IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	
v.	NO. 4:21-CR-358-ALM
JOHN RODGERS (2)	

Defendant's Response to United States' Motion to Quash Defendant's Subpoenas for Testimony by Current and Former U.S. Department of Justice Attorneys

The Government has filed a motion to quash the subpoenas of Principal Deputy Assistant Attorney General Doha G. Mekki, Assistant Chief Megan S. Lewis, and former Trial Attorney Katherine Stella (the "Government witnesses").[1] The Government contends that the subpoenas should be quashed because the DOJ denied Rodgers's *Touhy* request pursuant to 28 C.F.R. § 16.26, based on the deliberative process privilege, the work product doctrine, and Federal Rules of Evidence 401, 402, 403, and 405. For the following reasons, the Government's motion should be denied.

I. The *Touhy* Regulations are not a basis for quashing the subpoenas.

The DOJ's decision not to authorize the Government witnesses' testimony, following Rodgers's request under the relevant *Touhy* regulations is not an independent basis for quashing the subpoenas. *See* 28 C.F.R. §§ 16.21–29. These regulations merely allow for the "centralizing [of any agency's] determination" as to whether subpoenas

[1]Rodgers also subpoenaed FBI Special Agent Jeffrey Pollack, but because the DOJ determined Pollack is authorized to testify in a limited capacity, the Government does not move to quash his subpoena. However, Rodgers's arguments as to the admissibility of the DOJ witnesses' testimony apply equally to him.

"will be willingly obeyed *or challenged*." *Touhy v. Ragen*, 340 U.S. 462, 468, 71 S. Ct. 416 (1951) (addressing a subpoena duces tecum). The regulations are "directed primarily at providing 'guidance for the internal operations of the Department of Justice', so that disclosure requests are centrally consolidated and streamlined within the Department." *United States v. Aponte-Sobrado*, 824 F. Supp. 2d 285, 286 (D.P.R. 2011). "In fact, nothing in the language of these regulations makes reference to the Department's ability to withhold evidence against a court order when a subpoena has been appropriately issued by a party defendant." *Id.*

When a defendant complies with the applicable *Touhy* regulation's procedure for requesting information, the relevant agency determines whether it will grant the request and disclose the requested information, or challenge it. But "the reach of disclosure-limiting *Touhy* regulations ends at the courthouse doors." *Res. Invs., Inc. v. United States*, 93 Fed. Cl. 373, 380 (2010) (collecting cases); *see also United States v. Rosen*, 520 F. Supp. 2d 802, 809 (E.D. Va. 2007) (explaining that "the Housekeeping Statute does not and cannot confer on the Executive Branch the unilateral or unreviewable power to refuse to comply with a valid subpoena").

The Fifth Circuit has upheld the quashing of subpoenas based on a defendant's failure to comply with the procedural requirements of *Touhy* regulations. *See, e.g., United States v. Wallace*, 32 F.3d 921, 929 (5th Cir. 1994) (holding subpoenas properly quashed because defendants failed to make a timely demand by subpoenaing the witnesses in advance of trial and by following the applicable regulations); *United States v. Jimenez-Montoya*, 348 F. App'x 73, 74 (5th Cir. 2009) (upholding district court's ruling sustaining

government's objection to calling a federal agent as a witness because defendant never subpoenaed agent in compliance with the *Touhy* regulations). But that is not the issue here; the Government does not dispute that Rodgers complied with the process set forth in the regulations.

Specifically, 28 C.F.R. § 16.23, governs the DOJ's "[g]eneral disclosure authority in Federal and State proceedings in which the United States is a party," like this case. Subsection (c) deals with oral testimony and states:

> If oral testimony is sought by a demand in a case or matter in which the United States is a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by the party's attorney setting forth a summary of the testimony sought must be furnished to the Department attorney handling the case or matter.

28 C.F.R. § 16.23(c). This section of the statute "simply requires the party seeking testimony to provide a 'summary of the testimony sought' 'to the Department attorney.'" *Aponte-Sobrado*, 724 F. Supp. 2d at 287.

Rodgers complied with this provision. He notified the Department attorney that he sought trial testimony of the Government witnesses "to discuss the analysis of the evidence, interviews with witnesses related to the investigation, and their belief that Rodgers's version of events is the truth." *See* Gov't Motion to Quash, at attached Ex. 4.

To quash the subpoenas based simply on the DOJ's determination that the *Touhy* request should be denied not only exceeds the scope of the regulations but also results in a violation of Rodgers's constitutional rights to due process and compulsory process.[2]

II. The deliberative processes privilege and work product doctrine do not support quashing the subpoenas.

A. Deliberative Processes Privilege

The Supreme Court has recognized a deliberative process privilege covering "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Dept. of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). The purpose of the privilege is to protect the decision-making process from the inhibiting effect that disclosure of predecisional advisory opinions and recommendations might have on 'the "frank discussion of legal or policy matters" in writing.'" *Skelton v. U.S. Postal Serv.*, 678 F.2d 35, 38 (5th Cir. 1982) (quoting *NLRB*, 421 U.S. at 150).

