UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE PACKAGED ICE ANTITRUST LITIGATION

Case No: 08-MD-01952

Honorable Paul D. Borman

THIS DOCUMENT RELATES TO:
DIRECT PURCHASER ACTIONS
_____/

BRIEF OF THE UNITED STATES IN OPPOSITION TO DIRECT PURCHASER PLAINTIFFS' MOTION TO COMPEL THE U.S. DEPARTMENT OF JUSTICE TO PRODUCE CERTAIN TAPE RECORDINGS AND VERBATIM TRANSCRIPTS THEREOF

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INTRODUCTION

Direct Purchaser Plaintiffs ("Plaintiffs") are challenging the decision of the Assistant Attorney General of the Antitrust Division[1] (AAG Varney) declining to authorize the release of any material from the Antitrust Division's packaged ice investigation to the plaintiffs. The material that plaintiffs sought in this private party action, to which the United States is not a party, are recordings and transcripts of recordings that were created as part of a grand jury investigation by the Antitrust Division. The issue now before the Court is whether AAG Varney's decision was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law when determining, under 28 C.F.R. § 16.26 (2010) that the investigatory files and work product privileges, as well as the Privacy Act implications, far outweigh the alleged need of the plaintiffs for this information.

BACKGROUND

In 2005, the United States began a criminal investigation of potential antitrust violations of packaged ice manufacturers. (Culum Decl. ¶5, attached hereto as Exhibit D) The recordings at issue were made in the course of a grand jury investigation by the Federal Bureau of Investigation ("FBI") and the Antitrust Division concerning possible violations of the antitrust laws. (Culum Decl. ¶ 8) The grand jury investigation ultimately resulted in charges being filed against two corporations, Arctic Glacier and Home City Ice, as well as three individuals, Frank Larson, Gary Cooley, and Keith Corbin, employees of Arctic Glacier, for antitrust violations. (Culum Decl. ¶ 5) There was never a trial of the matter, (Culum Decl. ¶ 5), and there has been no public disclosure of the names of the people who chose to cooperate in the

[1] AAG Varney has been specifically delegated authority to assert applicable privileges in this case by the Deputy Attorney General who is authorized pursuant to Department of Justice regulations to determine whether information will be withheld in response to a demand to produce that information in federal proceedings. (Varney Decl. ¶ 5 attached hereto as Exhibit C)

investigation, the recordings, or the transcripts in the investigative file. (Culum Decl. ¶¶ 15, 16, 27)[2]

In 2008, the plaintiffs brought this antitrust action suing, *inter alia*, Home City, Arctic Glacier, and Reddy Ice. As plaintiffs begin discovery, they seek to obtain parts of the Antitrust Division's investigative file. While, as in any civil case that follows a criminal investigation, the investigative file may be helpful to plaintiffs, this does not entitle the plaintiffs to the recordings and transcripts that they seek. The United States has a responsibility and an obligation to protect the privacy rights of individuals and the confidentiality of the contents of its investigative file, and the mere issuance of a subpoena under Rule 45 does not eviscerate those obligations.[3]

STANDARD OF REVIEW

The United States is not a party to this private litigation. As discussed below, the doctrine of sovereign immunity bars actions against the United States unless the United States has waived its sovereign immunity. Here, the only applicable waiver is found in the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA"). The standard of review under the APA is whether the decision is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." 5 U.S.C. § 706(2)(A); *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194, 1197 (11th Cir. 1991), *aff'g*, 129 F.R.D. 551, 554 (N.D. Ga. 1990).

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[2] The only individuals given an opportunity to hear the recordings were counsel for subjects of the investigation, to allow them to assess the strength or weakness of the recorded evidence. (Culum Decl. ¶¶ 17, 20-26). Prior to playing any recording, the Antitrust Division secured from each counsel a confidentiality agreement, which provided, in part, that the substance of the recordings would not be revealed to counsel for any other subject and that the information obtained would be used solely in the criminal investigation. (Culum Decl. ¶ 18)

[3] A Rule 45 subpoena, which is issued at the whim of any civil litigant without judicial consideration of the merits of the request, the obligations of the recipient, or the needs of the requestor, does not have the force of law. *Doe v. DiGenova*, 779 F.2d 74, 84-85 (D.C. Cir. 1985) (construing the Privacy Act, 5 U.S.C. § 552a, court states that it is "inconceivable" that Congress intended the whims of litigants reflected in subpoenas to suffice to authorize disclosure of protected information).

