

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANE DOE NO. 2,

Plaintiff,

CASE NO.: 08-CIV-80119-MARRA/JOHNSON

vs.

JEFFREY EPSTEIN,

Defendant.

Related cases:

08-80232, 08-08380, 08-80381, 08-80994,
08-80993, 08-80811, 08-80893, 09-80469,
09-80591, 09-80656, 09-80802, 09-81092

**DEFENDANT'S, MOTION FOR RECONSIDERATION AND/OR REQUEST FOR
RULE 4 REVIEW AND APPEAL OF PORTIONS OF THE MAGISTRATE'S ORDER
DATED MARCH 4, 2010 (DE 480), WITH INCORPORATED OBJECTIONS AND
MEMORANDUM OF LAW**

Defendant, Jeffrey Epstein (hereinafter "Epstein"), by and through his undersigned attorneys, hereby files his Motion for Reconsideration and/or for Request Rule 4 Review and Appeal of Portions of the Magistrate's Order (DE 480) pursuant to Rule 60, Fed.R.Civ.P. Rule 4, Rule 4(c) and Fed. R. Civ. P. 53(e). In support, Epstein states:

I. Procedural Background

Plaintiffs' Motion to Compel is filed at DE (333). Defendant's Response in Opposition is filed at DE (390), and the arguments set forth therein are incorporated herein by reference as if completely set forth herein as they apply to request number one (1) of the Request for Production of Net Worth Discovery.

Significantly, these cases have been consolidated for discovery. Therefore, consistent rulings must apply. In making those rulings, this Court must continue to recognize that the

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allegations in the related cases cannot be forgotten. (E.g., see DE 242, 293, and 462).¹ Production of information in one case could provide a link in the chain of evidence used to prosecute Epstein for a crime or provide an indirect link to incriminating evidence in another case and in another jurisdiction. Id. and *infra*.

The Request for Production and the Responses thereto are cited herein and referenced in DEs 390-1 and 333-1.

II. The Fifth Amendment

The Fifth Amendment serves as a guarantee against testimonial compulsion and provides, in relevant part, that “[n]o person...shall be compelled in any Criminal Case to be a witness against himself.” (DE 242, p.5); see also Edwin v. Price, 778 F.2d 668, 669 (11th Cir. 1985) (citing Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)). The privilege is accorded liberal construction in favor of the right and extends not only to answers that would support a criminal conviction, but extends also to those answers which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. See Hoffman v. United States, 341 U.S. 479, 486 (1951). Information is protected by the privilege not only if it would support a criminal conviction, but also in those instances where “the responses would merely ‘provide a lead or clue’ to evidence having a tendency to incriminate.” See United States v. Neff, 315 F.2d 1235, 1239 (9th Cir.), cert denied, 447 U.S. 925 (1980); Blau v. United States, 340 U.S. 159 (1950); SEC v Leach, 156 F.Supp.2d 491, 494 (E.D. PA. 2001).

Moreover, the act of production itself may implicitly communicate statements and, for this reason, the Fifth Amendment privilege also encompasses the circumstances where the act of producing documents in response to a subpoena or production request has a compelled

¹ Notably, a Motion for Reconsideration and/or Rule 4 Appeal was filed relative to DE 462, and thus the requests dealing with tax returns therein are similar in nature when compared to the instant request.

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testimonial aspect. See United States v. Hubbell, 530 U.S. 27, 35-36 (2000). Thus, where the existence or location of the requested documents are unknown, or where production would “implicitly authenticate” the requested documents, the act of producing responsive documents is considered testimonial and is protected by the Fifth Amendment. See In re Grand Jury Subpoena, 1 F.3d 87, 93 (2nd Cir. 1993); Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1263 (9th Cir. 2000)(the “privilege” against self-incrimination does not depend upon the likelihood, but upon the possibility of prosecution and also covers those circumstances where the disclosures would not be directly incriminating, but could provide an indirect link to incriminating evidence).

