UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RANDALL ROYER, Plaintiff, v. FEDERAL BUREAU OF PRISONS, Defendant.	Civil Action No. 10-cv-1196 No. 10-cv-1996 Judge Royce C. Lamberth

PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSES

Plaintiff Randall Royer seeks an order compelling defendant Federal Bureau of Prisons (BOP) to provide complete responses to his discovery requests. BOP's responses were due over three months ago, and Royer sent a detailed letter to BOP's counsel identifying the deficiencies in BOP's responses over two months ago. To date, BOP has provided only a small fraction of the documents and information responsive to Royer's requests, and, despite repeated assurances that a response was forthcoming, BOP has failed to respond to Royer's deficiency letter or to respond in any meaningful way to the majority of Royer's requests. Royer is severely prejudiced by BOP's failure to cooperate in discovery because BOP has exclusive control of almost all of the information on which Royer's claims depend.

BACKGROUND

I. Factual Background

Royer is a federal inmate currently incarcerated in the Communications Management Unit (CMU) at BOP's USP Marion correctional facility in Illinois. Kirkpatrick Decl. ¶ 1. He is serving two consecutive 10-year terms in connection with a 2004 guilty plea to charges of Aiding and Abetting the Use and Discharge of a Firearm During and in Relation to a Crime of Violence, 18 U.S.C. §§ 2 and 924(c)(2), and Aiding and Abetting the Carrying of an Explosive During the Commission of a Felony in violation of 18 U.S.C. §§ 2 and 811(h)(2). Civ. No. 10-1996, ECF No. 106 at 2. The underlying felony was a violation of the Neutrality Act, 18 U.S.C. § 960, which makes it a crime to "knowingly begin[] … or provide[] or prepare[] a means for … any military or naval expedition … against the territory or dominion of any foreign prince or state … with whom the United States is at peace." *Id.* at 2-3.

Initially, Royer was housed in the general prison population and enjoyed the privileges and opportunities—educational, recreational, religious, and vocational, among others—available to general population inmates. Civ. No. 10-1996, ECF No. 1 at ¶ 1. In December 2006, with no prior notice or hearing, Royer was designated a "terrorist inmate," and since has been assigned to various housing units that are segregated from the general population, where he has been subjected to harsh and atypical conditions of confinement, including restrictions on the number and length of telephone calls, limitation to two non-physical contact visits per month, and denial of access to educational, vocational, recreational, and religious worship opportunities. *Id.* ¶¶ 2-3. He has been subject to these conditions regardless of where he has been housed since December 2006. *See id.* ¶¶ 92-97, 100-102.

In February 2009, Royer submitted an Inmate Request form to his case manager at FCI Terre Haute, seeking the basis for BOP's statement in its December 2006 Notice of Transfer that he "fought with a Bosnian terrorist group." *Id.* ¶ 30. (Royer fought with a detachment of the Bosnian army called Abu Zubair during the Balkans war in the 1990s). *Id.* ¶ 15. BOP responded, in relevant part, that:

> [I]nformation found in your Pre-Sentence Investigative Report, and also available through open source reporting, indicates that *Abu Zubair (known more formally as Abu Zubair al Madani) was a member of Al Qaeda sent to Bosnia by Bin Laden to establish camps for Al Qaeda.*

Civ. No. 10-1996, ECF No. 102-1 at 33 (emphasis added). This statement repeated verbatim an allegation contained in Royer's draft Pre-Sentence Report (PSR) that the sentencing judge ordered stricken from his final PSR. Civ. No. 10-1996, ECF No. 1 at ¶ 33. The sentencing judge had ordered the statement stricken after finding that the government had "improperly confuse[d] … a Bosnian military unit known as 'Abu Zubair' … with a now deceased [A]l Qaeda operative by the same name …." Civ. No. 10-1996, ECF No. 106 at 11 (citing *Royer v. Fed. Bureau of Prisons*, No. 10-cv-0146, 2010 WL 4827727, at *2-3 (E.D. Va. Nov. 19, 2010)).

