defendants did not demonstrate the relevancy of the requested information to these coordinated civil actions. Defendants’ current motion similarly fails to proffer a legitimate basis to support the relief they seek consistent with the Federal Rules of Civil Procedure. For this reason, DOJ’s response to defendants’ *Touhy* request was proper, and the court should deny the requested relief.

Discussion

I. The Requested Testimony Is Not Relevant to Any Party’s Claim or Defense.

The testimony defendants seek concerning alleged FBI-agent misconduct is not relevant to the defendants’ defense and should not be permitted. District courts have broad discretion to limit discovery ““to protect a party or person from annoyance, embarrassment, oppression, or undue

burden or expense.”” *Long v. Trans World Airlines, Inc.*, 761 F. Supp. 1320, 1323 (N.D. Ill. 1991) (quoting *Seattle Times v. Rhinehart*, 467 U.S. 20, 36 (1984)). Fed. R. Civ. P. 26 (c)(1) allows a court to enter a protective order limiting such discovery upon a showing of good cause. In the context of information subpoenaed from a non-party to litigation, as is DOJ in this case, “good cause . . . can be satisfied by a demonstrating that the requested discovery in the non-party subpoena exceeds the permitted scope under Rule 26(b)(1).” *Washington v. Boudreau*, No. 16 C 1893, 2021 WL 12101166, at *2 (N.D. Ill. July 22, 2021).

“Fundamental to a parties’ right to discovery is that the information is relevant for a stated purpose.” *Washington*, 21 WL 12101166, at *2. See Fed. R. Civ. P. 26 (b) (a party in federal court may seek discovery regarding “any nonprivileged matter that is *relevant to any party’s claim or defense* and proportional to the needs of the case, considering [*inter alia*] . . . *the importance of the discovery in resolving the issues.*”). Fed. R. Civ. P. 26 (b) (emphasis added).

Defendants have failed to demonstrate any relevancy to this civil action of testimony regarding alleged misconduct by FBI personnel. To the contrary, the putative relevance set forth in defendants’ brief is belied by common sense and by the facts already in the record this case. As such, defendants should not be permitted to waste DOJ law enforcement resources by engaging in a fishing expedition that appears designed only to harass or embarrass the FBI and its personnel.

This litigation concerns alleged misconduct by CPD officers, *not* by FBI special agents. To be sure, plaintiffs have never alleged misconduct by the FBI and, indeed, rely in part on the merits of the FBI’s investigation. See, e.g., Second Amended Complaint, No. 16 C 8940, Dkt. 238 at 15–17 (describing FBI investigation that resulted in Watts and Mohammed being “caught red-handed, shaking down a person they thought was a drug courier, but was actually an agent for the FBI,” and resulting in Watts and Mohammed having “each pled guilty to federal criminal charges

and [] sentenced to terms of imprisonment.”) (citing *United States v. Watts*, No. 12 CR 87-1 (N.D. Ill.) and *United States v. Mohammed*, No. 12 CR 87-2 (N.D. Ill.)). It is undisputed that the FBI investigation in question was opened based upon information that Watts and Mohammed were engaged in taking bribes from drug-dealers. *See* Defs.’ Mot. at 5 (investigation was opened based on “allegations of Watts accepting bribes from drug dealers at the Ida B. Wells housing development in order to allow them to continue to sell narcotics.”).

Turning these facts upside-down, defendants’ current motion is largely a sequence of fallacious arguments. Defendants argue that: (1) anticipated witnesses in this case, former CPD Officers Spaulding and Echeverria, have alleged “misconduct” by FBI employees during the course of the FBI investigation; (2) plaintiffs will introduce that testimony at trial; and (3) defendants need to depose FBI personnel reading this alleged FBI misconduct in order to rebut the allegations and demonstrate that the FBI investigation was properly conducted, to show that defendants “did not engage in misconduct, and the outcome of the Joint FBI/IAD Investigation proves this.” Defs.’ Mot. at 15. But the “outcome” of the FBI investigation proves just the opposite; it resulted in convictions of defendants Watts and Mohammed for violation of federal law. Thus, contrary to what defendants argue, demonstrating the legitimacy of the FBI investigation only confirms that Watts and Mohammed *did* engage in misconduct — indeed, in criminal acts.

