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 OPPOSITION TO DEFENDANT'S MOTION TO LIMIT DISCOVERY OR IN THE ALTERNATIVE TO EXTEND TIME FOR DISCOVERY

More than three years after this case was filed, and more than three months after its responses to plaintiff Randall Royer's initial discovery requests were due, defendant Federal Bureau of Prisons (BOP) has filed a motion (ECF 90) seeking either to limit discovery or, in the alternative, to extend to May 31, 2014, its deadline to respond to the discovery requests that are the subject of a pending motion to compel (ECF No. 89). BOP does not seek an extension of the discovery period that closed on October 23, 2013. Apparently, BOP seeks to deny Royer the opportunity to take any further discovery after it provides responses to the outstanding requests, and BOP seeks to recapture the ability to raise objections that it waived by failing to respond timely to Royer's discovery requests.

BOP's motion should be denied. This Court has already held that "Royer is entitled to whatever discovery devices are available to him under the Federal Rules and related caselaw," (ECF No. 80 at 3), and Royer's pending discovery requests are carefully crafted to seek discovery of the factual information that this Court identified in its March 28, 2013, opinions and

orders as relevant to Royer's claims. Further, although the discovery schedule must again be extended to allow Royer to seek additional discovery after BOP responds to the pending requests, BOP has offered no excuse for its failure to respond timely to Royer's initial discovery requests, and BOP has produced no discovery at all during the last eight weeks. Thus, the Court should extend the overall discovery schedule when it rules on Royer's pending motion to compel, but should not extend *nunc pro tunc* BOP's deadline to respond to the discovery that was due sixteen weeks ago, or allow BOP to raise objections that were waived when BOP failed to respond timely to the discovery requests.

I. BOP's Motion to Limit Discovery Should Be Denied.

A. BOP Ignores The Scope of Royer's Claims.

Royer alleges that BOP violated the Privacy Act, 5 U.S.C. § 552a, by classifying him as a terrorist inmate and subjecting him to harsh conditions of confinement based on records 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. Royer asserts two claims under the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.* First, Royer alleges that BOP violated the APA by promulgating without notice and comment the policy it used to classify him as a terrorist inmate. Second, Royer alleges that BOP violated the APA by failing to provide Royer with notice of a proposed rulemaking regarding Communication Management Units (CMUs).

BOP appears to believe that the claims in this action are limited to Royer's "individual constitutional claims," BOP Mot. at 2, and that this Court's order of May 24, 2013, limited discovery to "Royer's specific circumstances at his current penal institution." *Id.* at 8. BOP

ignores wholesale Royer's claims under the APA and Privacy Act, disregards the Court's findings that factual issues precluded summary judgment for BOP on Royer's APA, Privacy Act, and procedural due process claims, and misreads the Court's clear directive regarding discovery in this action. *See* ECF No. 80 at 3 ("Royer is entitled to whatever discovery devices are available to him under the Federal Rules and related caselaw.").

Further, the scope of Royer's discovery requests could not have come as a surprise to BOP, because Royer, while acting pro se, described the subjects on which discovery was needed. *See* Civ. No. 10-1196, ECF No. 77 at 1 ("Plaintiff proposes to file a summary judgment motion presenting the questions of whether: (1) ADX authorities posted notice of the CMU Notice of Proposed Rulemaking on the inmate bulletin prior to the comment deadline; (2) ADX inmates had any means besides the inmate bulletin of learning of the NPRM's existence; (3) BOP has a policy respecting inmates classified as 'terrorists,' and if so, (4) whether that policy deviates from existing federal regulations to the extent that the former effectively amends the latter."); Civ No. 10-1996, ECF No. 108 at 1 ("[Royer's summary judgment] motion will present the legal and factual questions of whether: (1) the subject records in this case are maintained in the electronic database of the BOP's Counter Terrorism Unit ('CTU'); (2) the CTU's database constitutes a Privacy Act system of records distinct from any PA-exempt system; (3) whether the BOP's actions with respect to the subject records were willful; (4) whether Plaintiff suffered from an adverse determination or adverse effects as a result of said actions; (5) Plaintiff's conditions of confinement and their duration are atypical and significant; (6) procedural protections with respect to those conditions are constitutionally sufficient.").

B. BOP Misstates the Standard for Discovery Under Rule 26 and Fails to Demonstrate that Royer's Requests are Unduly Burdensome or Oppressive.