However, the privilege has limitations. *In re Grand Jury*, 821 F.2d 946, 959 (3d Cir. 1987). These limitations are designed to "reflect the careful tailoring of the privilege to achieve its purpose of protecting confidentiality without unduly inhibiting the truth-finding process of litigation." *Id.*

[2]The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI.

First, the deliberative process privilege does not shield information that simply states or explains a decision the government has already made or protect purely factual, investigative matters. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (citations omitted); *Norwood v. F.A.A.*, 993 F.2d 570, 577 (6th Cir. 1993); *see also Doe v. Nebraska*, 788 F.Supp.2d 975, 985 (D. Neb. 2011) (noting that courts generally agree that the deliberative process privilege "protects only documents which are pre-decisional, deliberative and reflect the subjective intent of the legislators"). Rodgers submits that the DOJ witnesses' testimony includes factual material not subject to this privilege, including the factual timeline of their investigation and whether Rodgers was to be called as a witness.

Second, the privilege can be overcome "by a sufficient showing of need." *In re Sealed Case*, 121 F.3d at 737. "A litigant may obtain deliberative materials if his or her need for the materials and accurate fact-finding override the government's interest in non-disclosure." *FTC v. Warner Commc'n Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *see In re Grand Jury*, 821 F.2d at 959. The majority of caselaw discussing or applying this privilege and its limitations deals with civil litigation in which the plaintiff seeks disclosure of documents in discovery. Here, however, the issue is a criminal defendant's access to information to be used to defend himself against the Government. Even if the privilege were to apply in this case, Rodgers has a sufficient showing of need for the testimony.

Courts have considered the following factors in determining whether the privilege has been overcome: "1) the relevance of the evidence; 2) the availability of other

evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *FTC*, 742 F.2d at 1161.

The relevancy of the testimony sought is detailed fully below; evidence that the prior prosecution team believed Rodgers was telling the truth and intended to sponsor him as a witness in the case, rather than accusing him of being a liar and charging him with obstruction, is undoubtedly relevant and weighs in Rodgers' favor. The evidence is unavailable elsewhere, a factor also weighing in Rodgers's favor. Third, the Government's role in this litigation is to prosecute Rodgers for criminal offenses; certainly, Rodgers's ability to present his defense against the Government's case weighs in his favor. Finally, the information has already been disclosed to Rodgers—the issue here is whether the information could be disclosed to the factfinder to determine guilt. In that regard, the Government's interest in nondisclosure is not to protect its decision-making process or "frank discussion of legal or policy matters" *Skelton*, 678 F.2d at 38. This factor also weighs in Rodgers's favor.

Finally, the Government waived any privilege based on a May 22, 2020 email from former trial attorney Katherine Stella to Shannon McCabe, Megan Lewis, and Doha Mekki, disclosed to Rodgers's attorney in discovery, in which Stella stated that she advised Brian Poe that Rodgers's "status" had not changed and that the Government may want Rodgers to testify in the future. *See* Attachment A.

B. Attorney Work Product Doctrine

The work-product doctrine applies to "*materials* prepared in anticipation of litigation" by an attorney or the attorney's agent. *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979). Rodgers first submits that the doctrine does not apply to oral testimony of the prior prosecution team in this criminal case. *See Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 136 (E.D. Tex. 2003) ("First, the materials must be documents or tangible things."); *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366 (D.C. Cir. 2005) (the doctrine protects documents, such as memorandums and letters); *see also Hickman v. Taylor*, 329 U.S. 495, 511–14, 67 S.Ct. 385 (1947) ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.").

Even assuming the work product doctrine would apply to the oral testimony of the DOJ witnesses in this criminal case, the Government waived any such privilege. *See United States v. Nobles*, 422 U.S. 225, 239, 95 S. Ct. 2160 (the privilege is subject to waiver). The May 22, 2020 email shows that the prior prosecuting team was interested in sponsoring Rodgers as a witness. *See* Attachment A.

Finally, Rodgers has a substantial need for the testimony that defeats any privilege, as detailed above.

III. The Testimony is Admissible under the Federal Rules of Evidence

The Government also argues the subpoenas should be quashed because the Government witnesses' testimony would be inadmissible as irrelevant, violative of the rule 403 probative/prejudicial balancing test, and as improper character evidence under

rule 405. The Government has filed a motion in limine raising these same issues, to which Rodgers has filed a response. *See* Gov't Motion in Limine #9 at 12.

A. Relevance and Probity/Prejudice Balancing Test

The Government claims the DOJ witnesses' mental impressions and personal beliefs are irrelevant because Rodgers is charged with crimes against the FTC, not the DOJ, and because the alleged criminal activities occurred before the DOJ witnesses ever met Rodgers. *See* Gov't Motion to Quash at 7. Rodgers fails to see how the alleged victim or dates of the offenses have any bearing on a relevancy determination.

