

No. 74459-3-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

MICHAEL MOCKOVAK, *Appellant*,

v.

KING COUNTY and the KING COUNTY PROSECUTING
ATTORNEY'S OFFICE, *Respondents*,

and

UNITED STATES OF AMERICA, *Intervenor-Respondent*.

On Appeal from the Superior Court of Washington for King County

BRIEF OF THE UNITED STATES

SCOTT R. MCINTOSH
MICHAEL SHIH
*Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-6880*

ANNETTE L. HAYES
*United States Attorney,
Western District of Washington*
HELEN J. BRUNNER
*First Assistant United States
Attorney
WSBA No. 30245
700 Stewart Street, Suite 5220
Seattle, WA 98101
(206) 553-7970*

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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STATEMENT OF THE ISSUE

A Washington State jury convicted appellant Michael Mockovak on murder and theft charges arising from his unsuccessful attempt on his business partner's life. After his conviction, Mockovak invoked the Public Records Act, RCW §§ 42.56.001 *et seq.*, to request documents from King County and the King County Prosecuting Attorney's Office (collectively, "King County") related to his trial. When King County did not respond to his satisfaction, Mockovak filed this action in Superior Court under the Act's judicial-review provision. Eventually, Mockovak agreed to settle every claim except one: that King County had improperly invoked the Act's exemption for documents constituting attorney work product to redact 81 documents in part or in whole.

In the course of litigating his remaining claim, Mockovak served both a notice of deposition and a subpoena *duces tecum* on Leonard "Len" Carver, a Seattle police officer assigned full-time to the Federal Bureau of Investigation ("FBI"). Carver declined to comply with Mockovak's discovery requests, as regulations of the U.S. Department of Justice ("Department") required him to do. *See* 28 C.F.R. §§ 16.21 *et seq.* The trial court denied Mockovak's subsequent motion to compel Carver to testify and to produce the requested documents.

The question presented is whether the trial court abused its discretion by denying Mockovak’s discovery motion.¹

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The federal “housekeeping statute,” 5 U.S.C. § 301, authorizes federal agencies to regulate “the conduct of [their] employees” and “the custody, use, and preservation of [their] records, papers, and property.” Dozens of agencies have relied on this statute to promulgate regulations that address whether and how their personnel may respond to requests for testimony or documents. Such regulations typically prohibit agency employees from complying with discovery requests without authorization from the agency head or other senior agency officials.

Regulations of this sort are referred to as *Touhy* regulations, after the U.S. Supreme Court opinion confirming their validity. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). In *Touhy*, the Supreme Court examined a regulation of the Department of Justice, promulgated under the authority of the federal housekeeping statute, that prohibited employees of the Department from producing agency documents in response to subpoenas *duces tecum* without the approval of

¹ This case also presents the question of whether King County’s redactions to 81 documents were proper under state public-disclosure law. The United States expresses no view on that state-law question.

the Attorney General. The *Touhy* Court held that the regulation was valid and that the subpoenaed employee could not be compelled to produce documents in contravention of the regulation. 340 U.S. at 467-68. The Court explained that the “usefulness, indeed the necessity, of centralizing [such] determination[s] [regarding discovery demands] . . . is obvious” in light of “the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court.” *Id.* at 468; *see State v. Vance*, 184 Wn. App. 902, 912-14 (2014).

Because *Touhy* regulations represent a valid exercise of congressionally delegated rulemaking authority, courts cannot compel a federal employee to supply information in discovery if, as in *Touhy* itself, that employee has been denied permission to comply with a discovery demand pursuant to applicable *Touhy* regulations. *Touhy*, 340 U.S. at 468 (holding that, in the absence of authorization by agency head, an agency employee may not be held in contempt of court for refusing to comply with a subpoena *duces tecum*); *In re Boeh*, 25 F.3d 761, 763, 766-67 (9th Cir. 1994). Litigants interested in subpoenaing agency employees or obtaining agency records must instead seek the agency’s permission, following the procedures that the *Touhy* regulations prescribe. If the litigant is dissatisfied with the outcome of that process, his “sole remedy”

is to seek judicial review of the agency's decision under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* See *Puerto Rico v. United States*, 490 F.3d 50, 61 n.6 (1st Cir. 2007); *United States v. Williams*, 170 F.3d 431, 434 (4th Cir. 1999); *Boeh*, 25 F.3d at 764-65.

This case involves the *Touhy* regulations promulgated by the U.S. Department of Justice, the current incarnation of the regulation sustained in *Touhy* itself. Codified at 28 C.F.R. §§ 16.21-.29, these regulations apply to all discovery demands served on all current and former Department "employees." *Id.* § 16.21(a). "Employee" is defined to include "all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including . . . U.S. Marshals . . ." *Id.* § 16.21(b).

Under these regulations, no employee may "produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties . . . without prior approval of the proper Department official." 28 C.F.R. § 16.22(a). In state-court proceedings where the United States is not a party, the "proper Department official" is the U.S. Attorney for the judicial district where discovery is being sought. *Id.* § 16.22(b). A litigant demanding discovery

must supply the appropriate U.S. Attorney with a summary of the testimony or information requested, and must explain “its relevance to the proceeding.” *Id.* § 16.22(c)-(d). The U.S. Attorney may authorize the employee to respond to the demand if certain conditions are met. *See id.* §§ 16.24(b); 16.26(a)-(b).

B. Factual Background

This lawsuit under the Public Records Act, RCW §§ 42.56.001 *et seq.*, seeks documents related to a closed criminal case. In 2011, a Washington jury convicted plaintiff Michael Mockovak on murder and theft charges arising from his unsuccessful attempt on his business partner’s life. *In re Mockovak*, No. 69390-5-1, 2016 WL 3190500, at *1 (Wash. Ct. App. June 6, 2016). Mockovak conspired with one Daniel Kultin, his employee and a Russian émigré, to hire Russian hitmen for the task. *Id.* Unbeknownst to Mockovak, Kultin was an informant for the FBI, a component of the Department of Justice. *Id.* Kultin had contacted the FBI after Mockovak repeatedly said—“maybe in a joke way,” but not as a “funny joke”—that he wanted his business partner killed. *Id.*

The FBI assigned two agents to the case: FBI Special Agent Lawrence Carr and FBI Task Force Officer Leonard “Len” Carver. CP 966. Task Force Officers are state or municipal law-enforcement officers deputized by the FBI to “investigate, and assist others in the investigation

of,” federal criminal violations. CP 1376. “Much” of the FBI’s “criminal intelligence is derived from” regional partners such as Carver, “who know their communities inside and out.” *Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 17 (2014) (statement of James B. Comey, Director, FBI) (addressing the FBI’s efforts to combat violent crime domestically), *available at* <http://go.usa.gov/xxRWT>. The Task Force program enables the agency to conduct “multi-subject and multi-jurisdictional investigations” by combining Task Force Officers’ local expertise with the FBI’s national resources. *Id.* The program now encompasses hundreds of Task Forces and thousands of federally deputized Task Force Officers who assist the FBI in accomplishing its various missions. The FBI has set up at least 168 Task Forces to combat domestic violent crime across the country, and has staffed them with at least 789 FBI agents and 1,694 Task Force Officers. FBI, *Successes in Gang Enforcement*, FBI.gov (Jan. 18, 2011), *available at* <http://go.usa.gov/xYhVF>.

