

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

<p>UNITED STATES OF AMERICA, Plaintiff, vs. VAL H. DEMARS, Defendant.</p>	<p>5:15-MJ-00130-DW VIOLATION NUMBERS FASW003Y AND FASW003Z ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL</p>
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INTRODUCTION

On December 10, 2015, Defendant Val H. DeMars filed a Motion to Compel Discovery. The defendant requests certain discovery to assist in his preparation for his petty offense trial currently scheduled for February 10, 2016.

FACTS

On June 16, 2015, Mr. DeMars received two citations issued by Officer Summers of the United States Forest Service. The first offense, violation number FASW003Y, is “blocking roadway,” in violation of 36 C.F.R. 261.12(d). The second offense, violation number FASW003Z, is “improving spring to transfer water course,” in violation of 36 C.F.R. 261.10(a)¹.

On December 10, 2015, Mr. DeMars filed the pending Motion to Compel Discovery. Since that date, the United States and Mr. DeMars have narrowed

¹ The citation states that this offense is 36 C.F.R. 261.10(b). The United States’ response (Doc. 9 at p. 4 n. 21) states that the correct citation is 36 C.F.R. 261.10(a).

contested discovery to four items. The items will be designated as they appear in the motion. At this time, Mr. DeMars seeks: (b) “[t]he Delegation of Authority to Incident Commander(s);” (c) “[a] listing of all public agencies included/represented on the Incident Command Team, including a list of agency representatives;” (g) “[a]ll daily incident reports by ICT staff; (h) “[a]ll cleanup reports, including the final USFS Report on the 2015 Rainbow Gathering.”

DISCUSSION

I. Whether the United States Must Disclose Item (b) the “Delegation of Authority to Incident Commanders”

Defendant alleges that he is entitled to the “delegation of authority to incident commander(s)” because the material is in the possession of law enforcement, the United States has access to the information, and it has an affirmative duty to disclose favorable evidence. (Doc. 10 at p. 3-4). The defendant claims this piece of evidence is favorable and material to his defense and is not readily available to him. Id.

The United States requested that the court review this item of discovery *in camera* to determine whether it should be disclosed.² (Doc. 11 at p. 1). The Government stated that this item is an internal document that the United States Forest Service would likely implement on other large scale operations. (Doc. 4 at p. 1). Additionally, the Government argues that this item contains

² Doc. 5 and Doc. 9 both reference a previous discussion between counsel about the possibility that defense counsel would need to file a Freedom of Information Act (“FOIA”) request to obtain some of the discovery not turned over by the United States. The United States did not argue in its responses to the pending motion that defense counsel would need to use FOIA as an avenue for obtaining the information. Thus, this argument will not be addressed.

irrelevant information such as budgetary planning information and financial management guidance. Id. at p. 1-2.

The defendant generally requests discovery of the contested information under Federal Rules of Criminal Procedure 16(a)(1)(E) and (F).³

Rule 16(a)(1)(E) provides that:

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and (i) the item is material to preparing the defense, (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

A defendant who requests documents, believing them to be material to his defense, must "make a prima facie showing of materiality." United States v. Tornquist, No. CR 11-50118, 2012 WL 2862864, *3 (D.S.D. July 11, 2012) (other citations omitted). "Evidence is material if it enables a defendant to significantly alter the quantum of proof in his or her favor." Id. (United States v. Baker, 453 F.3d 419, 425 (7th Cir. 2006); United States v. Ross, 511 F.2d 757, 763 (5th Cir. 1975) (internal quotations omitted)). "Evidence is material under Rule 16 if there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation . . . or assisting impeachment or rebuttal." Tornquist, 2012 WL 2862864 at 3 (citing United

³ Doc. 5 at p. 1 states that the "motion is made pursuant to Rule 16(1)(E) and (F) of the Federal Rules of Criminal Procedure . . ." The same document on the next page states that the information "is . . . discoverable pursuant to Rule 16(a)(1)(A), (E), and (F). It doesn't appear that any of the defendant's statements are at issue so Rule 16(a)(1)(A) does not apply to the instant motion.

States v. Graham, 83 F.3d 1466, 1474 (D.D.C. 1996). The materiality standard is “not a heavy burden.” Graham, 83 F.3d at 1474 (other citations omitted).