The Department's decision concerning its response to a subpoena is entitled to deference, and the validity of the Department's decision is presumed. *Motor Vehicles Mfrs. Ass'n v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983). The standard of review is narrow, and a reviewing court may not substitute its judgment for that of the Department. *Citizens to Preserve Overton Park*, 401 U.S. 402, 216 (1971). The burden of proof is on the party challenging the Department's decision. *Frisby v. U.S. Department of Housing & Urban Development,* 755 F.2d 1052, 1055 (3d Cir. 1985). Based on these factors, the United States asserts that the Antitrust Division is clearly within the parameters of review, as is set forth more fully below.

ARGUMENT

A. There Is No Waiver of Sovereign Immunity

A Federal Government employee is prohibited by regulation from disclosing documents without authorization from an appropriate agency official. See 5 U.S.C. § 301. Under Department of Justice regulations, promulgated pursuant to the APA, an employee is prohibited without prior approval of the proper Department official from disclosing information. 28 C.F.R. §16.22(a). The purpose of the regulations is to establish a central authority in each agency or department to determine whether and to what extent subpoenas will be honored. The Supreme Court has specifically recognized the authority of agency heads to restrict testimony of their subordinates by this type of regulation. *United States ex. rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

An action such as this motion to compel seeking specific relief against a federal official, acting within the scope of his delegated authority, is an action against the United States, subject to the governmental privilege of immunity. *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989), *citing Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949).The doctrine of sovereign immunity

bars suits against the United States without its consent. Thus, if plaintiffs seek to challenge the AAG Decision, the appropriate procedure to follow is to bring a separate action in the appropriate court under the Administrative Procedures Act 5 U.S.C. §§ 701-06. *See*, *In re Boeh*, 25 F.3d 761, 764-65 (9th Cir. 1994); *Appeal of the Sun Pipe Line Co.*, 831 F.2d 22, 24-26 (1st Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); and *Swett v. Schenk*, 792 F.2d 1447, 1451 (9th Cir. 1986).

In this matter there is no waiver of sovereign immunity, as the plaintiffs have not brought a separate action to challenge AAG Varney's decision under the APA, and nothing in the Federal Rules of Civil Procedure waives sovereign immunity regarding subpoenas. *See United States v. Sherwood,* 312 U.S. 584, 589-91 (1941). Therefore, pursuant to the doctrine of sovereign immunity, the subpoena must be quashed and the motion to compel denied.

B. The Regulations Applied in the Varney Decision Require Denial of the Motion to Compel

When confronted with a subpoena for the production of materials, the Department of Justice, by its authorized representative, is required to consider the factors enumerated in 28 C.F.R. § 16.26, set forth fully in Exhibit B. If the production request would require disclosure that would violate a statute or regulation, or would reveal classified information, then the Department will not approve the disclosure. 28 C.F.R. § 16.26(b)(1)-(3), ©. If the disclosure would reveal a confidential source or informant (unless the source or informant has no objection) or investigatory records compiled for law enforcement purposes and disclose investigative techniques and procedures which would impair their effectiveness, then presumption for the Department is nondisclosure unless the Department determines that the administration of justice requires disclosure. 28 C.F.R. §16.26(b)(4)-(6), ©. If none of these situations applies, the Department will authorize disclosure after considering whether disclosure is unwarranted under the rules of procedure governing the case in which the matter arose and whether disclosure is appropriate under the relevant

substantive law concerning privilege. 28 C.F.R. § 16.26(a), ©.

In this matter, all three scenarios were present and considered by the AAG, and are discussed seriatim.

1. Disclosure Would Violate the Privacy Act

Under the Privacy Act, 5 U.S.C. § 552a(b), "[n]o agency shall disclose any record which is contained in a system of records[4] by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains," unless one of twelve exceptions applies. *See* 5 U.S.C. § 552a(b)(1)-(12). One of the stated purposes of the Privacy Act was to "prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of law abiding citizens produced in recent years from actions of some overzealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies." S.Rep. No. 1183, 93d Cong., 2d Sess. 1 (1974), *reprinted in Legislative History* at 154. This restriction is tempered with the acknowledgment that, in some circumstances, there is an important public policy need; thus, exemptions were outlined in the statute. A subpoena does not fall within the exemptions. *Doe v. DiGenova*, 779 F.2d 74, 84-85 (D.C. Cir. 1985).