Officer Carver’s position in the FBI typifies this collaborative arrangement. Although Carver is a commissioned officer of the Seattle Police Department, he is assigned full-time to the FBI’s Puget Sound Safe Streets Violent Crimes Task Force and works full-time to investigate “federal crimes for the purpose of federal prosecution.” *See* CP 464, 966.

Carver's chain of command reflects his federal status; he receives assignments from an FBI Supervisory Special Agent and must "comply with the investigative and administrative requirements of the FBI and the DOJ." CP 1376. To empower Carver to perform his federal duties, the FBI secured two designations for him: Special U.S. Deputy Marshal in the U.S. Marshals Service, which grants investigatory and arrest authority for violations of Title 18, and Special Federal Officer in the FBI, which grants the same authority for violations of Title 21. *Id.*; *see also* 21 U.S.C. § 878; 28 C.F.R. § 0.112(b). Carver swore an oath of office as a prerequisite to receiving each designation. CP 1376. The powers granted by these designations do not stop at Seattle's city limits; to the contrary, Carver may conduct "law enforcement operations" outside the State of Washington under FBI supervision. *Id.*

After Kultin reported his concerns to the FBI and agreed to become an informant, the FBI instructed him to tell Mockovak that his boyhood friend from Russia had grown up to become a member of the Russian mob. CP 173. For \$20,000, this friend could "arrange a murder of any target and conceal the murder as a street crime." *Id.* Mockovak gave Kultin a \$10,000 cash down payment and a photograph of the intended victim, which Mockovak had stolen from the victim's desk. *In re Mockovak*, 2016 WL 3190500, at *4. Kultin then informed Mockovak

that the killers had located the target and would soon carry out the hit. *Id.* “That sounds good,” Mockovak replied. *Id.* Mockovak was arrested the next day. *Id.*

The FBI and the State of Washington agreed that Mockovak should be prosecuted by the State. The King County Prosecuting Attorney’s Office conducted the trial, at which Kultin—who had worn a wire during many of his conversations with Mockovak—played a significant role. Mockovak was convicted of solicitation to commit murder, attempted murder, conspiracy to commit first degree theft, and attempted first degree theft. *In re Mockovak*, 2016 WL 3190500, at *4. This Court upheld Mockovak’s convictions on both direct and collateral review. *See State v. Mockovak*, 174 Wn. App. 1076 (2013) (unpublished); *In re Mockovak*, 2016 WL 3190500.

In addition to seeking appellate review of his convictions, Mockovak requested ten categories of Kultin-related records from King County and the King County Prosecuting Attorney’s Office under the Public Records Act. *See* CP 2, 7-8. Mockovak’s request reflects his assertion that, during his trial, the prosecution failed to disclose evidence suggesting that Kultin received preferential treatment from federal immigration authorities in exchange for his testimony. *See* Appellant’s

Br. 65-66. King County acknowledged receipt of Mockovak's request but did not follow up for ten months.

Mockovak sued King County for injunctive relief and statutory penalties stemming from King County's failure to respond. While that lawsuit was pending, King County disclosed hundreds of responsive documents, some of which it redacted in part or in full. *See* CP 20-21. King County also produced an exemption log justifying the redactions it made. *See* CP 70-131. Mockovak contested the justifications given for the redactions to 81 of those documents. *See* CP 1017. King County and Mockovak eventually settled all of Mockovak's claims except this final one: that King County had "improperly redacted or withheld certain documents identified" by the exemption log under the attorney-work-product privilege. CP 1934, 1936. Mockovak's challenge to those 81 withholdings is thus the only claim at issue. *Id.* Both Mockovak and King County moved for summary judgment on that claim.

In the course of litigating the propriety of King County's withholdings, Mockovak sought to depose Task Force Officer Carver. CP 1228, 1234. Mockovak also served Carver with a subpoena *duces tecum* for FBI records related to Kultan's immigration status and criminal history. CP 1230-31, 1236-37. Carver forwarded the discovery requests to the U.S. Attorney's Office for the Western District of Washington, which

informed Mockovak that, due to the Department's *Touhy* regulations, "the testimony of FBI employees, to include Task Force Officers, cannot be compelled by a subpoena. Rather, their testimony is subject to [DOJ] approval." CP 1240.

The U.S. Attorney advised Mockovak to request approval using the prescribed *Touhy* procedure, CP 1240, and Mockovak complied, CP 1246-50. His request explained that he intended to question Carver about, "in a very general sense, Daniel Kultin's immigration and citizenship history," and "whether there are documents which were kept in his possession, or in the possession of the Seattle Police Department, which were not shared with the King County Prosecuting Attorney." CP 1249.

The U.S. Attorney denied Mockovak's request. The denial letter explained that Carver, as a Task Force Officer, is an "employee" subject to the Department's *Touhy* regulations. CP 1261. Those regulations "require a threshold showing of relevancy" before an employee may be authorized to testify. CP 1262. Because none of the information Mockovak intended to elicit from Carver was relevant to Mockovak's Public Records Act challenge, the U.S. Attorney refused to authorize Carver to testify. *Id.*

Mockovak did not seek judicial review of the U.S. Attorney's *Touhy* determination under the Administrative Procedure Act. Instead, he asked the trial court overseeing his Public Records Act case to compel

Carver to appear. CP 1180-93. King County and the United States opposed Mockovak’s motion on three grounds. *See* CP 1263-75, 1279-84. First, in accordance with the Supreme Court’s holding in *Touhy*, no court may compel a subpoenaed federal agency employee to disobey applicable *Touhy* regulations. Second, by virtue of federal sovereign immunity, a state court lacks power to compel federal employees to produce government records or other evidence. Finally, under state discovery law, Mockovak had failed to show that Carver possessed any information relevant to the underlying Public Records Act dispute—which at that point had been narrowed to the single question of whether King County properly redacted or withheld 81 documents in its possession.

C. Prior Proceedings

The trial court denied Mockovak’s motions for the “reasons set forth” in the responses filed by King County and by the United States. CP 1913. The court then granted the defendants’ motion for summary judgment on Mockovak’s remaining claim. CP 1915. Mockovak has appealed both orders.

SUMMARY OF ARGUMENT

Task Force Officer Carver is a Seattle police officer assigned to the FBI pursuant to a collaborative arrangement between local and federal law-enforcement agencies. The trial court correctly denied Mockovak’s

motion to compel the deposition and subpoena of Carver for three independent reasons.

First, a court cannot enforce a discovery order against an “employee” of the Department of Justice who is barred from responding by valid Department regulations. Carver qualifies as a Department “employee” because he is a sworn Special Deputy U.S. Marshal in the U.S. Marshals Service, and because his role as an FBI Task Force Officer subjects him to the “supervision, jurisdiction, or control of the Attorney General.” *See* 28 C.F.R. § 16.21(b). The Department has refused to permit Carver to respond to Mockovak’s discovery requests. Thus, the trial court correctly denied Mockovak’s motion to compel a response.

Second, a state-court order compelling a federal employee to give testimony relating to his official duties or to disclose official records is effectively an order directed at the federal government. The effects of such an order fall on the federal government by compelling the government to act. *See In re Elko Cty. Grand Jury v. Siminoe*, 109 F.3d 554, 556 (9th Cir. 1997). As a result, such a proceeding implicates the federal government’s sovereign immunity, and it is therefore barred unless that immunity has been waived. The federal government has not waived its sovereign immunity here. Mockovak has failed to address this argument in the trial court and in this Court.