Federal Rule of Civil Procedure 26(b)(1) provides litigants with broad discovery rights to "any nonprivileged matter that is relevant to any party's claim or defense." *See also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (noting that Rule 26(b)(1) provides for liberal discovery). BOP erroneously asserts that a party must demonstrate good cause before obtaining discovery, BOP Mot. at 7, citing the provision of Rule 26(b)(1) providing that "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." The language cited by BOP affirms a court's "considerable discretion in handling discovery matters," *Food Lion, Inc. v. United Food and Commercial Workers Int'l Union*, 103 F.3d 1007, 1012 (D.C. Cir. 1997), but does not relieve the party opposing discovery of the burden to demonstrate that a request "is burdensome, overly broad, … or outside the scope of discovery." *U.S. v. Kellogg Brown & Root Servs., Inc.*, 284 F.R.D. 22, 27 (D.D.C. 2012) (citation omitted).

BOP has failed to meet its burden. BOP fails to provide any evidence or cite any authority to support its conclusory assertion that "the time and expense of responding [to Royer's discovery requests] outweighs the usefulness of the information sought." BOP Mot. at 8. Indeed, BOP's declarations make no attempt to quantify the expense associated with reviewing and responding to Royer's discovery requests, and BOP's own witnesses estimate that it will take about six months to respond fully to the requests. *See* Schiavone Decl. ¶ 13 ("I estimate it will take two days to review and retrieve the universe of documents from the above-identified databases."); *id.* ¶ 15 ("I estimate it will take a minimum of six months to complete this review and retrieve the universe of documents from all identified databases."); Qureshi Decl. ¶ 8 ("I estimate it will take a minimum of eight weeks to complete this review and retrieve the universe

of documents from all identified databases and paper resources."). Given that the requests were served on June 19, 2013, by its own estimates BOP should have been able to respond fully by mid-December 2013. Further, despite BOP's claim that it has "endeavored to provide [Royer] with all requested information" and has "gone to extraordinary effort to respond to [Royer's] extensive document requests," BOP Mot. at 2, BOP has produced nothing since September 13, 2013. Second Kirkpatrick Decl. ¶ 5. As of September 25, BOP stated that it was reviewing and processing the remaining two sections of Royer's Central File, *id.* ¶ 3, consisting of 231 pages, Schiavone Decl. ¶¶ 13, but to date the materials have not been produced. Second Kirkpatrick Decl. ¶ 3.

BOP's arguments that Royer's requests are unduly burdensome and oppressive rest on the flawed premise that the information sought by Royer is not useful. BOP Mot. at 8. In evaluating whether Royer is entitled to the discovery he seeks, the relevant inquiry for the Court is not, as BOP suggests, whether the discovery requests "present a nexus to" the remedy Royer seeks—which BOP improperly characterizes as only a modification of his current conditions of confinement[1]—but whether the requests seek information "regarding any nonprivileged matter that is relevant to any party's claim." Fed. R. Civ. P. 26(b)(1).

BOP appears to take fault with Royer's Document Requests 5-7 and 14, which seek production of BOP's policies concerning its classification of terrorist inmates, those inmates' conditions of confinement, and the conditions of confinement to which inmates serving sentences similar in length to Royer and those inmates housed in administrative segregation units are subjected. Significantly, BOP never explains why it believes that the requests are

[1] Royer also seeks damages, declaratory and injunctive relief, attorney's fees and costs in connection with his claims. Civ. No. 10-1196, ECF No. 74 at 3; Civ. No. 10-1996, ECF No. 106 at 5.

objectionable. And it cannot do so, as these requests are both relevant to, and narrowly tailored to lead to the discovery of admissible evidence on, Royer's APA and procedural due process claims. *See* Civ. No. 10-1196, ECF No. 74 at 8 ("Neither party has fully fleshed out the contours of the policy [under which Royer is classified] by providing documents outlining the policy or an exact description of the restrictions imposed."); Civ. No. 10-1996, ECF No. 106 at 29 (noting that the D.C. Circuit has held that administrative segregation "should thus be included as part of the baseline for determining whether the segregative confinement implicate[s] a constitutionally protected liberty interest" and "that courts must also consider the length of the deprivation and whether the segregation was within the range of what would be expected in light of the length of the sentence the prisoner is serving." (citations omitted)). BOP's implied objection to producing documents "concerning BOP's rulemaking concerning communications for Terrorist Inmates," BOP Mot. 7-8, fails for similar reasons.

BOP also objects that Royer has "demanded a privilege log." BOP Mot. at 5. Royer's request for a log is hardly unusual, and BOP is obligated to produce a privilege log for any responsive documents it withholds. *See* Fed. R. Civ. 26(b)(5)(A); *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 98 (D.D.C. 2008) ("[T]he intendment to [Rule 26(B)(5)(A)] is clear: the opposing party should be able, from the entry in the log itself, to assess whether the claim of privilege is valid.").