The subpoenaed material at issue here is maintained within the Division's criminal case system of records, ATR-006, and retrieved by a number of personal identifiers, including, for example, the names of subjects and targets of the investigation and assigned case numbers. (Culum Decl. ¶ 8) Accordingly, the Division is prohibited from making affirmative disclosures of personal information found on the tapes,

[4] A "system of records" means a group of records under the control of an agency that is maintained and retrieved by name or other personal identifier assigned to the individual. 5 U.S.C. § 552a(a)(3)-(5).

including individuals' names and information about them, without the consent of those individuals. The recordings and transcripts sought by plaintiffs contain the names of individuals who were investigated but not charged, information about possible criminal conduct of those individuals, the names of individuals who cooperated in the grand jury investigation, and the names of individuals who were not even subjects of the investigation. (Varney Decl. ¶ 13). Information that would be revealed in the recordings include: the identity of individuals and corporations who may have been the subjects of the criminal investigation but were not charged, the names of the individuals and companies who were not even subjects of the investigation, and various unsubstantiated speculation of criminal conduct by other individuals or corporations not previously disclosed to the public. (Culum Decl. ¶ 16) Thus, the production would disclose personal information of individuals, as acknowledged by AAG Varney: "I am particularly reluctant to authorize disclosure of the tapes at issue here because those tapes have never been played in public and contain information about persons who were under investigation and details about our investigation that have not been made public." Varney Decision, Exhibit A, page 2.

Although there are 12 exceptions set forth in 5 U.S.C. § 552a(b)(1)-(12), none of the exceptions would permit release of the tapes sought here, unless it is "pursuant to the order of a court of competent jurisdiction." *See* 5 U.S.C. § 552a(b)(11).[5] While the plaintiffs may argue that this is easily resolved, that is, if the Court issues an order for such disclosure, this quick remedy is not necessarily the appropriate

[5] Moreover, for purposes of the PA, a court of "competent jurisdiction" may be equated with personal jurisdiction over the non-party agency and its records. *See Laxalt v. McClatchy*, 809 F.2d 885, 890-91 (D.C. Cir. 1987). As discussed above, the United States has not waived its sovereign immunity for judicial review of the administrative decision denying the subpoena request under the Department's "Touhy" regulations, except for a separate action under the APA. *See* APA, 5 U.S.C.§ 701-706. The terms of the consent to be sued under the APA define the court's jurisdiction. Because sovereign immunity is jurisdictional in nature, the government's waiver of sovereign immunity is a jurisdictional prerequisite to a court's order. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941). In sum, this Court lacks "competent jurisdiction" to enter an order under the Privacy Act exception.

one. First, the Court's limited review of the AAG's decision considers only whether her decision was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. Clearly, it was not, and the possibility that a court could exempt the disclosure from restriction does not enter the analysis for the AAG. Second, although the Court could exclude the Privacy Act concerns by issuing an order, the Court must do so only after its own balancing the interests of the requester against the potential harm to the persons to whom the information pertains. *See Laxalt v. McClatchy*, 809 F.2d 885, 888-90, n. 20 (D.C. Cir. 1987). Here, as discussed more fully below, the claimed need for the material pales in comparison to the privacy interests of the individuals whose names and information about them are included on the recordings and transcripts, which would become part of a public record if used at trial, where its confidentiality cannot be protected. Thus, that the production of the recordings and transcripts includes information subject to Privacy Act restrictions makes the Varney Decision not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. It was consistent with the regulations, which require that, if production would violate a statute, the Department may not approve the disclosure. 28 C.F.R. §16.26(b)(1).