Having discovered that BOP classified him as a terrorist inmate and subjected him to harsh conditions of confinement based, at least in part, on false information, Royer brought the two actions now consolidated in this case. Royer asserts claims for violations of the Privacy Act, 5 U.S.C. § 552a, on the grounds that BOP has maintained records linking him to Al Qaeda that BOP knew to be false and that BOP refused to amend. Royer asserts claims under the Due Process Clause because he has not been provided with notice of the factual basis for his classification as a terrorist inmate or a meaningful opportunity to challenge his classification or conditions of confinement. In addition, Royer asserts a claim under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, for BOP's failure to follow notice-and-comment rulemaking

procedures in connection with its promulgation of the policy that is used to designate him as a terrorist inmate, and a separate claim under the APA based on BOP's failure to provide BOP inmates, including Royer, with notice of a proposed rulemaking regarding the CMUs.

II. Procedural Posture

This case began as two separate actions filed by Royer acting *pro se*: No. 10-1196, alleging two APA claims, was filed in this Court on July 15, 2010, and No. 10-1996, alleging Privacy Act and Due Process claims, was filed in the United States District Court for the Eastern District of Virginia on February 17, 2010. BOP twice moved to dismiss No. 10-1196, and this Court denied BOP's motion to dismiss Royer's amended complaint, to transfer, or in the alternative, for summary judgment (ECF No. 38) on March 28, 2013. After No. 10-1996 was transferred to this Court on November 22, 2010, BOP filed an answer on February 11, 2011, a motion to dismiss on May 12, 2011 (which was denied without prejudice on March 29, 2012, *see* ECF No. 83), and a motion for summary judgment on June 1, 2012 (ECF No. 91), which this Court denied in part and granted in part on March 28, 2013.[1]

In denying BOP's most recent dispositive motions, the Court made a number of findings that implicate Royer's right to discovery to prove his claims. With respect to Royer's APA claim that BOP promulgated a policy to be applied to terrorist inmates without first following notice-and-comment rulemaking, the Court noted that, "Neither party has fully fleshed out the contours of the policy by providing documents outlining the policy or an exact description of the restrictions imposed." Civ. No. 10-1196, ECF No. 74 at 8. Further, "[t]he Court is perplexed by BOP's new contention that no terrorist inmate policy exists … The Court hopes that BOP is not

[1] The Court dismissed Royer's claims under the First Amendment and the Freedom of Information Act (FOIA). In addition, the Court previously dismissed other claims. Civ. No. 10-1996, ECF No. 106 at 5, 34, & n.3 (citing ECF Nos. 46, 54, 63).

splitting hairs in its filing by arguing literally that no paper exists with the heading 'Terrorist Inmate Policy' …. Until BOP elaborates further on its contention that no 'terrorist inmate policy' exists, the Court cannot consider this argument given BOP's previous representations." *Id.* at 9. The Court also rejected BOP's argument that Royer's APA claim was moot because "the draft CMU regulation does not appear to be coterminous with the policy Royer challenges (namely, classifying inmates as terrorists and housing them in various restrictive units including, *but not limited to*, the CMUs."). *Id.* at 10.

With respect to Royer's Privacy Act claims, the Court first observed that BOP failed to "explain why, in a letter to Royer, it used language that mirrored the deleted draft PSR language verbatim," further noting that, "[f]or unknown reasons, the government continues to advance the same argument and put forth the same public sources (including a broken link) in support of its argument [that Royer, through his involvement fighting with Abu Zubair, is associated with Al Qaeda], despite having previously acknowledged to a federal court that the information is inaccurate." Civ. No. 10-1996, ECF No. 106 at 10-11 & n.7 ("These sources continue to include, mysteriously, the home page of the Department of Justice …. The Court is unsure how citation to the Department's homepage provides any support for the contention that Abu Zubair is a terrorist organization with links to Al Qaeda."). Moreover, the Court found that, because "the parties seem to dispute where the relevant information is housed and therefore whether it is exempt from Privacy Act provisions," *id.* at 13, factual issues central to Royer's Privacy Act claims such as "whether the [erroneous] records are housed in the [Counter Terrorism Unit's] database, whether that database constitutes a system of records [under the Privacy Act], and whether that system is separate from [BOP's Inmate Central Records System]" remain outstanding. *Id.*