Third, state discovery law restricts discovery in a Public Records Act action, as in all civil actions, to “any matter, not privileged, which is relevant to the subject matter involved in the pending action.” CR 26(b)(1). Carver—whose only connection to the case stems from his participation in the murder investigation that resulted in Mockovak’s conviction—has no knowledge relevant to the only claim that survived settlement: whether King County complied with the Public Records Act when it redacted 81 documents under the Act’s exemptions. *See Neighborhood Alliance of Spokane Cty. v. County of Spokane*, 172 Wn.2d 702, 715-17 (2011). Because Mockovak has failed to show that his discovery requests directed at Carver are relevant to his only surviving claim, Mockovak is not entitled to depose or subpoena Carver.

STANDARD OF REVIEW

The trial court’s denial of a motion to compel discovery is reviewed for abuse of discretion. *Clarke v. State Att’y Gens. Office*, 133 Wn. App. 767, 777 (2006). “A Court abuses its discretion when it bases its decision on unreasonable or untenable grounds.” *Id.*

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED MOCKOVAK'S MOTION TO COMPEL THE TESTIMONY OF FBI TASK FORCE OFFICER CARVER.

A. The Trial Court Lacks Authority To Compel Officer Carver's Testimony In Violation Of Applicable *Touhy* Regulations.

For three independent reasons, the trial court correctly concluded that it lacked the power to compel Carver's testimony. First, the Department's *Touhy* regulations prohibit its officers and employees from responding to discovery requests without prior approval of the proper Department official. 28 C.F.R. § 16.22(a). These regulations are "validly promulgated" and "have the force of law." *State v. Vance*, 184 Wn. App. 902, 914 (2014); *see Touhy*, 340 U.S. at 468 (sustaining the validity of the Department's predecessor regulations). Accordingly, as Division Two has held, a state court has "no authority" to compel a Department employee to answer a discovery request if the appropriate official declines to authorize that employee to respond. *Vance*, 184 Wn. App. at 914 (citing *Smith v. Cromer*, 159 F.3d 875, 878 (4th Cir. 1998)).

FBI Task Force Officer Carver is an "employee" subject to the Department's *Touhy* regulations. Section 16.21(b) defines "employee" to include "all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General

of the United States, including . . . U.S. Marshals” 28 C.F.R. § 16.21(b). Carver fits this bill twice over. Most obviously, Carver has been sworn as a Special Deputy U.S. Marshal under 28 C.F.R. § 0.112(b), which authorizes the Director of the U.S. Marshals Service to designate “local law enforcement officers” to “perform the functions of a Deputy U.S. Marshal.” *Id.*; *see* CP 1376. Carver’s status as a U.S. Marshal is alone sufficient to qualify him as an employee.

Furthermore, Carver’s responsibilities subject him to the “supervision, jurisdiction, or control of the Attorney General,” who has delegated day-to-day authority over FBI agents to the FBI Director and his subordinates. *See* 28 U.S.C. § 532. The record confirms that Carver’s “full-time official duties [are] devoted to the investigation of federal crimes for the purpose of federal prosecution.” CP 966. Carver “receives his assignments from a Supervisory Special Agent of the FBI,” “is under the day-to-day supervision and control of the FBI,” and “is empowered” to “engage in law enforcement operations” across the country under the auspices of the FBI. CP 1376. Carver must adhere to “the investigative and administrative requirements” of both the Department and the FBI. *Id.* In short, Carver does not meaningfully differ from an ordinary FBI agent when it comes to applying the Department’s *Touhy* regulations. And those regulations indisputably cover ordinary FBI agents, as both the U.S.

Supreme Court and Division Two have held. *See Touhy*, 340 U.S. at 468; *Vance*, 184 Wn. App. at 912-16.

As an employee of the Department, Carver may not respond to Mockovak's discovery requests without the approval of the U.S. Attorney for the Western District of Washington. *See* 28 C.F.R. § 16.22(a)-(b). That approval has been withheld. The trial court therefore correctly ruled that it "lacked jurisdiction" to grant Mockovak's motion to compel Carver's testimony. *In re Elko Cty. Grand Jury v. Siminoe*, 109 F.3d 554, 556 (9th Cir. 1997); *see Vance*, 184 Wn. App. at 912-16.

Mockovak does not dispute that Carver is an "employee" as the *Touhy* regulations define the term. Nor would any reasonable dispute be possible. Mockovak does not challenge Carver's status as a sworn U.S. Marshal, which is confirmed by the declaration of his FBI supervisor. And although Mockovak makes the perfunctory assertion (Appellant's Br. 39) that Carver is not under the Attorney General's "supervision, jurisdiction, or control," his brief does not identify any evidence rebutting the description of Carver's responsibilities presented above.

Instead, Mockovak's objections to the trial court's decision rest on a single premise: that the federal housekeeping statute, 5 U.S.C. § 301, unambiguously prohibits the Department from extending its *Touhy* regulations to Task Force Officers detailed to the FBI from a state or

municipal law-enforcement agency. *See* Appellant’s Br. 43. Mockovak reads § 301 as authorizing only regulations that govern the “conduct of [the Department’s] employees,” and “employee” as a “person who works for another in return for financial or other compensation.” Appellant’s Br. 41. Because Task Force Officers are compensated by their home agencies and not by the FBI, Mockovak believes they cannot lawfully be regulated as “employees” for purposes of § 301. He is incorrect.

To begin with, Mockovak has misinterpreted the meaning of “employee.” Congress did not expressly define that term when it enacted § 301 and its predecessor housekeeping statutes. “[W]hen Congress has used the term . . . without defining it,” courts look to “the conventional master-servant relationship as understood by common-law agency doctrine” for guidance. *See Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989). Here, common law principles weigh strongly in favor of treating someone in Carver’s position as an employee of the Department of Justice for purposes of § 301.

At common law, the “chief, and most decisive, factor” distinguishing the master-servant relationship from other agency relationships is the “right of control over the work or thing to be done.” *Hubbard v. Department of Labor & Indus.*, 198 Wn. 354, 359 (1939); *see also* Black’s Law Dictionary (10th ed. 2014) (defining “employee” as [s]omeone who

works in the service of another person . . . under an express or implied contract of hire, under which the employer has the right to control the details of work performance”). The Department’s definition of employee mirrors this common-law benchmark: An “employee” is any “officer[] or employee” subject to the “supervision, jurisdiction, or control of the Attorney General.” 28 C.F.R. § 16.21(b). That definition is fully consistent with the statute, and as shown above, it unquestionably applies to Carver. *Cf. Logue v. United States*, 412 U.S. 521, 530 (1973) (applying the “control” test to determine whether an individual was a federal “employee” under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)).

Mockovak nevertheless insists (Appellant’s Br. 41-42) that a person may only be an “employee” of the entity that supplies that person’s compensation. But while the source of remuneration may be relevant to the question of whether an employment relationship exists, it is by no means the dispositive factor. *See Hubbard*, 198 Wn. at 358-59; *see also Judicial Watch, Inc. v. Department of Energy*, 412 F.3d 125 (D.C. Cir. 2005) (holding that an employee of the U.S. Department of Energy assigned to a presidential advisory group was an employee of that group notwithstanding the fact that the Department of Energy continued to pay that employee’s salary). Indeed, the source of remuneration may not even be a *necessary* factor. As the Second and Third Restatements of Agency

explain, any “agent whose principal controls . . . the manner and means of the agent’s performance of work” is an employee, Restatement (Third) at § 7.07(3)(a), and “the fact that work is performed gratuitously does not relieve [the] principal of [vicarious] liability.” *Id.* § 7.07(3)(b) (2006); Restatement (Second) of Agency § 225 (1958).