2. The Parameters of 28 C.F.R. §16.26(b)(4) and (5) Are Present, and The Administration of Justice Does Not Overcome the Requirement to Deny Disclosure

If any of the circumstances in paragraphs 28 C.F.R. §16.26(b)(4) through (b)(6) exist, then the presumption of the Department is to deny disclosure unless the Department determines that the administration of justice requires disclosure. 28 C.F.R. §16.26©. Thus, where any of the circumstances of (b)(4)-(6) are present, the burden on plaintiffs of showing a need is high. In this matter, the disclosure falls within both (b)(4) and (b)(5). (Varney Decl. ¶¶ 7, 8)

a.. Disclosure would reveal a confidential source or informant under 16.26(b)(4)

Disclosure would reveal a confidential source or informant under 16.26(b)(4), (Varney Decl. ¶7),

and plaintiffs have not offered documents that state that the source/informant has no objection.[6] Indeed, plaintiffs only state: "Disclosure will not reveal a confidential source or informant, 28 C.F.R. §16.26(b)(4), because, as is clear from the subpoena and factual section of this brief, above, plaintiffs are already aware of the sources." Plaintiffs' brief at 18. This wildly understates the concern for confidentiality for sources and informants, and does not meet the criteria set forth in the regulations.

Witnesses who have agreed to cooperate and have consented to record their telephone conversations are especially concerned that their cooperation remains confidential because they are secretly recording fellow employees, professional colleagues, and friends. (Culum Decl. ¶ 14; Varney Dec. ¶ 4) The ability to maintain confidentiality of those who cooperate in the Department's investigations is absolutely essential to the success of the Division's investigations. (Culum Decl. ¶ 14; Varney Dec. ¶ 4) Without such protection, many individuals simply would not be willing to cooperate and record conversations with their friends and colleagues. (Culum Decl. ¶ 14; Varney Dec. ¶ 4) The knowledge or perception that consensual recordings of their telephone conversations would likely be released to third parties would chill the willingness of confidential human sources to consent to record their conversations, which would have a ruinous effect on the Division's ability to conduct investigations and prosecute cases. (Culum Decl. ¶ 14; Varney Dec. ¶ 4) As recognized by the D.C. Circuit in a FOIA case:

> It is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public.

Aspin v. Department of Defense, 491 F.2d 24, 30 (D.C. Cir. 1973); *accord Frankel v. SEC*, 460 F.2d 813,

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[6] The investigative agency, FBI, has not indicated that it has no objection. (Varney Dec. ¶ 7)

817 (2d Cir 1972), *cert. denied*, 409 U.S. 889 (1972); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 79 (D.C. Cir. 1974).

Plaintiffs claim that they meet the high burden of showing need because the evidence would be very good evidence and because, in the one deposition that has occurred so far, the deponent did not "remember telling Mr. Sedler during a call that Reddy Ice and Arctic Glacier had divided territories in Texas, Kansas and Oklahoma." (Plaintiff's brief at 7). First, that the recordings may be helpful to plaintiffs in their case does not give plaintiffs a right to disclosure of private, confidential information. As with other protections on tax records, bank records, or even home searches, just because the disclosure or search of these would turn up very good evidence does not circumvent the protections that are in place against these types of disclosures. So it is here – even though the recordings and transcripts would be helpful to plaintiffs, this is not a basis upon which to tear down the walls of protection that have been enacted to protect individual privacy or the investigative files. If it were the case, then every case with this issue would simply be a matter of a plaintiff stating that the recordings and transcripts would be very good evidence. Moreover, plaintiff's palpable lack of effort in obtaining the information through other sources, and instead, seeking to obtain this information from the government after just one deposition, cannot tip the scales in favor of disclosure. Plaintiffs have come nowhere near the type of showing that would be necessary for the AAG to determine that the administration of justice would require disclosure.

Based on the AAG's knowledge that Home City Ice has been cooperating with plaintiffs and providing evidence relevant to their case, that plaintiffs could interview or depose several people involved in these recordings about the conversations at issue and collusion in the packaged ice industry, that the recordings contain information about persons who were under investigation but never charged, as well as rumor and hearsay about other individuals who were never charged, and especially considering the fact

that the recordings have never been played in public, and based on all of the interests of the Division in maintaining confidentiality of sources, the AAG determined that the administration of justice did not require disclosure in this case. (Varney ¶ 7)

b. The Recordings and Transcripts Are Part of the Investigatory Records Compiled for Law Enforcement Purposes under 16.26(b)(5)

The recordings and transcripts are part of the investigatory records compiled for law enforcement purposes, and disclosure of these would disclose investigative techniques and procedures, the effectiveness of which would thereby be impaired. (Varney Decl. ¶8) Plaintiffs argue that, because the criminal investigation has ended, there is no interference with enforcement proceedings, and therefore the material should be produced. (Plaintiffs' brief at 18) Interference with an ongoing enforcement proceeding is only one of the two prongs of 16.26(b)(5). While the United States concedes that the criminal case has ended, the interest of the United States in maintaining its investigative techniques and procedures is obvious. With respect to this second prong, plaintiffs merely state: "Nor will production of the tapes "disclose investigative techniques and procedures " as to "impair[]" the "effectiveness" of the techniques and procedures by which the tapes were made." (Plaintiffs' brief at 18.) Plaintiffs are essentially asking the Court to find that, when a criminal investigation is completed, the investigatory file should no longer have any protections.