Further, BOP has failed to mitigate any burdens associated with responding to Royer's discovery requests. Challenges to agency decisions under the APA require the agency to "compile and designate the administrative record that was before it and which it directly or indirectly considered in reaching its decision on the action being challenged." *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 72 (D.D.C. 2008) (citation and internal quotation

marks omitted). Had BOP done so when it filed its first dispositive motion, *see* Local Rule 7(n)(1), Royer's need to seek discovery on BOP's policies as they relate to the classification and conditions of confinement of terrorist inmates might have been obviated. To date, BOP has not identified the policy or policies it used to classify Royer as a terrorist inmate. Similarly, BOP could have made the discovery process more efficient by agreeing to exchange the initial disclosures ordinarily required by Rule 26(a)(1). Because this case began as an action by a pro se prisoner, it was exempt from initial disclosures. *See* Fed. R. Civ. P. 26(a)(1)(B)(iv). Once he was represented by counsel, Royer offered to exchange Rule 26(a)(1) disclosures with BOP, but BOP declined. Second Kirkpatrick Decl. ¶ 2.

The Court's May 24, 2013, Order was clear with respect to Royer's right to discovery of information relevant to his claims. Nothing in the Order or in the Court's March 28, 2013, opinions and orders on BOP's motions for summary judgment supports limiting discovery to "Royer's specific circumstances at his current penal institution," BOP's Mot. 8, nor would it make sense to construe the orders in such a manner, as Royer's complaints challenge a BOP classification, and its accompanying conditions of confinement, that has been applied to him on a continuous basis since December 2006. Accordingly, there is no need for the Court to clarify its May 24, 2013 Order, as BOP requests.

C. Royer Has Not Refused to Compromise; BOP Never Asked Royer to Narrow The Scope of His Requests.

Contrary to BOP's assertion that Royer "has refused any compromise with respect to the requests at issue," BOP Mot. at 2, BOP made no attempt to confer with Royer's counsel about narrowing the scope of the requests before filing its motion.[2] Had BOP complied with Local

[2] BOP conferred with Royer's counsel concerning a contemplated joint motion for an extension of time to complete discovery. BOP proposed that discovery be extended to August 31, 2014.

Rule 5.4(m) and conferred with Royer's counsel, BOP would have learned (for example) that Royer is willing to limit his definition of "Privacy Act request" to those that form the basis of the allegations in his complaint, thus eliminating the need for BOP to process two FOIA requests submitted by Royer in 2010 for which he declined to pay search fees. *See* BOP Mot. at 6 n.1.

Further, BOP overlooks the compromises that Royer offered in his August 22 deficiency letter to which BOP still has not responded. S*ee* Kirkpatrick Decl., Ex. G at 3 ("By way of compromise, Mr. Royer will limit this request to all documents and things concerning or relating to any administrative hearings concerning Mr. Royer's classification, assignment, or conditions of confinement since December 2006"); *id.* at 4 ("[B]y way of compromise, we would be willing to consider entering into a narrowly crafted protective order with respect to institutions that currently house inmates whom BOP has classified as terrorists.").

II. The Court Should Not Extend BOP's Deadline to Respond to The Discovery Requests That are The Subject of a Pending Motion to Compel, But Should Extend the Discovery Schedule to Allow Royer to Seek Additional Discovery After BOP Responds Fully to the Pending Requests.

Royer served the pending discovery requests on June 19, 2013. BOP's responses were due on July 19, but BOP failed to respond. On August 1, having received no discovery responses, Royer filed an unopposed motion to extend the discovery schedule to October 23. ECF No. 83. Later in August, BOP served incomplete and untimely discovery responses. On October 23, Royer filed a motion to compel. ECF No. 89.

Although the title of its motion suggests that BOP seeks to extend the time for discovery, BOP does not request an extension of the discovery period generally, but seeks "an enlargement of time to, and including, May 31, 2014, to complete the discovery requested by Plaintiff." BOP

The parties were unable to agree on the length of the extension. BOP never mentioned its intention to file a motion to limit discovery or to extend *nunc pro tunc* BOP's deadline to respond to the pending discovery requests. Second Kirkpatrick Decl. ¶¶ 6-8.

Mot. at 1. To the extent BOP seeks to deny Royer any further discovery after BOP responds fully to the pending requests, or to recapture the ability to raise the objections BOP waived by failing to respond timely to Royer's discovery requests, BOP's motion should be denied.

Royer recognizes that the discovery schedule will need to be extended to allow Royer to seek further discovery, including depositions, after BOP responds fully to the requests that are the subject of the pending motion to compel. Royer respectfully requests that, in conjunction with its ruling on the pending motion to compel, the Court set a deadline for BOP to respond fully to the pending requests, and order that discovery close 75 days after that date.

CONCLUSION

The Court should deny BOP's motion to limit discovery because Royer's requests are neither unduly burdensome nor oppressive, and they do not exceed the scope of his claims. The Court should deny BOP's motion to extend the time for BOP to respond to the discovery requests that are the subject of Royer's motion to compel, and should adjust the discovery schedule when it rules on the pending motion to compel.

Respectfully submitted,

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