Finally, with respect to Royer's procedural due process claim, the Court found that "it is unclear that [BOP] ever directly provided him with notice of the reasons for his segregation and it appears that he has had no opportunity for a hearing." *Id.* at 34.

III. Discovery

On May 24, 2013, the Court entered an order consolidating both actions and setting a discovery schedule, with fact and expert discovery to be completed by August 23, 2013. ECF No. 80. On May 28, Royer retained counsel, s*ee* ECF No. 81, and on June 19, Royer served on BOP by hand-delivery his first set of interrogatories, requests for production of documents, and requests for admissions. Kirkpatrick Decl. ¶¶ 2-3 and Exs. A & B. Royer timed his first set of discovery requests so that he could review BOP's responses and have time to send a second round of written discovery and to conduct depositions before the August 23 discovery deadline. *Id.* ¶ 4 & Ex. C. BOP's responses were due on July 19, but BOP failed to respond. *Id.* BOP did not seek an extension of time in which to respond, and Royer did not consent to any extension. *Id.* On August 1, 2013, having received no discovery responses from BOP, Royer filed an unopposed motion to extend the discovery schedule to October 23, 2013. ECF No. 83.

On August 2, 2013, BOP served by email its response to Royer's document requests and produced approximately 850 pages of BOP policies and program statements applicable both nationally and with respect to particular institutions at which Royer has been incarcerated. Kirkpatrick Decl. ¶ 5 & Ex. D. On August 5, 2013, BOP served by email its responses to Royer's interrogatories and a few additional documents. *Id.* ¶ 6 & Ex. E. On August 12, 2013, BOP filed a late answer to Royer's complaint in 11-1196 (ECF No. 84) and served by email a purported

response to Royer's requests for admissions.[2] Kirkpatrick Decl. ¶ 7 & Ex. F. On August 14, 2013, the Court granted Royer's motion to extend the discovery schedule, with fact and expert discovery to close by October 23, 2013. ECF No. 85.

Despite the untimeliness of its responses, BOP nonetheless asserted a number of objections to Royer's document requests and interrogatories. *See* Kirkpatrick Decl. Exs. D & E. BOP acknowledged its responses were incomplete and stated that it would provide documents subject to its general objections in response to many of the document requests and interrogatories, but BOP offered no indication of when it might produce the responsive records. *See, e.g., id.* Ex. D, BOP Responses to Doc. Reqs. 1-3; Ex. E, BOP Response to Interrogatory 7 ("documents will be provided"); Ex. E, BOP Response to Interrogatory 21 (stating that BOP's response "will be supplemented"). In other responses, BOP identified documents but failed to produce them. *See, e.g., id.*, Ex. D, BOP Response to Doc. Req. 9 (identifying five documents but producing only three while a fourth was publicly available); Ex. D, BOP Response to Doc. Req. 17 (identifying the "SENTRY PP37 printout" as a responsive document).

On August 22, 2013, Royer's counsel served by email to BOP's attorneys a letter identifying numerous deficiencies in BOP's discovery responses and asserting that all objections had been waived because BOP's responses were untimely. *Id.* ¶ 8 & Ex. G. On August 26, BOP's counsel promised to provide Royer's Central File (from BOP's Inmate Central Records System), to propose a protective order to apply to certain discovery produced in this case, and to

