

**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 RENEWED MOTION
FOR AN ORDER DIRECTING THE U.S. ATTORNEY'S OFFICE
NOT TO WITHHOLD RELEVANT EVIDENCE**

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 Motion for an Order Directing the U.S. Attorney’s Office Not to Withhold Relevant Evidence (DE 50, renewed in DE 226), in light of the Government’s response (DE 230). The Government’s response confirms each of the victims’ arguments in support of their motion, specifically (1) that the Government’s privilege log is grossly inadequate; (2) the CVRA’s requirement that the Government exercise its “best efforts” to protect crime victims’ rights requires the production of the withheld documents; and (3) the CVRA creates a right to access to documents that support their position, just as criminal defendants have a right to access such documents. For each of these reasons, the Court should grant the victims’ motion and provide the materials that it has received in camera to the victims.

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

In their motion, the victims explained that the Government has substantially violated the Court’s order to provide an appropriate privilege log in connection with the disputed documents.

DE 226 at 6-12. The victims gave four specific illustrations of the inadequacies. The Government has now responded, but its response only reinforces the fact that it has properly invokes privilege in this case.

As an illustration of the inadequacies, the victims offered the example of the Government's failure to identify any documents among the 13,468 pages that it is withholding that concern AUSA Bruce Reinhart's internal knowledge about the Epstein prosecution before he left the U.S. Attorney's Office and became employed by Epstein. DE 226 at 8-9. The victims pointed out that the Government had admitted, in its response to the request for admission (RFA) #22, that "The Justice Department's Office of Professional Responsibility and/or other Government entities have collected information about . . . Bruce Reinhart's possible involvement in the Epstein matter." The victims wondered where that "collected information" was among the thousands of pages, since none of the document descriptions even contains the word "Reinhart."

In its response, the Government says that the "fallacy" in the victims' "reasoning is the assumption that the basis for the government's response to the request for admission was a document, rather than a personal observation. *If* it was based on the latter, there would be no document to produce." DE 230 at 3 (emphasis added). So which is it? Was the Government's answer based solely on a "personal observation" or not? There is simply no way to tell, even after reading the Government's response to the victims' motion. If the Government is taking the position that it does not have even a single document in its possession regarding the Reinhart issue, they should be required to state that forthrightly. The victims' would note that this would be remarkable, since the Reinhart issue was specifically brought to the attention of the Justice Department's Office of Professional Responsibility (OPR) – and presumably triggered at

least *some* kind of analysis of the issue. Yet, once again, it is impossible to tell where the Government is asserting privilege over Reinhart documents or staking out the extraordinary position that it does not have even a single document with the word “Reinhart” in it anywhere.

The victims similarly raised the point about other attorneys apart from Reinhart. The victims noted that, in the Government’s answers to RFA #22(b), it admitted that “[t]he Justice Department’s Office of Professional Responsibility and/or other Government entities have collected information about . . . [o]ther government [attorneys’] . . . possible improper behavior in the Epstein matter.” In response, the Government says that the victims have made a “fallacious assumption” that such other information about, for example, former AUSA Matt Menchel would be contained in a document, because the information “need not have been based upon a document.” DE 230 at 3-4. Here again, the Government deliberately leaves ambiguous whether or not it is saying there are no such documents. And here again, it would be truly remarkable if the Government, while “collect[ing] information” about such subjects did not produce even a single written document. If so, this might well be the first federal investigation in history in which federal investigators did not bother to take any notes!

The victims also noted that while it appeared that OPR had inquired into the possible wrongdoing by government prosecutors, none of the underlying factual information regarding those inquiries appears to have been produced. DE 226 at 10. In response, the Government says that it has properly invoked privilege over the OPR documents. DE 230 at 4. Here again, the Government ducks the issue. The victims contend that they cannot tell which of the thousands of pages of documents that the Government is withholding contain the factual information that OPR collected regarding improper government behavior. The Government’s privilege log shows

certain correspondence *about* OPR inquiries; but the log does not reveal any underlying substantive information that was “collected” during the OPR investigation. Where in the log is the information that was collected?

The declaration from Robin C. Ashton, Counsel of OPR, only deepens the mysteries swirling around the Government’s privilege log. For example, Ashton asserts “deliberative process” privilege over allegedly internal communications that were designed to “finalize” a letter that was to be sent to U.S. Attorney Ferrer. DE 243-1 at 5-6 (arguing that certain documents were “part of the internal deliberations to finalize the letter[] to U.S. Attorney Ferrer”). Yet this assertion of privilege obviously implies that there was a final letter delivered to U.S. Attorney Ferrer – a final letter over which “deliberative” process obviously could not be invoked. *See* DE 225 at 4 (noting that “[a]ny deliberative process privilege would only cover . . . the processes by which a decision was made, not the final decision itself”) (*citing NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151-52 (1975)). But victims cannot find any description of a final letter sent to U.S. Attorney Ferrer anywhere in the privilege log.