Mockovak separately argues (Appellant’s Br. 39-42) that Carver’s status as an employee of the Seattle Police Department precludes him from also serving as an employee of the FBI. This argument too is foreclosed by the common law, which acknowledges that a “person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other.” *See, e.g.*, Restatement (Second) § 226. Furthermore, “[a] servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services.” *Id.* § 227. The U.S. Supreme Court held as much in *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995), which Mockovak relies upon in purported *support* of his argument. *See* Appellant’s Br. 41. The *Town & Country* Court cited these settled principles to conclude that an individual did not cease to be the employee of a company when that individual agreed to serve as a union organizer in exchange for compensation paid by the union. 516 U.S. at 94-95. The same principles demonstrate that Carver does not cease to be

an employee of the FBI merely because he also serves as an officer in the Seattle Police Department.

Not only is the definition of “employee” in the Department’s *Touhy* regulations consistent with the common-law definition of “employee,” but it is also consistent with the history, structure, and legislative purposes of the federal housekeeping statute, all of which support reading “employee” in § 301 to allow the Department to regulate Task Force Officers such as Carver.

Section 301 empowers a federal agency to regulate not merely “the conduct of its employees” but also “the government of [the] department, . . . the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.”

5 U.S.C. § 301. The history of § 301 confirms that Congress intended this provision to sweep as broadly as it reads. Congress enacted the original version of the housekeeping statute to help President George Washington “get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents.”

H.R. Rep. 85-1461, at 1 (1958). And the current version of the housekeeping statute consolidates several older statutes relating to individual agencies, including one that permitted the Attorney General “to make *all* necessary rules and regulations for the government of [the]

Department . . . and for the management and distribution of its business.”
Act of June 22, 1870, ch. 150, § 8, 16 Stat. 163 (emphasis added); *see*
Touhy, 340 U.S. at 468.

Section 301 broadly authorizes agencies to regulate all facets of their business, and in particular, to manage their personnel’s responses to private demands for government testimony and documents through a centralized process. *See Touhy*, 340 U.S. at 468. Adopting Mockovak’s restrictive gloss on the meaning of “employee” would undermine the statute’s goals. After all, the information and records Mockovak has asked Carver to produce are the fruits of Carver’s performance of federal law-enforcement duties. And Carver is privy to that information and those records solely by virtue of his federal service. The Department’s legitimate interest in maintaining centralized control over information and records in Carver’s possession, which the housekeeping statute is designed to protect, does not depend on the name on Carver’s paychecks.

Accordingly, the application of the Department’s *Touhy* regulations to Carver would stand even if the definition of “employee” in those regulations were more expansive than the common-law definition. In some cases, as the U.S. Supreme Court has recognized, a statute’s structure and context may indicate Congress’s intent to adopt a broader definition of “employee” than the common-law conception of the term.

See, e.g., NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 124-132 (1944).

Here, even if common-law criteria were too restrictive to support treating Carver as an employee (which they are not), the structure and policies of the housekeeping statute would dictate that result.

Mockovak could not prevail even if he were right about the meaning of “employee” for a second and related reason. His argument presumes that the Department’s power to promulgate *Touhy* regulations flows from a single source: the clause in § 301 granting the Department power over the “conduct of its employees.” But the housekeeping statute contains multiple fonts of rulemaking authority, as explained in detail above. Read in full, the statute gives the Department sweeping latitude to make rules governing all aspects of its “govern[ance]” and all facets of its “business.” 5 U.S.C. § 301. The statute does not purport to restrict the Department’s authority over “dual-hatted” personnel who investigate federal crimes and wield federal arrest authority on the FBI’s sole behalf. Because Task Force Officers play an integral role in the FBI’s operations, and the official information and agency documents in their possession belong to the federal agency for which they are working, Task Force Officers are proper subjects of the Department’s *Touhy* regulations.

For these reasons, every court to consider this question has treated Task Force Officers as Department employees. *See Mayo v. City of*

Scranton, No. 3:CV-10-0935, 2012 WL 6050551, at *2 (M.D. Pa. Dec. 4, 2012); *United States v. Threet*, No. 09-20523-05, 2011 WL 5865076, at *1 (E.D. Mich. Nov. 22, 2011); *Hickey v. Columbus Consol. Gov't*, No. 4:07-CV-096, 2008 WL 450561, at *3 n.4 (M.D. Ga. Feb. 15, 2008). The government is not aware of, and Mockovak has not cited, any contrary authority.

As a last resort, Mockovak argues (Appellant's Br. 44-48) that, if § 301 does allow the Department to classify Task Force Officers as federal employees, the statute violates the "anti-commandeering" principles of the Tenth Amendment. This argument misunderstands the U.S. Supreme Court's anti-commandeering jurisprudence. Those cases hold merely that the federal government may not conscript nonconsenting state executive, legislative, or judicial officers to enforce federal laws. They have nothing to say about cooperative arrangements under which local law-enforcement officers, acting with the permission of their state or local governments, voluntarily agree to wear federal badges and to obey federal regulations.

The facts of *Printz v. United States*, 521 U.S. 898 (1997), illustrate this distinction. In *Printz*, the Supreme Court invalidated a federal statute requiring all state law-enforcement officers—willing or unwilling—to administer a federal regulatory scheme. The Court reasoned that the Tenth Amendment prohibits the "compelled enlistment" of state officials who

“object to being pressed into federal service” without the option of opting out. *Id.* at 905. This logic does not strip a local law-enforcement agency of its power to *voluntarily* assign one of its officers to the FBI. Nor does it prevent the FBI from requiring that officer to comply with federal regulations as a condition of the assignment.

B. Federal Sovereign Immunity Precludes The Trial Court From Enforcing Discovery Orders Against Officer Carver.

The trial court’s decision should be affirmed for an additional, independent reason: Federal sovereign immunity precludes state courts from compelling agency employees to testify “contrary to [their] federal employer’s instructions under valid agency regulations.” *Boron Oil Co. v. Downie*, 873 F.2d 67, 69-70 (4th Cir. 1989); *see State v. Vance*, 184 Wn. App. 902, 916 (2014) (collecting cases). As Division 2 has held, “[w]here an agency has not waived its immunity to suit, the state court lacks jurisdiction to proceed against a federal employee acting pursuant to agency direction.” *Vance*, 184 Wn. App. at 916 (citation omitted).

These undisputed principles control this case. As explained above, Officer Carver is a federal employee. Carver refused to submit to Mockovak’s discovery requests because the U.S. Attorney—acting pursuant to valid *Touhy* regulations—denied Carver authorization to respond. The United States asserted this sovereign-immunity defense in

its response to Mockovak's motion, CP 1272-73, and the trial court adopted the government's reasoning, CP 1913.

Mockovak failed to address this independent basis for the court's decision in his trial-court filings, and his appellate brief does not mention the issue either. Mockovak has therefore forfeited any objection to the sovereign-immunity defense.