[2] Because BOP failed to respond to Royer's requests for admissions within 30 days of service, the matters are deemed admitted and BOP's belated attempt to deny certain matters is ineffective absent court action allowing BOP to withdraw the admissions it made by default. Fed. R. Civ. P. 36(a)(3),

respond to the deficiency letter.[3] *Id.* ¶ 9. On September 4, Royer's counsel emailed BOP's attorneys to schedule a meet-and-confer regarding the issues raised by the deficiency letter. *Id.* ¶ 10 & Ex. H. On September 10, counsel for the parties conferred via telephone about the deficiency letter, in which BOP promised (without providing detail) to supplement its responses to some of Royer's requests and the parties identified certain issues relating to BOP's assertion of the law enforcement privilege and institutional safety concerns as necessitating this Court's involvement on a motion to compel. *Id.* ¶ 11. BOP's attorneys promised to provide a formal response to the August 22 deficiency letter that would both narrow and sharpen those issues for the Court's consideration. *Id.* On September 25, counsel for the parties again conferred telephonically to discuss why BOP had not produced a response to the deficiency letter and to discuss Royer's objections to BOP's proposed protective order. *Id.* ¶ 16. The parties were unable to resolve these issues before the federal government's shutdown on October 1, 2013. *Id.* ¶ 17. On October 17, the day that the federal government reopened, Royer's counsel emailed BOP's attorneys to inquire, among other things, when they could expect to have a response to the deficiency letter. *Id.* ¶ 18 & Ex. M. As of the date of this motion, BOP's counsel have not responded.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense …. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to

[3] On September 13, 2013, BOP produced (with some redactions) certain parts of Royer's Central File, but did not produce two sections containing BOP intelligence and information allegedly exempt from disclosure pursuant to FOIA. Kirkpatrick Decl. ¶ 14. On September 25, BOP counsel explained on a telephone call that BOP was reviewing and processing these two sections but that there would likely be information withheld or redacted. *Id.* ¶ 16. Royer reserves the right to challenge BOP's redactions and/or withholdings at a later time.

lead to the discovery of admissible evidence." The standard for relevance is broad at the discovery stage. *U.S. ex rel Pogue v. Diabetes Treatment Ctrs. of Am.*, 235 F.R.D. 521, 525 (D.D.C. 2006). A party may move to compel discovery provided that he "has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1). This Court considers "the prior efforts of the parties to resolve the dispute, the relevance of the information sought, and the limits imposed by Rule 26(b)(2)(C)." *Barnes v. D.C.*, 289 F.R.D. 1, 5-6 (D.D.C. 2012) (citing *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 350-52 (1978)). Rule 26(b)(2)(C) exempts information from discovery where the Court determines that: "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit …."

"[U]ntimely objections to discovery requests are waived." *Caudle v. D.C.*, 263 F.R.D. 29, 33 (D.D.C. 2009) (citing *In re Papst Licensing GMBH & Co. KG Litig.*, 550 F. Supp. 2d 17, 22 (D.D.C. 2008)). "Any ground not stated in a timely objection [to an interrogatory] is waived unless the court, for good cause, excuses the failure." Fed. R. Civ. P. 33(b)(4). Although Rule 34 does not contain a similar waiver provision for objections to requests for documents, courts in this district nonetheless have found untimely objections to Rule 34 requests to be waived. *Caudle*, 263 F.R.D. at 33 (citations omitted).

ARGUMENT

The Court should (1) compel BOP to provide complete responses to Royer's document requests and interrogatories; (2) declare that BOP's objections on all grounds other than privilege

have been waived by its failure to respond timely to Royer's discovery requests; (3) find that BOP's vague assertions of law enforcement privilege or institutional safety concerns cannot overcome Royer's right to obtain information directly relevant to his claims; (4) order BOP to comply with the requirements of Rules 33(b)(3) and (5), which require interrogatory responses to which no objections are lodged to be signed under oath and by the person making the statements, and (5) order BOP to pay Royer his reasonable expenses and attorney's fees in connection with this motion pursuant to Rule 37(a)(5)(A).

I. The Court Should Order BOP to Provide Full Responses to Royer's Discovery Requests Within 14 Days Because No Good Cause Exists for BOP's Delay and BOP's Objections Have Been Waived.