III. Request Number 1

Request No. 1: All Federal and State income tax returns, including all W-2 forms, 1099 forms and schedules, for tax years 2003-2008

Response to Request Numbers : Defendant is asserting specific legal objections including but not limited to relying on certain U.S. constitutional privileges in declining at present to respond to this request for production based on advice from my counsel that I cannot provide answers/responses to questions relating to my financial history and condition without waiving my Fifth Amendment and I must accept this advice or risk losing my Sixth Amendment right to effective representation. Accordingly, I assert my federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution. Drawing an adverse inference under these circumstances would unconstitutionally burden my exercise of my constitutional rights, would be unreasonable and would therefore violate the Constitution.

Responding to the above financial request would require Epstein to identify information regarding the offenses that were the prior subject of a federal investigation as set forth in more detail in a supplementary response available to be provided to the court in camera and ex parte to the extent the good faith assertion of the privilege is in question. The Fifth Amendment is a safe harbor for all citizens, including those who are innocent of any underlying offense, however responding to this and other relating inquiries have the potential to provide a link in a chain of information that would be protected. More specifically, the act of producing the above information may implicitly communicate statements of fact in that they would implicitly authenticate the requested information, require Epstein to admit that the requested information exists and admit that same were in his possession, custody and control. The very act of production itself may

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therefore provide a link in the chain of evidence adverse to Epstein, see generally *United States v Hubbell* 520 US 27, 36 (2000)

In addition to and without waiving his constitutional privileges, Defendant also objects as the request for production as unreasonable, overbroad, confidential, proprietary in nature and seeks information that is neither relevant to the subject matter of the pending action nor does it appear to be reasonably calculated to lead to the discovery of admissible evidence. The specific information requested as to tax returns also seeks information that is confidential and protected by federal law, 26 USC 6103. Further, Plaintiff's Complaint alleges a time period of "in or about 2004-2005." Plaintiff's request seeks information for a time period from 2003-2008.

To the extent this court rules that some or all of the requested information be produced, it should not be produced without limitations (including confidentiality), and should only be produced at the very end of litigation but before trial in order for Plaintiff to establish her burden making it apparent that punitive damages can be awarded.

As set forth in more detail in DE 390, which was provided to the court in camera, Epstein cannot provide answers/responses to questions relating to his financial history and condition without waiving his Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution, which includes his tax returns. Asking for Epstein's tax returns is financial in nature and it is confidential, proprietary and seeks information much of which is neither relevant to the subject matter of the pending action nor does it appear to be reasonably calculated to lead to the discovery of admissible evidence. Moreover, the request here is more broad in nature than the requests made by Jane Doe seeking only personal tax returns (i.e., this request here seeks or may seek production of information related not only to Epstein's personal tax returns but also to any alleged tax returns filed by any businesses in which Epstein has an interest in – and Jane Doe 2-8's Request for Production attached as **Exhibit "A"** does not define what tax returns they seek). Although page 3 of DE 426 seems to connote Plaintiffs seek only Epstein's personal tax returns those too should not be produced under the Fifth Amendment as more specifically set

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forth herein. Importantly, the Magistrate did not make a ruling on relevancy as to the tax returns, W-2s and 1099s here, and the Plaintiffs have not met the burden of establishing a “compelling need” for the specified information.

Producing the specified information, in full, would result in testimonial disclosures that would communicate statements of fact and would require Epstein to produce the returns, W-2s and 1099s and thereby “stipulate” to their genuineness, their existence, his control of the records, and their authenticity as his executed tax returns even though his possession of such records are by no means a foregone conclusion. Again, the information sought relates to potential federal claims of violations. See DE 390, in camera. Production would therefore constitute a testimonial admission of the genuineness, the existence, and Epstein’s control of such records, and thus presents a real and substantial danger of self-incrimination in this case, in other related cases and as well in areas that could result in criminal prosecution. See generally Hoffman v United States, 341 U.S. at 486; United States v. Hubbell, 530 U.S. at 36 and United States v. Apfelbaum, 445 U.S. at 128.