C. Mockovak Is Not Entitled To Seek Discovery From Officer Carver Under State Discovery Law.

The trial court's decision should be affirmed for a final independent reason: State discovery rules limit discovery in a Public Records Act action, as they limit discovery in all civil actions, to unprivileged matters "relevant to the subject matter involved." *See* CR 26(b)(1); *Neighborhood All. of Spokane Cty. v. County of Spokane*, 172 Wn.2d 702, 716-18 (2011).

As noted, Mockovak and King County have settled every claim except Mockovak's challenge to the redactions made to 81 documents specified in King County's exemption log. These documents are in the possession of King County and were partially or fully redacted under various Public Records Act exemptions. *See* CP 70-131. The only issues remaining in the case are whether King County properly invoked those exemptions and whether King County acted in bad faith. *See*

Neighborhood All., 172 Wn.2d at 717-18. Officer Carver is not affiliated with King County and could not have participated in the document-redaction process. Carver participated in the case only to the extent that he coordinated the FBI investigation that led to Mockovak's convictions—convictions Mockovak hopes to overturn with information gleaned from this Public Records Act lawsuit. Because Mockovak has failed to demonstrate that Carver has any information relevant to the narrow claim at the core of this discovery dispute, the trial court properly ruled that Mockovak is not entitled to depose Carver or to subpoena documents from him.

Mockovak responds (Appellant's Br. 52) that King County called Carver to the witness stand at Mockovak's criminal trial, and that Carver in the course of his investigation examined documents possessed not by King County but by the FBI. Mockovak believes that these facts together obligated King County to disclose not only its own documents but *the FBI's* documents. See Appellant's Br. 48-50 (discussing *Concerned Ratepayers Ass'n v. Public Util. Dist. No. 1 of Clark Cty.*, 138 Wn.2d 950 (1999)). But nothing in *Concerned Ratepayers* suggests that the Public Records Act requires Washington State agencies to acquire and turn over documents created by and belonging to a federal agency in contravention of that agency's *Touhy* regulations.

Mockovak would not be entitled to depose or subpoena Carver even if he is correct about the scope of King County's disclosure obligations under the Public Records Act. To reiterate, the settlement agreement between Mockovak and King County disposed of any claim related to the adequacy of King County's search and the number of documents King County produced. CP 1934-36. Mockovak has therefore abandoned any claim that King County acted unlawfully by failing to turn over FBI records.

CONCLUSION

For these reasons, the trial court's order denying Mockovak's motion to compel Officer Carver's testimony should be affirmed.

Respectfully submitted,

SCOTT R. McINTOSH
MICHAEL SHIH
*Attorneys, Appellate Staff
Civil Division, Room 7268
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-6880*

ANNETTE L. HAYES
*United States Attorney,
Western District of Washington*


HELEN J. BRUNNER
*First Assistant United States
Attorney
WSBA No. 30245
700 Stewart Street, Suite 5220
Seattle, WA 98101
(206) 553-7970*

JULY 2016

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

Today I directed electronic mail addressed to James E. Lobsenz, the attorney for the petitioner, at lobsenz@carneylaw.com, and Michael J. Sinsky, Senior Deputy Prosecuting Attorney, attorney for the respondent at Mike.Sinsky@kingcounty.gov, containing a copy of the foregoing brief in *Mockovak v. King County*, Cause No. 74459-3, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of July, 2016.



HELEN J. BRUNNER
WSBA No. 30245
Done in Seattle, Washington

2016 JUL 29 AM 11:26
COURT OF APPEALS DIV I
STATE OF WASHINGTON

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5 U.S.C. § 301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

28 C.F.R. § 16.21. Purpose and Scope

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any 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:

(1) In all federal and state proceedings in which the United States is a party; and

(2) In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena, order, or other demand (hereinafter collectively referred to as a "demand") of a court or other authority is issued for such material or information.

(b) For purposes of this subpart, the term employee of the Department includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials.

(c) Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prosecutive, or regulatory agencies.

(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. § 16.22. General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the U.S. Attorney for the district where the issuing authority is located. The responsible United States Attorney shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible U.S. Attorney shall request a summary of the information sought and its relevance to the proceeding.

2012 WL 6050551

Only the Westlaw citation is currently available.
United States District Court,
M.D. Pennsylvania.

Timothy MAYO, Plaintiff,
v.
CITY OF SCRANTON, et al., Defendants.

Civil Action No. 3:CV-10-0935.

Dec. 4, 2012.

Attorneys and Law Firms

Cynthia L. Pollick, The Employment Law Firm, Pittston,
PA, for Plaintiff.

Timothy E. Foley, Foley, Cognetti, Comerford & Cimini,
Scranton, PA, for Defendants.

MEMORANDUM ORDER

A. RICHARD CAPUTO, District Judge.

*1 Before me is the Motion to Compel Appearance of City of Scranton Detective Sergeant Tim Harding (Doc. 46) filed by Plaintiff Timothy Mayo. Plaintiff served a federal subpoena on Mr. Harding to appear as a trial witness in this matter. Subsequently, the United States Attorney's Office for the Middle District of Pennsylvania contacted Plaintiff's counsel to inform her that Mr. Harding is a Task Force Officer ("TFO") for the Federal Bureau of Investigation ("FBI"). (Doc. 46, Attach.4.) As such, the United States Attorney's Office indicated that in order to secure Mr. Harding's testimony in this proceeding, Plaintiff must comply with the regulations set forth in 28 C.F.R. §§ 16.21-16.29.

The Code of Federal Regulations contain the procedure for production or disclosure of any FBI 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." 28 C.F.R. § 16.21(a). These procedures apply:

In all federal and state proceedings in which the United States is not a party, including

any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena, order, or other demand (hereinafter collectively referred to as a 'demand') of a court or other authority is issued for such material or information.

28 C.F.R. § 16.21(a)(2). An employee of the Department "includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. Attorneys, U.S. Marshals, U.S. Trustees, and members of the staffs of those officials." 28 C.F.R. § 16.21(b).

In a case in which the United States is not a party, an employee of the Department of Justice shall not disclose information or produce material acquired as part of the performance of that person's official duties without prior approval of the proper Department official. *See* 28 C.F.R. § 16.22(a). And, to obtain approval for oral testimony in a case in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony, must be provided to the responsible U.S. Attorney, and the statement must set forth "a summary of the testimony sought and its relevance to the proceeding." 28 U.S.C. § 16.22(c).

Rather than following these regulations to obtain Mr. Harding's testimony in this matter, Plaintiff filed the instant motion to compel. (Doc. 46.) Plaintiff contends that Mr. Harding is not an FBI Special Agent. Instead, Plaintiff asserts that Mr. Harding has previously testified that he was employed by the City of Scranton at an arbitration proceeding. (*Id.* at Attach. 2.) Thus, Plaintiff argues that Mr. Harding should be compelled to testify at trial because there is "no rule or regulation that states that a City of Scranton employee cannot appear at trial in this matter." (Doc. 46, ¶ 6.)