Royer's discovery requests seek information that is directly relevant to (and in certain instances, dispositive of) Royer's claims, is in BOP's exclusive possession, and is unavailable to Royer through discovery from any other source. BOP's responses to date are incomplete, and BOP has no valid excuse for its failure to cooperate in discovery. Royer sent a detailed deficiency letter on August 22 and has asked for a response on five occasions over an approximately seven week period: by emails dated September 4, September 20, and October 17, and by telephone on September 10 and September 25. Kirkpatrick Decl. ¶¶ 10-11, 15-16, 18 & Exs. H, L-M. BOP's counsel stated that BOP would provide a formal response in emails dated September 11, September 12, September 13, and by telephone on August 26, September 10, and September 25. *Id.* ¶¶ 9, 11, 12-14, 16 & Exs. I-K. Royer's efforts to date have failed to elicit a response to the deficiency letter, and BOP's discovery responses remain inadequate. Thus, Royer has done all he can to resolve or narrow the discovery issues, and court action is necessary to compel BOP's cooperation in discovery. *See Pederson v. Preston*, 250 F.R.D. 61, 64 (D.D.C.

2008) (finding sufficient notice to opposing counsel to resolve discovery dispute provided five days before plaintiff filed motion to compel).

Moreover, because BOP's discovery responses were untimely, its objections to the requests and interrogatories are waived. *See Caudle*, 263 F.R.D. at 33. BOP never sought an extension of its July 19 deadline to respond and never provided an explanation to Royer's counsel why its discovery responses were late. To date, BOP has not attempted to justify its delay in responding, much less provided good cause for delay.

Accordingly, the Court should order that BOP's general and specific objections to Royer's discovery requests, to the extent that those objections do not assert privilege,[4] are waived and order BOP to provide complete responses within 14 days.

II. BOP's Vague Assertions of Law Enforcement Privilege Are Insufficient to Withhold Information Directly Relevant to Royer's Claims.

A. BOP Should Produce Its Policies Governing Terrorist Inmates (Document Requests 4 and 14).

In his requests for production of documents, Royer sought "Complete copies of all [BOP] orders, manuals, directives, training materials, guidelines, program statements, policies, protocols, and/or procedures concerning or relating to classification of Terrorist Inmates" Kirkpatrick Decl. ¶ 2 & Ex. A, Doc. Req. 4, and "All documents and things concerning [BOP's] adoption of guidelines, policies, protocols, program statements, procedures, and/or practices regarding the classification of Terrorist Inmates and/or their conditions of confinement." *Id.*, Doc. Req. 14. In its responses to these requests, BOP asserted that production of responsive

[4] The D.C. Circuit sets a higher standard for waiver of objections based on privilege than for waiver of other objections. *See United States v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) (characterizing waiver of privilege as "a serious sanction most suitable for cases of unjustified delay, unexcusable conduct, and bad faith."). Royer reserves the right to seek an order from this Court finding waiver of BOP's privilege objections should BOP continue to delay in providing even the most basic of information in response to Royer's discovery requests.

documents would disclose "confidential information and investigative techniques and procedures, the effectiveness of which would thereby be impaired." *Id.* ¶ 5 & Ex. D, BOP Responses to Doc. Reqs. 4 & 14. During the September 10 telephone conference among counsel, BOP continued to assert that documents responsive to these requests were protected by the law enforcement privilege, although it stated that it would make some information available under a protective order. *Id.* ¶ 11. Because Royer has not received BOP's response to his deficiency letter, he does not know which or how many documents will be withheld in response to these requests or on what grounds BOP asserts that the law enforcement privilege applies.