In an antitrust investigation, the FBI, in consultation with the Antitrust Division, determines what investigative techniques to use in any particular investigation, including whether to request someone to cooperate and agree to have their conversation consensually monitored, and agree to testify at trial. (Culum Decl. ¶ 9; Varney Decl. ¶ 4) As part of that analysis, the FBI and Antitrust Division determine, among other things, whether to use the investigative techniques to acquire, through consensually

monitored conversations, information that may be helpful to the investigation. (Culum Decl. ¶ 9; Varney Decl. ¶ 4) In those antitrust investigations in which the FBI determines that consensual monitoring is appropriate, the FBI continuously reviews the recordings, and the FBI provides ongoing and continual direction to the confidential human sources, including who and what to record in the future. (Culum Decl. ¶ 10; Varney Decl. ¶4) The FBI and the Antitrust Division continuously determine future investigative steps. (Culum Decl. ¶ 10; Varney Decl. ¶4)

In the packaged ice investigation, the FBI and the Antitrust Division developed specific goals and needs for the investigation, which continually were modified over time. (Culum Decl. ¶ 11; Varney Decl. ¶4) After determining those goals and needs, the FBI and the Antitrust Division developed an investigative strategy to meet those goals and needs, including the use of consensual monitoring. (Culum Decl. ¶ 11; Varney Decl. ¶4) Consistent with that strategy, particular recordings were sought to acquire information. (Culum Decl. ¶ 12; Varney Decl. ¶4) Public disclosure of these recordings will necessarily reveal, in part, the decisions of the Antitrust Division and the FBI in the investigation, including whether to record, who to record, and what to record, and for this reason, the public disclosure of the recordings will necessarily reveal the nature, scope, and direction of the investigation. (Culum Decl. ¶ 12; Varney Decl. ¶4)

The strategies used in past successful investigations are often used in future investigations, thus the disclosure of past investigation strategy would be very harmful to the future investigations of the Department. (Varney Decl. ¶12) In *Morrissey v. City of New York*, 171 FRD 85 (SDNY 1997), the court recognized that the ability of a law enforcement agency to conduct future investigations may be seriously impaired if certain information is revealed. "An excellent example in this case is information relating to the means by which a recording device is secured on an informant. Clearly, the fact that the investigation has been concluded does not mean that this information can be revealed, since disclosure would compromise

future investigations." *Id.* at 90-91. *See also, Tuite v. Henry* discussion, *infra*, at page 15. Based on the administration of justice analysis described above, the AAG determined that disclosure was not appropriate. (Varney Decl. ¶ 8)

3. The Law Enforcement/Investigatory Files Privilege and the Work Product Doctrine Require Denial of the Disclosure Request

In addition to the considerations above, the Varney Decision also considered the applicable privileges pursuant to 16.26(a)(2), specifically, the work product doctrine and the investigatory files privilege. (Varney Decl. ¶ 9)

a. Law Enforcement/Investigatory Files Privilege

The law enforcement/investigatory files privilege is one of a number of executive privileges held by the government. This privilege, which is "rooted in common sense as well as common law," presumptively protects all files related to law enforcement investigations. *Black v. Sheraton Corp.*, 564 F.2d 531, 542 (D.C. Cir. 1977); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984). It is based on the harm to law enforcement efforts that might arise from public disclosure of investigative files. *See Black*, 564 F.2d at 542.

The privilege is qualified, requiring the Court to balance the discovering party's need for particular documents against the public interest in non-disclosure. *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988); *see Black*, 564 F.2d at 545. Courts have considered a number of factors in weighing these competing interests, including the type of information sought and alternative sources for the information. *See, e.g., In re Sealed Case*, 856 F.2d at 272; see also *Wright v. OSHA*, 822 F.2d 642, 647 (7th Cir. 1987) (Freedom of Information Act case); *Kay v. FCC*, 867 F. Supp. 11, 19 (D.D.C. 1994)(same).