*2 Plaintiff's motion to compel will be denied. While Plaintiff argues that Mr. Harding was not an FBI Special Agent, Mr. Harding previously testified that he was "assigned full time to the FBI Safe Streets Task Force." (Doc. 46, at Attach. 2.) Based on this assignment to the FBI, Mr. Harding was subject to the supervision, jurisdiction or control of the Department of Justice for

purposes of 28 C.F.R. § 16.21(b). Accordingly, to obtain Mr. Harding's testimony in this matter, Plaintiff must furnish an affidavit or statement to the responsible U.S. Attorney setting forth a summary of the testimony sought and its relevance to this proceeding. As Plaintiff has not complied with this procedure, (Doc. 46, Attach .4), it would be improper to compel the testimony of Mr. Harding. Plaintiff's motion will therefore be denied.

NOW, this 4th day of December, 2012, **IT IS HEREBY ORDERED** that the Motion to Compel Appearance of City of Scranton Detective (Doc. 46) is **DENIED**.

All Citations

Not Reported in F.Supp.2d, 2012 WL 6050551

Footnotes

- 1 It is unclear from Plaintiff's motion what information he seeks to elicit from Mr. Harding at trial. However, it appears that Mr. Harding is represented by the United States Attorney's Office on a related matter. (Doc. 46, Attach.4.)

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2011 WL 5865076

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Northern Division.

UNITED STATES of America, Plaintiff,

v.

Christopher THREET, Defendant.

No. 09-20523-05.

|

Nov. 22, 2011.

Attorneys and Law Firms

Roy Kranz, U.S. Attorney's Office, Bay City, MI, for Plaintiff.

ORDER DENYING DEFENDANT'S MOTION TO COMPEL WITNESS ATTENDANCE

THOMAS L. LUDINGTON, District Judge.

*1 Now before the Court is Defendant Christopher Threet's motion to compel witness attendance. ECF Nos. 262, 269. Defendant requests that the Court compel the attendance of Drug Enforcement Administration ("DEA") Special Agents Cari Gettel, Scott Nedoff, Robert DeRocher, and Dave McGovern, Resident Agent in Charge Joseph Schihl, and Task Force Agent John Boismier as witnesses for the defense at the hearing on Defendant's motion to suppress. These witnesses were agents that traveled to Defendant's last known address to arrest him on January 13, 2011, during which Defendant's house and enclosed porch were searched before he signed a consent to search.

On August 2, 2011, Defendant sent subpoenas to DEA Special Agents Cari Gettel, Scott Nedoff, Robert DeRocher, and Dave McGovern, Resident Agent in Charge Joseph Schihl, and Task Force Agent John Boismier. Shortly thereafter, Michelle Gutzmer, Associate Chief Counsel of the Domestic Criminal Law Section of the DEA, and the United States Attorney's Office rejected the subpoenas as inconsistent with the requirements set forth in 28 C.F.R. § 16.21 et seq. and *United States ex rel.*

Touhy v. Ragen, 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951).

On August 16, 2011, Defendant sent additional correspondence in an effort to comply with the information required by the *Touhy* regulations. The letter stated, in pertinent part:

Our purpose in requesting the presence at said hearing is, in general, to request provision of relevant records, if any, and question the agents regarding events relative to the issues in the motion to suppress; and, more specifically, to question the agents regarding the events leading to and including the entry without a warrant onto the curtilage and into said residence, the protective sweep of said residence, and the arrest of Mr. Threet and the circumstances surrounding execution of a consent to search form, as well as any related issues.

ECF No. 269 Ex. B at 2. On September 23, 2011, Gutzmer and the United States Attorney's Office again rejected the subpoenas, citing the factors in 28 C.F.R. § 16.26(a) and (b) as the basis for the determination.

Defendant contends that *Touhy* is inapplicable because, in *Touhy*, the subpoenaing party was seeking to enforce a production of evidence and, more specifically, records, and the requests were made "without limitation." 340 U.S. at 466. This difference is not a distinction recognized by the federal courts. *See Boeh v. Gates*, 25 F.3d 761, 766 (9th Cir.1994) ("There is no difference in principle, however, between the power ... to specify what records a subordinate may release and the power to specify what information a subordinate may release through testimony.").

Moreover, if Defendant is dissatisfied with the DEA's response to his *Touhy* request, his remedy is an action against the DEA pursuant to the Administrative Procedures Act, and not pursuant to a motion to compel. *Boeh v. Gates*, 25 F.3d 761, 763-767 (9th Cir.1994); *Swett v. Schenk*, 792 F.2d 1447, 1451 (9th Cir.1986); *Hayes International, Inc. v. United States Dept. of the Navy*, 685 F.Supp. 228, 230 (M.D.Ala.1987). ("[T]he

APA governs federal court review of a federal agency's decision regarding testimony of the agency's employees in state court."'). Indeed, the *Touhy* regulations operate as a jurisdictional limitation on the Court's authority, precluding contempt proceedings without regard to the merits of the agency's decision to withhold evidence. *Boeh*, 25 F.3d at 765; *Swett*, 792 F.2d at 1452.

*2 To the extent Defendant is challenging the rejection of his subpoenas as a violation of his rights pursuant to the compulsory process clause of the Sixth Amendment, his motion will be denied. Defendant has not fully complied with the agency's *Touhy* regulations and thus may not assert a constitutional challenge to the regulations. *See United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir.1981). In particular, Defendant has not provided an affidavit "setting forth a summary of the testimony

sought[,]" as required by 28 C.F.R. § 16.23(c). Defendant's letter request contains the general topic areas of his intended inquiry but does not include a sworn statement summarizing the testimony he seeks.

Accordingly, it is **ORDERED** that Defendant's motion to compel witness attendance (ECF No. 262) is **DENIED AS MOOT**.

It is further **ORDERED** that Defendant's amended motion to compel witness attendance (ECF No. 269) is **DENIED**.

All Citations

Not Reported in F.Supp.2d, 2011 WL 5865076

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2008 WL 450561

Only the Westlaw citation is currently available.
United States District Court,
M.D. Georgia,
Columbus Division.

Byron N. HICKEY, Plaintiff,

v.

COLUMBUS CONSOLIDATED GOVERNMENT;
Chief R.T. Boren, individually and in his official
capacity; Capt. J.D. Hawk, individually and in his
official capacity; Sgt. Dean Walton, individually
and in his official capacity; Sgt. David Horiuchi,
individually and in his official capacity; Mayor
William J. Wetherington, individually and in
his official capacity; Former Mayor Robert
S. Poydasheff, individually and in his official
capacity; and H.R. Director Thomas E. Barron,
individually and in his official capacity, Defendants.

No. 4:07-CV-096 (CDL).

Feb. 15, 2008.

Attorneys and Law Firms

Gwyn P. Newsom, Columbus, GA, Richard Allen Bunn,
Hamilton, GA, for Plaintiff.

Clifton Cartwright Fay, Jaimie Briggs Deloach, Rebecca
J. Miller, Columbus, GA, William David Gifford, U.S.
Attorney Office, Macon, GA, for Defendants.

ORDER

CLAY D. LAND, District Judge.

*1 Presently pending before the Court are the following motions: the Attorney General's Motion to Quash Subpoenas, Plaintiff's Motion to Compel Discovery, Plaintiff's Motion to Unseal March 7, 2007 Order Authorizing Interception of Wire Communications, and the Attorney General's Motion for *In Camera* Proceeding. For the reasons set forth below, the Attorney General's Motion to Quash Subpoenas (Doc. 31) is granted, Plaintiff's Motion to Compel Discovery (Doc. 37) is denied, Plaintiff's Motion to Unseal March 7, 2007 Order

Authorizing Interception of Wire Communications (Doc. 54) is denied, and the Attorney General's Motion for *In Camera* Proceeding (Doc. 55) is granted.