This information is directly relevant to Royer's APA claims. As the Court found, BOP has not once, during the three year pendency of this litigation, provided "documents outlining the [terrorist inmate] policy or an exact description of the restrictions imposed," thus precluding a decision on the merits of Royer's claim that the promulgation of this policy violated the APA's notice-and-comment rulemaking requirements. Civ. No. 10-1996, ECF No. 106 at 8. Further, disclosure of these documents would allow Royer to prove that the draft CMU regulation (of which he was not provided actual notice, the basis of his second APA claim) is not, contrary to BOP's assertion during the earlier summary judgment stage of this litigation, coterminous with BOP's policy or policies governing terrorist inmates. None of the factors warranting exemption under Rule 26(b)(2)(C) apply: The documents sought here are neither cumulative nor duplicative and cannot be obtained from another source, as they constitute BOP's policies; Royer has had no opportunity to obtain this information by discovery in this action, and the burden or expense of the discovery sought is minimal, as BOP has produced a number of other policies and program statements that apply both to inmates nationally and specifically by institution.

To assert the law enforcement privilege, BOP must demonstrate: "(1) a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege." *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). BOP thus far has failed to meet even the threshold requirement for asserting the law enforcement privilege with respect to these documents. Thus, this Court should order BOP to respond fully to Document Requests 4 and 14 and produce all responsive documents.

B. BOP Has No Basis For Withholding Documents Concerning Any Alleged Association between Royer, Abu Zubair al Madani, and Al Qaeda or any Documents Showing that BOP Knew that No Such Association Existed (Document Requests 20 and 22).

Royer seeks production of "[a]ll documents and things concerning any alleged relationship, affiliation, or association between Mr. Royer and either or both Abu Zubair and [A]l Qaeda," Kirkpatrick Decl. ¶ 2 & Ex. A, Doc. Req. 20, and "[a]ll documents and things concerning or relating to [BOP's] knowledge and/or awareness that any information suggesting an alleged relationship, affiliation, or association between Mr. Royer and Al Qaeda, including but not limited to an alleged relationship, affiliation, or association between Mr. Royer and Abu Zubair, is inaccurate." *Id.*, Doc. Req. 22.[5] In its response to Document Request No. 20, BOP asserted that the "most directly responsive document" was Royer's PSR and that it would provide additional documents. *Id.* ¶ 5 & Ex. D, BOP Response to Doc. Req. 20. BOP did not respond adequately to Document Request No. 22, referring Royer instead to its response to

[5] For purposes of his discovery requests, Royer defined Abu Zubair as "an individual or group named Abu Zubair al Madani who was referenced in a draft version of Mr. Royer's PSR ... As used in these requests, 'Abu Zubair' does not refer to the battalion with which Mr. Royer was affiliated in Bosnia." *See* Kirkpatrick Decl., ¶ 2 & Ex. A, Definitions, ¶ 14.

Document Request No. 20. *Id.* During the September 10 conference, BOP appeared to retreat from its written responses, stating that it would provide "a generic category of withholding" in its formal response to the deficiency letter and that the parties would "agree to disagree" about whether BOP was obligated to produce responsive documents. *Id.* ¶ 11.

This information is directly relevant to Royer's Privacy Act claims, as he has alleged that his classification as a terrorist inmate and the harsh and atypical conditions of confinement to which he has been subjected since December 2006 are based on erroneous information that BOP maintains. If BOP does not produce these documents (and identify the system(s) of records in which BOP maintains these documents, *see* Kirkpatrick Decl., Ex. A, Interrogatories 5, 7-10), Royer will be unable to pursue his Privacy Act claims that, among other things, BOP made an adverse decision affecting his rights on the basis of erroneous information and failed to amend the erroneous records. *See* Civ. No. 10-1996, ECF No. 106 at 13 (identifying disputed factual issues as including "where the relevant information is housed and therefore whether it is exempt from Privacy Act provisions, … whether the [erroneous] records are housed in the [Counter Terrorism Unit's] database, whether that database constitutes a system of records [under the Privacy Act], and whether that system is separate from [BOP's Inmate Central Records System]"). Further, discovery of this information is neither cumulative nor duplicative and cannot be obtained from a source other than BOP. Fed. R. Civ. P. 26(b)(2)(C)(i). Finally, any burden or expense to BOP of complying with these requests does not outweigh the benefit to Royer of obtaining discovery that forms the crux of his Privacy Act claims. *See In re Denture Cream Prods. Liability Litig.*, -- F.R.D. --, 2013 WL 3337788, at *7 (D.D.C. July 3, 2013) (finding that burden did not outweigh likely benefit of production of a zinc study that plaintiff planned to rely on as evidence of causation in connection with claim); *cf. Smith v. BP Am., Inc.*,