Defendants similarly argue that they anticipate that plaintiffs will rely on testimony that FBI and CPD personnel “covered-up what they found in the investigation in order to protect [a particular agent’s] misconduct,” and that “had this alleged cover-up not occurred, members of Watts’ tactical team (other than Watts and Mohammed) would have been indicted or disciplined; allegations of framing innocent people would have been proven; and Plaintiffs’ convictions either

would not have occurred or would have been revealed to be wrongful earlier.” Defs.’ Mot. at 3–4. This argument also lacks merit, because the FBI was not investigating “allegations of framing innocent people.” Rather, as defendants acknowledge, the FBI investigation was opened based on “allegations of Watts accepting bribes from drug dealers at the Ida B. Wells housing development in order to allow them to continue to sell narcotics.” Defs.’ Mot. at 5.

Thus, defendants’ claimed need of the information they seek from the FBI does not hold water, and defendants therefore have not crossed the threshold of relevancy required to obtain the discovery they seek from the FBI.

II. DOJ’s Response to Defendants’ Touhy Request Was Proper.

Defendants’ requested for testimony about agent misconduct was properly rejected under the *Touhy* regulations. The DOJ *Touhy* regulations set forth the parameters governing when a Departmental attorney may authorize disclosure of information “relating to material contained in the files of the Department, or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status.” 28. C.F.R. § 16.21 (a). The regulations are, thus, discretionary, and do not require disclosure. The regulations specifically state:

(d) This subpart is intended only to provide guidance for the internal operations of the Department of Justice, and is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

28 C.F.R. § 16.21 (d). Among the factors — indeed, the first factor — the deciding official should consider when evaluating a *Touhy request* is whether the requested disclosure “is appropriate under the rules of procedure governing the case or matter in which the demand arose. 28 C.F.R. § 16.26 (a) (1). In this case, it is not.

Plaintiffs submitted a *Touhy* request to DOJ, seeking disclosure of testimony by FBI special agents concerning their involvement in the FBI's investigation of Watts and Mohammed. Letter to Don Lorenzen from Wallace Hilke (Sept. 14, 2022). Plaintiffs' stated that the requested testimony was relevant to their claims that "each [plaintiff] was wrongly convicted of drug crimes that they did not commit [; . . . that] Officers Watts, Mohammed, and other CPD officers planted drugs or other contraband on them [; . . . and] that CPD officials were aware of Watts' alleged pattern of misconduct . . . and turned a blind eye to the problem." *Id.* Plaintiffs stated that the "misconduct that Watts and Mohammed are accused of having committed in the criminal case (extorting people in the drug trade and retaliating against those who did not comply) is the same type of misconduct they engaged in with respect to Plaintiffs." *Id.*

Following plaintiffs' request, defendants submitted to DOJ a list of 18 topics concerning which they sought to question the special agents by deposition, including: "17. Defendants seek to question FBI agents regarding allegations of investigatory misconduct by agents during the investigation." Email to Don Lorenzen from Wallace Hilke (Oct. 21, 2022)(attachment entitled "Summary of Information Sought").

Despite finding the requests objectionable, including because they sought the same information which had already been produced to the parties by the FBI in document form, undersigned counsel responded to the parties' requests by generally authorizing the requested testimony. Letter to Wally Hilke from Don Lorenzen (Jun. 8, 2023). Specifically, the parties were informed:

The Agents are generally authorized to testify regarding their involvement in the FBI's 2004 – 2012 public corruption investigation of Mr. Watts and other CPD officers entitled "Operation Brass Tax" and information known to them because of their participation in that investigation. This includes the subject

matters identified in plaintiffs' *Touhy* letter and most subject matters listed in defendants' "Summary of Information Sought."