In this case, all of the recordings and transcripts plaintiff seeks were made during the course of a

grand jury investigation for law enforcement purposes and are part of the investigatory file pertaining to the Division's packaged ice investigation. (Culum Decl. ¶8) The requested recordings have never been played in public and contain information about persons who were under investigation and details about our investigation that have not been made public. (Culum Decl. ¶ 16) Disclosure of the requested recordings and transcripts would also reveal rumor and hearsay about other individuals whose names are mentioned in the recordings but who were never charged with any offense and other information that should remain confidential. (Varney Decl. ¶ 10)

As explained fully above, the recordings were done at the direction of the FBI, in consultation with the Antitrust Division, and included determinations of what investigative techniques to use in a particular investigation. (Culum Decl. ¶11-12) The FBI continuously reviewed the recordings and provided ongoing and continual direction to the confidential human sources, including who and what to record in the future. (Culum Decl. ¶10-12) The trail of what conversations are recorded and who is recorded – clearly investigatory file privilege information - would be discovered by a review of the recordings.(Culum Decl. ¶12) Likewise, a review of the transcripts, including what recordings were transcribed and what were not, also would reveal investigatory file privilege information. (Culum Decl. ¶13, Farren Decl. ¶8, (attached hereto as Exhibit E), Varney Decl. ¶4)

Plaintiffs claim that their subpoena seeks only factual materials to which the investigative file privilege does not apply, citing *United States v. Leggett & Platt, Inc*. [Cite] Plaintiff further argues that, even if the privilege applies, it is a qualified privilege and "must yield to plaintiffs' need in the circumstances presented here."

While plaintiffs' use of *Leggett* is facially appealing, a closer look at the decision reveals that it adds nothing to the issues at bar. First, the United States was a party to that action, thus the standard was

the "extremely broad" discovery rules under the Federal Rules of Civil Procedure, limited only by irrelevance or privilege, and not an APA standard of a decision made under regulations. Second, the dismissal was remanded by the Sixth Circuit to allow the District Court to make findings of whether the requested information was relevant. Once determined relevant, the Sixth Circuit then directed the District Court to determine whether the "official information privilege" and work product doctrine applied. *Id*. at 658. Thus, there was nothing about the production request that was determined by the Sixth Circuit, other than laying out the ground rules for the District Court when remanded.

Importantly, the privilege that was asserted by the government was, in its brief, called the "government privilege for confidential intra-agency advisory opinions." In the opinion, the Court referred to it as the "qualified government official information privilege," and it is what is now referred to as the "deliberative process privilege" – one which protects information prepared by the government and that is both predecisional and deliberative. *Leggett*, 542 F.2d at 659, n. 4 ("Given that the privilege is designed to encourage candid suggestions, advice, recommendations, and opinions, the privilege protects only suggestions, advice, recommendations and opinions, rather than factual and investigatory reports, data, and surveys in government files."). That is not the privilege that was asserted here. Plaintiffs rely on *Leggett* for the proposition that pure "facts" are not protected under the investigative files privilege, but *Leggett*, in fact, only set out parameters for the deliberative process privilege.

Even the *Leggett* decision has come under further refinement with respect to the "facts" under the deliberative process privilege. The deliberative process privilege can be asserted to protect disclosure of facts, if the facts would also disclose the judgment or discretion that has been exercise in compiling the facts. *See*, *eg*, *Mapother v. Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993)(the facts contained in the report were the result of a process by which the DOJ attorney separated "the significant from the

insignificant and the truthful from the untrue," thus, disclosure of the facts in the report would reveal the thought process of the preparer – what he thought would be most significant for the Attorney General to have before him, and the privilege was intended to protect not simply deliberative material, but also the deliberative process of agencies.) Thus, plaintiffs' sweeping statements that the *Leggett* case mandates a ruling in their favor are simply without merit.