The Court’s order seems to piggyback on DE 462 (a similar order), and thus seems to hone in on the “required records” exception for the proposition that, as a matter of law, Epstein’s tax returns, W-2s and 1099s must be produced because they are allegedly a mandatory part of a civil regulatory scheme, may have assumed some public aspect and are also a “forgone conclusion” – the concentration of this order being on the “foregoing conclusion” aspect. (DE 480) However, “required records” are ordinarily records collected by highly regulated business (e.g., physicians) wherein the records themselves have assumed public aspects which render them analogous to public documents. See In re Dr. John Doe, 97 F.R.D. 640, 641-643 (S.D.N.Y. 1982). Usually, these documents are known to more than the filer and the agency in which the

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document(s) were filed (i.e., known to other persons of the general public). Id. Even though the IRS may have certain returns or other information, they remain confidential under 26 U.S.C. §6103 from any disclosures and are therefore different than a regulated/public record that can be accessed by the public. In Trudeau v. New York State Consumer Protection Bd., 237 F.R.D. 325 (N.D.N.Y. 2006), the court maintained that “[r]outine discovery of tax returns is not the rule but rather the exception.” Id. at 331. The Court went on to note that [f]or nearly the past thirty-five years, tax returns have been considered ‘confidential,’ pursuant to 26 U.S.C. §6103.” Id. Because of the principle of confidentiality, it further noted, “courts in the Second Circuit have found personal financial information to be presumptively confidential or cloaked with a qualified immunity,” and must, therefore, “balance the countervailing policies of liberal discovery set forth in the Federal Rules of Civil procedure against maintaining the confidentiality of such documents.” Id.

To achieve that balance, courts in the Second Circuit have developed a “more stringent” standard than that set forth in the rules. To order disclosure of tax returns, a court must find that “the requested tax information is relevant to the subject matter of the action” *and* that “there is a compelling need for this information because the information contained therein is not otherwise readily available.” Id. The Magistrate’s Order makes no such finding in the instant matter, and it assumes that the Federal Government currently has the specified information in its possession. In fact, the burden of showing compelling need is on the party seeking discovery, but once a compelling need has been found, the party whose tax return information has been requested has the burden to “provide alternative sources for this sensitive information. Id. If the requested information is available from alternate sources, disclosure should not be compelled. Potential alternate sources to which the court pointed were gathering the information through deposition or

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disclosure in an affidavit by the requested party of net worth, wealth, and income. Id. at 331-32. See Barton v. Cascade Regional Blood Services, 2007 WL 2288035 (W.D.Wash. 2007)(“Tax returns are confidential communications between the taxpayer and the government [citing §6103] and although not privileged from discovery there is a recognized policy against unnecessary public disclosure. . . . The Court finds no compelling need which overcomes this recognized policy”). Courts have broadly construed these provisions to embody a general federal policy against indiscriminate disclosure of tax returns from any source. Federal Sav. & Loan Ins. Corp. v. Krueger, 55 F.R.D. 514-15 (N.D. Ill. 1972)(“it is the opinion of this court that [§6103] reflect[s] a valid public policy against disclosure of income tax returns. This policy is grounded in the interest of the government in full disclosure of all the taxpayer’s income which thereby maximizes revenue. To indiscriminately compel a taxpayer to disclose this information merely because he has become a party to a lawsuit would undermine this policy”); see also Premium Service Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975)(would have been appropriate for district court to quash subpoena for tax returns based on the “primacy” of the “public policy against unnecessary disclosure [of tax returns] arises from the need, if tax laws are to function properly, to encourage taxpayers to file complete and accurate returns”).

In Pendlebury v. Starbucks Coffee Co., 2005 WL 2105024 at *2 (S.D. Fla. 2005), the court agreed that “[i]ncome tax returns are highly sensitive documents” and that courts should be reluctant to order disclosure during discovery. Citing, Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1411 (5th Cir. 1993); DeMasi v. Weiss, Inc., 669 F.2d 114, 119-20 (3d Cir. 1982)(noting existence of public policy against disclosure of tax returns); Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975). The court in Pendlebury agreed that parties seeking the production of tax returns must demonstrate (1)