As a fourth and final illustration of the inadequacies of the Government’s privilege log, the victims pointed out that it appeared that the Government was claiming that there is no a single document – no email, no investigative report, no grand jury information, no record of any type – existing in the Middle District of Florida after the Southern District of Florida was recused from handling certain aspects of this case. DE 226 at 10-11. In response, the Government evades the issue, stating that “the USAO-MDFL assumed responsibility for the Epstein case, and exercises its own independent judgment and discretion about what action to take, if any.” DE 230 at 6. Is the Government really saying that there not a single responsive document exists in

the Middle District of Florida. Neither its privilege log nor its response to the victims' motion clarifies what the Government's position truly is.

The victims offered these four illustrations as evidence of pervasive inadequacies in the Government's privilege log. In view of these inadequacies, the Court should provide all the documents covered by the Government's privilege log to the victims.

II. THE CVRA'S BEST EFFORTS REQUIREMENT CREATES A FIDUCIARY EXCEPTION TO ALL PRIVILEGES.

The victims have also asked the Court to provide all the withheld documents to them on grounds that the CVRA's "best efforts" provision creates a fiduciary exception to any applicable privileges. In response, the Government hangs its hat on a single case: *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011). There, an Indian tribe argued that it was entitled to receive attorney-client privileged information about the handling of certain moneys held in trust by the Government because of "common-law trust principles." *Id.* at 2325. In rejecting the tribe's claim, the Supreme Court held that "the Tribe *must point to a right conferred by statute . . . in order to obtain otherwise privilege information from the Government against its wishes.*" *Id.* (emphasis added). The Supreme Court found that the Tribe could point to no such statutory right within the American Indian Trust Fund Management Reform Act of 1994. *Id.* at 2325-30.

Here, of course, the victims are not proceeding under an Indian trust fund statute, but rather the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. They have very specifically pointed to "a right conferred by statute" as the basis for obtaining the information in question. The victims have explained that the CVRA obligates government prosecutors to "make their *best efforts* to see that crime victims are . . . accorded[] their rights" under the CVRA. 18 U.S.C. §

3771(c)(1). Throughout their pleadings, at great length, they have explained why this specific statutory requirement obligates the Government to produce information that would help ensure that they are accorded their rights under the CVRA, including a right to be treated with fairness that creates “due process” protections. *See* DE 226 at 12-17; *see also* Part III, *infra*; DE 50 at 3-5; DE 76 at 2-6.

Moreover, even assuming as the Government argues in its brief, that “the Government seeks legal advice in a ‘personal’ rather than a fiduciary capacity,” DE 230 at 8 (*citing Jicarilla Apache Nation*, 131 S.Ct. at 2328), that does not obviate the more specific requirement here that it must use “best efforts” to protect crime victims’ rights. The victims have explained in detail why production of the documents to them is the only course of action consistent with the Government’s “best efforts” obligations. The victims, moreover, have not made any general claim, but only a specific claim that on the unique facts of this case the CVRA requires production of the documents. The Government does not even try to argue that withholding the documents in this case is somehow consistent with its CVRA best efforts obligations, presumably because no such argument would be plausible. For this reason as well, the Court should produce all the documents to the victims.

III. THE VICTIMS HAVE A RIGHT UNDER THEIR CVRA’S “FAIRNESS” RIGHT TO RECEIVE THE DOCUMENTS.

The victims finally argued in their motion that the CVRA’s right “to be treated with fairness” entitled them to access to documents helpful to their case. DE 226 at 14-17. The victims noted that criminal defendants receive exculpatory information automatically from the Government, and the situation here requires analogous treatment. *Id.* In response, the

Government claims that the victims do not have a “liberty” or “property” interest sufficient to trigger a due process claim, citing various Fourteenth Amendment cases. DE 230 at 8-9. But, once again, the Government evades the issue. The victims indisputably have a statutory right under the CVRA to be “treated with fairness.” If the Government is correct that the crime victims here lack a sufficient life, liberty, or property interest to invoke that right, then *no* crime victim *in any case* would ever be able to invoke that right. Surely, the right to fairness must mean something, particularly given that Senator Kyl, a CVRA co-sponsor, has directly stated that “[t]he broad rights articulated in this section [§ 3771(a)(8)] are meant to be rights themselves and are not intended to just be aspirational. One of these rights is the right to be treated with fairness. Of course, fairness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct Government agencies and employees, whether they are in executive or judiciary branches, to treat victims of crime with the respect they deserve.” 150 Cong. Rec. S4269 (Apr. 22, 2004).

The Government never even claims that it could somehow be “fair” to the victims for the Government to withhold information that would allow the victims to prove their case, particularly where the Government has repeatedly refused to stipulate to the relevant facts surrounding the victims’ treatment. *See* DE 225-1 at 1-6 (affidavit recounting the Government’s repeated efforts to block a stipulation concerning relevant facts). The victims have persuasively explained why their congressionally-recognized right to “fairness” requires the relevant documents be produced to them. For this reason as well, the Court should produce to the victims all of the documents that the Government is withholding on grounds of privilege.

CONCLUSION

The Court should enter an order directing the Government not to withhold material evidence in this case and should provide to the victims the materials it has received for in camera review. In addition, to solve the problem that the Government has not indicated which documents apply to which requests, the Government should be required to provide such a responsive document.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

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