The *Dellwood Farms* decision by the Seventh Circuit, on the other hand, is highly instructive. It discusses the balance that is to be made in determining the assertion of a privilege, stating:

> It seems to us, however, and not only to us, that there ought to be a pretty strong presumption against lifting the privilege. *Black v. Sheraton Corp*., 564 F.2d 531, 545-47 (D.C. Cir. 1977). Otherwise courts will be thrust too deeply into the criminal investigative process. Unlike France, Italy, and other European countries in which judicial officers control the investigation of crimes, the United States places the control of such investigations firmly in the executive branch, subject only to such limited judicial intervention as may be necessary to secure constitutional and other recognized legal rights of suspects and defendants. The plaintiffs in these civil suits, who are seeking to obtain material from the government's criminal investigation, are not criminal suspects or defendants. They thus have no definite legal right to the fruits of the FBI's investigative endeavors conducted in confidence; and it seems to us that neither should they have a right to force the government to tip its hand to criminal suspects and defendants by disclosing the fruits of the surreptitious (but presumably lawful) surveillance that the FBI conducted.
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> . . .
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> The heart of our concern is with the principle that the control of criminal investigations is the prerogative of the executive branch, subject to judicial intervention only to protect rights - *and no rights of the plaintiffs were invaded by the government's assertion of its law enforcement investigatory privilege*.

Dellwood Farms, Inc., v. Cargill, 128 F.3d 1122, 1125-26 (7th Cir. 1997)(emphasis added).

Moreover, plaintiffs' brief emphasizes the fact that the criminal investigation is over, as though this trumps any other consideration to be made regarding the privilege. (Plaintiffs' brief at 10) The fact that the criminal case is over is not controlling. In *Tuite v. Henry*, 181 FRD 175, 181 (D.D.C. 1998), *aff'd,* 203 F.3d

53 (D.C. Cir. 1999), the Court was faced with the same question. The court relied on the reasoning in *Black v. Sheraton Corp. of America*, 564 F.2d 531 (D.C. Cir. 1977) in finding that the closed status of the investigation was not dispositive of the issue, stating:

> It is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public. *Black*, 564 F.2d at 546 (quoting *Aspin v. Department of Defense*, 491 F.2d 24, 30 (D.C. Cir. 1973). The reasoning employed by the Court of Appeals in *Black* is applicable in the instant case. While the public interest in nondisclosure of law enforcement investigatory materials may lessen somewhat at the conclusion of the criminal investigation, it does not dissipate entirely as plaintiffs suggest. Indeed, in the present case, the interest in nondisclosure remains strong despite the conclusion of the investigation due to the very nature of the investigation.

Id. at 181.

Thus, the investigative files privilege is not eliminated because a case is closed, and the balancing is still required. As was recognized by AAG Varney, the particular strategies used in past successful investigations such as this are often used in future investigations, and thus the disclosure of the past investigation strategy used here could be very harmful to similar future investigations of the department. (Varney Decl. ¶ 12)

In this case, because of the privacy considerations as well as the investigatory techniques used, the privilege still applies to the recordings and the transcripts. *See, e.g., Diamond v. FBI*, 707 F2d 75, 77 (2nd Cir. 1983), *cert. denied*, 465 U.S. 1004 (1984) (release of records would disclose the identity of a confidential source); *White v. IRS*, 707 F.2d 897, 902 (6th Cir. 1983)(information would disclose identity of parties who had indicated willingness to provide IRS with information); *King v. Department of Justice*, 830 F.2d 210, 233 (D.C. Cir. 1987)(privacy interests outweighed public benefit when third parties who would

have been identified by disclosure included investigators, informants, suspects and their associates involved in McCarthy era investigations).

Plaintiffs' own exhibit, an excerpt of the Transcript of Proceedings (Plaintiffs' Brief, Exhibit D) that includes a letter from Mr. McNulty, underscores the potential harm in disclosure of individuals' names:

> I would like to say to the Court that the conspiracy has ruined me. I fought back against incredible odds in an attempt to prove that I was being blackballed from an industry which I had spent nearly 14 years of my life working in. . . . I initially contacted the Department of Justice over four and a half years ago, because I felt that I had to fight back against an organization headed by men who quite literally felt that they owned me and my career. Now, after so much additional information has been brought to the forefront and so many of these individuals have admitted their guilt, I see that said organization was even more despicable than I ever imagined. Obviously, I'm not the only person that they attempted to destroy, nor would I ever claim to be. However, I'm a victim of the defendants in every sense, – morally, ethically, and I would ask the court to rule legally. Your Honor, I do not have the ability to articulate to you the toll which my deciding to blow the whistle on these individuals has taken on my family, my marriage, our health, even my faith. Suffice it to say that all have been rocked to the core. Candidly, I oftentimes find myself questioning whether or not I should have blown the whistle when I'm faced with the realization of the hell on earth which my wife and child have endured these past five years.