FACTUAL BACKGROUND

Plaintiff is employed as a corporal/detective in the police department of Columbus, Georgia. (Compl.¶ 17.) Plaintiff claims that his employer discriminated against him because of his race and retaliated against him because of his opposition to race and sex discrimination in the Columbus police department. (Compl.¶¶ 18-24.) Plaintiff sued the Columbus Consolidated Government, along with a number of police officers and city officials, under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*; 42 U.S.C. § 1981; 42 U.S.C. § 1983; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*; and various state law theories. (Compl.¶ 1.)

In addition to other claims of discrimination and retaliation, Plaintiff contends that Defendants used a federal criminal investigation being conducted by the Federal Bureau of Investigation ("FBI") and the Drug Enforcement Administration ("DEA") as a means to retaliate against Plaintiff for his protected activities. Specifically, Plaintiff claims that Columbus Police Chief Richard Boren, DEA Agent Steve Ribolla, and Columbus police officer Richard Stinson "conspired to attempt to entrap [Plaintiff] into committing a criminal offense." (Pl.'s Reply to Defs.' Resp. to Pl.'s Mot. to Compel Discovery ¶ 6 [hereinafter Pl.'s Reply re Mot. to Compel]; Pl.'s Resp. to Mot. to Quash Subpoenas and Br. in Supp. Thereof ¶ 3 [hereinafter Pl.'s Resp. to Mot. to Quash].) In furtherance of this conspiracy, Plaintiff argues, Ribolla contacted Plaintiff on April 9, 2007 and asked Plaintiff questions about Plaintiff's previous investigation of criminal suspect Jeffrey Fluellen, as well as a possible connection between Fluellen and Lionel Lightning, the son of Larry Lightning, a Columbus police officer who was being investigated by the FBI and DEA. (Pl.'s Reply re Mot. to Compel ¶ 6; Pl.'s Resp. to Mot. to Quash ¶ 2.) At the time of the April 9, 2007 conversation between Ribolla and Plaintiff, Larry Lightning's telephone was being tapped pursuant to a court order, and Plaintiff's conversations with Lightning were subject to being intercepted and recorded. (Pl.'s Resp. to Mot. to Quash ¶ 2; Notice of Interception, Ex. F to Pl.'s Reply re Mot. to Compel.) Plaintiff did

not learn of the tap on Lightning's phone until several months after the April 9, 2007 phone call. (Pl.'s Resp. to Mot. to Quash ¶ 2.) Plaintiff posits that the April 9, 2007 conversation was meant to lure him into obstructing justice by calling Lightning to warn him that Lionel was under investigation. (*Id.* at ¶¶ 2-3.) Plaintiff did not make such a call.

*2 Plaintiff seeks to depose Boren, Ribolla and Stinson regarding the Lightning investigation and the April 9, 2007 phone call, and he seeks access to the Court's sealed March 7, 2007 Order in the case of *United States v. Larry Lightning*, Case No. 4:07-CR-00019-CDL-GMF-1. Plaintiff contends that he is not seeking to learn about confidential law enforcement activity. (Pl.'s Resp. to Mot. to Quash ¶ 2.) Rather, Plaintiff would like to obtain information regarding: (1) "how Ribolla obtained certain information regarding one of Plaintiff's prior investigations"; (2) "what knowledge Stinson and/or Ribolla have regarding Defendant Boren's and possibly Assistant Chief Rowe's knowledge of Plaintiff being called by Ribolla"; and (3) "why Ribolla asked Plaintiff in that conversation ... about ... a relative of former Columbus police officer Larry Lightning." (*Id.*) Plaintiff also seeks access to the Court's March 7, 2007 Order authorizing the wire tap on Lightning's phone. (Pl.'s Mot. to Unseal March 7, 2007 Order Authorizing Interception of Wire Communications and Br. in Supp. Thereof ¶¶ 1-3 [hereinafter Pl.'s Mot. to Unseal].)

Defendants and the United States Attorney General argue that the information Plaintiff seeks is privileged and that Plaintiff should not be permitted to depose Boren, Ribolla or Stinson about the Lightning investigation or the April 9, 2007 phone call between Plaintiff and Ribolla. As discussed below, the Court agrees with Defendants and the Attorney General that the information Plaintiff seeks is privileged.

DISCUSSION

I. Attorney General's Motion for *In Camera* Proceeding

The Court grants the Attorney General's Motion for *In Camera* Proceeding. The Court held an *in camera* proceeding on February 12, 2008, and received evidence that is relevant to the issue of whether the information Plaintiff seeks is privileged.

II. Attorney General's Motion to Quash

Plaintiff's counsel issued subpoenas to Ribolla and Stinson, directing them to appear as deposition witnesses in this case. The Attorney General seeks to quash those subpoenas pursuant to agency regulations that prohibit employees of the Department of Justice ("DOJ") from testifying, without prior DOJ approval, about information obtained as part of the person's official duties or because of the person's official status. (Statement and Points of Authority in Supp. of Mot. to Quash Subpoena 1-2 [hereinafter Mot. to Quash Br.]) The Attorney General declined to authorize the testimony of Ribolla and Stinson in this case.

A. DOJ Regulations Regarding Disclosure of DOJ Information

The Federal Housekeeping Act, 5 U.S.C. § 301, permits federal agencies to prescribe regulations establishing conditions for the production or disclosure of agency information.² Pursuant to 5 U.S.C. § 301, the DOJ promulgated regulations restricting DOJ employees from disclosing DOJ information in private litigation. *See* 28 C.F.R. §§ 16.21-16.29. The regulations read in part:

*3 In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

28 C.F.R. § 16.22(a). The Supreme Court has upheld the Attorney General's authority to promulgate such regulations, noting that "[w]hen one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious." *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468, 71 S.Ct. 416, 95 L.Ed. 417 (1951). Since the *Touhy* opinion, "an unbroken

line of authority directly supports [the] contention that a federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations.' " *Moore v. Armour Pharm. Co.*, 927 F.2d 1194, 1197 (11th Cir.1991) (quoting *Boron Oil Co. v. Downie*, 873 F.2d 67, 73 (4th Cir.1989)) (alteration in original).

The DOJ regulations require that, in deciding whether to authorize an employee to testify in response to a subpoena, the DOJ official should consider "[w]hether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose," and "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege." 28 C.F.R. § 16.26(a).³ The regulations prohibit the disclosure of information that (1) "would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection," or (2) "would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *Id.* at § 16.26(b)(4), (b)(5).

In this case, the Attorney General contends that the testimony Plaintiff seeks regarding the Lightning investigation and the April 9, 2007 conversation between Ribolla and Plaintiff is privileged because it "could reveal investigative records completed for law enforcement purposes and interfere with enforcement proceedings or disclose investigative techniques and procedures, the effectiveness of which could be impaired." (Mot. to Quash Br. 2.) For those reasons, the Attorney General refused to authorize the testimony of Ribolla and Stinson, citing the federal regulations governing the testimony of DOJ personnel.⁴ (*Id.* at 4.)