522 Fed. App'x 859, 862 (11th Cir. 2013) (affirming district court's finding that burden outweighed likely benefit where document requests exceeded scope of plaintiff's claims).

Because BOP has not properly invoked the law enforcement privilege, this Court should compel BOP to respond fully to Documents Requests 20 and 22.

C. The Grounds on Which BOP Based Its Classification of Royer and the Employees Involved in that Classification Decision Cannot Properly Be Withheld (Interrogatories 12 and 19).

In his interrogatories, Royer requested that BOP "[i]dentify all grounds on which [it] based [its] classification of Mr. Royer as a Terrorist Inmate, [its] institutional transfers of Mr. Royer, and the conditions of confinement to which he has been subjected, as alleged in ¶¶ 88-97 and 101 of the 10-1996 Complaint, since December 2006, including but not limited to any statutes, regulations, guidelines, program statements, policies, protocols, practices, or factual materials," Kirkpatrick Decl. ¶ 2 & Ex. A, Interrogatory 12, and to "[s]tate the name and position of employment of each person involved in classifying Mr. Royer as a Terrorist Inmate." *Id.*, Interrogatory 19. In its response to Interrogatory 12, BOP asserted that it "does not have 'Terrorist Inmate classifications' but does have assignments that are not available to inmates" and that responding "would require disclosure of confidential information and disclose investigative techniques and procedures, the effectiveness of which would thereby be impaired." *Id.* ¶ 6 & Ex. E. In its response to Interrogatory 19, BOP objected "to the use of the term 'terrorist inmate'" and asserted, as with Interrogatory 12, that a response would disclose confidential information and disclose investigative techniques and procedures. *Id.* During the September 10 conference, BOP's attorneys stated that their formal response to the deficiency letter would provide more information and that, while it would make certain information

available pursuant to a protective order, there would be other responsive information that it would not disclose. *Id.* ¶ 11.

This information is directly relevant to Royer's APA, Privacy Act, and due process claims. As noted above in Part II.A, BOP has not produced any information regarding its policies applicable to terrorist inmates or that describes the restrictive conditions of confinement to which such inmates should be subjected. *See* Civ. No. 10-1196, ECF No. 74 at 8. Moreover, it continues to deny (in unsworn interrogatory responses) that such a policy or classification even exists, despite previously having described Royer "as an offender with a history of/or nexus to international terrorism." *See* Civ. No. 10-1996, ECF No. 92-1, Schiavone Decl. ¶ 7. Disclosure of the grounds for Royer's classification will allow Royer to establish that BOP relied on erroneous information that it continues to maintain to designate him a terrorist inmate in violation of the Privacy Act and will also bolster his procedural Due Process claim, as the Court found that "it is unclear that [BOP] ever directly provided him with notice of the reasons for his segregation and it appears that he has had no opportunity for a hearing." Civ. No. 10-1996, ECF No. 106 at 34. Moreover, Rule 26(b)(1) expressly contemplates that "the identity and location of persons who know of any discoverable matter" is the proper subject of discovery, necessitating disclosure of an adequate response to Interrogatory 19. As with the discovery sought in connection with the document requests identified above in Parts II.A & B, the information sought here is not exempt from discovery under Rule 26(b)(2)(C), nor has BOP asserted that it is.

BOP has not satisfied the threshold requirements of the law enforcement privilege and thus has no basis to withhold information responsive to Interrogatories 12 and 19. Accordingly, the Court should compel BOP to respond fully to these interrogatories.