Transcript at 33-34.

In weighing the benefits of disclosure to the potential harm, AAG Varney considered not only the potential harm from the disclosure of the recordings and transcripts, but also the nature of plaintiffs' litigation and their allegations concerning the need for the recordings and transcripts. (Varney Decl. ¶ 11) Varney was informed that Home City Ice has been cooperating with plaintiffs and providing evidence relevant to their case. (Varney Decl. ¶ 11) Moreover, Varney considered that plaintiffs could interview or depose several people involved in these recordings about the conversations at issue and collusion in the packaged ice industry. (Varney Decl. ¶ 11) Under those circumstances, AAG Varney concluded that the plaintiffs' need for the recordings and transcripts was outweighed by the potential harm from disclosure. (Varney Decl. ¶ 11) For all of the above reasons, the investigatory files privilege weighs against the

disclosure of the requested information.

b. Work Product Doctrine

Plaintiff makes the unsupported allegation that the work product doctrine is "far fetched. Plaintiffs are not seeking anything that would remotely qualify as DOJ attorney work product."

As explained fully below, the recordings and transcripts of the recordings are clearly work product.

The recordings and transcripts were created during the course of a grand jury investigation at the direction of Division attorneys and their staff for use by Division attorneys in that investigation and any resulting criminal prosecutions. (Varney Decl. ¶ 12; Culum Decl. ¶12; Farren Decl. ¶¶ 7-9) . The recordings reflect the staff attorneys' efforts at investigating and preparing a case, including their pattern of investigation, assembling of information, and determination of the relevant facts and planning of strategy, and are therefore work product. *See, In Re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 842-47 (8th Cir. 1973)(work product doctrine applicable to grand jury proceedings, witness statements are work product of an attorney); *see also, United States v. Nobles*, 422 U.S.225, 247, n.6 (White, J. concurring) ("[A] grand jury investigation is in some respects similar to pretrial discovery).[7]

During the course of the investigation, the lead attorney directed people working on the investigation, including paralegals, to transcribe certain recordings. (Culum Decl.¶ 13) The decision of whether to transcribe any particular recordings reflects judgments concerning the perceived significance or usefulness of the recording. (Farren Decl. ¶ 8) Thus, the public disclosure of the transcripts will necessarily reveal the nature, scope, and direction of the investigation. (Farren Decl. ¶ 8, 9; Varney Decl. ¶ 4) See, *United States v. Nobles*, 422 U.S.225, 238-39 (the work product doctrine applies not just to

[7] That the recordings were played to certain counsel in the process of the criminal investigation does not waive this privilege. *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997)(no waiver of privilege when lawyers were allowed to listen to tapes).

attorneys but also to the attorneys' agents).

As found by AAG Varney, the recordings and transcripts would be considered protected work product, as they would reveal the nature, scope, and direction of the litigation. See Fed.R.Civ.P. 26(b)(3); *In re Sealed Case*, 856 F.2d at 273. As such, production of these materials would be patently unfair, allowing these parties to benefit from DOJ's consideration and analysis of the recordings. For this reason, the AAG determined that disclosure would not be appropriate.

CONCLUSION

Plaintiffs are seeking private and confidential information that is protected by the Privacy Act, the Investigative Files Privilege, and the Work Product Doctrine, and that does not overcome the presumption of denial under 28 C.F.R. §16.26(b)(4) and (b)(5), yet plaintiffs have failed to make any showing of need other than that it would be helpful for them to have this information. The AAG of the Antitrust Division has made findings under the Touhy regulations that disclosure of this information would be inappropriate, and has denied the request. The plaintiffs have now filed a motion in this court to challenge an action of the government over which there is no waiver of sovereign immunity other than the APA, yet plaintiffs have failed to follow the correct APA procedures in challenging it. The standard of review is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, and AAG Varney's decision is far from any of those. In fact, her decision is consistent with the law even under a de novo standard of review.

For all of the reasons stated in this brief, the United States requests that this Court deny plaintiffs' motion to compel and quash the subpoena.

Respectfully submitted,

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