The issue instead is whether the DOJ witnesses' testimony that Rodgers was telling the truth about his version of the events is relevant to resolving the probabilities of his guilt. *See Michelson v. United States*, 335 U.S. 469, 476 (1948) (explaining that a defendant's good character "is relevant to resolving probabilities of guilt"). Rodgers is charged with conspiring to lie to the FTC and mislead them, and his truthfulness is not only relevant to resolving probabilities of his guilt, but also an essential element of the conspiracy and obstruction charges. *See United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981) (explaining that a defendant's character for truthfulness is relevant when a lie by the defendant is an element of the crime); *United States v. Brown*, 503 F. Supp. 2d 239, 241 (D.D.C. 2007) ("In determining which character traits may be relevant to the instant case, the Court notes that Defendants have been charged with obstruction of justice and making false statements. The Court concludes that such charges implicate the truthfulness and veracity of Defendants . . . ."); *United States v. Warren*, No. CRIM 10-154, 2010 WL 4668345, at *4 (E.D. La. Nov. 4, 2010) (noting that obstruction of justice

and making false statements implicate the defendant's truthfulness and veracity). The testimony will also show Rodgers's character as a law-abiding citizen, which is always relevant, even when that character trait is "broader than the crime charged." *Hewitt*, 634 F.2d at 279 (explaining that law-abiding evidence "stands on a different footing" from veracity evidence and "is always relevant") (citing *Michelson*, 335 U.S. at 483).

The Government also contends that the subpoenas should be quashed because "any non-privileged relevant testimony of [the three Government witnesses] would be cumulative of Special Agent Pollack's authorized testimony." *See* Gov't Motion to Quash at 8. The Government's watered-down balancing test must assume that this Court will rely on the DOJ's *Touhy* decision (to allow only Special Agent Pollack to testify in a limited capacity and that the bulk of the testimony is privileged). However, the balancing test should consider whether the probative value of testimony by four Government witnesses concerning their opinion on Rodgers's truthfulness outweighs any dangers of unfair prejudice, confusing the issues, misleading the jury, undue delay, and wasting time. *See* Fed. R. Evid. 403. Rodgers seeks to elicit testimony of the Government witnesses not as to his veracity in general, but his truthfulness *about the charges at issue.* Evidence that the prior prosecution team believed he was telling the truth and wanted to sponsor him as a witness in the case does not confuse the issues, mislead the jury, unduly delay the proceedings, or waste time.

B. Admissibility under Rule 405

Finally, the Government claims the DOJ witnesses are improper character witnesses under rule 405. *See* Gov't Motion to Quash at 11. The Government posits that

they are not sufficiently acquainted with Rodgers to form an opinion on his character for truthfulness. However, these witnesses had ample connections and associations with Rodgers to form an opinion on his truthfulness as to his version of the events at issue in this case. As part of the previous prosecution team, the DOJ witnesses collected and reviewed evidence, interviewed Rodgers and other witnesses, and ultimately decided to sponsor Rodgers as a witness rather than accuse him of being a liar and charging him with obstruction. *Compare United States v. Dotson*, 799 F.2d 189, 194 (5th Cir. 1986) (holding IRS agent was a proper character witness because the agent had interviewed the defense witness four times, investigated her tax returns and financial information, and studied her grand jury testimony), *with United States v. Cortez*, 935 F.2d 135, 139 (8th Cir. 1991) (holding officers did not have sufficient contacts to be character witnesses where neither officers participated in any investigation and had only two short meetings with him).

The Government also argues that the DOJ witnesses are not members of Rodgers's community and have not surveyed a general cross-section of his community. Any community connections are relevant only to the admissibility of reputation testimony. *See* Fed. R. Evid. 404(a)(2)(A). To the extent that these witnesses would testify as to Rodgers' reputation for truthfulness, they have a sufficient basis to do so based on their investigation in this case, which included interviewing witnesses in his community. That they may not be members of Rodgers's community is irrelevant. *See United States v. Candelaria-Gonzalez*, 547 F.2d 291, 293–95 (5th Cir. 1977) ("[Reputation testimony] is

established not by what one knows to be fact concerning another, but by what one has heard in the community about the person in question.").

The Government also argues that the character evidence is not pertinent, or relevant, in this case. Rodgers has already explained how his truthfulness is an essential element to his charges. *See Warren*, No. CRIM 10-154, 2010 WL 4668345, at *4; *Brown*, 503 F. Supp. 2d at 241. The specific instances testimony goes to his truthfulness *about the charges at issue*, the very heart of the charged crimes and his defense.

For these reasons, the Government's Motion to Quash should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 1, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States District Court, Eastern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys who have consented in writing to accept this Notice as service of this document.

/s/ Brian D. Poe
BRIAN D. POE