Id. However, the agents were prohibited from disclosing information concerning allegations of investigatory misconduct by FBI personnel. *Id.* As undersigned counsel explained to the parties, with regard to "'investigatory misconduct,' the FBI has reviewed this issue and found no record of any allegation of investigatory misconduct by FBI personnel arising from conduct taken in furtherance of the 'Operation Brass Tax' investigation." Email to William Bazarek from Don Lorenzen (Jun. 28, 2023).

Because the FBI has no record of an allegation of investigatory conduct taken in furtherance of Operation Brass Tax, there was no reasonable basis upon which to conclude that an allegation regarding *any other* misconduct by FBI personnel could be relevant to this case. For this reason, and all of the reasons set forth above, the *Touhy* request for this testimony was denied, because it called for information exceeding the scope of Fed. R. Civ. P. 26 (b), and, therefore, disclosure would not be "appropriate under the rules of procedure governing the case or matter in which the demand arose." 28 C.F.R. § 16.26 (a) (1). Thus, defendants' argument that DOJ's *Touhy* response was arbitrary and capricious because it did not rely on any factor set forth in 28 C.F.R. § 16.26 (b) is misplaced. Nothing in the *Touhy* regulations or elsewhere requires that a requested disclosure fall within one of the prohibited categories set forth at § 16.26 (b) for a disclosure to not be authorized. To the contrary, as the Seventh Circuit has recognized, DOJ's denial of a *Touhy* request for law enforcement personnel to sit for depositions in a civil case furthers DOJ's interests in limiting "interfere[nce] with the Department's law enforcement mission by not [] distracting [] employees" and "is essentially a policy decision about the best use of the agency's resources." *St. Vincent Med. Grp., Inc. v. United States Dep't of Just.*, 71 F.4th 1073,

1076 (7th Cir. 2023) (citing *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999)).

III. Defendants' Request Is Overbroad

Another reason to reject defendants' request to question agents about agent misconduct is that their request is overbroad. Defendants seek to depose FBI agents on matters that are not relevant, as explained above, and indeed include on a subject that has no rational bearing upon the issues in this case. Defendants obliquely state that CPD officers Spaulding and Echeverria "both . . . testified to, in varying degrees, alleged misconduct committed by law enforcement during the joint FBI/IAD investigation." Defs' Mot at 3. However, the excerpted testimony of Echeverria upon which defendants rely has nothing to do with alleged FBI misconduct. Rather, in the excerpted testimony, Echeverria describes one conversation in which a City official, Tom Chester, "agreed that this investigation shouldn't be as long as it's taken, but they're not the governing agency over the investigation." Defs' Ex. B at 4:19 - 22. Assuming this conversation referred to the FBI, it suggests *only* that a City employee opined that the FBI investigation was taking a long time, and says nothing about alleged misconduct of FBI employees.

As for Spaulding, her allegations all concern one individual – FBI Special Agent ("SA") Patrick Smith. Spaulding claimed that SA Smith:

- "utilized an important FBI CHS [] during Operation Brass Tax to obtain prescription drugs for Smith's wife;"
- "provided his password to her so she could prepare official FBI 302 reports that should have been prepared by SA Smith;" and
- "failed to prepare necessary paperwork, which led to the destruction of Operation Brass Tax evidence that had been located inside a rental van used by Spalding and Echeverria during in the Joint FBI/IAD Investigation. Spalding testified investigative documents, cameras, photographs, and recording devices that belonged to the FBI were all destroyed because SA Smith purportedly failed to do his job."

Defs.' Mot. at 8. Only the second and third allegation by Spaulding could arguably have a bearing on the integrity of the FBI investigation in Operation Brass Tax. Consequently, if the court is inclined to allow any questioning of FBI personnel regarding alleged FBI misconduct, it should be narrowly limited to these subject matters.

Conclusion

For the foregoing reasons, the court should deny defendants' motion to depose FBI Agents regarding allegations of agent misconduct, or, in the alternative, enter a protective order to reasonably restrict the scope of permissible questioning regarding allegations of agent misconduct during the agents' depositions, as outlined above.

Respectfully submitted,

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