III. BOP Must Sign and Swear Interrogatory Responses.

Rule 33(b)(3) provides that "[e]ach interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath." Rule 33(b)(5) requires "[t]he person who makes the answers [to] sign them, and the attorney who objects [to] sign any objections." These requirements recognize the "important function and utility" of interrogatories as "an efficient and cost-effective method of discovery and marshaling evidence for trial." *Saria v. Mass. Mut. Life Ins. Co.*, 228 F.R.D. 536, 538 (S.D. W. Va. 2005) (citation omitted). "When responses are only signed by an attorney, and not the client, the attorney has effectively been made a witness." *Id.* Courts have deemed a party's failure to comply with the requirements of Rule 33(b)(3) to be the equivalent of a non-response. *See Unzicker v. A.W. Chesterton Co.*, Civ. No. 11-66288, 2012 WL 1966028, at *2 (E.D. Pa. May 31, 2012) (collecting cases).

Here, BOP's responses to Royer's interrogatories were signed only by its attorneys, and interrogatories to which BOP did not object were not answered under oath. Royer's August 22 deficiency letter informed BOP's attorneys that the interrogatory responses did not comply with the requirements of either Rule 33(b)(3) or (5), *see* Kirkpatrick Decl. Ex. G at 8, but to date, these deficiencies have not been corrected. This Court should order BOP to comply with Rule 33(b)(3) and (5). *See, e.g.*, Civ. No. 09-497, *KeyBank Nat'l Ass'n v. Perkins Rowe Assocs., LLC*, 2011 WL 765925, at *3 n.13 (M.D. La. Feb. 25, 2011) (ordering defendants to comply with Rules 33(b)(3) and (5)); *Impact, LLC v. United Rentals, Inc.*, Civ. No. 08-0043, 2009 WL 413713, at *14 (E.D. Ark. Feb. 18, 2009) (granting plaintiffs' motion to compel defendant to comply with Rule 33(b)(3) and (5)).

IV. Royer is Entitled to His Reasonable Expenses, Including Attorney's Fees, For This Motion.

Rule 37(a)(5)(A) provides that, upon granting a motion to compel discovery, the Court "must … require the party … whose conduct necessitated the motion … to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." *See also Beck v. Test Masters Educ. Servs., Inc.*, 289 F.R.D. 374, 381 (D.D.C. 2004) (upholding award of plaintiffs' expenses and fees under Rule 37(a)(5)(A) where defendant's opposition to motion to compel was not substantially justified and award was not unjust). Royer requests that he be allowed to submit documentation of the costs and attorney's fees incurred in bringing this motion should this Court grant his motion to compel. *See D.L. v. District of Columbia*, 251 F.R.D. 38, 50 (directing plaintiff to file request for amount of reasonable expenses, including attorney's fees, within 10 days of order granting motion to compel).

CONCLUSION

For the foregoing reasons, this Court should grant plaintiff's motion to compel discovery.

Respectfully submitted,

s/ Michael T. Kirkpatrick
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Dated: October 23, 2013

Counsel for Plaintiff

CERTIFICATE OF CONFERENCE

On September 10, 2013, and September 25, 2013, I conferred with Laurie Weinstein and Rhonda Campbell, counsel for BOP, about the issues raised in plaintiff's motion to compel. They concurred that a motion to compel was warranted for certain information requested by plaintiff that BOP asserts is protected from disclosure by the law enforcement privilege. They do not agree that a motion to compel is necessary for BOP to respond fully to plaintiff's First Set of Interrogatories and Document Requests, but they indicated that BOP will require significantly more time to respond than is contemplated by the rules or the current scheduling order. They have not indicated their position on whether a motion is necessary to compel BOP's compliance with Rules 33(b)(3) and (5) or for an order finding that all objections, to the extent they do not assert privilege, are waived because defendant's discovery responses are untimely.

s/ Michael T. Kirkpatrick