Mr. DeMars noticed his intention to assert a defense of public authority pursuant to Federal Rule of Criminal Procedure 12.3. (Doc. 3). This rule requires the defendant to file notice of his intent to “assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense . . .” Fed. R. Crim. P. 12.3(a)(1). Defendant questions the “delegation of regulatory powers at the time he was cited.” (Doc. 10 at p. 3). This delegation goes to the heart of defendant’s defense and whether Mr. DeMars had authority, whether actual or believed, to take the actions for which he was cited.

The document the United States offered for *in camera* review should be disclosed to the defendant with redactions. The Delegation of Authority is relevant except for the sections on Budget Planning and Financial Management Guidance. The defendant is only entitled to items material to his defense. Mr. DeMars has provided nothing to suggest to the Court that these two sections are relevant to Mr. DeMars’ defense and would play an important role in uncovering admissible evidence, aiding witness preparation or assisting impeachment or rebuttal. The Government is to redact the entirety of the sections discussing Budget Planning and Financial Management Guidance and provide the redacted discovery to the defendant. Accordingly, this discovery request is granted in part.

II. Whether the United States Must Disclose Item (c) a Listing of Agencies and Agency Representatives on the Incident Command Team

Mr. DeMars has requested a list of public agencies included or represented on the incident command team and a list of agency representatives. The United States responded that “there was never a formal agency list with specific representatives, however, members of the Pennington County Sheriff’s Office, South Dakota Highway Patrol, Rapid City Police Department, South Dakota Game Fish and Parks, and the Oglala Lakota Sioux Tribe offered assistance to the Black Hills National Forest Service.” (Doc. 9 at p. 3). The Government again represented in its second response to the motion (Doc.11 at p. 2) that a document does not exist to fulfil defendant’s discovery request.

The United States has fulfilled its discovery obligations with respect to this discovery request. “The government cannot be required to disclose evidence that does not exist.” 2 Charles A. Wright & Peter J. Henning, Fed. Practice & Pro., Crim., § 254 (database updated April 2015). The United States provided Mr. DeMars with a list of the agencies that assisted the United States Forest Service. (Doc. 9 at p. 3). The Government represented that no other information responsive to this request exists. (Doc. 11 at p. 2). Accordingly, this portion of the motion is denied.

III. Whether the United States Must Disclose Item (g) Daily Incident Reports by the Incident Command Team Staff and Item (h) All Cleanup Reports, including the Final United States Forest Service Report on the 2015 Rainbow Gathering

Defendant alleges that the United States must disclose the daily incident reports and cleanup reports, including the final United States Forest Service report. Defendant generally states that his defense “questions the delegation of regulatory powers at the time he was cited, and . . . the official actions taken under color of [United States Forest Service] authorities to ticket him . . .” (Doc. 10 at p. 3). He alleges that he is unable to make a more specific showing of relevance without the documents he requests. (Doc. 10 at p. 4).

The United States argues that the request for the daily incident reports and cleanup reports is overbroad, contains unrelated juvenile information, and production would be unduly burdensome. (Doc. 11 at p. 2). It argues that the documents relevant to defendant’s charges has been provided. Id.

The defendant has not explained with any specificity why these reports are material to his defense. The United States represented that the defendant has received “[i]nformation, probable cause statements re: DeMars’ citations (all related incident reports, probable cause statements, law enforcement reports related to these particular citations).” (Doc. 9 at p. 2 and n. 1). It is unclear to the Court how the incident reports that are unrelated to his violations are material to his defense and would “significantly alter the quantum of proof” in his favor. Tornquist, 2012 WL 2862864 (citing Baker, 453 F.3d at 425; Ross, 511 F.2d at 763 (internal quotations omitted)). Thus, this portion of the motion will be denied.

CONCLUSION

Based on the foregoing law and analysis, it is hereby

ORDERED that defendant Val H. DeMars' Motion to Compel Discovery (Doc. 4) is granted in part and denied in part.

NOTICE TO PARTIES

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have fourteen (14) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1)(A), unless an extension of time for good cause is obtained. See FED. R. CRIM. P. 58(g)(2); 59(a). Failure to file timely objections will result in the waiver of the right to appeal questions of fact. FED. R. CRIM. P. 59(a). Objections must be timely and specific in order to require review by the district court.

DATED this 19th day of January, 2016.

BY THE COURT:



DANETA WOLLMANN
United States Magistrate Judge