B. Reviewing the DOJ's Decision

*4 The decision not to permit the testimony of Ribolla and Stinson is a final agency action reviewable under the Administrative Procedure Act. *See* 5 U.S.C. § 704; *see also Moore*, 927 F.2d at 1197. The Court may overturn the agency action if the Attorney General's refusal to authorize the testimony of Ribolla and Stinson was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Moore*, 927 F.2d at 1197. "To determine whether an agency decision was arbitrary and capricious, the

reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' " *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1538 (11th Cir.1990) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)).

Based upon its *in camera* review regarding the information sought by Plaintiff, the Court finds that the Attorney General's action in refusing to authorize the testimony of Ribolla and Stinson was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Specifically, the Court finds that it was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law for the Attorney General to conclude that the information sought by Plaintiff is privileged under the law enforcement privilege and that disclosure of the information "would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *See* 28 C.F.R. § 16.26(b)(5). For these reasons, the Attorney General's Motion to Quash Subpoenas is granted.

III. Plaintiff's Motion to Compel

Plaintiff also seeks the testimony of Boren regarding the Lightning investigation and the April 9, 2007 phone call between Plaintiff and Ribolla. During Boren's November 26, 2007 deposition, Plaintiff's counsel questioned Boren about the Larry Lightning investigation, the tap on Lightning's phone, and whether Plaintiff was a suspect in a federal investigation. Citing the law enforcement privilege, Defendants' counsel instructed Boren not to answer these questions. (Boren Dep. 111:1-15, Nov. 26, 2007, Ex. D to Pl.'s Reply re Mot. to Compel; Defs.' Resp. to Pl.'s Mot. to Compel Discovery 11 [hereinafter Defs.' Resp. to Mot to Compel].)⁵ Plaintiff contends that the law enforcement privilege does not apply and that Boren should be compelled to answer Plaintiff's questions.

The law enforcement privilege exists to "prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *In re Dep't of Investigation*, 856 F.2d 481, 484 (2d Cir.1988)

(citations omitted); accord *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569 n. 1 (5th Cir.2006). To decide whether the privilege applies, a court "must balance 'the government's interest in confidentiality against the litigant's need for the [information].'" *In re U.S. Dep't of Homeland Sec.*, 459 F.3d at 570 (quoting *Coughlin v. Lee*, 946 F.2d 1152, 1160 (5th Cir.1991)). In making this determination, a number of courts weigh the ten factors developed in *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D.Pa.1973). See, e.g., *In re U.S. Dep't of Homeland Sec.*, 459 F.3d at 570; *Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C.Cir.1996). These factors are:

*5 (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; (10) the importance of the information sought to the plaintiff's case.

Frankenhauser, 59 F.R.D. at 344.

After considering these factors, the information supplied by the parties in their papers and in open court, and the evidence provided in the February 12, 2008 *in camera*

proceeding, the Court finds that the law enforcement privilege applies to the information Plaintiff seeks to elicit from Boren.⁶ As discussed above, it is reasonable to conclude that disclosure of the information sought by Plaintiff "would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." See 28 C.F.R. § 16.26(b)(5). The Court makes no finding that Plaintiff has established a need for any information in Boren's possession relating to the Lightning investigation and/or the interception of any telephone call involving Plaintiff; however, to the extent that Boren has any such information, the Court concludes that the government's interest in keeping the information confidential outweighs Plaintiff's need for such information. Plaintiff's Motion to Compel, therefore, is denied.

IV. Plaintiff's Motion to Unseal Documents

Plaintiff asks the Court to unseal its March 7, 2007 Order in the case of *United States v. Larry Lightning*, Case No. 4:07-CR-00019-CDL-GMF-1. In that Order, the Court authorized the interception of wire communications to and from Larry Lightning's telephone. For the same reasons that Boren's testimony regarding the Lightning investigation is privileged under the law enforcement privilege, the Court's March 7, 2007 Order is privileged. The government's interest in maintaining confidentiality of the Order outweighs Plaintiff's interest in disclosure because unsealing the Order would reveal investigatory records compiled for law enforcement purposes and may disclose investigative techniques and procedures the effectiveness of which would thereby be impaired. For these reasons, Plaintiff's Motion to Unseal March 7, 2007 Order Authorizing Interception of Wire Communications is denied.

CONCLUSION

*6 For the reasons stated above, the Attorney General's Motion to Quash (Doc. 31) is granted, Plaintiff's Motion to Compel Discovery (Doc. 37) is denied, Plaintiff's Motion to Unseal March 7, 2007 Order Authorizing Interception of Wire Communications (Doc. 54) is denied, and the Attorney General's Motion for *In Camera* Proceeding (Doc. 55) is granted.

All Citations

IT IS SO ORDERED.

Not Reported in F.Supp.2d, 2008 WL 450561

Footnotes

1 The Court finds that the information Plaintiff seeks is not relevant to his Title VII claims in this case because Plaintiff has not yet exhausted his administrative remedies as to the retaliatory investigation claim. The purpose of the exhaustion requirement is that the Equal Employment Opportunity Commission ("EEOC") "should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promoting conciliation efforts." *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1279 (2004) (per curiam) (internal quotation marks and citations omitted). Although Plaintiff received a "right to sue" letter from the EEOC on March 13, 2007, Plaintiff's right to sue is "limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Id.* at 1280 (internal quotation marks and citations omitted). The alleged retaliatory investigation did not occur until after Plaintiff received his right to sue letter, and Plaintiff did not notify the EEOC of the alleged retaliatory investigation until December 2007. The EEOC has not had an opportunity to complete its inquiry into Plaintiff's retaliatory investigation claim, and therefore Plaintiff is barred from bringing a Title VII claim at this time based on those allegations.

Even though the information Plaintiff seeks is not relevant to Plaintiff's Title VII claims, it is relevant to his § 1981 retaliation claims, which are not subject to the Title VII exhaustion requirement. Therefore, the Court must still determine whether the information Plaintiff seeks should be disclosed to Plaintiff.

2 Section 301 provides: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

3 A court must quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed.R.Civ.P. 45(c)(3)(A)(iii). In this case, the privilege asserted by the Attorney General is the law enforcement privilege. The law enforcement privilege exists to prevent disclosure of sensitive law enforcement investigatory information. The privilege applies if the government's interest in confidentiality outweighs the litigant's need for the information. *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 570 (5th Cir.2006). For a more detailed discussion of the law enforcement privilege, see *infra* Part III.

4 Under the applicable regulations, "employee of the Department" "includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials." 28 C.F.R. § 16.21(b). Based upon the Court's February 12, 2008 *in camera* review, the Court is satisfied that Stinson is properly considered an "employee of the Department" with regard to the information sought by Plaintiff.

5 Defendants further contend that, although Boren is not an "employee" of the DOJ such that the DOJ regulations permit the Attorney General to prevent disclosure of any information Boren has about a DEA/FBI investigation, the Attorney General holds the privilege with regard to any information Boren has about the Larry Lightning investigation or the April 9, 2007 phone call, and Boren cannot waive that privilege.

6 Because the Court finds that the evidence provided in the *in camera* proceeding is privileged and should not be revealed, the Court will not risk disclosing that information by providing a detailed analysis of the facts supporting its conclusion. In reaching its conclusion, the Court considered each *Frankenhauser* factor and determined whether the evidence proffered to the Court weighed in favor of or against disclosure. Based on the evidence, the Court concludes that the government's interest in confidentiality outweighs Plaintiff's need for the information he seeks.