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relevance of the tax returns to the subject matter of the dispute and (2) a compelling need for the tax returns exists because the information contained therein is not otherwise available. Id. at *2; see also Dunkin Donuts, Inc. v. Mary's Donuts, Inc., 2001 WL 34079319 (S.D. Fla. 2001); Cooper v. Hallgarten & Co., 34 F.R.D. 482, 483-84 (S.D.N.Y. 1964). Thus, before the Court can order production of the requested returns, W-2s and 1099s in this matter, the Plaintiffs must satisfy the "relevance" and "compelling need" standards. The Magistrate's Order fails to address the "relevancy" standard and Plaintiffs fail to provide same with supporting argument and case law, and the Plaintiffs fail to delineate any "compelling need" or availability of net worth from other sources (e.g., a stipulation as to net worth, which is certainly an alternative means). To the extent that the Court determines that the tax returns, W-2s and/or 1099s are relevant and that there is a compelling need for at least their disclosure of Epstein's wealth for punitive damage purposes, Epstein would agree to stipulate, through his attorneys, that he has a net worth of over \$50,000,000. Such a stipulation more than satisfies any necessity for the disclosure of the tax information or any additional net worth information.

This court already ruled in DEs 462 and 480 that Epstein is not required to produce his financial history information to the extent same seeks to identify Epstein's assets, where such assets are located and whether such assets have been transferred. Id. Moreover, the names and addresses of his accounts, financial planners and money managers were also sustained pursuant to the Fifth Amendment. Id. Therefore, to the extent this court orders production of all federal and state income tax returns, W-2s and 1099s and to the extent Epstein's tax information (personal or otherwise) contain such information, same should be redacted and subject to heightened confidentiality. However, this can only be done subsequent to an *in camera* hearing

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wherein this court can make a ruling on relevancy, production, redaction and confidentiality; but only after Plaintiffs show a compelling need.

Furthermore, Epstein's complicated business transactions have no relevancy to this lawsuit and, therefore, evidence of same should not be produced. The Fifth Amendment is a safe harbor for all citizens, including those who are innocent of any underlying offense. This request, if answered, may result in compelled production and/or testimonial communications from Epstein regarding his financial status and history and would require him to waive his right to decline to respond to other inquiries related to the same subject matter. Responding to this and other related inquiries would have the potential to provide a link in a chain of information and/or leads to other evidence or witnesses that would have the specific risk of furthering an investigation against him and therefore are protected from compulsion by Epstein's constitutional privilege.

Accordingly, any compelled testimony that provides a "lead or clue to a source of evidence of such [a] crime" is protected by Fifth Amendment. SEC v Leach, 156 F.Supp.2d at 494. Questions seeking "testimony" regarding names of witnesses, leads to phone or travel records, or financial records that would provide leads to tax or money laundering or unlicensed money transmittal investigations are protected. See also Hoffman v United States, 341 U.S. 479, 486 (1951)("the right against self-incrimination may be invoked if the answer would furnish a link in the chain of evidence needed to prosecute for a crime").

Wherefore, Epstein respectfully requests that this Court issue and order:

- a. finding that the danger Epstein faces by being forced to testify in this case relative to the above request is substantial and real, and not merely trifling or imaginary;
- b. sustaining Epstein's Fifth Amendment Privilege as it relates to the above request and denying Plaintiffs' Motion in that regard;

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c. reversing and/or revising the Magistrate's Order (DE 480) relative to Request Number 1 and entering an amended order sustaining Epstein's objections to the Magistrate's Order as to that specific request and not requiring him to produce information relative to same; and/or

d. remanding this appeal to the Magistrate-Judge for her reconsideration of these portions of her order;

e. alternatively, if this court rules that any of the information requested herein is relevant, it shall only do so after an in camera hearing and only after this court ensures that each and every document produced is the subject of a heightened-confidentiality order;

f. for such other and further relief as this Court deems just and proper.

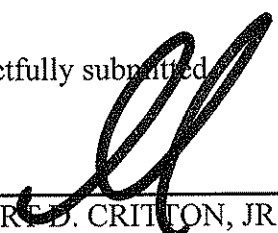
Respectfully submitted,

By: 
MICHAEL J. PIKE, ESQ.
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Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following Service List in the manner specified by CM/ECF on this 14th day of March, 2010.

Respectfully submitted,

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Certificate of Service
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